

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

In the matter of an appeal under sec.
331 of the Code of Criminal Procedure
Act No 15 of 1979 as amended.

C.A. 18/2009

H.C. Anuradhapura 148/2002

1 Marasinghe Arachchilage Karunaratne

2 Wanasinghe Arachchilage Ranjith

Wickremaratne

Accused-Appellants

Vs.

The Attorney General

Attorney General's Department,

Colombo 12.

Before : Rohini Marasinghe, J &

H.N.J.Perera, J.

Counsel : Indika Mallawarachchi for the Appellants

Dilan Ratnayake SSC for Attorney General

Argued on : 04.10.2012

Decided on: 08.02.2013

H N.J.Perera J.

The 1st and the 2nd accused appellants were indicted under section 364 (2) (g) of the Penal Code as amended by act no 22 of 1995 for committing Gang rape on Herath Bandage Kalyani Herath on or about the 13th of August 1996.

The accused appellants pleaded not guilty to the indictment and thereafter, after trial the Learned High Court Judge convicted and sentenced each accused appellant for 20 years R.I. and a fine of Rs 10,000/=. Each accused was also ordered to pay compensation in the sum of Rs 200,000/= to the prosecutrix in default of which a sentence of 4 years R.I. was imposed on them.

Being aggrieved by the said conviction and sentence the appellants have preferred this appeal to this court challenging the said conviction and sentence imposed on the appellants by the Learned Trial Judge.

At the stage of argument the counsel for the accused relied on two main grounds of appeal which are as follows;

- (1) Conviction is unsafe in view of the fact that the evidence relating to the identification of the accused appellants is wholly unsatisfactory and unreliable
- (2) The Learned Trial Judge failed to evaluate the evidence of the prosecution witnesses on the correct perspective thereby failing to address her mind to the serious infirmities in the identification evidence.
- (3) Prosecution case does not warrant the application of the Ellenborough principle

The facts pertaining to this case and the background to the incident may be set out as follows;

According to witness Kalyani on the day in question namely 13.08.1996, her husband had been at work and she had been sleeping with her nephew Ratnasiri and the two children. Around 1 a.m. she had heard the utterances of obscenities and sensed the flash of a torch light. This witness had further testified that she heard someone uttering obscenities from the direction of the window which was adjacent to her bed and thought that the voice was of the 1st accused. Witness had flashed her torch in the direction of the window and had seen the 1st accused whose face had been covered with a red cloth. She had further testified that there was another person standing by the other window whose face had been covered with a black cloth. This witness had further testified that the 2nd accused namely Ranjith had climbed the tiled roof and had tried to dislodge a tile and had thereafter threatened her to open the door at which point she had opened the door as she had been terrified. Witness Kalyani had further stated that thereafter the person who was standing near the window had pulled her by her hand and dragged her outside and placed her on the ground and committed an act of rape at the point of knife. The first accused had thereafter called out to the 2nd accused by name referring to him as Ranjith. This witness further testified that the 2nd accused too had raped her at the point of a knife and both accused had thereafter fled.

For the purpose of this appeal I am of the view that it would be sufficient to deal with the most important ground of appeal raised by the counsel for the appellants, is whether the prosecution had established the identity of the accused appellants beyond reasonable doubt.

Witness Kalyani had testified that she identified the 1st accused by his voice. Further she had admitted in her evidence that she had not spoken to the 1st accused before in her life. No evidence had been led at the trial as to how familiar she was with regard to the voice of the 1st accused apart from the evidence to the effect she had heard him speaking on the road. It is the contention of the counsel for the appellants that the prosecution had failed to elicit any evidence with regard to the familiarity of the voice of the 1st accused by the said witness.

Both witnesses have testified that both accused had their faces fully covered with a cloth. According to the evidence of witness Kalyani she had never spoken or had any dealings with the accused before. Therefore one has to be

alert and careful in accepting her evidence as it could be an afterthought. The Learned Trial Judge must be satisfied beyond reasonable doubt that the accused were correctly identified and if not give the benefit of the doubt to the accused. The Trial Judge must examine closely the circumstances under which the identification came to be made and the means of identification. In the instant case identification was made under difficult circumstances.

Both witnesses had very categorically testified that both accused had their faces covered with cloths and they do not testify that the cloths had come out enabling them to identify the accused.

I find that although the identification of the 1st accused appellant was made by voice, that the witness has never spoken to the accused before and no evidence had been led at the trial with regard to the familiarity of the voice of the 1st accused by the said witnesses and the opportunities the witnesses had to be familiar with the voice. The incident had taken place at 1 a.m. early morning when it was dark and identification of the 1st accused was made under difficult circumstances with the aid of a torch light. The 2nd accused had been identified because his name was mentioned by the 1st accused at the time of the incident. The evidence given by the witness Kalyani as to the identity of the 1st and 2nd accused therefore is very weak and unreliable and creates a doubt as to whether in fact the 1st accused was properly identified by the said witness. The main witness Kalyani had further stated that she was able to identify the 2nd accused as the 1st accused mentioned his name as Ranjith. According to witness Kalyani the 2nd accused name is Ranjith. Both witnesses have testified that both accused appellants had their faces fully covered with a cloth. Learned Counsel for the appellants next contended in the said circumstances it is fair to assume that the voices may have been blurry and incoherent and a question arises as to whether the witness was able to identify the voice of the 1st accused appellant to whom she had never spoken to beyond reasonable doubt. The prosecution had further failed to lead any evidence to establish that there is only the 2nd accused by that name in that village. The counsel for the accused appellants had brought to the notice of this court several judgments relating to voice identification. *Davies Vs The Crown* [2004] EWCA 2521, *Rohan Taylor and Others Vs R* SCCA No50-53/1991, *R Vs Hersey* [1998] Crim L.R.281, *R Vs Gummerson and Steadman* [1999] Crim L.R. 680, *R Vs Roberts* [2000] Crim L.R.183. In all these cases it

had been extensively considered and clearly laid down as to how a court should consider evidence of voice identification. The prosecution has to prove beyond reasonable doubt that it was the voice of 1st accused and nobody else. There cannot be a doubt and the evidence had to be very convincing and reliable. I am of the view that the purported voice identification by the said witness is wholly unsafe, unreliable and unsatisfactory. Having considered the unsatisfactory nature of the evidence of these witnesses I am of the view that the evidence led at the trial in this case is not sufficient to establish the identity of the accused to the required standard, that is beyond reasonable doubt.

In view of the conclusions I have already arrived at and for the reasons mentioned in the foregoing paragraphs of the judgment I find that it would be futile and redundant to embark on a useless exercise in dealing with the rest of the grounds of appeal taken by the counsel for the accused appellants. Therefore I set aside the findings, convictions and the sentences imposed on the accused appellants and acquit and discharge them from the charges.

Appeals allowed

JUDGE OF THE COURT OF APPEAL

Rohini Marasighe, J.

I agree.

JUDGE OF THE COURT OF APPEAL