

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA.**

In the matter of an appeal made in terms of  
Article 331(1) of the Code of Criminal  
Procedure Act No. 15 of 1979.

Democratic Socialist Republic of Sri Lanka

**Complainant**

Vs.

1. Gamini Saman Liyanage
2. Hewa Pedige Sarathchandra
3. Deegoda Gamage Kithsiri

CA No: 109-111/2011

**Accused**

High Court Colombo Case:351/2001

AND NOW

1. Gamini Saman Liyanage
2. Hewa Pedige Sarathchandra
3. Deegoda Gamage Kithsiri

**Accused – Appellant**

Vs.

Hon. Attorney General,  
Attorney General's Dept,  
Colombo 12.

**Complainant- Respondent**

Before : Menaka Wijesundera J.  
B. Sasi Mahendran J.

Counsel : Rasik Zarook PC with Rehana Deashapriya and  
Chanakya Liyanage for the 1<sup>st</sup> Accused – Appellant.  
Amila Palliyage with Sandeepani Wijesooriya, Sawani  
Udugampola, Lakitha Wakishtaarachchi and S. De  
Silva for the 2<sup>nd</sup> Accused – Appellant.  
Anil Silva, PC with Amaan Bandara for the 3<sup>rd</sup>  
Accused- Appellant.  
Rohantha Abeysuriya, ASG for the AG.

Argued on : 09.11.2023

Decided on : 28.11.2023

### **MENAKA WIJESUNDERA J.**

The three accused appellants (hereinafter referred to as the appellants) had been indicted for,

- 1) Conspiracy to abduct the victim, against all three,
- 2) Abduction of the victim to commit rape against 2<sup>nd</sup> and the 3<sup>rd</sup> appellant,
- 3) 1<sup>st</sup> appellant aided and abetted the 2<sup>nd</sup> and the 3<sup>rd</sup> to commit the offence of abduction of the victim,
- 4) A charge of rape against the 1<sup>st</sup> appellant,
- 5) A charge of rape against the 2<sup>nd</sup> appellant,
- 6) A charge of rape against the 3<sup>rd</sup> appellant,
- 7) Murder of the victim against all.

The three appellants opted for a jury trial and upon the conclusion of the trial the jury delivered a verdict of ,

- 1) All three appellants were found guilty for the 1<sup>st</sup> count,
- 2) 2<sup>nd</sup> and the 3<sup>rd</sup> were found guilty for the 2<sup>nd</sup> count,
- 3) 1<sup>st</sup> was found guilty for the 3<sup>rd</sup> count,

4) All three were found guilty for the charge of murder.

The facts of the case are that a Tamil girl was alleged to have been abducted raped and murdered by the appellants on or about 30.9.1996. The appellants had been on duty at Kondaveeli check point on the Jaffna Palelei Road.

According to **witness Upali Ariyadasa** who had been a soldier at the time of the incident the 1<sup>st</sup> appellant had been their Copral and the 2<sup>nd</sup> appellant also had been a soldier like him and the 3<sup>rd</sup> had been a Copral attached to the above mentioned check point.

This witness had been on duty by the side of the road on the 30th of September and the three appellants had been inside the abandoned house which had been near the check point and which had been used as a resting place for the officers on duty at the check point.

According to this witness the civilians coming on to the cleared area from the uncleared area has to go through the check point and every such person is checked by the officers on duty but a woman passing by can never be searched by a male officer.

While he had been on duty, he had seen a girl being escorted to the house by the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants around 1 pm and five minutes later he had heard a female voice shouting from the resting place nearby and he had gone near the house and had looked through the window, and he had seen a human being fallen on the floor and wrapped in some covering. The 1<sup>st</sup> appellant had seen him looking through the window and the 1<sup>st</sup> appellant had ordered him to go back to his duty point.

The learned Counsel for the respondents submitted that the reference to the time by the above witness could be an error because later in evidence he had said that he heard the cries of a female around two hours before he went off duty.

At 6 30 in evening when he was going off duty the 2<sup>nd</sup> and the 3<sup>rd</sup> had come out and when asked about the girl whom he had seen going in to the house the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants had said that she was killed (Page 67) but he says in cross examination that he cannot recall as to which one of the appellants said so, but he says that both the 2<sup>nd</sup> and the 3<sup>rd</sup> were present at that time. Hence the identification of the reveler is not known.

The next day he had gone on approved leave and when he came back, he had been produced before the Magistrate.

***One of the grounds of appeal raised by the Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> appellants was that the witness Wimaladasa was not specific as to who exactly told him that the girl seen going in to the house was killed .***

Upon perusal of the brief at page 67 we find that he says that it was either the 2<sup>nd</sup> or the 3<sup>rd</sup> appellant who had told him that they killed the deceased but he had not been able to say which one of them. The Counsel for the respondents also conceded to this fact, but he said that he is not relying on this confession because a confession made by one accused cannot be used against the other to which this Court also agrees to.

But at page 67 we observe that he had said that all three appellants had told him that not to divulge any information with regard to hearing the cries of a girl from the abandoned house near the check point. He also had been cross examined to the effect that there were prostitutes who had come to the very same house but he does not say that on that day he saw a prostitute coming in to the house.

Other witnesses had been led to show that the appellants had been on duty on the fateful day.

Hence the learned Counsel for the respondents added that it is very clear that it was only the appellants who had been present on that day in the house with a female whose identity was not known.

The mother of the deceased whose evidence in the trial under section 33 of the Evidence Ordinance had been marked in the trial, had said that on the 30<sup>th</sup> September the victim had left home on the bicycle to see the aunt and as she did not return in the evening, she had gone to the Kondeveli check point to inquire about her on the 1<sup>st</sup> October.

In the meantime, she had heard from **Pushpakaran** that he had seen the victim at the check point on the 30<sup>th</sup> around 3pm. She further says that even her sister had confirmed that she had left her place around 3pm but since the sister did not give evidence it amounts to hearsay evidence. Thereafter, she complained formally on the 1<sup>st</sup> and the investigations had commenced.

The Military police had taken the **appellants** and the witness **Nishantha and Ariyadasa** as suspects and later the witnesses Nishantha and Ariyadasa were made witnesses.

Hence on the 7<sup>th</sup> of October the Military police had lodged an investigation in to the complaint and all the officers who had been on duty on the fateful day had been taken in to custody and interrogated. This investigation had led to a dead body being discovered from a toilet pit which had been only 50 meters away from the resting place of the appellants while they had been on duty on the fateful day.

The father of the deceased had identified the body on a special mark of the victim.

The post mortem had been done in Colombo and the cause of death had been identified to be due to blunt trauma to the face neck and the pelvis area. But the time death is not known.

Hence the Counsel for the respondents averred that the dead body of the deceased had been exhumed from a toilet pit which had been very close to the resting place of the appellants within 24 hours of witness Ariyadasa seeing a female going in to the resting place of the appellants and from where he had heard cries of a female and from which place, he had seen a dead body lying on the floor.

But Court is mindful of the fact whether it is enough to draw the inference that the female who was seen going in to the resting place of the appellants was the deceased and no one else, and when Court questioned the learned Counsel for the respondents about this, he could not give a clear answer.

A witness by the name of **H Nishantha** who also had been an army soldier and who had been on duty on the next day which had been the 1<sup>st</sup> October had revealed that the 1<sup>st</sup> appellant who had led them had told him to dispose a dead body of a girl and he done so as he was a superior officer. He had wanted him to get the assistance of the 2<sup>nd</sup> appellant. They had dumped the body of a female in to a toilet pit, near the house which had been used as a resting place and from this location the police had later recovered the body of the deceased. He does not say that the body was taken out of the resting place but it had been outside . He had not been able to view the body at the time of the disposing of the body. The 1<sup>st</sup> appellant had been near the disposal sight and it is he who had given them the instructions.

***One of the grounds of appeal raised by the Counsel for the 2<sup>nd</sup> appellant was that the evidence of this witness is highly unreliable because he was unable to identify the sheet in which the body had been wrapped.***

*But upon close scrutiny of the evidence from page 301 he says very clearly that whatever he had to dump in the toilet pit was wrapped in a red color sheet and he had been consistent although he had been lengthily cross-examined and the defense had marked a contradiction where he had said that in the Magistrates Court that he could not recall the type of the wrapping.*

*Hence the Counsel for the 2<sup>nd</sup> appellant strenuously tried his level best show this Court that the identification of the bed sheet in which the body had been wrapped was unreliable but we find that before the trial Court he had been very specific in the identification of the sheet which is the only nexus between the disposal of the dead body and the recovery and that it was the body of the deceased.*

*But Court is mindful of the fact that it was subjected to a contradiction which we think does not go to its root because he had been virtually bullied in to admitting that he said something else in the Magistrates Court.*

*Hence, we are unable to agree with the said ground of appeal.*

At the time of the recovery of the body from the toilet pit the parents of the deceased had been present along with a large crowd of people and the mother had fainted and the father had started to yell and scream. (430)

A witness by the name of **Pushpakaran** had said in evidence that he had known the deceased and her family and that he had seen the deceased on the day of the incident which is on the 30 of September on the Palali road at a check point with the army personnel around 3pm.

The police had inspected the house which had been referred to by the witnesses and from the said house they had recovered a bag and a hair clip which the mother of the deceased had not identified, upon further surveillance they had observed a toilet pit nearby and on suspicion they had opened the pit to find a dead body inside wrapped in a cloth.

The said body had been taken out in the presence of the parents of the deceased and they had identified the body, but the postmortem had been conducted in Colombo. The clothes also which were inside the pit had been identified by the mother of the deceased to be the clothes she had worn on the fateful day.

The statements of the 3 appellants had been recorded and on the statement of the 1<sup>st</sup> appellant jewelry of the deceased had been recovered and the rim of a push cycle had been recovered on the statement of the 3<sup>rd</sup> appellant.

A discrepancy in the number of the cycle had been brought to the notice of Court but we find it to be of minor importance .

But this particular rim had been identified to be belonging to the deceased by the mother of the deceased at the Magistrates Court whose evidence had been admitted under section 33 of the Evidence Ordinance.

According to the mother whose evidence had been led under section 33 of the Evidence Ordinance says that the victim had left home at about 9 in the morning on 30<sup>th</sup> September 1996 to see the aunt and she was expected to return about 4 in the afternoon but she has not. As such the mother had believed that she may have stayed at the aunts but as on the next day she had got to know that witness Pushpakaran had seen her near the Kondeviel check point around 3 in the afternoon she had double checked with her sister and she had confirmed that the victim had left her house around 3pm on the 30<sup>th</sup>. (955) As such she had

first made inquiries from the Kondeveil check point and she had not got a suitable reply she had complained to the other relevant authorities.

She says that at the exhumation of the body she had been totally unconscious but she had identified her clothes and the jewelry in the Magistrates Court.

The appellants had made statements from the dock denying the allegation and saying that the statements were recorded from them under duress and threat by their higher officers.

In the instant matter the items of evidence against each appellant are as follows,

1 <sup>st</sup> appellant	2 <sup>nd</sup> appellant.	3 <sup>rd</sup> appellant.
<p>He had been in charge at the check point in question on the 30<sup>th</sup> of Sep.1996.</p> <p>He had told witness Wimaladasa to go away from the window when witness Wimaladasa had been peeping inside to see as to why he had heard a girl shouting on the 30<sup>th</sup> of Sep.</p> <p>Instructed witness Nishantha to dispose a dead body of a girl. He had also supervised witness Nishantha indisposing the dead body wrapped in a red colored sheet on the 30<sup>th</sup> of Sep.</p> <p>On a statement of the 1<sup>st</sup> appellant jewelry belonging to the deceased had been recovered and the items had been identified by the</p>	<p>Witness Ariyadasa had seen him accompanying a girl in to the house near the check point but identity not known.</p> <p>Witness Ariyadasa saying that he along with the 3<sup>rd</sup> appellant made a confession with regard to the killing of a girl on the 30<sup>th</sup> of September 1996.</p> <p>Witness Ariyadasa being warned not to divulge the fact of hearing the cries of a female voice on the 30<sup>th</sup> of Sep.</p>	<p>Witness Ariyadasa sees him accompanying a girl in to the house near the check point on 30<sup>th</sup> of Sep.</p> <p>Witness Ariyadasa says that he confessed to him along with the 2<sup>nd</sup> appellant that the girl who they had accompanied in to the house was killed.</p> <p>Witness Ariyadasa being told that not to divulge the fact of hearing a girl shouting from the house near the check point on the 30<sup>th</sup> of Sep.</p> <p>On his statement a bicycle rim had been recovered and from the serial number on the bicycle the mother of the deceased had identified the same as belonging to the deceased.</p>

mother of the deceased.		
He had warned witness Ariyadasa not to tell anyone about hearing the cries of a girl from the house they had been resting.		

Hence the question arises,

- 1) Who is the girl who was escorted in to the house by the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants on the 30<sup>th</sup> September ,
- 2) Whose dead body was seen by the witness Ariyadasa on the 30<sup>th</sup> of September, inside the house,
- 3) The body exhumed by the police was identified to be the deceased and according to evidence it had been wrapped in a sheet,
- 4) Witness Nishantha who had disposed the body on the instructions of the 1<sup>st</sup> appellant had identified in Court the red sheet from which the body had been wrapped at the time of disposal and which had been exhumed along with the body.
- 5) Hence it could be assumed that it was the deceased body which had been disposed by the witness Nishantha on the instruction of the 1<sup>st</sup> appellant with the help of the 2<sup>nd</sup> appellant.
- 6) If so, is it the girl who was escorted on the 30<sup>th</sup> by the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants to the house of the appellants is the deceased, for this to be established we have the evidence of the witness wimaladasa who had seen a girl being escorted to the house by the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants five minutes later cries were heard and when he went to see he saw a dead body on the floor of the house wrapped in a sheet. Hence it can be presumed that it was the deceased who was escorted in to the house. Then if that is so how did witness Pushpakaran see the deceased at the check point at 3pm on the same day which had been led by the prosecution.

Unless we assume that Pushpakaran has made a mistake with time and had said 3pm instead and also, we must note that between the time 1pm and 3pm there is a difference only two hours hence as these are war torn days and the people in general in the area would not have been in the best frame of mind.

As such we have enough evidence put forward by the prosecution to assume that,



- 1) It was the deceased who escorted in to the house of the appellants by the 2<sup>nd</sup> and the 3<sup>rd</sup> on the 30<sup>th</sup>,
- 2) It was the very same deceased who was later exhumed by the police from the toilet pit and such it was the body of the deceased who had been dumped in the toilet pit by the witness Nishantha on the instructions of the 1<sup>st</sup> appellant and with the help of the 2<sup>nd</sup>.

Hence now upon perusal of the above mentioned evidence led at the trial by the prosecution this Court has to see whether there is cogent evidence to prove the charges in the indictment beyond a reasonable doubt.

The main charges in the indictment are charges of conspiracy, abduction, rape and murder.

A charge of conspiracy had been defined as being “113A. **(1) If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, whether with or without any previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence, as the case may be.**”

Hence according to the above section there has to be an agreement to commit an offence or to abet an offence.

In the case of **King vs M.E.A Cooray (1950) 51 NLR 433** it has been held by Gratien J that “if the offence of conspiracy as defined in the section compared with the corresponding offence which has been either defined by statute in India or judicially interpreted as a common law offence in England, it emerges that the vital aspect in which the Ceylon legislature has departed by restricting the offence to agreements designed to further the commission or the abetment of criminal acts,”.

Hence under the offence of conspiracy there has to be clear evidence of previous agreement between the parties if not the principal offence of conspiracy and the aiding and abetting to conspire also fails.

In the instant matter the conspiracy charge has been drafted in order to commit the offences of abduction to commit Carnel intercourse.

But as this Court sees no previous agreement between the appellants hence the charge of conspiracy and the abetment and the aiding to conspire fails in the opinion of this Court.

Hence, we conclude that there is no evidence to establish the charges 1, 2, and 3.

**Then remains the charge of murder, and for that we find that against the 1<sup>st</sup> appellant there is evidence to say that ,**

- 1) He was in charge of the check point,
- 2) He had given instructions to witness Nishantha and the 2<sup>nd</sup> appellant to dispose the body of a girl, which was later identified to be that of the deceased,
- 3) Jewelry of the deceased was later recovered to be of deceased taken in to custody upon his statement, for these items of evidence when the defense was called the 1<sup>st</sup> appellant had made a statement from the dock stating that he made the police statement on the instruction of his superiors and he denied the entire allegation.
- 4) The 1<sup>st</sup> appellant warning witness Ariyadasa not tell anyone about hearing the cries of a girl on the 30<sup>th</sup> and also asking him not to peep in to the house when the witness had been caught looking at the body which had been lying on the floor after he heard the cries of a girl.

In light of the above evidence the 1<sup>st</sup> appellants position from the dock very naïve because the time of the entire incident had been during a war time and if a dead body is buried within 25 meters away from your place of duty when the entire place had been under military control it is hard to believe his ignorance of the incident.

Hence, we find that the prosecution had placed a case beyond a reasonable doubt against the 1<sup>st</sup> appellant where the charge is one of murder.

**In the case of the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants the evidence against them places the following items of evidence,**

- 1) They escorted a girl in to the house on the 30<sup>th</sup>,
- 2) 2<sup>nd</sup> appellant helped witness Nishantha to dispose the body of the deceased,
- 3) The statement which was purported to have been made by them to witness Ariyadasa which has already been rejected,] hence it is not considered although merely noted down for reference,
- 4) The rim of the bicycle belonging to the deceased had been found on the statement of the 3<sup>rd</sup> appellant which only displays knowledge of the whereabouts of the item.

Hence on perusal of these items of evidence against the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants we find that the verdict of the jury against the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants is not supported by evidence.

**Hence in that case what this Court has to see next is whether the trial judge had directed the jury adequately.**

One of the common and one of the main grounds of appeal of all the appellants had been that the trial judge had not directed the jury adequately as per the provisions of the CPC.

**Upon perusal of the directions given to the jury by the trial judge we find that he has referred to the principles of ,**

- 1) That the prosecution has to prove its case beyond a reasonable doubt,
- 2) The presumption of innocence,
- 3) Direct evidence and circumstantial evidence,
- 4) Evidence of each evidence including that of the police officers,
- 5) Quoted the relevant section under which the appellants had been charged along with the illustrations given in the penal code,

Under section 230 of the CPC states very clearly as to how a judge should address the jury at the conclusion of the trial and it states as ,

***‘It is the duty of the Judge-***

- (a) To decide all questions of law arising in the course of the trial and especially all questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties;***
- (b) to decide upon the meaning and construction of all documents given in evidence at the trial;***
- (c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;***
- (d) to decide whether any question which arises is for himself or for the jury.”***

*Hence, we find that in the instant matter the entire case is based on circumstantial evidence but we find that the judge had not explained to the jury the meaning of circumstantial evidence and how it should be applied to the evidence.*

*Furthermore, the charges of conspiracy and how it has to be considered in view of the evidence and the charges of murder abetment and aiding also has not been addressed to the jury in the light of applying it to the evidence in the case.*

*Hence, we find the address by the judge to the jury is extremely lacking and unsatisfactory.*

*The Counsel for the respondents also averred that if this Court finds the direction of the trial judge to the jury is inadequate, to consider the principles laid down in the case of Mannar Mannan vs The Republic of Sri Lanka 1990 1 Sri L R 280 in which it says that “despite the non-direction to the jury ....a reasonable jury properly directed would inevitably and without doubt have returned the same verdict”.*

*But we find that in this instance the jury if properly directed would not have found the second and the third appellants guilty.*

*As such we find the verdict of the jury is entirely perverse and bad in law as such, we allow the appeals of the 2<sup>nd</sup> and the 3<sup>rd</sup> appellants and as there is evidence which can be considered against the 1<sup>st</sup> appellant, we order a retrial to be held against the 1<sup>st</sup> appellant.*

*We are aware of the time which had passed after the commission of the offence, but in the interest of justice we are compelled to order a retrial against the 1<sup>st</sup> accused appellant.*

**JUDGE OF THE COURT OF APPEAL**

**Hon. Justice B. Sasi Mahendran**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**