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

In the matter of an Appeal under and in terms of section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:

CA/HCC/134/135/2020

High Court of Trincomalee

Case No: HCT/922/2019

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT

Vs.

01. Faizar Fahim

02. Najeer Nafir

03. Jamal Thariq

ACCUSED

AND NOW BETWEEN

01. Faizar Fahim

02. Najeer Nafir

ACCUSED-APPELLANTS

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: M.S.M Imtias instructed by Irfana Imran for the 1st and the 2nd Accused-Appellant
	: Azard Navavi, S.D.S.G. for the Respondent
Argued on	: 02-05-2024
Written Submissions	: 30-09-2022 (By the 1st and 2nd Accused-Appellant)
	: 22-03-2024 (By the Respondent)
Decided on	: 15-07-2024

Sampath B. Abayakoon, J.

The first and the second accused-appellant (hereinafter sometimes referred to as the 1st appellant or the 2nd appellant) along with the 3rd accused named in the indictment, was indicted before the High Court of Trincomalee for committing the following offences.

1. The 1st accused-appellant together with the 2nd accused-appellant and the 3rd accused committed the offence of gang rape on the female named in the indictment on or about 14-04-2015, at Muthur within the jurisdiction of the High Court of Trincomalee, and thereby committed

an offence punishable in terms of section 364(2)(g) of the Penal Code as amended by the Penal Code (Amendment) Act No. 22 of 1995.

2. The 2nd accused-appellant together with the 1st accused-appellant and the 3rd accused committed the offence of gang rape on the same female mentioned earlier at the same time and at the same transaction, and thereby committed an offence punishable in terms of section 364(2)(g) of the Penal Code as amended by the Penal Code (Amendment) Act No. 22 of 1995.

3. The 3rd accused together with the 1st and the 2nd accused-appellants committed the offence of gang rape on the same female mentioned earlier at the same time and at the same transaction, and thereby committed an offence punishable in terms of section 364(2)(g) of the Penal Code as amended by the Penal Code (Amendment) Act No. 22 of 1995.

4. At the same time and at the same transaction, the 2nd accused-appellant knowingly and intentionally set fire on the above-mentioned female, and thereby committed the offence of attempted murder, an offence punishable in terms of section 300 of the Penal Code.

After trial without a jury, the learned High Court Judge of Trincomalee of his judgment dated 02-11-2020 found the appellants and the 3rd accused guilty for the respective 1st, 2nd and 3rd counts against them.

The 2nd appellant was acquitted of the 4th count preferred against him, which was the count of attempted murder.

After having considered the mitigatory as well as the aggravating circumstances, the learned High Court Judge sentenced the 1st accused appellant who was found guilty for the 1st count for a period of 5 years rigorous imprisonment and

to a fine of Rs. 5000/-, with a default sentence of 1 month rigorous imprisonment.

He was ordered to pay Rs. 500,000/- as compensation to the victim, namely PW—01, and in default, was ordered two years rigorous imprisonment.

The 2nd accused-appellant who was found guilty of the 2nd count in the indictment was sentenced for a period of 15 years rigorous imprisonment.

He was ordered to pay Rs. 5000/- as a fine, and in default, he was sentenced for a period of 1 month rigorous imprisonment. He was also ordered to pay a compensation of Rs. 1 Million to the victim, and in default, he was sentenced for a period of 5 years rigorous imprisonment.

The 3rd accused who was convicted for the 3rd count in the indictment was sentenced for a period of 15 years rigorous imprisonment and to a fine of Rs. 5000/-, and in default, he was sentenced to a term of 1 month rigorous imprisonment. He was also ordered to pay Rs. 1 Million as compensation, and in default, was sentenced for a period of 5 years rigorous imprisonment.

The 1st and the 2nd accused-appellants have preferred this appeal on being aggrieved by the said conviction and the sentence. The 3rd accused indicted has not preferred an appeal.

Facts in Brief

The prosecutrix, namely PW-01 has been the legally married wife of the 2nd appellant during the time relevant to this incident. However, when she gave evidence before the Court for the 1st time on 20-08-2020, she and the 2nd appellant have been divorced.

According to her evidence, they had one child out of the marriage and was about one and a half years old during the time relevant to this incident. Her marriage with the 2nd appellant was in turmoil at that time. It has been alleged that the

2nd appellant had various other relationships, and was attempting to divorce her. He has failed and neglected to maintain her and his child.

On the day of the incident, the child has been taken by the child's grandmother and the PW-01 had been alone in the house. Her husband, the 2nd appellant had not come home in four days. While she was at home, the 1st accused whom she knew well has come and inquired about her husband and has left. Since she was alone in the house, she has gone to the neighbour's house to sleep. While she was sleeping in the night, she has heard a land master tractor being driven into their house compound. After hearing the noise, she has returned to her house where she has seen three individuals including her husband consuming arrack.

In her evidence-in-chief, she has stated that when she went to the house, *"he gave me soda",* without specifying who gave it to her. She has stated that she drank it and as result, she felt dizzy and fell asleep. She has further stated that she saw her husband intoxicated and in a state of unconsciousness. She has stated further that Thariq, referring to the 3rd accused, held her by her leg and placed his leg on her and whispered to her ear saying things similar to going to bed with his wife. He had been on top of her when he stated the said things.

Later in her evidence, she has stated that it was Thariq who gave her soda, which made her dizzy. After getting on top of her, Thariq has had sexual intercourse with her and has moved away. Thereafter, the 1st accused had dragged her and had left her close to her husband. She has seen all three of them lying in a row and her husband vomiting and in an unconscious state.

When she got up, she has realized that it was 4 o'clock in the morning and the 2 individuals had left. She has felt hungry and has seen her husband preparing tea, but has not given anything to her. Around 6 o'clock in the morning, she has had a fight with her husband and after that, while carrying the lamp they had in the house, it had accidently fallen on her, causing burn injuries to her body. Thereafter, the husband has doused the fire and she has been taken to Muthur

hospital and from there, to the Trincomalee General Hospital. She has received treatment at the hospital for about 3 months.

Under cross-examination, she has admitted that she did not say that the three persons who came had a bottle of arrack with them in her statement to the police. She has also admitted that in her police statement, what she stated was that it was her husband who gave her soda. She has explained the said discrepancy stating that she said so without much thought, and, it came to her mind while giving evidence actually it was the 3rd accused who did so.

It has been suggested to her that she did not say in her police statement that the 3rd accused Thariq kept his male organ inside her female genitals, to which she has replied stating that she said so. However, she has admitted that she did not state in her police statement what the 3rd accused whispered into her ear as stated by her in her evidence. It has been suggested to her that since she was angry with her husband and the others who came with him for consuming liquor and believed that they are the persons who helped him in his affair with another woman, a false complaint was lodged against them. She has dismissed it saying that it was not the case.

After the conclusion of the evidence of the prosecutrix, the prosecution has called PW-04 who was the Judicial Medical Officer (JMO) who examined the prosecutrix at the Base Hospital Trincomalee. He has examined her on 26-05-2015 at 3.45 in the afternoon, which was nearly one and a half months after the alleged incident.

Explaining this delay in examining the prosecutrix, the JMO has stated that she has been a patient transferred from Muthur hospital on 26-05-2015 for further medical treatment and there was no indication in the bed head ticket that the police being informed of this incident. When he inquired her about the history of the incident, it came to light that the burn injuries suffered by her was not self-inflicted, but caused by some others who attempted to set fire on her.

The JMO has recorded the history of the incident as narrated by the prosecutrix after translating it to English language.

She has given the history of the incident stating that on 13-04-2015, she was sleeping in the neighbour's house and around 11 o'clock in the night, Fahim and Thariq who came with her husband raped her, and it was Thariq who raped her and Fahim held her legs, and her husband too was present at the place of the rape. She has also stated that since she had not eaten properly for the previous three days, she fainted while she was being raped and had forgotten everything what happened thereafter, and when she gained consciousness, she was admitted to Muthur hospital. She has also stated to the doctor that her husband used to ill-treat her and caused her pain of mind asking for a divorce, but she never attempted to commit suicide by setting herself on fire by using kerosene oil.

However, JMO has not been able to examine her vaginal area due to the fact of it being in a swollen state as a result of the burn injuries.

PW-03 was the neighbour to whose house the prosecutrix has gone and stayed until she left after hearing her husband has returned home. She has left the house of PW-03 around 9.00 p.m., and on the morning of the following day at around 6.30 p.m., PW-03 has heard the prosecutrix screaming. When she and the other neighbours rushed to the house of the prosecutrix, they have seen her ablaze and had taken steps to take her to the hospital for treatment.

PW-02 was another neighbour who has rushed to the scene after the incident. According to the evidence of the police officers who conducted investigations into the incident, first information in this regard has been received by the Muthur police station from the police post of Trincomalee General Hospital on 16-04-2015. However, it appears that the statement of the prosecutrix has been recorded only on 21-05-2015. No explanation has been given as to the delay of recording the statement of the prosecutrix. There is nothing to indicate that she

was not in a position to make a statement to the police after her admission to the hospital.

After the closure of the prosecution case, the learned High Court Judge has decided to call for a defence from the appellants as well as the 3rd accused. Both the appellants have made lengthy dock statements.

The 1st appellant has admitted that he, along with the 2nd appellant and the 3rd accused went to the house of the 2nd appellant and consumed liquor. He has stated that after consuming liquor, he got drunk and fell asleep and left afterwards. He has denied that he raped the prosecutrix or had any hand in assisting anyone in that regard.

The dock statement of the 2nd appellant who was the husband of the prosecutrix had been to the same effect. He has stated that he came home along with two other friends believing that his wife would not be at home and they consumed liquor, as a result, he got intoxicated and did not know what happened. When he woke up in the morning, he has seen the 1st appellant and the 3rd accused sleeping near the door of his house and saw his wife near him. Later, his wife had an argument with him due to the fact of him receiving some phone calls. While he was preparing tea, he saw the lamp that was lit in the house had accidently fallen on his wife and she had received burn injuries.

The 3rd accused who has not appealed his conviction has given evidence under oath. He has admitted that he had liquor along with the 1st and the 2nd appellant, but has denied that he committed rape on the prosecutrix.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellants formulated the following grounds of appeal for the consideration of the Court.

1. The learned High Court Judge erred in law by failing to consider the belatedness and the test of promptness and spontaneity.

2. The learned High Court Judge erred in law by not considering the medical finding of the JMO that there was no penetration as evidenced in the Medico-Legal Report.
3. The learned High Court Judge erred in law by failing to consider the absence of *actus reus* and *mens rea*.
4. The learned High Court Judge erred in law by failing to consider the absence of common intention.
5. The learned High Court Judge erred in law by failing to analyze the non-existence of the element of commission or abetting the commission of participatory presence by each member.
6. The learned High Court Judge erred in law by failing to consider the absence of corroboration.
7. The learned High Court Judge erred in law by failing to consider the absence of resistance and implied consent on the part of the prosecutrix.
8. The learned High Court Judge erred in law by failing to analyze whether the prosecutrix is a credible witness and her evidence satisfied the test of consistency.
9. The learned High Court Judge erred in law by not considering the failure to mark the 1st information by the prosecution which amounts to a denial of a fair trial.
10. The learned High Court Judge erred in law by failing to analyze the identity of the accused when there was no ID parade.
11. The learned High Court Judge erred in law by mistaking as to which was the 1st information.
12. The learned High Court Judge erred in law by concluding that the case has been proved based on circumstantial evidence.
13. The learned High Court Judge erred in law by using the short history given by the prosecutrix as corroboration of her own testimony.

14. The learned High Court Judge erred in law by using the dock statements of the 1st and the 2nd accused to corroborate the evidence of the prosecutrix.
15. The learned High Court Judge erred in law by using the dock statement of one accused against the other accused.
16. The learned High Court Judge erred in law by failing to consider and properly evaluate the dock statements of the 1st and the 2nd accused and the evidence given on oath by the 3rd accused.
17. The learned High Court Judge erred in law by failing to apply the maxim *falsus in uno falsus in omnibus.*
18. Did the learned High Court Judge impose an illegal sentence in terms of section 364(4) of the Penal Code.
19. Is the prosecutrix a competent witness against her husband in terms of section 120 of the Evidence Ordinance.
20. Has the learned High Court Judge failed to appreciate that section 363(e) of the Penal Code excludes the possibility of committing rape by a husband.

Consideration of the Grounds of Appeal

Although 20 grounds of appeal were urged by the learned Counsel for the appellants, I will now proceed to consider them together as they are interrelated.

The learned Counsel for the appellant, among other matters contended, pointed out several misdirections of law by the learned High Court Judge in his judgment, to argue that the judgment cannot be allowed to stand under any circumstance due to the material infirmities of the judgment.

