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

06 Nanayakkara Egodage Sunil,
Kiripitiya,
Urubokka.

12. Herath Wijekoon Mudiyanselage
Abeysinghe,
Molokgamuwa,
Moragala,
Kirilipana.

Accused-Appellants

Vs.

C.A. 201-202/2005
High Court of Matara Case No. 70/2001.

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

Respondent

Before : Ranjith Silva,J. &
D.S.C. Lecamwasam,J.

Counsel : Dr. Ranjit Fernando for the accused-appellants

Kapila Waidyarathne,DSG for the A.G.

Argued &
Decided on : 27.10.2011

Ranjith Silva,J.

Both accused-appellants are present in court on bail.

06th and 12th accused appellants along with others were charged on several counts based on unlawful assembling under Sections 356 and 355 of the Penal Code. After trial the 06th and the 12th accused appellants were convicted under Section 355 of the Penal Code. Section 355 of the Penal Code is as follows: "**Whoever kidnaps or abducts any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered, shall be punished with rigorous imprisonment for a term which may extend to twenty years, and shall also be liable to fine".**

The learned counsel for the accused-appellants making lengthy arguments for the 2nd date contended that the accused-appellants (appellants) could not have been charged under Section 355 of the Penal Code as the victim was not a free person at the time he was abducted. According to this argument what the counsel intended was to show that a person who is already in illegal custody could not have been abducted. This argument is untenable. The section does not talk about the freedom and it does not talk about the legality of his custody at the time of abduction. Therefore, we do not agree with this argument and we reject this argument which reads into the section words which are not there and which were never intended to be there. According to this section the abduction could be either to murder the person abducted or the person abducted to be disposed of as to put himself in danger. In this case, according to the evidence, the abducted victim had been in illegal custody at the police station during the insurgency. He had been there along with his brother who was also taken into illegal custody. At the time these two people were abducted, they had been in illegal custody. Abduction had taken place at about 10.00 O' Clock in the night and the reason or the ruse employed by the two appellants were to record a statement from the victim. From the date of his abduction and from the time of his

abduction he was never seen up to date. By the time the victim was abducted he had been there in the police station for nearly four months with his brother who testified against the appellants. According to the evidence they had been in talking terms with the appellants and more often than not they had seen each other and talked to each other during that period. With regard to the identity of the appellants there was never a question, never a challenge and therefore it is too late in the day now to dispute the identity which is the second ground taken up by the counsel for the accused-appellants. The learned High Court Judge has dealt with the evidence and had come to the conclusion that certain other accused had not been identified beyond reasonable doubt and thus several accused were acquitted and discharged but the learned High Court Judge has after an evaluation of the evidence decided that as far as these two accused appellants are concerned there was no question of their identity and that the identity had been proved beyond reasonable doubt. In the situation that prevailed at that time these people were taken into custody haphazardly and without any basis just on suspicion rounded up and taken to the police station sometimes on mere suspicion and kept there at the police station. Some were summarily executed and their bodies were never found. There were mass graves later excavated and the skeletons were found. It is in an era of lawlessness that

these things have happened. The two appellants who were police constables knew the situation that prevailed, yet took the victim out of the cell in the evening at 10.00 on the guise of recording statements which were never done and the victim was never returned to the cell. The learned High Court Judge having considered the back ground and the evidence thought it to fit to apply the Ellenborough principles. I think in this case the learned High Court Judge was quite justified in applying the Ellenborough principles because if there were any explanations that could have come only from the mouths of the accused appellants and it was only the appellants who knew what they did with regard to the victim. Therefore, they were in a position to explain. That is one of the elements of Ellenborough principles and what have they done, in their dock statements they have barely denied and they have not explained their conduct or anything that happened after they took the victim away from the cell. They have kept silent and adverse inferences will have to be drawn because if they had said something that would have been adverse to them. That is why they refrained from explaining their conduct. I cannot see any reason why we should interfere with the findings, conclusions and the judgment of the learned High Court Judge.

For the reasons stated I dismiss this appeal, affirm the conviction and the sentences. With regard to the sentence, as so many years have now passed I refrain from increasing the sentence as a sympathetic gesture not because they deserve.

The Registrar is directed to issue a committal to take the accused into custody till he is produced in the relevant High Court. The sentence shall take effect from today namely, 27/10.2011.

JUDGE OF THE COURT OF APPEAL

D.S.C. Lecamwasam,J.

I agrr

JUDGE OF THE COURT OF APPEAL

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