

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

In the matter of an appeal under section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist
Republic of Sri Lanka

Court of Appeal Case

No. HCC/413/19

High Court of Rathnapura

Case No. 67/2018

Complainant

Vs.

Galappaththilage Lesely
Priyankara

Accused

AND NOW BETWEEN

Galappaththilage Lesely
Priyankara

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**
 WICKUM A. KALUARACHCHI , J

COUNSEL : Shehan de Silva with N. Maharachchige and
 H. Senevirathne for the Accused-Appellant.

 Anoopa de Silva, DSG for the Respondent.

WRITTEN SUBMISSIONS

TENDERED ON : 26.11.2021 (On behalf of the Accused-Appellant)
 02.03.2022 (On behalf of the Respondent)

ARGUED ON : 12.10.2022

DECIDED ON : 03.11.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted before the High Court of Rathnapura for the following three charges.

1. On or about the 15th of March 2008, committing the rape of Godaarawe Kankanamalage Hema Mallika, an offence punishable under section 364(1) of the Penal Code.

2. During the same transaction, committing the offence of Grave Sexual Abuse of the said victim by causing anal penetration, an offence punishable under section 365(2)(b) of the Penal Code.
3. During the same transaction, committing the offence of Robbery of a gold ring worth Rs. 1400/- and a pair of gold bangles worth Rs. 250/- from the possession of the said victim, an offence punishable under section 380 of the Penal Code.

After the trial, the learned High Court Judge convicted the accused-appellant for all three counts and sentenced him. This appeal has been preferred against the said convictions and sentences. At the hearing of this appeal, the learned Counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions. Both parties have tendered their written submissions, prior to the hearing.

The facts of the prosecution case could be summarized as follows:

At the time of the incident, the prosecutrix was 63 years old. She was 73 years old at the time she testified. During the time of this incident, she lived alone in her partly-constructed house after the death of her husband. She had gone to sleep around 9.30 p.m. on the day in question. Someone had touched her hand while she was sleeping. She had asked the person, thinking it was her son, "why did you come now son, where is the light?" to which the person who touched her hand replied, "get up, to give you light." Thereafter, the offender had given two to three blows to the prosecutrix, and she had felt her neck being squeezed. Thereafter, she had been raped and sexually abused for about two hours. Then he commanded the prosecutrix to get down from the bed and threatened her to give him money and jewelry.

The prosecutrix had opened the almirah and had given him jewelry. Thereafter, he had pressed a pillow against the face of the prosecutrix and had turned her to the other side, and left her, threatening not to get up until the morning.

Although six grounds of appeal have been stated in the written submission tendered on behalf of the appellant, the learned Counsel for the appellant pursued only the following two grounds:

- a) The learned High Court Judge has failed to consider the weakness of the evidence in respect of the identification of the appellant.
- b) The learned High Court Judge has failed to give the benefit of the doubt to the accused-appellant considering the difficulty of identifying the offender in low light.

Hence, the only issue to be determined in this appeal is whether there was proper identification of the accused-appellant. The report pertaining to the identification parade held in the Magistrate's Court of Balangoda has been marked as P-3. Accordingly, PW-1, the prosecutrix, has identified the appellant in the identification parade as the person who committed the rape and grave sexual abuse. Identifying the accused in the identification parade is a piece of evidence that helps to prove the identity of the accused. However, it is not conclusive proof regarding the identification, and the said evidence has to be evaluated with the other circumstances of the case.

In the case at hand, PW-1 stated in her evidence, found at page 96 of the appeal brief, that "William," to whom the prosecutrix had informed this incident, told her that the villagers who attended a funeral had told him that this offence may have been committed by the appellant

and some other boy. When the appellant and the other person were drunk and misbehaving at the funeral, the villagers who were there had said so. Under these circumstances, even if PW-1 did not see who committed the offences, she could have identified the appellant in the identification parade because she stated that the appellant is a known person in the village. Even at the commencement of the identification parade, objection has been taken on behalf of the appellant that there was no purpose in holding an identification parade, as the appellant and PW-1 knew each other.

Therefore, it is necessary to consider carefully the way PW-1 identified the appellant. The learned counsel for the appellant contended that PW-1 identified the appellant by seeing only his eyes, according to her own evidence. The contention of the learned counsel is correct because, in perusing pages 83 and 102 of the appeal brief, PW-1 has specifically stated that she identified the appellant when only the eyes were exposed and the rest of his face was covered with a bedsheet that was at her home. The learned Deputy Solicitor General appeared for the respondent submitted that on one occasion, PW-1 stated that she identified the appellant by his face. (Page 95, last answer) However, it is apparent when she was questioned whether that person had a beard, she clearly stated that she was unable to answer that question because he had covered his face except his eyes. Apart from that, when PW-13, the woman sub-inspector who investigated this matter, stated in her evidence that PW-1 described that she saw the eyes of the person who committed the crime and she remembered him having big eyes. So, it is apparent that PW-1 had identified the appellant by seeing only his eyes when the rest of his face was covered.

The learned Deputy Solicitor General appeared for the respondent did not dispute the arguments advanced by the learned counsel for the

appellant in respect of the identity of the accused-appellant. However, she asked the court to consider the fact that PW-1 had the opportunity to see the offender because the offender was in close proximity to her. “Turnbull rules” or guidelines regarding the identification were set out in the case of Regina V. Turnbull - (1976) 3 WLR 445. According to the Turnbull rules, it has to be examined closely the circumstances in which the identification by each witness had been made. How long did the witness have the accused under observation? At what distance? In what light? are material factors to be considered. According to the “Turnbull rules”, the distance between the witness and the accused is also a relevant factor in identification. However, these guidelines are to be applied in instances where the witness could see the face of the accused. In the instant action, although the offender was in close proximity to the PW-1, she could not see his face but had only seen his eyes. Therefore, the issue here is not that she had the opportunity to see him in close proximity but whether she could identify the offender by only seeing his eyes.

Another important matter to be considered is that, on page 90 of the appeal brief, when PW-1 was asked whether there was light, she stated that she saw the eyes of the appellant and identified him by the light of the torch in the appellant’s hand. When a person holds a torch, the light is usually directed away from him rather than towards him. Therefore, another doubt arises whether she could identify a person by seeing only his eyes in this low light emitted by the torch.

Under the above circumstances, I am of the view that the probability of making a specific and accurate identification of the offender is in doubt. Reasonable doubt arises as to whether PW-1 has properly identified the person who committed the offences. The said doubt becomes more intense as she has not stated about the appellant when

making a complaint to the police after the incident. When PW-1 was questioned about this, she stated that since she did not know the name of the appellant, she did not mention about him. She stated clearly in her evidence that she knew the appellant prior to the incident because he lived in the same village. However, when she gave her history to the doctor who examined her after the incident, she stated that on 15th March 2008, an unknown person had sexual intercourse with her forcibly. PW-5, the doctor also confirmed in his testimony that PW-1 stated in giving the history that an unknown person raped her. Hence, it is apparent that if she identified the appellant at the time of the incident, she should have at least told the doctor that a known person had raped her. By stating to the doctor two days after the incident that an unknown person raped her, it is evident that she had not identified the person who raped her and sexually abused her.

If the jewelry allegedly robbed from PW-1 were recovered, it would be a piece of evidence which would help in identifying the offender. In the absence of jewelry being recovered, there was no other evidence to establish the identity of the offender.

Therefore, I agree with the contention of the learned counsel for the appellant that the identity of the appellant is in doubt. No charge could be proved against the appellant unless his identity could be established. Accordingly, I hold that it is not proved beyond a reasonable doubt that the appellant and no one else committed the offences specified in the indictment.

Accordingly, I set aside the judgment dated 20.12.2019, the convictions, and the sentences. The accused-appellant is acquitted of all three charges against him.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL