

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

In the matter of a petition of appeal in  
terms of section 331 (1) of the Code of  
Criminal Procedure Act No 15 of 1979  
Democratic Socialist Republic of Sri  
Lanka.

**High Court (Kaluthara)**

**Case No: H.C. 395/04**

**C.A. Case No: 297/12**

Democratic Socialist Republic of Sri  
Lanka.

**Complainant**

**Vs.**

1. Kolamba Arachchige Sarath
2. Kolamba Arachchige Siripala

**Accused**

AND NOW

1. Kolamba Arachchige Sarath
2. Kolamba Arachchige Siripala

Kithulgalvila, Mahagama

Accused Appellants

**Vs.**

Democratic Socialist Republic of Sri  
Lanka.

**Respondent**

**BEFORE**

: **H.N.J. PERERA, J**  
**P.W.D.C. JAYATHILAKE, J**

**COUNSEL**

: Charith Galhena for the Accused  
Appellant.

Shanil Kularatne SSC for the  
Respondent

**ARGUED ON**

: 14.11.2014

**DECIDED ON**

: 12.03.2015

**P.W.D.C. Jayathilake, J**

On 1<sup>st</sup> of May in the year 2000, 19 year old Nisansala went to bed with her husband Sunil Kumara at about 8.30 in the night. Nisansala was an employee at Body Line Garments and her husband was an employee of Damro. They were suddenly woken up by a sound at midnight. When they came to open the door thinking that was the mother of Sunil Kumara who was residing close by, they have noted that the front door was opened. Then at once six persons, three from the front door and three from the back door entered in to the living room of their small house. Three of them dragged Nisansala to the bed room which was partitioned by polythene sheets while the other three were holding the husband in the living room. One of the persons entered in to the house was armed with a sword and others with knives. All of them were carrying torches.

The 1<sup>st</sup> and the 2<sup>nd</sup> Accused Appellants who were among the three persons who had taken Nisansala in to the bed room and raped her. They threatened her that she and her husband would be killed. Nisansala and her husband identified the 1<sup>st</sup> and the 2<sup>nd</sup> Accused Appellants when they removed the clothes which they have used to cover their faces. They robbed her gold chain and the pendant and it was revealed that they have also taken cash worth Rs: 2500/= collected in a till.

Kolamba Arachchige Sarath and Kolamba Arachchige Siripala respectively the 1<sup>st</sup> and 2<sup>nd</sup> Accused Appellants have been indicted on 6 counts punishable under the Penal Code. The charges brought against were being members of an unlawful assembly, punishable under Sec. 140, committing unlawful assembly with common intension to commit robbery punishable under Sec. 443 read with Sec. 146, committing robbery while being members of unlawful assembly punishable under Sec. 380 read with Sec. 146, committing gang rape punishable under Sec. 364(2), committing trespass by entering in to Nisansal's house with common intention for committing an offence, punishable under Sec. 443 read with Sec.32, committing robbery of jewellery worth Rs: 12,800/= and cash worth Rs: 2500/= punishable under Sec. 380 read with Sec.32, of the Penal Code.

After trial they have been convicted for all charges level against them and have been sentenced in the following manner.

The 1<sup>st</sup> and the 2<sup>nd</sup> Accused Appellants were sentenced for six months imprisonment for the 1<sup>st</sup> count. They were sentenced for five years rigorous imprisonment for the 2<sup>nd</sup> count. Ten years rigorous imprisonment and a fine of Rs: 10,000/= carrying a default sentence of three months simple imprisonment, for the 3<sup>rd</sup> count. Twenty years rigorous imprisonment and fine of Rs: 20,000/= carrying a default sentence of three months simple

imprisonment and also a payment of compensation Rs: 400,000/= by each to the victim for the 4<sup>th</sup> and 5<sup>th</sup> counts. The trial judge has stated that no sentences would be passed for the 6<sup>th</sup> and 7<sup>th</sup> counts as they are alternative charges. The judge has further directed all the imprisonment sentences to be effected consecutively. Being dissatisfied with the convictions and the sentences the 1<sup>st</sup> and 2<sup>nd</sup> Accused Appellants have preferred this appeal.

The main contention of the counsel for the Accused Appellant was that there was a great doubt about the identification of offenders. Nisansala has come to reside in that place 8 months prior to the incident after her marriage. She had seen the Accused Appellants prior to the incident as they were the residents of that area, but she didn't know them by their names.

Nisansala's husband is a person from the same area and also a relative of the Accused Appellants and both the Accused Appellants were known to him from their childhood. The counsel for the Accused Appellants contended, if Nisansala and her husband identified the Accused Appellants at the time of the incident, names of the Accused Appellants would have been mentioned in the 1<sup>st</sup> complaint made to the police which has not been done. Even though Nisansala and her husband have identified the Accused Appellants at the identification parade there are contradictions inter say, in evidence and in the statements made at the identification parade, submitted the counsel.

The learned trial judge has analyzed the evidence of Nisansala and her husband together with the evidence of the Judicial Medical Officer and has come to the conclusion that there is no doubt that the incident of rape had taken place. He has rejected the allegation made on behalf of the Accused Appellants that they have been shown to the witnesses at the police station prior to the identification parade.

As there were no circumstantial evidence against the Accused Appellants the only evidence available was the direct evidence of Nisansala and her husband. The validity of the evidence of them entirely depends on the accuracy of the identification of offenders at the time of the incident. When considering the evidence of Nisansala and her husband as a whole it is obvious that all persons entered in to the house were covering their faces at the beginning. According to Nisansala she could identify the Accused Appellants when the face coverings come off while she was being raped.

Incident of rape had taken place inside the bed room which was partitioned with polythene sheets. At that time Nisansala's husband was being held by some of the offenders in the living room.

It is not clearly mentioned the exact moment the Accused Appellants faces were seen by Nisansala's husband. He has admitted that he had known the Accused Appellants from their childhood, as they were residing about 400m

away from their house. Furthermore he has admitted he did not mention their names in the complaint because he could not properly identify them.

Despite the fact that the Accused Appellants had allegedly been shown to the witnesses prior to the identification parade, identification of them in the parade couldn't be considered as an act of so much validity, because witness should have been aware that two neighbors had been arrested in this connection. If the police were able to take two persons into custody out of the six, the police could have been able to elicit several more matters with regard to the incident through these two persons such as the others involved, jewelry and money robbed and weapons and other materials used. However, the police have not discovered any of the above. It is a golden thread spreading throughout the criminal law that a criminal charge has to be proved beyond reasonable doubt. If a reason can be pointed out that leads to doubt, it denotes whether the occurrence or existence of the incident has been proved beyond reasonable doubt.

In the instant case each and every point discussed above could be pointed to create doubt about the fact that whether the two persons arrested had actually committed the offence. Therefore, I am of the view that the Accused Appellants are entitled to receive the said benefit of doubt. As such, it appears

that the learned trial judge has failed to be mindful of the above state of affairs and has acted on emotions as the crime that had taken place was one condemned ethically by the society. Similarly, the civilized society accepts that one innocent person being convicted is worse than a thousand culprits being acquitted. Therefore, this court decides to set aside the conviction and the sentences imposed and acquit the Accused Appellants.

*Appeal Allowed.*

**JUDGE OF THE COURT OF APPEAL**

**H.N.J. PERERA J**

I agree

**JUDGE OF THE COURT OF APPEAL**