

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

- 1 Karunaratne Mudiyansele Madduma Bandara
- 2 Weerakoon Gamage Shelton
- 3 Ranhotige Ranjith Weerasundera

Accused-Appellants

C.A. 190-192/11

High Court Embilipitiya Case No. HCE 289/06

Vs.

The Attorney General

Respondent

Before : Sisira de Abrew, J. &

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

Counsel : N.A. Chandana Nissanka for the 1st accused-

Appellant

Neranja Jayasinghe with U.L.G. Bandara for the 2nd & 3rd

accused-appellants

Dileepa Peeris, S.S.C. for the A.G.

Argued &

Decided on : 15.03.2013.

Sisira de Abrew, J.

The accused-appellants produced by the Prison Authorities are present in Court

Heard counsel for both sides in support of their respective cases.

The 1st accused in this case was convicted for the offence of robbery and was sentenced to a term of 6 months rigorous imprisonment and to pay a fine of Rs. 1000 carrying a default sentence of one month simple imprisonment. He was also convicted of the offences under section 357 of the Penal Code, Section 333

of the Penal Code and Section 364(2) of the Penal Code. He was, on the 2nd count (charge under section 357), sentenced to a term of one year rigorous imprisonment and to pay a fine of Rs. 2,500/- carrying a default sentence of 3 months simple imprisonment. He was, on the 3rd count (offence under section 333 of the Penal Code), sentenced to a term of 6 months simple imprisonment and to pay a fine of Rs. 1000/- carrying a default sentence of one month simple imprisonment. He was, on the 4th count (charge of rape), sentenced to a term of 10 years rigorous imprisonment, to pay a fine of Rs. 5000/- carrying a default sentence of 6 months simple imprisonment and to pay a sum of Rs. 50,000/- as compensation to the victim carrying a default sentence of 2 years simple imprisonment.

The 2nd accused was convicted for offences under Section 357, 333 and 364 of the Penal Code. These sentences are as follows. On the 2nd count-1 year rigorous imprisonment and to pay a fine of Rs. 2500/- carrying a default sentence of 3 months simple imprisonment. On the 3rd count-6 months rigorous imprisonment and to pay a fine of Rs. 1000/- carrying a default sentence of 1

month simple imprisonment. On the 5th count-10 years rigorous imprisonment, to pay a fine of Rs. 5000/- carrying a default sentence of 6 months simple imprisonment and to pay a sum of Rs. 50,000/- as compensation to the victim carrying a default sentence of 2 years simple imprisonment. The 3rd accused was convicted on count no. 2 , count no. 3 and count no. 6. These sentences are as follows. On the 2nd count-1 year rigorous imprisonment and to pay a fine of Rs. 2500/- carrying a default sentence of 6 months simple imprisonment. 3rd count-6 months rigorous imprisonment and to pay a fine of Rs. 1000/- carrying a default sentence of 1 month simple imprisonment. 6th count-10 years rigorous imprisonment, to pay a fine of Rs. 5000/- carrying a default sentence of 6 months simple imprisonment and to pay a sum of Rs. 50,000/- as compensation to the victim carrying a default sentence of 2 years simple imprisonment.

The main charges leveled against the accused-appellants were that they raped the woman named Wickramarachchi Kankanamge Tharanga Nilmini. Facts of this case may be briefly summarized as follows. On the day of the incident between 9.00 p.m. and 12.00 mid night the 1st and the 3rd accused entered the house of the victim and the 1st accused reduced the flame of the lamp that was

burning inside the house. The 3rd accused was waiting near the door. The 2nd accused was waiting outside the house. The 1st and the 3rd accused after tying both hands of the husband of the prosecutrix, took the prosecutrix away from the house. Each accused raped the prosecutrix at a place close to the road. The main contention of the learned counsel for the accused-appellants was that the accused-appellants were not identified by the prosecutrix and her husband. I now advert to this contention. The prosecutrix has admitted that she knew the 2nd accused by the name. His name is according to the prosecutrix is Shelton. Vide pages 112 and 113 of the brief. She, at pages 133-135 of the brief, has stated that she knew the names of the accused-appellant but did not give the names to the police. According to her evidence she knew all three accused. She has at one stage stated that she had purchased clothes from the 3rd accused at Sunday fair. (Vide page 118 of the brief) Although she knew the names of the accused-appellants she has failed to give the names to the police when she went to make a statement. She even did not mention the names of the accused-appellants to her husband. According to her, the 2nd accused was living closer to her house. The question that arises is if she knew the names of the accused-appellants, as to why she did not give the names of them to her husband. The other question that arises is if she knew the name and the location of the 2nd

accused where he lives as to why she did not divulge these matters to the police. Then the next question that arises is as to why she did not divulge the names of the accused-appellants to the police. She says that she did not do so due to fear. But we note two weeks after the incident she has identified the accused-appellants at the identification parade. Although she takes up the position at the trial that she knew the accused-appellants prior to the incident, she in her evidence, at the non-summery inquiry had said that she did not know the accused prior to the incident. When we consider all these matters, we feel that her evidence regarding the identity of the accused is very doubtful. But the learned trial Judge has convicted all three accused without giving adequate consideration to the above matters. . The learned trial Judge has taken up the position that her evidence has been corroborated by her husband. But we note even the husband has not identified the accused at the time of the incident. In a charge of rape, if the Court feels that the evidence of the prosecutrix needs corroboration, then her evidence must be corroborated on material points. What are the material points?

- (1) The identity of the accused
- (2) The fact that she was subjected to sexual intercourse by the accused.
- (3) Sexual intercourse was committed against her will.

Although the learned High Court Judge concludes that her evidence has been corroborated by the husband's evidence, her evidence in our opinion has not been corroborated by the husband on material points. Therefore, the conclusion reached by the learned trial Judge that her evidence has been corroborated by her husband is erroneous.

Learned Senior State Counsel who appears for the Attorney General submits that he is unable to support the conviction in view of the fact that the accused-appellants had not been properly identified by the prosecutrix and her husband at the trial.

We have gone through the evidence led at the trial. We are of the opinion that the identity of all three accused has not been proved beyond reasonable doubt. If the identity of the accused-appellants has not been proved beyond reasonable doubt, this Court is not entitled to convict the accused-appellants. One of the most important factors in a criminal trial is the proving of identity of

the accused-appellants beyond reasonable doubt. Since the identity of the accused-appellants has not been proved beyond reasonable doubt, we are unable to permit the conviction to stand. We therefore, set aside the convictions and sentences on all counts and acquit all three accused-appellants.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

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

I agree

JUDGE OF THE COURT OF APPEAL

Cr/-