

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

In the matter of an Application made
in terms of Section 331 (1) of the Code
of Criminal Procedure Act No. 15 of
1979 read with Article 138 (1) of the
Constitution of the Democratic
Socialist Republic in Sri Lanka.

Democratic Socialist Republic of Sri
Lanka

COMPLAINANT

Vs

1. Saundara Durayalage Thushara
Pradeepika Jayasuriya Fernando
2. Brahmanage Ranjith Perera
3. Sinhala Pelige Dinesh
Pushpakumara Abeysinghe

ACCUSED

Case No. CA 291/2009

HC Colombo Case No. 1697/04

AND NOW

Saundara Durayalage Thushara
Pradeepika Jayasuriya Fernando
1ST ACCUSED – APPELLANT

Vs

The Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

BEFORE

: Deepali Wijesundera J.

: L.U. Jayasuriya J.

COUNSEL

: Amila Palliyage for the Accused-
Appellant.

A. Jinasena S.D.S.G. for the
Respondent.

ARGUED ON

: 16th October, 2017

DECIDED ON

: 10th November, 2017

Deepali Wijesundera J.

Three accused were charged in the High Court of Colombo under Section 357, Section 356 and Section 365 (b) (a) of the Penal Code. After trial the third accused was acquitted on all 8 charges. The first and second accused have appealed against the conviction and sentence. The second accused appellant had withdrawn the appeal. The instant case is the appeal of the first accused appellant, who was convicted on all eight charges.

The story of the prosecution is that on the day in question, prosecution witness number one Lucinda and prosecution witness

number two Richard who are British nationals have visited the Lotus Pond in Polonnaruwa in the evening. The evidence revealed that they have travelled to Polonnaruwa from Colombo in a van driven by prosecution witness number five Vipula. After visiting the said pond they have gone towards the van and have seen four persons near the van armed with guns. When they approached the van they have noticed the men wearing Poncho capes and had their faces covered with a cloth similar to a net. Thereafter they have bundled the victims into the van, and they have seen the driver Vipula at the rear of the vehicle with his hands tied. Thereafter Richard's hands too were tied and put into the rear of the vehicle. Lucinda was forced to sit on a seat and one of the men had driven the vehicle for nearly five hours round the same area. On the way Lucinda alleged that the appellant tried to have oral sex with her and thereafter raped her. At some point of time Richard too had witness the acts.

The learned counsel of the appellant argued that the learned High Court Judge had rejected the evidence of the complainant on the basis that she's not a reliable witness vide page 14 of the judgment. This the learned High Court Judge has done whilst discussing the legal principles and not after evaluation of the evidence of the complainant. The learned High Court Judge has properly evaluated the evidence of the complainant later in the judgment which runs into twenty pages (page 15 to 34) therefore we decide that the above observation of the learned High Court

Judge at the beginning of the judgment has no bearing on the findings and we reject the first ground of appeal.

The learned counsel of the appellant strenuously argued that the appellant has not been properly identified. As the virtual complainant has stated in her evidence that at the time she approached the vehicle it was pitch dark and raining and she has not stated as to whether there was a light burning in the said vehicle. Whilst giving evidence Lucinda has said when the van was moving around lights from the street lamps fell on the van. She further testified that the appellant flashed a torch several times to check on the driver and Richard. She has further stated that the appellant came very closed to her and when she refused to have oral sex he slapped her which gave her a good view of his face. Therefore we hold that Lucinda had ample opportunity to identify the appellant and there is no mistaken identity. Richard had specifically given reasons to remember the face of the appellant and we find those reasons to be probable (vide page 148 of the brief). The second ground of appeal too fails.

The learned counsel argued that the learned High Court Judge has rejected the evidence of the appellant due to four contradictions in his evidence which is not correct. The learned High Court Judge whilst referring to those contradictions has analysed the evidence of the

appellant at length vide pages 78, 79, 80 and 81 of the brief. It appears from the brief (vide pages 81 and 82 of the brief) that the learned High Court Judge has evaluated evidence of the defence witness who was the brother of the appellant.

I hold that Lucinda had ample time and opportunity to identify the appellant. In **1983 AIR SC 957 Macchi Singh and others vs State of Punjab** it was held "*that the eye sight can get accustomed to the condition or the situation*". In this case it was a lantern in the instant case it was an electric torch and the street lamps which shed light.

For the afore stated reasons we are not inclined to set aside the judgment dated 09/12/2009 of the High Court of Colombo. We affirm the said judgment and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

L.U. Jayasuriya J.

I agree.

JUDGE OF THE COURT OF APPEAL