[COURT OF CRIMINAL APPEAL.]

1948 *Present :* **Howard C.J. (President), Jayetileke and Windham JJ.**

THE KING *v.* BASNAYAKE.

Appeal No. 11 of 1948.

S. C. 13—M. C. Kurunegala, 25,415.

Court of Criminal Appeal—Charges of unlawful assembly, abduction and rape—Corroboration of complainant on charge of rape—Failure of Judge to direct Jury—No corroboration in fact—Accused entitled to acquittal.

Five accused were charged with being members of an unlawful assembly with the common object of abducting one K and with having abducted her, and the appellant was also charged with the rape of K. The trial Judge directed the Jury that if they found that there were less than five persons in the assembly, the first charge failed ; that if they found it was an elopement and not an abduction, the second charge failed. He did not however warn them that, in that event, they could not convict the appellant on the third charge unless the evidence of K was corroborated. The Jury acquitted the accused on the first and second counts.

Held, that the verdict showed that there was not in fact corroboration of the evidence of K and that in the absence of such a warning by the Judge the conviction must be set aside.

APPEAL from a conviction in a trial before a Judge and Jury.

H. V. Perera, K.C., with *M. M. Kumarakulasingham*, for the accused, appellant.

H. A. Wijemanne, Crown Counsel, for the Crown.

Cur. adv. vult.

May 3, 1948. HOWARD C.J.—

The appellant along with three others who were acquitted were indicted with being members of an unlawful assembly the common object of which was to abduct one Kamalawathie Senanayake in order that she may be forced or seduced to illicit intercourse. The second count in the indictment charged the accused with abducting the said

Kamalawathie Senanayake in prosecution of such common object with intent that she may be forced or seduced to illicit intercourse. A third count charged the appellant with committing the offence of rape on the said Kamalawathie Senanayake. The accused were all acquitted on the first and second counts, while the appellant was convicted on the third count and sentenced to three years' rigorous imprisonment. The evidence established that the appellant and Kamalawathie, both of whom were school teachers, had been engaged to be married. According to Kamalawathie her affections towards the appellant cooled off and on December 25, 1944, the engagement was broken off. On January 2, 1945, Kamalawathie went to stay in the house of one Mudiyanse Vidane at Diullegoda. This house was about half a mile from the Diullegoda School where she was teaching. The appellant was teaching at the Balalle School till May, 1945. Kamalawathie states that for about 3 months she went to the school accompanied by Kusalhamy's wife. On March 12, 1945, when returning from the school the appellant barred her way and asked her why she did not like his marriage proposal. On the following day Kamalawathie complained to the Aratchi about the appellants behaviour. On May 30, 1945, Kamalawathie states that she set out for the school as usual accompanied by a fourteen-year boy called Martin who carried her tiffin basket. She says that she was going along the V. C. road when the third accused came along with a gun and walked ahead of her. Two other men came behind her one of whom was the fourth accused. Near the house of one Kapuru Banda she called the latter and told him she wanted him to post some letters at Nikaweratiya. As she turned to go the fourth accused and another man stood behind her and the fourth accused told her that the gentleman who was transferred from Balalle to Karambe School had come to see her. She says that at that time she knew the appellant had been transferred from Balalle to Karambe. She maintains that she told the fourth accused there was no necessity for her to talk to the appellant and she must go to the school. The third accused came armed with a gun and as they were going towards the school the fourth accused lifted her bodily and carried her to a car which came towards them reversing. She says she struggled and raised cries. The appellant was in the back seat of the car and the second accused was at the wheel. Though struggling she was put in the back seat and the car drove off. She was crying and weeping. The appellant threatened her with a knife. She was first taken to an estate bungalow and then to a house in a coconut grove where an old woman and a man by the name of Kiri Mudiyanse were living. While there the appellant got her to sign certain documents and printed forms. One of these documents was an application by Kamalawathie for leave. She says that she signed them and filled in the gaps through fear. When night time came the appellant invited her to come to the bed. He then pulled her on to the bed. She cried out but no one came. He threatened to stab her and then had intercourse with her twice forcibly. On the second night he again had intercourse with her also forcibly, according to her story. On the following day about 1 or 2 P.M. the appellant received a warning and then said to the girl "The Police would be coming to arrest us. If you remain here you will disclose

everything that took place. Therefore I must take you to the jungle". Kamalawathie says that he then dragged her to the jungle with the help of Kiri Mudiyanse and the man who brought the warning message. The Police arrived about 5.30 or 6 P. M. Kamalawathie says that when she saw them she ran towards them and the appellant followed. She had previously, so she contends, concealed the knife with which the appellant had threatened her. She handed the knife to Police Constable Fernando telling him that it was the knife with which the appellant threatened her life. The Police then arrested the appellant. They then went to Kiri Mudiyanse's house where Kamalawathie says she told P. C. Fernando about the rape. Kamalawathie's story about the abduction was corroborated by the boy Martin. Kamalawathie was examined by the District Medical Officer, Maho, on June 2, 1945, who found that the hymen showed signs of a partial and recent rupture. There were no injuries on the rest of her body.

The main ground of appeal advanced by Mr. H. V. Perera on behalf of the appellant is that the Jury were not warned by the learned Judge that it was not safe to convict the appellant of rape on the uncorroborated evidence of Kamalawathie. In this connection we were referred to the case of *The King v Ana Sheriff*[1]. If there was in fact corroboration the warning would not in law be necessary. Moreover, if it could be taken as proved that Kamalawathie was abducted as she maintained, then no doubt such abduction would supply the necessary corroboration. The difficulty in holding that such abduction has been proved arises from the verdict of the Jury. The Jury have found the accused not guilty on the first two counts. They have therefore negatived an unlawful assembly with the common objective of abduction and also abduction in prosecution of such common object. Mr. Wijemanne for the Crown has argued that the only significance of this verdict on the first two counts is that the Jury were not satisfied that five or more persons took part in the abduction. The verdict does not, so he contends, negative an abduction. In this connection he has invited our attnention to certain passages in the learned Judge's charge. At page 6 it is stated that the Jury must find there were at least five persons to constitute an unlawful assembly. Again on page 10 the learned Judge states as follows :—

> "So that, if in the early stages of your deliberations you are satisfied beyond resonable doubt that only these four accused were present and that the fifth accused is just imagination, then the whole case collapses—I mean the first and second counts of the indictment collapse. The first and second counts on the indictment are the counts which involve all these accused in the dock."

On page 47 it is stated as follows :—

> "If you think it is a case of elopement, then the second count of the indictment falls to the ground just as the first count of the indictment falls to the ground if there were not five people in this assembly. Nobody pretends that there were more than five. The case for the Crown is that there were just five. That is a circumstance which you will take into consideration. They have committed themselves to five.

[1] *(1941) 42 N. L. R. 169.*

If you find that there were not five then the first count fails. If you find that this girl went of her own free will the second count fails. If you find that the girl was taken away by force, then the second count is established."

Again on pages 50 and 51 the following passage occurs :—

" But now you have got the whole case, at least the salient points of the case, before you, and as Crown Counsel put it in the forefront of his address to you a moment ago, it is for you to put yourselves in the place of Kamalawathie as far as it is possible to do so, and having regard to all these matters which you have now before you, you will ask yourselves the simple question whether this is a case of elopement or of an abduction. If it is a case of elopement the whole case falls to the ground and you will acquit the accused. Again, if you are satisfied that there were no more than these four accused concerned in this you will acquit the accused on counts 1 and 2. You will acquit all the accused on all the counts if you find that this was an elopement and that the woman willingly surrendered herself to the accused on the night of the 30th and 31st. But if you hold that this was an abduction by five people then the first and second counts are made out. If you hold that there were not five people but only four, as admitted by the first accused, then the unlawful assembly charge fails, and having regard to the manner in which the indictment has been framed the abduction charge also fails. Then all that remains for you to consider is whether the first accused is guilty of rape. In regard to that you will find him guilty of rape if you find that sexual intercourse occurred against the will of the girl and without her consent. But if you find that it was with her consent then the charge of rape also must fail.

If you have any reasonable doubt on any of these matters the accused is entitled to the benefit of the doubt. If you have no reasonable doubt in regard to these questions and if you are satisfied that there was an unlawful assembly, that there was abduction and there was rape, you will not fail to bring in a verdict which you ought to bring in accordance with your finding. If you find that the first accused is guilty you will not say now that the whole thing has been done and this woman has got married to another you will acquit the accused, but if you have any reasonable doubt you will give the benefit of the doubt to the accused. "

The learned Judge seems to have told the Jury that they must decide whether it is a case of abduction or elopement. If there were not four persons in the assembly then counts 1 and 2 fail. Also that count 2 fails if the girl went of her own free will. The Jury have found that both counts 1 and 2 fail, and in our opinion the appellant must be given the benefit of the doubt and the inference to be drawn from that verdict is that it was an elopement and not an abduction. In the circumstances the finding of the Jury that the appellant was guilty of rape is not easy to comprehend. There was no warning in the charge that, so far as the charge of rape was concerned, the Jury should look for corroboration.

If it was an elopement, there was an absence of corroboration and the attention of the Jury should have been drawn to the fact that if they convicted of rape after finding that it was an elopement and not an abduction they would be acting on the uncorroborated testimony of Kamalawathie. In the absence of such a warning the conviction must be set aside.

Conviction set aside.