

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

In the matter of an Appeal under and in terms of Article 138(1) of the Constitution read together with Section 11(1) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 with the Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

CA No: CA/HCC/ 0047/20
HC: Ratnapura: HC 205/17

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Sudu Hakurugee Chaminda Kumara

Accused

And now between

Sudu Hakurugee Chaminda Kumara

Accused- Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunaratna J.**

&

R. Gurusinghe J.

Counsel: K. Kugaraja AAL for the accused-appellant

Chethiya Goonesekara PC, ASG for the Complainant-Respondent

Written Submissions: By the accused-appellant on 07.03.2022

By the Complainant-Respondent 02.08.2021

Argued on : 16.03.2022

Decided on : **24.03.2022.**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Trial Judge of the High Court of Ratnapura, dated 23.04.2020, by which, the accused-appellant, who is before this Court, was convicted and sentenced to 22 years rigorous imprisonment and Rupees Two Hundred Thousand (Rs. 200,000/-) compensation for having committed the Kidnapping and rape of Sudu Dewage Rasika Darshani.

Altogether there were 2 charges in the indictment. They are as follows;

Count 1

- (i) On or about 16.09.2006, the accused named in the indictment was charged for committing the kidnapping of Sudu Dewage Rasika Darshani, within the jurisdiction of High Court Ratnapura under and in terms of section 357 of the penal code.

Count 2

- (ii) On the date referred to in Count No. 1 above, and in the course of the same transaction, the accused named in the indictment was charged for committing rape of Sudu Dewage Rasika Darshani, within the jurisdiction of High Court Ratnapura under and in terms of section 364(1) of penal code as amended by Act No.22 of 1995.

The accused-appellant pleaded not guilty on 11.01.2019 to the indictment and opted for a non-jury trial.

At the High Court, the prosecution had led the evidence of 6 witnesses. The evidence given by the victim Sudu Dewage Rasika Darshani (PW 1) is as follows;

“The witness (prosecutrix) was 19 years old at that time. The victim had said that on 16.09.2006, she and her sister had gone to the shop. Then she had gone to her sister's house. After that, she had gone to the PW 5's house to collect “seettu money”. After she collected money, when she was going home the accused-appellant met her. The accused-appellant had covered tightly the mouth of the victim by hand and strangled her. The witness had known the accused-appellant since childhood. She had screamed when the accused-appellant was putting the witness head underwater.”

“The accused dragged the witness to a forest and kicked the witness. The accused-appellant had assaulted the witness when the witness had tried to escape from the accused-appellant. She further said that she had no strength to escape from the accused-appellant. The accused-appellant had dragged the witness to a tea estate and the witness had said that she had seen the police coming to her house. After that, the accused had dragged her to a `Waadiya'. The witness had testified that the accused had worn a short trouser and a t-shirt only at that time. The accused-appellant had tried to take off the witness's clothes but she had scuffled with the accused-appellant with regard to this action. The accused had removed the witness's clothes but she resisted, and she had said "mata gedara yanna one" but the accused-appellant had replied, "ubata gedara yanna denne na", the accused-appellant had scolded in obscene words. After that, the witness had been pushed and her clothes were torn. At the time, she had worn a skirt, a blouse, a brassier, and a short trouser. She had struggled but had no chance to escape. The accused-appellant had told "wade karagena misa thama yanne na". Then the accused-appellant lay on her body and inserted his male organ into her female organ and had sex with her on a rock and her back touched the surface of the rock. The witness had resisted and struggled but the accused-appellant had grabbed the victim's neck and at that time she was confused. He had a sexual encounter with the victim forcefully for 30 minutes. The

witness (victim) further mentioned that she saw a white colour liquid on the accused appellant's penis. She had seen sperm on her clothes. After that, the witness had been told by the accused-appellant to wash her body and clothes as her clothes were muddy. The accused appellant had said "gedara palayan mata ubawa ekan yanna ba mata ganiyek innawa". Then she had gone home and she further said that the accused-appellant had possessed a mobile phone."

The witness PW 8, Judicial Medical Officer said that there was no evidence of vaginal penetration. However, the finding was consistent with inter labia penetration probably with the attempt to penetrate the vagina. There was also evidence of physical injuries of intentional violence. There was a large number of abrasions on the lower part of the lower limbs. The victim had said that these were caused by plant pricks called "Kakilla". There were also injuries on the buttock and back of the elbows suggestive of the position of the victim during an alleged act. The witness had said that all medico-legal findings taken together are well consistent with the given history of sexual assault.

According to the dock statement of the accused-appellant (Sudu Hakurugee Chaminda Kumara), he denied the allegation against him with regard to this heinous crime. He had said that he had a relationship with the victim (PW 1). He had known them for a long time on that particular day, their brothers had come when the accused-appellant and victim were chatting nearby the stream. After that the victim had said "Aiyala dakkoth mata gahai eka hinda duwamu". Then they had run away to a tea estate in advance after that had come to the main road. The accused asked the victim to go home but she had refused his request and said "mata aiyala gahai gedara yanna ba ". Then they had come along the main road. The accused-appellant had asked the victim to go home at the dawn of the next day and she had gone home.

After the trial the accused-appellant was convicted as charged and was sentenced as follows;

For Count number 1 - 06 years rigorous imprisonment - Fine of Rs. 20,000/- carrying a default term of 6 months simple imprisonment.

For Count number 2 - 14 years rigorous imprisonment and a fine of Rs. 50,000/- carrying a default term of 6 months Simple Imprisonment - Compensation in a sum of Rs. 200,000/- carrying a default term of 2 years Simple Imprisonment and all sentences to run consecutively.

The appellant has preferred this appeal claiming that this conviction and sentence is wrong. The learned counsel for the accused-appellant informs court on the date this matter was taken up for the argument that he is not challenging the conviction. The learned counsel requested to consider the following mitigating factors to reduce the sentence.

- (i) The accused-appellant has no previous conviction.
- (ii) He has saved the time in the Court of Appeal.

The learned President's Counsel for the respondent submitted that the reasons mentioned to reduce the sentence on behalf of the accused-appellant are reasonable.

The learned counsel for the accused-appellant informed the court that the accused-appellant was not having any previous convictions and he is a father of 2 children. Therefore, requested the court to reduce the sentence as he has pleaded guilty for all 2 counts and save the valuable time of the High Court.

The accused-appellant was having two children and we can understand that the wife and the children will suffer due to the bad behaviour of their father. It is important to consider that the accused-appellant save the valuable time of this court by challenging only the sentence. Since he is

not having any previous convictions, we believe that the accused-appellant should be given some relief by this court.

Considering the circumstances of the case we decide to impose 10 years rigorous imprisonment instead of 14 years, for the 2nd count and the other sentences to remain the same. Also, we decide that all sentences run concurrently with effect from 23.04.2020.

Appeal dismissed subject to the above alteration.

The registrar of this court is directed to inform the prison authorities about this Judgement. Send a copy of this judgement along with the original case record to the High Court of Ratnapura, forthwith.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal