

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

Democratic Socialist Republic of Sri Lanka

High Court – Gampaha

Complainant

Case No 139/06

-Vs-

1. Abeywickramasinghe Gunawardena
Sumith Chandana alias Susith
Chandana
2. Wanniarachchi Pathirahenalage Mahinda

Piyatissa
2. Rajapaksha Vithanage Piyal Shantha
Kumara

Court of Appeal

Accused

Case No- CA 227-229/16

-AND VS-

1. Abeywickramasinghe Gunawardena
Sumith Chandana alias Susith
Chandana
2. Wanniarachchi Pathirahenalage Mahinda

Piyatissa
2. Rajapaksha Vithanage Piyal Shantha
Kumara

Accused- Appellant

-Vs-

Attorney General

Respondent

Before : Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel : Ranil Samarasekera with Isuru Somadasa for the 1st
and 3rd Accused- Appellants.

Indika Mallawarachchi for the 2nd Accused – Appellant.

Rohantha Abeysuriya, A.S.G. for the State.

Argued on : 20.11.2023

Decided on : 05.12.2023

MENAKA WIJESUNDERA J.

The Accused appellants have been indicted for charges of abduction murder and robbery under the provisions of the Penal Code.

The appellants had opted for a trial before a jury and accordingly it has been conducted and the jury had found all three appellants guilty for all three charges.

The appellants being aggrieved by said finding had lodged the instant appeal.

The main ground of appeal is that the summing up of the trial judge to the jury being insufficient and erroneous. The learned Counsel for the respondents did not object to the said application seriously and he said that he could not say that the summing up was sufficient and is according to law.

The version of the prosecution is that the deceased had been living in the house of the aunt and the husband of the aunt had purchased him a three wheeler on the suggestion of the wife. The deceased had been an orphaned person.

The deceased had been looking after the transport of the deceased persons children and thereafter he had been engaged in taking hires at the Maharagama town.

According to PW1 the deceased had been of very sober behavior and on the 22.2.1999 he had left with his two children to school in the morning and thereafter had not returned home at the usual time in the evening. But on that day, he had not complained to the police because his child had been hospitalized but the next day also as the deceased had not come home PW1 had complained to the police.

On the 25th of the same month they had found the body of the deceased dumped in the river with the hands tied.

On the 29th of the same month the Kandy police had taken a three wheeler in to custody when the 1st and the 2nd appellants had tried to sell the three wheeler in which the insurance and the revenue license of the deceased had been found in the custody of the 3rd and the 2nd appellants which had been recovered on the statements of the 2nd and the 3rd appellants. The 2nd and the 3rd had been taken in to custody with the three wheeler.

On the statement of the 1st appellant a knife had been recovered from the roof of a prosecution witness who had said before that just prior to the incident the 1st appellant had borrowed a pair of shorts from the house and had returned after the news of the deceased and the chord of the pair of shorts had been missing and on the day the police had come to her house to retrieve the knife the pair of shorts had been returned by the 1st appellant and the knife had not belonged to her.

The evidence of the prosecution is that the body of the deceased had been tied with a chord which had been in pieces but had been shown to the witness who had lent a pair of shorts to the 1st appellant for identification and the witness had identified the same, but we note with surprise as to how that could be without any specific mark of identification on the said piece of chord.

At the end of the prosecution case the all three appellants had made dock statements and had denied the entire incident and had said that the statements had been obtained by force by the police.

At the end of the entire case the trial judge had addressed the jury and we find that the trial judge had made a very emotional speech to the jury which in our view is being very partial to the deceased and not fair by the appellants.(page 791).

Furthermore, as the entire case is based on circumstantial evidence the trial judge must itemize the said circumstances and address the jury, but the trial judge had failed to do the same.

At this stage we wish to quote the case of **Attorney General vs Abhaya Sri Guruge CA 179-11 in which it has been said that “ the judge in his summing up has failed to explain to the jury the importance of circumstantial evidence ,and also place the items of circumstantial evidence in its proper perspective. The said non-direction in our view goes to the root of the case”.**

We also observe that the prosecution has relied on section 27(1) recoveries made during investigations which the trial judge had failed to state that what can be implied on discovery of a production subsequent to a statement of an accused is only knowledge.

The trial judge had found fault with the appellants for failing to give evidence from the box which is shocking and extremely surprising. (page 790) She had in fact had invited the jury to consider as to why the appellants could not give evidence on oath which is violating the rights of an accused in totality.

Hence, we find that the appellants had been cast with an undue burden which is wholly prohibited in law and which is fundamental in criminal law.

Hence, we find the summing up of the trial judge to be wholly inaccurate and insufficient and against the basic principles of criminal law.

According to the submissions made by both parties we find that the items of evidence led against the appellants are,

- 1) The section 27 (1) recoveries which are a knife, the revenue and the insurance license of the three wheeler of the deceased, and the wrist watch of the deceased.
- 2) The three wheeler of the deceased had been taken in to custody from the Kandy police with the 1st and the 2nd appellants inside the three wheeler and the 3rd appellant had tried to arrange the sale of the same.
- 3) One of the prosecution witnesses saying that prior to the disappearance of the deceased the 1st appellant had borrowed a pair of shorts from her and had returned minus the chord in the pair of the shorts and on the same day the police had come to her house with the 1st appellant and had taken a knife from her roof on the direction of the 1st appellant which she had not seen before.
- 4) The body of the deceased had been dumped in the river and had been tied with a rope and it had been shown to the witness to show that it had been the missing rope in the pair of shorts returned by the 1st appellant but it had not been very successful.

- 5) The medical evidence is that the deceased may have died of drowning due to several ways of drowning which had been totally ignored by the trial judge and she had completely chosen not to mention the medical evidence to the jury.

Hence upon considering the above we find that even if the jury had been properly directed by the trial judge, the verdict delivered could not have been reached due to the inadequate evidence led at the trial.

As such we are compelled to set aside the verdict entered by the jury and the sentence imposed on the appellants by the trial judge and allow the instant appeals.

JUDGE OF THE COURT OF APPEAL

Hon. Justice B. Sasi Mahendran

I agree.

JUDGE OF THE COURT OF APPEAL