IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal under Section 331 of the Criminal Procedure Act No. 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal Case No. HCC/162/2019

V.

Kiribandage Rathnapala

High Court of Anuradhapura Case No. HC/89/2012

Accused

AND NOW BETWEEN

Kiribandage Rathnapala

Accused - Appellant

V.

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

Complainant - Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J. (P/CA)**

SAMPATH B. ABAYAKOON, J.

COUNSEL : Nihara Randeniya for the Accused – Appellant.

Shanil Kularatne, SDSG for the Respondent.

ARGUED ON : 04.10.2021

WRITTEN SUBMISSIONS

FILED ON : 13.01.2021 by the Accused Appellant.

05.05.2021 by the Respondent.

JUDGMENT ON : 29.10.2021

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K. PRIYANTHA FERNANDO, J.(P/CA)

1. The accused appellant (hereinafter referred to as appellant) was indicted in the High Court of *Anuradhapura* for one count of kidnapping from lawful guardianship, punishable in terms of section 354 of the Penal Code and one count of murder, punishable in terms of section 296 of the Penal Code. After trial the learned High Court Judge convicted the appellant on both counts and was sentenced to 5 years rigorous imprisonment and a fine of Rs.5000/- for the first count of kidnapping and sentenced the appellant to death for the 2nd count of murder. Being aggrieved by the above conviction and the sentence, the appellant preferred the instant appeal. The learned counsel for the appellant urged the following grounds of appeal;

    I. That the learned High Court Judge failed to consider the well settled principles of law relating to a case entirely based on circumstantial evidence.
    II. That the learned trial Judge convicted the appellant based only on suspicious circumstances and speculations.
    III. That the learned trial Judge has failed to analyze credibility of the prosecution witnesses and the entirety of the prosecution case.
    IV. That the learned trial Judge failed to consider that the evidence, important contradictions and omissions of the prosecution witnesses.

V. That the learned High Court Judge failed to appreciate the defence case and reject the same in the wrong premise.

2. Facts in brief elicited as per the witnesses for the prosecution are that the deceased child who was about 6 years old has been living with her mother *Wasantha* (PW1). Her father, husband of *Wasantha* has been in prison serving a term as an absentee from the army. *Weeraratne Bandara* (PW3) has been running a carpentry shop in the close vicinity of *Wasantha*'s house. On the 4th of June 2009 *Wasantha* has gone to *Weeraratne Banda's* house in the evening with the child. *Ajith Bandara Herath* (PW4) who has been the paramour of *Wasantha* also has come to PW3's house. The appellant who also lived in the vicinity had come to PW3's house to check about the cabinet he had wanted the carpenter PW3 to make for him.

3. The three men, PW3, PW4 and the appellant had consumed alcohol. As the child fell asleep on the chair, *Wasantha* has taken the child and had left her at her house. Whilst having dinner at PW3's house, the appellant has gone missing. Upon remembering that the child was sleeping at home, *Wasantha* had gone home to look for the child to see that the deceased child was also missing. When she alarmed the neighbours, they have started looking for the child as well as the appellant. Upon failing to find the child they have made a complaint to the police the same night (wee hours on the next day). Police personnel with the assistance of the army personnel have searched the area including the shrubs without success.

4. According to the police witnesses for the prosecution, the appellant was arrested on the 08.06.2009 at about 16.30 hrs. and his statement was recorded at 1.30 am on the 9th. In terms of section 27 of the Evidence Ordinance, police recovered the dead body of the deceased hidden in a pit dug by wild boar. It was the evidence of the police witnesses that they used minimum force to control the appellant who was under arrest when he tried to assault a police officer. In that, police have shot the appellant on his knee.

5. The position taken by the appellant in his sworn evidence at the trial was that after consuming alcohol at carpenter PW3's house, he got drunk. He could not remember what happened thereafter. When he regained consciousness the following day early morning, he had been in a drain close to the carpentry shop. Then he had gone to the lake to check the fishing net. As the fishing net was missing, he has been coming home where he was arrested by the police beyond the paddy fields beyond the lake. Police have assaulted him heavily and kept him at the police station. On the 6th June

police have taken him to the *Netiyagama* village and brought the carpenter (PW3). On the 7th also he was taken to the village for questioning about the child. Early morning on the 9th, police have obtained his signature on a document and then taken him to *Netiyagama* village. Police officers have pushed him to a well with his handcuffs put on. Police officers after taking him out of the well have asked him to run. When he refused stating that he cannot run due to his injuries, police officers have asked him to hold a ladder and have shot at his knee and had taken him to the hospital. Appellant denied showing the body of the deceased child to the police. With regard to the certified photograph of the appellant that was produced by the police at the trial, the appellant said that police have taken it from his wife.

6. All grounds of appeal urged will be discussed together.

7. Learned counsel for the appellant submitted that there is no direct evidence to show that the appellant kidnapped or killed the deceased child. Prosecution relied on circumstantial evidence. It is the contention of the learned counsel for the appellant that according to the evidence adduced, the appellant was not arrested on the 08.06.2009 as testified by the police officers, but was arrested on the 5th June and was kept at the police station illegally till the 9th June. Counsel contended that therefore, the section 27 recovery is false and should not be relied upon. Learned Senior DSG for the respondent submitted that although there is an issue on the date of arrest, recovery of the body of the deceased in terms of section 27 of the Evidence Ordinance could be taken into consideration.

8. Appellant in his evidence said that he was arrested by the police on the 5th June morning at about 10.30 while he was coming after looking for the fishing net at the lake (page 372 of the brief). Although the appellant said so in his evidence, learned counsel for the appellant at the trial has suggested to IP *Siriwardena* (PW 10) who was the main investigating officer, that the appellant was arrested on the 5th evening by 4 pm. (page 179 of the brief). However, the carpenter *Weeraratne Bandara* (PW3) who testified on behalf of the prosecution said that when he was arrested by the police in the evening by 4pm, the appellant was also in the police vehicle. He has not clearly said the exact date he was arrested; however, his evidence was that he was detained at the police station for two days until the body of the deceased child was found. Appellant had also been at the police station. Therefore, it is clear that the police have arrested the appellant not on the 8th of June as testified by police officers, but at least two days prior to the 9th when the body of the child was found.

9. Now I will turn to discuss whether the learned High Court Judge has erred when he accepted the evidence of the police officers on the recovery of the body of the child in terms of section 27 of the Evidence Ordinance, as submitted by the learned counsel for the appellant.

10. Section 27 (1) of the Evidence Ordinance provides;

Section 27

1) Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

11. This issue of '**Evidence obtained illegally, improperly or unfairly'** was discussed in **The Law of Evidence by ERSR Kumaraswamy (Volume 2 book 2) in Part 5 chapter** 27 page 1016 under the heading of '**Illegal Detention'**.

12. In this regard the views expressed by English Court of Appeal in case of **Sacheverell Stanley Walton Houghton Stephen Anthony Franciosy, Criminal Appeal Reports, Vol 68, 1979 at page 197,** is important to consider.

13. Facts of the above case of *Houghton* as reported are as follows;

On June 26, 1976, some £2 million worth of currency was stolen from London airport. Shortly after the theft the insurance interests involved offered a large monetary reward for the recovery of the stolen currency and the conviction of the thieves. Houghton (H) who was a well-educated man with a history of bad character on offences of dishonesty informed the police that he had information about the theft. Although H wanted the police to treat him as an informant, on his statement he was arrested on 03.07.1976, was detained without informing him of the reason. He was not allowed to see a solicitor. Later, he made a statement which prosecution alleged amounted to a confession to dishonestly handling stolen money. He was charged the next day on the 8th.

Relying on the confession H made, he was convicted. Trial Judge overruled the submission made on behalf of H that the confession the prosecution relied upon was not made voluntarily. On appeal, it was argued on behalf of H that the police officer abused his powers, thus, the confession should not have been admitted.

14. English Court of Appeal held that the facts an accused had been arrested unlawfully and that he was detained in breach of the Magistrates' Courts Act to the extent of two to three days do not *per se* mean that admissions made during the period of detention should be excluded. It is the discretion of the Judge.

15. On the evidence illegally or improperly obtained, in case of ***R. V. Leathem [1861] 8 Cox CC 498,*** *Crompton* J. said; "It matters not how you get it, if you steal it even, it would be admissible in evidence". This dictum traditionally reflected the approach of the English law. However, in case of ***R. V. Sang [1980] AC 402 [1979] Crim. L.R. 655*** Lord *Diplock* asserted that the Judge exercises powers in relation to whether admitting the evidence obtained illegally or improperly would make the trial unfair. It is not a discretion as to whether the fact the evidence was illegally obtained should make it inadmissible. The test is to weigh the prejudicial effect against the probative value. Evidence can be excluded if the Judge is of the opinion that the prejudicial effect on the jury was likely to outweigh its probative value. (**Illegally or Improperly Obtained Evidence: does it matter how you get it? by Megan Gibson - Cambridge University Law Society Legal Updates**.)

16. In the instant case the dead body of the deceased child was discovered in terms of the statement made to police by the appellant. The prejudicial effect on the accused by keeping him in custody for a longer period of about two days than it is permitted by law does not outweigh the probative value of the evidence adduced at the trial. Hence, the learned High Court Judge has not erred by admitting the evidence on recovery of the dead body of the deceased child in terms of section 27 of the Evidence Ordinance.

17. Prosecution in this case had relied solely upon circumstantial evidence to prove the charges against the appellant beyond reasonable doubt. Learned counsel for the appellant submitted that the learned trial Judge convicted the appellant based only on suspicious circumstances and speculations. It is the contention of the learned SDSG for the respondent that the circumstances proved are consistent with the sole hypothesis of the guilt of the appellant.

18. In case of ***Shankarlal Gyarasilal Dixit V. State of Maharashtra [1981] Cri. L.J 325*** Indian Supreme Court held;

> *"In a case of circumstantial evidence, the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. It is not to be expected that in every case depending on circumstantial evidence, the whole of the law governing cases of circumstantial evidence should be set out in the judgment. Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment. The simple expectation is that the judgment must show that the finding of guilt, if any, has been reached after a proper and careful evaluation of circumstances in order to determine whether they are compatible with any other reasonable hypothesis."*

19. In case of ***Junaiden Mohmed Haaris V. Hon. Attorney General. SC Appeal 118/17 [09.11.2018],*** where there were no eye witnesses to substantiate any of the charges against the appellant and the prosecution relied solely on circumstantial evidence, His Lordship Justice ***Aluwihare*** stated;

> *"... Thus, it was incumbent on the prosecution to establish that the 'circumstances' the prosecution relied on, are consistent only with the guilt of the accused-appellant and not with any other hypothesis.*
>
> *Regard should be had to a set of principles and rules of prudence, developed in a series of English decisions, which are now regarded as settled law by our Courts.*

The two basic principles are-

1. *The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn.*

2. *The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct (*per *Watermeyer J. in R. V. Blom AD 188)."*

20. I bear in mind that suspicious circumstances would not suffice to prove the guilt of the accused. Having the above legal principles in mind I will now consider the proved circumstances in the instant case and also whether they are sufficient to prove the charges against the appellant beyond reasonable doubt.

21. By the evidence adduced at the trial it is proved beyond reasonable doubt, that on 04.06.2009 in the evening the appellant was consuming alcohol with the carpenter (PW3) and PW4 (who was having an illicit affair with *Wasanthi* the mother of the deceased). It is also proved that the deceased child fell asleep on the chair she was seated at the PW3's house and that her mother (PW1) took her and kept her at their house that was in the same land. It is also proved beyond reasonable doubt that while they all were having dinner, the appellant went missing and when PW1 went to her house to see the child and the child was also missing. After raising alarm, villagers flocked and looked for the child and the appellant without success. After informing the police, police officers assisted by army personnel searched the area for the child and the appellant without success. On 05.06.2009 morning the appellant had gone to the *Chena* of PW6 *Dinapala* and had told PW6 that he is looking for a honeycomb. PW6 had heard a child calling, and upon inquiry the appellant had told him that it was his granddaughter. Later, on 09.06.2009 early hours, on the statement made by the appellant, police recovered the body of the deceased child that was covered in a pit, in terms of section 27 of the Evidence Ordinance.

22. Although the defence at the trial has suggested an involvement of the PW4 that was denied by the witness, PW4 had been there when the child and the deceased went missing. The above proved circumstances are consistent only with the guilt of the appellant and inconsistent with any other reasonable hypothesis of his innocence.

23. Learned counsel for the appellant submitted that the learned High Court Judge has failed to take into consideration certain contradictions and omissions in the evidence of prosecution witnesses. It was brought to the notice of the learned Trial Judge that in evidence of PW6, when the appellant came to his *Chena* on the 5th morning, although he said that he heard a child calling '*Maame*', PW6 has omitted to say the word *'Maame'* in his statement to police. Defence has failed to mark any other contradictions in his evidence on the appellant coming to his *Chena* on the 5th morning and a child calling the appellant from the shrub area, other than the omission of the word '*Maame*'. The omission to mention the word *'Maame'* to the police will therefore not affect the credibility of PW6. The

learned High Court Judge has clearly considered the above omission at page 10 of his judgment.

24. The learned counsel for the appellant also submitted that the PW4 has given contradictory evidence about his involvement and his previous meetings with *Wasantha* (PW1). It is quite natural for a witness to be slow in divulging the meetings with a woman with whom he had an illicit affair. However, he has admitted that he was having an illicit affair with PW1. Hence, the contradictory statement PW4 has made about his previous meetings with PW1 would not affect the credibility of his evidence on the sequence of events that took place on 04.06.2009.

25. Learned counsel for the appellant further submitted that the learned High Court Judge has failed to appreciate the defence case. The learned High Court Judge has considered the defence evidence carefully and has given good and sufficient reasons for rejecting the same in pages 11 and 12 of his judgment.

26. For the above reasons, I find no merit in the grounds of appeal urged by the appellant. Hence, I affirm the conviction and the sentence imposed on the appellant on counts 1 and 2.

Appeal dismissed.

PRESIDENT OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL