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

Ambagahawattage Sarath Fernando

C.A. No:270/2012 **Accused-Appellant**

H.C. Matara Case No:236/07

Vs.

Hon. The Attorney General.

BEFORE : SISIRA J. DE ABREW, J. (ACTING P/CA) &

P.W.D.C. JAYATHILAKA, J.

COUNSEL : Indica Mallawarachchi for the Accused-Appellant.

Yasantha Kodagoda, DSG, for the A.G.

ARGUED ON : 11.02.2014 & 12.02.2014.

DECIDED ON : 12.02.2014.

SISIRA J. DE ABREW, J. (ACTING P/CA)

Accused-appellant is present in Court produced by the Prison Authorities.

Heard both Counsel in support of their respective cases. The accused-appellant in this case was convicted of the murder of a man named, Maithripala Rubasinghe and was sentenced to death. He was also convicted for robbing a three wheeler bearing registration No.203-1067 from the possession of the said deceased person and was sentenced to a term of 7 years rigorous imprisonment and to pay a fine of Rs.10,000/- carrying a default sentence of 6 months rigorous imprisonment. Being aggrieved by the said conviction and the sentence he has appealed to this Court.

The accused-appellant is the 2nd accused in this case. The 1st and the 2nd accused both were charged for the offence of murder and the offence of robbery. The 1st accused too was convicted for both offences. The 1st accused was tried in absentia. He has not appealed against the conviction.

Facts of this case may be briefly summarised as follows.

On 18.08.1997 around 8.30 to 9.30 a.m. the deceased person who was a three wheeler driver parked his three wheeler infront of Matara bus stand. Around 11.00 a.m. on that day two people came and discussed a hire to go to Hakmana with the deceased person. The deceased person quoted Rs.400/- for the hire. The discussion between the said two people and the deceased person took about five minutes. Chaminda Pushpa Kumara who was also a three wheeler driver whose three wheeler was parked near the deceased's three wheeler witnessed the entire discussion between the deceased and the two people. These two people were later identified by Chaminda Pushpa Kumara at an identification parade. They were the 1st and the 2nd accused. Chaminda Pushpa Kumara says that the said two persons (the 1st and the 2nd accused) took the rear seat of the three wheeler and the three wheeler driver, the deceased person, drove away the three wheeler. This was between 11.00 a.m. and 11.45 a.m. The deceased person never returned to the three wheeler park. About 5 days later, decomposed body of Maithripala Rubasinghe (the deceased person) was found at a place called Walpita Jungle which was 6 miles away from Akuressa town. Chaminda Pushpa Kumara, at an identification parade, had identified the two persons as the persons who took the three wheeler with the deceased person. He also identified the 2nd

accused (accused-appellant) in this case as one of the persons who went with the 1st accused in the three wheeler of the deceased person.

10 days later the deceased's three wheeler was found in the compound of one Letchamie in Matale district. The Grama Sevaka of the area Sunil Senanayake handed over the three wheeler to the police station. Minutes after he handed over the three wheeler to the police station, a person came and claimed the three wheeler. Sunil Senanayake later identified this person at an identification parade. He is the 1st accused in this case. Sunil Senanayake directed the 1st accused to go and claim the three wheeler from the police station. He further showed him the route to go to the police station. The 1st accused after going on the road shown by Sunil Senanayake de-routed, but did not go to the police station. The 1st accused never claimed the three wheeler from the police station. Police, on a statement made by the 1st accused, recovered a pawning receipt which indicates that a ring has been pawned to a Pawning Centre in Matale. Thereafter police recovered a ring. Prosecution tried to establish that the ring discovered from the Pawning Centre was that of the deceased. But when we consider the evidence we feel that the prosecution has not established the

ring discovered was that of the deceased. Police observed the name of A.G. Sarath Fernando in the pawning receipt. Learned trial Judge has concluded, on the said evidence, that the 2nd accused had pawned the ring to the said Pawning Centre. He further concluded that the ring discovered from the Pawning Centre belonged to the deceased person. But when we consider the evidence there is no concrete evidence to arrive at the said conclusion. We therefore hold that the learned trial Judge committed ~~to~~ a misdirection on the said point. Although the learned trial Judge committed a misdirection we must consider whether the rest of the evidence establishes the charge against the accused-appellant. Although the learned trial Judge committed a misdirection, the Court of Appeal in terms of proviso to Section 334 of the Code of Criminal Procedure Act No. 15 of 1979 has a power to sustain a conviction. Proviso to Section 334 of the Code of Criminal Procedure Act reads as follows:

> "Provided that the Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismissed the appeal if it considers that no substantial miscarriage of justice as actually heard."

In this connection I rely on a judgment of the Court of Criminal Appeal in ***The King vs. Musthapa Lebbe*** (44 NLR 505) wherein the Court held thus -

> "The Court of criminal appeal will not interfere with the verdict of a jury unless it has a real doubt as to the guilt of the accused or is of opinion that on the whole it safer that the conviction should not be allowed to stand."

