

SAJEEWA ALIAS UKKUWA AND OTHERS
v
THE ATTORNEY-GENERAL
(HOKANDARA CASE)

SUPREME COURT
BANDARANAYAKE, J.
YAPA, J.
WEERASOORIYA, J.
JAYASINGHE, J. AND
UDALAGAMA, J.
S.C. APPEAL NO. 112003 (TAB)
H.C. COLOMBO 9961199
15 AND 18 OCTOBER 2004

Criminal Law – Murder conspiracy – Section 296 read with section 113 (b) and 102 of the Penal Code – Murder of six persons – Section 292 read with sections 32 of the Penal Code – Abetment of murder s.292 read with s.102 Penal Code – Robbery of jewellery s. 380 Penal Code – Gang rape – Section 364 (2) of the Penal Code as amended by Act, No. 22 of 1995.

Four appellants (accused) were indicted with conspiracy to commit the murder of six persons. They were acquitted on that charge. 1st, 2nd, and 3rd accused were indicted with the murder of six persons on the basis of common intention. They were convicted with the said murders except that of one Nissanka. The 4th accused indicted with abetment of the said murders was acquitted on that charge. The 1st, 2nd and 3rd accused were indicted with robbery of jewellery belonging to deceased Chandra Priyangani and Chitra Dayangani. The 1st, 2nd, 3rd and 4th accused were charged with committing gang rape of Chitra Dayangani. They were convicted of these offences.

The matters raised at the appeal were-

- (a) entire case for prosecution rested on circumstantial evidence;
- (b) reliability of the evidence of Jonty
- (c) corroboration of the evidence of Jonty
- (d) offence of gang rape

The deceased were Lalanadasa, a landed proprietor and a rich farmer, his wife Sriyawathie, daughters, Chandra Priyangani, Chitra Dayangani and Nayana Damayanthi and son Nissanka.

Amaradasa's family was hostile to Lalanadasa's family. The 1st accused was Amaradasa's employee, 4th accused was Amaradasa's son; the 2nd and 3rd accused were friends of the 1st and 4th accused. The 1st to 4th accused, friends were in the habit of harassing the members of the deceased family. As a result there was a prosecution in the Homagama Magistrate's Court on the morning of the day of the incident in February 1999 against Amaradasa and 1st and 4th accused. The 1st accused was absent.

As per medical evidence -

1. Lalanadasa died due to strangulation by a ligature
2. Sriyawathie died due to a deep cut injury of the neck
3. Nayana Damayanthi died due to cut injuries on her face and neck
4. Chandra Priyangani died due to a cut injury of the neck
5. Chithra Priyangani had 2 external injuries and one internal injury which suggested sexual assault. Death was due to hanging.
6. Nissanka had multiple injuries. Death was due to cut injury of the neck

On receipt of information over the phone of an unusual situation at a house, Inspector Suraweera of the Thalangama police visited the scene at about 11 p.m. on 10.02.1999. He observed the bodies of the deceased including Chithra Dayangani hanging. There was a condom, an empty packet of cigarettes and cigarette ash in the vicinity. He also found bleeding injuries and a blood smeared crow bar against the wall. Nissanka's body was found in the garden among coconut trees and a Kitul club smeared with blood and mud. Amaradasa's body was lying close by in a critical condition. He also died later.

Jonty a close friend of the 4th accused and Amaradasa family visited the scene of the crime 3 times, viz., around 2 p.m., around 3.30.p.m. and finally around 6 p.m. On the 1st occasion he saw the body of Lalanadasa and Nayana Damayanthi when he saw the 1st, 2nd and 3rd accused inside the house. On the second occasion he saw two more dead bodies viz., those of Chandra Priyangani and Sriyawathie. On the 3rd occasion he observed the 1st, 2nd and 3rd accused raping Chithra Dayangani whilst she was alive and tied to a bed. When the 3rd accused got off her body, the 4th accused went towards the girl saying that he too wanted to have sexual intercourse with her. Jonty did not see Nissanka dead or alive in the vicinity.

That afternoon the 4th accused and Jonty had been visiting places. All these visits were corroborated by witnesses. Thus Paranavithana spoke to fact that they had met him. 4th accused had a packet of cigarettes with him. The 4th accused and Jonty also wished to have a bath. Jonty told him that according to the 4th accused, the 1st accused and others had killed some people at Lalanadasa's house. The 4th accused also confirmed the killing.

Nihal Perera said that Jonty came around 1.30 p.m. and left his slippers at his place and went for a bath.

Premarathne said that the 4th accused visited him at his saloon and left on a bicycle borrowed from a boy and returned in 20 minutes.

Paranavithana also said that Jonty and 4th accused went for a bath on the three wheeler of Chaminda. On their return they had lunch together.

Jonty and the 4th accused were friends. The High Court found that Jonty had accompanied the 4th accused but he was not an accomplice.

IP Suraweera's observation at the scene supported Jonty, especially the finding of a contraceptive where Jonty saw the 1st, 2nd and 3rd accused raping Chithra Dayangani. He also found an empty packet of cigarettes in that room.

Further, IP Suraweera found on a statement by the 1st accused, 08 pairs of gold bangles. In two of them letters "Chandra" was engraved. On a statement of the 2nd accused the IP recovered two gold chains and a pendant. The letter "C" was engraved on the pendant. IP Suraweera also found two gold rings in the 1st accused's trouser pocket.

According to witness Pushpakumara who had an affair with Chithra Dayangani, the bangles, chains and the rings belonged to the two sisters. All those items were found concealed around the house of the 3rd accused.

Police also recovered on the statement of the 1st accused a katty in a trunk box at his grandfather's house.

The clothes the 1st accused was wearing at the time of his arrest had stains like mud and blood.

Held:

1. Jonty was not an accomplice and his evidence against the accused is corroborated
2. Circumstantial evidence strongly supports the prosecution story.
3. As per Explanation (1) of section 364(2) of the Penal Code, as amended by Act, No. 22 of 1995, the 4th accused was guilty of "gang rape" as he was not the innocent by stander, but abetted the commission of rape on Chithra Dayangani.
4. There is no merit in the appeal.

Cases referred to:

1. *Rex v Exall* – (1866) 4 F . Exall 4 F & F pg.4 F 922 at 929
2. *King v Gunaratne* – (1946) 47 N.L.R 145 at 149
3. *Arun Kumar v State of Uttara Pradesh* – (1989) Air SC 1445
4. *Promod Manto and Others v The State of Bihar* Air – (1989) SC 1475

APPEAL from the judgment of the High Court

Shyamal A. Collure, assigned Counsel for 1st accused-appellant.

L. Barana Gayan Perera with Prabha Perera for 1st accused-appellants

Rienzie Arsakularatne, P.C. with Harin Gomes, Wasantha Batagoda and Theja Korralage for 4th accused-appellant.

C.R. de Silva, P.C. Solicitor-General with *Palitha Fernando*, Deputy Solicitor General and *Sarath Jayamanne*, Senior State Counsel for respondent.

Cur. adv.vult

November 18, 2004

SHIRANI BANDARANAYAKE, J.

This is an appeal filed in terms of section 451(3) of the Code of Criminal Procedure Act, as amended by Act No. 21 of 1998 against the conviction and sentences imposed by the judgment of the Trial-at-Bar on the accused-appellants (hereinafter referred to as appellants). Four accused were indicted in respect of six (6) murders committed on the 10th February 1999. The indictment contained 24 counts which were as follows:

- (a) Counts 1 to 6 were in respect of all accused for conspiring along with deceased Amaradasa to commit murder of the six deceased persons, which were offences punished in terms of section 296 read with sections 113(b) and 102 of the Penal Code.

All appellants were acquitted of counts 1 to 6 in the indictment.

- (b) Count 7 to 12 were against 1st, 2nd and 3rd appellants for committing offences of murder of the six (6) deceased persons punishable in terms of section 292 read with section 32 of the Penal Code.

The 1st, 2nd and 3rd appellants were convicted on counts 7 to 11. They were acquitted of the charge in respect of one of the deceased persons, namely, Nissanka. The 1st, 2nd and 3rd appellants were sentenced to death in respect of counts 7 to 11.

- (c) Counts 13 to 18 were against the 4th appellant for aiding and abetting the 1st, 2nd and 3rd appellants for committing the offences set out in counts 7 to 12 in the indictment.

The 4th appellant was acquitted of counts 13 to 18.

- (d) Count 19 was against the 1st, 2nd and 3rd appellants for committing the offence of robbery of jewellery belonging to one of the deceased, namely, Chandra Priyangani, punishable in terms of sections 380 of the penal code. 30

The 1st, 2nd and 3rd appellants were convicted on count 19 and were sentenced to 10 years rigorous imprisonment.

- (e) Count 20 was against the 1st, 2nd 3rd appellants for committing the offence of robbery of jewellery belonging to one of the deceased, namely, Chithra Dayangani, punishable in terms of Section 380 of the Penal Code.

The 1st, 2nd and 3rd appellants were convicted on count 20 and were sentenced to 10 years rigorous imprisonment.

- (f) Count 21 was against the 1st appellant for committing gang rape on one of the deceased, namely, Chithra Dayangani, an offence punishable in terms of section 364(2) of the Penal Code as amended by Act, No. 22 of 1995. 40

The 1st appellant was convicted on the count of gang rape and was sentenced to 20 years rigorous imprisonment.

- (g) Count 22 was against the 2nd appellant for committing gang rape on one of the deceased, namely, Chithra Dayangani, an offence punishable in terms of section 364(2) of the penal code as amended by Act, No.22 of 1995.

The 2nd appellant was convicted on the count of gang rape and was sentenced to 20 years rigorous imprisonment. 50

- (h) Count 23 was against 3rd appellant for committing gang rape on one of the deceased, namely, Chithra Dayangani, an offence punishable in terms of section 364(2) of the penal code as amended by Act, No. 22 of 1995.

The 3rd appellant was convicted on the count of gang rape and was sentenced to 20 years rigorous imprisonment.

- (i) Count 24 was against the 4th appellant for committing gang rape on one of the deceased, namely, Chithra Dayangani, an offence punishable in terms of section 364(2) of the Penal Code as amended by Act, No 22 of 1995. 60

The 4th appellant was convicted on the count of gang rape and was sentenced to 20 years rigorous imprisonment.

All sentences of imprisonment against each of the accused were to run consecutively.

(A) THE INTRODUCTION

At the time of the incident, which took place in February 1999, the deceased family was living at Amaragoda Road, Hokandara. This family consisted of six members: the father, Vithanage Lalanadasa was a farmer and owned a large extent of land in the village. His wife Kollurage Siriyawathie was house-wife who had given birth to 3 daughters and one son. Out of the three daughters, the eldest, Chandra Priyangani after completing her GCE (Advanced Level) Examination had been following a course in Chartered Accountancy. At the time of the incident she was functioning as an Accounts Clerk attached to the Sumathi Publishers. Nissanka, the only son of Lalanadasa family was working as a technician in a private firm. The third in the family, Chithra Dayangani was an undergraduate, studying for a Degree in Bachelor of Commerce in the University of Sri Jayawardanepura. The youngest in the family, Nayana Damayanthi, was a student enrolled in an Accountancy Course.

The deceased Lalanadasa and Amaradasa were neighbours. The 4th appellant was the son of Amaradasa whereas the 1st appellant was his employee. The 2nd and 3rd appellants were friends of the 1st and 4th appellants. The Amaradasa family and Lalanadasa family have not been in good terms and it appears that the two families have had constant and long standing quarrels. There were allegations levelled against the Amaradasa family that they and their employees have been harassing the members of the Lalanadasa's family. The evidence also revealed that the family of Lalanadasa's was considered to be of a higher social standing among the villagers. The members of the Lalanadasa family however, did not associate others in the village very closely.

On the day of the incident Siriyawathie and Chandra Priyangani were present in the Magistrate's Court, Homagama as witnesses in a case where they had made a complaint to the police. Due to

continuous harassment meted out by the members of the family of Amarasasa, Lalanadasa had made several complaints to the police and based on one of such complaints, the Thalagama police had instituted action in the Magistrate's Court, Homagama against Amarasasa, the 1st appellant, 4th appellant and two other persons. This case was called in the Magistrate's Court, Homagama on the day of the incident and only Amarasasa and the 4th appellant had been absent on this occasion. 100

On the night of 10.02.1999, one Wanniarachchige Don Nihal Chandraguptha, who was residing at Boralesgamuwa, had telephoned one Dhammika Hingunearachchi who resided at Amaragoda Road, Hokandara. When he telephoned her for the second time that night around 8.10 p.m., it appeared to Chandraguptha that she was frightened and on making inquiries she had informed him that there is an unusual situation at a nearby house, where the dogs are barking and the cows are mowing. Chandraguptha had taken down the address of the particular house in question and had unsuccessfully attempted to contact the police station at Athurugiriya. Thereafter he had telephoned the police station at Thalagama around 8.30 p.m. and had informed them about the suspicions that have been aroused by the unusual situation that prevailed in the house situated at Amaragoda Road, Hokandara. 110

After receiving the said information, Inspector Suraweera of the Thalagama police had arrived at the said house around 11.00 p.m. No sooner the police jeep was parked, Inspector Suraweera had seen a woman, namely, Meemanage Siriyawathie and a child, namely, Buddhika Viranga, after emerging from the compound running towards the road through its gate. As their behaviour aroused suspicion and the fact that they could not answer the questions put to them correctly, the police had detained both of them in the jeep. 120

When Inspector Suraweera entered the house from the back door a light was on and he discovered the dead body of Lalanadasa in a sitting position inside a large wooden box which was used to store paddy. His hands and legs were tied with a coir rope. In a corridor adjoining that room, where Lalanadasa's body 130

was found, he saw the bodies of Siriyawathie and Chandra Priyangani lying on the floor. They had bled from the wounds on their necks and between the two dead bodies there was a crowbar about 6 feet long kept against the 'corridor- wall'. There had been blood on the upper part of the said crowbar. In another room hanging from the hinge of the door frame, the Inspector found the 140
 dead body of Chithra Dayangani. Her hands were tied from behind, her face was down and the body was touching the floor. The Inspector found that there was blood, a condom, an empty packet of cigarette ash in the vicinity. Thereafter the Inspector found the body of Nayana Damayanthi behind the toilet at the back of the house. Her body was covered with arecanut branches and there were cut injuries on her neck. Later about 30 meters away from the house, he found Nissanka's body lying between the coconut trees. There was blood as well as smears of mud on Nissanka's clothes. The police found a 'kitul' club which was smeared with blood and 150
 mud. Lying quite close to Nissanka's body the Inspector found Amaradasa who was in a critical condition.

According to the Post-Mortem Reports (X13, X19, X27, X31, X32 and X34) the causes of death of the victims were as follows:

1. Lalanadasa - 13 external injuries and 1 internal injury.
 Death due to strangulation by a ligature.
2. Siriyawathie - 3 injuries.
 Death due to haemorrhage following 160
 deep cut injury on the neck.
3. Nayana Damayanthi - 2 injuries.
 Death due to haemorrhage following
 cut injuries to the face and to the
 neck.
4. Chandra Priyangani - 11 external injuries.
 Death due to cut injury on the neck.
5. Chithra Dayangani - 2 external injuries and 1 internal
 injury with injuries suggestive of
 sexual assault. 170
 Death due to hanging.

- 6 Nissanka - 11 external injuries and 2 internal injuries.
Death due to cut injury on the neck.

(B) THE CASE FOR THE PROSECUTION

The case of the prosecution rests entirely on the evidence of witness W.W. Jayanatha, *alias* Jonty (hereinafter referred to as Jonty) who was a close friend of the 4th appellant as well as the Amaradasa family. On the day of the incident, Jonty accompanied by the 4th appellant had visited the residence of Lalanadasa on 3 occasions. All three visits had been on the request of the 4th appellant. Jonty had clearly stated that on his first visit to the residence of Lalanadasa, he had not known as to what was happening there. Since the first visit to Lalanadasa's house with the 4th appellant, Jonty had found it difficult to refuse to accompany the latter in the other visits, as the 4th appellant was pleading to Jonty to be with him since they were close friends. 180

According to Jonty he visited the residence of Lalanadasa for the first time on the day of the incident with the 4th appellant around 2 p. m. At that time he had seen only the bodies of Lalanadasa and Nayana Damayanthi. Jonty had seen at that time the 1st, 2nd, and 3rd appellants were inside the house. He had visited the said residence of Lalanadasa for the second time around 3.30 a.m., with the 4th appellant. On that occasion once again he had observed two more dead bodies which later he identified as the bodies of Chandra Priyangani and Siriyawathie. 190

Chandra Priyangani and Siriyawathie had been at the Magistrate's Court of Homagama in the morning of the incident and this position has been clearly established by the court officer at the Magistrate's court of Homagama. The sequence of events therefore indicates that Lalanadasa and Nayana Damayanthi had been killed before Siriyawathie and Chandra Priyangani returned from the Magistrate's Court of Homagama. 200

The 3rd and the last visit made by Jonty to the scene of crime with the 4th appellant was around 6.00 p.m. When he was at Lalanadasa's house Jonty had seen Chithra Dayangani being

raped by the 1st, 2nd and 3rd appellants. According to Jonty at the time she was being raped, she was alive.

Although Jonty made three (3) visits to Lalanadasa's residence, he did not see Nissanka either alive or dead in the vicinity. Nissanka's colleagues from his place of work had testified that he was at work until about 8.00 p.m. on the day of the incident. 210

The respondent contended that there is no evidence either direct or circumstantial as to the manner in which Nissanka came to his death. When the police visited the residence of Lalanadasa on the information they had received, after searching the house when they came across four dead bodies, one of the neighbours had informed the police that there was another person in the Lalanadasa family. The police had searched the garden which was about 2 acres in extent where they found Nissanka's body around 3.00 a.m. There had been evidence suggestive of Nissanka having first fought with his assailants. The police also found Amaradasa lying on the ground in the vicinity with injuries to which he succumbed on admission to the National Hospital, Colombo. 220

The day after the incident on 11.02.1999, on information the police had arrested the 1st, 2nd and 3rd appellants at the residence of the 3rd appellant which was about 1 kilometer from the scene of crime. The police, although was looking for the arrest of the 4th appellant, he could not be found in the village and when the trial was half way through he surrendered to the High Court. Considering the submissions made on behalf of the appellants as well as for the respondent, four main questions or issues have emerged which would need closer examination. They could be listed as follows:- 230

- (i) the entire case for the prosecution is relied on circumstantial evidence;
- (ii) reliability of the evidence of Jonty;
- (iii) evidence of corroboration of the testimony of Jonty;
- (iv) the offence of gang rape.

(C) (I) THE ENTIRE CASE FOR THE PROSECUTION IS RELIED ON CIRCUMSTANTIAL EVIDENCE 240

Learned Counsel for the 1st appellant submitted that the main items of evidence against the 1st appellant were fourfold which included that;

- (a) the evidence of Jonty who is alleged to have seen the 1st appellant thrice at the scene of crime on the day of the incident;
- (b) the recovery of 8 bangles belonging to two of the victims on a statement alleged to have been made to the police by him; 250
- (c) the recovery of a katty in a trunk box at his grandfather's house on a statement alleged to the have been made to the police by him; and
- (d) the clothes he was wearing at the time of his arrest (a white short sleeved shirt and a pair of trousers) had stains like blood and mud.

Learned counsel for the 2nd and 3rd appellants submitted that the prosecution relied on a finger prints placed on a tin of biscuits. It was contended that there were other finger prints on the said tin of biscuits which were not identified by the registrar of finger prints and only one thumb print had matched with the 2nd appellant's thumb print. The reason for the said thumb print to appear on the tin of biscuits according to the learned counsel for the 2nd and 3rd appellants was due to the fact that the 2nd appellant was asked to hold the said tin of biscuits on his head while he was being assaulted at the police station. 260

Considering the circumstantial evidence placed before the court, it is to be noted that, there were several items that were recovered and produced in terms of section 27 of the Evidence Ordinance. These items included the following: 270

- (a) Consequent to a statement made by the 1st appellant, IP Suraweera had recovered 8 pairs of bangles, two of which were made out of gold. In the inner surface of one of those bangles 'Chandra' was engraved. Chandra happened to be one of the deceased females.

- (b) Consequent to a statement made by the 2nd appellant two gold chains and a pendant were recovered. The letter 'C' was found engraved on the pendant.
- (c) At the time 3rd appellant was arrested, IP Suraweera found two gold rings in his trouser pocket. 280

In the inner surface of one of those rings the letter 'C' was found engraved.

The bangles, chain, pendant and the rings were identified as belonging to the two sisters by witness Nandana Pushpakumara, who had been having an intimate relationship with the deceased Chithra Dayangani prior to her death. According to the witness, some of the items were gifted by him to the deceased. All the items of Jewellery were found concealed at places around the house of the 3rd appellant and the accused were arrested at this place.

The evidence before Court clearly established the motive 290 against the appellants. The 1st appellant was an employee of the father of the 4th appellant. The 1st, 2nd, 3rd and the 4th appellants were close friends. Several witnesses have given evidence to the effect that the members of the family of the 4th appellant as well as the 1st appellant who was their employee have been harassing the deceased family on numerous occasions. This fact is corroborated by the numerous complaints made by the deceased family to police requesting them to inquire into the said allegations. In fact the case which was taken up at the Magistrate's court of Homagama in the morning on the fateful day was an action filed by the police on one 300 of the complaints made by the deceased against the appellants. In that case there were charges against the 1st appellant, the 4th appellant and the 4th appellant's father. The 1st appellant was not present in Court on that day and the inference that could be drawn from this conduct would be that, he had a mission to accomplish at a different location. The evidence of Ekmon, reveals not only that the 1st, 2nd, 3rd, and 4th appellants were close friends, but also that on numerous occasions he had seen four of them together harassing the members of the deceased family.

(II) RELIABILITY OF THE EVIDENCE OF JONTY

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Learned counsel for the 2nd and 3rd appellants contended that Jonty was the only eye-witness who said in evidence that he had seen the appellants inside the house, and further that the appellants were involved in the said murders. Learned Counsel for the appellants submitted that as Jonty was with the appellants, there is no reliability that could be placed on his evidence.

However, the evidence before Court clearly indicates that Jonty could not be treated an accomplice and his evidence rejected on the basis of non-reliability for the following reasons.

Jonty and the 4th appellant were friends from their childhood and had attended the same school until the latter entered another school for his General Certificate of Advanced Level Examination. In fact Kusumawathie, who was a witness for the defence said in evidence that Jonty was a frequent visitor at the 4th appellant's residence and that whenever the family of the 4th appellant went on trips, Jonty used to join them. Therefore, it is obvious that there has been a very close relationship between Jonty and the 4th appellant. 320

Jonty had met the 4th appellant on the day of the incident (10.02.1999) around 2.00 p.m., near a saloon which belonged to one Indika Pradeep. The saloon was situated near the Hokandara Junction. The 4th appellant had a packet of cigarettes in his hand and he had wanted Jonty to come with him on a mission. He had not revealed as to what this specific mission was. Thereafter the 4th appellant borrowed a bicycle from a boy who had come to the saloon and both of them had gone on that bicycle. On their way, the 4th appellant had told Jonty that the 1st appellant is at Lalanadasa's house and that he had wanted the 4th appellant to bring cigarettes. Thereafter they had decided to keep the bicycle at the furthest point they could go on it and had kept it at the residence of one Nihal Perera. After handing over the cigarettes to the 1st appellant, the 4th appellant and Jonty had left Lalanadasa's residence, came to Nihal Perera's residence to collect the bicycle and the pair of slippers and had gone back to the saloon to return the bicycle. 330 340

The 4th appellant and Jonty had before going to Hokandara Junction had gone to Jonty's house and there they had met Ajantha Paranawithana who was known as Aje Aiya. Paranawithana's had requested them to join him for a bath. Three of them along with a three-wheeler driver known as Chaminda had gone to a nearby lake for a bath. Thereafter, Jonty and the 4th appellant had lunch at Paranawithana's residence. 350

Jonty and the 1st appellant had thereafter gone to the latter's residence and left around 3.30 p.m. When they were proceeding past the residence of Lalanadasa, the 1st appellant had made a sound to get their attention and had requested them to come. After a while they had left and the two of them had gone to the school ground. Jonty had at that stage joined Ajantha Paranawithana and other friends to play cricket. The 4th appellant, who generally joins the group, did not do so on that day and after about 10 minutes he had called Jonty to visit Lalanadasa's residence, once again. 360

On this occasion, which was around 6.00 p.m. Jonty had seen Chithra Dayangani being raped by the 1st, 2nd and 3rd appellants. According to Jonty he was standing near the entrance to the room where Chithra Dayangani, who was an undergraduate, being tied up to a bed with her face upwards. Jonty has categorically stated that Chithra Dayangani was alive at the time she was raped by the 1st, 2nd and 3rd appellants and he had said that from the place he was standing he could clearly see what was happening inside the room. According to Jonty, no sooner the 3rd appellant got out of her body, the 4th appellant had gone towards the helpless girl saying that he too wants to have sexual intercourse with her. At this stage Jonty claims that he did not wish to remain there any longer and had gone to the rear of the house. From there he had seen Amaradasa, the father of the 4th appellant coming towards the house. Then Jonty had informed the 4th appellant and both of them had left the house from the front entrance and had gone to the Hokandara Junction. 370

The sequence of events that took place in that fateful day reveals that Jonty had accompanied the 4th appellant mainly due to the friendship he had with him and after the first visit to Lalanadasa's residence, and knowing quite well as to what had taken place, Jonty realized that he was at a point where he could not refuse to accompany the 4th appellant. 380

The evidence also reveals that it was not unusual for Jonty and 4th appellant to have lunch at Paranawithana's house. This fact has been clearly admitted by Paranawithana in his evidence. Moreover the fact that Jonty was with the 4th appellant since 2.00 p.m. on the day of the incident has been corroborated by all the witnesses referred to by Jonty. The prosecution had summoned all these witnesses Jonty had referred to at various stages and these witnesses have corroborated the evidence of Jonty on all material points. 390

It also to be borne in mind that after having lunch on the day of the incident at Paranawithana's house, Jonty and the 4th appellant had met Amaradasa. At that stage, according to Jonty, the 4th appellant had informed Amaradasa that the 1st appellant along with others had killed two persons at Lalanadasa's house. The 1st appellant it is to be noted was an employee of Amaradasa and the 1st appellant was to be present before the Magistrate's Court Homagama on a complaint made by the members of the Lalanadasa family. The animosity between the two families has been proved beyond any reasonable doubt. In such circumstances when the 4th appellant brought to the notice of his father about the deaths at their enemy's house, the father told his son to be with Jonty at the latter's place. It is to be noted that Amaradasa did not show any sign of suspicion of shock when he heard about the gruesome murders. Furthermore, it is common ground that the 1st and 4th appellants as well as Amaradasa were rivals of the Lalanadasa Family. Nevertheless, it is seen that they have been entering and departing from Lalanadasa's residence without any trepidation. They had used both the rear entrance as well as the front entrance for this purpose. If not for their knowledge that there would not be any one to challenge their presence, would they have moved so freely to their arch rival's residence? 400 410

After the third and the fourth visit to Lalanadasa's house, Jonty had gone to Paranawithana's residence. Prior to that according to Jonty he and the 4th appellant had met Paranawithana near Hokandara junction. Jonty had seen the 4th appellant speaking to Paranawithana. When Jonty was on the way to Paranawithana's house, in the three-wheeler belonging to the latter, Paranawithana had informed Jonty that the 4th appellant had told him that 1st 420

appellant and the others had killed some people at the residence of Lalanadasa. He had inquired from Jonty as to the truth of this statement. Paranawithana in his testimony had confirmed that the 4th appellant had told him that some people were killed at Lalanadasa's residence.

Learned counsel for the 1st appellant submitted that the Trial-at-Bar had erred in fact and in law in evaluating Jonty's evidence in the light of the intrinsic improbabilities and discrepancies found in his evidence and it is therefore necessary to consider whether such evidence is corroborated in material particulars as regards to killings. 430

E. R. S. R. Coomaraswamy (The Law of Evidence, Vol. I, pg. 18) in considering the value and advantages and demerits of circumstantial evidence has stated that the use of circumstantial evidence is criticized on the ground that it is not reliable evidence, However, he is of the view that,

"But it would be going too far to say that it is never safe to trust circumstantial evidence in the entire absence of direct, for there are many crimes which are committed under circumstances which preclude the possibility of direct evidence being given, but which yet allow of a perfectly safe inference being drawn from surrounding circumstances. The risk of perjury is minimized, since circumstantial evidence, unlike direct evidence, does not depend on the veracity of witnesses. It is less capable of fabrication." 440

It is also to be borne in mind that the English decisions have evolved a set of principles and rules of caution which have been followed in Sri Lankan cases. Consideration of circumstantial evidence has been vividly described by Pollock C.B. in *R v Exall*⁽¹⁾ 450 cited in *King v Gunaratne*⁽²⁾ in the following words:

"It has been said that circumstantial evidence is to be considered as a chain, and each piece as a link in the chain, but that is not so, for then of any one link breaks, the chain would fall. It is more like the case of a rope comprised of several chords. One strand of the rope might be insufficient to sustain the weight, but three strands together may be quite of sufficient strength. Thus it may be in circumstantial evidence

there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit." 460

The items of circumstantial evidence referred to earlier which comprise of the finger print on the tin of biscuits, recoveries in terms of section 27 of the Evidence ordinance, and the evidence of motive combined with the various incidents that took place on the day in question as related by Jonty creates a case of "a rope not with a single strand but of several strands".

(III) **EVIDENCE OF CORROBORATION OF THE TESTIMONY OF JONTY** 470

Paranawithana corroborated the evidence of Jonty and stated that on the day of the incident, he had seen Jonty and the 4th appellant around 2.00 p.m. near the Hokandara Junction. At that time the 4th appellant had a packet of cigarettes in his hand. According to Jonty he had visited Lalanadasa's residence around 2.00 p.m. with the 4th appellant as the latter had to hand over a packet of cigarettes. This was Jonty's first visit to the said house on that fateful day.

Paranawithana in his evidence had stated that he had seen Jonty and the 4th appellant together for the second time on that day when he accompanied them for a bath with another person know as Chaminda. Jonty had referred to the said visit for a bath in his evidence. 480

Paranawithana had also stated that he met Jonty and the 4th appellant for the third time on the day in question in the evening. At that time the 4th appellant had informed him that the 1st appellant and others have killed some people at the residence of Lalanadasa. According to Paranawithana, he had inquired from Jonty as to the truth of such a statement and Jonty had confirmed that it was true. 490

Nihal Perera who gave evidence stated that Jonty came to his residence around 1.30 p.m. on the day of the incident and had wanted to leave his pair of slippers at his place. According to Nihal Perera, he had seen Jonty walking towards the paddy field that leads to

Lalanadasa's residence. It appears that the 4th appellant had taken the precaution to be away from Jonty and Nihal Perera, as he was fully aware as to what was going on at Lalanadasa's residence. On the other hand Jonty was not aware of the killings and that would have been one reason for him to have left the slippers at Nihal Perera's residence without any trepidation. According to Nihal Perera, soon after Jonty visited his house, he had gone for a bath and on his return he had found that the pair of slippers had been taken away. Nihal Perera's version thus corroborated the position taken by Jonty about the time he had spent at Lalanadasa's house. 500

Indika Pradeep Premarathne, owned a saloon at the Hokandara Junction. In his evidence he confirmed that on the day in question, Jonty and the 4th appellant had come there around 2.00 p.m. The 4th appellant had borrowed a bicycle from a boy who had come for a haircut and he had returned it about 20 minutes later.

The observation made by IP Suraweera at the scene of incident is important to be considered as it corroborates the description given by Jonty. IP Suraweera had observed that on entering the house of Lalanadasa through the rear door, Lalanadasa's body was inside a wooden box which is used to store paddy. The dead body was in a sitting position with its neck slanted to a side and tied with a rope with the other end tied to one of the legs of the box. He had also seen the bodies of Siriyawathie and of Chandra Priyangani lying in the corridor with bleeding injuries. IP Suraweera had found a contraceptive in the front room where Jonty had stated that he had seen 1st, 2nd and 3rd appellants raping Chithra Dayangani. He had also observed an empty packet of cigarettes in that room. witness Ekmon in his evidence had stated that he had known Lalanadasa and both the father and the son were non-smokers. According to IP Suraweera, the body of Chithra Dayangani was not inside the room, but was found hanging from the door hinge of adjoining room. It appears that after raping the deceased, they had hung the body on the door hinge using a piece of wire and a rope. 5100 5200

Jonty had stated that, the 1st, 2nd and 3rd appellants one after the other had raped Chithra Dayangani. The Judicial Medical Officer who had carried out the post mortem had described the injuries on the vagina of the deceased and had categorically stated that the injuries were indicative of either one person having sexual intercourse with the girl several times or many persons having sexual intercourse with her. This corroborates without any reservation, the evidence of Jonty who stated that the 1st 2nd and 3rd appellants raped Chithra Dayangani one after the other. 530

The acceptability and the trustworthiness of Jonty's evidence could be easily ascertained by examining the evidence he had given with regard to the lay out of the Lalanadasa's residence and not speaking of the death of Nissanka. Jonty was a person who had never visited Lalanadasa's residence prior to the date of the incident. He had made three visits on that fateful day and the description given by him on the lay out of the interior of the house tallies correctly with the observations made by the investigating officers. According to Jonty's evidence, he visited Lalanadasa's residence between 2.00 p.m. and 6.00 p.m. on the day of the incident. Jonty has never spoken to the fact of seeing Nissanka's body during that period. There is evidence to indicate that Nissanka was at his work place at Borella until about 8.00 p.m. on that day. Jonty would not have had the opportunity of seeing Nissanka's body as he had died only after 8.00 p.m. and Jonty's last visit was made well before 6.00 p.m. 540 550

(IV) THE OFFENCE OF GANG RAPE

Counts 21 to 24 of the indictment deal with charges of gang rape preferred separately against each of the appellants. All of them were convicted on the count of gang rape and were sentenced for 20 years rigorous imprisonment.

Learned President's Counsel strenuously argued that, on a consideration of the evidence of Jonty it cannot be established that either the 4th appellant committed rape or that he aided or abetted any of the appellants to commit rape. Learned President's Counsel's position was that, when the 4th appellant arrived at the scene of the offence along with Jonty, the victim was already tied with her hands and legs apart and gagged and the 1st appellant was committing the sexual act. 560

Learned President's Counsel contended that there is no evidence to indicate that the 4th appellant had committed rape on the said deceased and that there is no evidence to show that the 4th appellant abetted any other person to commit rape. He further submitted that, the learned Trial Judges have misdirected themselves by coming to the conclusion that, in order to prove gang rape under our law, prosecution must only establish that the appellant was a member of the gang at the time when the act of rape was committed. Learned President's counsel also stated that learned Trial Judges have further misdirected themselves by considering the Indian decision of *Aruna Kumar v State of Uttara Pradesh*⁽³⁾ which was a case dealing with abduction under section 336 of the Indian Penal Code, and citing this case as a case laying down principles pertaining to gang rape as set out in section 376 of the Indian Penal Code.

Sections 363 and 364 of the Penal Code dealt with the offence of rape and the punishment for the said offence. Section 363 stated that,

"A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions..."

Prior to the amendment in 1995, section 364 of the Penal Code dealt with the punishment for rape. Under that law the offence exclusively dealt with a single person committing rape. These two sections were amended by the Penal Code (Amendment) Act, No 22 of 1995. By this amendment the legislature had brought in the concept of gang rape. Learned President's Counsel for the 4th appellant contended that the only object of introducing gang rape was to enhance the sentence and the liability would be only on persons of a group who committed the offence of rape or who had abetted the offence of rape.

Section 13 of the Penal Code (Amendment) Act, No 22 of 1995 deals with section 364 of the principle enactment and by that section, section 364 is repealed and a new section is substituted. The substituted section reads as follows;

“364(1)- Whoever commits rape shall,

except, in the cases provided for in sub-section (2) and (3), be punished with rigorous imprisonment for a term not less than seven years and not exceeding twenty years and with fine, and shall in addition be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person.

(2) Whoever-

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(a)

(b)

(c)

(d)

(e)

(f)

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term not less than ten years and not exceeding twenty years and with fine and shall in addition be ordered to pay compensation of an amount determined by court to the person in respect of whom the offence was committed for the injuries caused to such person....”

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The aforementioned Section also refers to 3 Explanations and 1st Explanation which is on gang rape is on the following terms:

“Explanation 1,

Where the offence of rape is committed by one or more persons in a group of persons, each person in such group committing, of abetting the commission such offence is deemed to have committed gang rape.”

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Prior to the Penal Code (Amendment) Act of 1995, there was no offence of gang rape. Although learned President’s Counsel was of the view that the purpose of the amendment to section 364 of the Penal Code was to enhance the punishment, a careful perusal of

the amended section indicates that the present law makes provision not only to enhance the punishment for the offence, but more importantly to make members of a group, liable when the offence of rape or abetment of rape is committed by one or more members of such group.

Under the old law, section 363 clearly referred to a single person committing the offence of rape. The meaning of that section was quite clear that it dealt with only a single person and the provision was made to ascertain whether there was consent by the women. The amendment on the other hand, categorically includes more than one person and this is clearly in the Explanation I to the amended Section. According to Explanation I, there are several ingredients that are necessary to be looked into concerning the offence of rape. They are:

- (a) assembly of a group of persons;
- (b) rape committed by one or more persons of such group;
- (c) some members in such group abetting the commission of rape.

It appears that amendment to section 363 of the Penal Code was taken from the Indian Penal Code. Section 367(2)g of the Indian Penal Code refers to gang rape and Explanation I which is reproduced below is on this particular offence.

“Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape.”

The object in introducing gang rape, including the Explanation and its applicability was explained by the Indian Supreme Court in *Promod Mahto and others v The State of Bihar* (4) in the following words:

“This Explanation has been introduced by the legislature with a view to effectively deal with the growing menace of gang rape. In such circumstances, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims when there are more than one in order to find accused guilty of gang rape and convict them under section 367, IPC.”

In *Promod Mahto's case (supra)*, sixteen (16) accused were prosecuted for committing offences punishable in terms of sections 367 and 320 read with section 149 of the Indian Penal Code. It was the case of the prosecution that A1 to A5 entered the house whereas A6 to A16 stood outside. Out of A1 to A5; A1 to A4 committed rape on the victim while A5 stood as guard. Then all of them removed the cash and articles from the house and left the place. The trial Court convicted A1 to A4 under section 367 independently and A5 constructively by invoking Explanation I. The High Court confirmed the convictions and sentences of A1 to A4, but reduced the sentence of A5. Considering the appeals made to the Supreme Court, they reduced the sentence of A1 to A4 solely on the basis of facts and circumstances of the case, but stated that,

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“...Once it is established that the accused had acted in concert and raped the prosecutrix then all of them would be guilty under section 367 in terms of Explanation I to clause (g) of sub-section (2) of section 367, IPC, irrespective of whether she had been raped by one or more of them.”

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Although *Arun Kumar and another v State of Uttar Pradesh (supra)* did not deal with the charge of rape, but on the charge of abduction in terms of section 366 of the Indian Penal Code, there are other binding authorities which deal with the offence of rape (section 376 of the IPC) in Indian Case Law, as *Pramod Mahto*, referred to earlier, is a case in point.

It is to be born in mind that there is a noticeable difference between the Explanation given in terms of Section 376 of the Indian Penal Code and the Explanation given under the amended section 364(2) of our Penal Code. (Section 13 of the Penal Code [Amendment] Act, No. 22 of 1995). According to the Explanation given in the Indian Penal Code, it is necessary for the persons to have acted ‘in furtherance of their common intention’ whereas no such requirement is needed in terms of our law.

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Accordingly, in terms of the Penal Code (Amendment) Act, there is no need for a member of a group of persons to be held liable for an offence of gang rape, to establish that each member of the group acted with a common intention to commit the said offence. What is necessary is to establish that the accused had been

members in the group and had either committed rape or had abetted the said crime. Once it is established that one of the accused had committed the offence of rape and there has been aiding and abetting, then all of them would be guilty under section 364(2)g in terms of Explanation I of the Penal Code (Amendment) Act, No. 22 of 1995 irrespective of the fact that whether the victim was raped by more than one of them. In fact the Sinhala version of the amended section 364 of the Penal Code, which is reproduced below, explains clearly that the amendment as contended by the learned President’s Counsel for the 4th appellant, was not only for the enhancement of the punishment for the offence but also to include the offence of gang rape which would bring in the liability for more than one person:

“තැනැත්තන් කණ්ඩායමක එක තැනැත්තෙකු හෝ ඊට වැඩි තැනැත්තන් සංඛ්‍යාවක් විසින් සිත් දුෂණය පිළිබඳ වරද සිදු කරනු ලැබූ අවස්ථාවක ඒ වරද සිදු කළ හෝ වරද සිදු කිරීමෙහිලා අනුබල දුන් ඒ කණ්ඩායමේ එක් එක් තැනැත්තා රංචු ගැසී සිටි දුෂණය සිදු කළේ යැයි සලකනු ලැබේ.”

Accordingly, it is clear that, the word ‘in a group’ which in the Sinhala version used as “ඒ කණ්ඩායමේ” was included for the purpose of making all the members of the group liable when one or more persons of that group had committed the offence of rape or had abetted the commission of the offence of rape.

In the instance case, there is no difficulty in deciding as to the culpability of the 4th appellant as there were several items of circumstantial evidence which clearly indicated that the 4th appellant was not a mere bystander, but in fact had abetted the commission of the offence of gang rape by the 1st, 2nd and 3rd appellants by intentionally aiding them. Such circumstantial evidence included the following:

The 4th appellant was the son of Amaradasa and their family and the deceased members of the Lalanadasa family had been arch rivals for a considerable period of time. In fact even on the day of the incident the 4th appellant had to be present at the Magistrate’s Court, Homagama on a complaint made to the police by the members of the Lalanadasa family.

In the circumstance, it would have been unthinkable for the 4th appellant to have made several visits to the residence of his

family's sworn enemy's without any fear or trepidation, if he was not aware that no one of that household is alive to bring any harm to him. Moreover, if there was no plan discussed among themselves there was no need for the 4th appellant to have brought cigarettes for the 1st appellant. The latter, after all, was an employee of his father and the 4th appellant would have been fully aware as to what was happening at Lalanadasa's residence. Moreover, when the 4th appellant visited the said house for the third time, he saw very clearly that there was a helpless girl tied to a bed and being sexually abused by three others who are known to him quite well. If the 4th appellant was not aware of what was taking place, would he have reacted in the manner he had behaved? There were no questions asked by the 4th appellant and he has not shown any kind of shock that would have been expected from a person who was not aware of such incidents taking place. Instead when the 3rd appellant came out of the room where the girl was being abused, what was the reaction of the 4th appellant? Learned President's Counsel conceded that the 4th appellant had uttered the following words: "මටත් දූෂණය කරන්න ඕනි". This certainly implies that he too was aware that the others had planned to sexually abuse the 4th appellant stood watching the helpless girl being brutally abused by his father's employee and his friends and by his utterance and his conduct the 4th appellant had expressed his approval of the activities that were taking place at Lalanadasa's house.

Considering the circumstances, would it be possible to treat the presence of the 4th appellant at the time the offence was committed, as a mere bystander who was observing some people engaged in the act of sexual abuse on a girl? It is to be born in mind that at no stage did the 4th appellant show any disagreement or disapproval of the action taken by the 1st, 2nd and 3rd appellants. There were no signs of protest. The 4th appellant however, stood watching the offence of rape being committed and clearly expressed his desire and willingness to follow suit and to take his turn. Accordingly the 4th appellant's supportive presence undoubtedly amounted to intentional aiding and in such circumstances it is clear that he cannot be treated as a person who was only an innocent observer of the incident of sexual abuse on a hapless victim.

On a consideration of the totality of the evidence I am of the view that the conduct of the 4th appellant clearly falls within the Explanation I of section 364(2).

Learned President's Counsel for the 4th appellant contended that in the event this appeal being dismissed, we should consider 790 whether the sentence imposed on the 4th appellant is appropriate or whether it could be mitigated. He submitted that as a result of this incident the 4th appellant, who was 17 years of age at that time, lost his education entirely. Considering his young age and fact that there has been no previous conviction, learned President's Counsel for the 4th appellant submitted that it is inappropriate to impose the maximum sentence prescribed by law for a first offender.

The 4th appellant, as stated earlier, was not a mere observer of the incident which took place at Lalanadasa's house. Considering the relationship between the 1st appellant and the 4th appellant, the 800 latter was in a position to prevent this incident taking place. Instead, by his actions he had given the necessary support for the others to commit the offence.

It is not disputed that a first offender should receive some kind of mitigation of sentence in most offences. As pointed out by Professor Andrew Ashworth (Sentencing and Criminal Justice – 3rd Edition, pg. 141) there is good and valid reason for dealing more leniently with an offence that can be interpreted as an isolated lapse. However Professor Ashworth is of the view that,

“Where the first offence is grave, there might be little reason 810 to make a concession to human frailty – there are some temptations or feelings to which one must simply not give way.”

The 4th appellant was found guilty and was convicted for committing the offence of gang rape in terms of section 364(2) of the penal Code as amended. Gang rape as stated earlier is an offence which involves more than one person. Peter Hungerford-Welch refers to such offences when more than one person is involved and states that,

“When more than one person is involved in the commission 820 of an offence, the fact that more than one person was

involved may make the offence more serious. A mugging by a gang is worse than a mugging carried out by one person (Criminal Litigation and Sentencing, 4th Edition, pg. 541).”

The 4th appellant therefore in my view was involved in the commission of an offence which was of a serious nature and I cannot see any reason for mitigation of his sentence.

On a consideration of the totality of the evidence, I see no merit in any of the ground urged by learned Counsel on behalf of the appellant.

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For the aforementioned reasons, the appeal is dismissed and the convictions entered and the sentences imposed are affirmed.

YAPA, J. – I agree.

WEERASURIYA, J. – I agree.

JAYASINGHE, J. – I agree.

UDALAGAMA, J. – I agree.

Appeal dismissed.