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

Duminda Munasinghe alias Kaluwa

ACCUSED-APPELLANT

C.A. No. 82/2010

H.C. Kandy 24/2002

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &
Sunil Rajapaksa J.

COUNSEL: Anuja Premaratne for the Accused-Appellant

Shavindra Fernando A.S.G., for the Complainant-Respondnet

ARGUED ON: 06.08.2014

DECIDED ON: 22.09.2014

GOONERATNE J.

The Accused-Appellant was indicted for the murder of his wife Niroshini Wickramage, on or about 27.12.1998 and convicted and sentenced to death. This is a case of circumstantial evidence and the prosecution commenced the case by leading the evidence of the Judicial Medical Officer who testified to several injuries, and to have detected sperm in the deceased vagina which indicates,, sexual intercourse within 24 hours of her death. Injury Nos. 1 -5 in the Post-Mortem Report (P1) refer to injuries in the deceased's neck which suggest strangulation. Injury Nos. 6 – 10 refer to injuries in the buttocks area which suggest that the deceased had been dragged to a close point. Evidence at folios 55 – 61 of the record suggests the required medical evidence.

The prosecution has led the evidence of the mother of the deceased, Mohamed Khan, Priyantha Wickramage (treated as an adverse witness and the trial Judge very correctly rejected that evidence) brother of the deceased and three wheel drivers, Chaminda Bandara and Mahesh and the police witnesses. The evidence in a gist of all the witness suggest that on the day in question when the deceased and the family were watching television in the evening the

Accused arrived at the house and called the deceased to accompany the Accused to buy cigarettes, and both of them left the house at about 10.30 p.m. Mother's evidence suggest that the deceased and the Accused had several dissensions between them. They were newly married. Having left the house at 10.30 p.m the deceased, daughter never returned home, until she came to know that the daughter had been murdered and found near the bank of the river at about 4.00 p.m. the following day. She went up to the river bank.

The evidence of Khan a bus driver reveals that the Accused came to the bus halt at about 11.00 p.m in search of Chaminda and had uttered "ඔය ගැණි මරලා ගගට දාලා ආවේ". This witness also testify that he felt that the Accused came to harm Chaminda. The brother of the deceased corroborate the evidence of his mother and adds that the Accused had threatened to kill him. The above named Chaminda the three wheeler driver also gave evidence and state he hid behind a bus when he saw and heard the Accused coming in search of him with a knife. The other witness also suggest about the confession stated above by the Accused. It is also in evidence that the Accused was under the influence of liquor.

The learned defence counsel inter alia emphasized on;

(a) Belated statements of some of the main witnesses for the prosecution.

(b) Contradictions inter se between the prosecution witnesses.

(c) Contradictions in the evidence of witness No. 3 for the prosecution which is void of credible value (131).

(d) Witness No. (4) was remanded. This would have an influence on others. Refer to case No. CA/96/2006.

(e) Refer to evidence of witness No. 7 and the evidence at folios 145 & 146. (Showing of I.B. Extracts by police prior to trial and about threat to kill the sister by Accused being denied).

(f) Evidence at folios 163/164. Witness (No. 6) produced from remand – as such unreliable evidence – belated statement (178).

(g) No proper evaluation of evidence by learned High Court Judge.

(h) Pregnancy of deceased not established by proper evidence.

(i) Unsafe to act on confessions in view of evidence that transpired in folios 93/94 of the record.

The learned Additional Solicitor General drew the attention of this court to the several items of circumstantial evidence and when corrected to each other the guilt of the Accused is established. He emphasized the fact that the defence has not challenged the following items of evidence.

(a) Accused last seen with the deceased

(b) Motive

(c) Dissensions between the accused and deceased (88/89)

(d) Doctor's evidence

When I consider the entirety of the evidence led before the trial court, it is apparent that the Accused was last seen with the deceased. It is also in evidence that there were dissensions between the parties, and provides proof of motive, (88/89) utterances made by the Accused transpired from neutral witnesses. All above transpired from uncontradicted evidence. Medical evidence which are also not contradicted by the defence suggest strangulation (injury Nos. 1 – 5 and injury Nos. 9 & 10 suggest dragging the deceased a short distance). At pgs. 63 & 64 of the record the Doctor testified that he found sperm in the vagina of the deceased and it suggest that sexual intercourse took place within 24 hours. The Accused surrendered to the police with his father (204). The evidence of witness No. 3 at folio 93 of the record suggest the confession and utterance as well as the Accused condition at that time of being under the influence of liquor, had not been challenged by the defence. I would incorporate the answer of witness which add to the guilt of the Accused as follows.

කලු මල්ලි ඇවිත් මං ගැනි මරලා ගගට දාලා අවේ සුනිල් අයියා අපේ තාත්තාට බැනලා තියෙනවා දැකුකොස් ඔකා මරන්න මං ආවේ කිව්වා. එයා හොඳට බීලා හිටියේ.

Witness Nos. (6) & (7) also provides supportive answers to above.

The Accused in this case made a dock statement. It is only a mere denial. There was no explanation by the Accused-Appellant. It was the view of the trial Judge that an explanation was warranted by the Accused. This court does not wish to interfere with the views of the trial Judge on that aspect. Dock statement is evidence for all purposes subject to certain disabilities. Nevertheless it has to be considered by the trial Judge. Trial Judge no doubt has given her mind to this aspect. As such trial Judge's views on same is correct and cannot be faulted. Uncontradicted evidence revealed that the Accused took away the deceased wife from her house making it known to the others in the household that he wish to buy cigarettes, and wanted the wife to accompany her. Both of them never returned home until information was received the next day that the dead body of the deceased was found near the bank of the river. Failure on the part of the Accused-Appellant to provide an explanation would entitle the trial court to draw an adverse inference. This would be an aspect to support the guilt of the Accused. No doubt the Accused was required in law to

offer an explanation of the highly incriminating circumstantial evidence established against him. Vide Sumanasena Vs. A.G 1999(3) SLR 137; 47 NLR 490. I have to observe that the trial Judge has correctly applied the 'Ellenborugh' dictum.

There is evidence of motive, and considering the above 'Sumanasena's case, this fact would considerably advance and strengthen the prosecution case. In the same decided case, views are suggested as regards the belatedness of statement, in the context of this case I think it is justifiable to observe that reason for delay is plausible. In any event no grave prejudice would be caused to either party. There was also a point suggested by learned defence counsel, of remanding of witness No. 4. The trial court had acted in terms of Section 154 of the Evidence Ordinance and treated the witness as an adverse witness for the prosecution. Accordingly the leaned High Court Judge had rejected that witness's evidence. Trial Judge has taken the steps as required by law, and as such the dicta in CA 196/06 cannot be extended or applied.

I have to observe in conclusion that the proved items of circumstantial evidence is consistent with the guilt of the Accused and inconsistent with his innocence. The proved facts are incapable of any other reasonable explanation

other than that of guilt. In the case in hand no acceptable explanation was offered by the Appellant. 44 NLR 254; 46 NLR 128 53 NLR 49.

In all the above facts and circumstances of this case we observe that the prosecution has proved its case beyond reasonable doubt. We affirm the conviction and sentence. Appeal dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

N.S. Rajapaksa J.

I agree.

JUDGE OF THE COURT OF APPEAL