

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

In the matter of an application for appeal under  
and in terms of Section 331 of the Criminal  
Procedure Code Act No. 15 of 1979.

The Democratic Socialist Republic of Sri  
Lanka

CA 131/2013

H.C. Puthalam – HC: 17/2008

**Complainant**

Vs.

Senanayaka Appuhamilage Harun  
Lanthra alias Paul mama

**Accused**

**AND NOW BETWEEN**

Senanayaka Appuhamilage Harun  
Lanthra alias Paul mama

**Accused – Appellant**

Vs.

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

**Complainant – Respondent**

**BEFORE: S. DEVIKA DE LIVERA TENNEKOON J**

**S. THURAIRAJA, PC, J**

**COUNSEL:** Accused – Appellant – Darshana  
Kuruppu wuth Thanuja Dissanayake  
Complainant – Respondent – ASG  
Wasantha Navaratne Bandara

**ARGUED ON** 20.10.2017

**WRITTEN SUBMISSIONS –** Accused – Appellant – 02.11.2015  
Complainant–Respondent – 15.11.2017

**DECIDED ON:** 14.02.2018

**S. DEVIKA DE LIVERA TENNEKOON J.**

The Accused-Appellant (hereinafter sometimes referred to as the Appellant) in the instant case was indicted in the High Court of Puthalam on 27.02.2008 for allegedly committing the following offences;

1. Having abducted Mohomed Ali Fathima Sharmila in order that she may be forced or seduced to illicit intercourse, or knowing it be likely that she will be forced or seduced to illicit intercourse an offence punishable under Section 357 of the Penal Code,
2. In the course of the same transaction for having committed the offence of rape in respect of the said Mohomed Ali Fathima Sharmila an offence punishable under Section 364(2)(e) of the Penal Code,
3. In the course of the same transaction for having committed the offence of wrongful confinement of the said Mohomed Ali Fathima Sharmila an offence punishable under Section 333 of the Penal Code.

The Appellant pleaded not guilty to the said charges and the Prosecution commenced trial. The Prosecution led the evidence of Mohomed Ali Fathima Sharmila (PW1), Mohammed Cader Mohammed (PW3), Perumal Gopal (PW4), Dharmapala Gedara Priyanka Sanjeevani Ariyaratne (PW6), Jayalath Jadege Indika Prabath (PW7), Dr. Yapa Mudiyanseelage Gedara Ilangarathne Banda (PW5), Udugampolage Aquinas Piyasiri Fernando (PW8) and closed the case.

The case in brief for the prosecution was that the prosecutrix had been at her Aunts place as her Aunt was ill and on or about the 19<sup>th</sup> of April 2007 the Appellant, who was known to her, had come to her Aunts place and informed her that her father had met with an accident. She had therefore left with the Appellant who had taken her to PW4's house. The Appellant had then promised that he will arraigned the marriage between the prosecutrix and her boyfriend and asked her to do as he says. The Appellant had then proceeded to remove her clothing and despite her objections had forced her to lay down on a mat in the room and climbed on her and forcibly removed her undergarments. The Appellant had then inserted his penis into her vagina. The prosecutrix had tried to stop the Appellant but had not been successful.

On the following day the prosecutrix's father (PW3) had come to the house where she was allegedly been held captive and had taken her home. However, since the Appellant had threatened her not to disclose the incident, she had not disclosed it to her father or anyone else for about 2 months until her father brought her a marriage proposal. At this point the prosecutrix had confessed that owing to what the Appellant had done to her she was unable to get married.

The Appellant made a statement from the dock denying all chargers levelled against him.

At the conclusion of the trial the learned High Court Judge found the Appellant guilty of all three chargers and sentenced him as follows;

- 1) For the offence under Section 357 of the Penal Code – Two (2) years rigorous imprisonment and a fine of Rs. 5,000/- (in default 6 months simple imprisonment)
- 2) For the offence under Section 364(2)(e) of the Penal Code – Five (5) years rigorous imprisonment and a fine of Rs. 10,000/- (in default 6 months simple imprisonment)
- 3) For the offence under Section 333 of the Penal Code – One (1) year rigorous imprisonment and a fine of Rs. 5,000/- (in default 6 months simple imprisonment)
- 4) A sum of Rs. 50,000/- as compensation to the Victim.

Being aggrieved by the said conviction and sentence the Appellant preferred the instant Appeal on *inter alia* the following grounds;

- a) The Prosecution has not proved the said charges beyond reasonable doubt,
- b) The contradictions and omissions of the prosecution witnesses go to the root of the case and thus the conviction of the Appellant cannot be substantiated,
- c) The prosecutrix's evidence does not inspire the confidence and as such is highly unsafe to convict the Appellant for the above charges,
- d) The prosecutrix's evidence was contradicted by Medical evidence and as such the conviction of the Appellant is highly unsafe,

- e) The Appellant was denied the right to a fair trial by not giving a translator.

The first charge against the Appellant is under Section 357 of the Penal Code which reads;

“Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

On a plain reading of the above provision it is evident that an essential ingredient of this offence is that a woman must be kidnaped or abducted to force or seduce her to illicit intercourse. In determining whether the Appellant had abducted/kidnapped the prosecutrix to force or seduce her to have illicit intercourse it is pertinent to consider the nature of the relationship between the Appellant and the prosecutrix and also the question of consent. These questions would be considered along with the 2<sup>nd</sup> charge against the Appellant under Section 364(2)(e) of the Penal Code which reads;

“Whoever-

(e) commits rape on a woman under eighteen years of age ;

shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall in addition be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person;”

The offence of rape is defined in Section 363 of the Penal Code.

It is prudent to note that on 27.06.2011 the prosecuting State Counsel had informed Court that he did not wish to proceed with the case on the basis that it had been revealed by the evidence that sexual intercourse had taken place with the consent of the prosecutrix (vide page 160 of the Appeal brief). The learned High Court Judge however had rejected the application of the prosecuting State Counsel and had proceeded with the trial against the Appellant and thereafter found the Appellant guilty.

When considering the evidence elucidated at trial a material incident is revealed through the prosecuting witnesses i.e. prior to the alleged incident for which the Appellant stood trial, the prosecutrix had spent a few days with the Appellant at PW4's residence. The prosecutrix alleges that the Appellant had taken her to PW4's house on the pretext of preparing a passport for her to send her overseas and kept her there for a few days. This is corroborated by PW4 who also testified that she seemed happy during her stay at PW4's residence. PW4 testifies that the prosecutrix spent about 3 weeks at his residence whilst PW3 (the father of the prosecutrix) testifies that she was missing for about 9 days.

Thereafter, PW3 had come in search of the prosecutrix and had found her at PW4's residence. The prosecutrix says that although there was a complaint

made against the Appellant to the police regarding this first incident that nothing resulted from it.

Consequently, when the prosecutrix was living at her aunt's house the Appellant had come and allegedly taken her away on the pretext that PW3 had met with an accident and thereafter allegedly raped her. On the next day PW3 (the father of the prosecutrix) had come and taken her home. The incident of rape was only revealed to PW3 on or about 09.06.2007, about 2 months from the date of the alleged incident.

The learned ASG submits the case of **Ajith Samarakoon Vs. Republic of Sri Lanka** (Kobaigane murder case) 2004 (2) SLR 209 at 220 which held that;

“just because the statement of a witness is belated the Court is not entitled to reject such statement if the reasons for the delay adduced by the witness are justifiable and probable the trial Judge is entitled to act on the evidence of the witness who made the belated statement.”

The father of the prosecutrix (PW3) in cross examination states not once but repeatedly that the prosecutrix had disclosed to him that she was raped on the same day that she was brought home. However, on the next date when he is cross-examined he states that the prosecutrix had revealed that she was raped only after the marriage proposal was brought by him and that it was 2 – 3 days after the alleged incident.

However, it was revealed that the prosecutrix had not disclosed the incident of rape for about 2 months and only revealed the incident to her father (PW3) when PW3 brought her a marriage proposal thinking she will be unable to get

married. The prosecutrix further testifies that she didn't reveal the incident of rape to anyone since the Appellant had allegedly threatened her with death and by saying that he would publish her photographs in the papers as a prostitute.

This Court finds that both the prosecutrix's and PW3's conduct and testimony sheds doubt on the prosecution's case and the delay in making the police complaint is not justifiable and not probable. The alleged incident was the 2<sup>nd</sup> time his daughter, of less than 18 years, had spent with the Appellant. When considering the evidence led by the prosecution there is no consistency about how long the prosecutrix spent with the Appellant on the first occasion and it seems that it could be between 9 days – 3 months. Although PW3 had lodged a complaint against the Appellant in connection with this incident nothing has resulted from it. When for the 2<sup>nd</sup> time the prosecutrix was found with the Appellant PW3, as her father and guardian, ought to have been more vigilant and inquired as to what happened to her, instead PW3 did nothing.

However, the prosecutrix had revealed to PW5 (JMO) when PW5 was examining her that the prosecutrix had an affair with the Appellant and that she knew that the Appellant was married (vide page 165 of the appeal brief).

Further, although the prosecutrix states in evidence that the Appellant allegedly raped her as he pleased and states that he did so about four times (the prosecutrix had told PW5 that it was about 6 times), the evidence of PW5 reveals that the injuries caused to her female genitalia were consistent with penetration more than 6 times on several occasions.

In the circumstances as discussed above it seems that the prosecutrix had a consensual relationship with the Appellant and as such the charges for illicit intercourse and rape cannot be substantiated.



The third charge against the Appellant relates to the wrongful confinement of the prosecutrix for a period of 3 days between the period 19.04.2007 and 21.04.2007. It is evident from the testimony of both the prosecutrix and PW3 that the prosecutrix had only spent one night with the Appellant on the 2<sup>nd</sup> instance.

Moreover, the many inconsistencies in relation to dates and time, contradictions and omissions in the narrative, previous and subsequent conduct of the prosecutrix and her father (PW3) and the belated complaint sheds serious doubt on the prosecution's case the benefit of which must be for the Appellant. I therefore hold that it is unsafe to allow the Appellant's conviction and sentence to stand.

In the circumstances as morefully discussed above this appeal is allowed and we set aside the conviction and sentence of the learned Trial Judge and the Accused – Appellant is hereby acquitted.

*Appeal Allowed.*

Judge of the Court of Appeal

**S. THURAIRAJA, PC, J**

I Agree.

Judge of the Court of Appeal