

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

*In the matter of an Appeal under and in terms of Article 138(1) of The Constitution read together with Section 11(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and with Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.*

**Court of Appeal No:**

CA/HCC/03/2022

Democratic Socialist Republic of Sri Lanka.

**COMPLAINANT**

**Vs.**

**High Court of Negombo**

**Case No:** HC/138/14

1. Ponweera Arachchige Don Susil

Nishantha

2. Randeni Arachchige Don Sameera

Madhusanka

3. Sanmugaraja Wijendran Shanika

Dilshan

**ACCUSED**

**AND NOW BETWEEN**

Randeni Arachchige Don Sameera

Madhusanka

**2<sup>nd</sup> ACCUSED-APPELLANT**

**Vs.**

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**COMPLAINANT-RESPONDENT**

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Neranjan Jayasinghe for the Accused-Appellant
	: Dishna Warnakula, D.S.G. for the Respondent
Argued on	: 10-05-2024
Written Submissions	: 09-05-2022 (By the Accused-Appellant)
	: 10-01-2023 (By the Complainant-Respondent)
Decided on	: 17-07-2024

**Sampath B. Abayakoon, J.**

Three accused persons were indicted before the High Court of Negombo for committing the following offences.

1. That they abducted the female mentioned in the charge against her will with the intention of raping her, at Uswatakeiyawa within the jurisdiction of the High Court of Negombo on or about 19-12-2005, and thereby committed the offence of abduction, punishable in terms of section 357 of the Penal Code.
2. At the same time and at the same transaction, they committed the offence of robbery on the said female, and thereby committed an offence punishable in terms of section 383 of the Penal Code.
3. At the same time and at the same transaction, the 3<sup>rd</sup> accused committed rape on the above-mentioned female being a group that comprised of the 1<sup>st</sup> and the 2<sup>nd</sup> accused, and thereby committed the offence of gang rape punishable in terms of section 364(2)(g) of the Penal Code.
4. At the same time and at the same transaction, the 1<sup>st</sup> accused aided and abetted the 2<sup>nd</sup> and the 3<sup>rd</sup> accused to commit the offence of gang rape, and thereby committed an offence punishable in terms of section 364(2) of the Penal Code.
5. At the same time and at the same transaction, the 2<sup>nd</sup> accused aided and abetted the 1<sup>st</sup> and the 3<sup>rd</sup> accused to commit the offence of gang rape, and thereby committed an offence punishable in terms of section 364(2) of the Penal Code.

After trial without a jury, the learned High Court Judge of Negombo acquitted the 1<sup>st</sup> accused indicted for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> charges preferred against him.

The 2<sup>nd</sup> and the 3<sup>rd</sup> accused indicted were acquitted of the 1<sup>st</sup> charge preferred against them.

However, both of them were convicted of the 2<sup>nd</sup> charge in the indictment, namely the charge of robbery. The 2<sup>nd</sup> accused was also convicted of the 5<sup>th</sup> charge preferred against him, namely the charge of aiding and abetting to commit gang rape.

The 3<sup>rd</sup> accused was also convicted for the 3<sup>rd</sup> count preferred against him, namely the charge of gang rape. Afterward, they were sentenced accordingly.

Being aggrieved of the conviction and the sentence, the 2<sup>nd</sup> accused-appellant preferred this appeal.

The 2<sup>nd</sup> accused-appellant (hereinafter referred to as the appellant) has been sentenced as follows.

1. On the 2<sup>nd</sup> count, for a rigorous imprisonment period of 8 years, and ordered to pay a fine of Rs. 10,000/-, with a default sentence of 6 months simple imprisonment.
2. For the 5<sup>th</sup> count, he was sentenced for a period of 10 years rigorous imprisonment and ordered to pay Rs. 10,000/- as a fine, with a default sentence of 6 months simple imprisonment.

The two sentences have been ordered to be served consecutive to each other.

### **Facts in Brief**

The prosecutrix (PW-01) was a mother of a 3 months old child when this incident happened. Although she could not remember the date of the offence, she has stated in her evidence that it happened in December 2005. On that day, around 10.30 in the night, she has been with her husband and the child in their house, which was a small house, built using wooden planks.

She has heard somebody calling her husband and when she opened the window to inquire, she has seen three persons standing near the entrance gate to their house. She has clearly identified the 1<sup>st</sup> accused whom she had known for some time as 'Chootiya'. Her husband, after having a chat with them had come and

informed her that they wanted Rs. 3000/- from him, and if not, to give some jewellery. It was the 1<sup>st</sup> accused who had made this demand. Since her husband could not comply, the 1<sup>st</sup> accused has pushed and forced her husband to go with him to a place away from their house with him. She has remained in the house. She has stated in her evidence that there was a light inside their house and also a street light near the entrance to their house.

After a little while, she has heard somebody entering the house and has seen two boys coming in. She has stated they were the once whom she saw in the company of the 1<sup>st</sup> accused. They have forcibly taken the jewellery she was wearing by pointing a knife at her. According to what she has stated in her evidence in chief, the appellant, namely the 2<sup>nd</sup> accused in the indictment, has pushed her onto the bed, while the other person kept watch near the door of their house.

However, later in her evidence, she has stated that it was the 3<sup>rd</sup> accused who pushed her onto the bed and thereafter committed rape on her. After the incident, she has escaped from the grip of the 3<sup>rd</sup> accused and had run towards her neighbour's house and informed the neighbour of what happened. When the neighbours came to inquire, the accused had already escaped.

It has been her evidence that she identified all three accused at the identification parade held in that regard.

It reveals from the cross-examination of the witness that, at the identification parade, she has failed to identify the appellant after going through the parade twice. However, on the 3<sup>rd</sup> occasion, she has identified the appellant, but conversely has stated that she cannot remember the face.

Another significant detail revealed during the cross-examination had been her evidence, recorded on page 138 of the appeal brief. She has stated that when those who came called for her husband, she saw them about 35 feet away. She has stated that, initially, she saw the 1<sup>st</sup> accused whom she knew as Chootiya, but she could not identify the other two because of the darkness. She has also

stated that when they came inside the house, the light inside the room was switched off by them (at page 149 of the appeal brief).

When PW-01 was cross-examined, several contradictions as to her original statement to police has been marked by the defence.

The husband of the prosecutrix has given evidence as PW-02. He has confirmed that someone came near his house and called him out on the night of the incident. He has also confirmed that from his house to the gate, it was about 30 feet and the persons who came were near the gate of the house. According to him, he has identified the 1<sup>st</sup> accused whom he knew as one of the persons who came and called him. The other two were unknown to him.

When questioned about the light condition, he has stated that there was a light, but the 1<sup>st</sup> accused wanted it to be switched off, and on his instructions, his wife switched off the light.

It is clear from the evidence that what the witness has stated was about the light that was available in their house, since it was the prosecutrix who has switched it off. He has not spoken anything about a streetlight or a light near the gate, situated about 30 feet away from their house.

Since he could not handover the money as demanded, the 1<sup>st</sup> accused has forced him to come along with him to the main road and had attempted to extort money from him, which he could not provide. When he returned home, his wife has informed him that the jewellery she was wearing was robbed and she was also raped.

He has stated at the trial that it was the 2<sup>nd</sup> accused-appellant and the 3<sup>rd</sup> accused who did that.

He has testified that at the identification parade held in that regard, he identified the 1<sup>st</sup> accused and the 3<sup>rd</sup> accused indicted, but not the appellant.

The Judicial Medical Officer (JMO) who had examined the prosecutrix after the incident and the police officers who conducted the investigation have given evidence at the trial.

When a defence was called by the learned trial Judge at the conclusion of the prosecution case, the appellant has made a dock statement stating that he was 14 years at that time and was arrested because he was a friend, which could have been a reference to the 1<sup>st</sup> accused.

### **The Grounds of Appeal**

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

1. The evidence in respect of the 2<sup>nd</sup> accused-appellant was doubtful as to the identification.
2. The learned High Court Judge has not given any reason to reject the dock statement of the appellant.
3. The sentence imposed was excessive.

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

The main contention of the learned Counsel for the appellant in this regard was that the identification of the appellant, allegedly by the prosecutrix at the time of committing this offence was highly doubtful.

He brought to the attention of the Court the discrepancies as to the light conditions that were available for such an identification. He also pointed out to the identification parade held in that regard and was of the view that even after the 3<sup>rd</sup> time, there had been no positive identification of the 2<sup>nd</sup> appellant as an accessory to the crime. He contended that based on the identity issue alone, the learned High Court Judge had no basis to conclude that the charges against the

appellant have been established beyond reasonable doubt, and urged that the appellant should be acquitted of the charges upon which he was found guilty.

The learned Deputy Solicitor General (DSG) who represented the Hon. Attorney General conceded during the hearing of this appeal that the question of identity of the appellant by the prosecutrix at the time of the relevant incident has not been properly considered by the learned High Court Judge in his judgment. She also agreed that due to the discrepancies in the evidence in that regard, it could not be concluded beyond reasonable doubt whether the 2<sup>nd</sup> appellant has been identified positively by the prosecutrix.

This Court would like to express appreciation to the learned DSG for assisting the Court in order to dispense justice as a responsible officer of the Court in this regard.

Having considered the facts and the circumstances of this matter and the evidence made available against the appellant before the High Court, I am of the view that this is a matter where Turnbull Guidelines set forth in the case of **Regina Vs. Turnbull (1977) QB 224** would become relevant. It was held that where a case against an accused depends wholly on the correctness of the identity of that person, the Judge should warn the jury of the special need for caution before relying on the correctness of the identification by the witness.

The said Turnbull guidelines require a trial Judge to be mindful that;

- *Caution is required to avoid the risk of injustice.*
- *A witness who is honest may be wrong even if they are convinced, they are right.*
- *A witness who is convincing may still be wrong.*
- *More than one witness may be wrong.*
- *A witness who recognizes the defendant even when the witness knows the defendant well may be wrong.*



Some of the circumstances a Judge should direct the jury to examine in order to find out whether a correct identification has been made include;

- *The length of time the accused was observed by the witnesses.*
- *The distance the witness was from the accused.*
- *The state of the light.*
- *The length of time elapsed between the original observation and the subsequent identification.*

There can be no doubt that the prosecutrix was raped, and her belongings were robbed during this incident. However, what matters is whether she was able to positively identify the 2<sup>nd</sup> accused-appellant as a member of the gang who committed rape on her and robbed her jewellery.

Although she has given evidence in Court where she has stated that there was light in her house as well as on the road so that she was able to identify the appellant, the evidence, taken as a whole establishes otherwise. Under cross-examination, she has clearly stated that when they looked out from the window of the house, she was only able to identify the 1<sup>st</sup> accused, and could not identify the other two because it was dark. Her evidence is to the effect that those who came inside the house ordered the lights to be switched off, which shows that she has not been able to identify the person who stood guard near the door of the house while the other person committed rape on her. Even at the identification parade held in this regard, she has failed to identify the appellant after the 1<sup>st</sup> two attempts. She has identified him at the 3<sup>rd</sup> attempt, but has stated that she could not remember his face, which does not give any indication as to whether her identification was positive even at the identification parade.

I am of the view that if at all, the husband of the prosecutrix would have been the person who had the best ability to identify the three persons who came to their house on that day. According to his evidence, he is the person who went outside of the house and spoke to the 1<sup>st</sup> accused. But he has never stated in his

evidence that he identified the other two persons who accompanied the 1<sup>st</sup> accused.

His evidence creates a grave doubt as to the source of light the prosecutrix says that were available at the time the three persons came and called her husband. She has stated that there was a streetlight near the gate of the house. However, her husband has failed to speak about such a light being available at that time. According to his evidence, the 1<sup>st</sup> accused had wanted the light emanating from the house to be switched off and the prosecutrix had done so when her husband wanted her to do it. That creates a reasonable doubt as to whether the prosecutrix identified the appellant as she claimed, or whether it was an afterthought after the appellant's arrest.

Another matter that should have been considered in favour of the appellant was the fact where the lights of the house was turned off by the prosecutrix when her husband told her to do so. According to her evidence, after the initial demand of money, her husband had been led away by the 1<sup>st</sup> accused. It is not clear whether she turned on the lights of her house later. However, her evidence which says that she only realized someone was coming inside the house because there was floodwater inside their house and she heard someone walking on the floodwater creates a doubt again, as to whether the house lights were switched on at that time.

I find that in the judgment, the learned High Court Judge has failed to consider any of these matters in relation to the fact whether the prosecutrix has made a positive identification of the appellant. Although a person giving evidence some 10 years after the incident may forget some details of the incident, this is not a situation where such a consideration can be held in favour of the prosecutrix, as the identification of the appellant is not a matter that can be disregarded in such a context.

For the reasons considered above, I am of the view that this was a situation where it was not safe to convict the 2<sup>nd</sup> accused-appellant for the counts preferred against him.

Accordingly, I set aside the conviction of the 2<sup>nd</sup> accused-appellant and acquit him of the 2<sup>nd</sup> and the 5<sup>th</sup> count of the indictment.

The appeal allowed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal