

PREMADASA

v.

STATE

COURT OF APPEAL
HECTOR YAPA, J.
KULATILAKE, J.
CA. 15/99
H. C. ANURADHAPURA 8/99
1ST JUNE, 2000

Penal Code S.364(2) - Rape - Non direction on a vital question of fact - Does it vitiate a conviction?

The date of the incident as deposed to by the Prosecutrix was 22.8.1998. It was her position that she was a virgin until 22.8.1998. She had only complained to the Police 2 days later - 24.8.1998. The Medical Expert had observed the tear of the hymen, but stated that the tear had taken place 8 days or more prior to her examining the prosecutrix which was on 24.8.1998.

Held :

- (1) According to the Medical Expert the probable date would be 16.8.88 or a date prior to that date. Neither the State Counsel nor the trial Judge had invited her to elucidate her opinion any further or elaborate the grounds upon which the opinion was based.
- (2) The crucial issue was whether the prosecutrix had been in fact ravished on 22.8.1998 by the accused appellant. The trial Judge has refrained from making any assertion in respect of this matter.
- (3) This non direction on a vital question of fact tantamounts to a grave error of law which is sufficient to vitiate the conviction.

APPEAL from the Judgment of the High Court of Anuradhapura.

Case referred to :

Mendis vs. Queen - 54 NLR 177 at 179.

Dr. Rarjith Fernando with Ms Anoja Jayaratne and Ms Sandamali Munasinghe for Accused Appellant.

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Palitha Fernando D. S. G., for the Attorney General.

Cur. adv. vult.

July 06, 2000.

KULATILAKA, J.

The accused-appellant was indicted in the High Court of Anuradhapura for committing the offence of rape on Dana Palage Dilrukshi Saumyatilaka an offence punishable under Section 364(2) of the Penal Code. The trial was conducted before a Judge of the High Court sitting without a jury and at the trial the accused-appellant was found guilty and accordingly was convicted and sentenced to a term of ten years' rigorous imprisonment.

The facts in brief are to the following effect. The prosecutrix in this case Danapalage Dilrukshi Saumyatilaka was at the time of the alleged incident a girl of 15 years and 2 months as borne out by her birth certificate marked P2. Hence the accused-appellant was charged in terms of Section 364(2) of the Penal Code. She was living with her sister as her mother had gone abroad for employment. The accused-appellant had been 20 years of age at the relevant time and was employed in the Navy, and had come home on leave. He was distantly related to the prosecutrix and at the time of the incident they were having a love affair.

The date of the incident as deposed to by Dilrukshi was 22 August 1998. A characteristic feature in this prosecution was that the alleged incident of the accused-appellant ravishing Dilrukshi had come to light only after Dilrukshi's sister's

husband had over-heard a conversation between the accused-appellant and one Gunapalage Rohana while they were in the act of partaking of liquor which was to the effect that the accused-appellant had sexual intercourse with the prosecutrix (said in colloquial language). The prosecutrix testified that after her sister's husband had complained to his wife (sister of the prosecutrix) of what he had over-heard, her sister had beaten Dilrukshi questioning her as to what took place and the prosecutrix had come out with her story. Dilrukshi testified that prior to the date of the incident the accused-appellant used to see her at her sister's place since they were in love. She stated to Court that they had even plans of getting married.

On 22.8.98 the accused-appellant had come to her sister's house around 3 p. m. Both her sister as well as her brother-in-law were not in the house. Apart from Dilrukshi her sister's two children of tender years had been present in the house. Thereupon the accused-appellant had dragged her inside the house put her on a bed and had sexual intercourse with Dilrukshi despite her resistance. While they were still on the bed there was a knock at the door and Dilrukshi had left the bed and gone to the verandah in order to see who had come. She found an aunt of hers at the door step asking for some tea leaves to which request she had obliged. When she came back she found the accused-appellant speaking to the two children. She categorically stated that she was a virgin until 22 August 1998. Thereafter the accused-appellant had left the house. It is interesting to note that the prosecutrix had complained to the police belatedly two days later on 24 August 1998. No explanation had been elicited from this witness regarding the delay in making her complaint of rape. The police had produced Dilrukshi before Dr. Hemamali Wimalasiri. According to the medico legal report prepared by Dr. Hemamali Wimalasiri who had examined the prosecutrix on 24.8.98 at 5.30 p. m. she had noted the injuries on the prosecutrix in the following terms: "Hymen not intact, no bleeding, reddened area at perineum just below the hymen. No other injuries". In

the column where "short history given by patient" had to be entered the Doctor has recorded the following observation: "History of rape on 22.8.98". This report had been marked P1.

Witness Rohana's evidence was that he met the accused-appellant on 22 August 1998 and the latter had invited him for a drink stating that it was an occasion to celebrate. He further testified that while they were in the act of partaking of liquor the accused-appellant had confessed to having had sexual intercourse with the prosecutrix. At that point of time the prosecutrix's brother-in-law Henni had barged in and queried from the accused-appellant about the utterance he made to Rohana, albeit, the accused-appellant had denied making such an utterance. According to Sub-Inspector Nimal Perera the Police had recorded a complaint of rape made by Danapalage Dilrukshi on 24.8.98 and thereafter had produced the prosecutrix before Dr. Hemamali Wimalasiri. The accused-appellant had surrendered to the police on the following day.

The main ground adverted to by the learned counsel for the accused-appellant in the course of his submissions is that the learned trial Judge has failed to consider and evaluate the discrepancy inter se arising from the evidence of Dilrukshi vis-a-vis the medical expert Dr. Hemamali Wimalasiri's opinion as to the date on which Dilrukshi had been subjected to sexual intercourse. The learned counsel submitted that the learned High Court Judge's failure to give his mind to such an important and material issue that arose in this case is a grave non direction amounting to a misdirection which would by itself, be sufficient to vitiate the conviction.

The accused-appellant had been indicted on the footing that the offence of rape on Dilrukshi Saumytilaka was committed by the accused-appellant on 22 August 1998. Dilrukshi in her evidence testified that the accused-appellant had sexual intercourse with her on 22 August 1998 and that she was a virgin until then. According to Rohana the alleged

utterance by the accused-appellant which would amount to an admission by the accused-appellant was made on the same day.

Medical expert Dr. Hemamali Wimalasiri has testified to Court what she had observed when she examined Dilrukshi on 24 August 1998. At that point of time she was aware of the history narrated to her by Dilrukshi, to the effect that she was ravished by the accused-appellant on 22 August 1998. The medical expert had observed a tear of the hymen but she boldly and categorically expressed the opinion that the tear of the hymen had taken place 8 days or more prior to her examining the prosecutrix.

In his dock statement the accused-appellant has admitted that he had a love affair with Dilrukshi but asserted that he did not ravish her and denied the charge.

As stated earlier the medical expert had expressed her opinion that the tear of the hymen she had observed when she examined Dilrukshi would have occurred 8 days or more prior to the date she examined her namely on 24 August 1998. Hence the probable date would be 16 August 1998 or a date prior to that date. Neither the learned prosecuting State Counsel nor the learned trial Judge had invited her to elucidate her opinion any further or elaborate the grounds upon which that opinion was based. In the case of *Mendis vs. The Queen*⁽¹⁾ at 179 His Lordship Justice Gratiaen frowned upon the failure by the prosecution to elucidate means by which the medical expert had come to a finding that the injuries were "sufficient in the ordinary course of nature to cause death". His Lordship's observations are as follows:

"As far as we can judge, however, from his evidence on record he was not invited to elucidate his opinion any further or to elaborate the grounds upon which that opinion was based".

The crucial issue that arose for determination by the learned trial Judge in the instant case was whether this girl Dilrukshi had been in fact subjected to sexual inter-course on 22 August 1998 by the accused-appellant as alleged by the prosecutrix. Unfortunately the learned trial Judge has refrained from making any assertion in respect of this matter. This non direction on a vital question of fact tantamounts to a grave error of law which in our view is sufficient to vitiate the conviction. Hence, we hold that this verdict should not be allowed to stand as it is unreasonable having regard to the medical evidence which creates a serious dent in the version of the prosecutrix that she was ravished by the accused-appellant on 22 August 1998. Hence, we set aside the conviction and the sentence and proceed to acquit the accused-appellant.

HECTOR YAPA, J. - I agree.

Appeal allowed.