

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

Attorney General

Vs

1. Nissanka Swarnapala alias Chandare
2. Weeramudalige Peelix
3. Mudiyansele Manjula Samankumara
4. Liyanadurage Dharnasiri
5. Narayana Mudiyansele Vasantha

**Accused**

CA 20 A-B/2010

HC Anuradhapura 171/2002

And now between

1. Mudiyansele Manjula Samankumara
2. Liyanadurage Dharnasiri
3. Narayana Mudiyansele Vasantha

**Accused-Appellants**

Vs

Attorney General

**Respondent**

Before : Sisira de Abrew J &  
Sunil Rajapakse J

Counsel : Prasanthalal De Alwis PC with Malaka Niroshana and  
Diwani Kaushalya for the 1<sup>st</sup> appellant (3<sup>rd</sup> accused)  
Dr. Ranjith Fernando for the 2<sup>nd</sup> and 3<sup>rd</sup> appellants  
(4<sup>th</sup> and 5<sup>th</sup> accused)  
Jayantha Jayasuriya ASG,PC for the Respondent.

Argued on : 18.12.2012, 19.12.2012 and 20.12.2012

Decided on : 28.2.2013

**Sisira de Abrew J.**

The above named five accused were convicted for committing the offence of gang rape on VG Sriyani Chandralatha and each accused was sentenced to term of fifteen years rigorous imprisonment (RI), to pay a fine of Rs.5000/- carrying a default sentence of one year imprisonment and to pay a sum of Rs.20,000/- to the victim carrying a default sentence of two years imprisonment. Being aggrieved by the said conviction and the sentence the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused have appealed to this court. The 1<sup>st</sup> and the 2<sup>nd</sup> accused have not appealed. Facts of this case may be briefly summarized as follows:

Victim Chandralatha whose husband works in a town called Avissawella usually sleeps with her children and the mother-in-law in her house. The mother who lives two miles away from her house did not, on 27.8.1997, come to sleep. On 27.8.87 around 10.00 p.m. Chandralatha went to sleep but woke up little later as she heard a sound of somebody walking inside the house. When she turned the light on she saw the five accused inside the kitchen. Somebody among the five removed the bulb in the kitchen. At this stage 1<sup>st</sup> accused kept a knife to her mouth and pressed her to the table in the kitchen and held by her hands. The 2<sup>nd</sup> accused too held her. At this time the other three accused were little away from her. The 1<sup>st</sup> accused put her on the ground and raped her while the 2<sup>nd</sup> accused was holding her. After the 1<sup>st</sup> accused finished the sexual act, he invited the 2<sup>nd</sup> accused. Then the 2<sup>nd</sup> accused raped her while the 1<sup>st</sup> accused was holding her. After the 2<sup>nd</sup> accused finished his sexual act, he invited the 3<sup>rd</sup> accused. When the 3<sup>rd</sup> accused came near her, she grappled with him and thereafter became unconscious. When she regained consciousness she heard somebody among the gang addressing another member in the following language: "This woman is pretending." Somebody in the gang at this stage addressed her in the following language: "Do not tell this to anybody. Do not

insult us. These things happen in the village.” There is no any evidence to say that the 4<sup>th</sup> accused and 5<sup>th</sup> accused uttered any word or did any act. In fact she says that when the 1<sup>st</sup> and the 2<sup>nd</sup> accused were holding her, the other three accused were little away from her.

Learned PC for the 3<sup>rd</sup> accused did not challenge the conviction but submitted that the sentence imposed him was excessive. The question that arises for consideration is whether the 4<sup>th</sup> and 5<sup>th</sup> accused, in view of the evidence of the victim, could be convicted for gang rape. Learned Addl.SG citing explanation I to Section 364 (2) of the Penal Code as amended by Act No.22 of 1995 and section 100 and 113A of the Penal Code contended that the 4<sup>th</sup> and the 5<sup>th</sup> accused could be convicted for the offence of gang rape. Explanation I to Section 364 (2) as amended by Act No. 22 of 1995 reads as follows:

“Where the offence of rape is committed by one or more persons in a group of persons, each person in such group committing or abetting the commission of such offence is deemed to have committed gang rape.”

Supreme Court in Sajeewa alias Ukkuwa and others Vs Attorney General (Hokandara case) [2004] 2 SLR 263 at page 285 interpreted this section as follows:

“Accordingly, in terms of the Penal Code (Amendment) Act, there is no need for a member 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 of 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 has been aiding and abetting, then all of them guilty under section 364(2) g in terms of the explanation I 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.” I have to follow this judgment as I am bound by it. In the present case

three people in the group have raped the victim. Therefore on the basis of the explanation I above, what is necessary is to consider whether the 4<sup>th</sup> accused and 5<sup>th</sup> accused abetted the commission of the act of rape. Abetment is defined in Section 100 of the Penal Code which reads as follows:

A person abets the doing of a thing who-

Firstly- Instigate any person to do that thing; or

Secondly- Engages in any conspiracy for the doing of that thing; or

Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.”

There is no evidence to suggest that the 4<sup>th</sup> and the 5<sup>th</sup> accused instigated the 1<sup>st</sup> accused and/or 2<sup>nd</sup> accused and/or 3<sup>rd</sup> accused to do the act of rape. There is no evidence to say that 4<sup>th</sup> and the 5<sup>th</sup> accused by any act or illegal omission intentionally aided the 1<sup>st</sup>, 2<sup>nd</sup> or 3<sup>rd</sup> accused to do the act of rape. Learned ASG heavily relied on the 2<sup>nd</sup> limb of abetment and contended that they (4<sup>th</sup> and 5<sup>th</sup> accused) engaged in conspiracy to do the act of rape. Conspiracy is defined in Section 113A of the Penal Code which reads as follows:

“If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, whether with or without any previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence, as the case may be.”

Thus in order to convict the 4<sup>th</sup> and 5<sup>th</sup> accused there must be evidence to say that they agreed with the 1<sup>st</sup> and/or the 2<sup>nd</sup> accused and/or the 3<sup>rd</sup> accused (1) to commit the act of rape or (2) to abet the commission of rape or (3) to act with a common purpose to commit the act of rape or abet it.

In order to prove that the 4<sup>th</sup> and the 5<sup>th</sup> accused committed conspiracy with the 1<sup>st</sup> accused and/or the 2<sup>nd</sup> accused and/or 3<sup>rd</sup> accused to commit the offence of rape on the victim learned ASG pointed out the following matters.

1. All five accused forcibly entered victim's house in the night.

2. The 1<sup>st</sup> accused threatened the victim and kept a knife near her mouth.
3. He pressed the victim against the table.
4. He removed her clothes.
5. He put her down on the ground.
6. He raped her while the 2<sup>nd</sup> accused was holding her.
7. The 2<sup>nd</sup> accused raped her while the 1<sup>st</sup> accused was holding her.
8. The 3<sup>rd</sup> accused grappled with her.
9. The 4<sup>th</sup> and the 5<sup>th</sup> accused were inside the house when these things were taking place
10. They left the house saying not to tell this to anybody.
11. They all left the house together.

It can be contended that they all had agreed to enter the house. Did they agree only on this? Then why did the 4<sup>th</sup> and 5<sup>th</sup> accused continue to remain in the house when the act of rape was being committed by the other three members. Why did the 1<sup>st</sup> to 5<sup>th</sup> accused, in the night, enter the house in which a woman was sleeping? Is it to commit to robbery or theft? There is no allegation that they committed robbery or theft. When I consider all these matters it is clear that they, before entering the house, have agreed to commit the offence of rape. Did the 4<sup>th</sup> and the 5<sup>th</sup> accused withdraw when the act of rape was being committed? The answer is no. They continued to remain in the house until the others raped her. This behaviour of the 4<sup>th</sup> and the 5<sup>th</sup> accused shows that they had agreed with the other members of the group to act with a common purpose to commit the act of rape on the victim or abet it. When I consider all these matters I hold the view that all accused have engaged in a conspiracy to commit the offence of rape. Therefore I hold that the acts of the 4<sup>th</sup> and the 5<sup>th</sup> accused come within the 2<sup>nd</sup> limb of the definition of abetment. I therefore hold that the 4<sup>th</sup> and 5<sup>th</sup> accused have abetted the other members of the group to commit the offence of rape. Therefore the decision of the

trial judge that they are guilty under the explanation I to section 364 (2) of the Penal Code as amended by Act No 22 of 1995 is correct.

When the victim regained consciousness she heard somebody among the 4 to 5 people (group which entered the house) saying that she was pretending. The learned trial judge concluded that these words were uttered by the 4<sup>th</sup> and the 5<sup>th</sup> accused. This is a misdirection committed by the learned trial judge.

The 1<sup>st</sup> accused in his dock statement admitted that on the day of the incident around 10.30 p.m he went to the house of the victim as he saw a male person inside this house and he came out when he saw the victim sleeping with somebody. The 2<sup>nd</sup> and the 3<sup>rd</sup> accused in their dock statement said they too had to say the same thing. But the 4<sup>th</sup> accused and the 5<sup>th</sup> accused said they did not commit any offence. The learned trial judge at page 193 of the brief concluded that all five accused admitted that they were inside the house of the victim at the time alleged by the victim. But the 4<sup>th</sup> and the 5<sup>th</sup> accused, in their dock statements, did not admit such a thing. This is another misdirection committed by the learned trial judge. But I have earlier held that the decision of the trial judge convicting the 4<sup>th</sup> and the 5<sup>th</sup> accused of the offence was correct. When the Court of Appeal holds that the trial judge was correct convicting accused of the charge, should their conviction be set aside on the basis of misdirection? In such a situation Court of Appeal should consider the proviso to Section 334 of the Criminal Procedure Code which reads as follows: "Provided that the court may, notwithstanding that it is of opinion that the point raised in appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred." When I consider the evidence and the misdirections, I hold that the misdirections have not occasioned a failure of justice. I therefore apply the said proviso and affirm the conviction of the 4<sup>th</sup> and 5<sup>th</sup> accused.

Learned PC for the 3<sup>rd</sup> accused submitted that term of 15 years imposed

on the 3<sup>rd</sup> accused was highly excessive. But I note that he was convicted for the offence of gang rape. According to the evidence led at the trial the 3<sup>rd</sup> accused did not hold the victim when the 1<sup>st</sup> and the 2<sup>nd</sup> accused committed the act of rape. Learned PC for the 3<sup>rd</sup> accused without wasting time of court honourably admitted that his client was guilty of the offence. Considering all these matters I set aside the term of 15 years RI imposed on the 3<sup>rd</sup> accused and sentence him to a period of ten years RI. The fine and the amount of compensation remain unaltered. I have earlier affirmed the conviction of the 4<sup>th</sup> and 5<sup>th</sup> accused. I note that according to the evidence they did not commit any sexual act on the victim. Therefore in my view the term of 15 years RI is excessive. I therefore set aside the term of 15 years RI and sentence each of them to a period of ten years RI. The fine and the amount of compensation remain unaltered. The sentence imposed by this court on 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused should be implemented from the date of sentencing by the learned trial judge. Subject to the above variation of the sentence the appeals of the appellant are dismissed.

*Appeal dismissed.*

*Sentence altered*

Judge of the Court of Appeal

Sunil Rajapakshe J

I agree.

Judge of the Court of Appeal