

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

In the matter of an application for Revision in
terms of Article 138 read together with Article
154P of the Constitution of the Democratic
Socialist Republic of Sri Lanka

Court of Appeal case no. CA 154/2013
H.C. Anuradhapura case no. H.C. 258/2008

H.H. dharmapriya Udayakumara

Accused Appellant

Vs.

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

Complainant Respondent.

Before : L.T.B. Dehideniya J. (P/CA)

: S. Devika De Livera Tennekoon J.

Counsel : Indika Mallawarachchi for the Accused Appellant.

: Dileepa Piries DSG for the Complainant Respondent.

Argued on : 05.06.2017

Written submissions filed on 12.07.2017

Decided on : 27.10.2017

L.T.B. Dehideniya J. (P/CA)

The Accused Appellant was indicted before the High Court of Anuradhapura on four charges.

1. That on or about 04.07.1997 the Appellant along with those unknown to the prosecution formed an unlawful assembly with the common object of abducting Chamila Thushari Perera thereby committing an offence punishable under section 140 of the Penal Code.
2. At the same time and place in the same transaction committing an offence punishable under section 357 read with section 140.
3. Committing an offence punishable under section 357 read with section 32 of the Penal Code.
4. Committing an offence punishable under section 364(2)(g) of the Penal Code

After trial the Appellant was acquitted from 1st and 2nd charges and convicted for 3rd and 4th charges and sentenced as follows.

Charge 3 - 5 years RI and Rs. 25000/= fine with a default term of 6 months

Charge 4 – 12 years RI and Rs. 25000/= fine with a default term of 6 months. Compensation of Rs. 100000/= with a default term of 1 year.

Being aggrieved by the said conviction and the sentence the Appellant presented this appeal.

The victim was called as the PW 1 and she testified in Court that on the day of the incident she was in the house with her blind father, mother and two younger siblings. One of her uncle called Somapala was sleeping outside the house. In the night at about 10.00 or 11.00, a gang of persons

had come to the house and first assaulted Somapala and came in to the house. Then she was hand cuffed and forcibly carried to the nearby jungle and was raped. A torch light was flashed towards her but accidentally it was focused on the Appellant and she was able to identify the Appellant as Wasantha who was living nearby the cemetery. She has asked the Appellant Wasantha why are you doing this to me and then the Appellant with the others ran away.

The Appellant's main grounds of appeal were the mistaken identity and the alibi of the Appellant. Therefore, I will first consider the point raised by the learned Counsel for the Appellant with regard to the identity. The Appellant is a person known to the victim from her childhood. She knew his father and where he was living. When the flash light was focused on the Appellant she identified the Appellant. In her complaint to the police she had given the name of the Appellant to the police. This corroborates her evidence. The Appellant in his evidence stated that he do not know the victim. The victim very specifically stated that she knew the Appellant. The victim further testified that the Appellant had proposed to her for a relationship two weeks prior to the incident and she had not agreed. These circumstances very strongly prove that the victim has identified the Appellant correctly.

The second ground of appeal is that the alibi of the Appellant was not considered. The alibi is that the Appellant was living in his maternal aunt's house on the day of the incident and he did not know the victim. The learned High Court Judge had not believed the Appellant on the point that he did not know the victim. The victim was not confronted with the alibi of the Appellant that he was living somewhere else on that day. Therefore the evidentiary value of the Appellant's evidence is less.

- (i) An alibi is not an exception to criminal liability, like a plea of private defence or grave and sudden-provocation. An alibi is nothing more than an evidentiary fact, which, like other facts relied on by an accused, must be weighed in the scale against the case for the prosecution. If sufficient doubt is created in the minds of jury as to whether the accused was present at the scene at the time the offence was committed, then, the prosecution has not established its case beyond reasonable doubt, and the accused is entitled to be acquitted. *Rex v. Chandrasekera* (1942) 44 N. L. R. at p. 126, and *Rex v. Fernando* (1947) 48 N. L. R. at p. 251, applied.

If the evidentiary value is lowered, the fact that the Appellant was at some other place cannot be acted upon in the instant case. It does not create a doubt in the mind of the Court.

I do not see any reason to interfere with the conviction.

The learned Counsel for the Appellant made an application to reconsider the sentence in the event of the Court is not setting aside the conviction. The Appellant was convicted 16 years after committing the offence and the life of the Appellant and the victim has changed considerably. The Appellant is now married and having a child. He has not committed any offence before or after committing this offence. I do not for a moment take the offence committed by the Appellant lightly, but the life of the child and the wife of the Appellant is a matter that should not escape from the consideration when imposing the sentence. Accordingly I hold that ordering the imprisonment term to run consecutively is too harsh.

I order that the two terms of imprisonments imposed on the Appellant on 3rd and 4th charges shall run concurrently. I further order that the term of

imprisonment ordered shall run from the date of conviction and sentence
i.e. 20.08.2013.

Appeal partially allowed. No costs.

President of the Court of Appeal

S. Devika De Livera Tennekoon J.

I agree.

Judge of the Court of Appeal