

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

*In the matter of an Appeal in terms of section  
331 (1) of the Code of Criminal Procedure Act  
No- 15 of 1979, read with Article 138 of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka.*

**Court of Appeal No:**

Democratic Socialist Republic of Sri Lanka

CA/HCC/0282/17

**COMPLAINANT**

**Vs.**

**High Court of Gampaha**

1. Vithana Weerasinghe Aarachchilage

**Case No:** 259/2006

Lalith Premakumara

2. Hewa Waraketiyage Indika Sampath

Waravita

**ACCUSED**

**AND NOW BETWEEN**

1. Vithana Weerasinghe Aarachchilage

Lalith Premakumara

2. Hewa Waraketiyage Indika Sampath

Waravita

**ACCUSED-APPELLANTS**

**Vs.**

The Attorney General

Attorney General's Department

Colombo 12

**COMPLAINANT-RESPONDENT**

Before : Sampath B. Abayakoon, J.  
: P. Kumararatnam, J.

Counsel : Sumith Senanayake, P.C. with Nisali Balachandra  
instructed by Damitha Wickramaarachchi for the  
Accused Appellants  
: Dilan Ratnayake, S.D.S.G. for the Respondent

Argued on : 11-09-2023

Written Submissions : 23-05-2018 (By the Accused-Appellant)  
: 28-08-2018 (By the Respondent)

Decided on : 16-01-2024

**Sampath B. Abayakoon, J.**

The 1<sup>st</sup> and the 2<sup>nd</sup> accused-appellants (hereinafter referred to as the appellants) were indicted before the High Court of Gampaha for committing the following offences.

1. On or around 02-09-2002, at a place called Paththalagedara within the jurisdiction of the High Court of Gampaha, abducted a female with the intention of forcing her to have sexual intercourse with them, and thereby committed the offence of abduction punishable in terms of section 357 read with section 32 of the Penal Code.

2. At the same time and at the same transaction, the 1<sup>st</sup> accused-appellant having ganged up with the 2<sup>nd</sup> accused-appellant raped the earlier mentioned female, and thereby committed the offence of gang rape, punishable in terms of section 364 (2) of the Penal Code as amended by Penal Code (Amendment) Act No. 22 of 1995.
3. At the same time and at the same transaction, the 2<sup>nd</sup> accused-appellant having ganged up with the 1<sup>st</sup> accused, committed the offence of gang rape on the earlier mentioned female, and thereby committed an offence punishable in terms of 364 (2) of the Penal Code as amended by Penal Code (Amendment) Act No. 22 of 1995.

After trial, the learned High Court Judge of Gampaha found both the appellants guilty as charged of his judgement dated 18-07-2017. The learned High Court Judge, after having considered the relevant facts and circumstances, and several mitigatory circumstances urged on behalf of the appellants, and also the gravity of the crime, has sentenced the appellants in the following manner.

Both the appellants were sentenced to a period of 2 years each rigorous imprisonment on count 1. In addition, both of them were imposed a fine of Rs.1000/- each and in default, one-month simple imprisonment.

The 1<sup>st</sup> appellant who was convicted for the 2<sup>nd</sup> count was sentenced for a period of 18 years rigorous imprisonment. In addition, he was imposed a fine of Rs.1000/- and in default, a period of one-month simple imprisonment.

The 2<sup>nd</sup> appellant who was convicted for the 3<sup>rd</sup> count was also imposed a period of 18 years rigorous imprisonment, and in addition, he was imposed a fine of Rs.1000/- and in default one-month simple imprisonment.

The sentence in relation to the 1<sup>st</sup> and the 2<sup>nd</sup> counts against the 1<sup>st</sup> accused appellant was ordered to run concurrently, while the sentences imposed on the 2<sup>nd</sup> accused-appellant for the 1<sup>st</sup> and the 3<sup>rd</sup> counts were also ordered to run concurrently to each other.

In addition to the above sentences, both the accused-appellants were ordered to pay Rs.250000/- each to the victim, who was PW-01 in the case and in default, they were sentenced to a period of one year each simple imprisonment.

On the basis of being aggrieved by the said conviction and the sentence, the appellants preferred this appeal.

### **Facts in Brief**

PW-01 was the victim of this incident. She had been married, and a mother of three children. On the day relevant to this incident, namely, 02-09-2002, she was working in a factory at Katunayake area, where she had been working for over 18 years by that time. On this day, after completing her day's work, she has left her work place to return home and has got down from the bus around 9.00 p.m. near Veyangoda railway crossing. She had got down at that point because she wanted to change some money from a known shop nearby, as she was in the need of giving change money to her husband and children on the next day for them to travel to school and work.

After attending to her need, she has returned near the railway crossing expecting to catch a bus to reach her home as it was easy for her to get into a bus from that point rather than going to the Veyangoda bus stand. While she was waiting for a bus, a known person who lived near their house whom she referred to as Nimal Weerakkody malli has come in his motorcycle and had offered to give her a lift. Being a person well known to her, she has got on to his motorbike and the said Nimal Weerakkody has taken a shortcut where they can reach their houses within 10-12 minutes. The shortcut was across a paddy field. While they were traveling, the victim's purse which she was carrying on her lap had fallen off the motorbike, and when she informed Nimal Weerakkody about that, he has stopped the bike few feet away from the place where the purse fell off. The victim has gone to fetch the bag, and at the same time, Nimal Weerakkody has turned the bike so that she can find her belongings with the aid of its light.

After collecting her goods, she has got onto the bike again, and when they were in the process of turning the bike towards the direction they intended to go, a three-wheeler has come and blocked the path of the bike.

The three-wheeler has come from the direction where the victim intended to go, and the victim has identified the three-wheeler as well as the driver as he was well known to her. There had been another person seated on the back whom she did not know. She has identified the person who drove the three-wheeler as Lalith, the 1<sup>st</sup> accused-appellant.

She has identified the 2<sup>nd</sup> accused-appellant as the person who was seated on the rear of the three-wheeler. She has identified the said person at an identification parade held at the Attanagalla Magistrate's Court.

When the bike was blocked, the 2<sup>nd</sup> appellant had come near the motorbike and the 1<sup>st</sup> appellant has started using filthy language towards the victim. She has observed both of them drunk, and as they were forcing her to get down from the bike, through fear she has got down. Fearing something worse, she has run towards a house she saw nearby. While running, he has seen both the appellants grappling with Nimal Weerakkody.

After coming near the house, she has pleaded with the inmates to open the gate stating that she is being harassed. However, no one has come to her aid, but she has seen a female looking out from a window of the house.

In the meantime, the two appellants have come near the house in their three-wheeler and has informed the female who was inside the house and had come out by that time, to not get involved. Thereafter, both the accused-appellants had forced the victim into the three-wheeler, and the 1<sup>st</sup> accused-appellant had gotten into the back seat along with her while the 2<sup>nd</sup> accused-appellant had started driving the three-wheeler. Although she has made several attempts to escape the appellants, she has failed.

They have taken the three-wheeler to an abandoned land where there were several partly built houses. Both the appellants have forced her into one of the partly built houses despite her pleas to release her. Due to the fear of being killed, she had surrendered to them and the appellants had taken her inside the house, and the 1<sup>st</sup> accused-appellant has told the 2<sup>nd</sup> accused-appellant to go back to the three-wheeler.

Thereafter, the 1<sup>st</sup> accused-appellant has forced the victim to lie down and has forcibly inserted his penis into the anus of the victim. He has then turned her over and inserted his penis into her vagina and had sexual intercourse with her.

After the 1<sup>st</sup> accused-appellant, the 2<sup>nd</sup> accused-appellant has come and had first attempted to force her to have oral sex with him which she has resisted. Thereafter, the 2<sup>nd</sup> accused-appellant also had inserted his penis into the victim's vagina and had engaged in sexual intercourse with her.

After achieving what they wanted, they have gone back to the three-wheeler leaving her inside the house. The victim has observed that both of them consuming something while inside the three-wheeler. The victim has used this window of opportunity to escape, and has crawled towards a thicket behind the house. She has seen a lavatory nearby and has hidden inside. She has felt that the two appellants were looking for her and both of them fighting with each other in the process. Having failed to find her, they have left.

After about 10 minutes, the victim and come out of the latrine and had seen a light of a house some distance away. She has managed to reach that house and had identified the house as the house belonging to Doctor Sigera, who was their family physician. The place where she was raped by the two appellants was the land behind Doctor Sigera's house. After reaching the house, she has informed what happened to Doctor Sigera and had given a call to her husband using Doctor Sigera's phone.

Thereafter, she has gone to the Veyangoda police station with her husband and had lodged a complaint about what happened to her, and the police had instructed her to get herself admitted to the hospital. She has got admitted to Gampaha hospital where she has been examined by a doctor and necessary treatment had been provided to her.

Under cross-examination, she has explained the reasons as to why Nimal Weerakkody went on the shortcut route to reach their houses saying that it was a shortcut and because she had no helmet, Nimal Weerakkody decided to take the shortcut route.

Under repeated cross-examination, she has explained in further detail what happened at the time of the incident. It had been suggested to her that the victim got into the three-wheeler on her own free will, which the witness has strenuously denied, explaining the reasons as to why she was forced to get into the three-wheeler.

It has been revealed during the evidence that Doctor Sigera mentioned by the victim was dead at the time this case was taken up for trial. She has also stated that since she is giving evidence 14 years after the incident, she cannot remember some of the intricate details of the incident.

The position taken up by the 1<sup>st</sup> accused-appellant had been that this incident happened with the consent of the victim, which the victim has denied. The 2<sup>nd</sup> accused-appellant has taken up the position that the victim got into the three-wheeler on her own free will which the victim has denied. In other words, although the 2<sup>nd</sup> accused-appellant said nothing about the consent, he too has not denied the incident.

Nimal Weerakkody mentioned by the victim in her evidence has given evidence at this trial as PW-02. During the time relevant to this incident, he had been working at the Ports Authority in Colombo, and was travelling on his motorbike

to reach his home when he met PW-01 near the Veyangoda railway crossing. As she was well known to him and was a neighbour, he had offered to give a lift to her for which she has agreed. According to the witness, he was also in need of obtaining a loan of Rs.1000/-, and when he asked for the loan, the victim has stated that once she reaches home, she will ask her husband to give it to him.

PW-02 has corroborated the evidence of the victim as to the reasons why they had to stop the motorbike.

When they were about to leave, the three-wheeler driven by the 1<sup>st</sup> accused-appellant had blocked their path. The 1<sup>st</sup> accused-appellant was well known to PW-02 as well. He has come and had attempted to grab the motorbike key from PW-02, and PW-02 has seen the victim running away towards a house nearby. The two appellants who came in the three-wheeler has pursued the victim in the three-wheeler and using that opportunity, PW-02 has moved away from the place of the incident.

He has stated that due to fear, he decided to leave the place without looking as to what happened to the victim. He has not gone to the police station, but has gone home. After waiting for some time, he had phoned the house of the victim and asked whether she returned home, for which he had been informed in the negative. However, during the night, the husband of the victim had called him and informed the incident faced by the victim.

Other than questioning about the incident and of some omissions in relation to the statement PW-02 made to police, and suggesting that he was lying, the two appellants had not taken any line of defence to challenge the evidence of PW-02.

PW-03 had been the inmate of the house mentioned by PW-01 where she has attempted to enter in order to escape the appellants. She has corroborated that in the night on the day of the incident, she heard a female screaming in front of the gate of her house and had confirmed that it was the PW-01.



The victim has pleaded to let her into the house stating that “these people are harassing me.” She has observed the 1<sup>st</sup> accused-appellant who was well known to her near the female and he had informed that “this is my work, do not put your hand.”

She has also observed the 2<sup>nd</sup> accused-appellant whom she knew previously as Waravita sitting inside the three-wheeler. Because of the threat made to her, she has not gone to help the victim and she had seen the two accused-appellants forcing the victim into the three-wheeler, and had seen the three-wheeler travelling towards Veyangoda town. She has given a statement as to what she saw to the police subsequently.

It needs to be noted that both the accused-appellants had not cross-examined PW-03 challenging her evidence.

The Judicial Medical Officer (JMO) who examined the victim on the following day morning, namely on 03-09-2002, has observed two injuries on her body. First injury had been above her right breast, which the JMO had opined as a bite mark. The 2<sup>nd</sup> injury had been described as an abrasion observed on the middle part of her inner left thigh. He has also observed fresh tear marks in her vagina as well as in her anus. He has opined that the injuries are compatible with the history given by the patient.

According to the evidence of PW-05 who was the investigating police officer, the complaint with regard to the incident had been received at 23 hours on 02-09-2002, which means a prompt complaint has been lodged. The investigating officer has conducted an inspection as to the place of the incident and the place where the abduction took place, and has confirmed the narration given by the victim in that regard. The 1<sup>st</sup> accused-appellant had been arrested in the afternoon of 03-09-2002, while the 2<sup>nd</sup> accused-appellant has surrendered to the police subsequently. The investigating officer has recorded the statements of the witnesses as well.

At the conclusion of the prosecution case, the learned High Court Judge has decided to call for a defence from the appellants where both of them had made dock statements.

1<sup>st</sup> accused-appellant has stated that he came in his three-wheeler through the shortcut which was across the paddy field. His version had been that, he saw a motorbike parked in the threshing floor of the paddy field and a man and a female in a compromised position near the motorcycle. According to him, when he went near the motorcycle to inquire, the male person has adjusted his trouser zip and moved away, and when he inquired from the female whether she is facing any trouble, she has informed him that her Identity Card fell off and was looking for it. He has also claimed that the female went near a house thereafter, which was about 50 meters away. He too had gone near the house and invited the female to get into his three-wheeler, but she has refused. However, she has later got into the three-wheeler and it was the 2<sup>nd</sup> accused-appellant who was with him had driven the three-wheeler thereafter.

Although he has offered to take her home, she had offered to have sex with them and has willingly come with them to the abandoned partly built house. He has claimed that he never had sexual intercourse with her, but only engaged in a sexual activity other than having sexual intercourse. He has claimed that after the said sexual encounter, the female left on her own.

The 2<sup>nd</sup> accused-appellant's version of events had been the same, and he has stated that after going inside the partly built house, he had consensual oral sex with her, and thereafter, the female wanted them to leave.

### **The Grounds of Appeal**

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

1. The learned High Court Judge misdirected himself of the evaluation of the defence version.
2. The learned High Court Judge failed to properly evaluate the evidence of prosecution witnesses.
3. The learned High Court Judge failed to appreciate that there was no corroborative evidence.
4. No substantial evidence to support the alleged abduction and that it will affect the credibility of the prosecution case.

As all four grounds of appeal are interrelated, I will now proceed to consider all the said grounds together.

### **Consideration of the Grounds of Appeal**

Although the learned President's Counsel who represented the appellants claimed that the learned High Court Judge has failed to properly analyze the evidence of the prosecution and was misdirected himself in his evaluation of the defence, I find no reason whatsoever to agree with such a contention.

The judgement amply demonstrates that the learned High Court Judge, after having considered the charges against the appellants, has summarized the evidence led on behalf of the prosecution and the defence taken up by the two appellants.

Thereafter, the learned High Court Judge has proceeded to analyze the evidence *inter se* and *per se* and had looked whether the version of events as narrated by the prosecutrix was cogent and credible, and whether the defence taken up by the appellants had created any doubt as to her evidence. It had been determined that the prosecutrix's evidence can be believed and acted upon. It had also been determined that the prosecutrix's evidence had been corroborated by the evidence of PW-03 who was an independent witness. The medical evidence had been well considered in relation to the other evidence. It was only after considering the evidence in its totality, the learned High Court Judge has determined that the defence evidence or the stand taken up by the appellants

cannot be believed and there was no reason to accept that the incident occurred with the consent of the prosecutrix.

The learned High Court Judge has convicted the appellants for the offence of abduction and also for gang rape accordingly.

In his submissions before this Court, the learned President's Counsel made an attempt to show that since the evidence of the prosecutrix had been to the effect that she was put on the floor of a partly built house and raped by two persons against her will, there should have been much more injuries on the body of the prosecutrix, if it happened in the way narrated by her.

I find no basis whatsoever to see any merit in the said argument. The prosecutrix has given clear evidence that after her abduction and taken to the abandoned house, through fear for life, she did not resist her assailants.

There is no basis to assume that there should be more injuries on the body, if the prosecutrix was laid on a rough surface.

However, the medical evidence clearly establishes the fact that there had been a bite mark above her right breast which cannot be attributed to anyone else other than the appellants. The prosecutrix has given clear evidence that when the 1<sup>st</sup> appellant removed her undergarment, her thigh got injured, which was reflective in the medical evidence. The doctor has observed fresh tears in her anus as well as the vagina. The prosecutrix being a sexually active married woman who has given birth to three children, cannot receive such injuries if she engaged in sexual activities with consent as claimed by the appellants.

In the case of **D. Tikiribanda Vs. The Attorney General Bar Association Law Reports 2010 (B.L.R. 95)** it was observed,

*“The law as it stands today in this country certainly does not accept the innocent victims of a sexual crime to struggle with the assailant valiantly that would not result in the victim sustaining injuries. Under the amended Penal Code Act No. 22 of 1995, the legislature has categorically expressed*

*this view by way of explanation (II) of section 363 of the Penal Code Act No. 22 of 1995.”*

The relevant explanation II of section 363 of the Penal Code reads as follows.

**II. Evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.**

However, in the instant action there had been injuries to the body of the victim, as well as to her vagina and anus, which are perfectly consistent with the version of events by the prosecutrix.

The learned President’s Counsel took up the position that the learned High Court Judge has failed to consider the defence position that the incident happened with consent in its correct perspective.

I find no reason to agree with such a contention. It is clear from the stand taken up by the appellants that they had not taken a consistent stand as their defence. When the prosecutrix gave evidence, it had been suggested to her that the incident occurred with her consent. In other words, the appellants have admitted having sexual intercourse with her, but has claimed that it happened with the consent of the prosecutrix.

However, when they were called upon for a defence, both of them in their dock statements had not taken up the position that they had sexual intercourse with her. Their position had been that they engaged in sexual activities with her that were not amounting to having sexual intercourse.

In fact, in their dock statements, they have made several admissions as to the evidence of the prosecutrix as well as other witnesses. They have admitted that when they encountered the victim she was with the PW-02, and the fact that she informed them that she was looking for her identity card. The fact that the victim went near the house of the PW-03 had also been admitted.

When the prosecutrix was giving evidence and subjected to cross-examination, the stand taken by the appellants in their dock statements had never been put to the prosecutrix or PW-02 and 03. The only suggestion made to the prosecutrix had been that the incident happened with her consent. When PW-02 Nimal Weerakkody was giving evidence, the stand taken by the appellants in their dock statements that he was in a compromising position with the prosecutrix had not been suggested to him. The evidence of PW-03 who was the inmate of the house where the prosecutrix had gone, had never been challenged during the trial.

This goes on to establish that the stand taken up by the appellants in their dock statements had been a concocted story created out of the prosecution witness evidence without any truth behind it.

The learned High Court Judge has well considered the defence as I have determined previously which provides no basis for the contention that the learned High Court Judge has failed to consider or evaluate the defence case.

The victim had been a 63-year-old female when she gave evidence before the trial Court some 14 years after the incident. When she was confronted with some omissions and discrepancies as to the original statement she made to the police and at the non-summary inquiry, she has given clear evidence stating that she cannot remember things in exact terms due to this time factor.

No doubt that the victim had faced a horrifying experience at that night, where she has feared for her life, other than being repeatedly raped. Given her family background and the fact that she was a mother of three children, there need not be any argument that the victim would attempt to forget this experience and move on with her life.

The earlier considered **D. Tikiribanda Vs. The Attorney General (Supra)** was a case where the inherent weaknesses of evidence of small children was considered. I am of the view that the observation made in that case is relevant

to the appeal under consideration as well. It was held that mostly the victims of sexual harassment prefer not to talk about the harrowing experience and would like to forget about the incident as soon as possible (withdrawal symptom). The offenders should not be allowed to capitalize or take mean advantage of these natural inherent weaknesses.

**Per Ranjith Silva, J. ;**

*“In the Indian as well as the Sri Lankan settings, it can be safely said that rarely will a girl or a woman make false allegations of sexual assault or will a mother instigate, induce or compel her small daughter to make such allegations for fear of the lasting consequences. One cannot expect her to be so silly, not to appreciate the stigma attached and that she and the rest of her family would be virtually ostracized for the rest of her life.”*

Another matter taken up by the learned President’s Counsel was that there was no corroborative evidence as to the incident of rape and no substantial evidence to support the alleged abduction.

This is an incident that has happened late into the night and at an isolated, abandoned, partly built house. Any perpetrator of a crime of this nature will make sure that his actions will be seen by no one knowing very well the consequences of it, unless it is seen by chance by someone.

In the case of **Sunil And Another Vs. The Attorney General (1986) 1 SLR 230**, it was held thus,

*“It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence, but if evidence is convincing such evidence could be acted on even in the absence of corroboration ...*

*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, such testimony should be rejected and 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.”*

At this stage, I find it appropriate to refer to the Indian case of **Bhoginbhai Hirjibhai Vs. State of Gujarat (AIR 1983-SC 753 at pp 756-758)** very often cited in our Courts. It was held:

- 1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*
- 2) Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*
- 3) Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*
- 4) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometime so operates on account of the fear of looking foolish or being disbelieved though the witnesses is giving truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment.*

As I considered above, the evidence of the prosecutrix is highly credible and trustworthy. I find no reason not to believe the version of events as narrated by the prosecutrix in this case.



Although there are no eye witnesses to the actual incident of rape, the prosecution has led ample evidence to establish by way of circumstantial evidence to show the credibility and trustworthiness of the prosecutrix's evidence.

The unchallenged evidence of PW-03 clearly establishes the fact that the prosecutrix was forced into the three-wheeler by the two appellants, despite her pleas to the PW-03 to let her into her house, where she has informed her that the two persons are attempting to harass her.

The evidence of PW-02 clearly establishes that the two appellants came and blocked their path and attempted to harass them, and as a result, the prosecutrix ran towards the house of PW-03.

The police officer who investigated the matter has observed that all the places indicated by the prosecutrix to police are in existence. The prosecutrix has straightaway gone to the police after the incident with her husband, and has made a prompt complaint. Her version of events to the JMO who examined her on the following day had been consistent with her evidence and the injuries sustained by her.

I am of the view that all these pieces of evidence have provided ample circumstantial evidence to support the evidence of the prosecution.

There was no basis to consider that the defence taken up by the appellants had created any doubt as to the prosecution case. It is my considered view that the evidence, when taken as a whole, has proved the case beyond reasonable doubt against the two appellants.

I am of the view that the sentence imposed has been determined after well considering the gravity of the crime and the mitigatory circumstances pleaded on behalf of the appellants.

For the reasons considered as above, I find no basis to interfere with the conviction and the sentence imposed upon the appellants by the learned High Court Judge of Gampaha.

Accordingly, the appeal is dismissed as it is devoid of any merit. The conviction and the sentence affirmed.

However, having considered the fact that the appellants had been in incarceration from the date of the conviction and the sentence, it is ordered that the sentence shall deemed to have taken effect from the original date of the sentence, namely, from 18-07-2017.

Judge of the Court of Appeal

**P Kumararatnam, J.**

I agree.

Judge of the Court of Appeal