

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

**In the matter of an appeal under and in  
terms of Section 331 of the Criminal  
Procedure Code Act No. 15 of 1979.**

The Attorney General of the Democratic  
Socialist Republic of Sri Lanka.

**Complainant**

**Court of Appeal  
Case No. CA 81/2010**

**Vs,**

1. Madumage Don Dinesh Dhanushka  
Jayawardena
2. Chiran Hasantha Balage

**Accused**

**And Now Between**

1. Madumage Don Dinesh Dhanushka  
Jayawardena
2. Chiran Hasantha Balage

**Accused-Appellant**

**High Court of Anuradhapura  
Case No. HC 195/2006**

**Vs,**

The Attorney General of the Democratic  
Socialist Republic of Sri Lanka

**Complainant-Respondent**

**Before : S. Devika de L. Tennekoon, J &  
S. Thurairaja PC, J**

**Counsel : Shanake Ranasinghe PC with N. Mihindukulasuriya for the  
Accused-Appellant  
Parinda Ranasinghe, SDSG for the Complainant-Respondent**

**Judgment on : 28<sup>th</sup> November 2017**

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## **Judgment**

### **S. Thurairaja PC J**

Madumage Don Dinesh Dhanushka Jayawardane (First accused appellant herein after sometimes referred to as first appellant) and Chiran Hasantha Balage (Second accused and herein after sometimes referred to as second appellant) were indicted by the Hon. Attorney General under Section 364 (2) (g) of the Penal Code for committing an offence of Gang Rape. After the trial both accused were found guilty by the learned trial Judge of the High Court of Anuradhapura.

The First Accused appellant was present before the High Court and the Indictment was served on him. Half way through he did not appear before the court and retained Counsel to defend him. The second Accused appellant was absent from the non-summery inquiry stage and defended himself through an Attorney at Law. During the trial at the High Court, summons and warrants were issued the 1<sup>st</sup> and the 2<sup>nd</sup> accused were not present. After fulfilling the requirements under Section 241 of the Code of Criminal Procedure Act (CCPA) 15 of 1979 (as amended), trial was held without accused persons but their Counsels represented them at the trial.

Both Accused persons were found guilty by the learned trial Judge and issued with open warrants without passing the sentences.

Both accused persons preferred an appeal against the conviction through their Attorney at Law to the Court of Appeal. When the matter was mentioned on several occasions the

first appellant was absent and unrepresented. This Court issued several notices to the first appellant and his Counsel on record brought no results, hence we decided to consider the appeal with the available materials.

The second appellant was also absent but was represented by a President's Counsel. He submits that he has proper instructions from the Second appellant.

Grounds of appeal on behalf of both appellants are identified as follows:

- (i) Evidence against the accused persons were insufficient and contrary to the Law.
- (ii) The learned trial Judge had not properly evaluated the evidence.
- (iii) Decision of the trial judge is contrary to the evidence before the court.
- (iv) The Ellenborough dictum is wrongly interpreted.
- (v) Identification parade notes were accepted wrongly. (sic)
- (vi) There is no evidence against second accused appellant for aiding and abetting the first accused appellant.

Considering the available evidence led before the trial court, it appears, that the Prosecutrix Hearath Mudiyansele Rohini Maithri and her sister Herath Mudiyansele Kumudu Priyanganie Maithri were employed at Katunayake and Colombo respectively, were returning home for the week-end. Their home is situated at Dampellessegama, Maradankadawala. On the 20<sup>th</sup> October 2001 at around 8.30 pm they alighted from the bus at Maradankadawala town and started to walk because there was no other transport

available to them. On the way the Second accused appellant was riding a motor bike with the first accused appellant on the pillion. Both accused commenced a conversation with the sisters who were walking towards the village.

At a lonely place the first accused who was on the pillion got down from the bike and approached the prosecutrix. Thereafter he dragged her to a place little away and had sexual intercourse without her consent. When a van approached there, both girls sought help from them and went to an Army camp and from there to the closest Police station to make a complaint.

Counsel for the Second appellant confines himself to one ground of appeal namely that there is no evidence to the fact that the second accused appellant aided and abetted the first accused appellant to commit the offence of rape.

The prosecution led the evidence of 9 witnesses. Six of them were lay witnesses, two medical professionals, Investigating Police officer and the Court interpreter.

The virtual complainant Herath Mudiyanseelage Rohini Maithri gave evidence and she was intensely cross examined by the Counsel for the accused. She clearly described the incident to the Court. There were no material contradictions marked, nor any omissions brought to the notice of the trial Judge. She clearly narrated the incident and identified the accused persons at the identification parade and in court. In her testimonial she says that the first appellant dragged her away to a lonely place, laid her on the floor, removed

her clothes and penetrated. When a van came to that place, he withdrew from the act. She also said that the second appellant was standing little away with her sister. According to her evidence the second appellant was riding the bike and he was not involved in any of the offensive act. Evidence of the Prosecutrix were corroborated by her sister and medical evidence.

When the first accused appellant took the virtual complainant, the second appellant was talking to the sister of the Prosecutrix. She had given evidence and stated that the second accused had asked her, "who are you all," then the sister had told him that they are sisters then he had called the first appellant and told him "let her go."

The above evidence on record shows that the second appellants was not involved in the act of rape. The evidence reveals that he was with the first appellant and nothing more. To convict a person under section 364 (2) (g), there should be some evidence of abetment must be proved. But in this case, there is no evidence against the 2<sup>nd</sup> accused appellant and he had told the first accused to "let her go". Therefore, we conclude that there is no incriminatory evidence against the second accused appellant, Viran Hasantha Balage. Accordingly, we quash the conviction and acquit from the charge.

Considering the grounds of appeal of the first accused appellant, we find that the available evidence before the court is sufficient to find the first accused guilty for the charge of rape. Findings of the learned trial judge on count number one is well founded, hence this court affirms the said conviction.

We notice in the judgment that the trial judge had found both accused persons guilty to both charges in the indictment. Which is incorrect. The first and second counts are in respect of first and second accused appellants respectively. This appears to be a minor mistake which can be rectified under Section 353 (??) of the CCPA. We correct the error as follows; The first accused appellant is convicted under Section 364 (2) of the penal code. As stated above the appeal of the second accused appellant is allowed and the conviction is quashed.

**Appeal of the first accused appellant is dismissed**

**Appeal of the Second accused appellant is allowed.**

**JUDGE OF THE COURT OF APPEAL**

**S. Devika de L. Tennekoon, J**  
I agree,

**JUDGE OF THE COURT OF APPEAL**