

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

In the matter of a petition of appeal in  
terms of section 331(1) of the code of  
criminal Procedure Act No 15 of 1979

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High Court (Gampaha)  
Case No: HC/18/99

Democratic Socialist Republic of Sri  
Lanka

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

**Complainant**

**Vs**

C.A Application No.223-224/07

1. Claid Earl Fenando
2. Hewawasam Puwakkpitiyage  
Premarathna

**Accused**

And

1. Claid Earl Fenando
2. Hewawasam Puwakkpitiyage  
Premarathna

**Accused Appellants**

**Vs**

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

**COMPLAINANT RESPONDENT**

**BEFORE** : SISIRA J DE ABREW, J  
P.W.D.C. JAYATHILAKE, J

**COUNSEL** : Anil Silva P.C. with Lasith Mudalige for the  
1<sup>st</sup> Accused Appellant.  
D.S.Wijesinghe P.C. with Kaushalya  
Molligoda and Isuru Somadasa for the 2<sup>nd</sup>  
Accused Appellant.

Rohantha Abey Suriya DSG for the  
Complainant Respondent

Argued On : 01.11.2013, 04.11.2013

Decided On : 05.12.2013

**P.W.D.C. Jayathilake J.**

Upali Senevirathne was the eldest child of a family of four children. He was a carpenter by profession. On the 5<sup>th</sup> of October 1989 he was engaged in carpentry in a house close to his permanent residence, 11/2, Malinda, Kapugoda. Upali was arrested with two other persons, namely Ananda Wataraka and Premadasa by the 1<sup>st</sup> Accused Appellant who was the Officer In Charge of the police station Pugoda. They were taken to the police station Pugoda in the police vehicle bearing No: 32 Sri 194 driven by the 2<sup>nd</sup> Accused Appellant who was a police driver attached to the police station Pugoda. Somawathi, the Mother of Upali went to Pugoda police station following morning along with Grama Niladhari of the area, namely Sujatha Somasili. At that time Somawathi saw her son Upali at the police station with Ananda Wataraka and Premadasa. Upali was in a loin cloth alone with his hands and

legs shackled. His face had a frightened look. Somawathi could not speak to her son. She saw the 1<sup>st</sup> Accused Appellant in his office room.

On two days she handed over food parcels of breakfast, lunch and dinner to the police officers at the gate asking them to give them to her son. On the 3<sup>rd</sup> day she was told by the police officers that her son was sent to Dompe police station. After that Somawathi went to Dompe police station and handed the food parcel to the gate where she was told that they would give him the food parcel if he was there. Once she went there in the afternoon, she was informed that, her son had not been brought to the police station. Then she went again to Pugoda police station where she was vituperated and driven away, telling her to see him in Boossa (place where a detention camp was situated) or in the river, Kelani. Thereafter, Upali never came home or Somawathi couldn't find him anywhere.

Complaints in this regard were not entertained by any authority at the time. A complaint was made to the Commission to Investigate Missing Persons, when that commission was instituted after about five years. After the investigations were made by the said commission the 1<sup>st</sup> and the 2<sup>nd</sup> Accused Appellants were indicted on four counts on abduction. The 1<sup>st</sup> count was in respect of said Upali, namely Sapuarachchi Kankanamalage Upali Senevirathna, committing an offence punishable under Sec.356 to be read with Sec.32 of the penal code by commit abduction with the intention of secret and wrongful confinement.

After the trial before High Court of Gampaha, both Accused Appellants were convicted for the first count and sentenced to two years Rigorous Imprisonment and imposed a fine of Rs : 2500/- carrying a default sentence of six month Rigorous Imprisonment. Being aggrieved with the said

conviction and the sentence, Accused Appellants preferred this Appeal to this Court.

Evidence of Somawathi, (the mother of Upali,) Ananda wataraka, (a person arrested together with Upali) and the police officers who investigated into the incident of abduction was led at the trial. The following matters were revealed in addition to the main story mentioned at the beginning.

Ananda Wataraka was questioned about a gun after they were taken to the police station. After Ananda Wataraka disclosed the fact that Upali hidden a gun in Ananda Wataraka's premises, Ananda was taken back to that place to search for the gun. After being taken back to the police station Ananda Wataraka was put into the cell while others were detained in a place at the back of the police station. In the same afternoon a person called Anil was brought to the cell. After six days Premadasa was brought to the cell while Upali was kept in the same place. Ananda had seen Upali twice while Ananda was going to the lavatory. Thereafter Ananda had not seen him. In Ananda's evidence he has further stated that they were assaulted from time to time by the police officers including the 1<sup>st</sup> Accused Appellant.

Ananda Wataraka was charged before High Court and had been leniently dealt with on his pleading guilty to the charges.

The 1<sup>st</sup> Accused Appellant had been serving in the Pugoda Police Station on the date of abduction, that is, 5<sup>th</sup> October 1989. He had reported for duty at 6.30 hours, and had made an entry that he was going to investigate some information received by him. He had gone for this investigation along with ten more officers in a jeep bearing No : 32 Sri 194, driven by the 2<sup>nd</sup> Accused Appellant. He had reported back to the station by 14.30 hours, but no entry

had been made in regard to the arrest of Upali by him or any other police officer.

The learned President's Counsel who appeared for the 1<sup>st</sup> Accused Appellant took up the position that the 1<sup>st</sup> Accused Appellant as a Peace Officer had the legal right to arrest Upali on suspicion.

This same argument has been raised in Embilipitiya abduction and murder case<sup>1</sup>. The relevant paragraph of the judgement of Kulathilake J in that case reads,

*"The learned president's Counsel who appeared for the 2<sup>nd</sup> Accused Appellant went on to say that in order to curb the insurrection the Army Officers were authorized to arrest any person"*

The said sentence was followed by the submission of the learned Deputy Solicitor General who appeared for the Respondent which states.

*"However the learned Deputy Solicitor General met this argument by submitting that if they came, as Army Officers without hiding their identity and arrested them that could have been lawful and he was not have any complaint to make as to the manner of abduction."*

In the instant case learned President's Counsel went on to say, that the 1<sup>st</sup> Accused Appellant and other Police Officers who came with him were in their uniforms and they had come as Police Officers to arrest Upali and

others. If they had a dishonest intention they would not have come in that manner, submitted the learned counsel.

The argument was that if the arrest was legal at the time of the arrest it would not become an offence by virtue of subsequent acts.

Chapter IV of the code of Criminal Procedure Code provides the provisions with regard to the arrest. Sec 32 provides the authority to peace officers to arrest a person without a warrant. Sec 32(b) gives the power to arrest any person, who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;

Therefore no doubt that the 1<sup>st</sup> Accused Appellant had authority to arrest Upali, if he had any information against him concerning any cognizable offence.

What would be the position if a police officer arrested a person on the authority provided by Law and disregarded the rest of the provisions with regard to the arrest. Criminal Procedure Code, while providing authority to Police Officers to bring the offenders into book, (at the same time) provides necessary provisions to protect the liberty of the subjects. According to the relevant provisions of the Criminal Procedure Code, Peace Officers shall not detain in custody or otherwise confine a person arrested for longer period than under all the circumstances of the case is reasonable, and such period shall not exceed the period prescribed by Law<sup>2</sup>. Officers in charge of police stations shall report to the Magistrates' Courts of their respective districts

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2. Sec.37 of the Code of Criminal Procedure

the cases of all persons arrested without warrant by any Police Officer attached to their stations or brought before them and whether such persons have been admitted to bail or otherwise<sup>3</sup>.

Submissions were made with regard to the certainty to the fact that Upali was arrested by the Accused Appellants. Somawathie had not seen the arrest. Evidence of Ananda Wataraka who testified to the fact that Upali was arrested by the 1<sup>st</sup> Accused Appellant should not have been believed because he was a person who had been brought to book by the 1<sup>st</sup> Accused Appellant, further submitted the learned President's Counsel.

A police team had come to Somawathi's house at 11.30 a.m on the day in question. But Somawathi has clearly stated when giving evidence none of the two Accused Appellants was among the police officers of the said team. There is no wonder of the absence of both Accused Appellants in that police team because it appears that the said police team was not from Pugoda police station but from Kosgama police station. They had asked Somawathi to send her son to Kosgama police station and not to Pugoda police station. Therefore as the learned trial judge who had the benefit of observing the demeanour and deportment of the witnesses was satisfied with the testimonial trustworthiness of them, this Court does not intent to intervene with the findings of the learned trial Judge over that matter.

The Accused Appellants had decided to keep silent after the prosecution case. As a result, the only fact which was before the trial judge was that Upali was taken away from his workplace and he was seen at the Police Station. The very facts revealed in the case speak that Upali had not been

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3. Sec. 38 of the Code of Criminal Procedure Code.



formally arrested. Yet, he had been detained and confined under the control of the 1<sup>st</sup> Accused Appellant.

*Explanation to Sec. 23(1) of is as follows.*

*Explanation - Keeping a person in confinement or restraint without formally arresting him or under the colourable pretension that an arrest has not been made when to all intents and purposes such person is in custody shall be deemed to be an arrest of such person.*

If the Police Officer who arrested a person has not completed the legal process to make it a legal arrest, what could be the result? I am of the opinion that there are two unavoidable inferences,

1. There was Criminal intention at the time of the arrest
2. Criminal intention had developed subsequent to the arrest.

It is the same conclusion that can be arrived at within the scope of facts revealed in this case as well.

Evidence reveals that it was a period of terror during which disappearances, and abductions were often heard about and unidentified corpses were found in different places. It has been decided in *Mohammad Sadiq V. emperor*<sup>4</sup> that *"If he has any intention other than that which is suggested by*

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4. AIR (1938) Lahore 474

*the natural circumstances of the case, the burden lies upon him under S. 106, Evidence Act to prove that intention".* This decision has been followed in Embilipitiaya abduction and murder case.

Even though the learned Deputy Solicitor General finally took up the position that he does not support the conviction, this court is unable to agree with that view. This Court is of the view that failures to comply with the legal provisions that complete a legal act of an authorized officer make such an act illegal with consequent liabilities. I, therefore, hold taking away Upali from his workplace by the 1<sup>st</sup> Accused Appellant was none other than abduction with intent to cause him to be secretly and wrongfully confined.

With this conclusion this court upholds the conviction of the first Accused Appellant. Although the Court is of the opinion that the sentence imposed by the learned trial judge appears to be lenient, this Court does not wish to interfere with it. Therefore, we affirm the sentence passed by the trial Court.

The second Accused Appellant was the Police driver attached to the Pugoda police station at the time of the incident. It was he who had driven the Police vehicle by which Upali and others were brought to the Police Station. It is quite clear that he was an employee working under the administrative control of the 1<sup>st</sup> Accused Appellant. He had had no option but to act on the directives given by his superior, namely, the 1<sup>st</sup> Accused Appellant. We, therefore, do not hesitate to agree with the submission made by the learned Counsel who appeared for the 2<sup>nd</sup> Accused Appellant to the effect that the 2<sup>nd</sup> Accused Appellant was not responsible for the consequences of the activities that took place on the day of the incident. No evidence what so ever about any particular participation of the 2<sup>nd</sup> Accused Appellant with

regard to the alleged arrest. Therefore, we are of the view that the learned trial judge was in error in arriving at the decision to convict the 2<sup>nd</sup> Accused Appellant. We set aside the conviction and the sentence in respect of the 2<sup>nd</sup> Accused Appellant and acquit him from the charge leveled against him.

*Appeal of the 1<sup>st</sup> Accused Appellant dismissed.*

*Appeal of the 2<sup>nd</sup> Accused Appellant allowed.*

**JUDGE OF THE COURT OF APPEAL**

**SISIRA J DE ABREW, J**

I agree.

**JUDGE OF THE COURT OF APPEAL**