

**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 and in terms of Article 138 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

Court of Appeal No:

CA-HCC-165-08

HC of Batticaloa:

HC 2458/07

Hon. Attorney General,
Attorney Generals Department
Colombo 12

Complainant

Vs.

George Vanniyasingam Kanalendran alias
Kamal

Accused

AND NOW BETWEEN

George Vanniyasingam Kanalendran alias
Kamal

Accused-Appellant

Vs.

Hon. Attorney General
Attorney Generals Department
Colombo 12

**Complainant-
Respondent**

Before: Wijesundera, J.
B. Sasi Mahendran, J.

Counsel: Dr. Ranjith Fernando with Maleesha Meera for the Accused-Appellant
Rohantha Abeysuriya, ASG for the State

Written 06.03.2017 by the Accused-Appellant)

Submissions: 28.08.2018 (by the Respondent)

On

Argued On: 28.06.2023

Decided On: 29.08.2023

Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as 'the Accused') was indicted before the High Court of *Batticaloa* for having committed the offenses of;

Count 1 – Committing the offence of rape of a minor, a young girl below the age of 16 years named Suntharamoorthy Suthamalar punishable under Section 364(2) of the Penal Code as amended by Act No. 22 of 1995.

Count 2 – Committing the offence of murder by causing the death of the abovementioned minor punishable under Section 296 of the Penal Code.

Count 3 – Committing the offence of Robbery of a sum of money, a gold bangle, and a gold chain belonging to and in the custody of Thandavarajah Amaravathy punishable under Section 380 of the Penal Code.

Prosecution led the evidence of eight witnesses and production marked as P1 to P8. The Accused made a dock statement. At the conclusion of the trial, the Learned High Court Judge by his judgment dated 18th of February 2008 found the Accused guilty and imposed the following sentences:

Count 1 – 10 years rigorous imprisonment and a fine of 5000LKR

Count 2 – Death Sentence

Count 3 – 10 years rigorous imprisonment and a fine of 5000LKR

Being aggrieved by the said conviction the Accused has appealed to this court.

The Following are the Grounds of Appeal set out in the written submission

1. *The approved/accepted English translation brief does not appear to indicate due compliance of Section 195(e) of the Criminal Procedure Code relating to “Jury Option” which would vitiate the entire preceding before the High Court.*

When we peruse the original record, the journal entry dated 08.03.2007 which was written in English, indicates that the option for a jury trial was offered to the Accused. The Accused chose to have the trial heard by a judge without a jury. For the aforementioned reasons, I am of the view that there is neither substance nor merit in this argument, and therefore, I reject this ground of appeal.

2. *The learned Trial Judge erred in fact and law by permitting the admission of the Deposition Evidence of Krishnapulle as it did not satisfy the laid down legal criteria under Section 33 of the Evidence Ordinance.*

Section 33 of the Evidence Ordinance reads as follows;

“Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable:”

During the trial, the Police informed the court that the spouse of PW1 had lodged a complaint, asserting that her husband (PW1) was apprehended by the Army. To substantiate the claim that PW1 was untraceable, the Prosecution presented evidence from his wife, *Dayamadi*, and Police Officer Jinna. Subsequent to the presentation of this evidence, the Prosecution moved an application before the court to permit the deposition

of PW1 to be marked as evidence, in accordance with Section 33 of the Evidence Ordinance of Sri Lanka. Upon due consideration, the Learned High Court Judge allowed the deposition to be marked as such.

We are mindful of the observation made in the case of **Annavi Muthiriyar v Emperor 1915, 16 Cr. L.J 294, Spencer, J** held that:

“It was held that where a witness cannot be found a mere statement by the prosecutor that the witness cannot be found is insufficient.”

We found that the prosecution has led the evidence of the wife and the police officer and provided an opportunity for the defense to cross-examine the witnesses. After such inquiry, the Learned High Court Judge has satisfied that the said witness could not be found and therefore he allowed the application.

We hold that the Learned High Court Judge has correctly allowed the application made under Section 33 of the Evidence Ordinance, by applying his judicial mind.

Therefore, for the aforementioned reasons, I reject this ground of appeal.

Now we have to consider whether there was sufficient evidence led before the Learned Trial Judge to come to the conclusion that the Accused had murdered the Deceased;

PW1, Arumugam *Krishnapillai*, who was an eye witness, stated in his non-summary proceedings that both he and the Accused had left to see a musical program. On the way, the Accused asked to stop at the Deceased's house, located in front of the *Mavadivedum* Army camp. When they stopped at the house at 3:30 pm, PW1 saw the Accused approach the Deceased, who was standing outside her house eating a mango, with a knife in her other hand. Upon seeing the Accused, the Deceased ran into her house, and the Accused followed, closing the door behind him. PW1 peeped through a block grill after entering the premises and observed the Accused pinning the Deceased to a wall, cutting her neck with a knife, and raping her by lifting the gown she was wearing. The Accused, who spotted PW1, threatened his life if he were to tell anyone.

The Defense had prayed for the rejection of PW1's evidence, applying Section 33 of the Evidence Ordinance, "Evidence in a former judicial proceeding when relevant." The

Learned Trial Judge effectively rejected this notion, as the Accused was granted permission to cross-examine this witness but opted not to. Therefore, the Learned Trial Judge deemed PW1's non-summary as admissible in the High Court trial.

According to PW2, Pastor Santhirasegaram *Chrisbus*, on the fatal day of 29th September 2002, he was traveling from Batticaloa to *Morakoddanchenai* on his motorcycle when he was stopped by an individual who declared that a person had been murdered inside a house and asked for help. PW2 proceeded to the house, where he found the Deceased lying in a pool of blood, and a drunk individual carrying an oil lamp. Enraged, PW2 held the Accused by his shoulder and walked out of the house. An old lady, the Deceased's grandmother (PW3), subsequently came running in distress and shouted at the Accused, "You have killed my child." PW2 then called and informed the *Eravur* Police.

In his cross-examination, PW2 stated that the approximate time of the events was between 5:30 to 6:30 pm.

PW3, *Thandavarajah Amarawathy*, the grandmother to the Deceased, testified about finding her granddaughter's lifeless body and noticing that a gold chain and money valued at 11,500 LKR were missing. In her cross-examination, she provided details about the clothing worn by her granddaughter and the Accused and clarified her observations during the tragic event.

When considering the testimonial creditworthiness of these witnesses' evidence, they have remained consistent and truthful throughout the evidence specified in both the examination-in-chief and the cross-examination.

According to PW7 *Dr. Sugumar* the Judicial Medical Officer in his postmortem report, there was a 15-inch-long cut wound under the Deceased's chin which slit opened her throat cutting off the blood vessels in her trachea, resulting in the complete blockage of blood circulation and breathing, categorically succumbing to instantaneous death, which was deemed as the cause of death. Further, he stated that there was an injury recorded found in the deceased's genital region as the Hymen was discovered to be torn denoting that the Deceased was subjected to intercourse prior to her death, to solidify this there were drops of semen found within the Deceased's genital area inside the injury

which appeared frozen thus confirming that she was raped. PW7 had also examined the Accused and noticed several injuries all over his body in his expert opinion which described as defensive wounds caused by the Deceased during the Incident.

In his expert opinion, it is evident that the blockage of the Deceased's breathing and the severing of blood vessels resulted in the Deceased's death.

In the course of the cross-examination, it is significant to note that not a single question was put forward by the Defense concerning the rape. The Defense focused solely on the injuries observed on the Accused's body.

This evidence is in agreement with the testimony of PW1 regarding how the Accused had cut the Deceased's neck, and the rape was not contested by the Defense.

According to PW5, *Siripala Udawaka*, Chief Inspector of Police, he arrived at the crime scene based on the information received from PW2. Upon reaching the location, he observed the injuries inflicted upon the Deceased, recovered the knife, and noticed the blood stains spread across the floor.

Considering the evidence from the Accused, who gave a dock statement claiming that he had only arrived at the crime scene to observe what was transpiring, it contrasts with the evidence provided by the Prosecution's witnesses. They testified that he was inside the house and had blood stains on his clothing. This position was not challenged by the Defense. Therefore, we hold that the Learned High Court Judge correctly rejected this evidence.

Upon considering the totality of the evidence, we hold that the Prosecution has proven beyond a reasonable doubt that the Accused committed the offenses of murder and rape against *Suntharamoorthy Suthamalar*.

We find insufficient evidence to establish that the Accused committed robbery; therefore, we acquit the Accused on the third count.

We hereby affirm the convictions and sentences for both the first and second counts. Consequently, this appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL