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

In the matter of an application for Leave to Appeal and an Appeal to the Court of Appeal in terms of section 331 and section 340 of the Criminal Procedure Act read with section 16 of the Judicature Act.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CALA 06/2013

H/ C Colombo, HC 4424/2008

Vs,

1 Deepthi Niranjala Nanayakkara

2. Palliya Guruge Samantha Nanayakkara

3. Fayaroof Nijam

4. Indika Abegunarathne

5. Lelwala Guruge Chaminda

ACCUSED

Pitiduwa Gamage Sumith Rohana,

No. 3A, Anagarika Dharmapala Mw,

Matara.

AGGRIEVED PARTY

AND NOW BETWEEN,

Pitiduwa Gamage Sumith Rohana,

No. 3A, Anagarika Dharmapala Mw,

Matara.

AGGRIEVED PARTY -APPELLANT-PETITIONER

Vs,

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT- RESPONDENT

1. Deepthi Niranjala Nanayakkara,

   No. 38, Kandahena Watta Rd,

   Depanama, Pannipitiya.

2. Palliya Guruge Samantha Nanayakkara,
   No.09, Dixson Junction,
   Galle.

ACCUSED- RESPONDENTS

Before : **Vijith K. Malalgoda PC J (P/CA) &**

H. C. J. Madawala J

Counsel: Nuwan Dissanayaka with Amila Palliyage and Eranda Sinharage for the Aggrieved Party- Appellant -Petitioner

Nalin Dissanayake with Sameera Patabendige for the Accused- Respondent

Rohantha Abeysooriya DSG for the AG.

Argued On: 07.09.2015

Written Submission On: 08.10.2015

Order On: 25.01.2016

Order

Vijith K. Malalgoda PC J (P/CA)

The two Accused-Respondents namely Deepthi Niranjala Nanayakkara and Palliya Guruge Samantha Nanayakkara along with three suspects were indicted before the High Court of Colombo on the following counts,

1. Being members of the unlawful assembly with the common object of kidnapping or abducting Pitiduwa Gamage Sumith Rohana an offence punishable under section 140 of the Penal Code.
2. Whilst being the members of said unlawful assembly, committing the offence of abducting Pituduwa Gamage Sumith Rohana an offence punishable under section 356 read with section 146 of Penal Code.
3. Whilst being the members of said unlawful assembly, causing injuries to Pituduwa Gamage Sumith Rohana an offence punishable in terms of section 314 read with section 146 the Penal Code.
4. Abduction of Pituduwa Gamage Sumith Rohana an offence punishable under section 356 read with section 32 of Penal Code.
5. Causing injuries to Pituduwa Gamage Sumith Rohana an offence punishable under section 314 read with section 32 of Penal Code.

The victim and the prosecution witness No 01 in this case, Pitiduwa Gamage Sumith Rohana being aggrieved by the sentence imposed by the High Court dated 05.12.2013 filed the present application before this court seeking leave to appeal in terms of section 16 of the Judicature Act read with section 340 of the Code of Criminal Procedure Act No. 15 of 1979.

Being satisfied with the material placed when supporting this application by the Aggrieved Party – Petitioner court granted leave to appeal on 26.03.2014.

When the matter come up before us for Argument all the parties to this application including the two Accused-Respondents and the complainant –Respondent were represented by counsel. The Learned

Deputy Solicitor General, who represented the Complainant-Respondent, did not make submissions before court but informed that the complainant-Respondent will abide by the decision of this court.

During the argument before us it was revealed that the Aggrieved Party –Petitioners and the 1st Accused-Respondent are husband and wife but they live in separation. The 2nd Accused-Respondent is the brother of the 1st Accused-Respondent.

The alleged incident of abduction and causing injury to Aggrieved Party- Petitioner took place on 5th June 2004 when the Aggrieved Party-Petitioner visited the Arpico Show Room in Hyde Park Corner Colombo. According to the evidence of the Aggrieved Party-Petitioner at the High Court Trial, he came out from the Arpico Food Court and got into his car with his third child in order to go home. At that time his vehicle was blocked by a van and the inmates of the said van had tried to remove him from his car after injecting him a drug. The people who gathered at the scene after hearing the cries of the child, had apprehended the offenders and handed them over to the police.

The Attorney General had forwarded an indictment against 5 suspects but out of them the 5th Accused was dead at the time when the matter was to taken up for the trial.

