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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

**C.A.No. 85/2011**
**H.C. Puttalam No. 63/2006**

Thomas Pullelage Fransis
**Accused-Appellant**

**Vs.**

Hon. Attorney General
Republic of Sri Lanka

**Respondent**

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**BEFORE** : **DEEPALI WIJESUNDERA, J.**
**ACHALA WENGAPPULI J.**

**COUNSEL** : Shehan de Silva for the Accused-Appellant
Janaka Bandara SSC for the Respondent

**ARGUED ON** : 18th May, 2018

**DECIDED ON** : 08th June, 2018

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**ACHALA WENGAPPULI J.**

The accused-appellant is present in Court produced by the Prison Authorities.

The accused-appellant was indicted for abduction to murder of one *Warnakulasuriyage Nishantha* and also for his murder on 21.05.2000. The accused -appellant opted for a trial without a jury. After the trial, he was found guilty to both these counts. He was sentenced to seven years Rigorous Imprisonment for the charge of abduction with a fine of Rs. 25,000.00, in default of the payment of fine he was sentenced to six months Simple Imprisonment and was sentenced to death on account of murder.

Being aggrieved by the said convictions and sentences, the accused-appellant sought to challenge their validity on the following grounds;

a. the trial Court has misapplied the last seen theory when the prosecution has failed to prove exact time of death of the deceased,
b. the trial Court has misapplied the Ellenborough dictum,
c. the trial Court has erroneously used the dock statement to support motive.

The prosecution presented a case based on circumstantial evidence to prove the two counts. According to the prosecution, *Katherine* is a sister of the accused-appellant and her husband has died four years ago leaving

their four children. The deceased was distantly related to them and was about 17 or 18 years of age at the time of the incident.

The evidence before the trial Court revealed that the accused-appellant has taken the deceased from the house of one *Katherine* in the night of 21st May 2000, on his motor cycle while armed with a cutting weapon. The deceased's body was recovered from a newly dug grave after 7 days. The body was in a putrefied state and its head was separated from the torso. A strip of cloth was also seen around the neck area of the deceased and his hands were tied behind using a thick rope. The lower part of the body had a blue colour pair of jeans, which was later identified by the witnesses as an item of clothing worn by the deceased when they saw him last. The post mortem revealed that the deceased had died due to strangulation. A sarong worn by the accused-appellant, when he took away the deceased that night, was also recovered from the same grave when the body of the deceased was exhumed. The accused-appellant has evaded arrest and was eventually arrested after 70 days at a sand mine in a different Police area. A sword was recovered by the Police under Section 27 of the Evidence Ordinance.

Learned Counsel ~~of~~ the accused-appellant, in support of the first ground of appeal submitted that the evidence led by the prosecution, specially the medical evidence, only supports the fact that the death of the deceased may have occurred 10 days prior to the post mortem examination, which predates the date of offence and therefore the

imposition of criminal liability on the accused-appellant on the last seen theory is clearly an erroneous conclusion reached by the trial Court. He relied on the judgment of ***The King v Appuhamy*** 46 N.L.R. 128 in support of her submission.

Learned Senior State Counsel for the Respondent in his submissions referred to the admission marked at the trial that the body on which Dr. Gnanaratne performed the post mortem examination is that of the deceased. Then he invited the Court to consider the medical evidence on the post mortem examination conducted on 29.05.2000 by Dr. Gnanaratne. The medical witness was of the opinion that the death of the deceased may have occurred about 10 days prior to his examination. When the prosecutor questioned whether it is possible that the death of the deceased could have occurred 8 days prior to his examination, seeking to include the date of offence, the witness answered in the affirmative.

In addition, referring to the stomach contents of the deceased, the medical officer was of the opinion the deceased had died after about less than 2 or 3 hours since his last meal. He has founded this opinion on his observation that he could clearly identify the rice and curries separately, although in a semi digested state, in the stomach of the deceased.

Learned Senior State Counsel then referred to evidence of the witnesses *Katherine* and *Sunil* where both of them stated that they had dinner late in that night before they went to sleep. It was about midnight

when the accused-appellant barged into *Katherine's* house and took away the unwilling deceased showing a sword.

In the light of these items of evidence, learned Senior State Counsel submitted that the prosecution has established the time of death of the deceased around the time he was abducted by the accused-appellant.

In ***The King v Appuhamy***(supra), the Court of Criminal Appeal has held thus;

> *"The prosecution failed to fix the exact time of death of the deceased, and the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance. The presence of rice and curry in the stomach of the deceased also indicates a strong possibility that the death took place some hours after the deceased set out with the accused".*

Their Lordships decided to allow the appeal due to several infirmities in the prosecution case, including the one reproduced above. It is seen from the judgment of the Court of Criminal Appeal that the deceased was last seen with the accused late in the evening and his body was found only on the following morning. Post mortem examination was performed on his body on the next day in the early afternoon. According to medical evidence, "it was possible for the man to have died about 9.00 p.m." and had his last meal three to four hours before his death. But, none of the witnesses spoke of the deceased having a meal since "midday". The accused has taken up the position that the deceased has taken a meal after

he went with him and "have been killed some hours after he had this meal." It is in these circumstances, the Court of Criminal Appeal held that the prosecution has failed to "fix the exact time of death."

However, in the matter before us, there is evidence of deceased having his last meal of rice and curry late in the night of his abduction. The deceased has then slept in the house of *Katherine* with *Sunil*. The accused-appellant has then woken up the deceased from his sleep at about mid night and took him on his motor cycle. In these circumstances, the medical officer's evidence that the deceased had died after 2/3 hours since his last meal, places the time of death around midnight, the time he was taken away by the accused-appellant. We are inclined to accept the submissions of the learned Senior State Counsel in relation to this ground of appeal.

The second ground of appeal concerns the applicability of the Ellenborough dictum to the case presented by the prosecution before the trial Court. The accused-appellant contended that the trial Court has considered the evidence presented by the prosecution under four separate segments in applying the Ellenborough dictum and erroneously concluded that each of these segments cumulatively presented a strong prima facie case.

The trial Court, in considering the evidence placed before it, by the prosecution has considered them under the following segments;

i. evidence in relation to motive

ii. evidence in relation to preparation

iii. evidence in relation to opportunity

iv. evidence in relation to subsequent conduct.

The accused-appellant's contention is that the evidence presented by the witnesses negates any motive entertained by the accused-appellant in relation to the commission of offences he was charged with. According to the accused-appellant, none of the witnesses said there exists a previous enmity between him and the deceased. Both the accused-appellant and the deceased were related to each other and there was clear evidence that the deceased went along with the accused-appellant quite willingly that night. The accused-appellant further claimed that there was no indication to suspect any untoward incident. In view of this, the accused-appellant contended that the trial judge's conclusion that the accused-appellant was angry with the 17-year-old deceased for staying with his widowed sister in her house is not supported by evidence.

Witness *Sunil*, in his examination in chief, denied the existence of any resentment between the accused-appellant and the deceased. However, during cross examination he was questioned, whether he told the Police of an incident where the accused-appellant has verbally abused the deceased and the witness admitted it. It is evident from his evidence that the accused-appellant was not happy with the deceased for his act of leaving *Katherine's* two of her four children at her parental house. This incident took place only in the previous evening. In addition, the witness

also admitted that he was assaulted by the accused-appellant for visiting his sister's house. Thus, it is reasonable for the trial Court to infer that the accused-appellant was against any association with his sister either by *Sunil* or the deceased.

Learned Counsel for the accused-appellant contended that the trial Court has attributed a motive to the accused-appellant merely on speculation. She relied on the judgment of ***Queen v Sathasivam*** 55 N.L.R. 255 in support of his contention that speculative motive is not admissible.

Considering the available evidence in its proper context, we are unable to agree with the submission of the learned Counsel that the trial Court attributed motive to the accused-appellant merely on speculation.

The accused-appellant also sought to challenge the conclusions reached by the trial Court under the segment termed as evidence in relation to subsequent conduct. The prosecution led evidence before the trial Court that the accused-appellant was arrested 70 days later whilst employed as a labourer in a sand mine which was located along the banks of *Kelani* river in *Dompe* Police area. There was also evidence, led through the Police witnesses, to the effect that despite several visits to the place of residence of the accused-appellant, he was not to be found.

In addition, the evidence of *Krishantha,* the brother-in-law of the accused- appellant, revealed that either in April or May 2000, the accused-appellant came to his house on a motor cycle and having left it with him, returned hurriedly in a bus without explaining as to why he is leaving the motor cycle with him. The accused-appellant never enquired about it thereafter. This motor cycle was later identified by *Sunil* and other witnesses as the motor cycle used by the accused-appellant to take the deceased away on that night.

Learned High Court Judge, considering the segment of evidence in relation to subsequent conduct, concluded that it supports the inferences she has reached under the other segments. This is a correct finding of fact, in view of the items of circumstantial evidence reproduced above.

Learned High Court Judge, before applying the Ellenborough dictum, concluded that the prosecution has established a strong prima facie case against the accused-appellant. Then only she applied the Ellenborough dictum on the accused-appellant. The accused-appellant relied on the judgment of ***Wimalaratne Silva and Another v Attorney General*** (2008) 1 Sri L.R. 103 where it was observed that;

> *"It must be emphasized that the Ellenborough dictum should not be drawn haphazardly in order to bolster the sagging fortunes of an otherwise weak prosecution case ... "*

The clear identification of the sarong worn by the accused-appellant by witness *Katherine* at the time of abduction of the deceased, connects him to the grave from which the body of the deceased was recovered. This sarong marked as P6, too was recovered from the same grave by the investigators at the time of exhumation of the dead body. The accused-appellant did not challenge this evidence nor did he offer any explanation in his statement from the dock.

As already noted, in the instant appeal, the prosecution did present a strong case before the trial Court and therefore its application of the Ellenborough dictum is clearly justifiable.

In relation to the third ground of appeal, the accused-appellant contended that the trial Court has erroneously considered the contents of the dock statement as supportive evidence of the strong motive entertained by him against the deceased when he disregarded the advice not to visit *Katheryn's* house.

This submission stems from the learned High Court Judge's finding that the accused-appellant's claim in his dock statement stated that the deceased was sleeping with *Katherine* on a mat when he entered her house that night is a lie.

The accused-appellant stated in his statement from dock that he took the deceased from the *Katherine's* house that night. When they reached his motor cycle which was parked at some distance from the house, the deceased opted to come in his push cycle. Then the accused-appellant went away. Later he learnt from the Police that he is wanted in connection of a murder.

In totally rejecting the dock statement of the accused-appellant, the trial Court held that he has uttered falsehood in it.

This conclusion could not be faulted as *Sunil* in his evidence clearly stated that it was he who was with *Katherine* when the accused-appellant entered the house that night. The accused-appellant did not suggest to Sunil during his cross examination that it was the deceased and not the *Sunil* who was there with *Katherine.* The witness said that the accused-appellant took the deceased on his motor cycle. This item of evidence was not challenged. The accused-appellant however, said in his statement from the dock, that the deceased opted the push bicycle. These assertions could clearly be termed as an afterthought by the accused- appellant. It is further confirmed, when he implicated his sister was in an immoral relationship with the deceased. The trial Court also observed that the accused-appellant has failed to offer any acceptable explanation through his statement from the dock. The trial Court has totally rejected his dock statement.

It is in this context that the learned trial Judge finally concludes that his statement does not provide any explanation to the strong prima facie case established by the prosecution.

In view of the above reasoning it is our considered view, that there is no merit in the appeal of the accused-appellant. Therefore, the convictions entered against the accused-appellant on 28th June, 2011 and the sentences imposed on him upon the said convictions are hereby affirmed.

The appeal of the accused-appellant is accordingly dismissed.

**JUDGE OF THE COURT OF APPEAL**

**DEEPALI WIJESUNDERA, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**