

R. K. A. INDRATILAKA

V.

THE STATE

In the Court of Appeal,

Colin — Thome, J. (President), Tambiah J & L. H. de Alwis J.

C. A. 29-31/81

H. C. Kegalle No. 176/77

May 6 & 7, 1981

Rape and attempted rape. Sec. 364 of the Penal Code and Sec. 364 read with s. 490. Conviction based on circumstantial evidence competency of an Ayurvedic Doctor regarding nature of injury - when facts proved rape, conviction of attempted rape as indicted — no prejudice to accused — circumstantial evidence by conduct of accused, (Sec. 8 of Evidence Ordinance) — Sec. 27 of Evidence Ordinance.

1. The evidence in regard to the identity of the 3rd accused appellant was entirely circumstantial. He was not known to the girl, Premawathie nor had she given a previous description of him. One of the items of evidence that connects him with the offence on Premawathie is that he bore a cut injury on his nose.

He gave three different versions as to how he came by that injury on his nose to three prosecution witnesses who saw him that night. His story of a fall on the railway line was ruled out by Dr. Herath and the appellant was compelled to admit that it was an incised injury.

He was arrested about seven days after the alleged incident by a Police Constable who lay in ambush. The car in which the 3rd appellant travelled when signalled to halt proceeded without stopping and the P. C. gave chase in his vehicle and caught up with the car. The appellant then attempted to run away.

A knife was recovered by the Police on a statement made by 3rd appellant to the Police. It was submitted by Counsel for the appellants that the statement leading to the discovery of the knife was irrelevant since the knife had not been shown to Premawathie and identified as the one with which she inflicted the injury. But the knife was shown to Dr. Herath and he had expressed the opinion that the injury on the nose of the 3rd accused-appellant could have been caused by a hard blow with it.

Held—

In the circumstances the statement made by the 3rd accused-appellant under Sec. 27 of the Evidence Ordinance is relevant.

There was ample evidence to find the three appellants guilty of the charges against them.

2. One of the charges framed against the 3rd accused-appellant was for the attempted rape of Premawathie, but Premawathie's evidence was that she was raped. It was submitted that the indictment has been drafted on the basis of the statement made by Premawathie to the Police and the suggestion was made that the evidence she gave in Court, was different from the statement she made to the Police.

Held.

Premawathie's statement to the Police was available to the defence and if there were any discrepancies in it, they would certainly have been elicited by the defence.

3. Learned Counsel next submitted that 3rd accused-appellant was prejudiced in having to face a charge of attempted rape, when the evidence against him was one of rape. It was submitted that in rape intention is not issue, whereas in a charge of attempted rape intention is a necessary ingredient which the appellant has been called upon to meet.

Held.

The intention there, is the intention to commit the particular offence of rape. An attempt is a stage in the commission of an offence which commences with intention and preparation and culminates in the completed offence. The maximum period of imprisonment for the offence of rape is 20 years, whereas for attempted rape it is only half that term. Attempted rape, therefore, is in essence a lesser offence than rape and the 3rd accused — appellant far from being prejudiced stands to benefit by being indicted on a lesser charge than that established on the evidence.

Held Also

According to the evidence of each of the three girls there were at least five persons who abducted Magilin and Premawathie and they constituted an unlawful assembly. The learned trial judge has explained adequately to the jury the nature of the various offences with which the appellants have been charged and the legal principles involved therein. We are opinion that there is ample evidence on which the jury were entitled to find the three appellants guilty of the charges brought against them.

Dr. Colvin R. de Silva with Mrs. M. Muttetuwegama and N. V. de Silva for the 1st, 3rd and 4th accused appellants.

G. L. M. de Silva S.S.C. for the Attorney-General.

cur. adv. vult.

June 8, 1981

L. H. DE ALWIS, J

The 1st, 3rd and 4th accused-appellants together with the 2nd and 5th accused were charged on 9 Counts in the amended indictment as follows:

- (1) That on or about 25. 7. 74 at Warakapola the 1st, 2nd, 3rd and 5th accused with others unknown to the prosecution were members of an unlawful assembly the common object of which was to abduct H. K. Premawathie and R. P. Magilin in order that they may forced to illicit intercourse an offence punishable under section 140 of the Penal Code;
- (2) That at the same time and place aforesaid and in the course of the same transaction one or more members of the unlawful assembly, in prosecution of the common

object of the unlawful assembly did abduct R. P. Magilin, an offence punishable under section 357 read with section 146 of the Penal Code.