Trial against the remaining Accused was commenced on 12.09.2009 and the Aggrieved Party – Petitioner was called to give evidence on that day. The trial proceeded for several days up to 20.07.2011 but the cross examination of the 1st witness was not concluded by that time. However this court observes that the trial did not proceeded since then, for the reason that the counsel who represented the Accused had made several applications before court for adjournments since they wish to conclude the case by a "short-cut".

When the case was called on 09.09.2013 before the High Court of Colombo, the Learned State Counsel who represented the Attorney General, moved to withdraw the Indictment against the 3rd and 4th Accused with liberty to file a plaint against them in the Magistrate Court. However we observe that the State Counsel when making the said application, did not give reasons for the said application. But the High Court had granted permission for the above application and accordingly the 3rd and 4th Accused were discharged.

After the said order was made by court, the 1st and 2nd Accused pleaded guilty to all the charges (i.e. 1-5 charges) against them and the matter was put off for identification and sentence.

On 05.12.2013 when the matter came up for sentence, all parties including the Aggrieved Party – Petitioner was represented by Counsel and were allowed to make submissions.

On the same day, the Learned High Court Judge having heard the submissions by all the parties, made the following order.

Acquitted the 1st and the 2nd Accused from 1st, 2nd and 3rd counts.

Convicted the 1st and 2nd Accused for count 4 and imposed a sentence of 02 years Rigorous Imprisonment suspended for 10 years and a fine of Rs. 30, 000/- on each accused carrying a default term of 1 year Imprisonment.

Convicted 1st and 2nd Accused to count 5 and imposed a fine of Rs. 1000/- each carrying a default term of 01 month simple Imprisonment.

In addition to the above Compensation of Rs. 100,000/- was also ordered to pay by each accused carrying a default term of 01 year simple Imprisonment.

Being dissatisfied with the above sentence imposed by the High Court, the Aggrieved Party-Petitioner had come before this court by way of this leave to appeal application and pleaded that

a. The Learned Trial Judge erred in law in making an order discharging the Accused from counts 1, 2 and 3 when the Accusedwere already convicted for those counts on 09.09.2013.
b. The sentence imposed by the Learned Trial Judge was inadequate and made without considering the facts and circumstances of this case.

When considering the above submissions, this court observes that, when the 1st and 2nd Accused pleaded guilty to the Indictment on 09.09.2013 the Learned Trial Judge made the following order in the case record. (as a journal entry)

1,2 වුදිතයන්ට විවෘත අධිකරණයේදී අධි චෝදනා කියවා දෙන ලදී.

1,2 වුදිතයන් එකී චෝදනාවන්ට වරද පිලිගනී.

එසේ වරද පිලිගැනීම මත (1) සිට (5) දක්වා චෝදනාවලට 1,2 වුදිතයන් වරද කරුවන් කරමි.

1,2 වුදිතයන් සඳහා ඇ.ස. වාර්ථා කැඳවන්න.

දඩුවම/ දඩුවම් ලිහිල්කරගැනීම හේතු දැක්වීම සඳහා කැඳවන්න.

From the above journal entry it appears that the Learned High Court Judge had convicted the 1st and the 2nd Accused on all 5 counts based on the plea tendered by them. However when this case was called for identification and sentence on 05.12.2013 after submission by all the parties the Learned High Court Judge had made the following order with regard to the conviction

"රජය වෙනුවෙන් ඉදිරිපත් කරන ලද කරුණු සහ දඩුවම ලිහිල්කරගැනීමට අදලව ඉදිරිපත් කරන ලද කරුණුද අගතියට පත් පාර්ශවය වෙනුවෙන් ඉදිරිපත් කරන ලද කරුණුද දඩුවම නියම කරීමේදී සැලකිල්ලට ගන්නා ලදී.

මෙම අධි චෝදනා පත්‍රයට අදලව නම් කර තිබූ 3 සහ 4 චුදිතයන්ට අදල චෝදනා පත්‍රය රජය වෙනුවෙන් ඉල්ලා අස්කරගෙන ඇති අතර ඒ සම්බන්ධයෙන් මහේස්ත්‍රාත් අධිකරණය නඩු පැවරීමට පියවර ගන්නා බවට දැනුම්දී ඇත.

ඒ අනුව 1 හා 2 චුදිතයන්ට එරෙහිව 1,2,3 චෝදනාවන් ගෙනයානොහැකි බවට තීරණය කරමි.

ඒ අනුව 1,2,3 චෝදනාවන්ගෙන් 1 සහ 2 චුදිතයන් නිදොස් කර නිදහස් කරමි.

After making the said order the court proceeded to sentence the two Accused for counts 4 and 5.

When considering the above order it is observed by this court that, the Learned High Court Judge had ignored the conviction he has recorded on 09.09.2013 and proceeded to acquit the 1st and 2nd Accused from three counts the Learned High Court Judge had already convicted.

If the Learned High Court Judge had believed that he made a wrong order on the previous day, then the judge should have vacated his previous order as it was made per- incuriam. In this instance the Learned High Court Judge had failed to do so.

On the other hand, the reasons given by the Learned High Court Judge to acquit the two Accused from counts 1,2,3 are also need further reasoning. As I have referred to at the beginning of this order, the 1st ,2nd and 3rd counts are based on unlawful assembly. 1st count being a count against all 5 Accused for being a member of the unlawful assembly and 2nd and 3rd counts for committing abduction and simple hurt being a member of unlawful assembly.

Section 138 of the Penal Code commences as follows;

> 138; an assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly……-

When looking at the above provision of law the main requirements under "unlawful assembly" can be identified as the requirement of 5 or more persons with a common object to commit the specified offence.

The requirement of 5 people, is essential to commit the offence but, the said requirement is not essential to convict the offender if there is evidence to establish 5 or more people took part in the commission of the said offence even though they are not before court.

In the case of ***Francis Appuhamy and 3 Others V. Queen (1966) 68 NLR 437*** *T.S. Fernando (J)* observed that,

> "We do not consider, as we have already indicated above, that there is much substance in the argument that the defence was taken by surprise by a case of an allegation of unlawful assembly composed of the appellants and an unidentified man ' being sprung upon it for the first time' during the summing-up of the trial judge. The charge was that the five persons in the indictment were members of an unlawful assembly. So long as the Crown was able to establish the presence of the requisite number of persons with a common unlawful object, the unlawful assembly was complete. All that was thereafter necessary was identification of those proved to be present. As Bose J. stated in delivering the judgment of Supreme Court if India in Dalip Singh V. State of Panjab [1 (1953) A.I.R. (S.C) at 366.] "This is not to say that five persons must always be convicted before section 149 can be applied. There are cases and cases. It is possible in some cases for judges to conclude that though five were unquestionably there the identity of one or more is in doubt. In that case, a conviction of the rest with the aid of section 149 would be good." In the local case of The King V. Fernando et al. [2 (1047) 48 NLR 200] one of the two reasons given by this court for the dismissal of an appeal of four appellants who had stood their trial (along with a fifth man who was acquitted) on charges of unlawful assembly and murder was that "while there was overwhelming evidence that the four appellants and another took part in the transaction which resulted in the death of the deceased, there were circumstances which involved in some doubt the identity of the fifth person."

In the present case the 1st and 2nd Accused pleaded guilty to all 5 counts, when the 1st prosecution witness was under cross examination. In his evidence the witness had given very clear evidence to the participation of 5 or more persons when the alleged act took place

At page 78 of the brief proceedings on 14.09.2009 page 4 proceeding commences at 11.40 A.M.

ප්‍ර: දැන් කියන්න කවුද ඒ අය?

උ: 1,2,3,4,5. ඒ පස්දෙනා ඇරෙන්න තවත් මලින්ද කියන අය සිටියා

After listening to the said evidence the 1st and the 2nd Accused decided to tender a plea of guilt.

The fact that Attorney General had decided to withdraw charge against 3rd and 4th Accused with liberty to file plaint in the Magistrate Court has no effect on the evidence given by the complainant on oath

before the High Court and the said evidence clearly discloses the participation of 5 or more persons with a common object of abducting the Aggrieved Party Petitioner.

Considering the material discussed above, I decide to set aside the conviction and sentence imposed by the Learned High Court Judge on 05.12.2013 and confirm the conviction dated 09.09.2013 convicting the 1st and 2nd Accused-Appellant on all 5 counts.

It was further contended by the counsel for the Aggrieved Party Petitioner before this court that the sentence imposed on the two accused who pleaded guilty was not proportionate and was grossly inadequate.

According to the Penal Code, the maximum sentence imposed on the counts the Accused were convicted are as follows;

Count 1 – section 140	06 months or with fine or with both
Count 2 – section 146 read with 356	07 years with fine
Count 3- section 146 read with 314	01 year or with fine up to Rs. 1000/- or with both
Count 4 – section 32 read with 356	07 years with fine
Count 5 – section 32 read with 314	01 year or with fine up to Rs. 1000/- or with both

When imposing sentences our courts were mindful of aggravating factors and Mitigatory factor in each case depending on facts and circumstances of the case. Since the present case was concluded on a plea tendered by the two accused, the court when imposing a sentence will have to be mindful of that fact as well.

As revealed during the trial, the aggrieved party Petitioner had visited the Arpico Show Room at Hyde Park Corner with his son to get him some food. When he came out from the food court and tried to take his car out from the car park, his vehicle was obstructed by a van and thereafter the inmates of the van had tried to abduct the Aggrieved Party Petitioner after giving him an injection. There were more than 5 persons took part in the said act and they acted with the common object of abducting the Aggrieved Party Petitioner. In order to abduct, an injection was given to him and there by committed the offence of simple hurt too. The act appears to be a high handed act taken place during the broad day light in a busy car park. According to the Aggrieved Party Petitioner highly contested divorce action between the Aggrieved Party Petitioner and the 1st Accused-Respondent was pending in the District Court at the time the alleged abduction took place and he claims that the reason behind this

abduction was to eliminate him. However this court observes that, the Indictment served by the Attorney General did not carry charges under section 355 of the Penal Code but, the charges were only under section 356.

As against the above position, on behalf of the 1st and 2nd Accused-Respondents it was submitted that the Learned Trial Judge had properly evaluated the material, specially the mitigatory factors of this case when imposing the said sentences. According to the Accused-Respondents, the 1st Accused – Respondent is the wife of the Aggrieved Party Petitioner and since she believed that her husband needs psychiatric treatment, she suggested to the Aggrieved Party Petitioner on several occasion to consult a Psychiatrist. Since the Aggrieved Party Petitioner has rejected the above request, the 1st Accused-Respondent has planned with her brother to take the Aggrieved Party Petitioner to a psychiatrist in a semi conscious state and her brother the 2nd Accused-Respondent obtained the assistance of two of his medical student friends for this purpose.

It is observed by this court that the conduct of the 1st and the 2nd Accrued-Respondents and their planning to commit this offence does not show that they have come to carry out an operation which will ended up in another grave crime. If the first Accused-Respondent who is the wife of the Aggrieved Party Petitioner wanted to eliminate the Aggrieved Party Petitioner as stated in his evidence before High Court, it is very unlikely that the 1st Accused –Respondent will come personally to abduct her husband with her own brother. Out of the other three members of the unlawful assembly two are medical students who came to inject a sedative drug in order to facilitate the abduction but there were no other members in the unlawful assembly who are criminal elements.

Therefore the above conduct of the 1st and the 2nd Accused-Appellants appears to be more of an innocent act rather than an organized criminal act.

Basnayake ACJ (as he was then) in the case of Attorney General V. H.N. de Silva (1955) 57 NLR 121 observed that, "A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare

of the state (which are synonymous) outweighs the previous good character, antecedents and age of the offender public interest must prevail."

Gunasekera J in the case of ***Attorney General V. Jinak Sri Uluwaduge and Another 1995 (1) Sri LR 157*** held that,

> "In determining the proper sentence the Judge should consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration. The Judge should also take into account the nature of the loss to the victim and the profit that may accrue to the culprit in the event of non- detection. Another matter to be taken into account is that the offences were planned crimes for wholesale profit. The Judge must consider the interests of the accused on the one hand and the interests of society on the other; also necessarily the nature of the offence committed, the machinations and manipulations resorted to by the accused a commit the offence, the effect of committing such a crime insofar as the institution or organization in respect of which it has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime."

It is further observed by Gunasekera J in the case of ***The Attorney General V. Mendis 1995 (1) Sri LR 138*** that,

> "In assessing punishment the judge should consider the matter of sentence both from the point of view of the public and the offender. The judge should first consider the gravity of the offence, as it appears from the nature of the act itself and should regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. Two further considerations are the nature of the loss to the victim and the profit that may accrue to the accused in the event of non- detection. For some offences generally speaking longer sentence of imprisonment are appropriate such as for example most robberies, most offences involving serious violence, use of a weapon to wound, burglary of private dwelling

houses, planned crime for wholesale profit, active large scale trafficking in dangerous drugs and the like.

Once an accused is found guilty and convicted on his own plea or after trial the judge in deciding on sentence, should consider the point of view of the accused on the one hand and the interest of society on the other. The nature of the offence committed the machinations and manipulations resorted to by accused to commit the offence, the effect of committing such a crime insofar as the institution or organization in respect of which it has been committed, is concerned, the persons who are affected by such crime the ingenuity with which it has been committed and the involvement of others in committing the crime are matters which the judge should consider."

In the case of ***Don Percy Nanayakkara V. The Republic of Sri Lanka 1993 (1) Sri LR 71*** S.N. Silva J (as he was then) held that,

"In assessing punishment the court has to consider the matter from the point of both the offender and the public. The accused had held high public office and exercised extensive statutory power in conducting public examinations in this country. These examinations have to be conducted fairly and the results declared accurately. Thousands of students who face public examinations, every year, should have complete confidence in the fairness and accuracy of every process of the examinations. The accused has subverted the very basis of this confidence by his conduct in dishonestly showing favour to persons with whom he was acquainted. Therefore, public interest demands that he should be imposed a deterrent punishment."

In the case of ***Sanjeewa and Another V. The Attorney General Shirani Bandaranayake J*** (as she was then) observed that,

f. a first offender should receive some kind of mitigation of sentence in most offences but where the first offence is grave, there might be little reason to make a concession to human frailty

S.N Silva Acting P/CA (as he was then) in the case of ***Attorney Genral V. Ranasinghe and Others 1993 (2) Sri LR 81*** whilst referring to the findings in ***Keith Billam (1986) volume 82 Criminal Appeal Report 347*** identified the following instances as aggravating features,

1) Violence is used over and above the force necessary to commit the rape;
2) A weapon is used to frighten or would the victim;

3) The rape is repeated;
4) The rape has been carefully planned;
5) The defendant has previous convictions for rape or other serious offences of a violent or sexual kind;
6) The victim is subjected to further sexual indignities or perversions;
7) The victim is either very old or very young;
8) The effect upon the victim, whether physical or mental, is of special seriousness;

When considering the above decisions of our courts, it is observed that the courts have a duty to be mindful of aggravating and mitigatory factors of the case before them when imposing the sentence, since those factors will play a key role in deciding the sentence. Some of the aggravating and mitigatory factors identified by our courts in the cases referred to above can be summarized as follows,

Aggravating factors,

a) Use of violence when committing crime
b) Use of weapons when committing crime
c) Drug related offences
d) Member of an organized gang
e) Repeating acts of similar offence
f) Previous convictions or pending cases of the similar type
g) Effect upon victims physical or mental condition
h) Obstruction of justice
i) Commission of an offence while on bail
j) Willful damage to state or private property
k) Disruption of governmental functions
l) Commits the offence in order to conceal another offence
m) Using high office to commit the offence

Mitigatory factors,

a) First offender
b) Good character
c) Determination to quit the criminal life
d) Serious medical condition
e) Victims conduct

f) Lesser harm (crime committed to avoid greater harm)
g) Coercion and/or duress
h) Voluntary disclosure of offence

In the present case when the 1st and the 2nd Accused-Respondents tendered a plea of guilt to the Indictment, the court decided to impose a non custodial sentence on both suspects.

When consider the circumstances under which the offence was committed and the relationship and the conduct of the each accused, their background and the history revealed during the submission made in mitigation confirms that the features available in the present case are more in favour of mitigatory factors identified by our court rather than the aggravating factors. Therefore I cannot agree with the contention of the Learned Counsel for the Aggrieved Party Petitioner when he submitted that the decision of the Learned Trial Judge to impose a non custodial sentence was taken without considering the facts and circumstances of this case.

Considering the facts and circumstances of the present case this court decides to impose the following sentence on the 1st and the 2nd Accused-Respondents.

Count 1 – 03 months Rigorous Imprisonment suspended for 10 years and a fine of Rs. 20,000/-

In default 06 month simple Imprisonment

Count 2 - 02 years Rigorous Imprisonment suspended for 10 years and a fine of Rs. 30,000/-

In default 01 year simple Imprisonment

Count 3 - Fine of Rs. 1,000/-

In default 01 month simple Imprisonment

Count 4 - 02 years Rigorous Imprisonment suspended for 10 years and a fine of Rs 30,000/-

In default 01 year simple Imprisonment

Count 5 - Fine of Rs 1,000/-

In default 01 month simple Imprisonment

Compensation of 200,000/- by each Accused in default 01 year simple Imprisonment

The above sentences will run concurrent with effect from today.

Appeal is party allowed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL