

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

In the matter of a petition of appeal in
terms of section 138 of the code of
criminal Procedure Act No 15 of 1979

High Court (Rathnapura)
Case No: 148/2006

Democratic Socialist Republic of Sri
Lanka

(Complainant)

Vs:-

C.A Application No. 222/10

Udugama Koralalage Don
Gamini Ajith Kumara, Galkatiya,
Kalawana.

Accused

Udugama Koralalage Don
Gamini Ajith Kumara, Galkatiya,
Kalawana.

Accused Appellant

Vs:-

The Hon Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT

BEFORE : SISIRA J DE ABREW, J
P.W.D.C. JAYATHILAKE, J

COUNSEL : Indika Mallawarachchi for the Accused
Appellant
Dappula de Livera DSG for the Respondent

Argued On : 03.09.2013

Decided On : 24.10.2013

P.W.D.C. Jayathilake J.

Chintha Priyandarshani was a grade 10 student of Opatha Jayanthi Maha Vidyalaya. She was the Head Prefect of the school. She used to walk to

school, along with her sister, Kokila who was a student of the same school. It took about 45 minutes, for their journey to school. As usual they attended the school on 24.10.2000. Priyadarshani in the interval had asked her sister, to go home alone on that day because she was to visit Sadamali who was her classmate as well as her best friend. Accordingly Kokila went home. On 25th the following day once Kokila came to school she found that her sister had not come to school. When inquired from Sandamali, Kokila was told that her sister had left the school on previous day without staying for after school classes, saying she was going home as she was not well.

After the disappearance of Priyadarshani was brought to the notice of her mother, her family members had started searching for her all over the village. While her brothers were walking along the road leading to school, they had seen a place where some plants and bushes had been tampered. Once they proceeded about 20 feet from that place towards the tampered plants they had found the umbrella of Priyadarshani. When they moved further down, they had found a shoe. After that they had entered a land grown with rubber and noticed some drag marks and blood stains. As there was a house nearby, where Gamini lived, they had called Gamini's father. Then Gamini's father had showed the path leading to a paddy land. When they were running along a ridge, first they found a black ribbon and then the dead body of Priyadarshani, another 30 feet beyond.

Somalatha is a woman who lives by the path along which Priyadarshani goes to School. She had seen Priyadarshani going towards her home around 4.00 p.m on 24th.

Ajith Kumara, Priyadarshani's elder brother and Gamini were friends. They had sawed timber together. Ajith Kumara had met Gamini between 4.30 to 5.00 p.m on 24th and Gamini went away saying that he was going to handover tea leaves. Gamini had returned to Ajith Kumara's boutique between 6.00 to 6.30 p.m. At that time Ajith Kumara had noticed that Gamini's shirt pocket was torn.

Udugama Koralalage Don Gamini Ajith Kumara, (above mentioned Gamini) was indicted for committing the murder of Narasingha Lekamge Chintha Priyadarshani, under Sec 296 of the Penal Code and committing rape of said Priyadarshani under Sec 364(2) (e) of the Penal Code. He was convicted on both Counts and sentenced to death on the 1st count and 20 years rigorous imprisonment on the second. Being aggrieved by the said conviction and the sentence Accused Appellant has submitted an appeal to this court.

Learned counsel appearing for the Accused Appellant submitted the following grounds of Appeal in support of the Accused Appellant's case.

Circumstantial evidence is inadequate to support the conviction.

The Trial Judge has failed to evaluate the evidence

The Trial Judge has misdirected himself on the law relating to Sec. 27 recovery.

Items of evidence favourable to the Accused Appellant have not been considered by the Trial Judge.

The prosecution case is entirely based on circumstantial evidence. The items of circumstantial evidence are as follows.

Injuries on Accused Appellant.

Torn Shirt Pocket.

and

Recovery of a school bag, a knife and a shoe on the statement made by the Accused Appellant.

15 year old Priyadarshani was raped and murdered on her way home from the school. The members of her family found her dead body which was lying in a jungle. They further found her umbrella a shoe and a ribbon on the way leading to the jungle. Drag marks and blood stains were noticed by them. After a day or two of the incident school children of the area staged a protest against the police demanding the police to apprehend the assailant. Under these circumstance police arrested Gamini on suspicion of the crime. The police had two reasons to suspect Gamini at the time of arrest. One was that, the place where Priyadarshani's body had been found was near Gamini's house. Gamini's torn shirt pocket was the other. After the arrest police produced Gamini before the Judicial Medical Officer. The Medical Officer observed miner abrasions on Gamini's hands and the chest. On statement made to the police by Gamini the school bag and the other shoe of Priyadarshani had been recovered. Police recovered a knife in consequence of the same statement.

Prosecution case was entirely based on the above circumstantial evidence led at the trial. The Trial Judge accepted those items of evidence and convicted the appellant for both counts of the indictment. He had emphasized the fact that tearing of the shirt pocket and abrasions on the hands and chest of Gamini had been caused as a result of a struggle at the time of committing rape. The Trial Judge had decided that Gamini's knowledge about the crime is proven by the recovery of school bag and the shoe on the information given by Gamini.

The learned Deputy Solicitor General while emphasizing those facts raised the question that "Where Gamini was in the evening of the day of the incident and the following day". He submitted that according to the evidence of Ariyapala, Gamini had not come home even by 11.00^o clock in the night on the day of the incident. He further submitted that according to the evidence led at the trial only Gamini's father had been present at the scene, which was closed to Gamini's house at the time of finding the dead body.

Learned counsel for the appellant invited the attention of this court to the fact that according to the evidence of the Medical Officer abrasions of Gamini's body had been caused two or three days prior to the medical examination. This medical examination has been done on 01.11.2000 seven days after the incident. According to the evidence of the Investigating Officer there had been blood stains on the plants and bushes of the jungle. The body had been dragged through the jungle up to the paddy land. An attempt had been made to hide the body in the mud of the paddy land. No attention had been drawn to the fact that Ajith Kumara, brother of the deceased had noticed only the tone pocket of Gamini and nothing else.

There were 36 injuries on the body of the deceased. Namely contusions abrasions cut injuries and stab injuries. Death was due to multiple stab injuries to head and the chest. The Medical Officer was of the opinion, those injuries at the genitals area consistent with a sexual act. He has expressed the opinion that cut injuries and stab injuries could have been caused by the scissors, which had been shown to him and marked at the trial.

There were tears of hymen at 3 and 9 o clock positions. The tear of hymen of 3 o clock position also extends up to the left labia minora. These injuries could have been caused two days before the post mortem examination and as a result of a penis being inserted to the vagina. This was the opinion of the Medical Officer. The post mortem examination had been held on 26.10.2000.

The Accused Appellant in the dock statement has denied the charges. He states that, the elder brother of the deceased was a good friend of his. Once he came to know about the death, he had gone to funeral house and helped them with their work for two days. He had been arrested by the police and had been tortured and assaulted.

According to the evidence of Chief Inspector Weerasingha who was the Chief Investigating Officer of the crime, the Accused Appellant has been arrested on 01.11.2000. But the evidence of Ajith Kumara and Karunawathi a elder brother and the mother of the deceased respectively reveal that the Accused Appellant had been arrested before the funeral. Karunawathi has stated in her evidence that the funeral was on 28 or 29.10.2000. As stated earlier even the Accused Appellant says he was arrested while helping with the work at the funeral house for two days. Apparently the arrest of the

Accused Appellant would have taken place on or before 29th. The evidence led at the trial does not reveal that the Accused Appellant had injuries prior to the arrest. The scissors marked at the trial as P12, has nothing to do with the crime. Evidence led at the trial does not reveal as to how P12 was found. When considering the above matters, this court tends to agree with the ground of appeal that items of evidence favourable to the Accused Appellant had not been considered by the trial judge.

What the police had used for Sec 27 recovery was the statement made to the police by the Accused Appellant while he was in remand custody. The explanation given by the police for recording the second statement from the Accused Appellant was that they were unable to record a statement in the proper manner due to the tense situation that prevailed at the time. The police witness who gave evidence in that respect says “ *that the statement of the accused was recorded in prison on the information received subsequently*”. I am of the opinion that under these circumstances the learned trial judge should have considered Sec 27 recovery evidence with extra care.

When excluding the two items of evidence namely evidence about the injuries of the Accused Appellant and Sec 27 recovery evidence which are subjected to a grave doubt only the item of evidence about the torn shirt pocket is left. To convict a man for committing rape and murder just on the reason that his shirt pocket was torn is hardly sufficient. I am, therefore, of the view that the trial judge has come to an erroneous conclusion in convicting the Accused Appellant without careful evaluation of the evidence of the prosecution case.

Although the crime committed is extremely inhuman, court must be guided only by evidence, which could be admissible in accordance with law and not by any extraneous matters such as feelings and emotions. For the above

reasons, I set aside the convictions and the sentences and acquit the Accused Appellant of both charges of the indictment.

Appeal Allowed.

JUDGE OF THE COURT OF APPEAL

SISIRA J DE ABREW, J

I agree.

JUDGE OF THE COURT OF APPEAL