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

SC Appeal 118/17
SC (SPL) LA 257/2016
CA no. 212-213/2012
HC Kandy No. 309/07

In the matter of an application for Special Leave to Appeal in terms of Article128 of the Constitution of the Democratic Socialist Republic of Sri Lanka

The Democratic Socialist Republic of Sri Lanka

Complainant.

Vs.

1. Junaiden Mohomed Haaris.
2. Abdul Razak Mohomed Salam (deceased)
3. Pakeer Mohomed Kamaldeen

Accused.

AND NOW

1. Junaiden Mohomed Haaris.

3. Pakeer Mohomed Kamaldeen

1st and 3rd Accused Appellants.

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant Respondent.

AND NOW BETWEEN

Junaiden Mohamed Haaris,

No.13, Kothmale Road,

Nawalapitiya.

Presently at,

Welikada Prison,

Borella, Colombo 08.

1st Accused Appellant Petitioner

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant Respondent-Respondent

BEFORE: Eva Wanasundera, PC, J
Buwaneka Aluwihare, PC, J &
Prasanna S. Jayawardena, PC, J

COUNSEL: Anil Silva, PC for 1st Accused-appellant-Petitioner

Rohantha Abeysuriya, DSG for A.G.

ARGUED ON: 12.01.2018

DECIDED ON: 09. 11.2018

Aluwihare, PC. J.,

The 1st Accused-Appellant-Petitioner-Appellant (hereinafter referred to as the Accused-Appellant) had been indicted along with two others on the following counts:

That on or about the 12th September, 2012 the accused-appellant along with the 2nd and 3rd accused;

1. Committed the offence of Rape on Solamalai Uma-Devi an offence punishable under section 364 (2) (g) of the Penal Code, as amended, the offence of "gang rape".

2. Committed the offence of Robbery in respect of a gold chain that was in the possession of aforesaid Solamalai Uma-Devi, an offence punishable under Section 380 of the Penal Code.
3. Committed the offence of murder, by causing the death of Solamalai Uma-Devi, an offence punishable under Section 296 of the Penal Code.

One of the Accused (2nd Accused) had passed away even prior to the commencement of the trial; accordingly, the trial at the High Court only proceeded against the Accused-Appellant and the 3rd Accused.

At the conclusion of the trial the learned High Court Judge convicted both the Accused-Appellant, and the 3rd Accused, on all charges.

The Court of Appeal after hearing the appeal of the Accused-Appellant, and the 3rd Accused, dismissed the same. Aggrieved by the judgment of the Court of Appeal, the Accused-Appellant sought special leave to appeal and special leave was granted on the following questions of law:

(i) Did the learned High Court Judge as well as the learned Judges of the Court of Appeal fail to consider that the evidence given by the witness Kandiah Vasudevan about the alleged statement made to the Petitioner by the 2nd Accused was belated and made at the instance of the Police.

(ii) Did the learned High Court Judge as well as the learned Judges of the Court of Appeal fail to consider that the alleged statement made by the

2nd accused which implicates the Petitioner as well is inadmissible in view of Section 30 of the Evidence Ordinance.

(iii) Did the learned High Court Judge as well as the learned Judges of the Court of Appeal misdirect themselves when they took into consideration the fact that the Petitioner was present with the 2nd accused when the 2nd accused pawned a gold chain allegedly belonging to the deceased as an item of evidence against the Petitioner.

(iv) Did the learned Judges of the Court of Appeal misdirect themselves when the conviction against the Petitioner in respect of the charge of rape was affirmed inasmuch as there was no evidence as regards the commission of gang rape or any involvement in the act of rape by the Petitioner?

The above questions of law are referred to in sub paragraphs (c), (d), (e) and (g) of paragraph 18 of the Petition of the Petitioner of the present application.

Before I consider the facts of the case and the legal issues raised in this appeal, it should be borne in mind that the prosecution relied entirely on circumstantial evidence to establish the charges, for the reason that there were no eyewitnesses to substantiate any of the charges against the Accused-Appellant. Thus, it was incumbent on the prosecution to establish that the 'circumstances' the prosecution

relied on, are consistent only with the guilt of the accused-appellant and not with any other hypothesis.

Regard should be had to a set of principles and rules of prudence, developed in a series of English decisions, which are now regarded as settled law by our courts.

The two basic principles are-

(i) The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn.

(ii) The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct (per Watermeyer J. in **R vs. Blom** 1939 A.D. 188)

The rule regarding the exclusion of every hypothesis of innocence before drawing the inference of guilt was laid down way back in 1838 in the case of **R vs. Hodges (1838 2 Lew. cc.227).** The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt.

It would be pertinent to mention here that a trial judge or for that matter a judge sitting in appeal, must necessarily consider the evidence (circumstances) guided by the principle referred to above.

Before I embark on discussing the facts of this case, I also wish to make specific reference to Rule 4 of the five Rules in evaluating circumstantial evidence, laid

down by E.R.S.R. Coomaraswamy in his monumental work "The Law of Evidence" (Vol. Page 24).

> ***"Rule 4":*** *The chain or strand of proved facts and circumstances must be so complete that no link in it is missing. If any vital factor which is necessary to make the chain or strand complete is missing or has remained unproved, it must be held that the prosecution has failed to establish its case. A vital link should never be inferred.*

I shall now set about narrating the factual background to the charges.

Witness Pushpalatha had testified to the effect that she saw her sister Uma-Devi alive for the last time on 12.9.2001 when she left home around 8.00 to attend a class where she was learning typing. Although she had not returned home that day; no one, however, appeared to have panicked as the deceased Uma-Devi had said that she had to attend a wedding. On the following day, when she did not return home, their father Alagan lodged a complaint with the police about his missing daughter.

Anusha Ariyasena, who was attending the same vocational training, had stated in her evidence that on 12.09.2001 Uma-Devi did attend the class. Both of them had walked back to the bus terminal and they had parted ways. The evidence is that Uma- Devi used to trek the distance from home to the class on foot, a distance of about two kilometres.

On the day following around 2.30 in the afternoon, witness Jayasundera who had gone to the thicket by the Mallanda bridge, had accidentally come across the dead body of Uma-Devi. The police had been summoned to the scene and the investigations had commenced.

As far as the persons responsible for this heinous crime were concerned, the investigations led virtually to nothing. After the post mortem, the Judicial Medical Officer opined the death had resulted from manual strangulation. The Judicial Medical Officer had observed a number of minor injuries on the body. Two bite marks, two nail marks, a laceration of an ear lobe and an abrasion of the neck, two other injuries had been observed near the genital area and anus. Undoubtedly, these are injuries that clearly establishes that Uma-Devi had been ravished, before she was strangled to death. The laceration of the ear and the abrasion marks on the neck are indications of forcible removal of jewellery Uma-Devi was wearing. Police were not successful in making a breakthrough for one whole year. A year later somewhere in November 2002, witness Kandiah Vasudevan made a statement to the police with regard to the murder of Uma-Devi and the investigations recommenced.

The most crucial evidence in this case emanates from Kandiah Vasudevan. Due to the inherent weaknesses of his testimony which I shall advert to later, close scrutiny not only of his testimony but also of his credibility is critical. At this point, however, I will only refer to his testimony.

According to his evidence, Vasudevan was eleven years when he was first employed by the accused-appellant in his grocery store. After working there for 2 years, Vasudevan joined the deceased 2nd accused, Salam, in his fruit stall, which also had been located at a distance not far from the grocery of the accused-appellant.

Vasudevan had said that Uma-Devi was known to him as she used to visit the grocery of the accused-appellant on the way to her classes. In answer to a question whether she (Uma-Devi) came alone, the witness had said, she comes with her small brother. He had come to know of the tragedy that had befallen Uma-Devi and had gone near the location where her body was, but not near enough to see the body.

The witness had further stated that two or three days after the body of Uma-Devi was located, he overheard a conversation between the deceased 2nd accused Salam, and the accused-appellant.

The conversation, as heard by Vasudevan in Vasudevan's own words is as follows:

" සලාම් කිව්වා, අපි දෙන්නා මැරුවා කියා කවුරුවත් දන්නේ නැහැ. පෙළපාලි ගියොත් හාරීස් යන්න එපා".

According to Vasudevan the utterance had been made by the deceased 2nd accused to the accused-appellant. At this point the prosecution had posed a question:

"කවුද මැරුවා කීවේ"?

To which witness Vasudevan had responded by stating "උමා මැරී ".

In my view, this question is clearly a leading question, as it suggests that the name of the deceased was referred to by the 2nd accused in the course of the alleged conversation.

Thus, the learned High Court Judge ought not to have allowed this question to be asked as it relates not to a peripheral matter, but to a matter that goes to the very root of the case. In the interest of justice, no witness should be prompted to say what the prosecution wants the witness to state; especially regarding issues that are critical. This is especially so, as Vasudevan's testimony is infirm because it is belated and also due to the fact that his relationship with the accused appellant had soured by that time.

Vasudevan's position was that due to fear, he did not divulge the conversation he purported to have overheard and had kept it to himself for more than a year and decided to divulge it, after he found employment on a farm, which was in the same area (Nawalapitiya). He left the employment of Haaris (the accused-appellant) on an unpleasant note as the accused-appellant had refused to increase his salary.

The other witness who purported to connect the deceased 2nd accused to the incident, is Sundaralingam, a businessman in Nawalapitiya who ran a textile shop and a pawn broking business. According to Sundaralingam, both the accused-appellant and the deceased 2nd accused (Salam) had been known to him and they had on numerous occasions come to him to pawn jewellery and to borrow money and subsequently had redeemed those articles as well. His evidence was that the

deceased 2nd accused had come to his textile shop on a date in September, 2001 in the company of the 1st accused-appellant and had pawned a chain (necklace).

The prosecution also had led evidence of witness Nilusha Herath, who said she lived in Mallanda Nawalapitiya and that the road leading to her house is somewhat densely populated. The 3rd accused was the caretaker of the building close to her house, which was used for slaughtering poultry. She had said that on a day in September, 2001, she heard the noise of someone wailing which had lasted for an instant, but could not say whether it was that of a man or a woman. Although this witness had come out of her house on hearing the noise, she had not seen anyone.

Ismail Mohamed Hanifa was the person who ran the poultry farm and the slaughter house and had admitted that the 3rd accused was the caretaker of the building that was used to slaughter birds and there were instances when more than 50 birds were slaughtered in a given day.

Chief Inspector De Silva, who conducted the investigations into this matter had inspected the building used for slaughtering and having observed dry stains similar to blood on the floor and on the walls, had obtained the substance that gave the appearance of blood stains, onto cotton swabs and had referred them for analysis to the Government Analyst. The witness from the Government analyst, Jayamanne who testified with regard to the analysis stated that he identified human blood on the specimens sent for analysis, but the condition of the specimens was not suitable for grouping.

DIG Abeyrathne Bandara in his evidence, on being questioned by the learned State Counsel, had said that the accused revealed information with regard to the productions (the chain) that were recovered in the course of the investigations. The above, appears to be the sum total of evidence led by the prosecution to establish the charges.

Analysis of the evidence.

Before I analyse the evidence, I wish to reiterate the fact that the 2nd accused was dead before the trial commenced and the 3rd accused whose conviction was affirmed by the Court of appeal had not canvassed his conviction before the Supreme Court. Thus, the issue this court is called upon to decide is the legality of the judgment of the Court of Appeal in relation to the accused-appellant who stood as the 1st accused before the High Court. I shall now deal with the questions of law on which special leave was granted in this matter.

The first question was whether:

(1) the learned High Court Judge as well as the Court of Appeal failed to consider that the evidence of Kandiah Vasudevan was belated and made at the instance of the Police.

At the outset, it must be stated that apart from the bare suggestion that Vasudevan gave evidence at the behest of the police, there is nothing to indicate that that was the case and as such I have no hesitation in holding that it cannot be said that

Vasudevan's evidence was at the behest of the Police. The witness, however, came out with his story after more than a year had passed since the death of Uma-Devi and sometime after he left the employment of the deceased 2nd accused. It is also in evidence that he left the employment with the accused-appellant over a salary issue. These are factors that accentuate the inherent weaknesses in Vasudevan's evidence. On the other hand, the witness was only a boy of 14 years when he overheard the purported conversation, between the accused-appellant and the deceased 2nd accused. In view of these factors, the infirmity in Vasudevan's evidence, resulting from belatedness dilutes to some extent. As such, having observed the demeanour and deportment of the witness, if the learned trial Judge had formed the view that Vasudevan was a credible witness, I do not think this court can fault the trial judge for forming such an opinion.

However, both the High Court and the Court of Appeal have overlooked a fundamental principle in evidence, that is, 'evidence must be weighed and not counted'. In this regard both the High Court as well as the Court of Appeal failed to evaluate the testimony of witness Vasudevan but had taken it on its face value which ought not to have been done in a case that is based purely on circumstantial evidence.

The court is required to consider whether the items of evidence are consistent with any other hypothesis other than the guilt of the accused. The Court of Appeal had neither considered the issue of credibility of the witness nor the admissibility of the statement purported to have been made by the deceased 2nd accused to the

accused-appellant, although both these issues had been raised before the Court of Appeal as reflected in the judgment itself. Having considered the issue of credibility of witness Vasudevan, I am of the view that the learned High Court Judge cannot be faulted for treating Vasudevan as a credible witness. In fairness to the learned High Court Judge, he had, to an extent considered the infirmities of Vasudevan's testimony before deciding to act on it. As such I answer the 1st question of law on which Special Leave was granted in the negative.

The second question of law on which Special Leave was granted was on the issue of admissibility of the purported statement made by the deceased 2nd accused to the accused-appellant which witness Vasudevan supposed to have overheard.

This issue had been raised before the Court of Appeal but the judgment of their Lordships does not appear to have considered this issue. There is only a passing reference that the said question was raised as an issue on behalf of the 1st accused-appellant.

At the hearing of this appeal the learned President's Counsel on behalf of the accused-appellant contended that this evidence is obnoxious to section 30 of the Evidence Ordinance, and therefore inadmissible.

Section 30 of the Evidence Ordinance reads as follows: -

> *"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself*

and some other of such persons is proved, the court shall not take into consideration such confession as against such other person."

Illustration

A and B are jointly tried for murder of C. It is proved that A said "B and I murdered C". The court shall not consider the effect of this confession as against B.

In the instant case the 2nd accused Salam was dead at the time the accused-appellant was tried before the High Court. As such the admissibility of the purported statement has to be considered under the evidentiary provisions relating to "statements by persons who cannot be called as witnesses" and to be more precise under section 32 of the Evidence Ordinance which deals with statements made by a person who is dead.

Section 32 (3) of the Ordinance states: -

(3) When the statement is against the pecuniary or Proprietary interest of the person making it or when ***if true, it would expose him or would have exposed him to criminal prosecution or to a suit for damages****.*

*(*Emphasis added)

In terms of the aforesaid provision, the statement made by deceased 2nd Accused Salam, to the Accused-appellant would be admissible under the provision, as the statement if "true", would have exposed Salam to a criminal prosecution.

The authority for this proposition is found in the case of **King Vs. Ludowyke 37 NLR 129**. In this case, the accused who was the Assistant Sweep Secretary of the Galle Gymkhana Club was charged with Criminal Breach of Trust of monies belonging to the Club. A clerk (since deceased) worked as an Assistant to the accused. The clerk had made a statement to the Secretary of the Club, as well as to the police having deposited the club money to the account of the accused at the request of the accused. Dreiburg J admitted this statement under Section 32(3) of the Evidence Ordinance because the statement would have exposed the clerk to a criminal prosecution. A similar decision was taken in the case of **Korossa Rubber Co. Vs. Silva 21 NLR 73** at page 75.

This provision is one of the exemptions to the hearsay rule and the rationale for admission of such statements appears to be that no person would implicate himself (of a crime) unless it is true. Thus, even though the statement purported to have been made by the deceased 2nd accused to the accused-appellant would not be admissible under Section 30 of the Evidence Ordinance, its admissibility under Section 32 (3) of the Ordinance cannot be denied.

As such I answer the 2nd question of law raised on behalf of the accused-appellant also in the negative.

Having held so I am of the view that it would be remiss on my part, if I am to overlook the evidentiary value that could be attached to the purported statement made by the deceased 2nd accused. It is the sole item of evidence that would even remotely connect the accused-appellant to this crime and in my view, it is

imperative that its evidentiary value should be tested to see whether it is consistent with the irresistible inference of guilt that is required to convict the accused-appellant.

It so appears that judges tend to gloss over facts and draw inferences whereas close scrutiny of evidence is *sine qua non* in cases based on circumstantial evidence. I find the Court of Appeal also had committed this cardinal error in the present case.

The court is not only required to decide whether the facts are consistent with the hypothesis of the prisoner's guilt, but whether they are inconsistent with any other reasonable hypothesis of his innocence (**R Vs. Hodges** *supra*) The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt. I shall now consider the evidence of witness Vasudevan in the backdrop of the aforesaid principles relating to circumstantial evidence referred to above.

It is common ground that Vasudevan made a statement to the police after more than a year had elapsed since the incident. As such the accuracy of his memory and the risk of forgetfulness come into issue. Vasudevan, a person belonging to Tamil ethnicity gave evidence in Sinhala. Throughout his examination-in-chief including the purported statement he said he overheard, Vasudevan testified in Sinhala. His proficiency in the Sinhala language was not tested. In his own words, this is what Vasudevan said that he overheard:

"*සලාම් කිව්වා, අපි දෙන්නා මැරුවා කියා කවුරුවත් දන්නේ නැහැ. පෙළපාලි ගියොත් හාරීස් යන්න එපා*".

To which the accused-appellant had not responded, according to Vasudevan.

The fact remains witness Vasudevan had heard only a part of the conversation that was taking place. According to him, he approached the accused-appellant's Grocery with the intention of getting some instructions from Salam. No sooner he heard this utterance he says he turned back and went, as such court does not have the benefit of ascertaining the context in which the statement was made.

Witness had not been asked what was the first word he heard when he approached the grocery or whether he heard anything else after this utterance.

In cross examination, it transpired that the conversation between Salam and accused-appellant had taken place in Tamil language and not in Sinhala. In the course of the cross examination he came out with the Tamil words said to have been used during this most crucial conversation. He translated on his own, the words he thought he heard and said the same before the Court. It appears that everybody, including the learned trial judge, has unquestioningly admitted that the translation was accurate.

Even if the statement made by Salam is taken, at its face value, the question is, whether the only irresistible inference that can be drawn from this conversation is that both Salam and the accused-appellant committed the murder of Uma-Devi.

The prosecution's case was that this murder was committed by three persons and not two.

Thus, the issue is when Salam said "අපි දෙන්නා මැරුවා කියා කවුරුවත් දන්නේ නැහැ" did he refer to

i. himself and the 3rd accused? ; or
ii. was it Salam and the accused-appellant? ; or
iii. could it have been Salam and some other person whose identity was not known to the prosecution?

One may have an inkling that Salam referred to himself and the accused-appellant. But without the knowledge of how the entire conversation between the two ensued and the context in which the utterance was made, can one say with certainty that the words "අපි දෙන්නා", referred to none other than Salam and the accused-appellant, when the prosecution's own case was that three people were involved?

If Salam's statement is to be acted upon, then the murder had been committed by two persons and not three. The complicity of Salam is in no doubt. Then it has to be either Salam and the accused appellant, or Salam and the 3rd accused who stand convicted or it could even be Salam and a third person. Thus, the question arises as to which two of the three persons indicted were responsible for the murder. Salam, when he said "අපි දෙන්නා මැරුවා" did he refer to himself and the 3rd accused who now stand convicted?

I also wish to state that the manner in which the prosecution has led evidence in this case by the prosecution is not desirable. Vasudevan is a belated witness by a considerable time gap and who had also had some displeasure with the accused-appellant. In this context the prosecution ought to have allowed the witness to

testify freely without prompting or leading, so that the credibility of the witness could have been properly evaluated. Immediately after witness Vasudevan had referred to the purported conversation, the learned State Counsel had shot the question "කවුද මැරුවා කීවේ?" Suggesting that the name of the deceased transpired during the conversation which was not the case. The learned State Counsel should never have asked this question and on the other hand ought not to have been permitted by the learned High Court Judge as up to that point of his evidence, Vasudevan had not referred to the identity of the dead person.

In response to this question Vasudevan answered "Uma-Devi".

The manner of questioning not only diminishes the evidentiary value of the testimony, but also tarnishes the testimonial trustworthiness of the witness, as one could reasonably expect the witness to have come out with the name "Uma-Devi" on his own, if that name was referred to in the conversation between Salam and the accused-appellant.

For the reasons set out above, I am of the view that it is difficult to conclude with certainty that the use of the word "අපි" in the purported conversation, is an exclusive reference to Salam and the accused-appellant. As such, that evidence cannot be used as an item of incriminating evidence against the accused-appellant.

The 3rd question of law, on which leave was granted was: as to whether both the learned High Court Judge and the Court of Appeal misdirected themselves in taking into consideration an item of incriminating evidence; namely, that the accused-

appellant was present with the deceased 2nd accused when an item of jewellery was pawned.

Apart from the purported conversation overheard by witness Vasudevan, the only other item of evidence the prosecution led to connect the accused-appellant to the crime, was the evidence of witness Sundaralingam which I have referred to earlier.

The significance of this evidence was that the item of jewellery that Salam and the accused-appellant alleged to have pawned to Sundaralingam, was identified as the chain that was worn by Uma-Devi when she left home for the last time.

Here again, Sundaralingam was questioned by the police after more than one year had elapsed since the death of Uma-Devi. Therefore, when his statement was recorded, he was required to recollect a transaction that he had performed with the deceased 2nd accused more than a year before. Sundaralingam being a businessman, it is reasonable to presume, that he is a man who attends to this type of transactions day in and day out, in the normal course of his business. The Court was in no position to gauge the frequency of such transactions; he may have carried out hundreds of such transactions in that year. The witness was asked to recollect all of a sudden, the details of a transaction that had taken place around 12 months before, where the deceased 2nd accused had pawned an item of jewellery. Here again the only way to test his memory was to allow the witness to narrate the transaction as best as he could remember. He did say that it was the deceased Salam, who brought the item of jewellery, it was Salam, who handed over

the piece of jewellery to him and the witness wrote out a note recording the transaction in the name of Salam.

Here again, I observe that the manner in which this witness had been questioned by the learned State Counsel is improper and as a result, the probative value of Sundaralingam's evidence is diminished to such an extent, that I do not think that the evidence of Sundaralingam should be taken into consideration, against the accused-appellant.

I shall advert to the questioning:

Q එහෙම නාවලපිටියේ ව්‍යාපාර කරන අය, ඒ විදියට උකස් කරලා සල්ලි අරගෙන යනවද

A. ඔව්

Q. හාරිස් , සලාම් දෙන්නත් ඇවිල්ල අරගෙන ගිය අවස්ථා තියෙනවද ?

A. ඔව්

Q. තමාට මොකක් හරි විශේෂ අවස්ථාවක් මතකද ඒ දෙන්න ඇවිල්ල යම් කිසි රන් බඩුවක් උකස් තිබ්බා ?

A. ඔව්

Up to this point of questioning, the witness had never said that both the accused-appellant and the deceased 2nd accused had approached him to pawn an item of jewellery.

The question (referred to above) suggests to the witness that both of them (Salam and the accused appellant) in fact had come to his shop to pawn jewellery. Thus, the manner of questioning referred to above has thereby substantially diminished

the probative value of the testimony. It is significant to note that under cross examination, he had only made reference to the deceased 2nd accused as the person who brought the chain for pawning. For completeness, I have reproduced below, that evidence as well:

Q. බඩු ගන්ඩ එන කස්ටමර් කෙනෙක් හැටියට කියන්ඩ වෙන් එක අරගෙන ඇවිල්ල බිස්නස් එක කරන්නේ කොහොමද ?

A. දන්නවනම් විතරයි ගන්නේ, අඳුනන අයෙක් වන සලාම් ගෙනත් දුන්නා. මම සල්ලි දුන්නා. නැවත මුදල් දුන්නොත් ආපහු බාරදෙනවා.

Q. සලම්ද උකස් කලේ ?

A. ඔව් සලාම් තමයි

Q. සලාම්ගේ නමද ලිව්වේ

A. සලාම්ගේ නම තමයි ලිව්වේ

Q. සලාම්ගේ නම ලිව්වා සලාම් සලාම් ගෙනාපු නිසා.

A. ඔව් සලාම් තමයි මගේ අතට බාරදුන්නේ.

The Accused -appellant in his dock statement had denied that he ever went with Salam to pawn jewellery to Sundaralingam and the Court of Appeal does not appear to have considered the dock statement of the accused-appellant.

As referred to earlier the purported conversation between the deceased 2nd accused Salam and the accused appellant and the evidence relating to the pawning

of the chain are the only two items of evidence led against the accused-appellant to establish the charge of murder and the charge of gang rape. As far as the offence of rape is concerned, the prosecution has placed no evidence whatsoever. Both the learned trial judge and their lordships of the Court of Appeal, however, had thought it fit to convict the accused -appellant on that count based on the two items of evidence referred to.

In relation to both these items of evidence, it would be pertinent to apply the rule laid down in the case **of D.P.P v. Christie 1914 A.C 545**

In the said case Lord Moultan said that where the evidential value of some evidence is slender, whereas the prejudicial effect which its reception might have on the minds of the jurors would potentially be so substantial as seriously to impair the fairness of the trial, it ought not to be admitted.

Reiterating the rule, Lord du Parcq in the case of **Noor Mohamed vs. R 1949 A.C 182** said;

> "*In all such cases the judge ought to consider whether the evidence is sufficiently substantial having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as the purpose is concerned, it can in the circumstances have only trifling weight, the judge will be right to exclude it.*"

For reasons adumbrated above, I hold that, due to the inherent weaknesses in the evidence, the evidence cannot be acted upon and in the absence of any other incriminating evidence, the conviction against the accused-appellant cannot be sustained. It appears that the Court of Appeal had also misdirected itself by holding that the evidence of the investigating officer had revealed that witness Sundaralingam to whom the chain had been pawned was discovered on a statement made by both, the accused-appellant and the deceased 2nd accused.

It must be noted that the prosecution had not led any evidence under Section 27 of the Evidence Ordinance with regard to any discovery of fact, consequent to the statements made by the accused at the trial and secondly, it is trite law that the discovery of a witness consequent to a statement made by a witness cannot be considered as a discovery of a fact for the purpose of Section 27.

For the reasons set out above, I am of the view that the conviction and the sentence imposed on the accused-appellant cannot be sustained.

Accordingly, I set aside both the judgments of the learned High Court Judge as well as the Court of Appeal and make order acquitting the accused-appellant of all charges in the indictment.

In view of the above finding, answering the 4th question of law on which special leave to appeal was granted, does not arise. Suffice it to say that the prosecution had not led any evidence to show that the accused-appellant was complicit in any way in committing the offence of gang rape.

As the 3rd accused had not preferred an appeal against the judgment of the Court of Appeal, I do not wish to disturb the findings against the 3rd accused.

The appeal of the 1st Accused-Appellant-Appellant is allowed.

Appeal allowed

JUDGE OF THE SUPREME COURT

JUSTICE EVA WANASUNDERA PC.

I Agree

JUDGE OF THE SUPREME COURT

JUSTICE PRASANNA JAYAWARDENA PC.

I Agree

JUDGE OF THE SUPREME COURT