

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

In the matter of an appeal against the  
Order of the High Court under section  
331 of the Code of Criminal Procedure  
Code No. 15 of 1979 as amended.

- (1) Karunanayake Mudiyanse Indu  
Saliyasiri Karunanayake  
(2) Karunarathnage Sanjeewa Lakmini  
Karunathne

**1<sup>st</sup> & 2<sup>nd</sup> Accused-Appellants**

**C.A. Case No:-82/2012**

**H.C Anuradhapura Case No:-66/2009**

**V.**

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

**Respondent**

**Before:- H.N.J.Perera, J. &  
K.K.Wickremasinghe, J.**

**Counsel:-**Indica Mallawarachchi for the 1<sup>st</sup> & 2<sup>nd</sup> Accused-Appellants

Amila Palliyage for the 3<sup>rd</sup> Accused-Appellant

Dappula de Livera A.S.G.for the Respondent

**Argued On:-**22.05.2015/19.06.2015

**Written Submissions:-**13.07.2015

**Decided On:-**13.10.2015

**H.N.J.Perera,J.**

The three accused-appellants were indicted before the High court of Anuradhapura on seven counts, committing the offence of kidnapping of Michaelge Dilrukshi Amerasinghe punishable under section 354 of the Penal Code, for committing the offence of Gang rape punishable under section 364 (2) (g) of the Penal Code and for committing the offence of grave sexual abuse on the said Michaelge Dilrukshi Amerasinghe also punishable under section 364 2(b)2 of the Penal Code. After trial the learned trial Judge acquitted all three accused from the charge of Gang Rape but convicted all the three accused-appellant for the charge of kidnapping punishable under section 354 of the Penal Code and for the charge of grave sexual abuse punishable under section 364 2(b) 2 of the Penal Code. All three accused were sentenced to a term of 2 years R.I and to a fine of Rs.15,000/- each on the first count and 12 years R.I and to a fine of Rs.10,000/- each for the offence of grave sexual abuse and the sentences of imprisonment to run consecutively.

Being aggrieved by the said conviction and sentence the accused-appellants had preferred this appeal to this court. Learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> accused-appellants urged five grounds of appeal as militating against the maintenance of the conviction.

- (1) Prosecution has totally failed to explain the long delay in submitting the prosecutrix for prompt medical examination thereby creating a serious doubt in the entirety of the prosecution case.
- (2) Evidence led at the trial does not support a conviction for Grave sexual abuse
- (3) Convictions of Grave sexual abuse are unsafe in view of the wholly unreliable and inconsistent evidence of the prosecutrix.
- (4) Accused-appellants have been denied of a fair trial as their evidence on oath have not been evaluated in its correct perspective.
- (5) Learned trial Judge failed to evaluate the evidence of the witness called by the defence once again occasioning in a denial of a fair trial.

The case for the prosecution was that the victim Dilrukshi was 11 years old when the alleged incident took place. According to her she was living with her Aunt at that time. The incident had taken place on 23.05 2005 a Wesak Poya day in the vicinity of the village temple. According to her the entire village had gathered at the temple and the temple was well illuminated as it was the Wesak full moon Poya day. The victim had gone to the temple and had attended the Bodhi pooja. She has testified that when she was at the tube well with her friend Nirmali Wathsala which was situated 10-25 feet away from the temple the 3<sup>rd</sup> accused-appellant had given her a message to the effect that her brother had wanted her to come to a particular road namely Theru Road. She further testified that when she had walked a distance of about 100 meters along the road the 3<sup>rd</sup> accused-appellant namely Nalaka had come on his bicycle, pushed the bicycle aside and carried her at which point the 1<sup>st</sup> and 2<sup>nd</sup> accused-appellants had joined him and held her and the 3<sup>rd</sup> accused-

appellant had carried her and run a distance of much more than 100 meters.

She further testified that whilst the 3<sup>rd</sup> accused-appellant had placed her on the ground the 1<sup>st</sup> and 3<sup>rd</sup> accused-appellants had removed her dress and under garments and the 1<sup>st</sup> accused-appellant had thereafter inserted his male organ into her vagina and raped her for about one hour. Whilst the said act of rape being committed by the 1<sup>st</sup> accused-appellant the 2<sup>nd</sup> and the 3<sup>rd</sup> accused-appellants had held her by her hands and legs respectively.

Subsequently the 2<sup>nd</sup> accused-appellant had committed an act of rape for about half an hour at which point the 1<sup>st</sup> accused-appellant and the 3<sup>rd</sup> accused-appellants had held her hands and legs respectively. She has further testified that the 3<sup>rd</sup> accused-appellant too had raped her. It was her evidence that when the 3<sup>rd</sup> accused-appellant raped her the 1<sup>st</sup> and the 2<sup>nd</sup> accused-appellants had held her by her hands and legs.

The prosecutrix had further testified that the 3<sup>rd</sup> accused-appellant had repeated the said acts and that each accused-appellant had raped her three times and that she was subjected to the said ordeal for about three hours. Thereafter she was taken to the place where she was picked up from and the 2<sup>nd</sup> accused-appellant at that point pointed a knife at her and threatened her not to tell about this incident to anyone.

It was her evidence that she returned to her aunt's home around 1.00 a.m and informed her aunt about the incident at about 11.00-12.00 noon and she with her Aunt and Uncle went to the police station and made a complaint to the police. Police evidence reveal that the complaint had been made on the following day. The prosecutrix had stated that she was admitted to the Hospital the very next day and was examined by a Doctor. She has categorically stated that she had number of injuries in her body. But police evidence and the Doctor's evidence does not

support the fact that she was produced before a Doctor and examined on the same day. There is no evidence to show why the prosecutrix was not produced before the Doctor on the same day or immediately after she had made the complaint to the police. The prosecutrix claimed that she had injuries on her body and that she was examined by a Doctor on the same day.

Dr. Laksiri Dhananjaya had testified to the fact that the said prosecutrix was examined by him at the Anuradhapura Hospital on 17.06.2005 at 1.30.p.m. She has been admitted to the hospital on 14.06.2005 and had left the hospital on 26.06.2005. On examination he found no injuries on the body of the prosecutrix. He had stated that the prosecutrix had been produced by the police after about 24 days from the date of the incident. According to him if the prosecutrix had any injuries the said injuries could have been cured by then. The Doctor had clearly stated that he cannot rule out the possibility of penetration.

The learned trial Judge had acquitted the accused-appellants of the rape charge on the basis that there isn't sufficient evidence to prove the said charges of rape but since there is evidence that the accused-appellants had placed their male organs between the legs of the prosecutrix convicted the accused-appellants for grave sexual abuse punishable under section 364 B(2)B of the Penal Code.

The prosecutrix has in court very clearly stated that all three accused-appellants inserted their male organs in to her female organ. Nowhere in her evidence it is stated that the accused-appellants committed any other sexual act or that they had committed acts of grave sexual abuse by placing their male organs between her legs.

It was the contention of the Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> accused-appellants that it was the findings of the learned trial Judge that the prosecutrix had testified that the accused-appellants had used her legs

and committed a sexual act which factual finding demonstrably false and wholly contrary to the evidence led at the trial. It was further submitted by the said Counsel that the evidence led at the trial does not support the charges of grave sexual abuse and that the learned trial Judge had grossly misdirected himself on a critical issue of fact and arrived at a totally fallacious factual finding which is wholly unsupported by evidence and contrary to the evidence led at the trial.

The prosecutrix had very clearly stated that the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> accused-appellants inserted their male organs to her female organ. Further she had clarified the same and stated that they did not insert the male organ deep into the female organ but inserted a little nine times.

Although the prosecutrix had stated in the history given to the Doctor that one person had inserted his male organ into her vagina at which point she felt pain and thereafter he had placed his penis between her legs and performed a sexual act and the other two also had done an act using her legs her evidence in court was to the effect that all three accused-appellants inserted their male organs into her female organ. Nowhere in her evidence she stated that the accused-appellants committed any other sexual act or that they committed acts of grave sexual abuse by placing their male organs between her legs which are the ingredients of the charges in count 5,6 and 7 of the indictment. However the prosecutrix at the trial has categorically testified that all three accused-appellants had inserted their male organs into her vagina and that she was raped nine times.

The learned trial Judge has acquitted the accused-appellants of the charges of rape on the basis that there isn't sufficient evidence to support a conviction for rape. In my opinion there was no evidence before the learned trial Judge for him arrive at the conclusion that the accused-appellants has committed offences mentioned in the charges

5,6 and 7 of the indictment. The learned trial Judge should have acquitted the accused-appellants accordingly. Yet I find that the learned trial Judge has not disbelieved the evidence given by the prosecutrix. He has not stated anywhere that her evidence is unreliable or not credible. It is very clear the lack of medical evidence to support the position of the prosecutrix had influenced the learned trial Judge in coming to the said conclusion regarding the 2,3 and the 4<sup>th</sup> charges in the indictment.

The learned trial Judge has convicted all three accused-appellants for the 1<sup>st</sup> charge in the indictment. The three accused-appellants are very well known to the victim and she had stated that they were friends of her brother and they used to come to her aunt's place to meet her brother. She has very clearly identified the three accused-appellants as the persons who carried her and raped her. She was staying at her Aunt's place and there is cogent evidence to prove that she was kidnapped by the three accused-appellants on the said day. I am of the view that there is no reason to disbelieve the evidence given by the prosecutrix with this regard. The reason put forward by the accused-appellants that the prosecutrix had made a false allegation against the accused-appellants because of an argument that took place between the accused-appellants and the prosecutrix on this day over a flashing of a torch in to the face of the prosecutrix cannot be believed and unacceptable.

For the reasons enumerated by me, on the facts and the law, in the foregoing paragraphs of this judgment, I set aside the conviction and sentences of the charges 5,6 and 7 of the indictment of all three accused-appellants and acquit them. I affirm the conviction and sentence of the accused-appellants for the count 1 of the indictment and considering the age of the victim and the facts and circumstances of this case I am of the view that the punishment imposed by the learned trial Judge on the accuse-appellants is not justified and inadequate. Therefore I substitute

a term of 5 years R.I. on count No.1 on each of the accused-appellants in this case. The fine imposed by the learned trial Judge should stand.

Accused-appellants acquitted on count 5, 6 and 7 of the indictment.

Conviction of the accused-appellants on count 1 is affirmed.

Subject to the said variation of the sentence of count 1, the appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

K.K.Wickremasinghe, J.

I agree.

**JUDGE OF THE COURT OF APPEAL**