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

In the matter of an appeal under
Section 331 of the Code of
Code of Criminal Procedure Act
No 15 of 1979 as amended

C.A. o1/2001

H.C. Anuradhapura 245/01

Kadirage Guneratne

Accused Appellant

Vs

Hon. Attorney general

Respondent

Before: **Sarath de Abrew, J**

H.N.J.Perera, J

Counsel: Anil Silva PC for the Appellant

Haripriya Jayasundera, SSC for the Respondent

Argued on: 16.05.2012

W/Sub: 20.6.2012 & 20.7.2012

Decided: 25.10.2012

H.N.J.Perera, J

Appellant was indicted before the High Court of Anuradhapura for committing the murder of one Yakdessage Seetha, on 07.05.2012.After trial on 04.03.2011 the accused was convicted and sentenced to death .Being aggrieved by the said conviction and the sentence the accused appellant has preferred this appeal to this court.

The facts pertaining to this case and the background to the incident may be set out briefly as follows.

The deceased was married to Kadirage Jayatilleke who was one of the brothers of the accused. The said Jayatilleke had married the deceased against the wishes of his parents and the other sibling's .After his marriage he has got completely disowned by his family and has lived separately with his wife, the deceased.

At the time of the incident Jayatilleke has been working as a teacher at Gonakumbukwewa maha Vidyalaya and have been occupying a house which was nearly 6-7 miles away from the school.

On the day of the incident around 1.30 pm, the accused had come to school and informed witness Jayatilleke that their mother was bitten by a snake and had asked the witness to accompany him home. The accused has been dressed in a sarong and a boxing banian and had behaved in an unusual way, in an agitated manner. He had also told the witness Jayatilleke that he came to that area to find some herbal medicine. The appearance of the accused had aroused suspicion in the Principal and teachers, who had made inquires about him from the witness Jayatilleke .One of the teachers had brought to the notice of the witness that the same person had come in search of him in the morning around 9.30, and upon being told that the witness that the witness was teaching, went away saying he will come later.

As the witness had showed reluctance to accompany the accused, the Principal had intervened and asked the accused to go home, and had sent the witness to his house with two other teachers for his safety. Half way through the journey the witness had asked the other two teachers to proceed and had proceeded alone. Upon arriving home, the witness had found his wife the deceased lying in a pool of blood, murdered.

According to SP Ellepola the dead body had been found inside the house with bleeding injuries on the neck. There had been an axe near the dead body with blood stains on the blade which was covered with a piece of paper. He has also observed a pineapple and a gunny bag near the dead body and had observed blood stains on the gunny bag.

As the doctor who performed the post Mortem Examination was dead the prosecution had led the evidence of doctor Karunatilleke .There had been six external injuries on the body.

Injury no.1 is a crescent shaped cut injury on the back of the head where the brain matter was found exposed. Dr. Karunatilleke had categorised this injury as a fatal injury and had said that in view of this injury the death is instantaneous .He also had stated that a sharp cutting weapon with a considerable weight must have caused this injury. When the axe that was marked and produced as P3 was shown, he had said that it is compatible with all the injuries. The defence had opted not to cross examine this witness. Therefore the evidence given by Dr Karunatilleke has been accepted unchallenged.

The notes of the Identification Parade and the contents of the Government Annalyst Report too have been admitted by the defence.

The accused appellant made a statement from the dock. His position was that sometime prior to the date of this incident his brother Premadasa had been bitten by a snake. He had been treated at the Medawachchiya Hospital and at the Anuadhapura Base Hospital. He was thereafter discharged and brought home but the swelling on the leg worsened. For the said swelling Premadasa took treatment from a native Physician who had asked that "Bomi Potu" and "Kitul Flowers" be obtained to prepare some medicine. The said native physician also had indicated that "Bomi Potu" could be obtained from the village of Kadewa. The accused appellant went in search of this medication to the house of one Sirisena which was at Galkande close to Kadewa. The accused appellant's mother had requested the accused to inform witness Jayatilleke that she was bitten by a snake and ask him to come home. It was the position of the accused that

accordingly he first went to the school and became aware that his brother was teaching some students at that time. He had proceeded to Sirisena's house and found kitul flowers but could not find the Bomi potu. Thereafter he went back to the school and conveyed the information to his brother Jayatilleke and as he said that he would come later went back home .And that night the police came to his house and arrested him and his brother. He denied committing this offence, and also the fact that the police took any clothes from him.

In this case the items of evidence relied by the prosecution is purely circumstantial.

In the case of King Vs Abeywickrema 44 NLR 2554 it was held that in order to base a conviction on circumstantial evidence the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence.

In King Vs Appuhamy 46 NLR 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 than that of guilt.

In Podisingho Vs King 53 NLR 49 it was held that in the case of circumstantial evidence it is the duty of the trial judge to tell the Jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt.

In Emperor Vs Brown 1917 18 Cri.L.J. 482 court held that the Jury must decide whether the facts proved exclude the possibility that the act was done by some other person, and if they have doubts the prisoner must have the benefits of those doubts.

In Don Sunny Vs Attorney General 1998 2 SLR 1 it was held that the charges sought to be proved by circumstantial evidence the items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

It was submitted on behalf of the accused appellant that the evidence led by the prosecution in this case did not satisfy the legal criteria set out above and therefore the accused appellant should have been acquitted. It was further submitted on behalf of the accused appellant that in a case of this nature the fact that the accused was seen at or about the place of incident at or about the time the incident was alleged to have been committed is of importance but in this case prosecution had failed to fix the exact time of death of the deceased and the fact that the deceased was last seen in the company of the accused. According to the evidence led in this case the accused appellant was seen at Gonakumbukwewa Maha Vidyalaya where the witness Jayatilleke was a teacher between 10.00 and 10.30 am. The accused had inquired about his brother, witness Jayatilleka and as he was teaching at that time went away and returned at about 1.40 pm. The learned Trial Judge had come to the conclusion that in the interim the accused had committed the murder. The learned Trial Judge had fixed the time of death at 11.30 am based on a statement in the post Mortem Report of Dr Shanmugadasan and the evidence of Dr Karunatilleka. It was the contention of the counsel for the appellant that the learned Trial Judge had not elicited the media, grounds and reasons why the doctor fixed the time at 11.30 am. It was further submitted on behalf of the accused appellant before the Trial Judge comes to a finding based on an opinion expressed by an expert he should satisfy himself that the expert has given reasons for his opinion. The prosecution had led the evidence of Dr. Karunatilleke as the doctor who

performed the post mortem. Dr Shanmugadasan was dead at the time the trial was taken up. It is very clear that Dr. Kartunatilleka had fixed the time of death at 11.30 am based on a statement in the post mortem report of Dr Shamugadasan. In this case too the trial Judge had not elicited the media, grounds and reasons why the doctor fixed the time at 11.30 am. Senior State Counsel for the respondent in her written submissions to court have stated that as Dr Shanmugadasa was dead by the time the trial commenced, the prosecution was unable to elicit as to how he ascertained the probable time of death, and as such the prosecution is not relying on the time of death noted down by Dr Shanmugasdasa and all what the prosecution intends to establish is that the accused had an opportunity to commit the murder in question in between the times he came to the school of Jayatilleka and it is none other than the accused who committed this crime.

As submitted by the learned Counsel for the accused appellant I find that there is no cogent evidence led in this case to establish that the death of the deceased occurred between 10.30. am and 1.40 pm and therefore this is a matter the learned trial judge should have considered in favour of the accused appellant in this case, and failure to do so had occasioned a miscarriage of justice.

The fact that the accused had the opportunity to commit the said murder is not sufficient. The prosecution must prove that the act was done by the accused alone and must exclude the possibility of the act done by some other person. In the case of The Queen Vs Kularatne 71 NLR at page 534 the Court of Criminal Appeal quoted with approval the dictum of Whitemeyer, J. In Rex Vs Blom as follows:- " two cardinal rules of logic which governs the use of circumstantial evidence in the criminal trial.

(1) The inference sought to be drawn must be consistent with all the approved facts. If it does not, then the inference cannot be drawn.

(2) The proof of facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they had not excluded the other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

There is no direct evidence in this case. The items of evidence relied by the prosecution is purely circumstantial. Another item of circumstantial evidence relied on by the prosecution is the alleged presence of a pineapple close to the body of the deceased. The police evidence was to the effect that a pineapple was found close to the body of the deceased. It was submitted on behalf of the appellant that none of the other prosecution witnesses who were cross-examined on this matter could categorically state that they saw a pineapple close to the body of the deceased. The contention of the Counsel for the accused appellant is that, apart from the investigating officer SP Ellepola, none of the other witnesses had observed a pineapple at the scene of the crime and therefore it is an introduction by the police. It was further submitted on behalf of the appellant that even the police officer who guarded the dead body until it was removed also does not testify about the presence of a pineapple, and similarly Dr Shanmugadasan who visited the scene and gives a description about the things that were there does not speak about the presence of a pineapple. I find that this position had not been challenged by the prosecution and even assuming that in fact there was a pineapple close to the body of the deceased there is absolutely no evidence to connect the pineapple that was found

at the scene with the pineapple that was allegedly purchased by the accused. In Parameshwaran Vs Officer-in-charge Norwood 1988 (2) SLR 138 it was held that in a criminal case it is imperative that the identity of productions must be accurately proved by direct evidence which is available and not by way of inferences. In this case too there is no evidence to show that the pineapple alleged to havebeen found close to the body of the deceased is the same pineapple alleged to have been bought from the witness Nizam.

If the evidence of the witness Nizam is believed it confirms the fact that the death of the deceased would have been committed after 10. am on that day. The fact that the accused had purchased a pineapple to be given to the deceased creates a doubt as to the intention of the accused appellant to commit the murder of the deceased on this fateful day. There is a doubt as to whether the accused in fact went to the house of the deceased on this day carrying a pineapple. And even if he had, the question arises as to whether he is the only person who could have committed the murder of the deceased.

In this case there is no evidence to show that there was any motive to commit the murder of the deceased by the accused appellant. There is evidence to show that the witness Jayatilleka had married the deceased on his own a few months prior to the incident. Although the parents of the witness Jayatilleka had not approved the marriage of their son to the deceased, there is evidence to show that his parents had visited the new couple at their house and the accused appellant and one of his friends on their way to a musical show had gone to the house of the deceased and at the instance of the deceased had stayed at that house that night. Therefore there is no evidence to show that the

accused appellant had any motive to cause death of the deceased. Witness Kadirage Sirisena too in his evidence had denied that there was any animosity between them. In Queen Vs Sathasivam 55 NLR 255 it was held that evidence with regard to a speculative motive cannot be led under section 8 of the Evidence Ordinance. In Queen Vs Matthew de Zoysa 67 NLR 112 it was held that the Jury should be directed not to pay any regard to the speculative motive suggested by the Crown Counsel which is only a figment of his imagination. It has been stated that the existence of a motive is not wholly essential in the prosecution case, There is no requirement therefore for the prosecution to prove a motive in order to prove a charge. In Emperor Vs Balram Das it was held that where there is clear evidence that a person has committed an offence it is immaterial that no motive is proved, or that the evidence of motive is unclear. But in this case there is no direct evidence to show that the accused had committed this offence. Although there is no requirement for the prosecution to prove a motive in order to prove the charge against the accused clear evidence of a existence of a motive would have strengthened the case for the prosecution against the accused. This court is of the opinion that in this case, there is no good evidence to show that the accused had a motive to commit the murder of the deceased. (Sumanasena vs Attorney General 1999 (3) SLR 137).

Another item relied by the prosecution is the presence of human blood on a shirt and a sarong recovered from a room where the accused appellant and his brother were residing. To draw an adverse inference against the accused on this item there should be evidence that the accused at the time wore a long sleeved shirt. The prosecution witness had said that the accused at the time of the incident was wearing a short sleeved shirt. As

submitted by the counsel for the accused appellant for any adverse inference against the accused appellant to be drawn there should be clear and cogent evidence that the clothes worn by the accused appellant at the time he visited the school are the same clothes that were produced in court. Although the witness Jayasooriya had testified in court that the accused was wearing a short sleeved shirt on that date the police officer produced a brown coloured long sleeved shirt saying that it contains stains like blood. The counsel for the respondent in her written submissions had conceded the fact that there is a discrepancy between these two witnesses as to whether it was a long sleeved shirt or a short sleeved shirt. The Government Analyst had found human blood on this shirt. Yet the prosecution had failed to establish that the blood found on the shirt is that of the deceased.

Consideration of circumstantial evidence has been vividly described by Pollock C.B. in R. V. Exall [1866] 4 F & F 922 at page 929, cited in King v Gunaratne [1946] 47 NLR 145 at page 149 in the following words:

"It has been said that circumstantial evidence is to be considered as a chain, and each piece as a link in the chain, but that is not so, for then, if any one link breaks, the chain would fall. It is more like the case of a rope comprised of several chords. One strand of the rope might be insufficient to sustain the weight, but three strands together may be quire of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit."

The items of circumstantial evidence referred to earlier in this case in my opinion are insufficient to sustain the weight of the rope. Further the totality of the evidence led in this case does not lead to an inescapable and irresistible inference and conclusion that it was the accused-appellant who inflicted injuries on the deceased. The prosecution has failed to prove the case beyond reasonable doubt and rebut the presumption of innocence.

For the reasons enumerated by me, on the facts and the law, in the foregoing paragraphs of this judgment, I set aside the conviction and the sentence of the Learned High Court Judge of Anuradhapura dated 04.03.2011 and acquit the accused appellant.

Appeal is therefore allowed.

JUDGE OF THE COURT IOF APPEAL

SARATH DE ABREW, J.

I agree

JUDGE OF THE COURT OF APPEAL