

**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 (Negombo)**

**Case No: HC 181/09**

**C.A. Case No: 293/2012**

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

**Complainant**

**Vs.**

1. Suraveera Arachchige Kamalasiri,  
No. 215,  
05 Patumaga,  
Abagahahena Nawa Janapadhaya,  
Badalgama.

2. Walpitagamage Chandana

Kumara, No. 63, 03 Patumaga,

Abagahahena.

3. Wijethunga Mudiyansele

Pradeep Kumara alias Thushara,

No.71, 04 Patumaga, Nawa

Janapadhaya, Bavalgama.

**Accused**

**AND**

**NOW**

4. Suraveera Arachchige Kamalasiri,

No. 215,

05 Patumaga,

Abagahahena Nawa Janapadhaya,

Badalgama.

5. Walpitagamage Chandana

Kumara, No. 63, 03 Patumaga,

Abagahahena.

6. Wijethunga Mudiyansele

Pradeep Kumara alias Thushara,

No.71, 04 Patumaga, Nawa

Janapadhaya, Bavalgama.

**Accused Appellants**

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**Complainant Respondent**

**BEFORE**

: H.N.J. PERERA, J

P.W.D.C. JAYATHILAKE, J

**COUNSEL**

: Chandana Sri Nissanka for the 1<sup>st</sup>

And 2<sup>nd</sup> Accused Appellant.

P. Kumararatnam D.S.G for the

Respondent.

**ARGUED ON** : 18.11.2014

**DECIDED ON** : 19.03.2015

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

Indrani was woken up in the night since she was at once unable to breathe.

She found that Kamalasiri had been squeezing her neck and mouth. He raised

her skirt, inserted his male organ into her vagina and had intercourse for about

15 minutes. After that, he having wiped his male organ with her blouse and

went away. She couldn't shout due to her neck and mouth being squeezed.

Just then, Wasantha entered and he too inserted the male organ into her

vagina and remained for about 15 minutes. After he left she was going out

thinking to tell the people of the house in front but, she couldn't do so. Thushara came into the house, dragged her back to the place where she was and attempted to squeeze her neck and mouth. He asked her for what was given to others. He got on her body, raised the skirt and inserted the male organ to her vagina and had sex for about ten minutes. She fainted and only at 12 noon of the following day, she woke up. In the evening, she told Hemalatha her sister in law residing close by about this. Indrani didn't go to police as she was threatened by the offenders, not to go to the police. Her husband who was working at a brick kiln came after 3 days. But, he went back to his work place the following morning advising her to go to the police and make a complaint.

All three offenders were known to Indrani as they were from the same village. She identified them at the time of the incident for two reasons. One is that their voices were familiar to her. The other is the moonlight that infiltrated through the polythene sheet that covered the window.

Indrani made a complaint to the police several days after the incident. She had an explanation for the delay, that was the fear due to the threat made by those three. On Monday, as she knew that Kamalasiri was to go to Bingiriya for a court case, she went to the police.

Suraveera Arachchige Kamalasiri, Walpitagama Chandana Kumara alias Wasantha and Wijetunga Mudiyaaselage Pradeep Kumara alias Pradeep Thushara were indicted for “gang rape” punishable under Sec. 364 (2) (F) of the Penal Code. They were convicted after trial and the sentence of 12 years of imprisonment was passed and a fine of Rs. 5000/= was imposed each carrying a default sentence of 3 months simple imprisonment. In addition, a compensation of Rs.20,000/= to be paid to the victim by each carrying a default sentence of 12 months simple imprisonment. Being dissatisfied with the said conviction and the sentence, the Accused Appellants have preferred this appeal before this court.

The learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Accused Appellants submitted that the tests of probability, inconsistency and credibility were failed in the prosecution

case. The prosecutrix had made a belated complaint. The learned counsel argued that prosecutrix's version had not been corroborated by the medical evidence.

The learned counsel for the 3<sup>rd</sup> Accused Appellant contended that the credibility of the evidence of the prosecutrix was very poor and the whole story revealed by Indrani was inherently improbable. He emphasized the following facts revealed by Indrani in her evidence. The 1<sup>st</sup> Accused had been identified on his own introduction. She couldn't raised cry when all three did the act of sex, because she had been held by her neck and mouth by them. The 1<sup>st</sup> Accused Appellant had told her at the time of the incident of rape that he was going to Bingiriya for a court case. Indrani, in the short history given to the Judicial Medical Officer has stated that the Accused were armed with a sword. The learned counsel argued therefore, the totality of the circumstances causes suspicion. He further argued that the involvement of the 3<sup>rd</sup> Accused Appellant in the incident of raping Indrani is highly unbelievable as the 3<sup>rd</sup> Accused

Appellant had been the boy friend of Indrani's daughter, according to the evidence of Indrani.

The learned State Counsel who made submissions supporting the conviction invited the attention of court to the evidence of Indrani. He pointed out that Indrani had begged the 3<sup>rd</sup> Accused Appellant for the reason why she was being harassed despite her innocence. He submitted that this showed the genuineness of the witness.

It is obvious that there is no direct evidence that corroborates the verity of Indrani's evidence. Hemalatha and her husband, the other two witnesses say what Indrani had told them. Indrani had divulged the incident to Hemalatha in the evening of the next day. Still for all the learned trial judge has come to the conclusion that he decides that Indrani's evidence was acceptable in relation to the incident on the criteria of tests of probability and credibility. He has followed the principle laid down in *Keerthi Bandara Vs. A.G*<sup>1</sup> that belated complaint should not be rejected provided that the delay has been substantiated acceptably. The explanation of Indrani that she was reluctant to



go to the police because the Accused Appellants were thugs of the village (ගමේ මරු) has been accepted by the learned trial judge. Both occurrence of the rape and the reason for the delay in complaining to the police are the questions of facts. It was held in *Dharmasiri V. Republic of Sri Lanka*<sup>2</sup> that evidence of the witness should not be rejected on the ground of delay itself if the delay has been reasonably explained. The Supreme Court has decided that deciding on the questions of facts is a duty of the trial judge and the court of appeal should not intervene in such decisions.

It was held in *AG Vs Mary Theresa*<sup>3</sup>

*“Credibility is a question of fact and not law. Appellate Judges have repeatedly stressed the importance of trial Judges’ observations of the demeanour of witnesses in deciding questions of fact. Demeanour represents the trial Judges’ opportunity to observe the witness and his deportment.”*

Shirani Thilakawardane J. in agreement with Sripavan J. (as he then was) and Imam J. in the said judgment of the Supreme Court has further held

*“Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance”.*

All three Accused Appellants in their dock statements had stated that each of them had a affair with Indrani’s daughter. Indrani was against the said affairs and that was the reason for Indrani’s leveling an allegation against them. The learned trial judge had rejected those statements for the reason that the said statements were devoid of probability and credibility. When considering the facts involved in the instant case with the conclusion of the trial judge, there exists no question of law to be decided by this court other than the correctness of findings by the trial judge.

It was held in ***Mary Theresa Case***

*“ An appellate court has no jurisdiction to upset the trial findings of facts that have evidentiary support. The Court of Appeal improperly substitutes its view of the facts of a case when it seems for whatever reason to replace the findings made by the trial judge”.*

As discussed above, we see no reason to interfere with the findings of the learned trial judge in convicting the Accused Appellants for the charges leveled against them. Therefore, we confirm the conviction and the sentence by the trial court and dismiss the Appeal.

*Appeal dismissed.*

**JUDGE OF THE COURT OF APPEAL**

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

I agree

**JUDGE OF THE COURT OF APPEAL**

- 
1. (2000) 2 SLR 245
  2. (2010) 2 SLR 241
  3. 2011 2 SLR 292