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

In the matter of an appeal in terms of the Section 331 of the code of Criminal Procedure Act No: 15 of 1979.

Hon. Attorney General
Attorney General's Department
Colombo 12

COMPLAINANT

Court of Appeal Case No: CA-24/2011

High Court Badulla Case No: 46/2006

VS

Ambagahagedara Nimal Ratnayake

ACCUSED

AND NOW BETWEEN

Ambagahagedara Nimal Ratnayake

ACCUSED-APPELLANT

VS

Hon. Attorney General
Attorney General's Department
Colombo 12

COMPLAINANT-RESPONDENT

BEFORE : **M. M. A. Gaffoor, J.**

K. K. Wickremasinghe, J.

COUNSEL : Indica Mallawaratchy AAL for the Accused-Appellant

Dileepa Peeris Deputy Solicitor General for the -Respondent

ARGUED ON : 25.01.2018

WRITTEN SUBMISSIONS
FILED ON : 29.08.2018 (by the Accused-Appellant)
30.11.2018 (by the Compalinant-Respondent)

DECIDED ON : **01.04.2019**

M. M. A. GAFFOOR, J.

Heard both Counsel in support of their respective cases. The Accused-Appellant was indicted for committing the murder of Dissanayake Mudiyanselage Siriyawathi on or about 6th July 2004. The deceased was a fifteen-year-old girl living together with the Accused-Appellant as husband and wife. She was not legally married to the Accused.

After the indictment was read, Accused pleaded not guilty and opted for a *non-jury trial* (Vide page-000022 of the appeal brief). To prove the prosecution case, prosecution led the evidence of several witnesses including Ambagahagedar Punchibanda, Alhenegedara Bandara Menika, Ambagahagedara Wasanthi, JMO-Dr. Dissanayake, and several Investigating Police officers.

The prosecution case was based on the evidence of the Accused-Appellant's mother and the sister's evidence. On the day of the incident Accused-Appellant came home with the deceased and after sometime went to Accused-Appellant house which was in the same compound.

After a short while Accused-Appellant had come and told his mother and sister who were in the main house that **"Siriyawathi Maruwa".** It doesn't reflect from the case record that the deceased's was in a distressed mood to hang herself. None of the witnesses spoke about any argument or other misunderstanding between the Accused- Appellant and the deceased.

Ambagahagedara Punchibanda (vide page: 000030) stated that after he came home he was informed by his wife that his daughter in law was dead. He had visited the scene (house of his son) and found the dead body of the deceased. According to him, deceased face was covered with black cloth and \ there had been a ligature hanging around her neck.

Punchibanda's Son (Accused –Appellant) had not been at home when he went. When he met him he had asked him as to what had happened but his son had not given any reply (page: 000036) This had been the observations of Punchibanda with regard to the dead body as he was not at home when the incident took place.
Alhene Gedara Bandara Menika (page; 000038) Mother of the Accused-Appellant, She said both the Accused -Appellant and the deceased had come home on that day around 11.30 am. After meeting her, both of them had gone to Sunil's house which is close by. Around 3.30 pm her son had come and informed her that **Siriyawanthi Maruwa** (page: 000045).

Further giving evidence Bandara Menika said after saying Siriyawathi Meruwa her son had told her that he was going to the Police Station and gone (page: 000047). Badara Menika had gone towards her son's house and had observed the deceased dead body. On the same day she had given a statement to the Police and later given evidence at the Non-Summary and at the High Court Trial.

When perusing her evidence, she is consistent in her evidence. This is very rare occasion that a mother giving evidence against the conduct of her own son. Therefore, this Court will not consider her evidence very lightly. Even under cross examination Bandara Menike is very consistent with regard to her evidence. No contradictions or omissions had been marked throughout her evidence.
Further, even under cross examination when the Defence Counsel suggested to her that her son had told,

ප්‍ර: සාක්ෂිකාරිය තමුන්ගේ පුතා ඇවිල්ලා තමුන්ට කිව්වෙ සිරියාවති මැරුවා කියලද මැරුණා කියලා ද?

උ: මැරුවා කියලා කිව්වා. (page: 000049)

Giving evidence Ambagagedara Wasanthi (page: 000053) corroborates her mother Bandara Menike's evidence in all the aspects:

විත්තිකරුගේ සහෝදරියක් වන වසන්තිගේ සාක්ෂියේ මේ ආකාරයට සටහන් වී ඇති බව නිරීක්ෂණය කරමි. (Page: 000056)

ප්‍ර: ඒ කියන්නේ 11.30 ට ආවා. 11.45 ට විතර ගියා?

උ: ඔව්.

ප්‍ර: ආපහු වෙලාවක නිමල් ආවාද තමුන්ගේ ගෙදරට?

උ: ඊට පස්සේ 3 ට විතර ආවා.

ප්‍ර: තනියමද ආවේ?

උ: ඔව්.

ප්‍ර: මොනවා හරි නිමල් අවිල්ලා කිව්වා ද?

උ: අක්කා මැරුවා කියලා කිව්වා.

මෙම සාක්ෂිකාරිය හරස් ප්‍රශ්නවලට පිළිතුරු දෙමින් ද පහත සඳහන් ලෙස සාක්ෂි දී ඇති බව නිරීක්ෂණය කරමි. (Page: 000060)

ප්‍ර: අයියා තමුන්ට කිව්වේ සිරියාවති මැරිලා කියලා නේද?

උ: අම්මා අතින් තමයි කිව්වේ. මම පිටිපස්සෙන් හිටියේ. මට ඇහුනා සිරියාවති අක්කා මැරුවා කියලා කිව්වා.

In this case, the Accused- Appellant Nimal Ratnayake is the son of Bandara Menike and the brother of Wasanthi. Therefore, there is no issue with regard to the identity of Accused -Appellant.

The doctor who performed the postmortem had also been called to give evidence at the trail. According to him on 2004.07.06 the postmortem had been performed at the Mahiyanganaya Base Hospital. Doctor had noted several injuries on her body. A Doctor said injury pattern is consistent with the ligature strangulation. According to the PMR findings the cause of death is due to strangulation by a ligature.

පශ්චාත් මරණ පරීක්ෂණය පැවැත් වූ වෛද්‍යවරයා විසින් පහත සඳහන් පරිදි සාක්ෂි ලබා දී ඇති බව නිරීක්ෂණය කරමි.

ප්‍ර: ඔබ සඳහන් කළා මෙම තැනැත්තියගේ දේහයේ ගෙලේ තුවාලයක් සහ ඊට අමතරව පාද දෙකෙහි දණහිසට පහළින් සිරිම් සහ තැලීම් තුවාල තිබුණා කියා?

උ: ඔව්.

ප්‍ර: එම කරුණු සලකා බලා මෙම තැනැත්තියගේ මරණයට හේතුව කුමක් ද සඳහන් කර තියෙන්නේ?

උ: ලණුවකින් ගෙල සිර කිරීමෙන් සිදු වූ මරණයක් කියා.

The conclusion of the Doctor who performed the Postmortem was that death due to *ligature strangulation*.

After being informed of the incident Police had investigated the matter. When the Police visited the house of the deceased they had observed the body and the face were covered by the black cloth which had been taken in to custody. Statements of witnesses had also been recorded.

Police had recorded the statement of the accused. After recording his statement, a nylon rope had been found. The said nylon rope had been marked as P-05, and the portion which lead to the finding of the nylon rope had also been marked as P-04. Thus we come to the conclusion that the version of the prosecution witnesses is corroborated by the Police Officers' investigations.

The Prosecution after leading evidence of several witnesses and marking P-01 to P-06 closed the case for the prosecution. After conclusion of the prosecution case as there was a prima-facie case against the Accused the Learned High Court Judge had called for the defence.

For the defence Accused-Appellant opted to give a dock statement (page: 000079). Accused in his dock statement stated that a person by the name of Karunaratna is

the person who is responsible for the death of the deceased. Accused further said Karunaratna is the person who told him to surrender to the Police. This position had never been suggested by any of the prosecution witnesses including the investigating Police Officers.

In several decisions it had been held that absence of cross examination of Prosecution witnesses of certain facts leads to inference of admission of that fact.

In the Indian Supreme Court decision of ***Motilal v. State of Madhya Pradesh*** **(1990) (CLJ NOC 125 MP)** it was observed that:

> "*Absence of cross examination of Prosecution Witnesses of certain facts leads to inference of admission of that fact*".

Furthermore, this principle is echoed in ***Pilippu Mandige Nalaka Krishantha Kumara Tissera v. Attorney General*** **(2007)** and is in line with the approach adopted by Indian Courts as well as evidenced by the decisions in ***Sarwan Singh v. State of Punjab*** **(2002) (AIR SC 111)** where it was held that,

> "*It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted*"

We now consider the dock statement of the Accused-Appellant. When this Court carefully peruse the dock statement, the position taken by the Accused-Appellant at the trail and the dock statement it's totally different. It appears to this Court that the dock statement made by the Accused-Appellant is after thought. We have perused the dock statement very carefully and decided to reject the same.

Thus, we come to the conclusion that the defence taken up by the Accused - Appellant in his evidence is an afterthought and we reject the same.

After the prosecution and the defence submissions the learned High Court Judge fixed the case for judgement.

After trial, the Learned High Court Judge found the Accused guilty of the indicted charge levelled against the Accused- Appellant.

The Learned High Court Judge convicted the Accused on 10.03.2011. After the conviction the Learned High Court Judge had recorded the *Allocutus* as per following the procedure under the Criminal Procedure Code.

When this matter came up for argument the learned counsel for the Accused Appellant took up several defects in the High Court Trial.

Accordingly, **the 1st defect was that**, Learned High Court Judge erred in law by perusing and relying upon the non-summary evidence of pw-01 at the time of writing the judgement.

The 2nd defect was that, Learned High Court Judge misdirected himself in law on the principles relating to section 27 of the evidence ordinance.

The 3rd defect was that; Learned High Court Judge was totally oblivious to the fact that a mere non- confessionary utterance by the appellant had been converted to a confessionary statement by the State Counsel thereby denying the appellant of a fair trial.

The 4th defect was that; items of circumstantial evidence are wholly inadequate to support the conviction.

The 5th defect was that, items of evidence favourable to the appellant have not been considered by the Learned High Court Judge, there by denying the appellant of a fair trial.

Before taking a decision with regard to this case we have carefully analyzed the evidence and the submissions made by both counsel as well as the written submissions tendered before us. We have taken in to consideration the above five defects stated by the counsel for the Accused- Appellant. After perusing the case record and the submissions made by both counsel we reject the submissions made by Counsel for the Accused- Appellant with regard to the above defects highlighted have no merit. Therefore, we reject the arguments made by l the counsel for the Accused- Appellant.

Justice *Thilakawardena, in* ***The AG Vs. Sandanam Pitchi Mary Theresa*****, (SC Appeal 79/2008 SC minutes dated 06.05.2010)** has observed that,

> *"Discrepancies that do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance."*

It was further held in the case that,

> *"Appellate courts are generally slow to interfere with the decisions of inferior courts on questions of fact or oral testimony. The Privy Council has stated that appellate court should not ordinarily interfere with the trial courts opinion as to the credibility of a witness as the trial judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility and whether after careful thought or with reckless glibness; and he alone can form a reliable opinion as to whether the witness has emerged with credit from cross examination." (Also see: Valarshak Seth Apcar v. Standard Coal Company Limited* AIR (1943) PC 159).

When we peruse the case record the prosecution, in this case, had proved the guilt of the Accused-Appellant beyond reasonable doubt. The Trial Judge had evaluated the prosecution evidence and arrived at the correct decision by convicting the Accused-Appellant for the indicted charge of the Penal Code. The totality of the

evidence proved nothing beyond the guilt of the Accused-Appellant. The trial Judge had correctly taken into consideration the seriousness of the crime committed by the Accused- Appellant who had killed a young girl who was living with the Accused. At the time of her death there is no evidence or suggestion that that there was a fight. It appears that there had been no fight between the two.

A girl of young as fifteen years old had to leave this world as a result of the action of the Accused. A young girl of fifteen should have been under her parent's love and care. Instead of looking after her Accused had killed her. After the incident Accused had gone to his mother's house and informed her that he killed Siriyawathi and then gone to the Police. There are many areas which he had to explained at the trial, but not done by the Accused-Appellant as per the Ellenborough dictum. We also take this in to consideration when coming to a finding against the Accused-Appellant.

Considering the evidence before us this Court is of the view that the Appeal of the Accused-Appellant should be dismissed and the conviction of the Learned High Court Judge is here by affirmed.

Accordingly, the appeal is dismissed.

The Registrar is directed to issue a copy of this order to the Learned High Court Judge of Badulla.

JUDGE OF THE COURT OF APPEAL

K. K. Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL