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

In the matter of an appeal in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No: CA /HCC/151/2016
HC Kandy Case No: HC/220/2015

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

Complainant

Vs.

Colombage Don Denzil Jayawardana

Accused

And Now Between

Colombage Don Denzil Jayawardana

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Tenny Fernando AAL for the Accused-Appellant

Rajindra Jayaratne SC for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 25.06.2018 and 25.10.2022

By the Complainant-Respondent 17.10.2018

Argued on : 07.06.2022 and 17.06.2022

Decided on : **28.10.2022.**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Kandy, dated 11.08.2016, by which, the accused-appellant, who is before this Court, was convicted and sentenced to death for having murdered Bannaheka Mudiyanse Walawwe Chuli Lalani Nadeesha Warapitiya (the deceased), committing the offence of rape on Bannaheka Mudiyanse Walawwe Chuli Lalani Nadeesha Warapitiya, under section 364 (1) of the Penal Code as Amended by Act No 22 of 1995.

After the trial, the accused-appellant was given 40 years of rigorous imprisonment and Rs. 20,000/- fine and in default 5 years simple imprisonment.

There were 3 charges in the indictment. They are as follows;

(a) Count 1

that on or about 25.05.2014, he committed the offence of trespass at Ramya Chandrakanthi Kodithuwakku's house which is an offence punishable under section 435 of the Penal Code.

(b) Count 2

that at the same date, time and place set out in count 1 and during the same transaction he committed the offence of rape of Bannaheka Mudiyanse Walawwe Chuli Lalani Nadeesha Warapitiya which is an offence punishable under section 364 (1) of the Penal Code as Amended by Act No 22 of 1995.

(c) Count 3

that at the same date, time and place set out in count 1 and during the same transaction he committed the offence of murder of Bannaheka Mudiyanse Walawwe Chuli Lalani Nadeesha Warapitiya which is an offence punishable under section 296 of the Penal Code.

At the trial, 11 witnesses gave evidence on behalf of the prosecution namely;

Ramya Chandrakanthi Kodituwakku (PW 1)

Danushka Warapitiya (PW 2)

Dr. D.L Waidyarathna (PW 8),

Dr. Ruwanjaya Ileperuma (PW 9)

M. Premarathna (PW 13)

Sub Inspector Polwatta (PW 15)

Police Inspector Jayasekara (PW 16)

Police Sergeant 29763 Gunarathna (PW 18)

Police Inspector Dharmakeerthi (PW 19)

Police Sergeant 28800 Wickramasinghe (PW 21)

Police Constable 9042 Kumarasinghe (PW 22)

Upon the conclusion of the Prosecution Case after the Learned High Court Judge having explained the rights of the accused-appellant, he made a Dock Statement and closed the defence case.

At the conclusion of the trial, the Learned Trial Judge found the Accused-Appellant guilty on all counts and proceeded to impose the following sentences;

Count No. 01

20 years Rigorous Imprisonment and Rs. 10,000/- fine with a default sentence of 5 years.

Count No. 02

20 years Rigorous Imprisonment and Rs. 10,000/- fine with a default sentence of 5 years.

Count No. 03

Death Sentence.

The accused-appellant preferred this appeal against the said conviction and sentences.

The grounds of appeal are as follows;

i. The learned High Court Judge misdirected with regard to the admissibility of the evidence against the 1st and the 3rd counts when there is no proof against the accused appellant and thereby the conviction against the 1st and the 3rd counts are bad in Law.

ii. Learned High Court Judge misdirected herself by failure to consider that prosecution has failed to establish the time of death and thereby to establish the ingredients of the 2nd count and therefore the conviction against the 2nd count is bad in Law

iii. Learned Trial Judge misdirected herself by failure to appreciate the version of the doctor in par with rest of the prosecution witnesses which clearly conflicts the probability factors of each side and thereby that casts a reasonable doubt on the prosecution case

iv. The learned High Court Judge misdirected herself by failure to evaluate all the evidence judicially but surmised certain events as it was proved by the prosecution beyond reasonable doubt and therefore the conclusion that accused appellant is guilty of all counts, are bad in Law.

v. Learned High Court Judge completely misdirected herself by failure to appreciate the medical evidence in the judicial manner which clearly emphasis the possibility that someone known to the family of the deceased had the best opportunity to commit the crime than a stranger and therefore the conviction is bad in Law.

vi. Learned High Court Judge misdirected herself by failure to appreciate the dock statement in the proper legal context and its original nature and thereby the conclusion to convict the accused appellant for all counts are bad in law.

The case before this court is one of a very peculiar nature where direct evidence is nowhere to be found and even a suspicious could not be directly pointed towards any particular person. However, since the accused-appellant has admitted his testimony that he was engaged sexually with the corpus of the deceased while it was left alone on the ground, prosecution could have established the time of death which would solved the many numbers of unsolved issues. A case depending on circumstantial evidence must be proved leaving no hypothesis other than guilt of the accused-appellant and in this case, it is completely the other way around. The loose ends of the prosecution have been justified by the Learned High Court Judge in order to justify the conviction and such attributions can be observed at the evaluation of evidence of the Learned High Court Judge.

Learned Counsel for the accused-appellant argued that the case is completely depending on particular evidence namely a DNA report and rest of the case against the accused appellant is completely conjecture. Therefore, he further argued that the conviction is not according to the evidence produced before court and specially the case depending on circumstantial evidence, is weak as a whole.

It is important to note that the Appeal brief contains three petitions of appeal as detailed below:

(i) Petition of appeal in respect of the appellant under the signature of Attorney-at-Law Ananda Kodituwakku dated 26.08.2016.

a. This petition contains a hand written endorsement in Sinhala language on the first page and caption page which reads as follows;

> "2016.08.26 at 9.30 am". There is no rubber stamp attached to this endorsement. The other part of this handwritten endorsement is unclear, but seems to have been ended with the word "Regi" in Sinhala. A rubber stamp of the High Court Kandy appears on a stamp at a different place on the same page. However, the date of the seal is not clear to the naked eye though it appears to be a date that starts with 2 (refers to a number from 20-29) in August. It is to be noted that there is no corresponding journal entry to confirm as to when this petition was received by the registry of the High Court.

b. It is to be noted that this copy of the petition filed on record under Ananda Kodituwakku's signature does not contain any corrections on any of the pages of the petition whether handwritten or typed corrections.

ii. .

a. The second copy of the petition of appeal is also filed by Attorney-at-Law Ananda Kodituwakku and it contains certain initialled handwritten corrections made on the petition. This petition had been originally dated 24.08.2016 but had been corrected in hand writing to read as 31.08.2016.

b. There are three other handwritten and initialled corrections on this petition and a note at the end of the last page which reads thus;

"NB; please be kind enough to pardon the mistakes as I prepared this document while taking treatment in the Kandy General Hospital".

The registered post article shows that the postal department seal on the stamp refers to the date 31st August. The seal of the registrar of the High Court appears on all three pages of this petition and is dated 01.09.2016.

c. It is pertinent to note that the petition mentioned in paragraph 2 (1) above is the final version of this second petition. Both these petitions are the same in content, the only difference is that the first petition incorporates the hand written corrections in second petition word to word with computer typed amendments done in accordance with exactly the same three handwritten corrections on this petition other than the correction in the date. The date in this petition is corrected to read in handwriting as 31.08.2016 but the first petition aforementioned contains the computer typed date as 26.08.2016

d. The third petition had been signed by the appellant himself and had been submitted by the Jailor of the Prison. This had been signed on 16.08.2016 and posted on 17.08.2106 and date stamped by the registrar on 19.08.2016.

There is no endorsement in the journal entry of the receipt of the first mentioned petition dated 26.08.2016 or the jailor's petition dated 16.08.2016. However, upon the receipt of the petition dated 31.08.2016 petition with handwritten corrections, there is a journal entry dated 05.09.2016 stating that "another petition of appeal has been submitted by the appellant's lawyer" (vide side minute next to journal entry dated 05.09.2016)

There is no acceptable and reliable proof of the filing of the first Appeal papers within the stipulated time of 14 days in view of the above-mentioned facts. The filing of the second petition of appeal by Attorney-at-Law Kumarasingha is clearly time barred. Even though the first petition of appeal under his name appears to have been filed within the required time it is highly suspicious whether it can be accepted as filed within the appeal period due to the absence of an acceptable seal and the improbability that it could have been filed within time.

It appears that the handwritten endorsement on the first petition filed by Attorney-at-Law Kumarasinghe is suspicious and false and for the same reasons it is doubtful whether the registrar's seal on the Appeal papers on the front page is genuine or an introduction in view of the absence of an endorsement in the journal entry.

