

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Court of Appeal Case No.
HCC 138/2016

1. Arumugam Sasikumar
2. Kalimuththu Suresh

High Court of Vavuniya No.
2549/2014

Accused

AND NOW

Arumugam Sasikumar

Accused Appellant

V.

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

Complainant Respondent

BEFORE : **K.K. WICKREMASINGHE, J**
K. PRIYANTHA FERNANDO, J

COUNSEL : Nihara Randeniya for the Accused Appellant.

P. Kumararatnam SDSG for the Respondent.

ARGUED ON : 02.08.2019

WRITTEN SUBMISSIONS

FILED ON : 01.10.2018 by the Accused Appellant.

07.11.2018 by the Respondent.

JUDGMENT ON : 23.10.2019

K. PRIYANTHA FERNANDO, J.

01. The Accused Appellant (Appellant) was indicted with the 2nd Accused in the High Court of Vavuniya on one count of abduction punishable under section 355 of the Penal Code, and on one count of murder punishable under section 296 of the Penal Code. After the conclusion of the case for the prosecution, the learned High Court Judge acting under section 200 of the Code of Criminal Procedure Act acquitted the 2nd Accused of both counts. After conclusion of the trial, the learned High Court Judge convicted the Appellant on count No.1 and sentenced him for 10 years rigorous imprisonment. Being aggrieved by the said conviction and the sentence the Appellant preferred the instant appeal.

Grounds of appeal urged by the Appellant are;

1. That the learned Trial Judge erred in law when concluding that the prosecution proved its case beyond reasonable doubt.
 2. That the learned Trial Judge failed to analyze the evidence of the prosecution witnesses.
 3. That the learned Trial Judge based his judgment purely on speculations and surmises.
 4. The learned Trial Judge failed to evaluate the defence case properly and rejected the defence evidence in the wrong premise.
02. All four grounds of appeal can be considered together as they are based on the same footing, that the evidence has not been evaluated properly by the learned Trial Judge.
03. Counsel for the Appellant submitted that it is unsafe to convict the Appellant on the testimony of the PW3 who is not a credible witness.
04. Prosecution mainly relied upon the evidence of the sole eye witness called by the prosecution Gunarasa Nagarani (PW3) who is the wife of the deceased victim. Her evidence was that her husband (victim) was taken away by those who came from the EPDP office. She identified the Appellant and the 2nd Accused as the persons who took the husband. She

had not seen them before. After 12 days of taking her husband away, his body was found and she had identified the body as of her husband's at the hospital.

05. She had identified the Accused persons at the identification parade held in the Magistrate's Court. Her sister in law had told her the same day that the name of the person who abducted her husband is Kumar. However, in cross examination it was revealed that in her statement to the police made after 12 days of the alleged abduction, she had told the police that unidentified persons abducted her husband in the night of February. That was after the body of the deceased was recovered. Although she learnt the name of the suspect as Kumar from her sister in law, she had failed to give his name to the police. Although she had told the police that her husband was abducted in February, according to the charge the date of abduction is 8th March 2009. If she knew that the name of the person who abducted her husband was Kumar, she could have given the name to the police. The best witness to testify on the identity of the Accused would have been her sister in law who knew the Appellant before. Prosecution has failed to call her to give evidence.
06. In cross examination, PW3 again said that when she went to the Chettikulam EPDP camp, the Officer in charge told her that it was Kumar who abducted her husband. She had told in her evidence at the inquest that she could identify the person and that he is in the Chettikulam camp. She had further said that he was fat and not much hair on the head. Then again in re-examination she had said that it was not Kumar she referred to as the person who was fat and without hair on the head, but the Officer in charge of the camp.

07. On the above contradictions *per se* and *inter se* in the testimony of the PW3, her evidence on the identity of the Appellant cannot be relied upon.
08. In case of *Sumanasena V. Attorney General* [1999] 3 Sri L.R. 137 it was held that evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law.
09. In case of *Wijepala V. Attorney General SC Appeal 104/99, 3rd October 2000* Court said;

'... The evidence of a single witness, if cogent and impressive, can be acted upon by a Court, but, whenever there are circumstances of suspicion in the testimony of such a witness or is challenged by the cross examination or otherwise, then corroboration may be necessary. The established rule of practice in such circumstances is to look for corroboration in material particulars by reliable testimony, direct or circumstantial....'

10. The above-mentioned discrepancies in her evidence go to the root of the case and affect the credibility of PW3. On the identity of the Appellant as the person who abducted the deceased, there is no other evidence either direct or circumstantial adduced by the prosecution. Medical evidence on the autopsy conducted on the body of the deceased and the evidence of the Police Officer who investigated into the matter after the body of the deceased was found are not of any assistance to the identity of the Appellant as the offender or the person who abducted the deceased. Hence, it is unsafe to convict the Appellant on the sole testimony of PW3

who is incredible. I find that the grounds of appeal have merit and the appeal should be allowed.

Hence, conviction of the Appellant by the learned High Court Judge is set aside. Appellant is acquitted of count No.1.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL