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

In the matter of an Appeal from the order of the High Court of Kandy dated 06.07.2018 in HC/APPEAL/27/2019 made in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No: SC/APPEAL/27/2019

HC Kandy Case No: HC/APPEAL/48/2008

MC Theldeniya Case No: 48360

Officer- In- Charge,
Police Station.
Udu Dumbara

Complainant

Vs.

1. U.G. Sunil,
   No. 11/02, Pansalwatta Road,
   Kundasale.
2. R.M. Jayarathne,
   No. 56, Pilawala Colony,
   Pilawala.
3. D.M. Priyanatha Kumara,
   No. 67, Ratemulla,
   Talathuoya.
4. Sunil Rajapakshe,
   No. 38, Mahawatte,
   Kundasale.
5. Sunil Samanthilake,
   No. 80, Ayojanagama
   Kundasale
6. Chaminda Bandara,
   No. 13C, Arangala, Mahawatte,
   Kundasale.
7. Chandana Priyantha
   No. 10, Natharanpotha,
   Kundasale.

Accused

And then Between

1. U.G. Sunil,
   No. 11/02, Pansalwatta Road,
   Kundasale.
2. R.M. Jayarathne,
   No. 56, Pilawala Colony,
   Pilawala.
3. D.M. Priyanatha Kumara,
   No. 67, Ratemulla,
   Talathuoya.
4. Sunil Rajapakshe,
   No. 38, Mahawatte,
   Kundasale.
5. Sunil Samanthilake,
   No. 80, Ayojanagama
   Kundasale
6. Chaminda Bandara,
   No. 13C, Arangala, Mahawatte, Kundasale.
7. Chandana Priyantha
   No. 10, Natharanpotha,
   Kundasale.

Accused Appellants

Vs.

1. Officer- In- Charge,
   Police Station.
   Udu Dumbara
2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

And Now Between

1. U.G. Sunil,
   No. 11/02, Pansalwatta Road,
   Kundasale.
2. R.M. Jayarathne,
   No. 56, Pilawala Colony,
   Pilawala.

   (Deceased)

3. D.M. Priyanatha Kumara
   No. 67, Ratemulla,
   Thalathuoya.
4. Sunil Rajapakshe,
   No. 38, Mahawatte,
   Kundasale.
5. Sunil Samanthilake,
   No. 80, Ayojanagama
   Kundasale
6. Chaminda Bandara,
   No. 13C, Arangala, Mahawatte,
   Kundasale.

   (Deceased)

Accused- Appellants- Appellants

Vs.

1. Officer- In- Charge,
   Police Station.
   Udu Dumbara
2. Hon. Attorney General,
   Attorney General's Department, Colombo 12.

Respondents- Respondents

BEFORE : VIJITH K. MALALGODA P.C., J.
K.KUMUDINI WICKREMASINGHE, J.
JANAK DE SILVA, J.

COUNSEL : Anuja Premarathna PC with Imasha Senadheera for Accused Appellant Appellant

Ms. Varunika Hettige SDSG for the Respondents

ARGUED ON : 08.02.2023

WRITTEN SUBMISSIONS : 10th August 2020 and 09th March 2023 for the Accused Appellants Appellants

07th May 2021 and 22nd February 2023 for the Respondents

DECIDED ON : 05.06.2024

K. KUMUDINI WICREMASINGHE, J.

This is an appeal from the order of the High Court of the Central Province holden in Kandy. The Accused Appellants Appellants (hereinafter referred to as Appellants) were charged in the Magistrates Court of Theldeniya for the following offences:

1. Being a member of an Unlawful Assembly with the common object of which was to abduct Subasinghe Mudiyanselage Udagedara Dissanayake and thereby committed an offence punishable under section 140 read with section 32 of the penal code.
2. At the same time, place and the same transaction the 6th Accused whilst being a member of the said Unlawful Assembly, was armed with a deadly weapon and thereby committed an offence punishable under section 141 of the penal code.
3. At the same time, place and the same transaction whilst being members of the unlawful assembly, in furtherance of the common object, caused trespass and entered to the residence of Subasinghe Mudiyanselage Udagedara Dissanayake and thereby committed an offence punishable under Section 434 read with Section 32 of the Penal Code.
4. At the same time, place and the same transaction being a member of the unlawful assembly, in furtherance of the common object abducted Subasinghe Mudiyaselage Udagedara Dissanayake and thereby committed an offence punishable under Section 354 read with Section 32 of the Penal Code.

The Learned Magistrate of Theldeniya by order dated 7th February 2007 convicted the Appellants for the 1st, 3rd and 4th charges aforesaid and sentenced the Appellants accordingly. Consequent to the said conviction the following sentences were imposed on the Appellants:

1. In respect of charge 01 a fine of Rs.1000/= carrying a default sentence of 3 months
2. In respect of the 03rd charge a fine or Rs.100/=.

3. In respect of the 4th charge a fine of Rs.1000/= carrying a default term of 3 months and 6 months rigorous imprisonment.

The Appellants aggrieved by which appealed to the High Court of the Central Province holden in Kandy and consequent to the appeal being heard the Learned High Court Judge by order dated 6th July 2018 affirmed the convictions and sentences imposed by the Learned Magistrate.

Aggrieved by which the Appellants appealed to the Supreme Court. Leave to appeal was granted on the 21st July 2018 on the following questions of law:

1. Has the Learned High Court Judge and the Learned Magistrate of Theldeniya judicially considered the charge levelled against the Accused and the evidence that has been placed before this court.
2. Did the Learned High Court Judge and the Learned Magistrate err in considering the Dock Statement made by the 2nd Accused against the rest of the Accused.

The facts of this case can be briefly summarised as follows. The Officer in Charge reported facts to the Magistrate Court of Theldeniya producing 1st to 5th Appellants upon a complaint made by Lalitha Kumari Kulathunga on an alleged abduction of her husband Subasinghe Mudiyanselage Udagedara Dissanayake (PW1). Thereafter an identification parade was held in respect of the 1st to 5th Appellants. The Police proceeded with the investigation and arrested two more suspects namely the 6th and 7th Appellants. They were thereafter produced for an Identification Parade and PW1 identified both of them. Two ID parades were held in respect of the 7 Appellants marked පැ3 and පැ4. Thereafter the Appellants were charged on four counts before the Magistrate Court of Theldeniya as mentioned above.

6 witnesses testified in the trial. PW1 who was the victim of the abduction testified regarding the incident and that on the day of the incident he had been home with his wife when at about 7:30 PM, 4 people came to his residence by a Van bearing registration number WHGA 2743 marked as පැ1 identifying themselves as officers attached to the Criminal Investigations Department (CID) and had requested PW1 to accompany them to record a statement. PW1 had identified the 3rd, 4th, 5th and 6th Appellants in court. He stated that he got into a van parked nearby; however, he was not taken to the Ududumbara Police station but had been dropped at the Hasalaka Town. The next day PW1 had made a complaint to the Theldeniya Police.

PW2 who was the wife of PW1 testified that 4 people came to her residence identifying themselves as police officers and required PW1 to accompany them to the Ududumbara Police Station. PW2 had identified the 3rd and 5th Appellants in the identification parade and in court. Immediately after PW1 had been taken by the Appellants, PW2 had informed the Ududumbara and Theldeniya Police Stations that her husband had been abducted.

PW3 testified that she went to the boutique owned by PW1 at around 7:00 PM on 9th December 2002. She stated that at that time the boutique was closed. However, PW2 opened the door leading to her residence and she was able to purchase a few items. Whilst she was doing so a few people walked into the house and even though she attempted to leave they did not let her and asked her to remain. She stated that these people had identified themselves as officers attached to the CID and informed PW1 that it was necessary to record his statement and to accompany them to do so.

The evidence of PW10 and PW11 who were involved in conducting the identification parade had not been led as the said fact had not been disputed by the Appellants.

PW12 attached to the Udumbara Police Station testified that upon receipt of information that PW1 had been abducted, that he had visited the residence of PW1. PW2 thereafter had informed him that she was the one who called the police station. PW12 testified that he had informed the Theldeniya Police Station and informed the Kandy operation centre.

PW13 attached to the Theldeniya Police Station testified that upon the information that PW1 had been abducted he had been involved in the arrest of the Appellants and had taken into custody the van and produced the suspects and the production (Van) to the Magistrates Court. He further testified that PW1 gave a statement to the Theldeniya Police regarding the incident that occurred and he identified the Appellants and having examined the production he had identified the van.

PW15 testified that he was a police officer attached to the Dehiattakandiya Police Station and upon receipt of the information the PW1 had been abducted based off the police complaint made by PW2, Police Officers had checked vehicles and had arrested the Appellants and had taken the vehicle into custody. PW15 had identified the Appellants in Court.

After the trial the Learned Magistrate convicted the accused for unlawful assembly section 140 of the Penal Code, house trespass section 434 of the Penal Code and kidnapping 354 of the Penal Code and discharged them from the charge punishable under section 141 and were sentenced as mentioned above.

Aggrieved by which an appeal was submitted to the High Court. The High Court Judge directed parties to file written submissions however no oral submissions were made before the High Court Judge. Thereafter the Learned High Court Judge dismissed the appeal on the basis that evidence of the prosecution witnesses was uncontradicted and/or unchallenged when applying the tests of consistency per se and inter se. The Learned High Court Judge further held that the Defence had failed to discharge the burden of giving an explanation acceptable to the court.

Aggrieved by which the Appellants made an application before the High Court and for Leave to appeal to the Supreme Court under Rule 22 of the Supreme Court Rules of 1990. The Learned High Court Judge by order dated 21.07.2018 granted leave to appeal on two questions of law.

I will now proceed to answer the first question of law on which leave was granted namely "Has the Learned High Court Judge and the Learned Magistrate of Theldeniya judicially considered the charge levelled against the Accused and the evidence that has been placed before this court".

The evidence led at trial included the testimony of 6 witnesses. Two identification parade reports have been marked and the van bearing registration number WHGA 2743 marked P1 in trial which has been identified by the witness. The Appellants made dock statements denying the charges levelled against them.

It has been firmly established that, in a criminal case, that the charges against the Accused should be proved beyond reasonable doubt. Proof beyond a reasonable doubt generally means the Court must carefully consider the entirety of admissible evidence to such scrutiny to see whether the ingredients of the charges are proved. If the Court is not satisfied the accused person must be acquitted.

Proof beyond reasonable doubt however does not mean proof beyond the shadow of doubt. A clear distinction made on what exactly proof beyond reasonable doubt means was explained by Lord Denning in **MILLER v Minister of Pension [1947] 2 A. E. R 372, at 373**:"*Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect*

the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility in his favour..... the case is proved beyond reasonable doubt but nothing short of that will suffice."

As per **section 3 of the Evidence ordinance** "*A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man might, under the circumstances of the particular case, to act upon the supposition that it exists.*"

In this case, the prosecution relies heavily on the testimonies provided by the witnesses to prove the guilt of the Accused. PW2 and PW3 testimonies collaborate the testimony of PW1 regarding the incident and the sequence of events. The credibility of a witness is a question of fact, not of law. Appellate judges have repeatedly stressed the importance of the trial judges' observations of the demeanor of witnesses in deciding questions of fact.

Lord Pearce in **Onnassi v. Vergottis [1968] 2 Lloyds Reports 403** stated that '*one thing is clear, not so much as a rule of law but rather as a working rule of common sense. A trial judge has, except on rare occasions, a very great advantage over an appellate court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a court of appeal should never interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial judge and the court of appeal has not been occasioned by any demeanor of the witnesses or truer atmosphere of the trial (which may have eluded the appellate court) or by any other of those advantages which the trial judge possesses*'.

Considering the testimonies provided by PW1 and PW2, it is evident that PW2 promptly complained to the relevant Police Stations that her husband had been kidnapped by the Appellants immediately after the incident had taken place. PW1 in his testimony stated that the Appellants informed him that they were taking him to Dehiattakandiya and they had dropped him at Hasalaka town. PW1 also maintained in his examination in chief that the 5th Accused was armed with a pistol. PW1 testified that he was afraid that the Appellants were actually attached to the Uda Dumbara Police station owing to which he had proceeded to Theldeniya Police Station and lodged a complaint about the incident. The two witnesses' testimonies have remained for the most part consistent throughout the trial.

In the written submissions of the Respondents, it is submitted that the evidence placed before the Learned Magistrate was consistent and corroborative in nature and as such the defence had failed to impeach the credibility of the witnesses. I am inclined to agree with this contention of the Respondents.

A key test of credibility is whether the witness is an interested or disinterested witness. Rajaratnam J. in **Tudor Perera v. AG (SC 23/75 D.C. Colombo Bribery 190/B – Minutes of S.C. Dated 1/11/1975)** observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinised with some care. The independent witness will normally be preferred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive, and reliability have all to be weighed (**Vide, Halsbury Laws of England 4th Edition para 29**). Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness.

In State of UP v. Anthony [1985] AIR 1985 SC48 the Indian Supreme Court stated that '*while appreciating the evidence of a witness, the approach must be whether the evidence...read as a whole appears to have a ring of truth*'

Applying the above-mentioned principal to the testimony of PW3 who can be considered as an independent witness. PW3 was present at the house of PW1 purchasing items from PW2 in the shop that PW1 and PW2 had established in part of their house when the incident in concern occurred. PW3's testimony collaborated with the testimony of PW2 and the sequence of events. Therefore, applying the above-mentioned principle, the testimony of PW3 being a disinterested witness should be considered with considerable weight when concluding accuracy of the testimonies of PW1 and PW2.

Relying on the above judicial literature stated in **Frad Vs. Brown and Alwis Vs. Piyasena Fernando 1993 1 SLR 119**, I hold that the findings of the trial Judge who had the opportunity of observing demeanor and deportment of witnesses should not be easily disturbed.

Addressing the issue of the charge sheet being defective as the 4th charge of kidnapping is wrong. It is well settled law that if a charge sheet is defective, objection to the charge sheet must be raised at the very inception. The objection that the charge sheet is defective has not been raised at any point during the trial despite the Appellants being represented by Counsel since the beginning of the

trial. Further, even though both parties have mentioned this issue in their written submissions this court will only address the questions of law on which leave has been granted.

I am of the view that the prosecution has established a strong case with incriminating and cogent evidence against the Appellants. Owing to which I answer the first question of law on which leave was granted in the negative.

Now I will consider the second question of law on which leave was granted, namely "Did the Learned High Court Judge and the Learned Magistrate err in considering the Dock Statement made by the 2nd Accused against the rest of the Accused."

It must be noted that a Dock Statement is considered evidence, however, subject to the infirmity that it was not given under oath and therefore, not subject to cross examination. In T**he Queen v. Buddhrakkita Thera and 2 Others [1962] 63 NLR 433, —***The right of an accused person to make an unsworn statement from the dock is recognised by our law* ***[King v. Vellayan [1918] 20 NLR 251.*** *That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination*‖.

The manner in which such a statement should be evaluated was analysed in **The Queen v. Kularatne [1968] 71 NLR 529** as follows: **—***We are in respectful agreement, and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that,*

(a) If they believe the unsworn statement it must be acted upon,

(b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and

(c) That it should not be used against another accused‖

In the case of **Sarath v Attorney General [2006] 3 SLR 96** it was held that a dock statement cannot be considered in isolation and when a judge analyses a dock statement it must be done in the context of the entire case including the evidence of the prosecution and narrative.