Furthermore, had the first appeal dated 26.08.2016 being filed on that date itself and in view of the fact that there were no corrections to be made on it there is no need for the second appeal to be filed by the same lawyer which in fact was not in proper form as it contained so many corrections that the lawyer intended to be done. The lawyer need not have made the endorsement in his handwriting to the effect that he was in hospital and request the errors to be pardoned. The first appeal dated 26.08.2016 cannot probably carry the corrections that the appeal dated 31.08.2016 contained either.

The learned counsel for the respondent states that this court to dismiss the two appeals relating to the appellant filed by Attorney-at-Law Kumaarasinghe in *limine* on the ground that it is time barred.

It is my view that as the petition of appeal forwarded by the Jailor on behalf of the appellant is filed within time as further confirmed by the postal seal on the envelop stated that this appeal could be accepted as a valid appeal and hence this appeal can proceed only on this appeal forwarded through the jailor.

In the case of Hanumant Govind Nargundkar Vs. State of Madhya Pradesh AIR 1952 SC 343, held that;

> “It is a well settled law that where there is no direct evidence against the accused and the prosecution rests its case on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused"
>
> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."'

It is evident that on or about 25.05.2012, a dead naked body of a young girl was found in a bushy land approximately 200 meters away from her house, who was sleeping in the house with her mother in the room few hours ago. Evidence suggested that she was attacked whilst she was on the bed inside the room and then taken away out of the house and abandoned in a bushy land 200 meters away. There were no eye witnesses.

The accused appellant was arrested on 02.11.2014 and upon carrying out a DNA comparison of vaginal material with the accused-appellant biological samples, it was revealed a 100%

match. This evidence undoubtedly concluded that accused appellant had direct contact with the deceased and most likely he had sexual intercourse with the deceased.

The learned Counsel for the accused-appellant submits that there are several important issues unresolved, in the prosecution case that cast clear doubts if the accused appellant is the real culprit who committed the offences in the indictment.

i. Is there any positive evidence to prove that accused appellant entered the house?

   a. Quite contrary to the above position, the evidence of the prosecution clearly portrayed affirmatively that the doors in the front and the rear were closed before they went to sleep and there was nothing strange that was observed when they woke up in the morning.

   b. The prosecution was unable to bring any evidence to establish that accused appellant has in fact entered the house to commit the offences he has been charged for. No fingerprints, no footprints or any other biological or circumstantial evidence to prove that accused appellant was inside the house at any time related to the alleged offence.

Learned Counsel for the appellant argued that there is no possibility for any person in all human probability enters the house when three adult males sleeping across the living area, to commit this crime without making any alarm to anyone in the house. Even if the accused-appellant entered the house at any time as prosecution states could it be possible to lock the doors from inside? Since there is no explanation forthcoming from the prosecution as to how the doors were kept locked from inside, only reasonable explanation one could arrive at is that the possibility of person living inside the house could have committed the offence or has assisted the perpetrator to commit the offence. On behalf of the appellant, it was submitted that the prosecution has not led any evidence to that effect. Having considered entirety of the prosecution case, it leaves a lacuna and a suspicious as to who actually have committed this offence inside the house. The deceased was sleeping on the bed with her mother.

It is reiterated in many numbers of judicial pronouncements, when a case is squarely based on circumstantial evidence, some guidelines should be followed in analysing evidence. While dealing with circumstantial evidence, it has been held in Sharad Birdhichand Sarda vs. State of Maharashtra AIR 1984 SC 1622; that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

i. the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established.

ii. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

iii. The circumstances should be of a conclusive nature and tendency.

iv. They should exclude every possible hypothesis except the one to be proved; and

v. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The prosecution led evidence to the effect that the accused appellant had sexual intercourse with the deceased by bringing in DNA report which was 100% match. It is the argument based on the explanation given by the accused appellant that accused appellant did so when he found the corpus lying fallen on the ground as he could not resist his feelings seeing the naked body of the deceased.

The police witness stated that there was no sign of force used to open the doors and police observed no sign of any other opening in the house to enter the house by an intruder. Therefore, it is the submission on behalf of the accused appellant that, prosecution has failed to prove its case beyond reasonable doubt. Even though the proof of a motive is not a burden on prosecution in a case depending on substantial evidence or rather direct evidence, in a case based on circumstantial evidence is a factor weighs in favour of the accused appellant.

In most recent judgment of the Supreme of India in Nandu Singh Vs. State Of Madhya Pradesh 2002 LiveLaw (SC) 229 and in the subsequent decision in Shivaji Chintappa Patil vs. State of Maharashtra, (2021) 5 SCC 626, Court relied upon the decision in Anwar Ali observed as follows;

> "Though in a case of direct evidence, motive would not be relevant, in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances."

The prosecution did not discharge any other hypothesis other than the guilt of the accused by leading evidence or rather obtaining certain material explanation from the prosecution witnesses. The prosecution principally relied on DNA comparison. Learned Counsel for the Appellant argued that the prosecution did not question from the doctor as to existence of sign of sexual activities deceased could have engaged prior to the instant incident. The prosecution did not question the doctor of the possibility of having intercourse without ejaculation by someone other than the accused appellant before he committed sexual intercourse.

It was submitted on behalf of the appellant that if the rape charge is to be maintained, the prosecution must have proved that the deceased being subjected to sexual intercourse prior to her death and doctor could not specifically mentioned the time of death but only gave a time span the deceased could have lived after the blunt trauma received on her head. The

prosecution failed to lead evidence to exclude intervention of another person other than the accused appellant since the circumstances related to this case. Learned Counsel for the appellant further submitted that;

i. Doors were locked and there was no sign that doors were forcefully opened or broken or left open by the time everyone woke up.

ii. Would a reasonable person take a chance to enter a house and commit any violence act on the deceased while mother was sleeping in the same room and several men were sleeping in the living area?

iii. Did the prosecution prove with credible evidence that none of the family members who was in the house on that day committed this offence?

iv. Is it not reasonably doubtful that no one was alarmed of gruesome murder committed by a complete outsider who didn't have the complete knowledge of the prevailing condition or situation inside the house?

v. Have the police found anything whatsoever to suggest that an intruder has entered the house to commit this crime?

On behalf of the appellant the learned Counsel further argued that the prosecution at no point of time explained these hypotheses for court to arrive at a just decision and the lacuna in the prosecution case raise a reasonable doubt of the conviction against the accused appellant.

It was the view of the Court of Appel in Gunawardane Vs. Republic of Sri Lanka 1981 (2) SLR 315; when considering circumstantial evidence in a criminal case as stated in, The House of Lords in Mc Greevy Vs. Director of Public Prosecutions (1973) 57 Cr. Ap. Reports 424, held that in cases of wholly circumstantial evidence no duty rests upon the Judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to give a further direction in express terms that this means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are;

a. consistent with the guilty of the defendant; and
b. exclude every possible explanation other than the guilt of the defendant.

The court of appeal held further in Gunawardana Vs. Republic of Sri Lanka (*Supra*) that, this case did not overrule the earlier decisions or imply that there is now a greater or lesser burden of proof on the prosecution in a case of circumstantial evidence. This authority merely states that a Judge who in addition to the usual direction about proof beyond reasonable doubt gives a further direction to the jury as in Hodge case (1938) 2 Lew. 227, 228, errs in redundancy, as the particular direction stems from the general requirement and basic necessity that proof must be established beyond reasonable doubt.

Appellant says that learned Trial Judge who delivered the judgment has arrived at her conclusion based on materials that are not accurate or rather not given in the course of the proceedings.

She heavily relied on recovery of a sledgehammer that had been used to cause the head injury on the deceased. It was the position of the Learned High Court Judge that subsequent to arrest of the accused, on his directions, the sledgehammer was recovered underneath a tree in the garden of the house when the incident happened. It was the evidence that police officer recovered the sledgehammer from the owner of the said sledgehammer which had been used to put up huts for the wedding function.

Further he stated that the photographs taken by the SOCO officers when they commenced the investigation helped him to recover sledgehammer. The accused appellant was arrested 09.11.2014 nearly 6 months subsequent to the incident according to police witnesses. The accused only had shown a coconut tree 120 feet away from the house. The sledgehammer that had been brought by one Anura was taken into custody. Therefore, when the Learned High Court Judge asserted that the sledgehammer was recovered on the direction of the accused appellant is a misdirection and there by the conviction based on surmises and conjecture.

Another argument raised by the learned counsel for the appellant was that Learned High Court Judge completely misdirected herself while concluding that, the accused appellant has entered the house can be determined based on doctor's evidence and DNA evidence, which is completely misdirection of facts. The Learned High Court Judge concluded that the defence has not challenged the position that he entered the house which is also a complete fallacy since prosecution at no point of time proved the accused appellant entered the house with positive evidence.

Learned Counsel for the appellant says that when doctor has not mentioned anything to the effect that the deceased was raped on her bed inside the room, the Learned High Court Judge concluded that doctor has opined so when giving evidence.

He further argued that the learned High Court Judge misdirected herself by surmising rather assuming without a proper basis that accused appellant entered the house when the mother of the deceased and the deceased came out of the house for call of nature at which point a person can have an opportunity to enter the house. There is no conclusive evidence to establish that accused-appellant actually entered the house in the absence of any direct or circumstantial evidence to that effect.

On behalf of the appellant, it was further submitted that the learned High Court judge completely misdirected herself by concluding that there is a high probability that the doors were not closed due to tiredness after the wedding function even though witness testified and said they closed the door. When there is evidence to seal the position that they close the door after returning from the toilet and it is contradictory to the conclusion arrived earlier mentioned in the same page of the judgment. The learned High Court Judge extended her presumption that accused appellant has an opportunity to see the deceased and the mother going out of the house for call of nature and at that point he has possibly entered the house.

There is no evidence to suggest that any other person's involvement in the crime which is an unreasonable remark since the prosecution has failed to prove complicity of the accused in the crime he has been charged for.

In Teper vs. Reginain (195) A. C 480 at 489, it was held that circumstantial evidence on which a case depends must satisfy three tests.

i. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

ii. Those circumstances should be a definite tendency, unerringly pointing towards gilt of the accused.

iii. The circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.

This position was confirmed in Gambhir vs. State of Maharashtra (1982) 2 S.C.C.(CR)431).

E.R.S.R. Coomaraswamy, THE LAW OF EVIDENCE, VOLUME I on page 612 says as follows; The Indian Supreme Court considered the use of the evidence of a medical expert and stated;

i. If the evidence of the medical expert is that the injury seen by him on the body of the deceased could have been caused in the manner and by the weapon described by the eyewitness, his evidence lends assurance to the evidence of the eyewitness and makes it safe to act upon it, provided that such witness is otherwise found to be reliable.

ii. If the expert says that the injury examined by him could not have been caused in the manner or by the weapon stated by the witness, the medical evidence throws a grave doubt on the evidence of the witness, and ordinarily the former should be relied upon, even though the latter may not suffer from any other infirmity.

iii. If the court finds for any reason that the direct evidence is unreliable, the medical witness ceases to be of any use in the case and cannot be of any use to the prosecution, even though the doctor might have said that the injury could have been caused as described by the witness, because the question of corroborative support from medical evidence can arise only when the direct evidence is first found to be otherwise reliable and not till then.

In the case of Nagendra Bala Mitra Vs Sunil Chandra Roy AIR 1960 S.C. 706; Cr.L.J.1020 the above-mentioned position was adopted.

Considering above judicial decisions, it was the contention of the learned counsel for the accused-appellant that the prosecution has failed to establish ingredients of the charges brought against the accused appellant and the learned High Court Judge's attempt to venture

into surmises and conjectures in the place of actual evidence unearthed during the trial has caused miscarriage of Justice against the accused-appellant.

The very reason the accused-appellant is connected to the alleged crime is, his DNA was found in the vaginal swabs recovered from the deceased and for that he has given an explanation making a statement from the dock. He admitted that he had intercourse with the corpus found lying fallen on the bushy ground as he was making his way to harvest pepper seeds early hours of that day. He couldn't notice any sign of living, having conceived sexual desire, has prompted him to engage with sexual intercourse with the corpus. Learned counsel for the appellant says that having an indecent act or rather sexual intercourse with a dead body does not constitute the offence of rape.

On behalf of the accused-appellant it was further submitted that the Learned High Court Judge misdirected herself by failing to properly analyse the dock statement on correct legal and factual context when she made remarks in her judgment. The Trial Judge in fact introduced certain materials that was prejudicial to the accused as they were stated in the dock statement. One most detrimental material introduced was that "the deceased was slightly breathing" which was not stated by the accused-appellant in his dock statement. It was agued on behalf of the appellant that the above introduction clearly demonstrate that the learned High Court Judge ventured into materials to convict the accused-appellant than being reasonable when analysing the evidence.

Apart from that when the prosecution has failed to establish its case beyond reasonable doubt, the Learned High Court Judge rejected the dock statement on the basis, accused has failed to mention of another person being part of the crime if he knew. The rejection of defence version on that ground is not permitted in Law.

In W. M. R. B. Wijeratne and Others Vs. Attorney General 2010 Vol 1 BLR 109, it was held by the full bench of the Supreme court that;

> "the inclusion of reasons in a judgment cater to two distinct situations; Public accountability and need to know. An acceptable judgment must indicate the Judge's absorption of the narrative of events, his evaluation of the evidence with reasons thereon, his application of the law and legal principles."

In Rohan Kithsiri Vs. Attorney General CA 214/2008 decided on 11.02.2014 Sisira de Abrew J held thus, "It is interesting to find out the reason for the rejection of the evidence of the accused-appellant by the learned Trial Judge. When I. P. Liyanage was giving evidence, learned defence counsel suggested to him that I. P. Liyanage used a wire to assault the wife of the accused-appellant. But when accused-appellant was giving evidence, he stated that I. P. Liyanage used an antenna wire to assault his wife. The learned Trial Judge observed the difference between the wire and the antenna wire and proceeded to reject the evidence of the appellant. This was one of the grounds to reject the evidence of the accused-appellant by the learned Trial Judge. The above ground, in our view, is not a ground to reject the evidence of the accused-appellant. Learned Deputy Solicitor General too submits that he is unable to agree with the said ground to reject the accused appellant's evidence.

I will now consider the other ground adduced by the learned Trial Judge to reject the accused-appellant's evidence. When I. P. Liyanage was giving evidence, learned defence counsel suggested to him that he came from the adjoining land but, when accused-appellant was giving evidence, he took up the position that while I. P. Liyanage was questioning him, he (I. P. Liyanage) instructed two officers to go to the adjoining land and they brought a parcel. Therefore, it appears there is a discrepancy between the suggestion and the evidence of the accused-appellant.

This was one of the grounds to reject the accused-appellant's evidence. When we consider the accused appellant's evidence, it appears that he had given consistent evidence on this point. He says that I. P. Liyanage instructed two officers to go to the other land and little later the two officers brought a parcel. He has been subjected to lengthy cross examination. But in our view his evidence has not been shaken by the cross-examination. When I consider the evidence of the accused-appellant, I hold the view that there is no reason to reject the accused-appellant's evidence. Learned Trial Judge without properly evaluating the accused-appellant's evidence rejected his evidence on the above two grounds.

The accused -appellant, in his evidence, admitted that he was a heroin addict. It appears that he had honestly admitted that he had two previous convictions, where he was fined Rs 4000/= (four thousand rupees). Accused-appellant, in his evidence, stated that when he was taken to the Police Narcotic Bureau he was suffering from the withdrawal of heroin and I. P. Liyanage gave him six packets of heroin. It appears that he has honestly admitted all these facts before the learned Trial Judge. When we consider his evidence, we hold that there is no reason to reject the evidence of the accused-appellant. Learned Trial Judge, in our view, was wrong when he rejects the accused appellant's evidence. What is the position if the court believes the evidence of the accused-appellant or is of the opinion that the evidence of the accused appellant creates a reasonable doubt in the prosecution case?

In this connection the Judgment of His Lordship Justice T.S. Fernando in Ariyadasa Vs. Queen 68 NLR 66 is important. It was held in the said judgment thus;

i. If the jury believed the accused's evidence, he is entitled to be acquitted.
ii. Accused is also entitled to be acquitted even if his evidence though not believed, was such that it caused the jury to entertain a reasonable doubt in regard to his guilt.

In line with those judicial decisions, appellant says that the learned Trial Judge misdirected herself when rejecting the dock statement of the accused appellant without legally valid reasons. Therefore, it was argued on behalf of the appellant that the conclusion of the learned high court Judge is bad in law.

While evaluating the defence evidence, the learned counsel for the appellant submitted that the Trial Judge had misdirected himself in attaching a burden to the defence to prove its innocence and to disprove the veracity of the prosecution evidence. The Learned High Court Judge has expected an explanation from the accused appellant in the absence of a case established beyond reasonable doubt with cogent evidence.

In Maileen Archchige Suramya Vs. Attorney General CA 320/2012 decided on 08.05.2015 It was held thus;

> "The function of an appellate court in dealing with a judgment mainly on the facts from court which saw and heard witnesses has been specified as follows by Macdonnel C.J. in the King Vs. Guneratne 14 Ceylon Law Recorder 174; have to apply these tests as they seem to be, which a court of appeal must apply to an appeal coming to it on questions of fact;
>
> i. Was the verdict of the judge unreasonably against the weight of the evidence,
> ii. Was there misdirection either on the law or the evidence?
> iii. Has the court of trial drawn the wrong inferences from the matters in evidence?

Similarly, Wijewardene, J, stated in Martin Fernando V. Inspector of police, Minuwangoda 46 N.L.R.210, that; "An appellate court is not absolved from duty of testing the evidence extrinsically as well as intrinsically" although the decision of a magistrate on questions of fact based on demeanour and credibility of witnesses carries great weight. Where a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt. ".

In Shankerlal Gyarasilal Dixit Vs. State of Maharashtra AIR 1981 Supreme Court 765; it was the view of the Supreme Court of India that 'Since this is a case of circumstantial evidence, it is necessary to find whether the circumstances on which the prosecution relies are established by satisfactory evidence, often described as 'clear and cogent. Secondly, whether the circumstances are of such a nature as to exclude every other hypothesis save the one that the appellant is guilty of the offences of which he is charged. In other words, the circumstances have to be of such a native as to be consistent with the sole hypothesis that the accused is guilty of the crime imputed to him'

It was further observed by the Supreme Court (*Supra*) of India that "Our judgment will raise a legitimate query; If the appellant was not present in his house at the material time, why then did so many people conspire to involve him falsely? The answer to such questions 396 is not always easy to give in criminal cases. Different motives operate on the minds of different persons in the making of unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions. In the instant case. The dead body of a tender girl, raped and throttled, was found in the appellant's house and, instinctively, everyone drew the inference that the appellant must have committed the crime'

This case is based on circumstantial evidence. Deceased was 24 years at the time of the incident. The deceased was last seen alive by her mother in their room around midnight of the day of the incident. She was not on her bed at around 5.15 am and her naked body was recovered from a nearby uninhabited land later that morning. The day before the incident the deceased's brother's homecoming was celebrated at the deceased's house. The deceased had retired to bed at around 8 pm and her mother Chandrakanthi had retired to bed at around 8.30 pm. It appears that the others have gone to sleep at around 10.30pm.

The deceased's brother Danushka and his bride have slept in another room and Chandrakanthi's sister and Yohan's wife have slept in the third room. Chandrakanthi's son Yohan and her elder son's friend Somaratne have slept on mats in the sitting room. The deceased's mother had woken up the deceased who was sleeping in her room to apply siddhalepa on Chandrakanthis's leg between 12 am - 1 am and both have thereafter gone out of the house to use the external toilet and returned to sleep in the same room. It is the deceased who had locked the kitchen door (soibey lock) behind them. They have switched on the kitchen light to go to the toilet and switched off upon their return inside the house.

According to Danushka he had woken up at 2.59 am hearing a sound but had fallen asleep. He had however woken up less than an hours' time later and had returned to bed having answered a call of nature. He had not noticed anything at this point either outside or inside the house. Chandrakanthi had woken up to prepare their meals between 5 am - 6 am and witnessed that her daughter is not on bed. She had alerted the others and searched for her but to no avail. Later it had been observed that there was blood on her pillow.

Yohan had made a 119 complaint to the police. Danushka had made a complaint to the police and arrived at the scene with the police. About 45 minutes after police arrived a neighbour had found the body in an uninhabited land adjoining the deceased's land. After the body was recovered officers of the SOCO, Registrar of Finger Print (RFP), police kennel division & police dog had arrived at the scene by 9.45 am. The Magistrate and the JMO had also arrived soon. The SOCO officer had collected samples on the day of the incident and sent the sealed parcels to Genetic without delay.

The JMO had taken high medium and low swabs from the deceased's vagina and referred same for DNA analysis on 03.07.2014. The prosecution had led evidence of the chain of these samples and marked the DNA receipts (Genetic) as productions. It is important to note that the defence had not challenged the DNA evidence or the manner in which the samples were collected or otherwise. Subsequent to referring samples to Genetic, police have arrested several suspects and sent their samples for DNA comparison. However, their samples have not matched the DNA of samples taken from the scene and the deceased's body on the day of the incident.

The CID has recorded statements of several suspects including that of the Appellant after the incident. At the time of taking this statement the Appellant was not a suspect of the case and it was 6 months thereafter that he was arrested. In his statement the appellant had stated that he was working in a mine in Elahera during the time of the incident.

According to CID officer Polwatta who gave evidence before the High Court, the CID has recorded a statement of the mine owner. According to him the mine owner had stated that the Appellant did not work for him after April 2016. In November 2016 the Appellant was arrested and his blood sample was extracted at Genetic. The DNA found in the middle and low vaginal swabs were identified as a 100% match with the DNA of the Appellant. No other DNA of a male was found in her vaginal swabs. According to the DMO the fatal injury was on the head. Where a heavy hammer had been used to attack her while she was sleeping on the bed. This injury had caused a fracture of the skull bone as well as bleeding in her brain. A

contra coup injury had been caused on the brain due to the injury that caused the fracture of the skull.

This could cause immediate loss of consciousness and also result in bleeding from her ear that could have resulted in the blood stains on her pillow and bed sheet. This injury could cause death in the ordinary course of nature within 5-6 hours of sustaining the injury. According to the JMO the deceased had been dragged to the place where the body was recovered. There were abrasions and contusions on the neck but death was not due to constriction of the neck. These injuries could have been caused when the deceased was dragged with the grip on her rear collar of her blouse. The resulting pressure on her neck could have caused these injuries. The deceased had bled from her vagina and she had a ruptured hymen. Blood and other fluids were found on the leaves that were underneath her body close to the vaginal area.

Chandrakanthi, Danushka, Anura (tent contractor), JMO, DNA expert, DNA sample taker, two police officers, two CID officers gave evidence on behalf of the prosecution. The deceased's body was found in the nearby land where an unoccupied house was situated about 200 feet away from her house. She was found completely naked and her three-quarter trouser and blouse she wore when she went to sleep were found near her body. The kulugediya (sledgehammer) used to put up the tent for the home coming was left leaning against the left side wall of the deceased's house by the contractor Anura. However, this was recovered 100 feet away at the root of a coconut tree.

The coconut tree near which the kulugediya was seen was shown by the Appellant to the police 6 months after the incident after the Appellant was arrested. By this time the Kulugediya was not at the coconut tree as it had been handed over to Anura. However, the photographs taken by SOCO officers confirm that it was found at the root of this coconut tree at the initial investigation stage. A mobile phone belonging to Yohan's wife was found near the kulugediya.

It is urged by the learned counsel for the respondent that the DNA report and the other material referred to above and the necessary inferences of such material leads to the strong and unshakeable inference that it is the Appellant but none other who entered the house of the deceased, inflicted injuries that caused her death and also raped her.

The prosecution had proved its case beyond reasonable doubt and made the Appellant liable to answer the allegation and the items of evidence which militates against his innocence in terms of the Ellenborough Dictum and the principals laid down in the judgment of AG V Ajith Samarakoon (Kobeigane avurudu kumari case)

The Appellant had admitted the act of sexual intercourse on the body which was lying deserted and naked on the ground when he went to pluck pepper in the night. The appellant had not in his dock statement or in cross examination of prosecution witnesses challenged the DNA report or the evidence of the DNA specialist. The inference of the appellant's dock statement is that the Appellant had denied the indictment on trespass and murder. He is additionally denying the charge of rape as his contention is that he had a physical relationship with a corpse or had intercourse at a time when the adult deceased was not in a position to express or refuse consent.

The defence had suggested to the CID officer during cross examination that the police mercilessly assaulted the appellant, broke his teeth and took his statement by force. The police witness had answered this question in the negative and stated that the appellant was produced before the JMO before he was remanded. This position had not been challenged by the defence and no evidence had been tendered to prove the allegation of assault.

The appellant had failed to deny, comment or explain the lie that the prosecution alleged he had uttered in taking up an alibi. The position taken up in the dock statement had not been put to the prosecution witnesses in cross examination. The evidence of the prosecution witnesses had not been challenged and or discredited by the defence during the cross examination. This failure amounts to the acceptance of the truth of the prosecution witnesses' version.

For the aforesaid reasons it is my view that the appellant had failed to create a doubt in the prosecution case. The prosecution has proved its case beyond reasonable doubt.

For all these reasons the conviction of the appellant is affirmed. Having regard to the facts and legal principles involved in the present matter in question, this appeal has failed to hold any merit. Thus, the conviction and the sentence dated 11.08.2016 should stand and therefore is affirmed.

Appeal dismissed.

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

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal