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

In the matter of an Application made in terms of Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA No: CA/HCC/ 0080/2017
HC: Gampaha: HC 64/2009

The Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

1. Mallikarachchilage Upatissa
2. Welivita Liyanage Don Mahesh Lasantha Perera

Accused

And now between

Welivita Liyanage Don Mahesh Lasantha Perera

Accused- Appellant

Vs.

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

Complainant-Respondent

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

&

R. Gurusinghe J.

Counsel: Seevali Amitirigala, PC with Pathum Wijepala instructed by Hemanthi Kumudu, AAL for the 2nd Accused-Appellant

Suharshi Herath, DSG for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 21.11.2017 & 11.01.2021 & 15.12.2022

By the Complainant-Respondent 26.03.2018 & 28.12.2022

Argued on : 12.10.2022

Decided on : **23.01.2023.**

N. Bandula Karunarathna J.

The 2nd accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Gampaha with the 1st accused person and 2 others who are dead by now for attempted murder, gang rape and causing the death of 5 persons in the same family, on or about 19.05.2007 at Mahawatta, Delgoda, within the jurisdiction of Gampaha High Court for an offence punishable under section 296, 364 (2) (ඡ) and 300 of the Penal Code.

Altogether, there were 8 charges in the indictment. At the time the indictment was served before the High Court of Gampaha, the two accused persons namely Mallikaarachchilage Upatissa and Welivita Liyanage Don Mahesh Lasantha Perera were alive. Both of them were charged under section 32 for the murders of Thilakarathna (farther of PW 1), Ramyalatha (mother of PW 1), Dilshan Maduwantha (brother of PW 1), Sajintha Lakshan (brother of PW 1) and Prabavathee (grandmother of PW 1).

The trial against the appellant commenced before the High Court Judge of Gampaha without a jury on 29.08.2011, and at the conclusion of the said trial, the learned High Court Judge had convicted the 2nd accused-appellant and sentenced him to death. Being dissatisfied with the said conviction and sentence, the 2nd accused-appellant had preferred this appeal to the Court of Appeal seeking to set aside the conviction and sentence imposed upon him. The 1st accused person was acquitted and discharged from all counts in the indictment.

The appellant had been indicted on the legal principle of 'common intention' under section 32 of the Penal Code which it is worded as follows;

> 'When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone'

The 7th count has been preferred on the basis of `gang rape.' Thus, unlike prior to the year 1995, consequent to the amendment 22 of 1995 coming into force, an accused who becomes liable under section 364(2) for gang rape, faces a heavy sentence even if he had not performed the principle act but had only abetted one or more of the perpetrators.

Prosecution led direct evidence through Dinusha Madhurangi (PW 1) the subject of counts 6, 7 & 8. Other direct and circumstantial evidence too were placed by the prosecution to prove their case. Upon the conclusion of the case for the prosecution, the defence was called. The appellant gave evidence subject to cross examination and called other witnesses as well. At the conclusion of a trial, a trial Judge is able to consider direct and circumstantial evidence that had been placed before him. The learned trial Judge is also legally permitted to draw inferences based on such evidence as justice may demand. In the instant case, the trial Judge had the opportunity to consider all these evidence.

According to the direct evidence placed by the prosecution, on 19.5.2007 witness Madhurangi (PW 1) had been asleep at home with her parents, siblings and the grandmother when the incident happened. The appellant and the 1st accused had dragged her into the sitting room where she had been attacked with a 'manna knife' on her head. She had been conscious when her clothes were removed by them. But thereafter she had fallen unconscious. The prosecutrix had received treatment at the General Hospital in Colombo for 8 long months.

The learned counsel for the prosecution submits that she had taken part in two identification parades and was able to identify the appellant.

The injury caused to her head by the appellant had resulted in her getting headaches and her being compelled to use the left hand to write letters. The Incident had happened in the night. All the inmates had been attacked. It was only after the witness Jayalath Arachchige Janaka Srimal came to the house of the victim on the following morning that the incident had come into light. He immediately took witness Madhurangi who was still alive, to the hospital.

Prosecution evidence also revealed that the accused persons, Amaradasa and Upasena (deceased accused persons) had not been in good terms with the parents of Madhurangi over a land dispute. Police had recovered three cutting weapons in the course of the investigation and the opinion of the medical experts had been that certain injuries observed on the corpses could have been inflicted with these recovered weapons. Witness Madhurangi (PW 1) has had 3 cut injuries on her head. There had been 4 lacerations at 1st, 4th 6th and 9th positions in her hymen. One such injury had penetrated into her rectum. The swabs taken had confirmed it to be having sperms in it.

It is important to note that the trial Judge admitted the evidence of the prosecutrix to be credible. The accused-appellant in his evidence took up an *alibi* and informed court that he was at his home that fateful night and it was only in the morning that he also came to the place of the incident along with the other villagers.

In this case, the only survivor from this incident that gave evidence was Dinusha Madurangi (PW 1). In her evidence, she states that she had gone to sleep and then she had heard that there was a noise as if pots and pans were being broken. Then, after seeing her mother going to the kitchen and that she had fallen asleep again.

Page 112 of the appeal brief is as follows;

ප්‍ර : දිනූෂා කීවා වළං පෙරළෙන සද්දයක් ඇසුනා. අම්ම සද්දය බලන්න ගිය බව කීවා.

උ : ඔව්.

ප්‍ර : ඊට පස්සෙ අම්මා අයේ කාමරයට ආවද?

උ : කුස්සිය පේනවා කාමරයට. ලයිට් දැම්මාම අපේ කාමරය පේනවා කුස්සියට. කුස්සියේ ලයිට් දැම්මා. එමපණයි මතක. මට නින්ද ගියා.

ප්‍ර : දිනූෂට ඒ වෙලාවේ ආයේ නින්ද ගියාට පස්සේ ආයේ ඇහැරුණාද කොයි අවස්ථාවක හෝ?

උ : ඇහැරුණා.

ප්‍ර : ආයේ ඇහැරුනේ කොහොමද?

උ : කවුදෝ දෙදෙනෙක් මාව ඇදගෙන ගියා සාලයට. එතකොට මට ඇහැරුණා.

ප්‍ර : සාලයට ඇදගෙන ගියේ කොහොමද? උස්සාගෙනද?

උ : එහෙම මතකයක් නැහැ.

This witness does not state if she saw what happened to the other members of the family but later at the hospital, she came to know that they had died. Apart from this evidence, she did not state that she saw the killing of any member of her family nor did she state that any

identified person killed any member of the family. In the wake of this situation, it must be stated that the only surviving person from this incident has failed to give neither direct nor indirect evidence as to how the murders of the five members of her family took place.

Thereafter, Jayalath Arachcchige Janaka Srimal (PW 2) also gave evidence. In his evidence, he clearly stated that he is not a person who saw the incident. This witness did not give any evidence relating to the murder of the five members of the family.

Page 183 of the appeal brief is as follows;

ප්‍ර : තමන් ඒ සිද්ධිය සම්බන්ධයෙන් කිසිම දෙයක් දන්න පුද්ගලයෙක් නොවෙයි?

උ : සිද්ධිය දැක්කේ නැහැ.

The next witness who gave evidence was Solanga Arachchige Don Ranjan Rohitha (PW 4). He too gave evidence stating that he did not see how the five members of the same family was killed. The learned President's Counsel who appeared on behalf of the appellant argued that there was no evidence available to convict the 2nd accused-appellant of the murders under indictment Nos. 1 to 5. The conviction would entirely depend on the eye-witnesses evidence. Such evidence could be direct evidence or circumstantial evidence. In the event it is circumstantial evidence, such evidence must collectively, together displace the presumption of innocence of the accused.

Page 226 of the appeal brief is as follows;

ප්‍ර : තමන් අද සාක්ෂි දෙන්න ආවේ පංච පුද්ගල මනුෂ්‍ය ඝාතනය සම්බන්ධයෙන්. එය කොහොමද සිදු උනේ කියල මොනවා හරි දැක්කද?

උ : මම දැක්කේ නැහැ.

ප්‍ර : එම සිද්ධිය සම්බන්ධයෙන් කිසිම දැනීමක් තමන්ට නැහැ නේද?

උ : නැහැ.

The next witness was Karunaratne Weerakoon Mudalige Wimalaratne (PW 3). When he gave evidence, he too stated that he does not know how this incident occurred or the time it happened.

Page 252 of the appeal brief is as follows;

ප්‍ර : ඊට පස්සේ තමා පොලීසියට කටඋත්තරයක් දුන්නාද මේ සිද්ධිය සම්බන්ඳව?

උ : ඔව්.

ප්‍ර : මෙම සිද්ධිය උනේ කීයටද, කොහොමද ඒ කිසිම දෙයක් කියන්න තමා දන්නේ නැහැ නේද?

උ : නැහැ.

The next witness who gave evidence was Pedige Sampath (PW 8). He too stated that he does not know how this incident happened.

Page 268 of the appeal brief is as follows;

ප්‍ර : ඒ හැරුනු කොට මේ සිද්ධියක් ගැන තමන් කිසිම දෙයක් දන්නේ නැහැ නේද?

උ : නැහැ.

ප්‍ර : අඩුම තරමින් වෙච්ච දෙයක් ගැන තමන් දන්නේ නැත්ද?

උ : නැහැ.

ප්‍ර : දැන් තමන්ගෙන් රජයේ උගත් නීතීඥ තුමිය ඇහුවා නේද, මෙම විත්ති කූඩුවේ සිටින විත්තිකරුවන් තමා හඳුනනවා නේද කියල?

උ : ඔව්.

ප්‍ර : ඒ විත්තිකරුවන් තමා හඳුනන්නේ කොහොමද කියල කියන්න.

උ : නෑදෑයො වෙනවා දෙන්නම.

ප්‍ර : ඒ නිසා හඳුනනවාද?

උ : ඔව්.

The above were unofficial witnesses and none of them were eyewitnesses to the murder of the five members of the same family. There was no direct or circumstantial evidence, which rebutted the presumption of innocence of the accused-appellant. When I consider the evidence of the police there was no recovery made from the accused-appellant, which links the accused-appellant to the murder of the said five members of the same family.

It is important to note that when the learned Deputy Solicitor General concluded the submissions the following points were stated.

(i) The judgment of the learned High Court Judge was sought to be affirmed.

(ii) The appeal be dismissed.

(iii) There was no cross appeal that was filed against the acquittal of the 1st accused by the Attorney General.

(iv) The Attorney General, accepts that the acquittal of the 1st accused was correct in law and fact.

The pivotal issue that needs to be resolved, arises due to the following determination in the judgment of the learned High Court Judge.

Page 959 of the appeal brief is as follows;

Paragraph 157 “පළවන චූදිතව, අධිකරණයේදී දිණුෂා මධුරංගි දැරිය විසින් අපරාධය සිදුකල අයෙක් බවට හඳුනාගෙන තිබුනද, හඳුනාගැනීමේ පෙරෙට්ටුවේදී පළවන චූදිත හඳුනාගැනීමට අපොහෝසත් වීම මත පළවන චූදිත ඔහුට විරුද්ධව ඇති චෝදනාවන්ට වරදකරු කිරීම අවදානම් සහගත බව පෙනී යයි.

එසේම පළවන චූදිතට විරුද්ධව වෙනත් සාක්ෂි ඉදිරිපත් වී නැත. ඒ අනුව පළවන විත්තිකරුට විරුද්ධව ඇති චෝදනා පැමිණිල්ල සාධාරණ සැකයෙන් තොරව ඔප්පුකර නොමැති බැවින් පළවන චූදිතව, 1, 2, 3, 4, 5, 6 සහ 8 දක්වා වූ අධිචෝදනාවලින් නිදොස්කොට නිදහස් කරමි.”

According to the reasoning of the learned High Court Judge the following facts can be deduced;

(i) According to the evidence of the victim, the 2nd accused had been identified.

(ii) However, at the Identification Parade the said victim had, not identified the 1st accused.

(iii) There was no evidence apart from the identification against the 1st accused person.

(iv) Taking the above facts and the law into consideration it was decided by the learned trial Judge that charges 1, 2, 3, 4, 5, 6 and 8 have not been proved beyond reasonable doubt against the 1st accused person. Therefore the 1st accused person had been acquitted.

It is important to note that in the decision of acquitting the 1st accused person, the fact that he had not been identified at the Identification Parade was the criteria and the reasoning. Both the 1st and the 2nd accused-appellants were accused of the same charges. The 2nd accused-appellant was identified at the parade. Both accused were identified by the victim when she was giving evidence in court. The conviction of the 2nd accused-appellant was because he was identified at the identification parade. The acquittal of the 1st accused person was the non-identification of him at the parade.

It is the contention of the learned counsel for the 2nd accused-appellant that the identification of the 2nd accused-appellant was based on contaminated evidence. When the 1st witness gave evidence in the High Court, both accused persons were identified. The 1st witness in her evidence stated that she had known the two witnesses as being people living close by and in fact one had come to meet her grandmother long time ago. If the child had seen these men before the incident and also if she knew who they were why was an identification parade held. The purpose of an identification parade is to identify an offender when the victim states that she does not know the offender but states that if she sees him again, she can identify such person.

Identification parades are not held to identify an offender who is known to the victim. If the person is living in the same village and even had visited the victim's house previously, there was no point of having and identification parade.

When the Magistrate who conducted the identification parade was called to give evidence it was stated in the evidence that the 2nd accused-appellant had stated that the child lives close by and the child had seen the accused morning and noon.

Page 291 of the appeal brief is as follows;

> "එම දරුවා මාගේ බිරිඳගේ පැත්තෙන් ඥාතීන් වෙනවා. අපි සිටින්නේ වෙලෙන් එගොඩ. ඔවුන් සිටින්නේ වෙලෙන් මෙගොඩ. උදේ සවස අපි මේ දරුවන්නව දකිනවා."

If the witness PW 1 knew the 2nd accused-appellant and identified him that would not establish the identity of the 2nd accused-appellant by independent evidence.

In the case of Queen vs. Sivanatam 68 NLR 350 it was held that "it is a suspicious circumstance if a witness is shown a photograph before he attends an identification parade."

The case above states that showing a photograph is suspicious prior to the identification parade. Then how suspicious it is when PW 1 had seen the 2nd accused-appellant morning and noon?

The process of identification of a person who is known to a witness by name or otherwise is described as “recognition” as opposed to “identification”. Situations of “recognition” are considered more satisfactory than instances of identification. However, even in situations of “recognition” the court should analyse the evidence of the witness who claims that the accused is a known person and examine whether the evidence is satisfactory to bring home a conviction.

In K. Don Anton Gratien vs The Attorney-General, C.A 226/2007 decided on 01.07.2010, the Court of Appeal analysed the evidence of the sole eye witness who claimed that he knew the accused, and arrived at the conclusion that the evidence was unsatisfactory. Therefore, the court held that the evidence is not sufficient to establish the identity of the appellant to the required standard namely, beyond reasonable doubt.

To establish the identity of an accused, it is not mandatory the witness should have known him by his name or otherwise, prior to the incident. Even in a situation where a witness had seen a person at an incident for the first time, his evidence in court identifying the accused in the dock as the person whom he saw at the incident should not be rejected merely because the witness had neither seen him before nor had known his name prior to the incident. A ‘dock identification’ is a valid form of identification. However, time and again courts have been mindful of the danger in convicting an accused solely based on a ‘dock identification’.

At page 256 in Volume 1 “The Law of Evidence” by E.R.S.R. Coomaraswamy, in the context of “dock identification”, it is observed as follows;

> “This practice is undesirable and unsafe and should be avoided, if possible”.

Court of Appeal in Munirathne & Others vs The State, 2001 (2) SLR 382 observed the undesirability of conviction based on dock identification.

In K.M.Premachandra & others vs The Attorney-General, C.A. 39-41/97, decided on 13.10.1996, set aside the conviction of one accused whose conviction was based on a dock identification was set aside.

In Roshan vs The Attorney-General, 2011 (1) SLR 364 at 377, it was held;

> “ .. in the backdrop of an acknowledged disparity in the complexion and appearance of the accused at the trial stage, the assailant being a total stranger to the complainant who had a mere 04-hour visual contact with the assailant, the evidence of subsequent dock identification several years later would not eliminate the generation of a reasonable and justifiable doubt as to the veracity and genuineness of the identification, unless there are other supervening and compelling reasons to justify”.

It was held thus in Attorney General vs. Joseph Aloysius and Others 1992 (2) SLR 264. "The witness should not see or be reminded of any photograph or description of the suspect or be given any other indication of his identity"

Section 9 of the Evidence Ordinance recognizes the relevancy of “facts necessary to explain or introduce relevant facts”. Said section provides *inter alia* that, facts which establish the identity of any person whose identity is relevant, as a “relevant fact”.

Facts leading to assess the quality of evidence of visual identification are important facts a court needs to take into account in deciding on the identity of an accused. What matters is the quality of the evidence. In such situations the evidence of the witness should demonstrate that there was sufficient opportunity for the witness to have seen the person concerned at the time of the incident and thereafter had the ability to identify the person concerned during his testimony in court.

Page 114 of the appeal brief is as follows;

ප්‍ර : එතන දෙදෙනෙක් සිටි බව දැක්කකා ක්විවා නේද?

උ : ඔව්.

ප්‍ර : දෙදෙනෙක් දැක්කේ කොහොමද?

උ : ටෝච් එකක් පත්තුකරගෙන ආවා. එම නිසා දගලනවිට ටෝච් එක එහාට මෙහාට උනා. එම නිසා දැක්කා.

ප්‍ර : දිනූෂා කිව්වා ඉස්සල්ලා අවස්ථාවේදී ඇහැරුණාම අම්මා කුස්සියේ ලයිට් දැන්මා කියලා. තවත් වෙන කොහේ හෝ ලයිට් පත්තුවෙමින් තිබුණාද?

උ : එළියේ ලයිට් එකක තිබුණා. එය පෙනෙන්නේ නැහැ කාමරයට.

.....

.....

ප්‍ර : ටෝච් එකක තිබුණා කියල කිව්වා නේද?

උ : ඔව්.

ප්‍ර : එම එළිය එහාට මෙහාට වැනෙන විට දෙදෙනෙක් ඉන්නවා දැක්කා කිව්වා නේද?

උ : ඔව්.

ප්‍ර : එම එළියෙන් කවුද කියල හඳුනාගන්න පුළුවන් උනාද?

උ : ඔව්.

ප්‍ර : කවුරු කියලද හඳුනාගත්තේ?

උ : ලසන්ත සහ උපතිස්ස.

ප්‍ර : ලසන්ත සහ උපතිස්ස කියන තැනැත්තන් මීට කලින් දිනූෂා දන්න තැනැත්තන්ද?

උ : ඔව්. අපේ ගමේ අය.

ප්‍ර : ලසන්ත කියන තැනැත්තා තමන්ගේ ගමේ පදිංචි තැනැත්තෙක්ද?

උ : ඔව්.

ප්‍ර : කොහේද පදිංචිවෙලා සිටියේ කියල දන්නවද?

උ : නැන්දලාගේ ගෙදරට උඩ ගෙදර.

ප්‍ර : නැන්දගෙ ගෙවල් තිබෙන්නේ කොහේද?

උ : අපේ ගෙදරින් ටිකක් යන්න ඕනෑ. වෙල හම්බවෙනවා. ඒ ටිකදුර ගියාම නැන්දලාගේ ගෙදර.

ප්‍ර : නැන්දගෙ ගෙදරට උඩහින් ලඝන්ත පදිංචිවෙලා සිටියාද?

උ : ඔව්.

ප්‍ර : ලඝන්ත කියන තැනැත්තා සමග මීට කලින් දිනූෂා කතාබහ කරලා තියනවාද?

උ : නැහැ.

In the case of Abeysekara vs. Attorney General 1981 (1) SLR 376 it was held "identification parades are held to enable persons to identify suspects who had not been known to them earlier"

Thus, when the 2nd accused-appellant had the same evidence as the first and for him to be convicted merely because he is identified at the parade is unfair and erroneous in law.

The learned President's Counsel for the appellant argued that the identification of the 2nd accused-appellant at the identification parade has been upon contaminated evidence. He further says that the learned High Court Judge had proceeded upon an erroneous basis of identification and therefore the 2nd accused-appellant needs to be acquitted as well.

There is a contamination of evidence in the following situation as well when PW 1 was spoken to by the nursing sister at the hospital before the 'identification Parade. The said nursing sister had told PW 1 that when she would go to the identification Parade the people who harmed her would be there to be identified.

Page 143 of the appeal brief is as follows;

ප්‍ර : හඳුනාගැනීමේ පෙරට්ටුව කියන්නේ මොකද්ද කියා ඉස්පිරිතාලේ සිස්ටර්ද කියා දුන්නේ?

උ : ඔව්. ඔයාට කරදර කල අය ගැන හඳුනා ගන්න, ඒ දෙන්නා ඉන්නවා කිවුවා.

In the judgment, the learned High Court Judge goes on to state that even though the nursing sister spoke about the parade, there were no photographs of the accused person and he was not being shown.

Page 953 of the appeal brief is as follows;

> සිද්ධියට පසුව පෙරට්ටුව පැවැත්වීමට පෙර මෙම චිත්තිකරුවන්ව හෝ අඩුම වශයෙන් ඔවුන්ගේ ඡායාරූප හෝ දැරියට පෙන්වා දුන් බවට හෝ කිසිදු සාක්ෂියක් හෝ චිත්තියෙන් යෝජනාවක් හෝ ඉදිරිපත් වී නැත.

From the above the learned High Court Judge admits indirectly that the accused-appellant or his photograph should not be shown to the victim. If the 2nd accused-appellant was known by the victim and if he had been seen by her frequently, then immediately after the incident

when PW 1 was subject to a medical examination, she should have informed the hospital police or the doctor about the 2nd accused-appellant. In the medico-legal report (MLR) which was filed in this case as P 10, it is clearly stated in its short history that PW 1 states that she was assaulted by unknown persons. This also creates a doubt in the following issues.

If she knew the 1st and the 2nd accused persons as villagers, she could have stated that they assaulted her at the time when she was examined by the doctor. The identification of the accused at the parade and also the non- identification of them by the victim in the MLR tantamount to a serious doubt in the identification of the person who caused this diabolic crime on the victim in the first place.

It is my considered view that if the 2nd accused-appellant was convicted because he was identified, by PW 1 the said identification is not according to law. Thus, the 2nd accused-appellant should be acquitted on this ground alone.

The evidence against the 1st and the 2nd accused persons are the same. The only difference is that the 2nd accused-appellant was identified at the identification parade. However, the 2nd accused-appellant was known and seen by the victim noon and night as a person who lived in the same area where the victim and her family was residing. In this situation the identity of the 2nd accused-appellant by the identification parade is not according to law to make that the sole criterion to convict the 2nd accused-appellant.

It was held in the case, Alim vs. Weerasinghe 38 CLW 95 that;

> "where the same facts are capable of an inference in favour of the accused and also of an inference against him, the inference consistent with his innocence should be preferred."

Learned President's Counsel for the accused-appellant further argued that based on this principle, one could for argument's sake state, that the 2nd accused-appellant was identified by the victim at the Identification Parade because he really attacked the victim. On the other hand, one could also state that the said victim identified the 2nd accused-appellant due to the fact that he was known to the said victim for many years prior to the conducting of the parade as a person who lived in the same village, close to her home.

Thus, above are two interpretations, one which is against the 2nd accused-appellant and one in favour of the 2nd accused-appellant. Therefore, arising, of these two interpretations creates a doubt in the prosecution case. The benefit of doubt must go to the 2nd accused-appellant. It is very clear in terms of the case Alim vs. Weerasinghe 38 CLW 95, the interpretation that is consistent with the innocence of the accused must be considered over the interpretation, which is inconsistent with the innocence and should be disregarded.

When considering the evidence in regard to the rape charge, the prosecution witness PW 1 stated that her skirt was dragged but did not know what happened as she lost consciousness after that.

Page 119 of the appeal brief is as follows.

ප්‍ර : බොත්තම් තිබුනද නැද්ද මතකයක් තියෙනවද?

උ : මතක නැහැ.

ප්‍ර : කවුද ගැලෙව්වේ? එක් අයෙක්ද දෙදෙනාමද?

උ : එහෙම දන්නේ නැහැ. මන්නෙන් කෙටුවට පස්සේ මම දන්නේ නැහැ.

ප්‍ර : කෙටුවට පස්සේ තමයි ඇඳුම් ගැලවූ බව කීවේ.

උ : ඔව්.

ප්‍ර : සම්පූර්ණ වශයෙන් ගැලෙව්වාද නැත්ද කියා කියන්න පුළුවන්ද?

උ : සාය ගැලවූවා. බ්ලව්ස් එක මතක නැහැ.

ප්‍ර : ඊට පස්සේ මොකද උනේ කියලා කියන්න පුළුවන්ද?

උ : මට සිහිය නැතිවුන නිසා මම දන්නේ නැහැ.

It is very clear that the prosecution witness PW 1 did not see who had sexual intercourse with her. Learned President's Counsel for the appellant says that the best evidence without any doubt to ascertain if the 2nd accused-appellant raped her or not, was the medical evidence that existed. Upon the examination of the doctor's evidence, it was disclosed that there were sperms in the genital track of the PW 1.

Page 462 of the appeal brief is as follows;

> ඊට අමතරව මා ලබාගත් සාම්පල අනුසාරයෙන් ලිංගික පිරිමි අයෙකුගේ ශ්‍රාවයන් ඇතුලට ඇතුල් වී ඇත්දැයි කරන ලද පරීක්ෂණය සිදු කර තිබෙනවා. එය Seminal Acid Phospatate ලෙස නම් කර තිබෙන අතර එය positive බව සඳහන් වෙනවා. එලෙසම යෝනි මාර්ගයෙන් ලබාගත් සාම්පල්වල පිරිමි අයගේ ශුක්‍ර ධාතු ඇතැයි නිගමනයකට එළඹ තිබෙනවා.

The doctor states that the sperm was found after an examination that was done less than one day of the incident.

Page 472 of the appeal brief is as follows;

ප්‍ර : මේ දැරියට 2007.05.19 දින යම් ලිංගික ප්‍රවේශයක් සිදුව තිබුණා නම්, පුරුෂ ලිංගයක් ඇතුල් කර තිබුණා නම්, ඇයගේ යෝනි මාර්ගයට එසේ නම් එම කාල සීමාව ගැලපෙනවාද ඔබ පරීක්ෂා කළ තත්වයට.

උ : දිනකට අඩු කාලයක් වගේ කාලයකදී මෙම සළකුණු නිරීක්ෂණය කර තියෙනවා.

ප්‍ර : ඔබ කිව්වා ඔබ අන්තිමට පරීක්ෂා කළේ මැයි 19 වෙනිදා කියලා.

උ : ඔව්. එදින උදේ 8.15 ට පමණ.

ප්‍ර : ඔබ ඔබේ අධිකරණ වාර්තාවේ දක්වා තිබෙනවා ආසන්න කාල සීමාවක් තුළදී සිදු වූ ලිංගික පුවේශයක් ඔබට නිරීක්ෂනය වූ බව.

උ : එහෙමයි.

ප්‍ර : වෛද්‍ය විද්‍යාවේ ආසන්න කියන වචනය පාවිච්චි කරන්නේ කොපමන කාළයකටද?

උ : දිනකට අඩු කාලයක්, පැය 24 අඩු කාලයක්.

It was the evidence of the doctor that sperms could be detected after 2 days of the sexual intercourse. According to the doctor, sperms were obtained to swabs.

Page 499 of the appeal brief is as follows;

ප්‍ර : Vaginal swabs ගෙන තිබෙන්නේ මොන අවස්ථාවේදීද?

උ : වෛද්‍ය විද්‍යාවේ ලබා ගන්නා ආකාරයක් තිබෙනවා. පුළුන් කොටසකට කුඩා ලී ආධාරකයක් උපකාරයෙන් ගන්නා Vaginal swabs එකතු කරගන්නා ක්‍රම වේදයක් තිබෙනවා. එම ක්‍රමවේදය අනුගමනය කරමින් ලබාගෙන තිබෙනවා ස්වාමීණි.

If sperms were present in the genital track of PW 1, why was it not submitted for a D.N.A test? This incident had occurred on 19.05.2007 and by then the D.N.A. technology was used in criminal investigations.

In Attorney General vs Pottar Nauffer 2007 (2) SLR 144, it is clear that the D.N.A. technology was used at that time. If the D.N.A. test was done, it would have proved who committed the rape on the victim. Had they done the said D.N.A test, they could have elicited the evidence of such test through a witness who was summoned by the prosecution. The Government Analyst who gave evidence was a specialist on giving evidence of the presence of sperms in rape cases.

Page 616 of the appeal brief is as follows;

ප්‍ර : 1992 වර්ෂයේ සිට ඔබ මේ දක්වා රස පරීක්ෂක කාර්යාලයේ එකම අංශයට අනියුක්තව නේද රාජකාරී කරන්නේ?

උ : එසේය

ප්‍ර : කුමන අංශයේද?

උ : මාස්තු විද්‍යාත්මක අංශයේ. ස්ත්‍රී දූෂණ හා මිනී මැරුම්වල ශරීර ලේ සහ ශුක්‍රධාතු සම්බන්ධයෙන් පරීක්ෂණ කටයුතු.

In terms of section 5 of the Evidence Ordinance, "a fact is said not to be proved when it is neither proved nor disproved". By not tendering the sperms for a D.N.A. test it is not proved that the sperms that existed in the victim's genital track was that of the 2nd accused-appellant. This fact could have been proved if the sperms that were observed by the doctor to be in the genital track of the witness PW 1 was subject to D.N.A. test in order to establish with proof if the sperms were that of the 2nd accused-appellant or not.

At the moment what exists is only a mere suspicious circumstance that the sperms are that of the 2nd accused-appellant. While this suspicion existed, the learned High Court Judge convicted the 2nd accused-appellant for the rape of the witness PW 1. This conviction is erroneous and illegal as it was not proved beyond reasonable doubt the guilt of the 2nd accused-appellant. The learned President's Counsel submits that, on these facts and the law, that this appeal be allowed and the accused be acquitted from common intention.

When a person is convicted for murder on the basis of common intention it is necessary to prove that the murderous intention was shared before a person can be convicted on the application of section 32 of the Penal Code. In this case what is the evidence of a murderous intention in the first place? Secondly, if there was one, was it shared? The only evidence of the witness PW 1 is that the 2nd accused appellant attacked her with a 'manna.' This was stated in the evidence at the trial.

Further, it was revealed from the child's evidence that in the short history in the medico-legal report. It is very clear that she had told an unknown person assaulted her. This is the only

evidence that is there against the 2nd accused-appellant. There was no evidence that there was any animosity with the witness PW 1 and her family. The wife of the 2nd accused-appellant was a party to a partition action to which the witness PW 1's family, was also a party. In this case, there was no murderous intention in the first place, established in evidence and since there was no murderous intention, especially because it was certainly cannot be established that it was shared under section 32 of the Penal Code.

Another argument raised by the learned President's Counsel for the appellant was that his alibi was not considered by the learned Trial Judge. In this case the 2nd accused-appellant, gave evidence and his wife had given evidence establishing his alibi. There was neither contradictions nor omissions in the evidence of the 2nd accused-appellant. However, the learned Trial Judge had concluded that since the evidence of the prosecution witness PW 1 had been given without any challenge, the evidence of the accused as to the fact that they were in their houses are untrue.

Page 955 of the appeal brief is as follows;

> "පැමිණිල්ලේ සාක්ෂිකාර දැරිය අභියෝගයකින් තොරව දෙන ලද සාක්ෂි සැලකිල්ලට ගැනීමේ දී මෙම චූදිතයින් එදින රාත්‍රී සිය නිවෙස්වලම රැඳී සිටි බවට 1 හා 2 විත්තිකරුවන් දෙන ලද සාක්ෂි සත්‍යයෙන් තොර බව පෙනී යයි."

It is important to note that the evidence of the 2nd accused-appellant was also unchallenged. In such a situation, to decide that the evidence of the appellant is untrue and thereby his alibi should be rejected, is illegal and erroneous. Learned President's Counsel for the appellant questioned as to what was the untruth in the evidence of the appellant established in the course of evidence and argued that merely declaring that the alibi is faulty, without any reason would not only be unreasonable and it would be irrational. Therefore, it is very clear that the alibi has not been considered at all.

The evidence of the appellant does not have a single contradiction nor an omission marked. In such a situation, what is the reason not to consider the alibi in the same yardstick as the consideration of the evidence of the victim's evidence? There was no evidence to establish the murder of any of the 5 deceased persons. At the same time there was no recovery under section 27 of the Evidence Ordinance. In the absence of such evidence, the conviction of the appellant for the murders were unfair and erroneous.

What exists are only suspicious circumstances. These suspicious circumstances do not take the place of proof beyond reasonable doubt.

In the case of SC (SPL) Appeal No. 07/2018 Rathnasingham Janushan vs O.I.C. Police Station Jaffna, Chief Justice Jayantha Jayasuriya PC, held as follows;

> "Maintaining law and order, bringing in perpetrators to justice, convicting accused whose guilt is proved according to law and subsequent sentencing are important stages that has to be preserved and protected to ensure that members of the society enjoy rule of law and democracy. The victim in this case has been subjected to a gruesome attack by a group of people. The manner in which this attack was carried out in broad daylight could have had a serious impact on the society. There is no doubt that the brutal attack the victim was subjected to in this case cannot be condoned, but should be subjected to strong condemnation."

However, a heavy responsibility lies on the court to ensure that an accused who is brought to trial, is convicted according to established legal principles irrespective of the seriousness and the gravity of the incident. As stated above, even if the crime that has been committed is gruesome and serious, the conviction must be according to established legal principles irrespective of the seriousness and gravity of the incident.

Section 3 of the Evidence Ordinance reads as follows;

> 'Proved;
>
> > A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
>
> Disproved;
>
> > A fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.
>
> Not proved;
>
> > A fact is said not to be proved when it is neither proved nor disproved.'

In the present situation, considering the evidence I am of the view that it was "not proved" under section 3 of the Evidence Ordinance, therefore there is no possibility under the law to have convicted the 2nd accused-appellant.

The conviction is erroneous. Therefore, on this question of law itself the 2nd accused-appellant is acquitted and discharged from all charges against him. The conviction and the sentence are quashed.

Appeal allowed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal