

PIYASENA AND TWO OTHERS

v.

THE ATTORNEY-GENERAL

COURT OF APPEAL.

ABEYWARDANE, J., JAYALATH, J. AND WIJETUNGA, J.

C.A. 34-36/84.

H.C. RATNAPURA 62/80.

M.C. EMBILIPITIYA 19122.

JULY 09 AND 10, 1986.

Criminal Law—Charge—Several acts of rape in two different places—Is charge bad for duplicity?—Corroboration—Identification.

The prosecution case was that the prosecutrix was raped by the three accused persons—each three times once in the prosecutrix's own house in the presence of her mother and twice elsewhere where there were no witnesses. Each of the accused was indicted on a single charge of rape and after trial the jury found each of the accused guilty of rape. It was contended that the charge was bad, the corroborative material did not cover all three acts of rape and the accused being at a loss to know of which act of rape they were convicted, were prejudiced in their defence and the identification parade having being held the evidence on the identity of the accused should not have been accepted.

Held—

(1) Although each accused had committed three distinct acts of rape these acts constituted a series of acts in one continuing transaction. It was one activity although the activity involved more than one act. Hence it is legitimate to indict each accused in a single charge of rape. It was not necessary to have a separate count for each act of rape. Sufficient particulars had been given in the charge and the charge was not bad for duplicity.

(2) The Judge in his summing up had sufficiently explained the law relating to corroboration including the circumstances under which a jury can convict in spite of the absence of corroboration of the victim's evidence.

(3) The identification of the accused by the prosecutrix was acceptable and the verdict of the jury was reasonable.

Cases referred to:

(1) *Director of Public Prosecutions v. Merriman* — (1973) 56 Cr. Appeal Reports 756, 775, 776.

(2) *Jamieson v. Priddle* — (1971) 56 Cr. Appeal Reports 229, 234; (1972) W & R 293, 298.

APPEAL from conviction in the High Court of Ratnapura.

Ranjith Abeysuriya with *Athula Pathinayake* for accused-appellants.

Nihal Jayasinghe, S.S.C. for Attorney-General.

September 5, 1986.

JAYALATH, J.

The three accused-appellants N. T. Piyasena, K. T. Bandupala and P. P. Gunapala were charged on four counts as follows:—

- (1) That they did on or about the 24th October 1977 at Mahagamā within the jurisdiction of this court abduct Goowandarage Karunawathie in order to have unlawful sexual intercourse and thereby commit an offence punishable under section 357 of the Penal Code.
- (2) That at the time and place aforesaid and in the course of the same transaction you the first accused abovenamed did commit rape on Goowandarage Karunawathie an offence punishable under section 364 of the Penal Code.
- (3) That at the time and place of aforesaid and in the course of the same transaction you the second accused abovenamed did commit rape on Goowandarage Karunawathie an offence punishable under section 364 of the Penal Code.
- (4) That at the time and place of aforesaid and in the course of the same transaction you the third accused abovenamed did commit rape on Goowandarage Karunawathie an offence punishable under section 364 of the Penal Code.

Thus each of the accused-appellants were charged on two counts punishable under sections 357 and 364 of the Penal Code.

After trial the jury returned an unanimous verdict of guilty on each of the counts against all the accused-appellants.

Each accused-appellant was sentenced to 5 years' rigorous imprisonment on count one and (the 1st, 2nd and 3rd accused-appellants were sentenced) to 15 years' rigorous imprisonment on counts two, three and four respectively, by the learned trial judge. The sentences against each accused-appellant were to run consecutively, so that each accused-appellant would have to serve a period of 20 years' rigorous imprisonment.

Before considering the submissions made by the learned Counsel for the accused-appellants it would be necessary to state the facts of this case as briefly as possible.

Goowandara Karunawathie stated at the trial that she was 18 years of age at the time of the incident and living with her mother and father at Mahagama, Embilipitiya. With them lived another boy by the name of Piyasena, who was a distant relation. The four of them had gone to sleep at about 7 p.m. after their dinner on the 24th October 1977. They lived in a small house which contained a small verandah, a hall and a kitchen. There was a door in front of the house and there was also a door in the rear of the house.

On that day she and her mother slept near each other near the kitchen. Piyasena slept in the kitchen, Karunawathie said that she had not fallen asleep. She said that some time later she heard someone knocking on the front door, and wanted the door to be opened. Her mother replied saying that she cannot open the door. The person who knocked at the door then said that the door would be forced open if she did not open it.

She said that the door was then opened and three persons entered the house. Karunawathie said that Bandupala the 2nd accused-appellant entered the house first, followed by the 1st and 3rd accused-appellants. She said that they were armed with clubs. There was a bottle lamp on a table alight, which she said one of the persons hit with a club and broke into pieces.

The 1st accused-appellant who had a club in his hand went towards her father and took the pickaxe which was with her father. These persons then tried to pull her out. She said that the inmates of her house on seeing what was happening raised cries. Her mother and father were then assaulted by the 1st and the 2nd accused-appellants with clubs and pushed towards the kitchen, and threatened with death. Piyasena was assaulted by them with clubs and chased out of the house.

Karunawathie said that she was first put on the floor by the second accused-appellant, whom she identified as Bandupala, and thereafter lifted on to a bed which lay beside her. The 2nd accused-appellant then attempted to rape her; but she said that he could not do so as she resisted. The 2nd accused-appellant then called the 1st accused-appellant and having cast a remark told him that she was resisting and was not yielding to his demands. Karunawathie said that she had struggled with the 2nd accused-appellant when he attempted to rape her. The 1st accused-appellant then threatened her and raised her gown and raped her.

Karunawathie stated that after about 15 minutes the 1st accused-appellant released her and the 2nd accused-appellant came and having raised her gown and raped her. After about 10 minutes the 2nd accused-appellant released her and the 3rd accused-appellant came and raped her in the same manner. The 2nd accused-appellant threatened her father and mother and warned them that if they made a complaint to the police about this incident they would kill both of them. The 1st and the 3rd accused-appellants then went out of the house at the request of the 2nd accused-appellant.

Karunawathie said that the 2nd accused-appellant then dragged her out of the house, having threatened her father. Before doing so he collected a gown and an underskirt from a line and asked Karunawathie to wear it. She said that when she was taken out of the house she saw the 1st and 3rd accused-appellants waiting outside.

When Karunawathie was being dragged out of the house she said that her mother followed her right up to the spill which was a little distance away. The 2nd accused-appellant then put her on to a boat, and with the 1st and 3rd accused-appellants rowed the boat towards the house of the 1st accused-appellant. This house was situated in the midst of a jungle. Karunawathie said that she was led into the house and the doors were locked. It was about 12 midnight when they reached the 1st accused-appellant's house. There was no one else there.

Karunawathie said that the 2nd accused-appellant then put her on a mattress which lay in the house and raped her. The 1st accused-appellant then raped her, followed by the 3rd accused-appellant. After that the 2nd accused-appellant told her to sleep, but she could not sleep. She said that again at about 5 a.m. the 2nd accused-appellant raped her forcibly in spite of her protests. He then left saying that he was going to the pola. Then 1st accused-appellant again raped her after the 2nd accused-appellant left. The 3rd accused-appellant followed the 1st accused-appellant and raped her again for the third time. Karunawathie said that the three of them raped her in spite of her resisting them and raising protests.

The 1st accused-appellant then went away saying he was going to the pola. Karunawathie said that he tried to lock her inside his house before leaving for the pola, but she pushed the door and got out to the front of the house and sat on the doorstep. The 1st and 2nd

accused-appellants had left for the pola whilst the 3rd accused-appellant waited near her. The 1st accused-appellant then returned and took her towards the main road, and then to a boutique where he got her some tea. On their return from the boutique at about 7 a.m. they met the 2nd accused-appellant, who asked Karunawathie to accompany him to the house, Karunawathie said that she refused to go. He threatened Karunawathie that he would take her to Mau Ara, and there kill her. Karunawathie replied that she felt dizzy and she could not go anywhere. He then took her along a sandy road and again asked to come with him to Mau Ara, but she refused. She said that whilst she was being threatened she saw a jeep approaching towards them. The 2nd accused-appellant tried to drag her by the hand, but she resisted and got away, and ran towards the jeep. The 2nd accused-appellant ran towards the jungle which was on the right side and fled when the jeep came near them. Karunawathie said that she walked towards the jeep and she got into the jeep and waited with two police officers whilst two others searched the area for the 2nd accused-appellant. The police officers however could not apprehend the 2nd accused-appellant who had escaped.

Karunawathie stated that she was then taken to the 1st accused-appellant's house by the police officers. Thereafter she was taken to her house at Mahagama where her statement was recorded by the police. She said she was later examined by a doctor at the Pallebedda Hospital.

Mr. Jayasekera, Judicial Medical Officer of the Pallebedda hospital who examined her on 25.10.77 found four external injuries on her which were as follows:

Injury No. 1 was an abrasion behind the back of the chest. It was 3 1/2" wide.

Injury No. 2 was an abrasion on the left thigh 3 inches long.

Injury No. 3 was an abrasion on the left thigh. He could not describe the size of this injury.

Injury No. 4. was a scratch by a finger nail, 1 inch long.

The doctor stated that injuries 1, 2 and 3 could have been inflicted by a club. Injury No. 4 could have been inflicted by a finger nail.

The doctor also stated that there was a complete tear in the hymen. The tear was a recent one and consistent with Karunawathie's story that she had been raped with force. He said that Karunawathie had lost her virginity as a result of this injury.

Podi Menika, Karunawathie's mother in her evidence corroborated Karunawathie's evidence that the 1st, 2nd and 3rd accused-appellants entered their house on the 24th October 1977 and raped Karunawathie in spite of the father, Karunawathie and herself raising cries and pleading with them not to harm Karunawathie. These incidents occurred in their house, and in their presence. She saw her daughter being raped by the three accused-appellants from the kitchen in which she and her husband were kept confined.

Podi Menika also said that the three persons entered their house by forcing open the rear door. She said that she had refused to open the front door when they knocked on it. She said she followed the three persons who were dragging her daughter towards the spill after they had raped her in their house. On reaching the spill they got on to a boat and rowed away in spite of her protests. Podi Menika said that she made a complaint to the Embilipitiya police at about 7 a.m. (in the morning). She said she was in a dazed condition at the time she made a complaint to the police.

Sub-inspector Wimaladasa said that on receipt of the complaint on 25.10.77, he left with two other police officers and the complainant at about 8.15 a.m. They went by jeep towards the complainant's house. He made his observations at the house. The house consisted of a small verandah, a hall and a kitchen. There was a bed on the left side of the hall which could be seen when one enters the hall from the verandah. The bed could also be seen from the kitchen. This bed was shown to him as the one on which Karunawathie had been raped. He said the front door had been intact but the zinc sheet in the rear door had been bent and dented. He said there was a bottle lamp near the bed, which had been broken to pieces.

S.I. Wimaladasa said that after he made his observations he and the other police officers went in search of the accused-appellants. They went to the 2nd accused-appellant's house which is about 150 yards from Podi Menika's house, but there was no one there. They then left towards the Young Farmers Colony on receipt of some information and when proceeding along the road Karunawathie came towards the jeep and told them what had happened. Karunawathie was wearing a black gown with red spots on it. She also had a parcel in her hand which had an underskirt in it. These articles and another gown which she had worn in the house were produced by him as P1, P3 and P4.

S.I. Wimaladasa said that when proceeding along the road as they saw Karunawathie come towards them they saw someone, whom they later came to know was the 2nd accused-appellant. He ran away into the jungle. S.I. Wimaladasa and another officer searched for him, but failed to apprehend him as he had escaped.

He then went to the 1st accused's house where Karunawathie had been taken to and raped once again. He said that the door of the house had been left open but nobody was there. Karunawathie showed him a mattress lying on the floor. Karunawathie had told him that this was the mattress on which the accused-appellants had committed rape on her the second time. Wimaladasa stated that after Karunawathie's statement was recorded in her house she was produced before the Judicial Medical Officer and examined by him. The productions were duly sealed and sent to the Government Analyst and his report was produced as P5. In his report the Government Analyst has stated that he traced human blood and semen on one of the gowns and underskirt worn by Karunawathie; and there was also semen found in the other gown worn by Karunawathie.

After the evidence of the police officers the case for the prosecution was closed. None of the accused gave evidence or called any witnesses to give evidence on their behalf.

In the course of the cross-examination on behalf of the 2nd accused-appellant it was suggested that Karunawathie had known the 2nd accused-appellant prior to this incident, and that she had consented to have sexual intercourse with him, which she denied. Karunawathie was cross-examined in great detail by the defence, and throughout she maintained that she identified the 2nd accused-appellant Bandupala, whom she had seen before. She said that she came to know the 1st and 3rd accused-appellants and their names in the course of the incident as they were called by each other by their names. She said that she came to know and identify them by their faces and their names. There was some contradictions marked by the defence in cross-examination of Karunawathie.

The main submissions of the learned counsel for the accused-appellants were:—

- (1) that upon the facts disclosed by the evidence there were separate acts of rape alleged by the prosecution, first in Karunawathie's house, and thereafter at the 1st

accused-appellant's house. He contended that there should have been separate counts for each act of rape which he said was a distinct offence.

- (2) He further submitted that the question of corroboration would arise with regard to each distinct offence of rape alleged. He stated that particularly in regard to the rape alleged in first accused-appellant's house there was no corroboration. Considering the facts of this case, he said it is difficult to discern of which act of rape the accused-appellants were found guilty by the jury. Karunawathie had stated in her evidence that there were nine acts of rape committed on her by the accused-appellants.
- (3) The learned counsel for the accused-appellants further submitted that there had been no identification parade. He also submitted that the mother had not identified the 1st and 3rd accused-appellants and did not give their names correctly.

In considering the first submission made by the learned counsel for the accused-appellants that there should have been separate counts in respect of each act of rape it is necessary to advert to the facts again. The three accused-appellants were alleged to have raped Karunawathie at her house from 10 a.m. on the night of the 24th October 1977 and then taken her away by force immediately after these acts were committed. She was again raped by them in the 1st accused-appellant's house. The rape in Karunawathie's house, the abduction and again the rape in the 1st accused-appellant's house are in my view all a series of acts in one continuing transaction and the prosecution is entitled to charge the accused-appellants on separate counts for each act of rape, or in one count as one continuing act of rape. Lord Morris of Borth-y-Gest in the case of *Director of Public Prosecutions v. Merriman* (1) supports this view, and states in his judgment as follows:

"It is furthermore a general rule that not more than one offence is to be charged in a count in an indictment. By Rule 4 of Schedule I to the Indictments Act 1915 (now repealed) it is provided as follows: 'A description of the offence charged in an indictment or where more than one offence is charged in an indictment, of each offence so charged shall be set out in the indictment in a separate paragraph called a count'. The question arises—what is an offence? If 'A' attacks 'B', and in doing so stabs 'B' five times with a knife, has 'A'

committed one offence or five? If 'A' in a dwelling house of 'B' steals ten different chattles, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view, such questions when they arise are best answered by applying common sense and by deciding what is fair in the circumstances. No precise formula can usefully be laid down but I consider that clear and helpful guidance was given by Lord Widgery, C.J. in a case where it was being considered bad for duplicity. (See *Jamieson v. Priddle* (2)). I agree respectfully with Lord Widgery that it will be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act. It must of course depend on the circumstances. In the present case it was not at any time suggested, and in my view could not reasonably have been suggested, that count one was open to objection because evidence was tendered that the respondent stabbed Mr. Parry more than once."

I am of the view that sufficient particulars of the offence have been given in the charges framed and he could not have been prejudiced in the formulation of his defence in this case.

In this case as submitted by the learned Senior State Counsel there were several acts of penetration by each of the accused-appellants in committing the offence of rape in the course of the same transaction. It may also be stated that no objection was made by the defence at the trial that the indictment was bad for duplicity, and in my view the submission that the charge is bad for duplicity must necessarily fail for these reasons.

The second submission made by the learned counsel for the accused-appellants was that there is no corroboration in respect of every act of rape alleged against each of the accused-appellants.

A perusal of the summing up in this case clearly indicates that the learned trial judge has taken great pains to explain to the jury the law on the requirement of corroboration in an offence of rape and the circumstances in which a jury can convict in spite of the absence of corroboration of the victim's evidence. The learned trial judge has warned the jury adequately of the danger of convicting an accused on the uncorroborated testimony of the virtual complainant in a case of

rape. In my view the jury has been adequately directed by the learned trial judge on the law regarding corroboration of the complainant's testimony.

Another contention of the appellants was that no identification parade was held. It was submitted that Podi Menika had not identified the 1st and 3rd accused-appellants by their names, as the names she gave were incorrect. But as stated earlier Karunawathie who had been altogether nine hours with the three accused-appellants from about 10 a.m. on the night of the 24th October till about 7.30 a.m. on the morning of the 25th October said that she did identify them by their faces and their names the accused-appellants had called each other. Both Karunawathie and Podi Menika said that they identified 'Bandu' the 2nd accused-appellant whom they had seen before and who lived 150 yards away from their house. These are all questions of fact which were left to the jury to decide.

After due consideration of all the submissions of the learned counsel for the accused-appellants and the Senior State Counsel and the totality of the evidence led in this case, I do not think that this is a case in which it could be said that the verdict of the jury is unreasonable.

For the above reasons I affirm the conviction of each of the accused-appellants.

There is no doubt that the crime committed by the accused-appellants is a heinous crime which requires deterrent punishment. However considering the age of the accused-appellants and the fact that they have not had a previous record of crime and the fact that they have served a period of 3 years and 7 months in remand custody after their convictions I am of the view that the ends of justice will be met if each of the accused-appellants are sentenced to 5 years' rigorous imprisonment on count 1; the 1st accused-appellant to 10 years' rigorous imprisonment on count 2, the 2nd accused-appellant to 10 years' rigorous imprisonment on count 3, and the 3rd accused-appellant to 10 years' rigorous imprisonment on count 3. The sentences against each accused-appellant to run concurrently.

Subject to this variation in the sentence the appeal is dismissed.

ABEYWARDENA, J. – I agree.

WIJETUNGA, J. – I agree.

Appeal dismissed.

Sentence varied.