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

In the matter of an Appeal against the conviction and sentence pronounced on 30.03.2017 by Learned High Court Judge of the Northern holden in Vavuniya.

C.A. No. 41/2017

H.C. Vavuniya No. HCV/2650/2016

Thillai Ambalan Maheswaran alias Ravi

1st Accused-Appellant

Vs.

01. Democratic Socialist Republic of Sri Lanka

02. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondents

****

BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI, J.

COUNSEL : Yalith Wijesurendra (Assigned Counsel) for the Accused-Appellant.

Varunika Hettige D.S.G. for the respondents

ARGUED ON : 02nd May, 2019

DECIDED ON : 31st May, 2019

****

ACHALA WENGAPPULI, J.

The appellant, *Thillai Ambalan Maheswaran alias Ravi* was charged with the 2nd accused for committing the murder of one *Arumugam Elangarasa* between 25th to 26th April 2012 at *Pavatkulam.*

At the conclusion of the trial, which had been held without a jury, only the appellant was convicted for murder and was accordingly sentenced to death.

Being aggrieved by the said conviction and sentence, the appellant invoked appellate jurisdiction of this Court seeking to set them aside on the basis that the trial Court had erroneously relied on the confessionary items of evidence presented by the prosecution.

The prosecution case was that the deceased who was engaged in cultivation in the *Pavatkulam* area went missing and it was the 2nd accused, who was employed by the deceased as a helper, informed the family members of his disappearance. The 2nd accused had stayed in the house at the farm with the deceased at the time of his disappearance.

Son of the deceased had made a formal complaint to Police but no trace of the deceased was found until someone from the village had seen a part of a leg jutting out of the water line in an abandoned well which was located in a jungle area but closer to the place where the deceased lived.

The Police then recovered the body of the deceased from that well. At the time of recovery, they observed electrical wires wrapped around the body and heavy stones were attached to it. The 2nd accused also participated in conducting a search for the deceased and was present at the well when the body was recovered, among other villagers.

A post mortem examination was conducted on the body of the deceased and his death was due to electrocution.

The appellant was arrested by the Police on suspicion and upon investigations, they recovered some electric cables tied to a sarong from a place located about 150 meters from the well in which the body of the deceased was found. The prosecution did not establish any relevance of the sarong to the deceased by showing it to his family members who gave evidence before the trial Court. Similarly no evidence was placed before the trial Court by the prosecution in relation to the wires that had been recovered upon information provided by the appellant to the wires that were found along with the body of the deceased.

Strangely during examination in chief of SI *Jayatilleke,* who conducted the investigation into this incident, the prosecution had led evidence containing certain confessionary parts of the statement made by the appellant in describing the circumstances under which some of the productions that had been recovered.

The relevant section of the proceedings is reproduced below;

"Q : In that event, in which section of the statement has he informed you so ?

A : "Having removed the sarong worn by *Elangarasa,* it was wrapped in metal wire and was hidden in a nook; that place can be shown by me to Police; the wire which was used for electrocution was rolled and hidden in two spots; such places can be shown by me to the Police."

In its judgment, the trial Court, had stated (as per the English translation) " *... clear evidence has revealed that the metal wires used for committing the offence had been seized consequent to the statement of the 1st accused.*" The trial Court repeats the statement once more as it states further down in its judgment that the " *.. Court is of the view that the metal wires used to cause death to Elangarasa, the deceased in this case, were discovered in consequent to the statement of the accused.*"

There is no admissible evidence before the trial Court to conclude that the wires recovered upon the information provided by the appellant were in fact are the ones used to electrocute the deceased. Thus, it is clear that the trial Court, having allowed these confessionary items of evidence

to be led by the prosecution, had thereafter utilised the same to impute criminal liability on the appellant.

In ***The Queen v Appuhamy*** 60 N.L.R. 313, the Court of Criminal Appellant decided that;

> *"It is only when a "fact" has been discovered in consequence of information given by an accused person and when a witness has given evidence to that effect that so much of such information as relates distinctly to the fact thereby discovered may be proved."*

Clearly the trial Court had erroneously admitted inadmissible evidence against the appellant and had found the appellant guilty to murder on the strength of that evidence. The phrase quoted above from the judgment of the trial Court that *"the metal wires used to cause death to Elangarasa"* is clearly inclusive of the confessionary part of the statement which had been prohibited under Section 25(1) of the Evidence Ordinance since it creates an impression in the mind of a reader that the appellant had confessed to the killing of the deceased by electrocution. The discovery of the wire and sarong, if properly led under Section 27 of the said Ordinance, only establishes the fact that he had knowledge of the places where these items were later found by the Police. That knowledge of the appellant is clearly insufficient to impute on him any murderous intention, an element of the offence that had to be proved beyond reasonable doubt by the prosecution, in establishing a charge of murder.

We are inclined to agree with the submissions of the learned Counsel for the appellant that the conviction of the appellant is erroneous and therefore should be interfered with.

Accordingly, we set aside the conviction and sentence imposed on the appellant by allowing his appeal.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL