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

In the matter of an Appeal made
under Section 331 of the Code of
Criminal Procedure Act No.15 of
1979.

**Court of Appeal Case No:
CA/HCC/0154/2014
High Court of Negombo
Case No: HC/404/2010**

Balage Indika Sudarshana

ACCUSED-APPELLANT

vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon,J
P. Kumararatnam,J**

COUNSEL : **Faisz Musthapha, P.C. with Shantha
Jayawardene and Keerthi Thilakaratne for
the Appellant.
Ayesha Jinasena, ASG with Chaturangi
Mahawaduge, SC and Chaturanga
Bandara, SC for the Respondent.**

ARGUED ON : **21/03/2022**

DECIDED ON : **01/06/2022**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was directly indicted in the High Court of Negombo under Sections 364(1) and 296 of the Penal Code for committing Rape and Murder respectively against Dissanayake Mudiyansele Chamila Dissanayake on or about the 12th of November 2007.

Trial commenced before the High Court Judge of Negombo as the Appellant had opted for a non-jury trial. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellant had made a dock statement and closed the case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant as charged and sentenced him to 15 years Rigorous Imprisonment with a fine of Rs.10000/- with a default sentence of 01-year rigorous imprisonment for the first count and the death sentence for the 2nd count on 03/09/2014.

The prosecution has called 18 witnesses and marked productions P1 to P44 to prove their case. The Appellant made a dock statement in support of his plea of innocence against the charges raised.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned President's Counsel appearing for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom platform from the prison.

The behalf of the Appellant the following Grounds of Appeal are raised.

1. The Learned High Court Judge had failed to critically analyse the inherent improbabilities and the inter se contradictions of the prosecution case.
2. The Learned High Court Judge has been misdirected on the burden of proof:
 - a. Considering the defence case before the prosecution case.
 - b. Considering the evidence of the Appellant after rejecting the dock statement and shifted the burden of proof on the Appellant.
3. The Appellant was denied of a fair trial:
 - a. By not calling finger print and DNA evidence.
 - b. Due to infirmities in the identification parade.

Background of the case

The Appellant, at the time relevant to the date of offence was attached to the Negombo Base Hospital as a doctor. He was assigned duty in the operation theatre situated on the 7th floor of the hospital and further engaged in examining post-surgery patients during the time period relevant to this case.

PW1 Beatrice, who was attached as a cleaning worker at 7th floor of the hospital was the first witness to give evidence in this case. She had commenced work at the hospital in the year 2002, and was familiar with the staff and doctors who worked in the operating theatre and the surroundings. According to her the Out Patient Department (OPD) was situated on the 1st Floor and the Clinic and X-Ray Rooms were on the 2nd Floor. On the 3rd Floor there are two discrete ENT Wards for Males and Females and another similar ward separated based on gender functioned on the 4th Floor. In the 5th and 6th Floors rooms for doctors and nursing

sisters had been allotted. The Operation Theatre and the Intensive Care Unit were situated on the 7th Floor where she was assigned cleaning duty. Up to the date of the offence she had worked there for about five years. On 12/11/2007 she had reported for duty around 7.00 a.m. as usual, and has been engaged in work up until 11.30 a.m., which is when she had gone to take a break at the end of the corridor where a chair was placed. Visibly situated in front of the corridor is a wall about 3 ½ feet in height. From where she was, she could see all the corridors of the other floors. At that time having heard a dragging sound, she had looked down to see the Appellant dragging a cardboard with a girl on it along the sixth-floor corridor. When she called out to the Appellant as ‘Sir, what has happened?’ and asked him what the problem was, the Appellant had raised his head and smiled at her and said had said ‘nothing’. At that time, she had identified the Appellant as the doctor who works in the operation theatre. His room was also situated on the 6th floor. Although she had told this to PW12 Mayura Yapa, she had told her to keep quiet and warned her not to tell anybody else what she saw. As such she had not divulged this incident to anybody until she was interrogated by the police. Later the same day around 12.00 p.m. while she was talking with the supervisor in his room, she had heard a commotion from the direction of the OPD. When inquired, she was told that a girl had fallen from a higher floor of the building. As lot of people were running towards the OPD she had not followed the crowd in that direction. After work she had gone home and the police had visited her there which is when she had given her statement pertaining to this case. She had identified the Appellant at the identification parade held at the Magistrate Court of Negombo.

PW12, Mayura Yapa was working as a nurse at the operating theatre situated on the 7th floor of the Negombo Hospital. On 12/11/2007 she had worked in the operation theatre and went to drink some water to the pantry on the 7th floor. PW1 had told her that a doctor on the 6th floor had carried a woman. Thinking that as the doctors had been allocated rooms on the 6th

floor, the mentioned doctor would have carried his wife, she had advised PW1 not to divulge it to anybody else. According to her, PW1 had informed her of this between 11:00 and 12:00 hours on that day. Further, PW1 had described the doctor as a fair and short person.

PW3 Dammika is a good friend of the deceased as the deceased and her aunt were residing together in the same room along with her at a boarding house situated in a village called Kovinne. The deceased had a boyfriend called Susantha Predeep. Three weeks prior to her demise she had undergone a surgery on one of her breasts at Negombo Base Hospital. As the post operation clinic was fixed on 12/11/2007, the deceased had left her boarding place at 5.50 a.m. to attend it. As the deceased did not return even after 8.00 p.m. on the same day, PW3 had gone to the Negombo Base Hospital and inquired about the deceased. Upon inquiry she was told that a girl had fallen from a higher floor of the hospital and she had been transferred to Ragama Teaching Hospital. On the following day the police accompanied her to 6th floor of the hospital where she had observed the rooms. One of those rooms seemed to be occupied by a tenant. The police had taken her to a room close to that room and showed her a black coloured bag in which several items had been packed. This witness had identified the hand bag of the deceased as P2, the diary of the deceased as P3, two panties as P6 and P7, a pair of slippers of the deceased as P9, a bunch of keys of the deceased as P10 and her identity card as P11. Thereafter she had spotted a hair clip and two crail pins used by the deceased on the corridor of the 6th floor and she had identified them as P12 and P13 respectively.

According to this witness, the deceased had used to wear two panties as a habit when she gets her monthly menstrual flow. She had got her period few days before she went to the hospital. Further this witness was very certain that the deceased never carries her panties in her hand bag. PW3 was also able to identify the clothes of the deceased during the trial.

According to PW4, Nishantha Padmasiri, on the 12/11/2007 he was on duty at the first stair case where clinics are held. On that day the clinics had commenced at 8.00 a.m. and people were not allowed to go upstairs during clinic time. Between 11.30 a.m. and 11.45 a.m. a girl had gone upstairs after seeking his permission. She had told him that she was going to meet a doctor and also to collect her reports from the 3rd floor. He had observed that the girl was carrying a bag, an umbrella and a book. As a special feature he had observed that the girl had a snagged tooth when she spoke to him. After some time when he went to the main gate was told that a girl had fallen from the top of the building. When he went to see the patient, he had identified the deceased as the girl with the snagged tooth.

PW5 Kapilaratne de Silva in his evidence stated that as a security officer he was at duty at the gate of the new building on the 12/11/2007. While on duty he had seen two telephone wires falling down, broken apart and had looked up to see a girl fall from the building. According to him when he looked up the girl seemed to be falling parallel to level 3 of the building and did not cry out. He had identified the dress of the deceased at the trial.

According PW11, Kanthi Swarnalatha was visiting his son who had been admitted to the male ward situated on the 4th floor of the Negombo Base Hospital, on 12/11/2007 at 6.00 a.m. As the doctor who was attending to her son had asked her to stay back till after visiting hours, she had remained on the 4th floor corridor to meet the doctor. While so waiting around 10.00 a.m. she had noted a girl who firstly went up the stairs alone carrying a book coming down the stairs accompanied by a doctor. When she came to see her son in the evening, she had gotten to know that a girl had fallen from the building. When she heard the news, she had thought out loud whether it could be the girl she saw accompanied by the doctor earlier that day. She had identified the deceased and the doctor after seeing their photographs which had been marked as P15 and P22 respectively. According to her the deceased was a beautiful girl.

PW32, Nimal Camilus, in his evidence confirmed that the deceased had come to the clinic on 12/11/2007. As her reports were not in the clinic, she had gone with the Appellant to get it from the ward. He had seen them at that time and identified the Appellant in the court. He had also been able to identify the deceased's photograph which had been marked as P15.

PW13, Dr. Priyanjith Perera is the JMO who conducted the post mortem examination of the deceased on 13/11/2007. He had also visited the scene of crime on 15/11/2007. According to the results of the post-mortem examination he has observed that the deceased could have fallen from a height of the 6th floor of the building. According to him, they have observed the possibility of a straight drop from the 6th floor concrete slab to the place where the deceased had been found fallen on the ground.

According to him the deceased is a small made and moderately nourished person. She had been wearing a T-shirt and a skirt which were found to have blood stains. The deceased was wearing a brassier which had been torn into two halves on middle. It was unhooked from the back and lifted up. Stiches were torn closer to the hooks. Further, the deceased was without any underwear. A head injury with internal bleeding and contusion on her lips were seen. The doctor excluded the head injury as the cause of death. The doctor had noted petechial haemorrhages inside the vocal box, eye lids and behind the left ear indicated that she was asphyxiated confirming that the injuries on the neck were caused due to the exertion of pressure on the neck by manual strangulation. According to him this may not have killed the deceased as she was said to have been found alive at the scene after a possible fall from the building and strangulation of this nature, even if it failed to kill the victim, it might have rendered her unconscious and subsequently contributed to the cause of death.

The doctor further stated that bruises on the lips and laceration of the frenulum, were likely the result of forceful closure of mouth probably with hands as the absence of abrasions on the surrounding structures exclude

the possibility of the fall or contact with a rough object. Majority of the bruises on the upper arms, thighs, lower legs and front of the chest indicted that they were likely to have been caused by finger tips when applied with force while restraining her during sexual assault or/and dragging her body by arms and legs.

The bruise on the inner part of the right thigh with overlying intradermal bruises and abrasions were a likely result of contact with a rough blunt object with force. The severity of the bruise indicates that it was unlikely to have been caused by fingertips. It was possible that when the deceased landed on the buttocks after the fall the inner aspect of the thigh grazed against some hard object on the ground such as the kerb on the pavement. The doctor further held that the internal examination revealed bleeding from the vagina, which was found to be the consequence of a lacerated hymen. The hymen was freshly lacerated at 7 o'clock position, which extended horizontally to the left and ended at 5 o'clock position. Further examination of the genitalia revealed a small bruise on the vagina wall at 1 o'clock position. According to the witness the genital injuries could have been caused by vaginal penetration with an erect adult penis or penis like object.

According to the doctor, the cause of death was due to Haemorrhage shock caused by fracturing of the pelvic bones and soft tissue contusions contributed by head injury and attempted manual strangulation. The post mortem report was marked as P25.

PW33, Anuruddhi Samanthika, the doctor who examined the Appellant states that she had noted 10 non-grievous injuries on the Appellant. He had been in a confused mood at that time. No evidence was found to prove that the Appellant has had sexual intercourse. But she had not excluded the possibility of having sexual intercourse sans any injury on the penis. She also said that the Appellant had told her that he tried to commit suicide while being held in the police cell.

PW10, Dr. Asela Samaratunga had attended to the deceased immediately following the fall. When he examined the deceased, she was breathing and he had noted that she was bleeding from her vagina. The deceased was not wearing any underwear. Her clothes were not removed when he attended to the deceased. As per the instructions the deceased was prepared to be transferred to the National Hospital in Colombo. As the deceased passed away on her way to the Colombo National Hospital, the deceased was then transferred to Ragama Teaching Hospital. PW40 Ahamed Fathima has been working as a Management Assistant at the Negombo Hospital when this incident took place. She had confirmed that the Appellant had been allocated room No. 33 on the 6th floor. As only one key was available which had been in the possession of the wife of the Appellant, the said room was opened by her for inspection. The witness had stated that up until that point she had not been aware that the Appellant's wife also occupied that room. She further stated that the hospital authority had not extended permission for accommodation to the spouses of the doctors. She had gone in to the Appellant's room and noticed that access to the slab outside the window was only through the window in the room.

PW41, Dammika Wickramasekera was one of the consultant surgeons attached to Negombo Hospital at the time of the incident. He had confirmed that the deceased had undergone a surgery on her breast and was discharged on 25/10/2007. He had identified the exercise book which had been carried by the deceased. He had identified his handwriting and his rubber seal on the book which had been marked as P31. As per the book, the deceased was summoned for further examination on 12/11/2007. As the Appellant was working under him, he had identified the Appellant's handwriting which had been made on 12/11/2007 in the book.

PW38, Ashley Tissera was the Director of Negombo Base Hospital during the period pertaining to this case. After being informed of the incident, he had gone to the place where the deceased had fallen onto. According to him

the doctors were given accommodation on the 6th floor and the Appellant was given room No.33 on the 6th floor. He had excluded the possibility of suicide as the deceased had hit the ground close to the building. With his experience, if anybody commits suicide by jumping off a building, the body would land some distance away from the building. He had visited room No.33 and according to him the room has only one entrance and a window. Another window was available in the bathroom. The window in the room is at about 4 feet height from the floor.

PW22, IP Subasinghe Officer-in-Charge of Crime Branch of the Negombo Police Station had received information about the death of the deceased around 4.20 p.m. After receiving the information, he had gone to the scene of crime around 4.35 p.m. and started the investigation. A blood mark was seen at the place where the deceased had hit the ground. From the place where the deceased had fallen, the passages of the 7 storied building are situated upwards along a straight line. The width of the passage is about 2 ½ feet. With his experience he had excluded the possibility of suicide.

Thereafter, he had gone to 6th floor and commenced investigations. On the left side corridor of the 6th floor, he had seen a hairpin and two Crail pins lying on the ground. A lock of hair was seen lying on the ground close to the room opposite to the Appellant's room. Thereafter he had gone to record statements from PW1, PW4 and PW5. Around 1.40 a.m. he had arrested the Appellant at the hospital premises. After the arrival of Scene of Crime Officers, he had gone into the Appellant's room for further investigations. He had noticed that the Appellant's room - room No.33 is perpendicular to the blood mark found on the ground where the deceased hit the ground. The Appellant's room had two windows. One is in the room and the other is in the bathroom. Another lock of hair was found lying on the ground of the room close to a cupboard. A cardboard was found under the bed of the Appellant. He had noticed scratch mark on one of the sides of the cardboard indicative of dragging something on the same (X13). Upon

search of the cupboard, two tablets of Viagra with the brand name, 'Silagra' had been detected. In the card two tablets had already been removed (X14). Thereafter, the witness had examined the room opposite to the Appellant's room as a hair sample was found close to the said room. Another hair sample was found from inside the room. Upon further investigation, a black coloured bag was detected in a cupboard drawer. Items belonging to the deceased had been found inside the said bag. A love letter dated 04/11/2007 written to the deceased's boyfriend was also noticed lying amongst other items in that bag. He had identified those items in the open court.

According to PW29, SI Siriwardena a Scene of Crime Officer (SOCO) attached to the Negombo Police Station who had visited the crime scene, partaken in the investigation, had taken photographs and prepared the building sketch. Upon observing the 6th floor corridor, he had noticed drag marks on the floor of the corridor and found a lock of hair outside room No.33 which had been accommodated by the Appellant. He has also noticed a hair clip and Crail pins on the floor of the corridor. There was a name board 'MO's Anaesthetist's Room' fixed to room No. 33. As PW22 had expressed suspicion about room No.33, he had proceeded to examine the same. When he examined the room, he had noticed that a Cherry plant on the slab had broken branches. He had climbed onto the slab through the bathroom window and noticed that the Cherry plant stood straight beneath the bathroom window. Although some weeds were there, only the Cherry plant was observed to be damaged. As the evidence revealed that a witness had observed a doctor dragging something along the 6th floor corridor from the 7th floor corridor, he had gone to the 7th floor corridor and looked over at the 6th floor corridor and has satisfied himself that the place witnessed as along which the doctor dragged the girl is indeed visible to the 7th floor corridor. He was also satisfied that if a person speaks out from the 7th floor corridor, they could be heard from the 6th floor corridor.

PW9, Dr. Damayanthi was summoned to the Emergency Treatment Unit regarding a woman who had fallen off the hospital building. As the patient's condition was serious, the patient was transferred to the Colombo General Hospital. She had gone in the ambulance as the doctor in-charge. As the patient's condition became worse, the patient was re-routed to Ragama Teaching Hospital. She had identified the dress of the deceased at the trial.

Finally, the prosecution had called PW15, the Additional Magistrate of Mahara and proceeded to mark the notes from the identification parade through him (P44).

Defence was called and the Appellant taken the opportunity to make a lengthy dock statement and had denied the charge.

When a case solely rests on circumstantial evidence, the inference of guilt can be justified only when all the incriminating factors and circumstances are found to be incompatible with the innocence of the accused. It is the incumbent duty of the prosecution to prove the case beyond reasonable doubt.

In the case of **C. Chenga Reddy and Others v. State of Andhra Pradesh** (1996) 10 SCC 193 the court held that:

“In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence”.

In the case of **Attorney General v. Potta Naufer & others** [2007] 2 SLR 144 the Supreme Court held that:

“When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence”.

In the case of **Kusumadasa v. State** [2011] 1 SLR 240 the Justice Sisira de held that:

“The prosecution must prove that no one else other than the accused had the opportunity of committing the offence. The accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence”.

In **Premawansa v. Attorney General** [2009] 2 SLR 205 the court held that:

“In a case of circumstantial evidence if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapable conclusion that the accused committed the offence”.

In the case of **Regina v. Exall** (176 English Reports, Nisi Prius at page 850) Pollock, C.B., considering the aspect of circumstantial evidence remarked:

“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in a chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the rope might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength”.

In this case it is the incumbent duty of the prosecution to prove all the circumstances which points only at the Appellant as the person who committed the offence as charged, beyond reasonable doubt.

In the first ground of Appeal the Appellant contends that the Learned High Court Judge had failed to critically analyse the inherent improbabilities and the inter se contradictions of the evidence of the prosecution case.

Although the Learned President’s Counsel contends that glaring contradictions exists among the evidence produced by the material witnesses of the prosecution, upon perusal of the entire High Court proceedings, not a single contradiction is marked on the evidence of any of the witnesses called by the prosecution.

Learned President’s Counsel contends that the evidence of PW1 is in contradiction with the evidence given by PW12. PW1 Beatrice in her evidence states that while she was taking a break after her work in the morning, she had seen the Appellant pulling a cardboard with a girl lying on it along the 6th floor corridor. When she inquired from the Appellant as to what has happened the Appellant raising his head, smiled at her and said nothing. According to her evidence she had very clearly had seen the

Appellant's face and he had pulled the cardboard with a girl lying on it at that time. The said cardboard was marked as X13 at the trial.

The Learned President's Counsel argues that even though PW1 had told PW12 that she had seen the Appellant pulling a cardboard with a girl lying on it, the said PW 12 in her evidence had stated that PW1 had mentioned that a doctor working on the 7th floor had carried a woman believed to be his wife. Hence the President's Counsel argues that there is a contradiction between the evidence of PW1 and PW12.

The incident happened on 12/11/2007 and PW12 had given evidence on 13/05/2013 nearly about 06 years afterwards. Hence it is not possible for a witness to recall evidence 100% accurately in accordance with the statement given to the police. Although PW12 had not mentioned about the doctor pulling a woman on a board, she had mentioned about him carrying a woman at that time.

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(**Vide;** page 856 of the brief)

Hence, this cannot be considered as a serious contradiction which affect the root of the case. Further PW12, Mayura Yapa seemed to be a reluctant witness as she had told PW1 Beatrice, not to divulge what she had seen to anybody else. Only her evidence is at odds with PW1's, as PW12 had said that she was told that the doctor was seem to be helping a woman to walk with difficulty. But seeing a woman in the custody of the Appellant at the appropriate time is not disputed.

In the case of **The Attorney General v. Sandanam Pitchi Mary Theresa** (2011) 2 Sri L.R. 292 it was held that,

“Witnesses should not be disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter.

...The court observed further, that human beings are not computers and that it would be dangerous to disbelieve the witness and reject evidence based on small contradictions or discrepancies”.

The Learned High Court Judge had visited the scene of crime and the building from which the deceased had fallen down. The Learned High Court Judge after going to the spot from where PW1 was supposed to have witnessed the pulling, confirmed that the place is very much visible from the 7th floor (X3). For this inspection the defence counsel also participated and no one made any other observation nor any objection. Hence it is non-contradictory evidence that PW1 had witnessed that the Appellant had pulled a cardboard with a girl lying on it on the date of incident.

PW22 also accompanied and assisted the Learned High Court Judge at the scene of crime. PW29 who had conducted the investigation along with PW22 also endorsed the fact that the visibility of the place where PW1 had seen the Appellant pulling a girl on a cardboard is clear from the 7th floor.

Next the Learned President's Counsel argues that the circumstances which the police traced the witness PW1 Beatrice is highly improbable and open to grave suspicion.

According to PW22 IP Subasinghe he had received information regarding PW1 on the night of the incident from a person believed to be a worker of the hospital. Upon that information this witness had gone to PW1's house which is 7 Km away from the Negombo Hospital.

According to PW1 the police had arrived at her residence between 9 and 10 p.m. on 12/11/2007 and recorded her statement. In her evidence she had only mentioned that the arrival time of the police to her residence and had not mentioned the time of commencement of recording of her evidence. According to PW22 the statement of PW1 had been recorded at 00.20 hours on 13/11/2007. It shows that police had recorded her statement promptly. The Learned President's Counsel further argued that not calling the attendant from whom the police gathered information to trace PW1 clearly establishes that she was a witness put up by the prosecution and had lied to Court.

Section 125 of the Evidence Ordinance reads:

“No Magistrate or Police Officer shall be compelled to say whence he got the information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue or the excise laws.”

E. R. S. R. Coomaraswamy refers to the case of **Weston v. Peary Mohan Dass** [1912] 40 Cal.898 at 920 in his much-acclaimed academic work by the name of 'The Law of Evidence' Volume II (Book 2) as mentioned below:

“Section 125 is based on the principle that the public interest in the detection and combating of crime demands that those persons who are the channel by means of which the detection is made, should not be unnecessarily disclosed. If objection is taken under this section, it cannot be made the ground of adverse inferences against the witnesses”.

Hence, not disclosing the source of information with regard to the detection of the PW1 has not caused any prejudice to the Appellant.

The Learned President's Counsel further argued that the inconsistency of the evidence of PW1 Beatrice, PW4 Nishantha, PW11 Kanthi Balasuriya and PW32 Camilus Appuhamy regarding the time and the movements of the Appellant and the deceased are contradictory inter se.

According to PW31, the Medical Examination book of the deceased clearly shows that the deceased was present at the Clinic on 12/11/2007 and was examined by the Appellant. This had been corroborated by PW41, Dhammika Wickramasekera, who was attached to Negombo Base Hospital at the time of the incident as a surgeon.

According to PW1, she had seen the Appellant dragging a girl lying on a cardboard on the 6th floor corridor around 11.30 a.m. Thereafter, she had heard that a girl had fallen from the building around 12.00 p.m.

PW4, the security guard at the staircase had seen the deceased ascend from the 2nd floor between 11.30 a.m. to 11.45 a.m. 15 minutes later when he came down to assume duty near the main door, he was told that a girl had been pushed off the building from a higher floor.

According to PW11 the deceased had gone up the stairs from the 4th floor around 10.00 a.m. A few minutes later, the deceased had come down the stairs with the Appellant and was seen getting onto the 4th floor lift.

PW32 had seen the deceased following the Appellant out of the clinic and the two of them returning to the clinic with the book around 10.30 a.m.

The above-mentioned prosecution witnesses are not expert witnesses. They are ordinary members of the society who never expect to be called in to give evidence before a court about these seemingly routine occurrences that happen during their work shift. All the witnesses had referred to a rough time stamp without actually having verified it with an accurate clock. These witnesses had observed the movements of the deceased alone and with the Appellant inside the hospital. They had not had any advantage of looking at notes or books when they gave evidence.

In the case of **Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR SC 753 the court held that:

“Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

...In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates of such matters. Again, it depends on the time-sense of individuals which varies from person to person.”

Considering the above-mentioned judicial decision, the time discrepancies mentioned above cannot be considered as major inter se discrepancies which affect the root of the prosecution case.

According to PW29 upon receiving information, his Unit - SOCO team had arrived at the spot along with PW22 to conduct an investigation on this case. They first had gone to the place where the deceased was supposed to have landed on the tarred surface. As the place of landing lies straight below the ledges of the 7 storeys of the hospital building, they started their investigation from the ground floor and ascended up to the 07th floor, checking every floor thoroughly. As they found a hair sample (X5) close to room No.33 they had carried out a thorough check of the 6th floor. Along the corridor of the 6th floor drag marks had been noted and three ladies hair pins were found lying on the floor (X3, X4). As room No.33 was closed at that time, PW40, Fathima, the Management Assistant of the Negombo Base Hospital was summoned to open it. She had come accompanied by another woman and opened the room. At that point he had come to know that room No.33 had been the one which was officially allocated to the Appellant. After a preliminary observation the witness had returned to the police station around 8.00 p.m. as PW22 had to go check an information regarding this case.

PW3 had confirmed that the hair pins which were found on the 6th floor had belonged to the deceased.

On the following day PW29 had gone into the room again and observed that the room has a window at a height of 4 feet from the floor. The size of the window is 3 feet in height and 4 feet in width. It is a sliding window. Looking through the window he had noticed a concrete slab about 3 feet in width running along the exterior of the 6th floor (X22). He had gone to the bathroom and noticed a similar sized window and had climbed through that window and alighted on the slab. His height is 5 feet and 6 inches. He had noticed some weeds and a cherry plant growing on the edge of the

room wall on the slab. Further he had noticed a branch and some leaves of the cherry plant had been broken and leaves had fallen on the slab (X25, X26, X27, X28). According to him his investigation revealed that the point where the deceased had fallen is just straight below the bathroom window and the fallen cherry plant leaves (X9, X10). According to PW29, PW22 IP Subasinghe had headed the investigation and he had acted upon his directions.

PW40 had confirmed that room No.33 had been officially allocated to the Appellant. But she was unaware whether the wife of the Appellant was also accommodating the room. She further said that the spouses of the doctors were not allowed accommodation in the rooms so allocated. But she confirmed that the room key was handed over to her by the wife of the Appellant as the Appellant was not to be found at that time.

According to PW22, he had checked all the rooms on the 5th floor before proceeding to the 6th floor (Page 1156 of the brief). As a hair sample was found close to room No.33 on the 6th floor, the investigation was confined to the 6th floor thereafter. Hence it is incorrect to say that the police had not checked the other rooms allocated for the accommodation of doctors at that time.

Considering the evidence pertaining to the police investigation, any major discrepancies have not been highlighted during the trial.

The Learned President's Counsel also contended that the recovery of the cardboard from the Appellant's room is an introduction as it was not shown to PW1 to confirm neither the description nor its size.

PW1 had given evidence after about 06 years following the incident. As the time passes the memory of the person also fades away to some extent. Hence, it is not possible to identify all the productions accurately. In this case PW1 had given her evidence without any contradiction being marked. The cardboard cannot be considered as an introduction only as a

consequence of it not being shown to her as the said cardboard was marked as X13 in the trial. Hence, not showing the cardboard X13 to PW1 is not fatal enough to affect the evidentiary value of PW1.

In the case of **Wickremasuriya v. Dedoleena and others** 1996 [2] SLR 95 Jayasuriya, J. held that;

“A judge, in applying the Test of Probability and Improbability relies heavily on his knowledge of men and matters and the patterns of conduct observed by human beings both ingenious as well as those who are less talented and fortunate”

His Lordship further held that;

“If the contradiction is not of that character the Court ought to accept the evidence of witnesses whose evidence is otherwise cogent having regard to the Test of Probability and Improbability and having regard to the demeanour and deportment manifested by witnesses. Trivial contradictions which do not touch the core of a party’s case should not be given much significance, especially when the probabilities factor echoes in favour of the version narrated by an applicant”

In **Iswari Prasad v. Mohamed Isa** 1963 AIR (SC) 1728 at 1734 the Court held that;

“In considering the question as to whether evidence given by the witness should be accepted or not, the court has, no doubt, to examine whether the witness is, an interested witness and to enquire whether the story deposed to by him is probable and

whether it has been shaken in cross-examination. That is whether there is a ring of truth surrounding his testimony.”

Guided by the above cited judgments I conclude that the learned High Court Judge had adequately applied the probability test and come to a correct finding. Hence it is incorrect to say that the Learned High Court Judge had not adequately considered the probability of the prosecution case. Hence, the first ground of appeal has no merit.

On the second ground of appeal the Appellant contends that the Learned High Court Judge has misdirected on the burden of proof by:

- a. Considering the defence case before the prosecution case.
- b. Considering the evidence of the Appellant after rejecting the dock statement and shifted the burden of proof on the Appellant.

The Learned President’s Counsel commenting on the judgment submits that the Learned Trial Judge has grossly misdirected himself on the burden of proof by examining and rejecting the evidence of the defence prior to considering the prosecution case and thereby shifted the burden of proof on to the Appellant.

Writing a judgment is an art. The High Court Judges use different methods to write judgments. But all those methods must be consistent with Section 283 of the Code of Criminal Procedure Act No.15 of 1979.

In his judgment the learned High Court Judge had firstly narrated and considered the evidence of the witnesses including the stance taken during the cross-examination. As correctly stated by the Learned Additional Solicitor General, this indicates that at the end of this exercise, the trial judge had a complete version of the prosecution and the defence cases before him.

Thereafter, the Learned High Court Judge adhering to the legal principle that is necessary had proceeded to consider the dock statement, of the Appellant and had arrived at the conclusion that the dock statement had not caused any impact on the prosecution case. This is not an instance of shifting of the burden of proof to the Appellant as claimed by the Learned President's Counsel.

Thereafter, the Learned High Court judge had moved on to consider the evidence critically and arrived at the finding that the prosecution had proved their case against the Appellant beyond reasonable doubt. He had given reasons as to why he accepted the prosecution case and rejected the defence case.

The Learned President's Counsel submits that the entire approach of the Learned High Court Judge is flawed from the very commencement of the judgment.

In this case the approach adopted by the Learned High Court Judge does accord with the provision of Section 283 of the Code of Criminal Procedure Act No.15 of 1979. As such, it is appropriate to consider this case under Section 436 of the Code of Criminal Procedure Act No.15 of 1979 and proviso of Article 138 of The Constitution of the Democratic Socialist Republic of Sri Lanka.

Section 436 of the Code of Criminal Procedure Act No.15 of 1979 states as follows:

“Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-

- a. of any error, omission or irregularity in the complaint, summons, warrants, charge, judgment, summing up or

other proceedings before or during trial or in any inquiry or other proceedings under this Code; or

- b. of the want of any sanction required by section 135,
Unless such error, omission, irregularity, or want has occasioned a failure of justice.” [Emphasis Added]

Article 138 of The Constitution of Democratic Socialist Republic of Sri Lanka states:

“The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any court of First Instance, Tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all cases, suits, actions, prosecutions, matters and things of which such High Court of First Instance, Tribunal or other institution may have taken cognizance;

Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect or irregularity, which has not prejudiced the substantial right of the parties or occasioned a failure of justice”. [Emphasis added]

Considering the approach adopted by the Learned High Court Judge in writing the judgment, I find neither a prejudice occasioned nor a failure of justice occurred in this case. Hence this ground of appeal is also devoid any merit.

As the 3rd ground of Appeal, the Learned President's Counsel argued that the Appellant was denied of a fair trial due to:

- c. Not calling finger print and DNA evidence.
- d. Infirmities in the identification parade.

In this case the Hon. Attorney General had decided to send out a direct indictment against the Appellant. The indictment was served on the Appellant on 23/02/2011. The DNA report was formerly filed of record of the High Court of Negombo on 30/11/2011. Finger Print Report was handed over on 29/04/2013.

Even though it was argued that the Finger Print report and DNA Report were not called, the Appellant had asked a considerable number of questions pertaining to DNA evidence from PW22. The following questions have been put to the witness regarding the DNA Report. (Pages 1158, 1159, 1170, 1171)

ප්‍ර : ඒ කෙස් රොද මහත්තයා තමුන්ගේ භාරයට ගන්න ද මොන අවස්ථාවකදී හරි ?

උ : එහෙමයි. පරීක්ෂණ කටයුතු වලින් පස්සේ

ප්‍ර : එය පී. ආර්. ගත කරන්නත් ඇති ?

උ : එහෙමයි.

ප්‍ර : ඒ පී. ආර්. ගත කලාට පස්සේ මහත්තයා නඩු භාණ්ඩත් සමග ඒ කෙස් රොදත් ඩී.එන්.ඒ. පරීක්ෂණයට ලක් කලාද?

උ : එහෙමයි.

ප්‍ර : මහත්තයා ද ඒ ඩී.එන්.ඒ. පරීක්ෂණයට අවශ්‍ය ප්‍රශ්නාවලිය සැකසුවේ ?

උ : එහෙමයි.

ප්‍ර : ඒ ප්‍රශ්නාවලියේ මහත්තයා ප්‍රශ්නයක් නගන්න ඇති මේ කෙස් රොද මරණකාරීගේ ද කියලා, ප්‍රශ්න නගන්න ඇති ?

උ : එහෙමයි.

(vide; page 1158 of the brief)

ප්‍ර : මහත්තයා කිව්වා, මහත්තයා ඒ ඩී.එන්.ඒ. පරීක්ෂණය සඳහා ඔය නිසකෙස් යොමු කලා කියලා ?

උ : එහෙමයි.

ප්‍ර : ඒ පිලිබඳව වාර්තාවක් ලැබුණා කියලා දන්නවා ද?

උ : ලැබුණා කියලා දන්නවා. නමුත් ඒ වකවානුව වන විට මා ඒ පොලීසියේ සිටියේ නැහැ.

ප්‍ර : යෝජනා කරනවා සාක්ෂිකරු ඒ ඩී.එන්.ඒ. වාර්තාවට අනුව මෙම තමුන් විසින් තමුන්ගේ භාරයට ගත් නිසකෙස් මරණකාරියගේ නිසකෙස් බවට තහවුරුවීමක් වෙලා නැහැ කියලා ?

උ : ඒ ගැන මම දන්නේ නැහැ ස්වාමිනි.

ප්‍ර : මහත්තයා ප්‍රකාශ කලා මේ නිසකෙස් සොයා ගැනීමෙන් පස්සේ, හන්දෑවේ 5 ට පමණ තමයි නිසකෙස් සොයා ගන්නේ, ඊට පස්සේ මහත්තයා ගියා කිව්වා තවත් විමර්ශන කටයුත්තක් කරන්න?

උ : එහෙමයි.

(vide; page 1159 of the brief)

උ : එහෙමයි.

ප්‍ර : ඔය ආකාරයටම තමා මෙම ස්පිරිතලයේ අනිත් කාමරවල ජනෙල් පිහිටා තිබෙන්නේ?

උ : එහෙමයි.

ප්‍ර : ඒ ජනේලයෙන් තමා මහත්තයා කිව්වේ යම්කිසි පුද්ගලයෙක් අර එලියේ තිබෙන කොන්ක්‍රීට් කැල්ලට පහිනින හැකියාවක් තිබෙනවා කියා ?

උ : ඇතුල් වෙන්න පුළුවන්.

ප්‍ර : ඒ අනුව ඕනෑම කාමරයකින් ඒ ජනේල පසියට ඇතුල් වෙන්න පුළුවන් ?

උ : එහෙමයි.

ප්‍ර : මහත්තයා නැවතත් හැන්දෑවේ 8.30 ට විතර මෙම වින්තිකරුගේ කාමරයේ කෙස් වගයක් තිබීම නැවත සොයා ගන්නා කිව්වා ?

උ : එහෙමයි.

ප්‍ර : ඒ කෙසුත් මහත්තයා අර ඩී.එන්.ඒ. පරීක්ෂණයට ඉදිරිපත් කලා මහත්තයාගේ ප්‍රශ්නාවලිය සමඟ ?

(*vide*; page 1170 of the brief)

උ : මතක හැටියට ඉදිරිපත් කලා.

ප්‍ර : ඒ වින්තිකරුගේ කාමරයේ තිබී සොයා ගන්න කෙස් ප්‍රමාණයත්, මරණකාරියට අයත් කෙස් බවට ඩී.එන්.ඒ. වාර්තාවෙන් තහවුරු වෙලා නැහැ කියා කියන්නේ ?

උ : ඒක මම දන්නේ නැහැ. එතකොට මම ඒ ස්ථානයේ සිටියේ නැහැ.

ප්‍ර : මහත්තයා කිව්වා පැ-20 කියා කාඩ්බෝඩ් එකක් මහත්තයා වින්තිකරුගේ කාමරයේ තිබී සොයා ගැනීමක් කලා කියා ?

උ : එහෙමයි.

ප්‍ර : ඒ කාඩ්බෝඩ් එක මහත්තයා ඩී.එන්.ඒ. පරීක්ෂණයට යොමු කිරීමක් සිදු කලා ද?

උ : ඒ ගැන හරි මතකයක් නැහැ.

ප්‍ර : මහත්තයා ඒ ගැන සටහනක් යොදා නැද්ද මොනවත් ඩී.එන්.ඒ. පරීක්ෂණයට යැව්වා කියා?

උ : ස්ථානයට ඉදිරිපත් කල පසු උසාවි යන නිලධාරීට තමා උපදෙස් දීමා නිබන්තේ ඒ කටයුතු කරන්න. මම සටහන් ඒ සම්බන්ධයෙන් දාලා නැහැ.

(*vide*; page 1171 of the brief)

The above questions put to PW22 clearly establish that the defence was well aware and possessed the DNA Report when cross-examining PW22, the chief investigating officer.

In **King v. Chalo Singho** 42 NLR 269 the court held:

“Prosecuting Counsel is not bound to call all the witnesses named on the back of the indictment or tender them for cross-examination. In exceptional circumstances the presiding Judge may ask the prosecuting counsel to call such witnesses or may call him as a witness of the Court”.

As discussed above, it is improper to say that the prosecution had withheld the Finger Print Report and DNA Report and therefore, the Appellant was denied a fair trial. In this case the prosecution had called all necessary witnesses to prove their case.

Next the Learned President’s Counsel contended that the purported identification of the Appellant at the identification parade by PW1 is marred by grave irregularities. To substantiate his argument the Learned President’s Counsel submits that the Appellant being a doctor, persons similar to him were not put up for the parade and thereby occasioned a grave injustice to the Appellant. At the parade the Appellant was not attired the way in which a doctor generally dresses. According to the identification

parade notes which had been marked as P44, he was dressed in a T-shirt and a pair of trousers and pair of slippers as a common man. As PW1 did not know the name of the Appellant but only knew him as a doctor serving in the operating theatre, the identification parade was held to establish the correct identity of the Appellant. Up to the point of the incident PW1 had known the Appellant for about two years. The Appellant had not raised any objection regarding holding the identification parade except the fact that he had worked in five wards in the Negombo Base Hospital for about one year and therefore, majority of the minor staff had been accustomed to him.

Phipson, in his book titled Phipson on Evidence (Sweet & Maxwell Thomson Reuters, 17th Edn.2015) sates that:

“It is often important to establish the identity of a person who a witness testifies that he saw on a relevant occasion. Sometimes, the witness will testify that he had seen the person before, or even know the person well, and therefore recognized the person observed on the relevant occasion”.

In this case accepting the identification evidence has not caused any prejudice to the Appellant, as the PW1 had seen him regularly at the hospital prior to the date of incident.

Hence, the Appellant is not successful in his third ground of appeal.

In this case without any contradiction or omission the evidence given by the prosecution witnesses established that the deceased had come to the Negombo Base Hospital clinic on 12/11/2007 and died falling from an upper floor of the building.

PW1 had clearly seen the Appellant dragging a cardboard on which a female was lying. PW12 had corroborated the evidence of PW1 with regard

to the presence of a female. Detection of hair clips and recovery of the deceased's bag with her personal belongings amply prove the deceased's presence on the 6th floor. Drag marks on the dusty surface of the corridor floor were observed on the 6th floor.

Before the deceased was seen lying on the cardboard, the other witnesses who were in the building had seen the deceased in the company of the Appellant.

The investigators had searched all the floors of the hospital building and found hair pins of the deceased only on the 6th floor corridor. Police had detected the broken and withered leaves of the cherry plant on the concrete slab adjacent to the bathroom of the room No.33 occupied by the Appellant on the same floor. The place where the deceased landed is just straight below the bathroom window of the Appellant's room. The deceased is a small made person whose height is 4.10 feet as per the medical evidence. PW29 whose height is 5.6 feet had climbed through the bathroom window of room no.33 to the sledge area to conduct an investigation and to take photographs.

Medical evidence revealed that the deceased was raped, strangled and let down from the building when she was unconscious. The deceased was without her underwear. Further possibility of committing suicide was overruled by the Learned High Court Judge.

The Appellant in his dock statement did not deny the evidence given by PW1. Further the evidence given by PW1 was not challenged in cross-examination on material points. Further he did not deny that he was in close proximity with the deceased during the time period of the incident.

In **Pilippu Mandige Nalaka Krishantha Thisera v. The Attorney General** CA 87/2005 decided on 17/05/2007 the court held that:

“I hold that whenever evidence given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness”.

Considering the evidence presented by both parties in this case, I conclude that the prosecution has presented highly incriminating circumstantial evidence against the Appellant. But he has failed to offer a reasonable explanation against the incriminating circumstances which had only pointed at the Appellant as the perpetrator of this case.

In **Ajith Samarakoon v. The Republic (Kobaigane Murder Case)** [2004] 2 SLR 209 Jayasuriya, J. held that:

“The principles laid down in R v. Cochrane and R v. Burdette do not place a legal or a persuasive burden on the accused to prove his innocence or to prove that he committed no offence but these two decisions on proof of a prima facie case and on proof of highly incriminating circumstances shift the evidential burden to the accused to explain away the highly incriminating circumstances when he had both the power and the opportunity to do so”.

As discussed under the appeal grounds advanced by the Appellant, the prosecution had adduced strong and incriminating circumstantial evidence against the Appellant. The Learned High Court Judge had very correctly

analyzed all the evidence presented by both parties and come to the conclusion that all the circumstances are consistent only with the hypothesis of the guilt of the Appellant and totally inconsistent with his innocence.

As the Learned High Court Judge had rightly convicted the Appellant for the charge of Rape and Murder, I affirm the conviction and dismiss the Appeal of the Appellant.

I greatly appreciate and thank both the counsels for assisting this court by filing comprehensive and helpful written submissions.

The Registrar is directed to send a copy of this judgement to the High Court of Negombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL