IN THE COURT OF APPEAL DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Application for Appeal under and in terms of Section331 of the Criminal Procedure Code.

CA Case No: 88/2015
HC Matara Case No: 105/11

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

Complainant

Vs.

Rubasinha Liyanage Ruwan
Kotapola, Galdola,
Ilukpitiya.

Accused

And Now

Rubasinha Liyanage Ruwan
Kotapola, Galdola,
Ilukpitiya.

Accused-Appellant

Vs.

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

Complainant-Respondent

Before : Devika Abeyratne, J
P. Kumararatnam, J

Counsel : Darshana Kuruppu with Dineru Bandara, Buddika Thilakaratne and Sajini Elvitigala for the Accused-Appellant
Shanil Kularatne for the State

Written Submissions : 13.10.2017, 01.04.2019 (by the Accused Appellant)
On 16.07.2018(by the Respondent)

Argued On : 05.10.2021 and 06.10.2021

Decided On : 12.11.2021

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Devika Abeyratne,J

The Accused Appellant *Rubasinha Liyanage Ruwan* was indicted before the High Court of *Matara* on the following Counts.

1. Abduction to have illicit intercourse with *H.G. Imalka Harshani*, an offence punishable under section 357 of the Penal Code.
2. Committing the offence of rape on the above victim, an offence punishable under section 364(1) of the Penal Code.
3. Committing the murder of the said victim, an offence punishable under section 296 of the Penal Code.

After a *non jury* trial he was found guilty on all 3 counts and sentenced to 8 years Rigorous Imprisonment and a fine of Rs.10000/- with a default sentence of 1 year rigorous imprisonment for the first count, and 16 years Rigorous

Imprisonment and a fine of Rs.10000/- with a default sentence of 1 year imprisonment for the second count and the Death Sentence for the third count.

Aggrieved by the said conviction and the sentence the accused appellant has preferred his appeal to the Court of Appeal.

The appellant was connected through Zoom technology and informed Court that he has given instructions to his Counsel to argue the matter in his physical absence, due to the covid pandemic.

In the written submissions of the appellant the following grounds of appeal have been raised.;

1. The trial Court has failed to apply or appreciate the principles governing the evaluation of Circumstantial Evidence.

2. The Learned Trial Judge has erred in law and fact by failing to consider that the prosecution has not ruled out the possibility of a party committing the offence.

3. The Learned Trial Judge has failed to appreciate the many inconsistencies between the evidence of the prosecution witnesses thereby failing to consider that the evidence led at the trial was insufficient to rebut the presumption of innocence.

The case for the prosecution rested on and the accused was convicted on circumstantial evidence.

The facts of the case *albeit* briefly are as follows;

On 13.02.2007 the daughter of PW 1 the deceased 16 year old school girl had informed her father that she was staying after school to attend some extra classes. PW 1 who had returned from work around 4.30 pm after being informed that the daughter had not returned from school, has gone in search of her to the bus halt where she usually gets off. There he has met one *Maddumage Mahinda* who had informed that he has seen a girl who looks like his daughter going past the "ball court" carrying a school bag. It had also been informed by an owner of a *boutique* that the child had bought some sweets from his shop. After the search to find the daughter failed, PW 1 had informed that his daughter was missing to the *Deniyaya* Police by telephone around 8.45 pm and with the help of the villagers continued with the search when PW 3 *Krishantha* had discovered the body of the girl in an abandoned house that belonged to *Gamini* PW 2.

It was in evidence that there is a shortcut to the house of PW 01 which is situated close to the abandoned house, and the house of the appellant and a person called *Ariyawansa*. The house of the grandparents where PW 6 was living although on a higher elevation, was also in close proximity to this road which was used by the deceased and other villagers, which begins near the bus halt. The distance from the abandoned house to the house of PW 1 is about one and a half to two kilometers.

According to medical evidence PW 19 the JMO, the young girl had been raped and strangulated and he has observed 26 injuries on the victim's body. The defence called Dr *Illaperuma* who testified that the DNA samples that were sent for analysis was degraded. Therefore, no analysis of DNA is available in this case.

It was revealed in the evidence of the police witness PW 21, that the statement of PW 6 the child witness was recorded based on the statement of PW 12 *Siriyawathi*. According to PW 12 on the day of the incident when she was walking in the area close to the house where the body was found, she has heard *Ariyawath*i the grandmother of PW 6 shouting at someone using words to the following effect;

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ප්‍ර : මොකක්ද කිව්වේ කියලා කියන්න පුලුවන්ද උසාවියේදී?

උ : වේස බල්ලෝ වේස බල්ලෝ තෝ පහළ යන්නේ නැහැ කියලා කෑගහන ශබ්දයක් ඇහුනා.

She had assumed that *Ariyawathi* was scolding PW 6 and informed about what she heard to the police in her statement. Based on PW 12's statement, the police have thereafter recorded the statement of PW 6 . The Police witness PW 18 *Dharmadasa's* evidence is that most statements of witnesses have been recorded based on rumours and information gathered from the villagers.

According to the evidence elicited at the trial, it is unclear whether *Siriyawathi* has informed the Police that she saw PW 6 in the area when *Ariyawath*i was heard shouting. It can only be presumed that *Siriyawathi* has assumed that *Ariyawathi* was scolding PW 6, and it appears that on that assumption the police have recorded the statement of PW 6.

In the above circumstances the failure of the police not recording a statement from *Ariyawathi* is surprising and questionable . The woman who was alleged to have been shouting at someone in abusive words described above and who is the guardian of PW 6 who was a minor, not being questioned the reason for her shouting and at whom she was shouting is difficult to comprehend.

The evidence of PW 6 is that *Ariyawathi* does not scold him in the manner stated above and that he too was unsure at whom she was shouting. The interest of the police to record a statement from a ten years old boy who was considered to be the recipient of that abuse, who later was made a star witness had to be explained by the prosecution, especially when the evidence relied on was circumstantial evidence.

However, the lapses on the police investigations should not be all allowed to impair the relevant issue, which is the statement of PW 6, who appears to be a witness who have seen the victim a few hours before her death in the company of the appellant.

PW 21 who had been the investigating officer had recorded the statement of PW 6 on 20.02.2007 at 18.30 hours at the house of the child (page 379 and 380 of the brief). However, contradicting that position PW 6 has testified that he went to the *Deniyaya* Police Station with his grandmother where he was taken in to a room alone and his statement was recorded. The Police officer had denied this position when it was put to him in cross examination. The prosecution has failed to clarify this position. Although there is a question under what circumstances or where the statement of PW 6 was recorded, it has not affected the evidence of PW 6 and no material contradictions or omissions were marked based on that statement.

According to PW 6 who was 10 years old at the time of the incident (he was sixteen years old when he gave evidence) he has seen the deceased whom he knew, who was in school uniform and carrying her school bag, being dragged by the accused appellant who was covering the mouth of the deceased with his hand towards the abandoned house around 5 pm when he was going down the path to have a bath in the river.

He has heard his grandmother *Ariyawathie* shouting around that time and without having a bath he had returned home. One reason him returning was to see who the grandmother was shouting at. (Page 131 bottom of the brief) Thereafter, he had waited in his room without disclosing what he saw to anyone. On the night after the incident, PW 6 his grandparents, two aunts and his uncle had been home, but he has not divulged what he saw to anyone. He has later visited the crime scene to see the dead body of the victim who was called '*Bonikki*' because she was a pretty child.

Four days later the police have come to get a statement from him where he has testified to what he saw on that day. The accused appellant has been in police custody at that time. In his evidence PW 6 from page 138 onwards of the brief has stated several reasons why he did not disclose what he saw to any family member, teacher or his school friends. One reason being his fear of PW 1, stating

In Page 136

ප්‍ර: ඇයි තමුන් කිව්වේ නැත්තේ සීයාට?

උ : මම කාටවත්ම ඒ ගැන කිව්වේ නැහැ. ඒ නිසා කිවුවේ නැහැ.

ප්‍ර : එහෙම නොකියන්න හේතුව මොකද්ද?

උ : මම උපාලි මාමාට බය හන්දා.

ප්‍ර : දැන් ඒ කියන්නේ ඉමල්කා අක්කාගේ තාත්තා එච්චර බය වෙන්න තරම් ඕන පුද්ගලයෙක් ගමේ?

උ : නැහැ එහෙම නෙවෙයි. එයා බොනවා. මම බොන කට්ටියට බයයි.

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ප්‍ර : නාන්න යන්නේ කොහේටද?

උ : අපේ ගෙදරට යට දොළක් තියෙනවා ඒ දොළට යන්නේ.

ප්‍ර : දොළට ගියාම දුමින්ද කාව හරි දැක්කද?

උ : ඔව්.

ප්‍ර : දුමින්ද දැක්කේ මොනවද?

උ : මම දැක්කේ ඉමල්කා අක්කගේ එක අතකින් කට වහගෙන අනිත් අතින් අත් දෙක අල්ලා ගෙන ඒ ගාමිණී මාමලයි ගෙදරට යන ගල් පඩි පෙළ දිගේ පහලට ඇදගෙන යනවා දැක්කේ.

ප්‍ර : කවුද ඇද ගෙන ගෙනිච්චේ කවුද කියලා දැක්කද?

උ : ඔව්.

ප්‍ර : ඒ පුද්ගලයාට දුමින්ද මොකද්ද කියන්නේ?

උ : රුවන් මාමා කියලා.

ප්‍ර : රුවන් මාමා අද උසාවියේ ඉන්නවද?

උ : ඔව්.

ප්‍ර: කොහෙද ඉන්නේ?

උ : අර ඉන්නවා (පෙන්වා සිටී.)

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ප්‍ර : මීටර් 30 වගේ දුරකින් දැක්කේ, හරි ඉමල්කා අක්කා කියලා හඳුනා ගත්තද?

උ : ඔව්.

ප්‍ර : දුමින්ද මෙක දැක්කාම මේ ගැන කාට හරි කිවුවාද?

උ : නැහැ.

ප්‍ර : ඇයි කිව්වේ නැත්තේ?

උ : මට මොකක් හරි වෙයි කියලා බයට.

ප්‍ර : දුමින්ද කාගෙන් මොකක් හරි වෙයි කියලද බය වුනේ?

උ : ඒ කියන්නේ මම එහෙම කිව්වොත් උපාලි මාමා බීගෙන ඇවිල්ලා මට මොනවා හරි කරදරයක් කරයි කියලා බයට මම කිව්වේ නැත්තේ.

ප්‍ර : උපාලි මාමා කියන්නේ කවුද ඉමල්කාගේ?

උ : තාත්තා.

Considering the above evidence, the probability factor of PW 6 not saying what he witnessed a few hours before the body was recovered has to be very carefully analysed and evaluated.

It is to be noted here that the learned trial judge who delivered the judgment did not have the benefit of observing the demeanour and deportment of the witness. The learned trial judge in page 524 of the brief has stated that the explanation given by the child that he did not inform his grandmother because she faints for the slightest reason is believable and accepted. It is further stated that from the answers of PW 6 it can be concluded that he seems to be a child who will try to live out of controversy in the following manner.

..... මෙම දරුවා සාක්ෂි දෙන ආකාරය මා හට නිරීක්ෂණය කිරීමට නොහැකි වුවත්, ඔහු පිළිතුරු දී ඇති ආකාරයෙන්ම ඔහු තම පරිසරය පිලිබඳ හොඳ දැනුමක් ඇති ප්‍රශ්නගත අවස්ථාවලින් මිදී ජීවත් වීමට තැත් කරන්නෙකු බව පෙනෙයි.

විත්තිකරු විසින් මරණ කාරිය ඇඳගෙන යනු දුටු බව තම ආච්චිට නොපැවසුවේ ඇයට මොනවා හරි කිවොත් ක්ලාන්තය හැදෙන නිසා යයි පවසා ඇත. මෙය ඉතා ස්වාභාවික පිළිතුරකි. සුළු දෙයකින් හෝ මහත් කලබලයට පත්වන පුද්ගලයන් විශේෂයෙන්ම වයස්ගත පුද්ගලයන් සමාජයේ දක්නට ලැබෙන දෙයකි. මෙය විත්තිය විසින්ද අභියෝග කර නැත.

The learned trial judge has been impressed with the testimonial trustworthiness and has accepted the evidence as creditworthy and truthful. The learned trial judge's analysis was assailed by the counsel for the appellant that it was improbable.

In page 18 of the Judgment the learned trial judge has gone on to say;

"මාමට තමන් බය බවත්, මෙය කිව්වොත් ඔහු බීගෙන පැමිණ තමන්ට කරදරයක් කරයි යැයි ඔහු සිතූ බවත්, පවසා ඇත. පිරිමියෙකු විසින් දුවව ඇඳගෙන ගිය බව ගමේ ප්‍රචාරය වුවහොත් එය තරුණියගේ පියා එය පිළිබඳව අසතුටට පත්වෙතැයි කල්පනා කිරීමට තරමට තමා ජීවත්වන පරිසරය ගැන මෙම සාක්ෂිකරුට අවබෝධයක් තිබුණු බව පෙනෙන අතර, එම සිතුවිල්ල ඔස්සේ බැලුවිට එකී තරුණිය මිය යාමෙන් කෙලවර වෙතැයි සිතූ බවක් නොපෙනෙයි.

තව දුරටත් මෙවන් කරුණක් වැඩිහිටියන්ට පැවසුවහොත් ඔවුන් එය විශ්වාස කරයිද එසේ නැතිනම් තමන්ට දඩුවම් විඳීමට සිදුවීමෙන් කෙලවරවේදැයි චකිතයක් මෙම ළමයාගේ සිතෙහි ඇතිවීමද ස්වාභාවිකය."

Although this analysis seems to be based on assumptions by the learned trial judge, the analysis does not take away the convincing and cogent evidence of PW 6. He has faced a lengthy cross examination from page 123 to 153 of the brief giving convincing, unwavering and intelligent answers. He was not confused with his evidence. So much so a predecessor judge at page 150 of the brief has made this observation.

(එකී ප්‍රශ්නවලට සාක්ෂිකරු බියක් හෝ චකිතයකින් තොරව උත්තර දෙන බව පෙනී යයි.)

Ratnasinh Dalsukhbhai Nayak v State of Gujarat **2004 (1) SCC 64** is a case where it is stated that;

> *"The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the*

higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

(This passage was quoted in *Nivrutti Pandurang Kokate v State of Maharashtra* (2008 (12) SCC 565) and *State of Karnataka v Shantappa Madivalappa Galapuji* (2009 (12) SCC 731))

In ***Ranjeet Kumar Ram V State of Bihar (2015 SCC Online SC 500)*** where the evidence of a seven year old child, who was the sole witness was considered the Indian Supreme Court has stated that *"by concurrent findings courts below found her evidence unassailable and we find no ground to take a different view."* And *"Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one."*

In the instant case, PW 6 has given a clear and consistent narrative of what he saw. There is no evidence to conclude that the trial judges had an issue about evaluating the evidence which the witness had seen when he was 10 years old.

In ***State of UP. v Krishna Master AIR 2010 SC 3071*** it was held;

"*This Court is of the firm opinion that it would be doing injustice to a child witness possessing sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in its life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future."*

On a consideration of the following authorities from other jurisdictions the perception of evidence given by child witnesses can be further clarified.

In the case of ***R v Barker [2010] EWCA*** Crim 4 – Lord Chief Justice (England and Wales Court of Appeal) it was held;

(At Para 40) "……*We emphasise that in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. Like adults some children will provide truthful and accurate testimony, and some will not. However children are not miniature adults, but children, and to be treated and judged for what they are, not what they will, in years ahead, grow to be. Therefore, although due allowance must be made in the trial process for the fact that they are children with, for example, a shorter attention span than most adults, none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults. The purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child. If competent, as defined by the statutory criteria, in the context of*

credibility in the forensic process, the child witness starts off on the basis of equality with every other witness. In trial by jury, his or her credibility is to be assessed by the jury, taking into account every specific personal characteristic which may bear on the issue of credibility, along with the rest of the available evidence."

It was recognized in England as early as 1778 that children could be competent witnesses in criminal trials. In ***R v Brasier (168 Eng. Rep. 202 (1779))*** it was held;

"……. that an infant, though underage of seven years, may be sworn in- a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath .... for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; but if they are found incompetent to take an oath, their testimony cannot be received ……"

In the Canadian Supreme Court in **R v R.W. [1992] 2 S.C.R. 122** the changes that had undergone with regard to the law effecting the evidence of children in the recent years has been considered. It has referred to ***R. v. B. (G.),*** **1990 CanLII 7308 (SCC)** ;[1990] 2 S.C.R. 30, at pp. 54-55, where *Wilson.J* has stated;

"*... it seems to me that he was simply suggesting that the judiciary should take a common sense approach when dealing with the testimony of young children and not impose the same exacting standard on them as it does on adults. However, this is not to say that the courts should not carefully assess*

the credibility of child witnesses and I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the "reasonable adult" is not necessarily appropriate in assessing the credibility of young children."

As stated earlier in the judgment the learned counsel for the appellant sought to impugn the testimonial trustworthiness and credibility of PW 6 mainly on improbability of his evidence and the belated statement to the Police.

With regard to delay in PW 6 giving a statement to the police, in ***Queen* vs *Pauline de Croos 71 NLR 169,*** it was observed by *T.S Fernando* J that a delayed witnesses evidence could be acted upon if there were reasons to explain the delay.

In ***Kahandagamage Dharmasiri V Attorney General*** SC appeal NO.04/2009 decided on 19th July 2011, where the statement of a nine year old witness who witnessed his mother being murdered whose statement was recorded three weeks after the incident *Thilakawardena J* stated;

"The Appellant stressed on the fact that even the 2nd eye witness (the son of the deceased) Maduranga's statement was belated and was as a consequence a fabrication and concoction. Whilst it is desirable for prompt statements to be made after an incident, the relevance is that this would pre-empt or forestall the likelihood of the opportunity for fabrication of the facts. It was held in the case of ***Sumanasena V Attorney-General (1999) 3 Sri. L.R 137*** *at 140;*

" just because the witnesses is a belated witness the Court ought not to reject his testimony on that score alone and that a court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness."

In the instant case, it is elicited that there is about a four day delay in giving the statement of PW 6. This 10 year old child was living with his grandparents. On one hand there is no evidence to evaluate his relationship with his grandparents or the aunts and uncle he has referred to in his evidence. A reaction of a boy who is in a loving family having the trust and confidence that he will be protected is different to a child living with his extended family. Admittedly, each child will react differently to a similar situation faced by him or her. It will be based on their age, education, intelligence, family background and support, his psychology and such circumstances.

From *Siriyawathi* PW 12's evidence when she heard *Ariyawathi* shouting at someone she has assumed it was to PW 6 she was shouting which may have been normal behaviour of the grandmother to the 10 year old boy. PW 6 has insisted that he usually was not scolded in that language by his grandmother.

In the following Indian authorities it was considered that the evidence of a child witness must find adequate corroboration, before it is relied upon as the rule of corroboration is of practical wisdom than of law. ***(Prakash Vs. State of M.P.(1992) 4 SCC 225; Baby Kandayanathi Vs. State of Kerala, 1993 Supp (3) SCC 667; Raja Ram Yadav Vs. State of Bihar, (1996) 9 SCC 287)***

In ***Panchi and Others Vs. State of Uttar Pradesh (1998) 7 SCC*** **177** of the Indian Supreme Court it was held that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. It was further held that *"the law is that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible."*

In ***Bhagwan Singh and Ors Vs. State of M.P. (23.01.2003)*** of the Supreme Court of India it was held that; that he sole testimony cannot be relied without the corroborative evidence; the evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring; therefore always the court looks for adequate corroboration from other evidence of his testimony; It is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident and before there was any possibility of coaching and tutoring him.

E.R.S.R. Coomaraswami **in his treatise " Law of Evidence" Vol 2 book 2 at page 658** has stated referring to child witnesses;

"There is no requirement in English law, that the sworn evidence of a child witness needs to be corroborated as a matter of law. But the jury should be warned, not to look for corroboration, but of the risks

involved in acting on the sole evidence of young girls or boys, though they may do so if convinced of the truth of such evidence…… This requirement is based on the susceptibility of children to the influence of others and to the surrender to their imaginations."

At page 659 it states, *"As regards the sworn testimony of children, there is no requirement as in England to warn of the risks involved in acting on their sole testimony, though it may be desirable to issue such a warning, though the failure to do so will generally not affect the conviction."*

***M.Ajith Kumara alias Ajith Vs. Attorney General in CA No 2018/2012,* decided on 26.09.2014,**where the evidence a boy of 5/6 years where he has witnessed a gruesome murder was considered, ***Gooneratne* J,** had held that there was no basis to intervene and interfere in the reasoning of the trial judge and further went on to state that the *defence had not succeeded in making any breakthrough in the evidence of the child witness to favour the defence case.'*

From the above cited authorities it is apparent that corroboration is not expected in each and every case when courts have to decide on the evidence given by children. The credibility of the evidence of a child witness would depend on the circumstance of each case.

The child not divulging what he saw until the police came for him which would have been scary experience has to be considered very carefully. On the one hand PW 6 may not have initially read too much in to what he witnessed when he saw the girl being grabbed and pushed towards the abandoned house. However, when a few hours later when the body of the victim was discovered PW 6 obviously may have been petrified, disturbed and worried not knowing

what to do. The child's reaction, his mental status, his fear and reason why he did not divulge the incident to anyone may have been motivated for self preservation. However, his testimony to Court is without any material omissions or contradictions. His evidence is that even to the Police he has tried not to divulge what he saw, but as stated in page 143 of the brief, when he could not withhold it any longer he has blurted it out. No evidence has been established that PW 6 was tutored or coached or that his evidence was to implicate the appellant purposefully. His uncontradicted evidence the learned trial judge has believed without any reservations, which is justifiable.

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ප්‍ර : පොලිසියේ මාමා තමාගෙන් ඇහුවාද තමුන් දැන ගත්තේ කොහොමද කියලා? මොනවද ඇහුවේ තමුන්ගෙන්?

උ : ඔයා මොනවද මේ ගැන දන්නේ කියලා ඇහුවා. මම මොනවත් දන්නේ නැහැ කියා කියා ඉදලා අන්තිමේ පොලිසියට බය හන්දා කිවුවා.

ප්‍ර : එතකොට දැන් පුතා පොලිසියේ මාමලා අහනවා දැන් පුතාගෙන් මේ ගැන දන්නවාද කියලා දැන් පුතා දන්නේ නැහැ කියලා කියන්නේද?

උ : ඔව්.

ප්‍ර : ඔහොම කොච්චිචර වෙලාවක් දන්නේ නැහැ කිව්වද?

උ : විනාඩි 15ක් විතර කිවුවා.

ප්‍ර : ඊට පස්සේ මොකද වුනේ පුතා එක පාරටම මේක පොලිසියට කියන්න හේතුව මොකද්ද වුනේ?

උ : මම කවදාවත් පොලිසියට ගිහිල්ලා නැහැ. මම ඒකට බය වුනත් එක්කම මගේ කටින් පිටවුනා.

PW 6 has clearly identified the appellant as *"Ruwan Mama" w*ho he said was the person who took the victim towards the house of PW3. This evidence was not affected by cross examination. There were no contradictions or omissions

with regard to his evidence. There was no ground or legal barrier set forth by the defence for Court to disregard the evidence of PW 6.

The counsel for the appellant unsuccessfully attempted to show that PW 6 was giving evidence against the accused appellant, as PW 6's uncle *"Sumith"* was not in good terms with the appellant. PW 6 has clearly answered that he did not know of any known animosity existed between his uncle *Sumith* and the appellant. This evidence was unchallenged and believable.

In the overall perusal of the evidence of PW 6 it is quite clear, coherent, cogent, without any reservation and believable which has not been challenged in cross examination. Therefore, the trial judge's conclusion is justifiable.

After the conclusion of the argument the Counsel for the appellant has submitted to this Court many authorities in support of the grounds that were raised on behalf of the accused appellant. It is very salutary of the counsel to assist court in that respect.

I have closely perused the evidence, the submissions and the relevant authorities pertaining to the issues raised in this case.

I have also considered the following issue.

It is trite law that the burden is on the prosecution to prove the case beyond reasonable doubt. This being a case that has rested mainly on circumstantial evidence from which the inference of guilt is drawn must be cogently established; it must also be established that the crime was committed by no one else but by the accused; the evidence should only be consistent with the guilt of the accused and inconsistent with his innocence.

As stated earlier PW 6 has given very clear and cogent evidence that he saw the accused appellant dragging the victim towards PW 3's house with her mouth closed.

In the Dock Statement of the accused appellant he has stated that as his children were sick he was not in the area and was at his mother-in-law's house and he was informed of the incident when he returned home on the following day. In evidence it transpired that his house is in close proximity to the house where the body was recovered and anyone who is alighting from the bus could be seen from his house.

PW 6 had testified very clearly that the appellant was seen dragging the victim towards the house where the body was found. He has specifically stated that the distance between him and the accused appellant was about 30 meters and as it was around 5 pm he could clearly identify the appellant, and that the accused appellant did not observe his presence. When there was such clear evidence implicating the appellant, there was never even a suggestion that PW 6 was lying about seeing what he said he witnessed. The suggestions made on his behalf was that PW 6 was giving evidence against the appellant because his uncle *Sumith* was not in good terms with the appellant.

However, neither the Dock Statement nor the evidence adduced on behalf of the accused has raised a reasonable doubt on the prosecution case.

In the case of ***State of Tamil Nadu Vs. Rajendran (1999) Cr.L.J.4552*** the Indian Supreme Court observed that;

> *"In a case of circumstantial evidence when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then*

the same become an additional link in the chain of circumstances to make it complete."

Abbot J. in Rex Vs. Burdett (1820) 4 B & Ald 161 at 162 observed that;

" No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the prima facie case tends to be true, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."

In the case of ***Rajapaksha Devage Somarathna Rajapaksha And Others Vs. Attorney General (SC Appeal) 2/2002 TAB)*** *Justice Bandaranayke* observed that;

"With all this damning evidence against the appellants with the charges including murder and rape the appellants did not offer any explanation with regard to any of the matters referred to above. Although there cannot be a direction that the accused person must explain each and every circumstance relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound to offer any explanation of his conduct there are permissible limitation in which it would be necessary for suspect to explain the circumstances of suspicion which are attached to him."

On consideration of the totality of the evidence of the prosecution witnesses and the authorities cited above we are of the view that there is no reason to interfere with the conclusion reached and sentence imposed by the Learned

High Court Judge of the *Matara* on 27.03.2015. Accordingly we affirm the conviction and the sentence and dismiss the appeal.

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree **JUDGE OF THE COURT OF APPEAL**