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

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

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

CA 176 - 2014

HC Monaragala Case No. 97-2013

ArumugamRavichandran

ACCUSED

AND NOW BETWEEN

ArumugamRavichandran

ACCUSED – APPELLANT

Vs.

The Hon. Attorney General
Attorney Generals Department
Colombo 12.

COMPLAINANT- RESPONDENT

BEFORE: **P.R. WALGAMA J**

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: **AmilaPalliyageAttorney-at-Law for the Accused – Appellant**

DileepaPeeris – DSG for the Complainant – Respondent

ARGUED ON: **28.06.2016,04.07.2016, 01.08.2016**

WRITTEN SUBMISSIONS: **Accused – Appellant – 30.09.2016**

Complainant – Respondent – 04.11.2016

DECIDED ON: **11.01.2017**

S. DEVIKA DE LIVERA TENNEKOON J

In the instant case the learned High Court Judge found the Accused-Appellant(hereinafter sometimes referred to as the Appellant) guilty on three charges preferred by the Hon AG on 15.04.2006. The nature of the charges were;

1. Committing the offence of kidnapping of the deceased against the guardian of the deceased.
2. Committing the offence of Grave Sexual Abused against the deceased on the same transaction and
3. Committing the offence of murder of the deceased during the course of the same transaction

The learned High Court Judge sentenced the Appellant for 10 years rigorous imprisonment on1st and 2nd counts and the Appellant was sentenced to death on the 3rd count.

Being aggrieved by the aforesaid sentence imposed by the learned High Court Judge the Appellant preferred the instant appeal on the following grounds;

1. The Procedure adopted by the learned trial judge is contrary to the provisions of Section 165 of the Evidence Ordinance and violates the norms and principles of the adversarial system of Criminal Justice.

2. The learned High Court Judge has failed to consider or evaluate the standards and reliability of DNA evidence adduced before the trial applying internationally accepted tests and by failing to do so denied a fair trial to the accused.

3. The DNA scientist who obtained the blood samples of the accused for DNA testing was not called to give evidence by the prosecution and the learned High Court judge has failed to consider the said irregularity in procedure favourable to the accused.

4. The items of circumstantial evidence are not sufficient to prove the prosecution's case against the accused beyond reasonable doubt.

When looking at the evidence presented by the prosecution it is evident that the prosecution's case has been based on circumstantial evidence against the Appellant in this case.

Therefore before discussing the aforesaid grounds of appeal submitted by the Appellant it would be prudent to evaluate the evidence elucidated by the prosecution in order to arrive at a conclusion.

Following are the items of circumstantial evidence produced against the Appellant.

PW1, PW2 and PW3 are the father, mother and the uncle of the 6 year old deceased respectively. According to the evidence of aforesaid three witnesses the incident had occurred on 15.04.2006 consequent toPW3 bringing the Appellant to the house of the PW1and PW2.

According PW3, who is the uncle of the deceased, the Appellant was known to him and since the date of the incident was the day after the Sinhala and Tamil New Year PW3 had visited his sister PW2 to have lunch at her house. The Appellant had also accompanied PW3. Before lunch,as admitted by allthe

witness,the Appellant and PW1 (father of the deceased) had consumed liquor. After they had lunch the deceased was seen seatedon the front bike bar ridden by the Appellant who was doing rounds around the house.

According to PW1 at one occasion the deceased had come to him and had requested for Rs. 10/- to accompany the Appellant to buy chocolate from the nearby boutique. The witness had given the deceased Rs. 10/- and finally saw the deceased and the Appellant leaving towards the boutique on the bicycle.

Few minutes later since there was no trace of the two of them he had gone in search of the deceased and met the Appellant near a sugar cane plantation coming from the direction from where the deceased's body was subsequently found. Thereafter, when the Appellant was questioned as to the whereabouts of the deceased the Appellant had replied that the deceased 6 year old boy had got off near the boutique and he was unaware of his whereabouts.This was the position taken by the Appellant in his defence.

However, the prosecution was able to produce the following items of circumstantial evidence against the accused;

At the first instance although the Appellant had denied having any knowledge of the whereabouts of the deceased, the evidence of PW6 who was a neighbour of the deceased, PW15 who was the boutique owner and PW4 who found the body of the deceased, it was established with cogent evidence that it was the Appellant who was seen accompanying the deceased to the boutique.

Considering the evidence of PW6, PW15 and PW4 all of whom had no personal connection to either the deceased nor the Appellant it may be said that this evidence presented by the prosecution is unbiased and independent in contrast to the position taken by Appellant with regard to the evidence of PW1, PW2 and PW3 which allegedly was bias due to the close relationship they shared with the deceased.

However, the learned High Court Judge has correctly evaluated the room for bias in each of these witnesses by giving due regard to the relationship between each of the said witnesses and the deceased and thereafter, in judgment (vide pages 440 – 450 of the Appeal brief), presents a comprehensive narrative as to why the contention of bias raised by the Appellant against PW1, PW2 and PW should fail.

Notwithstanding the aforesaid findings of the learned High Court Judge in relation to the evidence of PW1, PW2 and PW3,as per the evidence of PW6, PW15 and PW4 this Court is of the view that the prosecution was able to infer strong circumstantial evidence against the Appellant.

According to PW15,the boutique owner, it was admitted that the deceased came to her boutique to buy 2 chocolates whilst an unknown person was waiting for the deceased 10-12 meters away. Although this unknown person was not identified by PW15 she was able to identify the sarong worn by this person (P9) and therefore the prosecution was able to draw the nexus that it was the Appellant who was waiting for the deceased outside the boutique.

The said position was corroborated in evidence with the testimonies of PW6 and PW4 who were neighbouring villagers and independent witnesses. According to PW6 he stated in evidence that he saw the Appellant taking the deceased on his bicycle towards the said boutique around 12.30 pm. According to PW4 it was he who found the body of the deceased at a nearby bush. The mother of the deceased testified in Court that she saw the Appellant taking the deceased on his bicycle towards the area where the body was found. Apart from this testimony PW4 stated in evidence that he followed the bicycle tire tracks which led tothe area where the body was found.

The second phase of the prosecution commenced with the official testimony of PW12Prof. Ruwan Illeperuma who gave evidence on the DNA data, thereafter

PW10 Inspector of Police Rohana, who conducted the police investigation, gave evidence followed by PW14 Dr. M.N. Rahulhaq the Judical Medical Officer who performed the post-mortem on the deceased. The official testimonies of PW12, PW10 and PW14 were of such nature that it supported the inference of guilt of the Appellant drawn by the prosecution.

The evidence of PW10 narrated thecourse of investigations subsequent to the body of the deceased been discovered and the nexus to the Appellant. This evidence propounded the exact location from which the body was discovered and the manner in which the body was found and the way in which the inquest was held and most importantly how two hairswere found on the thigh of the deceased close to the genitals.

The DNA evidence based on these two hairs compared to a blood sample obtained from the Appellant was thereafter presented as evidence through PW12 and according to the evidence of PW12 it was successfully established that the hair found on the thigh of the deceased belonged to the Appellant.

This finding corroborates the evidence of PW14 who gave evidence regarding the Post Mortem Report prepared by Consultant Judicial Medical Officer Dr.Ruwanpura. It is vital to note at this stage that the learned High Court Judge in his judgment referred to the provisions contained in the Criminal Procedure Code and correctly explained when a post-mortem report prepared by one Judicial Medical Officer could be led through another Judicial Medical Officer at a trial and how that piece of evidence would become admissible.

The Post Mortem Reportwas marked as P3 during the trial and from these findings it was opined that there had been anal intercourse. Therefore, it is incumbent to note the grave circumstances under which the hairs of the Appellant could have fallen on the thigh of the deceased close to the genitalsand

further the cause of the two abrasions found on the tip of the penis of the deceased labelled injury numbers 8 and 9.

It was revealed in P3 that the death of the deceased child had been caused due to ligature strangulation and the cord which was used to hang a pendent around the neck of the deceased was observed to be the mode used by the Appellant to kill the deceased.

Contrary to the aforesaid position by the prosecution the Appellant took up the defence of total denial and from perusing the judgment it appeared that the learned High Court Judge had accurately evaluated the case for the prosecution first and thereafter considered whether the defence taken up by the Appellant was sufficient to create a reasonable doubt in the case for the prosecution.

The defence taken up by the Appellant was that it was PW3, the uncle of the deceased,who took the deceased to the boutique and not the Appellant as narrated by the prosecution. In his defence the Appellant stated that at the time PW3 brought the deceased to the boutique the Appellantallegedly was also at the boutique. Thereafter PW3 had left the boutique with the deceased and whilst leaving the boutique some villagers had come and assaulted him and handed him over to the police and further that at the Police Station two hairs were allegedly forcibly removed from the Appellant.

In the case of the **King v. Appuhamy 46NLR 128** it was held that in order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable-hypothesis that of his guilt.

In the instant case as correctly evaluated by the learned High Court Judge it is incumbenton the prosecution to establish a strong nexus between the guilt of the Appellant and the death of the deceased. From the evidence of PW1,PW2 and PW3 it is clearthat the Appellant removed the deceased from the house. The

evidence of PW6 and PW15 establishes that the Appellant was seen with the deceased riding a bike towards the boutique at one point and that the Appellant was waiting for the deceased 10-12 meters away from the boutique when the deceased came to buy chocolates. PW2 had seen the Appellant riding the bicycle with the deceased towards the area where the body was discovered afew hours after the disappearance of the deceased and the Appellant. The evidence of PW4 admitted that from the aforementioned clues he was able to find the body by following the tire tracks left behind from a bicycle which lead towards the cane shrubs.

As fittingly observed by the learned High Court Judge the Appellant never raised a defence to any of the above witness testimony by contending thatthe Appellant was at the boutique after which PW3 took the deceased with him. Neither of the said prosecution witnesses were suggested nor questioned on whetherthe Appellant was at the boutique when PW3 brought the deceased to the boutique, as per the version of the Defence. Further, as observed by the learned High Court Judge it is apparent that the accused had taken upvaryingpositions when questioned about the whereabouts of the deceased. Firstly, when he was questioned before the discovery of the body the Appellant had taken the position that he dropped the deceased at the boutique. The Appellant's dock statement set forth acontrasting position, that the Appellant never took the deceased with him to the boutique and that it was PW3 who took the deceased on his bicycle.

Based on the forgoing discrepancy in the Defence's version of the events that led to the death of a 6 year old boy,the learned High Court Judge refused to accept the defence and acted upon the strong evidence adduced against the Appellant by the prosecution. The view of this court too is that the dock statement of the Appellant is not sufficient and is incapable of raising any reasonable doubt in the case for the prosecution.

This Court is of the view that meticulous analysis and reasoning presented by the learned High Court Judge to reject the defence and to act upon the items of evidence elucidated by the prosecution is correct in law and the defence of total denial raised by the Appellant is an improbable and unacceptable defence which may have been suggested as an afterthought.

Having evaluated the evidence of the prosecution I shall now consider whether the grounds of appeal raised by the Appellant would suffice to negate the aforesaid findings of the learned High Court Judge in support of the innocence of the accused.

The first point raised by the Appellant is that the procedure adopted by the learned High Court Judge is contrary to the Section 165 of the evidence ordinance and such procedure violates the norms and the principles of the adversarial system of criminal justice.

Section 165 of the evidence ordinance reads as follows;

> "The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant ; and may order the production of any document or thing ; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:
>
> Provided that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved;
>
> Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document, which

such witness would be entitled to refuse to answer or produce under sections 121 to 131 both inclusive, if the question were asked or the document were called for by the adverse party ; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149 ; nor shall he dispense with primary evidence of any document, excepting the cases herein before excepted."

This Court observes that the nature of questioning adopted by the learned High Court Judge,as pointed out by the Appellant during argument stage andpages 5 and 6 of his written submissions, have not unfairly prejudiced the Appellant and is not such that would alter the character of the adversarial system of criminal justice. One could say that the learned High Court Judge was an active listener though the trial process.

As stated in the section it is apparent that the line of questioning adopted by the learned High Court Judge during the trial was well within the scope of Section 165 and was in order to discover or to obtain the proper proof of the relevant facts and not to cause any prejudice to the Appellant as this is a case of circumstantial evidence.

The Counsel for the Appellant contends that the questionsraised by the learned High Court Judge at page 325 of the appeal brief are contrary to Section 165 aforementioned. However, this Court sees that no unfair prejudice was caused to the Appellant since the learned Trial Judge never compelled the witness to give a favourable answer to the prosecution but simply inquired as to whether the witness could identify the person on the bicycle if he was seen again.

It is prudent to note that as per page 145 of the appeal brief after questioning the Judicial Medical Officer the learned Trial Judge afforded an opportunity to both the defence and prosecution to seek clarity on any matter that was revealed though the questions raised by the learned High Court Judge but however both

the defence and the prosecution waived that opportunity. The said section is reproduced below;

මෙම අවස්ථාවේ දී අධිකරණයෙන් අසන ලද ප්‍රශ්නතුලින් මතු වූ යම් කාරනාවක් විස්තර කර ගැනීමට අවශ්‍ය වන්නේ දැයි විත්තියෙන් විමසා සිටිම.

අවශ්‍ය නොවන බව කියා සිටි.

මෙම අවස්ථාවේ දී අධිකරණයෙන් අසන ලද ප්‍රශ්නතුලින් මතු වූ යම් කාරනාවක් විස්තර කර ගැනීමට අවශ්‍ය වන්නේ දැයි පැමිණිල්ලෙන්ද විමසා සිටිම.

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මෙම නඩුව පසුවට තබම්.

Considering the above conduct of the learned High Court Judge, one may suppose that the learned High Court Judge was well aware of the scope of Section 165 and therefore had acted within the parameters of the said provision.

Although the learned Counsel for the Appellant submitted a number of authorities including some English judgments in support of his contention this court sees no relevance with the findings of the said authorities and the line of questioning adopted by the learned High Court Judge in the instant case.

The second ground of Appeal urged by the learned Counsel for the Appellant is that the learned High Court Judge has failed to consider or evaluate the standards and reliability of DNA evidence adduced before the trial applying internationally accepted tests and by failing to do so denied a fair trial to the accused.The Counsel for the Appellant submits a number of foreign authorities in support of this contention. Hence, I will briefly consider their relevance. At the outset, the nature of the expert evidence led in the said cases must be distinguished from that of the instant case. The case of Cobey Vs. State 73, Md. App. 233(Md. Ct. Spec. App. 1988) is concerned with the expert evidence relating to a technique known as Chromosome Variant Analysis in which the cell tissues of an aborted foetus was compared to a sample. The case of Daubert,

Vs. Merrell Dow Pharmaceuticals, Inc 509 U.S. 579, 113 S. Ct. 2786 1992 relates to a case in which Court determined whether a prescription antinausea drug cased birth defects.The underlining rational discussed in these cases is the "general acceptance"test as formulated in the case of Frye Vs. United States 293 F. 1013 (D.C. Cir 1923) i.e. that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

In the instant case the learned High Court Judge relies on the expert evidence of PW12 and his extensive experience and qualifications on the subject matter in proof of the DNA evidence. PW12 in his evidence testifies to the internationally accepted testing methods adopted in analysing the DNA data thereby one may reliably determine the "general acceptance"of this method vis-à-vis the evidence.

It is prudent to note that the learned High Court Judge does not solely rely on the DNA evidence but considers it in tandem with the strong circumstantial evidence to hold the Appellant guilty of the said chargers. In such a context the second ground of Appeal should fail.

With regard to the third ground of Appeal raised by the Counsel for the defence this court sees no merit in that argument as the prosecution has been able to established the chain of the production intact till the analysis was carried out. The learned Counsel for the Appellant contends that the learned High Court Judge has improperly evaluatedthe transfer of the blood samplesfrom the crime scene to the laboratory where it was tendered for the analysis during the course of the investigations.

This Court observes that from pages 448 – 451 of the Judgment that the learned High Court Judge has directed his judicial mind to this contention and thereafter presented sound reasoning concerning the acceptance of the PW12's evidence.

In relation to the impugned blood sample as claimed by the defence it is apparent that the learned High Court Judge had given a proper account regarding the chain of evidence of the intact productions by referring to the evidence and the documents which were marked as P5 –P7(b) before evaluating the evidence by PW12.

Therefore,this Court sees no reason to reject the findings of the learned High Court Judge relating to the evidence of PW12 or the DNA evidence as contended by the Appellant.

In addition to the aforesaid grounds of Appeal the Counsel for the Appellant further alleged that the elucidated items of circumstantial evidence were insufficient to prove the prosecution's case against the accused beyond reasonable doubt.

The only ground urged by the counsel to support the above argument is the failure of PW15 to identify the accused at the trial. However it should not be forgotten that PW15 had not totally failed to identify the person who waited 10-12 meters away from PW15. PW15 successfully identified P9, the sarong worn by the Appellant at the scene of the crime, as the attire of the said unknown person. The evidence of prosecution connected P9 to the accused which was the sarong the Appellant wore at the time of the incident.

Finally, it was alleged by the Counsel for the Appellant that the learned High Court Judge had erred in law when evaluating the evidence regarding the concept of the last seen with the deceased.

In order to substantiate the aforesaid contention the learned Counsel submits that the case for the prosecution breaks at the point when PW15 failed to identify the proper culprit who waited for the deceased till he returned from the boutique after buying the two chocolates. Therefore it is urged by the Counsel that the prosecution has failed to prove the case beyond reasonable doubt.

However, when observing the concept of the last seen with the deceased one must give due regard to its applicability in a case of criminal trial.

In the case of **The King V. Appuhamy 46 N.L.R 128** it was held that, in considering the force and effect of circumstantial evidence, in a trial for murder, the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance if the prosecutor has failed to fix the exact time of death of the deceased.

In the cases of **State of Uttar Pradesh v. Satish, AIR 2005 SC 1000**and**Ramreddy Rajesh Khanna Reddy and another v. State of Andhra Pradesh (2006) 10 SCC 172** it was held that the last seen theory comes into play when the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is sosmall that the possibility of any person other than the accused being the author of the crimebecomes impossible.

Therefore, it is incumbent that for the concept of the last seen to be relied upon the prosecution has to establish the last seen withinclose proximity to the time of death in any given situation.

However, when observing the evidence of the prosecution it is apparent that the prosecution has never relied upon the concept of last seen with the deceased in the given case as there had been number of strong circumstantial evidence available against the Appellant.

Even if this court is to evaluate the final ground urged by the counsel for the defence it is evident that the prosecution has been able to establish strong circumstantial evidence against the Appellant that it was him and not any other

person who waited 10-12 meters away from the PW15 on that day till the deceased returned from the boutique. The learned High Court Judge had also considered this and arrived at the same conclusion.

Therefore, this court finds no merit in this contention as raised by the leaned counsel for the defence.

In the case of **Don Sunny v. AG 1998 2 SLR 1**which discussed the principles on which a trial judge should follow in a case purely based on circumstantial evidence.

1. When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

   On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.

2. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.

3. If upon a consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence then they can be found guilty.

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 the case in hand when evaluating the judgment it is prudent that the learned High Court Judge in this case had correctly applied the principles set out in the above case when evaluating the each and every piece of circumstantial evidence against the accused.

Therefore this court is of the view that the learned High Court Judgehad not erred in law as claimed by the Appellant when finding the Appellant guilty of all three charges preferred against him.

Considering all the matters therefore, this court see no reason to interfere with the judgement of the learned High Court Judge and we proceed to dismiss the appeal. We affirm the conviction and the sentence imposed on the Appellant.

Appeal Dismissed.

Judge of the Court of Appeal

P.R. WALGAMA J

I Agree.

Judge of the Court of Appeal