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

In the matter of an appeal in terms of Se.331 of the Code of Criminal Procedure Act No.15 of 1975.

C.A.344/2007

H.C. Avissawella No. 106/2003

Don Athukoralage Indrasiri
Accused Appellant

Vs

Hon. Attorney General
Respondent

Before : W.L.Ranjith Silva, J. & D.S.C.Lecamwasam, J.

Counsel: A.K.Chandrakantha for the Accused Appellant
Sarath Jayamanne D.S.G for the State

Argued: 20-06-2011 and 08-07-2011

W/subm: 23-08-2011

Decided: 01-11-2011

W.L.Ranjith Silva, J.

The accused appellant, who shall hereinafter sometimes referred to as the appellant, was indicted in the High Court of Avissawwlla for committing the murder of his wife Kaluhakuruge Priyangani, on or about first of October 1997 at Wellikanna, which is an offence punishable under section 296 read with section 294 of the Penal Code.

The appellant opted for a non jury trial and was tried accordingly, found guilty convicted for murder and sentenced to death. Being aggrieved by the said conviction and the sentence the appellant has preferred this appeal to this Court against the said conviction and the sentence.

On the day of the incident around 8:30 p.m. the father of the deceased, (witness No.2) had heard the discharge of a gun followed by shouting from the direction of the house where the appellant and his daughter lived. He had rushed there immediately and found his daughter lying on the floor with bleeding injuries. The appellant was at that time sitting on a bed and had told the witness that one Perera who was their immediate neighbour shot his wife. The appellant had also mentioned this to Lionel, the son of witness No.2. Thereafter this witness had gone to the house of the said Perera but Perera had refused to open the door for him and had told him to come with the police.

The investigating officer S.I. Gunawardana having received the information from Lionel, along with several other officers, arrived at the place of incident. As he entered the house the appellant who was seated on an easy chair had attempted to run away and this officer had chased after the appellant and arrested him. On search of his person (the appellant's) he found a currency note to the value of Rs. 500 and a gold ring in one of his trouser pockets. Thereafter he recorded a statement from the appellant and on that statement he had recovered three parcels of gunpowder, a stick used to compress / load gunpowder into the barrel of the gun. On the same statement the shotgun used in the crime was also recovered from a toilet pit on the following day. The appellant made a statement and in that he had stated that when he was trying to put his child to sleep he heard the sound of gunfire from the direction of the kitchen and then he saw his wife come there with blood on her chest, emitted a sound (eai) and fell on the floor.

There were no eye witnesses for the prosecution and the case rested entirely on circumstantial evidence. The appellant was the wife of the deceased and they lived in that house with their two-year-old child. The body of the deceased was found lying between the kitchen and the hall of the house. At the time of the incident the appellant was present in the house and the evidence disclosed that the appellant raised cries soon after the incident and that the father of the deceased and the brother of the

deceased who were living in the same neighbourhood, close by, had rushed to the scene and the appellant, at that point of time, had told the farther of the deceased that the deceased was shot by Perera.

Perera lived with his wife and five children in close proximity, 65 feet a way from the house of the deceased. He denied the allegation but admitted that he was not in good terms with the deceased family over a minor dispute. The relations between them were strained as the children of Perera had taken some vegetables from the garden of the deceased. The appellant had another case pending against Perera on a charge of arson but Perera was discharged from the proceedings as the appellant refrained from giving evidence in that case. The father and the brother of the deceased never suspected or implicated Perera. Although the police took Perera into custody and questioned him he was released the following day. At the trial, on behalf of the defence, it was suggested to Perera that he was the one who shot the deceased but the allegation was promptly denied by him.

Grounds of appeal

At the stage of arguments and also in the written submissions the appellant urged the following grounds of appeal.

a) Delay on the part of the Judge in pronouncing the Judgment,

b) Misdirections made by the Learned Trial Judge in the evaluation of evidence.

Circumstantial evidence

According to the medical evidence, that has virtually gone unchallenged, the gunshot injuries that were found on the body of the deceased could have been caused by the discharge of a gun at close range of about 3 feet from a high elevation. (Vide. Page 143 of the brief) At page 120, S.I. Gunawardane has stated in his evidence that the gun would have been aimed through one of the smoke holes that were found on one of the kitchen walls. This police officer further stated that if a person stood outside the smoke holes he could have easily seen the inside of the kitchen. The red coloured plastic can found inside the kitchen had two bullet holes on it and two pellets inside the can which smelled of gunpowder. The Counsel argued that on this evidence there was a strong possibility that the gun was fired from outside the house and that the findings of the Learned Judge on that issue was erroneous. The evidence of the police officer with regard to the fact that where the assassin would have been standing when the gun was fired was just a bear opinion and this officer was certainly not competent to express such an opinion. The district medical officer who

conducted the post-mortem (autopsy) opined that the deceased died due to gunshot injuries and that the gun was fired at very close range at a distance of about 3 feet. According to the opinion expressed by the medical officer the range of firing could not have been more than 3 feet and also there had been burn marks at the entry to the wound and also marks of smoke at the exit of the injury. The deceased had gunshot injuries on her chest near the heart and the injuries were necessarily fatal. On this evidence the only rational or sensible conclusion that one could safely draw is that at the time the gun was discharged who ever the miscreant would have been, would have done so from within the house and not from outside and the assassin would have been just 3 feet away from the deceased.

The investigating officer has recovered the bullets and the two empty used cartridges from the kitchen of the house of the deceased. (Vide. Pages 116 and 117 of the brief). This vital piece of evidence proves beyond any doubt that the gun had been discharged and the fatal bullets had been fired from within the house that is inside the kitchen. If the assassin had done it from outside the kitchen then the empty cartridges should have been found outside the kitchen.

According to the Government Analyst the gun sent to him for analysis was a locally manufactured one and that gun was in working condition. The

medical evidence was that it was possible for the injuries to have been caused by the said gun.

On hearing the cries raised by the appellant when the father of the deceased visited the house the accused was inside the house. He was in the house, seated and he did not take any steps to go out of the house in pursuit of Mr. Perera or in search of the assassin. Even after the father and the brother of the deceased came to the house of the appellant the appellant neither showed any interest to dispatch his injured wife to the hospital nor made any effort to go to the police station to inform the police. This is not the conduct that could be expected from a husband in the ordinary course of events whose wife was just gunned down by one of his neighbours.

It is also significant to note that the Father and the brother of the deceased who came immediately to the house of the deceased did not confront, meet or see Mr Perera the person who the accused said was the culprit especially in considering the fact that Mr Perera lived 65 feet away from the house of the deceased. (Vide page.97)

It was also in evidence that the behaviour of the appellant was strange and that he had been consuming liquor as there was a bottle of alcohol nearby.

It was also in evidence that the appellant had tried to escape when the police came there and that the police gave chase and apprehended him.

It was also in evidence that when the police apprehended the appellant and searched him they found a Gold ring in his pocket that was later identified as belonging to the deceased. The father of the deceased corroborated this evidence with regard to the recovery made by the police and he too identified the ring.

The accused made a statement to the police and the police recovered the gun that was used in the commission of the crime from a toilet pit in the garden of the accused appellant just adjacent to the house of the appellant. This was recovered on the following day as it was late in the night and the police could not recover the gun immediately. It appears that soon after recording the statement of the appellant the police arrested the appellant and had taken him to the police station and thereafter brought him back to the house on the following day in order to recover the gun. This is what would have happened in the normal course of events. Whether the accused appellant was present at the time of the recovery of the gun or not does not affect the evidence and there is no requirement in law that the recovery has to be made in the presence of the person who made the statement. Police witnesses have made two different statements with regard to the presence of the appellant at the time of the recovery of the gun and I am of the

opinion that this discrepancy in evidence is not sufficient to discredit any one of those witnesses.

On the statement made by the appellant the police recovered certain material that was used in the preparation of local cartridges.

Father of the deceased in his evidence stated that there had been intermittent quarrels between the deceased and the appellant and also complaints of harassment by the appellant and that the deceased on certain occasions used to come to their house to avoid the appellant. The father of the deceased had stated in evidence that there were complaints against the appellant made to the police by the deceased in this regard.

Circumstantial evidence is that which relates to a series of other facts than the fact in issue, which by experience had been found so associated with that fact than in relation of cause and effect they lead to a satisfactory conclusion. For example when foot prints are discovered after a recent snow, it is proper to infer that some animated being passed over the snow, since it fell and from the form and number of the foot prints it can be determined whether they are those of a man a bird or quadruped. All the judicial evidence is either direct or circumstantial. By direct evidence is meant the principal fact or *factum probandum* attested directly by the

witnesses, things or documents. To all other forms the term circumstantial evidence is applied.

The case against the appellant is entirely dependent on circumstantial evidence. Therefore it has become necessary to consider the principles governing the reception and evaluation of circumstantial evidence. In the case of **Queen Vs Kularatne71 NLR at page 534** the Court of Criminal Appeal quoted with approval what Watermeyer, J. held in Rex Vs Blom. I quote, "Two Cardinal rules which govern the case of circumstantial evidence in a criminal trial:

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

2) The proved 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.

It was held in the case of the **Queen Vs Santin Singho 65 NLR at page 445** that in the case of circumstantial evidence a direction given by the trial judge in the summing up that the accused person must explain each and

every circumstance established by the prosecution is wrong and would completely negative the direction given earlier by him that the circumstances must not only be consistent with the accused persons gilt but should also be inconsistent with his innocence.

It was also held in this case that it is fundamental that the burden of proof is on the prosecution. Whether the evidence the prosecution relies on is direct or circumstantial the burden is the same. This burden is not altered by the failure of the appellant to give evidence and explain the circumstances.

In **Emperor Vs Brown 1917 Criminal Law Journal 482** the 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, prisoner must have the benefit of those doubts. (Queen Vs Kularatne (supra)).

In **King Vs Abeywickrama 44 NLR 254** it was held as follows. I quote; "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 hypotheses of his innocence." (See also **King Vs Appuhamy 46 NLR 128, Podisingho Vs King 53 NLR 49)**

In the face of all the items of incriminating circumstantial evidence

aforementioned which no doubt make out a very strong case against the appellant it is necessary to consider whether it would be fair to expect an explanation from the appellant. In this regard I refer to **Rex Vs Cochrane 1814 Gurney's Report 499** and **Ajith Fernando Vs Attorney General 2004 SLR 288.** Their Lordships held in those cases that although an accused is entitled to remain silent when there is a cogent case made against him which requires an explanation from him, if the accused is in a position to explain but does not explain, certain adverse inferences can be drawn against the accused. (See also; **R Vs Seeder Silva 41 NLR 337, King Vs Wickramasinghe 42 NLR 313, King VS Peiris Appuhamy 43 NLR 410)**

First Ground-delay in pronouncing the Judgment

Counsel for the appellant contended that the Judgment was postponed on two occasions without recording any reasons for such postponement and that finally the Judgment was pronounced after nearly two months causing serious prejudice to the accused appellant. I find that this argument is not tenable. A delay of two months cannot be considered as having caused substantial prejudice to the appellant in the circumstances of this case. The case was not dependent on the evidence of eye witnesses or an eyewitness in which case the deportment and demeanour of the witness would have been relevant and all-important. This is a case dependent entirely on circumstantial evidence.

In the instant case there are different witnesses speaking to several distinct circumstances; all tending to the same result, namely the guilt of the appellant. Each circumstance is a necessary link in the chain of evidence required to produce a conviction of the appellant; and there is therefore the less danger of perjury in this case. Circumstantial evidence in the abstract nearly, though perhaps not altogether as strong as positive evidence that is direct evidence in the concrete, it may be infinitely stronger.

Second ground of appeal

Evaluation of the circumstantial evidence and the dock statement

At page 205 to page 226 of the brief in particular page 211 and 212 the Learned Trial Judge having studied the evidence has concluded that the shooting had taken place within the kitchen and not from outside and not by an outsider but by the person who was inside the house. The learned High Court judge has considered the medical evidence and the evidence given by the police officers in arriving at this decision which is most fundamental and relevant and which is the most significant circumstantial evidence that was against the appellant, vital and decisive. The learned judge cannot be faulted for the conclusions he had drawn on the subsequent conduct of the appellant. The learned judge has also given reasons as to why he came to the conclusion that the appellant had attempted to fabricate

a case against his neighbours Mr. Perera and as to why he rejected the story of the appellant. Referring to the dock statement the Learned Trial Judge has sufficiently analyzed and evaluated the dock statement and Learned Trial Judge cannot be faulted on that too. The Learned Judge has also given reason as to why he decided that the accused should explain the highly incriminating evidence against him and as to why he decided to apply the Ellenborough principles.

For the reasons I have adumbrated on the law and the facts pertaining to this case, in the foregoing paragraphs of this Judgment, I hold that the learned judge cannot be faulted for the conclusions drawn and the findings he reached including his Judgment. As I see no merit in this appeal, I dismiss the same, whilst affirming the conviction and the sentence.

JUDGE OF THE COURT OF APPEAL

D.S.C..Lecamwasam, J.

JUDGE OF THE COURT OF APPEAL