- (3) That at the same time and place aforesaid and in the course of the same transaction one or more members of the unlawful assembly in prosecution of the common object of the unlawful assembly did abduct H. K. Premawathie, an offence punishable under section 357 read with section 146 of the Penal Code;
- (4) That at the same time and place aforesaid and in the course of the same transaction they did abduct H. P. Magilin in order that she may be forced to illicit intercourse, an offence punishable under section 357 read with section 32 of the Penal Code;
- (5) That at the same time and place aforesaid and in the course of the same transaction they did abduct H. K. Premawathie in order that she may be forced to illicit intercourse, an offence punishable under section 357 read with section 32 of the Penal Code;
- (6) That the 1st accused did commit rape on R. P. Magilin, an offence punishable under section 364 of the Penal Code;
- (7) That the 4th accused did commit rape on H. K. Premawathie, an offence punishable under section 364 of the Penal Code;
- (8) That the 2nd accused did attempt to commit rape on H. K. Premawathie, an offence punishable under section 364 read with section 490 of the Penal Code;
- (9) That the 3rd accused did attempt to commit rape on H. K. Premawathie, an offence punishable under section 364 read with section 490 of the Penal Code.

At the close of the prosecution case the 2nd and 5th accused were found not guilty by an unanimous verdict of the jury on all the charges preferred against them and were acquitted.

At the conclusion of the trial, the Jury by an unanimous verdict found the 1st accused guilty on Counts 1, 2, 3, 4, 5 and 6; the 3rd accused-appellant guilty on Counts 1, 2, 3, 4, 5 and 9; and the 4th accused guilty on Count 7. The 1st accused was sentenced to 6 months' rigorous imprisonment on Count 1, 4 years' rigorous imprisonment on each of the Counts 2 to 5 and 12

years' rigorous imprisonment on Count 6, sentences to run concurrently. The 3rd accused was sentenced to 6 months' rigorous imprisonment on Count 1, 4 years' rigorous imprisonment on each of the Counts 2 to 5, and 10 years' rigorous imprisonment on Count 9, sentences to run concurrently. The 4th accused was sentenced to 12 years' rigorous imprisonment on Count 7. The 1st, 3rd and 4th accused have appealed against their convictions and sentences.

The victims of these offences were two young girls, Magilin, aged about 17 years at the time and Premawathie 16 years of age. Premawathie had been living with her father at Giriulla from her infancy, after her mother had deserted them and was brought back by her father along with her younger sister Somalatha, to the house of her mother Pini at Paspolakande about a week before this incident. Magilin was an orphan and had no brothers or sisters. She happened to be living with her aunt Pini at the time Premawathie and her sisters came to live with their mother.

On the day in question Magilin who was the eldest of these girls had arranged to meet her boy friend, Sirisena, at a Carnival in Alawwa Town, about a mile and a half from their home. She invited Premawathie and her younger sister Somalatha to join her and the three girls set out on foot from their home at about 5 o'clock in the evening to go to the Carnival. They met Sirisena outside the Carnival grounds and he bought their tickets and took them inside. After doing the round of the Carnival they set out to go home at about 8.30 or 9.00 p.m. Sirisena parted company from them and went his way home. The three girls came by themselves to the bus stand in order to take a bus home but found that the last bus had already left. They therefore set out on foot. After they had proceeded some distance, Magilin says that she noticed 6 or 7 men with their heads covered with gunny bags about 30 feet behind them. Suddenly these men came running up to them and two of them lifted her by her shoulders and legs while three others lifted Premawathie. They struggled and raised cries but no help was forthcoming, as the road was deserted and there were no street lights. Magilin goes on to say that she was carried along a narrow sandy road up to a bridge and placed on the ground by the side of the road. One of the men then raised her gown and got on her body. She struggled fiercely but was unable to escape from the clutches of her assailant. She says that the man inserted his penis into her vagina and had sexual intercourse with her against her will. When he was getting ready to have intercourse with her again, she saw her younger sister Premawathie coming to the spot and she appealed to her to rescue her. That man then went towards her sister and Magilin jumped up and ran to the Nelundeniya tarred road. There she met a cyclist who was passing by on the road and asked his assistance to trace Premawathie. The little

