

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

1. Sudu Hakuruge Jamis.
2. Kuda Liyanage Premaratne
Perera alias Oliver.

Accused-Appellants.

-Vs.-

The Attorney General.

Respondent.

CA 204/2010
HC RATNAPURA 98/2001

Before: Sisira J De Abrew, J. &
P.W.D.C. Jayathilake, J.

Counsel: Caniskka Witharana for the 1st Accused-Appellant.
Neranjan Jayasinghe for the 2nd Accused-Appellant.
Thusith Mudalige SSC for the A.G.

Argued on: 12.11.2013 and 13.11.2013
Decided on: 13.11.2013.

Sisira J De Abrew, J.

Heard Counsel for both parties in support of their respective cases. The Accused-Appellants in this case were convicted of the murder of a woman named Doloswala Batahenage Kusumawathie and were sentenced to death. Being aggrieved by the said conviction and the sentence they have appealed to this Court. Before I deal with the facts of this case, I would like to comment on certain misdirections committed by the learned Trial judge in his judgment. The both accused-appellants in this case gave evidence under oath. Learned Trial Judge has observed that he was unable to consider the credibility of the evidence of the 2nd accused as he was present in Court when the 1st accused gave evidence. In short he was of the opinion that when one accused gives evidence the other accused should be removed from the dock. I have to state here that above observation made by the learned trial judge is wrong. The accused persons are entitled to be present in Court until the conclusion of the full trial unless the trial judge makes an order under Section 241 of the Criminal Procedure Code to remove the accused from the dock by reason of his conduct in Court. I hold that the learned trial judge was wrong when he made the above observation. Both accused-appellants, in their evidence, took up the defence of alibi. The learned trial judge had observed that in order to accept the defence

of alibi the accused must be away at least 50 K.m. or 100 K.m. from the scene of the offence. He has come to this conclusion after considering the illustration in Section 11 of the Evidence Ordinance. I must mention here that the learned Trial Judge has made a mistake in considering the illustration in Section 11 of the Evidence Ordinance. The above conclusion reached by the learned trial judge is clearly wrong. It is not necessary to give further reasons as the error made by the learned Trial Judge is very obvious. We note that he had convicted both accused-appellants after committing the above mis-directions. Learned Senior State Counsel upholding the best traditions of the Attorney General's Department informs this Court that he is not supporting the conviction. We are pleased with this submission. The case for the prosecution depended on circumstantial evidence. Since it is based on circumstantial evidence, I would like to consider certain judicial decisions relating to the principles governing cases of circumstantial evidence.

In *King Vs. Abeywickrama* 44 NLR page 254 Soertsz J. remarked as follows :

"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 page 128 Keuneman J 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 his guilt.”

In Podisingho Vs. King 53 NLR page 49 Dias J held that

“In a 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. Browning (1917) 18 Cr.L.J. 482 Court held

“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 benefit of those doubts.”

Applying the principles laid down in the above judicial decisions, I hold that in a case of circumstantial evidence if the Court is going to arrive at a conclusion that the accused is guilty

of the offence, such an inference must be the one and only irresistible and inescapable conclusion that the accused himself committed the crime. Further I hold that if the proved facts are not consistent with the guilt of the accused, he must be acquitted.

Facts of this case may be briefly summarized as follows:

The deceased woman Kusumawathie was a teacher attached to the village school. Every morning she used to leave home around 6.30 in the morning. On 18.10.1990 when Yogarajah was walking on the road, the 1st accused came from a certain location in front of him and slapped him. According to Yogarajah, the 1st accused thereafter dragged him to a place which was 100 feet away from the road. Then he saw the 2nd accused who was wearing a batik sarong and a shirt standing near a woman who was lying fallen. Yogarajah later says that this woman is the deceased woman in this case. According to Yogarajah at the time he went there the 2nd accused was raping the woman who was lying fallen. It has to be noted here that he came out with this version only in the cross-examination. Thereafter, Yogarajah was asked to drop a rock on the body of the woman who was lying fallen. Thereafter, the 2nd accused remarking that it was not the way to drop the rock, took the rock and dropped it again on the

on the other part. Yogarajah who saw the gruesome incident which I have narrated earlier did not decide to go to the police station. He went to the cinema and came back. According to him on the instructions of the 2nd accused he too committed a criminal act. According to him the 1st and the 2nd accused were not known to him. He left the area with his wife and came back only after six weeks. But the accused-appellants went and informed what they saw to Damunupola and on the same day they went and informed the police of what they saw. Under these circumstances I have to ask the following question. Whose behaviour is suspicious? Is it the behaviour of the accused-appellants or the behaviour of Yogarajah? The clear answer is that Yogarajah's behaviour. Under these circumstances the question has to be asked whether this Court can affirm the conviction on the evidence of Yogarajah. This question has to be answered in the negative.

According to Yogarajah he was dragged to the place of the incident and the 1st accused made him to see the gruesome incident. If the 1st and the 2nd accused committed the murder of the woman, will they drag witnesses to witness the incident? Will they drag witnesses to implicate them? It is difficult to think that the offender after committing the murder, would drag a witness

to the place of the incident to witness it. Therefore in the first place, I hold that the evidence of Yogarajah does not satisfy the test of probability.

Yogarajah says that when he went to the place, the 2nd accused raped the woman who was lying fallen. Will the 2nd accused commit the act of rape in the presence of two males? Can one think that a person will commit the act of rape in the presence of two male persons one of whom is going to be a witness in open air and broad day light except when the two male persons are also assisting the rapist and/or waiting to take turn. But according to Yogarajah, he or the 1st accused were not behaving in the above manner. In fact according to the medical evidence, the deceased woman had not been sexually assaulted. There is no medical evidence to support the contention that she had been raped. It is difficult to accept the evidence of Yogarajah on this point. For the above reasons, I hold that the evidence of Yogarajah again does not satisfy the test of probability.

Yogarajah's wife whose name is Suppiah Marriyar was a witness on the back of the indictment. According to Journal Entries she had been present in Court prior to the conclusion of the prosecution case. She had been warned by Court to be

present. But unfortunately the learned prosecuting State Counsel had failed to call wife of Yogarajah as a witness. If wife of Yogarajah was called as a witness, in my view, the decision of the trial judge would have been different. Under these circumstances it is necessary to consider whether an adverse inference can be drawn from the failure on the part of the prosecutor to call wife of Yogarajah as a witness. Section 114(f) is as follows:

“ the Court may presume that evidence which could be and is not produced would if produced, be unfavorable to the person who with holds it”.

I think this is a fit case to draw the inference under Section 114 (f) of the Evidence Ordinance. In my view the prosecutor refrained from calling the wife of Yogarajah because if she was called as a witness, as I pointed out earlier, the decision of the trial judge would have been different. When I consider all these matters I hold that the proved facts are not compatible with the guilt of the accused-appellants. Therefore they cannot be convicted for the offence. Considering all these matters, I hold that the prosecution has not proved its case beyond reasonable doubt. I therefore set aside the conviction and both death sentences imposed on the accused-appellants and acquit the accused-appellants. Accused-

appellants have been sentenced to death on 27.08.2010. I state that the Prison Authorities are not entitled to keep the two accused-appellants in their custody when they receive a copy of this judgment. I hereby nullify the committal signed by the learned trial judge sentencing the accused-appellants to death. This Court hopes that the Attorney General would take steps to re-investigate the case against Yogarajah who had given evidence in this case.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL.

P.W.D.C.Jayathilake J.

I agree.

JUDGE OF THE COURT OF APPEAL.

Mm/-

body of the woman who was lying fallen. Yogarajah who had decided in the morning to go to a cinema in Ratnapura without informing the police or anybody went and saw the film. When he came back, he divulged the entire incident to his wife. Following day Yogarajah left his house and came back only after six weeks. Yogarajah admits that he divulged the entire incident to his wife. One day he started fighting with his wife. Then the wife had addressed Yogarajah in the following language: "Are you trying to kill me in the same way that you killed the woman". These utterances were heard by a person in the neighbourhood. This ^{the} was brought to the notice of police through some witnesses and the police questioned Yogarajah and his wife. Police later arrested the 1st and the 2nd accused. The accused-appellants gave evidence under oath. According to them when they were walking in the tea estate belongs to Damunupola, they saw a woman lying fallen and also noticed a rock on the top of the body of the woman. They immediately brought this matter to the notice of the owner of the estate Damunupola. On Damunupola's instructions, both accused-appellants went and complained to the police. It has to be noted that they went and lodged a complaint at the relevant police station on the same day (18/10/1990). It is relevant to consider the behaviour of both accused-appellants on one part and the behaviour of Yogarajah