**BANDARA**
**v.**
**THE STATE**

COURT OF APPEAL.
HECTOR YAPA, J. (P/CA)
KULATILAKE J
C.A. 27/99.
H.C. AMPARA: HC/AMP. 292/99
15TH, 20TH, 21ST SEPTEMBER, 2000

*Penal Code - S. 364 - Rape - Test of spontainety and contemporaneity - Delay in making complaint - Demeanour and deportment - Discrepancies and inconsistancies in the evidence - Accused silent - Inference to be drawn - Evidence Ordinance S.3, S.8(2) - Fact in issue - Proof*

The Accused - Appellant was convicted of the offence of rape and sentenced to a term of imprisonment and a fine.

In appeal it was contended that -

i. There was a delay in making the complaint;

ii. That there was an attempt by the prosecutrix to hide the fact that, the accused was a person known to her for sometime and that the evidence of the prosecutrix was per se contradictory.

**Held :**

(i) If there is a valid reason or explanation for the delay and if the trial Judge is satisfied with the reasons and explanations given, no trial Judge would apply the test of spontainety and contemporaneity and reject the testimony of a witness in such circumstances.

'delayed witnesses evidence could be acted upon if there were reasons to explain the delay.'

(ii) A careful reading of the evidence elicited from the prosecutrix reveals that she had in fact brought to light her means of knowledge of the Accused-Appellant.

*Per* Kulatilake J.,

"When there is a case to answer on the prosecution evidence if the Accused - Appellant remains silent, Court may regard the inference from his failure to testify as, in effect a further evidential factor to support the case"

(iii) Discrepancies and inconsistencies which do not relate to the core of the prosecution case, ought to be disregarded especially when all probabilities factor echoes in favour of the version narrated by a witness.

**APPEAL** from the High Court of Ampara.

**Cases referred to :**

1. Q vs Pauline de Croos - 71NLR - 169 at 170.
1a. *Talpe Liyanage Manatunga vs. A. G.* - CA 47/98, HC Galle 1855.
2. Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat - 1983 AIR SC 753 at 758.
3. A. G. vs. Viswalingam - 47 NLR 289.
4. In Re. Anthony alias Bathavatsalu - 1960 Cr. LJ 927 (Vol. 61, CN 326).
5. Edrick de Silva vs. Chandradasa de Silva - 70 NLR 169 at 170.
6. Kankanam Aratchilage Gunadasa vs. Republic - CA 121/95 - HC Chilaw 71/95.
7. King vs. Themis Singho - 45 NLR 378.
8. King is Abeyratne - 47 NLR 232
9. Regina vs. Cowan.
10. Regina vs. Gayle.
11. Regina vs. Riccicard - 1996 QBD 373.

Nalin Ladduwahetty for Accused - Appellant.
Suhada Gamlath, Senior State Counsel for the Attorney General.

*Cur. adv. vult.*

October 23, 2000.
**KULATILAKA, J.**

The accused-appellant was convicted by the High Court Judge of Ampara sitting without a jury of committing the offence of rape on Vijitha Priyangika Kumari on 12.2.1995 an

offence punishable under Section 364 of the Penal Code. He was sentenced to eight years' rigorous imprisonment and in addition to a fine of Rs. 2000/-with a default term of one year's imprisonment. The accused-appellant has appealed against the conviction and sentence.

The facts briefly stated are as follows: The prosecutrix Vijitha Priyangika Kumari was 13 years of age at the time she was ravished. She came from a broken home. Her father was living in separation from her mother. Her mother and elder sister were factory workers. It transpired in the submissions of learned counsel that the acused-appellant was 26 years of age and was employed at the Insurance Corporation at the time he was alleged to have committed the crime.

The prosecutrix testified that the accused appellant was known to her. On 12.2.95 she was on her way to the near by stream to have a bath and for some washing as well. Mid-way, she met the accused-appellant and had engaged in a conversation for a short while. As she was about to proceed towards the stream the accused-appellant had dragged her to the woods nearby and despite her resistance had sexual intercourse with her. Thereupon he had seen the brother of the prosecutrix coming towards them and he had released her from his grip. He had threatened both the prosecutrix and her brother with death in the event they informed about the incident to anyone else. Thereafter on 22.2.95 she made a complaint to the police.

Brother of the prosecutrix Ajith Thushantha who was 10 years of age then, testified before the High court that when he was bathing in the stream at the behest of his loku amma he went in search of his sister and had seen the accused-appellant positioned himself on the body of his sister who was lying on the ground. As he saw them the accused-appellant had released his sister and thereupon had threat-

ened both of them with death if he were to tell about the incident to anyone else.

Police Sergeant Ratnasiri Arunadasa testified to the investigations carried out by the police. The complaint of rape had been lodged by the prosecutrix on 22.2.95. He had recorded the statement of her mother Seelawathie as well at the police station and taken into custody the clothes worn by the prosecutrix at the time of the incident. The accused-appellant had been present in the police station at the point of time.

The medical evidence was adduced by Dr. Chandrawansa Jayasinghe. He has stated to Court that he had observed a somewhat old tear of the hymen at 7 o'clock position which was consistent with having had sexual intercourse. When the learned trial Judge called upon the accused-appellant for his defence he had opted to remain silent.

The point which is at issue in this appeal is whether the evidence in the case reveals that there was consent on the part of the prosecutrix in having sexual intercourse with the accused - appellant.

There are two main grounds adverted to by the learned counsel for the accused-appellant in support of his proposition of consent:-

(1) that there was a delay of 10 days in making the complaint of rape against the accused - appellant.

(2) that there was an attempt by the prosecutrix to hide the fact that the accused-appellant was a person known to her for sometime.

It was common ground that the prosecutirx had made her complaint to the police on 22.2.95. It was submitted by counsel that it was while in the process of making a complaint against her mother for beating her that she had

come out with the story that she was ravished by the accused-appellant.

Learned counsel argued that this Court should apply the Test of Spontainety and Contemporaneity and reject her story. We have very carefully considered the evidence given by the prosecutrix at the trial. According to the prosecutrix and her brother Ajith Thushantha, soon after the incident the accused - appellant had threatened to kill them and throw them to the stream on their way back home from school in the event they divulged the incident to anyone. Throughout her evidence this factor (threat) echoed again and again and further this item of evidence has come before the trial Court unimpugned and unchallenged. Further she stated to court that most of the time she was alone in the house for the reason that her father was living elsewhere and her mother and elder sister were working at the factory to earn their living. In addition she had entertained fear that she would not be permitted to go to school by the elders had she complained about the incident. In fact she had attended school only for one day after the incident. Further one cannot forget the fact the prosecutrix and her brother were children of tender years at the time of the crime. If there is a valid reason or explanation for the delay and if the trial Judge is satisfied with the reasons or explanation given, no trial Judge would apply the Test of Spontaneity and Contemporaneity and reject the testimony of a witness in such circumstances. In this case it was never suggested to the prosecutrix in cross-examination that her evidence was concocted or fabricated on account of the ensuing delay in making her complaint to the police. *In Queen vs. Pauline de Cross*[1] at 180 Justice T.S. Fernando observed that a delayed witness's evidence could be acted upon if there were reason to explain the delay.

It has transpired in cross-examination that the mother of the prosecutrix had beaten her with a piece of firewood

and when her father took her to the police station to lodge a complaint against the mother, the prosecutrix had come out with the story that she was ravished by the accused-appellant. In fact the learned trial Judge wisely had himself cleared this point. (vide page 60 of the record). It is pertinent to note that at the time she made complaint, for some unknown reason the accused-appellant himself had been present at the police station.

On a perusal of the judgment we find that the learned trial Judge has considered all these relevant material before accepting the explanation afforded by the prosecutrix for the delay. Hence we see no merit and substance in the submission of learned counsel that the prosecutrix's delay in making her complaint to the police should be attributed to consent on her part. It is to be observed that the unimpugned item of evidence to the effect that soon after the commission of the crime the accused-appellant had threatened the prosectix as well as her brother with death in the event they divulged the incident to anyone would amount to "conduct, influenced by the fact in issue" in term of Section 8 (2) of the Evidence Ordinance.

Adverting to the second ground urged by the learned counsel for the accused-appellant he submitted to Court that at the very commencement of her evidence the prosecutrix had attempted to impress upon the trial court that she came to know the accused-appellant on the day prior to the incident namely, on 11.2.95. Further the learned counsel referred to the fact that at a subsequent stage in her evidence her position had been that she knew the accused-appellant before because he used to visit her uncle and later stated in cross-examination that the accused-appellant was a friend. Thus the learned counsel urged that the learned trial Judge should not have relied upon her evidence as it was per se contradictory and therefore unsatisfactory on a material point. Albeit a careful reading of the evidence elicited from the prosecutrix reveals that she had in fact brought to light her

means of knowledge of the accused-appellant. She had seen him on her way to school. The accused-appellant was a friend of her uncle (podi mama) who was living with her grand mother. She had seen the accused-appellant in that house on a few occasions. The day prior to the incident there had been a party at her grand mother's house to celebrate her uncle's wedding. In fact the accused-appellant was related to her uncle's wife. At the party they came to know each other well, so much so that in her evidence she referred to the accused-appellant as "Sham Mama". Her younger brother Ajith Thushantha corroborates her evidence on this point. He also referred to the accused-appellant as "Sham Mama".

It is necessary to emphasise the fact that the learned trial Judge had the benefit of observing the demeanour and deportment of this witness which is an all important factor and having observed the witness the learned trial Judge has upheld her testimonial trustworthiness and veracity of her evidence. In this regard vide the decision of Justice F.N.D. Jayasuriya in *Talpe Liyanage Manatunge vs. The Attorney-General*[1a].

The learned counsel also made reference to certain discrepancies and inconsistencies in her evidence, to wit, the time at which she made her complaint to the police on 22.2.95, the period she spent at the hospital and also to a contradiction marked as P[1]. The learned trial Judge thought it fit to disregard these trivial discrepancies and inconsistencies having regard to the demeanour and deportment of the prosecutrix. Our courts have laid down the principle that the discrepancies and inconsistencies which do not relate to the core of the prosecution case ought to be disregarded especially when all probabilities factor echoes in favour of the version narrated by a witness. This position is vouchsafed by Justice Thakkar in *Bharwada Bhoginbhai Hirjibhai vs. The State of Gujerat*[2] at 755 and Justice Cannon in *Attorney-General vs. Visuwalingam*[3].

The learned counsel also commented upon some instances in her evidence which indicate that there was some reluctance on her part to come out with her story before the trial court. In this regard the learned Senior State Counsel submitted that unlike in the western countries victims of rape in the Asian Societies are often thoroughly unwilling to come forward promptly and disclose the details of the crime committed against them. To substantiate his submission the learned Senior State Counsel engaged the authority of *Re Anthony alias Bakthavatsalu*[4] where Anantanarayanan, J made the following observation:

"On account of the stigma which gets attached after the commission of the offence of rape and which would seriously jeopardise the chances of getting married in decent circumstances, the victims and their relatives are often thoroughly unwilling to come forward promptly with reports of the offences".

We are in agreement with that submission of the learned Senior State Counsel. However on a perusal of the evidence of the prosecutrix we find that once she had made up her mind to speak out she had given a vivid description of how she was ravished by the accused - appellant. Before dragging her to the shrub jungle nearby, the accused-appellant had engaged himself in a conversation with the prosecutrix which gives a clue to what his intentions were. He had inquired from her whether there was anybody in her house and the whereabouts of her mother, elder sister and younger brother. She testified that thereupon when she was about to proceed toward the stream she was dragged to the shrub jungle despite her resistance. He put her on the ground and when she cried out for help ("mother, mother") the accused-appellant had covered her face with the clothes she was carrying with her for washing. She had struggled in vain to free herself from his grip. In cross-examination she has described in detail how he

succeeded in having sexual intercourse with her forcibly. Her narrative was to the effect that the accused-appellant penetrated her without her consent. Her version was not impugned or assailed in cross-examination.

In this regard we are reminded of the observations of Justice *H.N.G. Fernando in Edrick de Silva vs. Chandradasa de Silva*[5] at 170 where he observed: "That when there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross examination that is a special fact and feature in the case, it is a matter falling within the definition of the word "proof" in Section 3 of the Evidence Ordinance and a trial Judge or Court must necessarily take the fact into consideration in adjudicating the issue before it".

The learned Senior State Counsel further submitted that an adverse inference should be drawn against the accused-appellant for the reason that he opted to remain silent on the face of incriminating circumstances established by the prosecution. He cited the judgment of Justice *F.N.D. Jayasuriya in Kankanam Arachchilage Gunadasa vs. The Republic*[6] in support of this contention. On the other hand the learned counsel for the accused-appelant referred us to the judgment of Howard, CJ in *King vs. Themis Singho*[7] It was a case where the appellant did not go into the witness box. But the appeal was allowed in that case for the reason that the Court of Criminal Appeal found that the evidence of the prosecutrix was weak to secure a conviction for rape. He also referred us to the case of *King vs. Ariyaratne*[8] where the defence was that the accused had nothing to do with the girl. Appeal was allowed there for the reason that because of the weak evidence the Crown Counsel conceded that he was unable to support the conviction.

In this case as we have already observed the prosecutrix's story that she was raped by the accused-appellant came unassailed and unimpugned. The evidence of the medical expert to the effect that there was a rupture of the hymen at 7

o'clock position which was consistent with the story of having sexual intercourse. When there is a case to answer on the prosecution evidence of the accused-appellant remains silent court may regard the inference from his failure to testify as, in effect, a further evidential factor to support the prosecution case. Vide the judgment of Lord Taylor of Gosforth, C.J. *in Regina vs. Cowan*[8] *Regina vs. Gayle*[9], *Regina vs. Ricciard*[10]

In this case on the face of cogent and over-whelming evidence against the accused-appellant which is of incriminating nature he remained silent, though he had the opportunity to explain away such incriminating evidence adduced against him.

On a consideration of all the matters referred to above we proceed to dismiss the appeal of the accused-appellant.

**HECTOR YAPA, J. (P/CA)** - I agree.

Appeal dismissed