girl Somalatha was with the cyclist. Together they went to the Alawwa Police Station but were informed that the place of incident was outside their jurisdiction and were directed to the Warakapola Police Station. A passing lorry was stopped and they were put into it. On reaching the Warakapola Police Station, Magilin made a complaint of what had happened and was brought by Sub-Inspector Serasinghe and two other Police Constables in a Police Jeep to the place where this incident had occurred. As they were approaching the bridge, two or three men who were near the bridge started to run. The Police Officers stopped the Jeep and gave chase and arrested one of the men. He was brought up to the Jeep and shown to Magilin and she identified him as the man who raped her. He is the 1st accused appellant.

Premawathie's evidence is that after she was lifted by the three men she was carried to a garden where a cremation had taken place. She was lifted over the fence and put on the ground and the three men crept through the fence into the garden. One of the men put her down on the ground, raised her gown, got on her body and had sexual intercourse with her forcibly. This man had a knife in his hand and threatened her not to shout. While he was on her body the knife that he had in his hand fell on her leg. She seized the knife and stabbed him on the nose with it. The man then rolled off her body on to the ground and she got up. Two other persons then came up to her and attempted to put her down on the ground. She stabbed at them with the knife and felt that the knife had struck both. Thereafter the three men went away. When she found herself alone in the garden she went in search of Magilin and Somalatha. Three men who were under a Bonlax tree with gunny bags over their heads suddenly stood up and one of them came and closed her eyes with his hands. All of them lifted her and carried her to a room. She was placed on a bed like a camp bed. The door was closed, her clothes were removed and she was ravished by one of them. After he had finished he went out of the room and another person came in. This person spread a sheet on the ground and placed her on it and had sexual intercourse with her against her will. She resisted and did not know what happened thereafter. Later when it was dawn the Police broke into the room and rescued her. The 4th accused-appellant was at the time lying on the sheet hugging her. She said that he was the man who first had sexual intercourse with her on the camp bed when she was brought into the room. She identified him by his features and by the fact he was wearing a pair of long trousers at the time he first raped her.

Somalatha who was about 8 years old at the time said that when her two sisters were carried away by a gang of about five men wearing gunny bags over their heads, she jumped into a drain through fear and hid. Sometime later she saw a bicycle light

approaching and came on the road. She met the cyclist and told him that her two elder sisters had been carried away by some men and asked him to find her mother. The cyclist put her on the cycle and said he was going to the Police Station. On the way they met Magilin by the road side and together with her they went to the Alawwa Police Station and from there to the Warakapola Police Station.

The cyclist is witness Vipulasena who lived at Opatha and ran a bicycle repair shop at Alawwa. On the day in question he had gone to Alawwa town to see a picture but instead had met friends and had spoken with them till about 12.45 a.m. He then set out to go home on his bicycle which had a lamp. While he was proceeding along Nelundeniya road he met the little girl Somalatha at a culvert and she complained to him that some unknown persons had carried away her two elder sisters. He put her on the bicycle and set out towards Alawwa town. On the way they met the other girl Magilin by the roadside. He then brought the two girls to the Alawwa Police Station and from there took them to the Warakapola Police Station.

Sub-Inspector Serasinghe stated that Magilin accompanied by Vipulasena and Somalatha came to the Warakapola Police Station at about 2.10 a.m. on 26.7.74 and made a complaint. He left the Station for inquiry at 2.40 a.m. along with Police Constables Piyadasa and Silva. As they were approaching the place of incident, he saw three persons who were standing in front of a row of boutiques at the Wariyagoda Junction suddenly taking to their heels. He stopped the jeep and gave chase with the Police Constables. He was able to arrest one of the men who was the 1st accused-appellant. He brought him up to the Police Jeep and showed him to Magilin.

Both Magilin and Premawathie and the 1st and 4th accused-appellants were produced by the Police before the D. M. O. Kegalle for examination. The D. M. O. Dr. Perera examined Magilin at 1.20 a.m. on 26.7.74 and found the following injuries:

1. a linear abrasion 1½" long on the right thigh;
2. a lacerated injury 1¼" long on the left labia majora.
3. a lacerated injury 1¼" on the right labia majora
4. a tear of the hymen at 1 o'clock and 7 o'clock positions.

The tear was recent and was bleeding. He was of the view that injuries 1 and 2 were scrape or finger nail marks caused in an effort to stretch out the thighs. Injury 3 he said, could have been caused in an attempt to open the lips of the labia and injury 4 could have been caused in an attempt at forcible intercourse. In his

view injury 4 could have been sustained within 24 hours of his examination.

Premawathie was examined at 1.00 p.m. that day and she had the following injuries:

1. lacerated wound 1" by ½" on the left buttock with multiple abrasions on both buttocks,
2. curved linear abrasion on the left thigh adjoining the left labia majora
3. tear of the hymen at 3 o'clock and 8 o'clock positions.

There was a superficial lacerated wound on the vulva below the clitoris with recent bleeding from hymen.

4. lacerated wound 2" long on the left big toe.

He was of the opinion that injury 1 could have been caused on a rough surface like sandy ground. Injury 2 could have been caused by nail marks in an attempt to spread out the thighs. Injury 3 could have been caused by forcible intercourse. Injury 4 could have been caused as a result of a struggle on a rough surface. He further said that all the injuries could have been sustained within 24 hours of his examination and that injuries 1 and 4 could have been caused while struggling on rough ground. The injuries on the hymen suggested that several acts of sexual intercourse had taken place recently.

The 1st and 4th accused-appellants also had injuries on their sexual organs. The 1st accused-appellant had :

1. redness of the glans penis
2. 2 curved abrasions on the body of the penis.

The Doctor was of the view that injury 1 could have been caused by pressure on the spongy glans tissue and injury 2, appeared to be scrape or finger nail marks inflicted by the victim while resisting. He was of the view that these injuries could have been sustained within 24 hours of his examination.

The 4th accused-appellant had the following injuries:

1. contusion and redness over prepuce of the penis
2. 4 linear abrasions over the glans penis
3. dried blood stains over penis and pubic hair
4. lacerated wound 1¼" long over left side of head with contusion.

The doctor was of the opinion that injury 1 could have been caused by forcing the penis into the cervix. Injury 2 could have been caused by finger nails of a woman while resisting. All the injuries were consistent with the appellant having had sexual intercourse with a woman, and could have been sustained within 24 hours of his examination.

The 3rd accused-appellant was arrested on 2.8.74 P.C. Piyadasa said that he remained in the Wariyagoda area from about 8.45 a.m. till about 2.30 p.m. that day. At about 1.30 p.m. he saw a car approaching along the road near the bridge at Wariyagoda junction with the 3rd accused-appellant inside. He signalled the car to stop but it proceeded without stopping. He gave chase. At the same time a lorry happened to come from the opposite direction and blocked the path of that car. The Constable alighted from his car and went up to the other car and arrested the 3rd accused-appellant. The 3rd accused-appellant was at the time getting ready to run away. He was seated in the front seat by the driver, and had a piece of sticking plaster on his nose.

The constable recorded the statement of the 3rd accused-appellant at the Police Station at 6.10 p.m. that day. The 3rd accused-appellant made a statement (P12) as follows: "Can show the knife." In consequence of that statement the police constable went with the 3rd accused-appellant to Hettigahawatte in Alawwa and recovered a knife buried under a stone by the side of the road. The spot was pointed out to him by the 3rd accused-appellant.

Three witnesses were called by the prosecution to speak to the injury on the 3rd accused-appellant's nose. Karunaratne, the Chief Dispenser of the Ideal Dispensary, Alawwa stated that he knew the 3rd accused-appellant for about 15 years. He said that the 3rd accused-appellant came to his dispensary with several others one night sometime after 10 o'clock. He had an injury on his nose and wanted it dressed. On being questioned he said that it was caused with a piece of glass. The injury was bleeding at the time and the witness gave him a piece of cotton wool to place on it. As the doctor was not in he advised the 3rd accused-appellant to go to Hospital and get his injury attended to. There was another person with him who also had an injury on his shoulder. The 3rd accused appellant said that he had cut himself with a piece of glass and had stabbed the other man with a screw driver.

The next witness is Mitrananda, a Technician, working in the Sarasavi Cinema, Alawwa close to the Ideal Dispensary. He said that one day at about 12.30 a.m. he heard a loud knocking on the door of the dispensary and came out to see what the disturbance was. He saw the 3rd accused-appellant at the dispensary door.

He had a bleeding injury on his nose. On asking him how he sustained the injury the 3rd accused-appellant replied that he fell on the railway line. He knew the 3rd accused-appellant from his young days.

Neither of these two witnesses is able to give the exact day or the year when the 3rd accused-appellant came to the dispensary. But another witness, Dr. Herath has fixed the date beyond any doubt as the night of the 25th/26th July, 1974. He is a doctor of Indigenous Medicine and was at the time assisting one Dr. Fernando in his dispensary at Alawwa. He had come to Alawwa on 23.7.74 and had left on 26.7.74 at about 2.00 p.m. He said that on the 25th at about 7.30 p.m. he closed the dispensary and retired for the night. At 12.30 a.m. he heard someone knocking at the door and opened it to find the Cinema Technician Mithrananda with the 3rd accused-appellant. The 3rd accused-appellant had a blood stained injury on his nose and wanted it dressed. He asked him how he came by the injury and the latter replied that he fell on the railway line. He examined the injury and found it was a cut injury. He thereupon questioned the 3rd accused-appellant again and asked him to speak the truth. The 3rd accused-appellant then said that he was cut with a sword by an enemy of his. The doctor told him that he could not treat him and advised him to go to hospital to get the injury dressed.

Each of the three appellants made a statement from the dock denying his guilt. The 1st accused-appellant said that he knew nothing about the incident and was arrested by the Police when he was sleeping inside his boutique room that night.

The 3rd accused-appellant who is a van driver said that he was returning home after work along the railway line when he fell and sustained an injury on his nose. He went home and came back to the Ideal Dispensary for treatment. He was not given any treatment but was only given a piece of cotton wool to be placed on the injury. About 10-12 days later when he was on his way to the garage where he had given his van for repairs, he was arrested by the Police.

The 4th accused-appellant said that he was sleeping in his room on the night in question, when the Police Inspector knocked at the door and put him up. The door was opened and the Inspector entered it with a girl. He was arrested and taken to the Police Jeep.

Learned Counsel for the Appellants raised four points in the course of his argument before us. He submitted (1) that the identity of the 1st and 3rd accused-appellants has not been establi-

shed beyond reasonable doubt; (2) that there are serious discrepancies in the evidence of the prosecution witnesses, which render the prosecution case unreliable; (3) that the statement made by the 3rd accused-appellant to S. I. Serasinghe leading to the discovery of the knife is irrelevant and its admission in evidence has caused grave prejudice to the appellant; (4) that the 3rd accused-appellant has been prejudiced by being called upon to face a charge of attempted rape when the evidence led at the trial was one of rape.

With regard to the identity of the appellants, it was submitted that the place where the girls were set upon on the road was very dark and their assailants' heads were covered with gunny bags to avoid identification. Magilin had not known or seen the 1st accused-appellant prior to that day. But there was moonlight that night and there is evidence that Magilin had ample opportunity of identifying the appellant who raped her. The whole incident would have taken a considerable period of time, which Magilin puts at over half an hour. During that period the 1st appellant was in very close proximity to Magilin and would have been clearly seen by her. Magilin further says that while he was lying on her body he kissed her face and although she turned her face she did not close her eyes. Moreover at the time the appellant was having sexual intercourse with her he had removed the gunny bag from his head.

The 1st appellant immediately on arrest was brought to the Jeep by S.I. Serasinghe and was identified by Magilin as the man who raped her. It was submitted that she had not previously given a description of the 1st appellant in her statement to the Police and that therefore her identification of him was of no value. In fact Magilin and witness Vipulasena stated that Magilin's statement was not recorded at the Warakapola Police Station when she went there early that morning and made a complaint. According to them their statements were recorded long after the 1st accused-appellant was arrested. It was further submitted that if Magilin had given a description of the 1st appellant in her complaint to the Police that statement could very well have been produced as the first information in the case. Magilin admitted that she could not remember if in her statement she had mentioned that she had pointed out the 1st appellant and said that she was giving a description of the 1st appellant for the first time in Court. But at the same time she said that she had given his description to the Police though not in detail. P.C. Piyadasa says that he recorded Magilin's statement at 2.10 a.m. on 26.7.74 when she came to the Police Station to make a complaint, and Sub-Inspector Serasinghe thereafter left for inquiry to the scene of the incident at 2.40 a.m. Now these are matters of record and both

police officers undoubtedly were refreshing their memory from the Information Book when they were giving evidence from the witness box. Magilin and Vipulasena on the other hand were speaking entirely from memory in regard to an incident that had occurred about five years prior and naturally would not be in a position to give an accurate narrative of the details. That such witnesses could make mistakes is illustrated by the evidence of Vipulasena himself who gave the age of the little girl Somalatha as 16 years at the time of the incident when she was then only about 8 years. P.C. Piyadasa's evidence places the matter beyond any doubt that Magilin's statement was recorded at the Warakapola Police Station at 2.10 a.m. that morning before the Police party set out for investigation and Magilin says that in that statement she gave a description of the man who raped her.

Undoubtedly no proper identification parade was held but that does not render Magilin's evidence of the identification of the 1st appellant inadmissible. It only affects the weight to be attached to her evidence and, was entirely a matter for the jury. Magilin stated that she gave a description of the 1st appellant in her statement though she gave no details in regard to his hair, height and complexion. She said she could remember quite well his shape and features and could say definitely that he was the person who raped her when he was shown to her by the Police after his arrest. It must be remembered that this identification took place within a very short time of the commission of the crime. There was no reason for her to have implicated the 1st appellant falsely when he was not even known to her. On the other hand she was frank enough to admit that the other man who carried her was not among the accused in the dock.

Magilin further stated that the man who raped her was wearing a black and white striped sarong and this is corroborated by Sub-Inspector Serasinghe who said that at the time the 1st appellant was arrested he was wearing a nylon sarong with black and white stripes.

The 1st appellant was arrested at the Wariyagoda junction which is about 1/8th of a mile from the scene of the offence committed on Magilin. He was loitering at the junction at about 3 o'clock in the morning when one would have expected him to have been asleep at home. His house is about a mile from the junction. He was standing in front of the row of boutiques about 12 fathoms from the room where the 4th accused-appellant and Premawathie were later found by the Police. On seeing the Police Jeep he had taken to his heels and was arrested after a chase.

There is also the evidence of the doctor that the 1st appellant had scrape or finger nail marks on his penis which are

consistent with Magilin's evidence that she put up a desperate struggle against her assailant. Magilin has not specifically mentioned that she scratched the 1st appellant on his penis, but her evidence is that at the time the 1st appellant was inserting his penis into her vagina she kicked him and also hit him with her hands. It can hardly be expected of a victim in such a terrifying situation to remember every detailed act of resistance she put up. She would no doubt instinctively have used her hands to prevent the insertion of the appellant's penis into her vagina. The 1st appellant has not explained in his dock statement how he sustained the injuries on his sexual organs.

As regards the 4th accused-appellant he was found with the girl Premawathie inside a boutique room in the Wariyagoda junction at about 3 o'clock in the morning by Sub-Inspector Serasinghe. He was lying on a sheet on the ground with Premawathie who was naked. On the Police entering the room the 4th accused-appellant ran towards the rear door but was arrested. According to Premawathie the 4th accused-appellant was one of the persons who carried her from under the Borlax tree to the room and was the person who first had forcible sexual intercourse with her on the camp bed. She identified him by the fact that he was wearing a pair of long trousers at the time, and later when the Police entered the room a pair of long trousers was found hanging on the wall. She has also identified him by his features.

It was submitted that the room where they were found was small and dark with no windows to it. There was not even a lamp burning inside. Sub-Inspector Serasinghe too says that there was no light in the room when he entered it and he had to flash his torch light to examine the room. But this incident would have taken a considerable period of time and Premawathie would have been close enough to the appellant to identify him.

The 4th accused-appellant had stains like dried blood on his penis and pubic hair which are suggestive of recent sexual intercourse, and the injuries on his penis, according to the doctor are consistent with his having had sexual intercourse with a woman within 24 hours of his examination.

The evidence in regard to the identity of the 3rd accused appellant is entirely circumstantial. He was not known to the girl Premawathie nor had she given a previous description of him. One of the items of evidence that connects him with the offence on Premawathie is that he bore a cut injury on his nose. Premawathie's evidence is that she stabbed the man who was raping her on the nose with a knife which had fallen from his hands. Although it was dark at the time she was able to see where the blow alighted.

Karunaratne the Dispenser of Ideal Dispensary and Mithranda a Technician in Sarasavi Cinema, which adjoins the dispensary say that one night at about 12.30 the 3rd accused-appellant came and knocked at the dispensary door and wanted a bleeding injury on his nose attended to. In fact, the appellant himself admitted in his dock statement that he went to the Ideal Dispensary one night to get an injury on his nose attended to. Although neither of these two witnesses could give the precise date of the 3rd accused-appellant's visit to the dispensary, that is furnished by Dr. Herath to whose dispensary also the appellant had gone when he could not get treatment at the Ideal Dispensary. Dr. Herath gives the date of the appellant's visit as the 26th of July 1974 which is the day of the incident. The doctor also stated that a Carnival was on during that period. The Ideal Dispensary is situated about a ¼ mile from the place of the incident and the appellant's visit to the dispensary has taken place a short time after the infliction of the stab injury by Premawathie on her assailant's nose. According to Dr. Herath the injury on the nose was blood stained and could have been sustained within half an hour of his examination.

The 3rd accused-appellant has given three different versions as to how he came by that injury on his nose to the three prosecution witnesses who saw him that night. His story of a fall on the railway line was ruled out by Dr. Herath as improbable in the absence of any contusions around it and the appellant was compelled to admit that it was an incised injury when he alleged that it was inflicted with a sword by an enemy of his. The incised nature of the injury, which the appellant attempted to conceal, is consistent with Premawathie's evidence of a stab with a knife. Dr. Herath was shown a knife P9 and expressed the categorical opinion that the injury on the appellant's nose could have been caused by a hard blow with it. At the trial the doctor identified the tell-tale scar on the appellant's nose.

It was suggested that Dr. Herath was not competent to distinguish between an abrasion and an incised injury and that he had only looked at the injury at a distance of about 2 feet. But the doctor's evidence is that he examined the appellant's injury under a fluorescent light and found the injury to be an incised one. He is a fully qualified Ayurvedic Doctor. He had followed a five year course at the College of Indigenous Medicine and had done one years' post graduate work in hospitals. He has obtained a D. A. M. S. Diploma in Medicine and Surgery in Ayurvedha and had been in private practice for four years from 1971. It was suggested to him that striking the nose on a blunt object like the edge of a table could have caused a split injury that could have simulated an incised injury. While admitting that it could be so the

doctor said that in the present instance the injury on the 3rd accused-appellant could not have been caused in that fashion as there was no contusion around the injury as one would have expected if his nose had come in contact with the edge of a table. The doctor was satisfied that it was an incised injury and the appellant himself has tacitly admitted it to be so when he alleged it to be a sword injury.

The 3rd accused-appellant was arrested on 2.8.74 about 7 days after the alleged incident. P. C. Piyadasa said that he lay in ambush near a bridge at the Wariyagoda junction and signalled a car in which the 3rd appellant was travelling to halt. The car proceeded without stopping and he gave chase in his vehicle. When the 3rd accused appellant's car had to slow down on account of a lorry obstructing it the Police Constable had got down from his car and arrested him. The 3rd accused-appellant was seated in the front seat by the driver, and had attempted to run away. At the time of his arrest he had a piece of sticking plaster on his nose.

The knife P9 was recovered by Sub-Inspector Serasinghe buried under a stone by the road side at Hettigahawatte on a statement made by the 3rd accused-appellant to the effect that "he can show the knife." It is submitted by Counsel for the Appellants that the 3rd accused-appellant's statement leading to the discovery of the knife was irrelevant since the knife had not been shown to Premawathie and been identified as the one with which she inflicted the injury. But the knife was shown to Dr. Herath and he has expressed the opinion that the injury on the nose of the 3rd accused-appellant could have been caused by a hard blow with it. In the circumstances the statement made by the 3rd accused-appellant under section 27 of the Evidence Ordinance is relevant.

It is true that the knife with which Premawathie stabbed the 3rd accused-appellant was snatched from her hand by three other men who were under a Bolax tree and there is no evidence that the knife got back into the hands of the 3rd accused-appellant. But all that the prosecution sought to establish was that the 3rd accused-appellant knew where the knife was and nothing more.

One of the charges framed against the 3rd accused-appellant is for the attempted rape of Premawathie, but Premawathie's evidence is that she was raped. It is submitted that the indictment has been drafted on the basis of the statement made by Premawathie to the Police and the suggestion was made that the evidence she gave in Court was different from the statement she made to the Police. Premawathie's statement to the Police was available to

the defence and if there were any discrepancies in it they would certainly have been elicited by the defence. The defect in the indictment is evidently due to the carelessness of the State Counsel who drafted it.

A further suggestion was made that the 3rd accused-appellant who is charged with the attempted rape of Premawathie could be one of the two persons who had attempted to put her on the ground when she got up after she had been first raped. The other person, it was submitted, was the 2nd accused who was charged with the attempted rape of Premawathie, and was acquitted. Learned Counsel for the Appellants submitted that the attempt to put Premawathie on the ground amounted only to preparation and did not constitute the offence of attempted rape. Be that as it may, there is no doubt that the 3rd accused-appellant is the person who put Premawathie on the ground and raped her as that is the man she stabbed on the nose.

Learned Counsel next submitted that the 3rd accused-appellant was prejudiced in having to face a charge of attempted rape when the evidence against him was one of rape. It was submitted that in rape intention is not in issue whereas in a charge of attempted rape intention is a necessary ingredient which the appellant has been called upon to meet. The intention there, it must be noted is the intention to commit the particular offence of rape. I do not see how a person can complain of prejudice when he is charged with a less serious offence than is made out on the evidence. An attempt is a stage in the commission of an offence which commences with intention and preparation and culminates in the completed offence. The maximum period of imprisonment for the offence of rape is 20 years whereas that for attempted rape is only half that term. Attempted rape therefore is in essence a lesser offence than rape and the 3rd accused-appellant far from being prejudiced stands to benefit by being indicted on a lesser charge than that established on the evidence.

There are admittedly some discrepancies in the prosecution case. Magilin for instance said that when the 1st accused-appellant was about to rape her for the second time, Premawathie came to the spot and she appealed to her for assistance. But Premawathie said that she did not see Magilin at the time. Next Sub-Inspector Serasinghe says that he saw three persons running away from a row of boutiques at the Wariyagoda junction and arrested the 1st accused-appellant after a chase. Magilin says that the 1st accused-appellant was seen running from near the bridge and was arrested there. The bridge is about 200 yards from the junction. Witness Vipulasena on the other hand says that the 1st accused-appellant was arrested while he was sleeping inside a boutique room in

the junction that morning. There is also a contradiction in the prosecution evidence in regard to Premawathie's mother Pini's visit to the boutique room early that morning. Witness Vipulaseena said that on the instructions of Sub-Inspector Serasinghe he went in the Police Jeep and brought Premawathie's mother to the room where Premawathie was found. P. C. Piyadasa on the other hand denied that they went to Pini's house and brought her. These contradictions have been referred to by the learned trial Judge in his summing-up and the jury have evidently not considered them very material.

According to the evidence of each of the three girls there were at least five persons who abducted Magilin and Premawathie and they constitute an unlawful assembly. The learned trial judge has explained adequately to the jury the nature of the various offences with which the appellants have been charged and the legal principles involved therein. We have been unable to find any misdirections by the learned trial Judge in the summing-up nor have any been pointed out to us by learned Counsel for the Appellants. The case has been properly presented to the jury. We are of opinion that there is ample evidence on which the jury were entitled to find the three appellants guilty of the charges brought against them. The appeals are accordingly dismissed and the convictions and sentences imposed on the accused-appellants are affirmed.

COLIN-THOME, J.

I agree.

TAMBIAH, J.

I agree.

Appeals dismissed.