

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

In the matter of an appeal against an order of the High Court under Section 331 of the code of Criminal Procedure Act No. 15 of 1979.

CA No: CA/HCC/ 0313-314/2016
HC: Colombo: HC 2665/2005

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

1. Pathirajawansa Kudahettige Rajawansa Karunadheera
05th Post, Anupallama, Wellawaya
2. Athauda Arachchilage Chaminda Shrinath
No. 20, Yudaganawa Road, Buttala

Accused

And now between

1. Pathirajawansa Kudahettige Rajawansa Karunadheera
05th Post, Anupallama, Wellawaya
2. Athauda Arachchilage Chaminda Shrinath
No. 20, Yudaganawa Road, Buttala

Accused- Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Yalith Wijesundara AAL for the 02nd Accused-Appellant

Riyaz Bary DSG for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 02.04.2018 and 11.02.2020.

By the Complainant-Respondent 16.07.2018.

Argued on : 24.03.2022

Decided on : **25.05.2022.**

N. Bandula Karunarathna J.

This appeal is preferred against the Judgement, delivered by the learned Judge of the High Court of Colombo, dated 21.09.2016, by which, the 1st and 3rd accused persons, were convicted and sentenced to 10 years of Rigorous Imprisonment. Both of them preferred this appeal against the said conviction and the sentence. The 1st accused-appellant decided to withdraw his appeal on 05.10.2021. The 3rd accused person decided to proceed with the appeal. Now he is being considered the 2nd appellant in this appeal and he is contesting only the sentence. The 2nd accused person was acquitted after trial by the learned High Court Judge on 21.09.2016.

The 2nd appellant, hereinafter referred to as the "appellant", was indicted in the High Court of Colombo along with 2 others on the following charges;

1. That the 3rd accused-appellant, Athauda Arachchilage Chaminda Srinath committed the offence of abduction on the 27.09.2002 of Manamperige Priyangani (a female under 16 Years of age) from her lawful custodian namely Manamperige Gunadasa at Pillewela within the jurisdiction of Badulla High Court, which is an offence punishable under section 354 of the Penal Code.
2. That the 1st accused-appellant namely Pathiraja Wansha Kudahettige Raajawansaha Karunadheera committed the offence of rape at Pillewela within the jurisdiction of Badulla High Court, on the 27.09.2002 of Manamperige Priyangani (a female under 16 Years of age) which is an offence punishable under section 364(2)(e) of the Penal Code as amended by Act No 22 of 1995.

3. Charge against the 2nd accused person.
4. That the 3rd accused-appellant namely Athauda Arachchilage Chaminda Srinath committed the offence of rape at Pillewela within the jurisdiction of Badulla High Court, on 27.09.2002 of Manamperige Priyangani (a female under 16 Years of age) which is an offence punishable under section 364(2)(e) of the Penal Code as amended by Act No 22 of 1995.

On the direction of His Lordship the Chief Justice this case was transferred to Colombo High Court, from Badulla High Court and then on the 07.12.2005 proceeded for trial in the High Court of Colombo.

The case has been taken up for trial after the accused persons pleaded not guilty and preferred a non-jury trial for the charges against them. Eight witnesses gave evidence for the prosecution and P 1 to P 3 were marked as documents. The 1st and the 3rd accused-appellants gave evidence on behalf of the defence.

At the end of the High Court trial the 1st accused-appellant was found guilty of the charge of rape and he was sentenced to ten years of rigorous imprisonment. He was ordered to pay a fine of Rs.5,000/- and in default 3 months simple imprisonment. He was further ordered to pay a compensation of Rs.50,000/= to the Prosecutrix and in default 12 months simple imprisonment.

The 3rd accused person (2nd accused-appellant) was found guilty of both the charges. For the first charge under section 354 of the Penal Code, he was sentenced to seven 7 years of rigorous imprisonment. He was ordered to pay a fine of Rs.5,000/- and in default 3 months simple imprisonment.

The 3rd accused person (2nd accused-appellant) was sentenced to 10 years rigorous imprisonment for the second charge against him, under section 364(2) (e) of the Penal Code. He was ordered to pay a fine of Rs.5000/- and in default 3 months simple imprisonment. He was further ordered to pay a compensation of Rs.50,000/= to the Prosecutrix and in default 12 months simple imprisonment.

The present appeal is against the said conviction and the sentence.

The grounds of appeal are as follows;

- (i.) The conviction of the accused-appellants is solely based on the evidence of the Prosecutrix.
- (ii.) The evidence of the prosecutrix contains many vital infirmities and thus is not credible at all.
- (iii.) The initial medical report which was provided by the medical officer at the Buttala Hospital has arrived at the conclusion that she has not been subjected to any sexual harassment. Only with the interference of an NGO called SEDEC, the

prosecution has obtained a medical report from a medical officer at Karapitiya Hospital in Galle, a month after the purported incident.

- (iv.) There is no identification parade report available in the brief, and there are issues related to the identification.

Prosecutrix states in her evidence that at the time of this purported incident, she was a girl at the age of 14, studying in grade 9 in the Waguruwela Junior School. She along with the sister were staying with their grandfather and grandmother. On the day of the incident, she was sick with fever and she went alone in the morning at around 9 am to the Buttala District Hospital that was on 27.09.2002, she went for a blood test. She reached the hospital by 10 am and gave the blood for the test and left the hospital around noon.

She came to a bus halt and waited there for about 15 minutes. A three-wheeler stopped near her, there were three men inside. A boy from that three-wheeler got down from it and covered her mouth with a handkerchief, which made her unconscious. She states that when she regained her consciousness, she found herself on a rock which was surrounded by a jungle, she thought that it was in Okkampitiya. When she became conscious, she felt that somebody had raped her. She states that 3 people threatened her, removed her clothes and repeatedly raped her. She had struggled but couldn't survive. They brought her a meal but she didn't eat.

They stayed on the rock there till the nightfall and thereafter they took her into another three-wheeler, took her down and that vehicle went into a road at the other side of the district hospital. She states that at a short distance from the district hospital, there was a big house surrounded by sugar cane. There was a big dog that looked like a police dog and there were two people in that house. One of them had a disability in a leg. The people came in the three-wheeler and handed over her to the custody of those people.

The person who was not disabled took her to a room and raped her. She states that the two people in that house raped her over and over again until dawn. In the morning another two persons came in a three-wheeler and came to this house early in the morning. The prosecutrix identified one of them as the third accused person and he is the 2nd appellant. Learned counsel for the appellant argued that he has not participated in the abduction and thus the abduction charge against him cannot stand.

They took her into the three-wheeler, telling her that they will drop her at home. Then came towards her house, but they took a different route through sugar cane and went towards the quarters of the workers of the Sugar Factory. They opened one of the quarters and put her in. She states that in that quarters, the rooms were separated using wood. The room was empty. After some time, the 1st accused came inside the room and raped her. He left and in no time the 3rd accused, who took her in the three-wheeler came in and raped her again. Then the 3rd accused (2nd appellant) bought her a parcel of food. She didn't even open it. Then they informed her to get ready to go home.

She states that she overheard the 1st accused talking to the 3rd accused and telling him of taking her to another house which is inside a banana plantation. Thereafter the 3rd accused (2nd appellant) took her in a Push bicycle and started travelling. She states that when they came near a culvert she jumped off the bicycle and started running and screaming. At that time the 3rd accused (2nd appellant) went away on his bicycle, as the crowd gathered around her, she asked an elderly person to take her to the police station. He has taken her on his bicycle to the Buttala Police. Then the police investigations were started upon her Complaint.

When this appeal was taken up for argument on 21.02.2022, the learned counsel for the appellant (3rd accused) informed the court that his client has decided not to challenge the conviction for the rape charge and requested to acquit him from the abduction charge as there is no evidence against him to prove it.

Section 352 of the Penal Code is as follows;

Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to “kidnap such minor or person from lawful guardianship “.

Section 353 of the Penal Code is as follows;

Whoever by force compels, or by any deceitful means, or by abuse of authority or any other means of compulsion, induces any person to go from any place, is said to” abduct” that person.

Section 354 of the Penal Code explains the Punishment for kidnapping as follows;

Whoever kidnaps any person from Ceylon or lawful guardianship shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to a fine.

According to section 352 of the Penal Code, this offence consists "out of the keeping of the lawful guardian of such minor, without the consent of such guardian." Therefore the 3rd accused person kept the prosecutrix out of the lawful guardian for some time and his wrongful act was within the meaning of section 352 of the penal code. The argument raised by the learned counsel for the appellant has no merit and we decide the appellant is liable for committing the offence under section 354 of the Penal Code. Considering the evidence of the prosecutrix this court decides the appellant cannot escape from the kidnapping charge against him.

There is no material before this court to interfere with the said sentence against the appellant either in law or fact.

Accordingly, we affirm the conviction and the sentence and dismiss the appeal.

It was revealed that the appellant is the father of 2 small children. He was convicted and sentenced on 21.09.2016. For nearly 6 years he is inside the prison and therefore if his sentence is backdated to 21.09.2016 the appellant would be able to unite with his family soon.

Considering the circumstances of the case, we direct the two sentences (7 years rigorous imprisonment and 10 years rigorous imprisonment) to run concurrently, with effect from 21.09.2016.

Subject to the said alteration this Appeal is dismissed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal