

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.

Court of Appeal
Case No: 145-146/2013

H.C. Puttalam No: 58/01

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

Complainant

-Vs-

1. Galmankada Dewage Nimal Jayasuriya
2. Galmankada Dewage Nimal Wasantha
3. Galmankada Dewage Upul Thushara alias
Athula
4. Ranpati Dewage Darmawardane alias
Ukkun

Accused

-And Now Between-

1. Galmankada Dewage Nimal Jayasuriya
3. Galmankada Dewage Upul Thushara alias Athula

Accused-Appellants

-Vs-

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

Complainant-Respondent

Before : S. Thurairaja PC, J

&

A.L. Shiran Gooneratne J.

Counsel : Thanuka Nandasiri with Bhagya Peiris for the 1st Accused-Appellant

Dharshana Kuruppu for the 3rd Accused - Appellant

P. Kumararatnam, SDSG for the Respondent.

Written Submissions of the 3rd Accused-Appellant filed on: 06/09/2017

Written Submissions of the 1st Accused-Appellant filed on: 05/03/2018

Written Submissions of the Complainant-Respondent filed on: 23/11/2018

Argued on : 19/11/2018

Judgment on : 11/12/2018

A.L. Shiran Gooneratne J.

By an amended indictment dated 09/09/2009, together with persons unknown to the prosecution, Galmankada Dewage Nimal Jayasuriya (1st Accused-Appellant) and Galmankada Dewage Upul Thushara (3rd Accused-Appellant), together with Ranpati Dewaga Ranjith Chandrasiri 2nd Accused, (now deceased) and the 4th Accused were indicted in the High Court of Puttalam in terms of Section 140, Section 146 read with Section 357, Section 364(2), and 10 other counts under the Penal Code in relation to the offence of abduction and rape of Disna Piumi Sirimanne (PW1).

At the conclusion of the trial, by judgment dated 06/11/2013, the learned High Court Judge convicted all the accused in respect of the relevant charges. The 1st Accused-Appellant was convicted on counts 4, 5, 6, 7, 8, 9, 10, and sentenced accordingly. The 3rd Accused-Appellant (hereinafter referred to as the Appellant) was convicted on count 1, 2, and 3 and was sentenced only on count 1 and 2. The learned High Court Judge has not given reasons as to why he did not proceed to sentence the Appellant on count 3.

When this case was taken up for argument, the counsel for the 1st Accused-Appellant moved Court to withdraw the appeal preferred against the conviction and sentence of the said Appellant. Taking into consideration the facts and the circumstances of the case, the Court permitted the withdrawal of the said appeal and

affirmed the conviction and sentence against the said Appellant and made order that the sentence be implemented from the date of conviction namely, 06/11/2013.

The 1st count preferred against the Appellant is that he has been a member of an unlawful assembly, an offence punishable under Section 140 of the Penal Code and the 2nd count is that whilst been a member of the said unlawful assembly, the Appellant did commit the offence of abduction, an offence punishable in terms of Section 146 to be read with Section 357 of the Penal Code. In the 3rd count, the Appellant is charged under Section 32 to be read with Section 357 of the Penal Code.

The only ground of appeal preferred by the Appellant is that the identification of the Appellant had not been proved beyond reasonable doubt.

Disna Piumi Sirimanne (PW1), who was 13 years of age at the time material to this incident, had been abducted when she was returning from school together with her sister Dilshani Sirimanne, (PW3). In her evidence PW1 states that, she together with her sister was riding their bicycles on their way home, from school, when the accused waylaid them on the road. PW1 had been dragged on to a parked vehicle.

The Appellant contends that he was not at the scene of the crime, when PW1 was dragged to the vehicle, however, admits that he had visited the house in which PW1 was held without her consent, where the offence of rape was committed on several occasions. Therefore, the Appellant contends that he was never a member of an unlawful assembly in the commission of the offence of abduction of PW1, as

found guilty. It is to be noted that the Appellant has only been charged of the offence of unlawful assembly and being a member of the said unlawful assembly in prosecution of the offence of abduction.

The counsel for the Appellant assails the conviction and sentence against the Appellant only on the ground of identification.

In the said back ground, the Court is required to look into whether the Appellant was a member of an unlawful assembly at the time of abduction of PW1 or continued to be a member of the said unlawful assembly.

PW1, in her evidence has clearly identified the Appellant as one of the accused who dragged her into the van and thereafter got into it. PW1 has recognized the Appellant by name and as a person living in the same village. She also claims that she has known the Appellant for 3 years to the date of the incident. PW1 has observed that the Appellant was engaged in a conversation with the rest of the accused. PW1 had been forcibly kept in a house, where the offence of rape had been committed by the 1st Accused repeatedly. In cross examination, she has reiterated her position that she remember having seen the Appellant at the time, the abduction took place. The stand taken by Appellant that PW1 has not seen the Appellant at the time of abduction together with the rest of the Accused has been firmly denied. There were no contradictions marked regarding the identity in cross examination.

Tharanga Dilshani (PW3), the sister of PW1 who was present at time of the abduction of PW1, has also identified the Appellant as one of the accused seen seated near the door of the van. PW3 was not cross examined regarding the identity

of the Appellant. Evidence of identification deposed to by PW1 was corroborated by PW3.

The Appellant in his statement from the dock did not suggest that the evidence given by PW1 or PW3 was false.

In Abeygunawardane Vs. Attorney General C.A. 105/97 decided on 18/05/99 it was held that,

“where the accused never suggested in his dock statement that the prosecutrix or her mother gave false evidence was a fact that could be relied on in deciding the credibility of the two witnesses”.

Accordingly, we are of the view that the prosecution has proved the identity of the Appellant and also that the Appellant being a member of an unlawful assembly in prosecution of the common object, did commit the offence of abduction of PW1.

In the circumstances, I hold that the identity of the Appellant has been well established, and therefore reject the ground of appeal preferred by the Appellant.

For the reasons stated above, I affirm the conviction of the Appellant dated 06/11/2013, and the corresponding sentence in respect of count 1 and 2 of the indictment.

As noted earlier, the Learned High Court Judge has convicted the Appellant on count 3 of the indictment but failed to impose a sentence on the said count. In Count 3, the Appellant is charged on the basis of common intention in the

commission of the offences preferred in count 1 and 2, in terms of Section 32 read with Section 357 of the Penal Code. We observe that the Learned Trial Judge has not addressed the relevant facts in issue, in order to establish common intention. Taking into consideration the totality of the evidence led in this case, we are of the view that there is nothing said or done, by the Appellant, at the time material to the offence which reveals a common intention by the accused in relation to the commission of the said offences. Therefore, we set aside the conviction on count 3 and acquit the Appellant on the said charge.

The sentence of 6 months Rigorous Imprisonment on count 1 and 5 years Rigorous Imprisonment and a fine of Rs. 5,000/-, in default 3 months Simple Imprisonment on count 2, imposed by the Learned High Court Judge shall take effect from today, the sentences are to run concurrently. The Registrar is directed to issue the relevant committals and to communicate this order to the Superintendent of Prisons along with a copy of this judgment forthwith.

Appeal partly allowed.

JUDGE OF THE COURT OF APPEAL

S.Thurairaja PC, J

I agree.

JUDGE OF THE COURT OF APPEAL