

C.A 203/2013

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

In the matter of an appeal against the
Order of the High Court under section
331 of the Code of Criminal Procedure
Act No. 15 of 1979 as amended.

Ekanakaka Mudiyansele

Samaraweera Ekanayaka

Accused-Appellant

C.A. Case No:-203/2013

H.C. Kandy Case No:-357/2007

V.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondent

Before:- H.N.J.Perera, J. &

K.K.Wickremasinghe, J.

Counsel:-Chathura Ameratunga for the Accused-Appellant

Chethiya Gunasekera D.S.G for the Respondent

Argued On:-28.04.2015/11.06.2015

Written Submissions:-15.07.2015/17.07.2015

Decided On:-02.09.2015

H.N.J.Perera, J

The accused-appellant was indicted in the High Court of Kandy for three counts, for committing the offence of kidnapping of Thakshila Nayanakanthi Thillekeratne punishable under section 354 of the Penal Code, for committing the offence of rape punishable under section 364A (1) of the Penal Code and committing an offence of murder of the said Thakshila Nayanakanthi Thillekeratne punishable under section 296 of the Penal Code and was convicted for all three counts and sentenced to a term of 7 years rigorous imprisonment in respect of the 1st count and to a term of 20 years R.I. in respect of the 2nd count and was also sentenced to death in respect of the third count on 13.09.2013. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

The prosecution case rests solely and squarely on circumstantial evidence.

According to the prosecution on the day of the incident the deceased who was only 8 years of age had gone to school. As the deceased had not returned home parents had searched for her till 3.30 p.m. After that they had informed the police. The police had also come to the area and had continued the search. Next day one of the villages had seen a pair of slippers and had followed trail till he found the body of the deceased inside a shrub jungle. Deceased's father had identified the body of his daughter. Mother of the victim had been abroad when the incident occurred and the deceased had been living with her grandmother and her father.

According to the prosecution, the deceased on her way back home with her friends had to travel on a lonely path to go home. According to the friend of the deceased Imesha Malkanthi , all of them had been going home after school. After walking up to a particular point deceased usually takes a different path to go to her house. Imesha Malkanthi says that she saw the accused-appellant obstructing the deceased.

She identified the accused-appellant person in court as the person who obstructed the deceased. It was contended by the Counsel for the accused-appellant that the said witness Imesha Malkanthi had identified the accused-appellant first time in courts therefore as there is only the dock identification of the accused-appellant by the said witness Imesha Malkanthi that it is undesirable and unsafe for the court to rely upon the identification of the accused-appellant in court. Witness Imesha Malkanthi without any hesitation had identified the accused-appellant as the person who obstructed the deceased. Further in her evidence she had very clearly stated that she knows and had seen the accused-appellant in the village several times. She has also stated that although she does not know the name of the accused-appellant she saw him about three months prior to the date of the incident in the village and states that she had seen him walking on the village road.

Witness Imesha Malkanthi had very clearly identified the accused-appellant as the person who obstructed the deceased on that date when the deceased was going towards her house. She had very categorically stated that she saw the accused-appellant on that day. The learned trial judge had believed her evidence. This court also see no reason to disbelieve her. In fact the witness Imesha Malkanthi's evidence that she saw the accused-appellant that day is also admitted by the accused-appellant himself who had stated whilst giving evidence that he met the deceased with two other boys on that day. The accused-appellant

himself admits his presence at the scene on the day of the incident and that he met the deceased.

According to Imesha Malkanthi the deceased on her way back home with her friends had to travel on a lonely path to go home. The deceased had started walking alone as she is used to walk along the said path when the accused-appellant obstructed her way.

It was further submitted on behalf of the accused-appellant that according to witness No 13 evidence, the profile of the trouser does not match with the DNA profile of the accused-appellant which means that the stains found on the trouser belonged to another person and not to the accused-appellant. According to witness I.P. Kamal Ranaweera he arrested the accused-appellant on 28.09.2002 and had recovered a trouser (P7) and a shirt (P8) from the house of the grand-mother of the accused-appellant on the directions given by the accused-appellant after recording the statement of the accused-appellant at about 11.p.m on the same day. The said portion of the statement which enabled the police to recover the said clothes on the directions given by the accused-appellant was marked P9. These clothes had been sent for DNA analysis thereafter. The offence had been committed on 23.09.2002. The accused-appellant had been arrested on 28.09.2002. These clothes were only recovered after recording the statement of the accused-appellant. Section 27 of the Evidence Ordinance provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. Until the arrest of the accused-appellant no clothes were available. As blood sample of the deceased victim was not available at the time, the DNA analysis was conducted with the blood samples of the parents of the deceased. The DNA report confirms the fact that the blood sample of the

victims parents matches that were found on the trouser of the accused-appellant. Therefore the allegation that the police had introduced blood stains on the clothes of the accused-appellant fails as there were no clothes available before the arrest of the accused-appellant and no blood sample of the victim was available when the accused-appellant was finally arrested. Witness Ruwan Jayashantha Illeperuma from the GENETECH had given evidence in this case. The report issued by the said institution had been marked as P 16. In the said report marked P16 it has been clearly stated that the biological stain observed on the dark blue trouser belonging to the suspect E.M.Samaraweera Ekanayake, originated from a child of Ms.Atugedera Anula Kumari and Mr. H.M.Thilakarayne.(mother and the father of the deceased}

The accused-appellant too had admitted the fact that he met the deceased on her way home from school that day. He had further admitted that he was residing with his grand-mother at that time. The police had recovered the said clothes from the accused-appellant's grand-mother's house after the arrest of the accused-appellant and after recording a statement from him under section 27 of the Evidence Ordinance. Therefore the allegation that the police had introduced the blood stains on the clothes of the accused-appellant cannot be believed or accepted.

The accused-appellant had been last seen with the victim of this case and subsequently her body was found inside a shrub jungle. The deceased had been raped and murdered. In the Post-mortem Report marked P6 it is stated that the death is due to asphyxia in the form of strangulation and smothering. There are fresh injuries on the genitalia which are compatible with penetration. The prosecution had led the evidence of Dr.Irugal Bandara Dissanayake who conducted the post-mortem. The deceased had seven external injuries neck and the face and all these injuries show that the deceased had struggled with her assailant. The

deceased had been raped and murdered. The said doctor's evidence is not seriously challenged by the defense. The defense position is that the accused is not responsible for these acts.

The Ellenborough dictum contained in Lord Cochrane's case and as adopted and developed by courts today provides that "No person accused of a crime is bound to offer any explanation of his conduct or circumstances of suspicion which attach to him; but nevertheless if he refuses to do so where a strong prima facie case has been made out, and when it is in his power to offer evidence, is such exist, in explanation of such suspicious appearance which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or adduced would operate adversely to his interest."

Sri Lankan courts have for the most part applied the principle that while suspicious circumstances alone do not relieve the prosecution of the burden of proving the guilt of the accused beyond reasonable doubt, the existence of a telling evidence of a mass of circumstances, which remain unexplained by the accused, could result in a finding of guilt against the accused. I hold that the evidence led in this case does warrant the application of the Ellenborough principle.

In *Mawaz Kahn V. R.* [(1967) All E.R 80 PC] it was held that where the circumstantial evidence taken together with the setting up of a false alibi by the accused persons might determine the guilt or innocence of the accused in the absence of an explanation. In the instant case, it is evident that a strong case has been established against the accused based on his conduct when he was last seen with the deceased, he being the person who has been seen last with the victim, the recovery of the clothes by the police from the accused after recording his statement under section

27 of the Evidence Ordinance and by the failure of the accused to give an explanation how the blood stains were found on a trouser worn by him. Further in the instant case the accused had in the first instance tried to deny the fact that the said trouser belonged to him stating that it belonged to his brother and later had admitted the fact that the said clothes belonging to him were recovered from his grand-mother's place by the police.

On perusal of the said judgment of the learned trial Judge it is also clearly seen that he has given cogent reasons for disbelieving the defendant's evidence. The learned trial Judge has very correctly analysed the defense evidence to see whether it raised any doubt in the prosecution case. The trial Judge in his judgment specifically gives reasons why the accused appellant's evidence is disbelieved by him.

In King V. Musthapha Lebbe 44 N.L.R 505 Court of Criminal Appeal held that:

"The Court of Criminal Appeal will not interfere with the verdict of a Jury unless it has a real doubt as to the guilt of the accused or is of the opinion that on the whole it is safer that the conviction should not be allowed to stand."

The attendant circumstances of this case, section 27 statement, consequent to which clothes were discovered not only embrace the knowledge of the accused-appellant as to these items being in the place from which they were detected but that it was evidence connecting him with the rape and murder of the deceased. In my opinion the prosecution has proved the case beyond reasonable doubt.

In Ambika Prasad and Another V. State (Delhi Administration) 2000 SCC Cr1.522 it was held that:-

“A criminal trial is meant for doing justice to the accused, victim and the society so that law and order is maintained. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties.”

For the above reasons, I refuse to interfere with the judgment of the learned trial Judge and affirm the conviction and sentence. I dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

k.k.Wickremasinghe, J

I agree.

JUDGE OF THE COURT OF APPEAL