The Learned Magistrate has considered the 2nd Appellants dock statement and states as follows "රාජපක්ෂ මුදියන්සේලාගේ ජයරත්න නමැති විත්තිකරු තමා මළගෙදරක ගොස් පැමිණෙන විට මෙම නඩුවේ පැහැර ගැනීමට ලක්වූ දිසනායක නමැති අයව ගෙන නොගිය බවත් ප්‍රකාශ කර ඇත. කෙසේ නමුත් විත්ති කූඩුවේ සිට කරන ලද එකී ප්‍රකාශය අනුව මෙම විත්තිකරුවන්ගේ රථයේ දිසානායක යන අයව කැමැත්තේන් හෝ අකමැත්තෙන් රැගෙන ගිය කරුණු ඔවුන් පිලිගෙන ඇත".

When a judge considers a dock statement, they typically evaluate it as part of the overall evidence presented in a case. The judge assesses its relevance, whether the dock statement is relevant to the case at hand. It should pertain to the facts or issues in dispute. Another factor considered by the judge is the credibility of the dock statement. A judge may consider factors such as the source of the statement, any potential biases or motives of the person making the statement, and whether there is corroborating evidence. If there are inconsistencies between the dock statement and other evidence or statements presented in court, the judge will take note of these discrepancies and may question the reliability of the dock statement. The judge also determines whether the dock statement meets the legal standards for admissibility. This includes considerations such as whether it was obtained lawfully and whether any hearsay rules apply. Finally, the judge assigns weight to the dock statement relative to other evidence in the case. They may give more weight to statements that are supported by other evidence or that are more consistent with the overall facts of the case.

However, it's essential to note that the admissibility and weight of dock statements can vary depending on the specific circumstances of each case and the discretion of the presiding judge.

In the case of **Queen v Buddharakkita Thero [1962] 63 NLR 433 at 444** it was stated that a right to make such a statement is treated as evidence on behalf of the Accused, subject however to the infirmity that attached to statements that are unsworn and have not been tested by cross examination.

In the case of **The Queen v Arasa [1966] 70 NLR 403 at 405** Justice H.N.G. Fernando took the view that the dock statement was a matter before the court which could be taken into consideration in deciding the case.

E.R.S.R. Coomaraswamy (The Law of Evidence, Volume II book 2, Stanford Lake Publication 2013, page 533) states that the consensus of judicial opinion in Sri Lanka appears to be that the unsworn statement has evidentiary value and must be considered by the jury as such, subject to infirmities.

Considering the evidence led in this case the prosecution had a duty to fulfil beyond a reasonable doubt that the ingredients of the sections set out in the four charges levelled against the Accused. The Learned Magistrate has taken into consideration the evidence led which included testimonies from PW1 and the investigating Police Officers when concluding that a kidnapping had taken place. The Learned magistrate has considered the evidence in totality and not just the dock statement of the Appellant when concluding the guilt of the Appellants as the dock statement admitting that PW1 was in the van belonging to the 2nd Appellant only adds onto the evidence which has been led at trial.

The dock statement made by the appellant does not create any doubt in the case of the prosecution. It has been held in many of our cases that when a dock statement is made that it has to be acted upon if the court believes the version even if it is not subjected to cross examination.

When I consider all the above matters, I answer the questions of law raised by the Appellants in the negative. Due to the abovementioned reasons, I hold that there is no ground to interfere with the judgment of the learned High Court Judge and the learned Magistrate.

Accordingly, I affirm the judgment of the learned High Court Judge and the Learned Magistrate and affirm the conviction and the sentence.

This Appeal is hereby dismissed.

The Registrar of this Court is directed to follow the procedural steps.

JUDGE OF THE SUPREME COURT

Vijith. K Malalgoda P.C.J,

I agree.

JUDGE OF THE SUPREME COURT

Janak De Silva J,

I agree.

JUDGE OF THE SUPREME COURT