Further I rely on a Judgment of His Lordship Justice H.N.G. Fernando in ***M.H.M. Lafeer vs. The Queen*** (74 NLR page 246) wherein His Lordship Justice H.N.G. Fernando held thus –

> "There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."

According to the prosecution case the two accused after discussing a hire to Hakmana went in the three wheeler driven by the deceased person. The deceased person's body was later found in highly decomposed position. The deceased person never returned to the three wheeler park. Later the said three wheeler was found in Matale and the 1st accused who went with the 2nd accused claimed the ownership of the three wheeler. Learned Deputy Solicitor General does not rely on the evidence relating to discovery of the pawning receipt and the ring. It has to be noted here that the two accused persons went in the three wheeler on a hire to go to Hakmana. What is the explanation given by the accused-appellant to the above incriminating evidence? He merely denied the charge. When we consider the dock statement we feel that the accused has failed to offer any explanation to the incriminating evidence set out above. Since the accused-appellant has failed to offer an explanation to the incriminating evidence that I have stated above, I would like to rely on the dictum of Lord Ellenborough in ***R vs. Lord Cochrane and Others*** (1814 Gurney's Report 479) wherein it says–

> "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to

offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

When I consider the evidence in this case I hold that the prosecution has put forward a strong prima facie case and it is in the power of the accused ~~who~~ to offer an explanation to the said incriminating evidence. Therefore, I am justified in relying on the Dictum of Lord Ellenboro.

In ***Sumanasena vs. Attorney General*** His Lordship Justice Jayasuriya (1999 3 SLR page 137) held thus –

"When the prosecution establishes a strong and incriminating cogent evidence against the accused, the accused in those circumstances was required in law to offer an explanation of the highly incriminating circumstances established against him."

In ***Baddewithana vs. The Attorney General*** (1990 1 SLR page 275) His Lordship Justice P.R.P. Perera held thus –

> "From the failure of an accused to offer evidence when a prima facie case has been made out by the prosecution and the accused is in a position to offer an explanation, an adverse inference may be drawn under S. 114 (f) of the Evidence Ordinance."

In ***Boby Mathew vs. State of Karnataka*** (2004 Cr. L.J. Vol. III page 3003) –

The body of the deceased person was found tied to a cot in the accused-appellant's room. But the accused-appellant did not offer any explanation to the evidence led by the prosecution. Indian Supreme Court held that the accused was bound to offer an explanation to the evidence led by the prosecution. His conviction of murder was affirmed by the High Court of India.

Applying the principles laid down in the above judicial decisions, I hold that failure of an accused person to offer an explanation when a strong prima facie case has been established by the prosecution can be considered against the accused-appellant.

Learned Counsel for the accused-appellant relying on the judgment in ***The King vs. Appuhamy*** (46 NLR 128) contended that the time of death should be established by the prosecution. She further contended that the time of death has not been established in this case. But we observe when the body was found after 5 days of the incident it was in a highly decomposed position. In ***The King vs. Appuhamy's*** case the deceased person was last seen with the accused-appellant. But the accused-appellant after he left with the deceased person came and met the brother of the deceased person on two occasions. Considering the facts of that case His Lordship Justice Keanaman decided that the establishing the time of death in a circumstantial evidence case is essential. But the facts of ***Appuhamy's*** case are quite different from the facts of this case. We therefore hold that the said decision is not applicable to this case. The 1st accused who claimed the three wheeler 10 days after 18.08.1997 went with the 2nd accused in the three wheeler driven by the deceased person. This was a hire to go to Hakmana. Hire was discussed by both the 1st and the 2nd accused. When I consider the evidence led at the trial, I hold that the participation of the 2nd accused to the crime has been established beyond reasonable doubt. Since the case of prosecution depended on circumstantial evidence I would like to consider the rules governing circumstantial evidence.

In the case of ***The King vs. Abeywickrema*** (44 NLR 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 hypotheses of his innocence".

In ***The King vs Appuhamy*** 46 NLR 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 The King*** 53 NLR 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 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."

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 of guilt such an inference must be the one and only, irresistible and inescapable inference that the accused committed the crime. In the present case the two accused, who went on a hire to Hakmana in the three wheeler driven by the deceased person, did not offer any explanation to the said journey. Later the decomposed body of the deceased person was found at a place called Walpita Jungle which was 6 miles away from Akuressa town. The three wheeler was claimed by the 1st accused who went with the 2nd accused in the said three wheeler. When I consider the above evidence I hold that one and only, irresistible and inescapable inference that the Court can arrive is that the both accused-appellant committed the murder of the deceased person and robbed his three

wheeler. For the above reasons, we affirm the conviction and the sentences and dismiss the appeal.

Appeal dismissed.

ACTING PRESIDENT OF THE COURT OF APPEAL

P.W.D.C. JAYATHILAKA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

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