He was of the view that there was no credible evidence placed before the Court to decide that the 1st and the 2nd appellant committed the offence of gang rape. He pointed out several major discrepancies in the evidence of the prosecutrix which has not been properly considered by the learned High Court Judge, which if considered in the correct perspective, would make the evidence of the

prosecutrix not credible. He contended that under the said circumstances, the learned High Court Judge should have looked for corroboration of the incident, which has not been considered. He also submitted that the delay in making a complaint has not been considered and pointed out that considering the short history given by the prosecutrix one and a half month after the incident to the JMO as corroboration was a misdirection.

He also pointed out that this was not a case based on circumstantial evidence, although the learned High Court Judge has considered alleged circumstantial evidence in the judgment. Further, it was stated that the learned High Court Judge has considered the dock statements made by the appellants as corroborative evidence of the prosecution case, which was also a misdirection as to the law. He pointed out several other infirmities in the judgment for the consideration of the Court.

The learned SDSG submitted that the evidence has established that when the prosecutrix returned home, the 2nd appellant who was her husband was drunk and unconscious. He agreed that there was no evidence to establish that he was in any way connected with an offence of gang rape, although he was convicted of the said offence.

He submitted further, that the only evidence as stated by the prosecutrix against the 1st appellant was the fact that he dragged and kept her near her husband. He submitted that other than the said statement, there was no evidence as to his participation of a gang rape. He agreed that apart from the above fact, there was no other evidence to connect the 1st appellant for the offence of gang rape, although, admittedly, he has been present and consuming liquor along with the 2nd appellant and the 3rd accused.

The learned SDSG conceded that there are several misdirections as to the applicable law and the way the evidence has been considered by the learned High Court Judge in his judgment, and agreed that he is not in a position to defend the judgment due to the said misdirections.

Before I proceed any further in considering the appeal, I would like to express my appreciation to the learned SDSG for agreeing as to the infirmities in the judgment and the strength of the evidence, as a responsible officer of the Court, enabling the Court to decide on this appeal.

This is a case where the only eyewitness to the incident had been the prosecutrix herself. I am in agreement with the submissions of the learned Counsel for the appellants that the prosecutrix was not a credible witness for the trial Court to act entirely on her testimony in order to decide that the prosecution has proved its case.

There is no doubt that it is unfair to expect independent eyewitness accounts on an incident of this nature. However, this Court is of the view that a trial Court can rely on the evidence of a victim alone on an incident of rape, if it can be decided that her evidence was credible in that regard.

This Court is very much mindful that looking for corroboration should not be the norm in cases of this nature, and is also mindful of what the Indian Supreme Court observed in the case of **Bohoginbhai Hirijibai Vs. State of Gujarat (1983) AIR S.C. 753** which stated thus,

> "*In the Indian setting, the refusal to act on the testimony of as victim of sexual assault in the absence of corroboration as a rule, is adding insult to the injury.*"

However, it is the view of this Court that in a situation where it is not prudent to act only on the evidence of a prosecutrix, the Court should look for some corroboration which connects the accused to the offence.

This view is supported by the decision in the case of **Sunil Vs. The Attorney General (1986) 1 SLR 230** wherein **Dheeraratne, J.** held:

> *"Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of the witness requiring corroboration is not credible that testimony should be rejected and the*

accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence is not credible."

In the case of **Inoka Gallage Vs. Kamal Addararachchi and Another (2002) 1 SLR 307**, it was held:

"Generally, a conviction of rape almost entirely depends on the credibility of the woman so far as the essential ingredients are considered, the other evidence being merely corroborative. There may be many factors in a case tending to show that the testimony of the prosecutrix suffer from infirmities or defects in a manner so as to make it either unsafe or impossible to base a conviction on her evidence."

In the instant case, the indictment has been forwarded to the High Court on the basis of gang rape committed by the appellants along with the 3rd accused. The indictment has also included a charge against the 2nd appellant for committing attempted murder on the prosecutrix.

It appears that the charges have been drafted by the Hon. Attorney General based on the statements made by the prosecutrix to the investigators of the matter and also on the non-summary proceedings before the relevant Magistrate's Court.

However, in giving evidence at the trial, the prosecutrix has stated that she received burn injuries due to an accident, and not because her husband set her on fire, which I see as a piece of evidence that creates a major concern as to her credibility. Besides that, her evidence has been that her husband was drunk, unconscious and even vomiting when she came to their house, which shows that the husband has played no part at all in any incident of alleged gang rape, which also creates a doubt as to the way she has narrated the incident before the trial Court. Her evidence against the 1st appellant also does not suggest any involvement by him to an offence of gang rape or aiding and abetting such an offence.

Besides that, she has stated in her evidence in chief that it was the 3rd accused who gave her soda which made her dizzy after drinking it. However, it has been established before the Court that in her statement to the police, what she has stated had been that it was her husband who gave her soda which was also a matter that raises a credibility issue as to the evidence of the prosecutrix.

I am of the view that the evidence clearly suggestive of an act committed by the 3rd accused making use of the drunkenness of the others who were present at that time.

Explanation 01 in section 364(1) of the Penal Code, which explains the offence of gang rape reads as follows;

> ***Explanation 01*** **– Where the offence of rape is committed by one or more person in a group of persons, each person in each group committing or abetting the commission of such offence is deemed to have committed gang rape.**

The offence of gang rape was introduced to the Penal Code by the Penal Code (Amendment) Act No. 22 of 1995. There was no offence of gang rape until such time.

The object of introducing a specific offence as gang rape, including its explanation and applicability has been explained by the Indian Supreme Court in **Promod Mahto and Others Vs. The State of Bihar (1989) SC 1475** in the following words;

> *"This explanation has been introduced by the legislature with a view of effectively deal with the growing menace of gang rape in such circumstances, it is not necessary the prosecution should not adduced clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims when there are more than one in order to find the accused guilty of gang rape and convict them under section 367 of IPC."*

Shirani Bandaranayake, J. (as she was then) having considered the relevant provisions of the Indian Penal Code and the ingredients that should be proved in relation to the offence of gang rape as stated in our Penal code, while considering the above-mentioned case and several other cases in **Sajeewa *alias* Ukkuwa and Others Vs. The Attorney General (Hokandara Case) 2004 2 SLR 263 at 285** held as follows,

> *"Accordingly, in terms of the Penal Code (Amendment) Act, there is no need for a member of a group of persons to be held liable for an offence of gang rape, to establish that each member of the group acted with a common intention to commit the said offence. What is necessary is to establish that, the accused had been members in the group and had either committed rape or had abetted the said crime. Once it is established that one of the accused had committed the offence of rape and there had been aiding and abetting the all of them would be guilty under section 364(2)(g) in terms of explanation 01 of the Penal Code (Amendment) Act No. 22 of 1995 irrespective of the fact that whether the victim was raped by more than one of them."*

It is my view that since there was no evidence to establish that the 1st appellant had sexual intercourse with the prosecutrix or he abetted the commission of the offence of rape by anyone else in the group, there was no basis to conclude that the prosecution has proved the offence of gang rape against him.

Another matter that needs the attention of this Court is the fact that the 2nd appellant was the legally married husband of the prosecutrix when the alleged incident has occurred.

Section 363 is the relevant section of the Penal Code, which describes the offence of rape. This section states that a man is said to commit "rape" who has sexual intercourse with a woman under circumstances falling under any of the stated descriptions :-

Description (e) of section 363 reads as follows,

> **With or without her consent when she is under 16 years of age unless the woman is his wife who is over 12 years of age and is not judicially separated from the man**.

Section 120 of the Evidence Ordinance is a section that describes competent witnesses before a Court of law.

Section 120(3) reads thus,

> **120. (3) In criminal proceedings against a husband or wife for any bodily injury or violence inflicted on his or her wife or husband such wife or husband shall be a competent and compellable witness.**

It is my view that although section 120(3) of the Evidence Ordinance has stated so, when it comes to a legally married wife giving evidence against her own husband in a charge of rape, she cannot be considered as a competent witness subjected to the provisions of section 363(e) of the Penal Code.

This is the very same question that has been considered by **Sisira De Abrew, J.** in the case of **Saman Kumara Vs. Republic of Sri Lanka (2009) 1 SLR 18** where it was held;

1. *To call the wife of the husband under section 120(3), it should be proceedings instituted against the husband for causing bodily injury or violence to the wife. Section 120(3) envisages a situation where husband or wife assaults his or her spouse – but not when sexual intercourse was performed on his wife by the husband.*
2. *The prosecution in a case of rape cannot call the wife of the accused to give evidence against her husband. The prosecutrix is not a compatible witness against the accused unless and until the marriage is declared void by the District Court.*

In the above judgment, his Lordship considered the judgment in **K.C. Morjan Vs. Attorney General C.A. 3/2002 – Court of Appeal Minute 13.01.2003** where the same question arose for consideration. In the said case, the prosecutrix was the legally married wife of the accused. When the matter was brought to notice of the trial Judge, he overruled the objection raised by the defence.

Per Raja Fernando, J.

> *"In terms of section 19 of the Marriage Registrations Ordinance or section 607 of the Criminal Procedure Code it is only the District Court that has the jurisdiction to either dissolve or annul a marriage. Further section 42 of the Marriage Registrations Ordinance makes the certificate of marriage proof of marriage. We hold the prosecutrix was not a compellable witness against the accused unless and until the marriage is declared void by the District Court."*

In the instant case, since the prosecutrix has admitted that the 2nd appellant was her legally married husband and the marriage was dissolved sometime after this incident, I find that the prosecutrix was not a competent witness against the 2nd appellant when it comes to her evidence against him in relation to the charge relating to gang rape, although she is a competent witness in relation to the 4th charge relating to attempted murder.

In considering the corroborative evidence in relation to the evidence given by the prosecutrix, the learned High Court Judge has considered the evidence of PW-03, the occupant of the house where the prosecutrix was before she returned to her house as corroborative evidence. Although it may corroborate the prosecutrix's version of events before she left the house and returned to her own, it has not provided any corroboration as to what happened thereafter, which should be the material corroboration that should have been considered.

The learned High Court Judge has considered the history given to the JMO by the prosecutrix as a corroboration of her story.

There again, I find that the learned High Court Judge was misdirected as to the history given in the MLR which can only show the consistency of a story narrated by a victim of a crime, which does not provide corroboration per se of the incident. Although the learned High Court Judge has discussed at length the absence of corroboration and the fact that the corroboration is not always necessary in cases of sexual offences, as I have reflected before, it is my considered view that this a case where it is dangerous to act only upon the evidence of the prosecutrix in the absence of corroboration.

The learned High Court Judge has considered several passages of the statements made by the two appellants in their dock statements as corroboration of the evidence of the prosecutrix and to find that against the appellants. Although the appellants have made several admissions in their dock statements to the effect that they went to the house of the 2nd appellant, consumed liquor and slept in the house after they got drunk, that cannot in itself be considered as corroboration of the offence of gang rape under which the appellants have been indicted.

I find that there was no basis for the learned High Court Judge to consider the principles of circumstantial evidence in his judgment as this was not a case relied on circumstantial evidence to prove the charges against the appellants.

The evidence of the prosecutrix where she has stated that the 1st appellant pulled her by her hand and left her near her husband has been compared with the statement from the dock by the 1st appellant where he has stated that, when he was sleeping on the floor, *"a hand fell on me and without knowing whose hand I tossed the hand off"* as corroboration of the evidence of the prosecutrix. There again, I am of the view that the learned High Court Judge has considered the dock statement in the wrong perspective to rely on it to convict the appellants.

It appears that the learned High Court Judge has clearly compared the evidence of the victim against the dock statements of the appellants and the evidence

given under oath by the 3rd accused which was again a clear misdirection as to the way the evidence should be considered in a criminal action.

Although there are several other misdirections in the judgment as pointed out correctly by the learned Counsel for the appellants and conceded by the learned SDSG, I find it unnecessary to consider the said arguments any further, as the judgment cannot be allowed to stand on the above considered legal grounds alone.

I am of the view that the prosecution has failed to prove the offence of gang rape against the two appellants.

As stated by **Sisra De Arbrew, J.** in **C.A. No.100-2002 decided on 20.07.2007**, in this instance too, I am reminded of the sacred and respected view adopted throughout by our Courts, that is to say,

> *"It is better to acquit hundred offenders, rather than to send one innocent man to jail"*

Therefore, I am of the view that the prosecution case was saddled with doubts, which can be termed as reasonable doubts that should have been considered in favour of the appellants.

Accordingly, I set aside the conviction of the appellants by the judgment dated 02-11-2020 and the sentence imposed upon them.

The 1st and 2nd accused-appellants are acquitted of the respective 1st and the 2nd counts preferred against them.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal