

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

In the matter of an Appeal
Against an order of the High
Court under Sec. 331 of the
Code of Criminal Procedure
Act No. 15 of 1979.

01) Junaideen Mohomed Haaris,
Bogambara Prison

02) Abdul Razak Mohamed Salam
(deceased)

03) Pakeer Mohomed Kamaldeen,
Bogambara Prison

Accused

C. A. Case No. : 212-213/12

H. C. Kandy Case No. : 309/2007

Vs

The Hon. Attorney General

Attorney General's Department,
Colombo 12.

Complainant

And now

01)Junaideen Mohomed Haaris,
Bogambara
02)Mohomed Kamaldeen,
Bogambara Prison

Accused-Appellants

Vs

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

Complainant Respondent

BEFORE : M. M. A. Gaffoor, J &
K. K. Wickramasinghe, J

COUNSEL : AAL Anil Silva PC for the 1st Accused-Appellant.
AAL J. Zeinudeen for the 3rd Accused-Appellant.
S. Thurairaja DSG. for the Attorney General.

ARGUED ON : 28th July 2016

DECIDED ON : 25th October 2016

K. K. WICKRAMASINGHE, J.

Three persons were charged on the indictment which contained five counts.

Count No.1:-

On or about 12th September 2001 in Malanda, Nawalapitiya within the jurisdiction of this court the 1st accused was found to be in the company of the 2nd and 3rd accused persons did commit rape on Solamalai Umadevi and that in the above company he has aided and abetted the 2nd and 3rd accused to commit rape on the said Solamalai Umadevi and that he has thereby committed an offence punishable under section 364 (2) (g) of the Penal Code as amended by Act No.22 of 1995.

Count No. 2:-

At the same time and place, during the course of the same transaction the 2nd accused was found to be in the company of the 1st and 3rd accused persons and did commit rape on Solamalai Umadevi and that in the above company he has aided and abetted the 1st and 3rd accused to commit rape on the said Solamalai Umadevi and that he has thereby committed an offence punishable under section 364 (2) (g) of the Penal Code as amended by Act No.22 of 1995.

Count No. 3:-

At the same time and place ,during the course of the same transaction the 3rd accused was found to be in the company of the 1st and 2nd accused persons and did commit rape on Solamalai Umadevi and that in the above company he has aided and abetted the 1st and 3rd accused to commit rape on the said Solamalai Umadevi and that he has thereby committed an offence punishable under section 364 (2) (g) of the Penal Code as amended by Act No.22 of 1995.

Count No. 4:-

At the same time and place, during the course of the same transaction the 1st, 2nd and 3rd accused persons robbed the gold jewellery that was in the possession of the said Solamalai Umadevi and thereby committed an offence punishable under section 380 read with section 32 of the Penal Code .

Count No. 5:-

At the same time and place, during the course of the same transaction the 1st, 2nd and 3rd accused persons did commit the murder of Solamalai Umadevi and thereby committed an offence punishable under section 296 read with section 32 of the Penal Code .

The 2nd accused was dead at the time of the trial. Therefore the charge against him was withdrawn by the state counsel and the rest of the charges were also amended accordingly.

The deceased Solamalai Umadevi who was a 23 years old girl used to go to a typing class every day. On the 12th of September 2001 she had not returned home after the class. On the following day early morning her father had gone to the police station and lodged a complaint about the Umadevi's disappearance.

On that evening her father had informed by the police of a dead body of a woman found near Mallanda Bridge, which was situated on the way to the deceased's home. The father of the deceased had identified the body of Umadevi.

There were no eye witnesses to the incident and it was wholly rested on circumstantial evidence.

The second accused appellant was staying nearby where the dead body was found. The place where he was living was used as a slaughter house of chicken and it was done outside the house. According to the neighbour of the second accused appellant he had heard a woman screaming in the middle of the night on the 12th September 2001 from the second accused appellant's house. PW2, the owner of the chicken slaughter house has confirmed that on the 12th of September 2001, the 2nd Accused Appellant was staying in that slaughter house.

During the course of the investigation, the police had found blood stains inside the said house, which was identified as human blood by the Government analyst.

Witness Wasudevan who was said to have been working under Salam (original 2nd accused who is now a dead) had heard a conversation between the first accused appellant and Salam (original 2A). According to the witness the conversation had taken place after few days of the murder of Solamalai Umadevi. The witness was said to have been visited the shop of the first accused appellant in order to deliver a message to Salam. Thereby he had overheard a conversation between the first accused appellant and Salam divulging the fact that both of them were committing the murder of Umadevi.

Investigation revealed that the 2nd accused (who is now dead) had pawned the necklace which belonged to the deceased (necklace had identified by the father of Umadevi) in the presence of the 1st accused appellant.

The first accused appellant in his dock statement had pleaded not guilty and further stated that he knew nothing about the incident. He had also mentioned that witness Wasudeva had left him saying that his wages were inadequate. Therefore he had an animosity with the first accused appellant.

The second accused appellant also has denied the allegation against him and he had further mentioned that the blood stains which were found to be in the slaughtering house where he was living, was belonged to a kind of insects (කුරුමිණියෝ).

According to witness Pushpalatha (sister of the deceased) it was revealed that on the day of the incident the deceased had gone to the typing class but never returned home. This particular class was situated about 2km away from their house (This corroborates the evidence of her father). She had also identified the diamond cut necklace, which had a broken joint, as worn by the deceased when she was last seen. Further mentioned that it was not available at the time when the dead body was found.

Counsel for the first accused appellant submitted that witness Wasudeva is not a reliable witness and therefore his evidence should not be acted upon according to the following infirmities:-

1. He had made a statement to the police on 28.11.2012 (after 11 years of the incident) (vide page 169 of the brief).
2. It was not a voluntary statement since he had given the statement only when the police came searching for him (vide page 169 and 170 of the brief).
3. He had not divulged about the incident to anyone, even to his father until the police came and recorded the statement.
4. Wasudeva had an animosity against the first accused appellant (vide pages 172 to 174 of the brief).
5. It was not a probable statement (vide page 164 of the brief)

It is also submitted by the counsel that it is very unlikely that two people to discuss about a murder committed by them in the presence of another staying 20 feet, who could hear the dialogue.

It is further submitted that since the original second accused Salam was dead, at the time when the trial was taken up, his utterings cannot be considered as evidence against the first accused appellant.

ඉ ඒ වෙලාවේ මොකක් කියනවාද තමාට ඇහුණේ?

උ සලාම් කීවා, අපි දෙන්නා මරුවා කියා කවුරුත් දන්නේ නැහැ, පෙළපාලි ගියොත් හාරිස් යන්න එපා කියා සලාම් කීවා හාරිස්ට.

The evidence led against the first accused appellant is inadmissible in terms of the Evidence Ordinance and it should be rejected.

The pawned necklace which had been recovered from witness Maliappan Sinniah Sundaralingam was said to have been pawned by Salam (the 2nd Accused), after the death of the deceased in the presence of first accused appellant (vide pages 219, 220 of the brief).

According to the evidence of the investigating officer revealed that witness Sinnaiyah Sunderalingam to whom the chain had been pawned was discovered on statements made by both accused (first accused appellant and the 2nd accused-who is now dead) Therefore the counsel for the first accused appellant states that adverse inference cannot be drawn in respect of first accused appellant since second accused was dead at the time of trial. (King v. Sudahamma 26 NLR 220).

The counsel for the first accused appellant further states that even if it was admissible, only inference that could have been drawn against the first accused appellant was that he had the knowledge of the place where Salam (second accused) had pawned the necklace. Therefore that evidence should not have been allowed to be led by the learned High Court Judge.

The counsel for the 1st Accused Appellant submitted that In King Vs Haramanis 48 NLR 403at 404 the court has observed “As a matter of law the prosecution is neither bound to assigned nor prove a motive as to why a criminal act was done.....But when the facts themselves are not clear and there is also the absence of an intelligible motive theses combined factors may have the effect of creating doubts in favour of the accused”

In the present case, one cannot say that the facts are not clear. There is clear circumstantial evidence against both the Accused Appellants which amply demonstrate the culpability of the Accused appellants. Therefor the above mentioned case is not applicable to the present case.

Though the appellants marked few contradictions, but it is evident that, those contradictions do not go to the root of the case. Therefor those contradictions cannot be considered as material contradictions.

The **Lucas Dictum** holds that a statement made in or out of court that is proved or admitted to be false and can be shown to be motivated by the fear of truth and the realization of guilt, can be taken as corroboration of other incriminating evidence or testimony. The false statements were that when police asked about the blood stains the 2nd accused appellant said that it was belonged to insects. The expert evidence proved that it was human blood. Therefor it is evident that the 2nd accused appellant gave a false explanation in order to hide his guilt.

Under these circumstances, learned High Court Judge was entitled to draw the necessary inferences and compelling inferences from the circumstances that are from the failure of the 2nd accused appellant to offer an explanation about blood stains found in the slaughter house where he was residing. Since there is highly incriminating circumstances established the dictum of Lord Ellenborough is applicable to the facts of the instant case. Though the right to silence is applicable in the general rule I would refer to the following dictum of Lord Ellenborough in the Case of Rex Vs Lord Cochrane and others[Gurney's Rep. 479]:-

“No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion; but if he refuse to do so , where a strong prima facie case has been made out , and when it is in his own power to offer evidence, if such exist, explanation of such suspicious appearances, 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 not adduced would operate adversely to his interest”

In the same vein King Vs Seeder de Silva 42 NLR 337 Howard CJ decided the same.

Also in the case of King Vs Wickremasinghe 42 NLR 313 Moseley S.P.J. stated the same.

Counsel for the accused appellant has submitted that witness Wasudewa had given a belated statement and therefor he is not reliable. In the case of Sumanasena Vs AG 1999 3SLR 137 Court of Appeal decided that “ ...*Just because the witness is a belated witness court ought not to reject his testimony on that score alone, court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the court could act on the evidence of a belated witness...*”

Considering all above I am of the view that the learned trial judge has very correctly and cautiously considered the evidence and taken a correct decision .I see no merit in this appeal. Therefor I affirm the conviction and the sentence imposed by the learned High Court Judge.

Appeal is hereby dismissed.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I Agree

Judge of the Court of Appeal

Cases referred to;-

- (i) King vs Sudahamma 26 NLR 220
- (ii) King Vs Haramanis 48 NLR 403
- (iii) Rex Vs Lord Cochrane and others [Gurney's Rep. 479]
- (iv) King Vs Seeder de Silva 42 NLR 337
- (v) King Vs Wickremasinghe 42 NLR 313
- (vi) Director of Public Prosecutions Vs Christie [1914-1915] All E.R. 63-730