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

Malwanne Hewavitharanage
Samantha Pushpakumara
No.19, Godawela
Kiula
Matale

Accused – Appellant

Court of Appeal Case No. 87/2010
Anuradhapura H.C. No. 343/2005

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo 12

Respondent

BEFORE: Anil Gooneratne, J. &

W.M.M. Malinie Gunaratne, J.

Counsel: Neranjan Jayasinghe

for the Accused – Appellant

Dilan Ratnayake. SSC

for The Respondent

Argued on : 27.5.2014

Decided on: 31.10.2014

Malinie Gunaratne, J.

This is an appeal against the conviction and the sentence imposed on the present Accused – Appellant by the learned High Court Judge of Anuradhapura sitting without a jury.

The present Accused - Appellant was indicted in the High Court of Anuradhapura, on two counts.

(i) For causing the murder of Welage Rankira on the 28th May 2000 at Namalpura, an offence punishable under Section 296 of the Penal Code.

(ii) For causing grievous hurt to one Rankirage Jayawickrama in the same time, place and transaction, an offence punishable under Section 317 of the Penal Code.

At the end of the trial, learned High Court Judge delivered her judgment on the 04th of August 2010 finding the accused guilty on both counts on the indictment and was sentenced to death on count one and in respect of count two sentenced to a term of 5 years rigorous imprisonment. The accused has preferred an appeal to this Court against the findings, conviction and sentence pronounced and imposed on him by the learned High Court Judge of Anuradhapura.

In this case the accused was found guilty of murder on purely circumstantial evidence. The material evidence in the case was given by Rankirage Jayawickrama, a son of the deceased. According to the evidence given by him, on this day, he and his family members had gone to the house of his father to spend the night as a door in his house was broken by someone. Although he had not seen this incident he had believed that the appellant had done it as he had observed that the appellant was outside his house soon after this incident. In order to repair the door and secure the house he had to return to his house. He had come with his father the deceased.

On their way they met the accused and had told them that he wants to show a card to the deceased which the appellant had claimed would allow him to get any man or woman out of their house. As there was no light at the scene of this incident, the deceased had asked the witness to bring a torch from the house of his brother which was nearby. When he proceeded about 100 – 125 feet he had heard a sound of foot steps behind him. When he turned the appellant had attacked him with a kathy. The witness fell down and he was unconscious for a while. When he regained consciousness he saw the injuries he had received and then he went to his brother's house and again he lost consciousness. At the Anuradhapura hospital after two days he regained consciousness and he came to know of his father's death. Evidence of the witness is that he did not see who attacked the father. However, his position is that it was only the deceased, appellant and he who were present together throughout the incident.

Considering the submissions made on behalf of the appellant as well as for the respondent, two main questions or issues have emerged which would need closer examination. They could be listed as follows:-

(i) The entire case for the prosecution is relied on circumstantial evidence;

(ii) Reliability of the evidence of prosecution witness (PW 1).

Firstly, I proceed to deal on the 2nd contention.

At the hearing of this appeal learned State Counsel invited to consider first, the evidence led by the prosecution with regard to the 2nd count on the indictment. In the oral and written submissions of learned State Counsel, it has been stressed that the evidence as to the assault on witness Jayawickrama (PW 1) has been both credible and uncontradicted. Learned State Counsel contended during the course of the oral arguments the evidence of Jayawickrama (PW 1) was not contested or assailed by the defence in any way with regard to the assault on Jayawickrama. It is significant to note, the evidence given by Jayawickrama (PW 1) has not been challenged or impugned by the Counsel who had appeared for the accused, in cross examination.

In Himachal Pradesh vs. Thaknar Dass 1993 2 CRI 1694, Misra C.J. held: *"Whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed"*.

In Motilal vs. State of Madya Pradesh 1990 CRI LJ No.: 125, held, absence of cross examination of prosecution witness of certain facts leads to the inference of admission of that fact.

In Edrick de Silva vs. Chandradasa de Silva 70 N.L.R. 169 at 170, Justice H.N.G. Fernando observed *"When there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross-examination, that is a special fact and feature to the case. It is a matter falling within the definition of the word "prove" in Section 3 of the Evidence Ordinance, and as Trial Judge of Court must necessarily take that fact into consideration in adjudicating the issue before it".*

Ajith Samarakoon vs. Attorney General 2004 2 SLR 209, Nandasena vs. Attorney General 2007 1 SLR 225 and Gunasiri and two others vs. Republic of Sri Lanka 2009 1 SLR has followed the same view.

On a perusal of the evidence given by Jayawickrama (PW 1), it is important to note that the evidence transpired from him that it was only the deceased, appellant and he who were present together throughout the incident and regarding the assault on him was uncontradicted and uncontroverted and only mere suggestions that were made by the Defence Counsel, that the witness did not see who caused the fatal injuries to his father. The witness consistently takes that position.

However, he consistently maintained that it was only the accused, deceased and he who were present together throughout the incident. The credibility of this witness has not been assailed throughout the cross-examination of this witness. Hence, it is the position of the prosecution that

there is a strong item of circumstantial evidence against the appellant as he was the person with whom the eye witness last saw the deceased alive.

The learned Counsel for the appellant contended that the identity of the appellant had not been established by the prosecution. At the time of the incident, Jayawickrama (PW 1), who knew the appellant had met him on the road near a school and the appellant had asked the deceased where he was going. The appellant wanted to show the deceased a card. (Vide pages 52 – 53). It is important to note with regard to the 2nd count, the identity of the appellant was never questioned by the defence. At the Identification Parade too, this witness had identified the appellant. This evidence was accepted under Section 420 of the Criminal Procedure Code (Vide Page. 78). This evidence had not been shaken by the defence at the trial. In the light of the above evidence there is no question of the identity of the appellant. Evidence of Jayawickrama (PW 1) has established the identity of the appellant beyond reasonable doubt. Therefore I hold that the identity of the appellant had been established beyond reasonable doubt and reject the contention of the learned Counsel.

For the reasons enumerated , I hold that the trial judge's findings in regard to credibility and testimonial trustworthiness of Jayawickrama (PW 1) were justified.

The accused was found guilty of murder on purely circumstantial evidence. Since the second issue that now arises for consideration is whether the prosecution has placed circumstantial evidence to satisfy the Court to support their case.

Circumstantial evidence is evidence of facts where the principal or the disputed fact, or *factum probandum* could be inferred. In Chatuna vs. State of Assam (1981) CRI. L.J. 166 describing circumstantial evidence, it was stated that *"Evidence proves or tend to prove the factum probandum indirectly by means of certain inferences of deduction to be drawn from its existence or its connection with other facts probantia it is called circumstantial evidence".*

In R. vs. Gunaratne (1946) 47 N.L.R 145, the Court of Criminal Appeal cited with approval the following quote which suggested that despite certain weaknesses, circumstantial evidence would afford sufficient proof of the facts in issue. It was stated that,

"It has been said that circumstantial evidence is to be considered as a chain and each piece of evidence as a link in the chain, but that is not so, for then if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the rope might be insufficient to sustain the weight, but three stranded together may be quite sufficient strength".

If the prosecution seeks to prove a case purely on circumstantial evidence, the prosecution must exclude the possibility that the proved facts are consistent with the innocence of the accused. In the present case has the prosecution excluded this probability?

The learned Counsel for the appellant contended that there is no evidence either direct or circumstantial, as to the manner in which Welage Rankira came to his death. He strenuously argued that on a consideration of

the evidence of Jayawickrama (PW 1), it cannot be established that the appellant committed murder.

But the Respondent's position is, the prosecution has made a strong prima facie case with regard to the 1st count of murder based on circumstantial evidence. The learned State Counsel made meaningful submissions relating to certain circumstances that surfaced from the prosecution evidence. He referred to the following facts namely,

(i) Jayawickrama's evidence has arrived at the conclusion upholding the testimonial trustworthiness and credibility.

(ii) Accused was the last person with whom the deceased was seen alive.

(iii) Recovery of the weapon (P 3) in terms of Section 27 of the Evidence Ordinance.

(iv) With regard to the identity of the appellant there is no doubt.

(v) Judicial Medical Officer's evidence, with regard to the injuries of Jayawickrama (PW 1).

These items create a case of a rope not with a single strand but of several strands and I am of the view the prosecution has made a strong prima facie case on that against the appellant. Evidence complete the chain of events, and bring to light the murder responsible for the death of the deceased.

It is important to note, that the evidence placed before the court with regard to the recovery of the weapon was not contested or challenged by the defence in cross examination. Absence of cross examination of prosecution

witness of certain important and relevant facts leads to the inference of admission of that fact.

When a production recovered consequent to a statement made by an accused, not only embrace the knowledge of the accused as to the item but that it was evidence connecting him with the murder. In Nissanka vs. The State (2001) 3 SLR 78, Kulatilake J. held *"Hence in the attendance circumstances of this case Section 27 statements P6, P7 and P9 consequent to which productions marked P3, P4, P5 and P1 were discovered not only embrace the knowledge of the accused and as to these items being hidden in the places from which they were detected but that it was evidence connecting them with the murder".*

Evidence pertaining to the discovery of the Kathy (P3) was deposed to by Police Sergeant Sudesh Gamini. According to his evidence it was discovered consequent upon the statement " ...." (P5). On a careful perusal and examination of the evidence led in the case pertaining to the recording of the statement of the accused and the discovery of this item, I am satisfied that the police had discovered the production (P3) consequent to the statement made by the accused. Accordingly, recovery of P3 on Evidence Ordinance Section 27 statement has been proved against the appellant.

It is important to consider the medical evidence of this case. The evidence of Dr. H.A. Karunatilake (PW 10) corroborate the evidence of PW 1. His Medico Legal Report reflects the injuries of PW 1. The Judicial

Medical Officer who had carried out the post mortem of the deceased had described seven cut injuries out of which injury No.1 (back of the head) No. 3 (left side of the forehead) and No.6 (deep cut injury penetrating the trachea) were likely to cause the death of the deceased. Although there is no conclusive proof that P3 was used in the attack, medical evidence has confirmed that the injuries inflicted could have been caused with P3. Other items of circumstantial evidence above complied with the medical evidence formed a prima facie case for the prosecution and the available circumstantial evidence which was of strong and compelling nature implicated the accused on 1st count of the indictment.

With all these damning evidence against the appellant the charges including murder and causing grievous hurt, the appellant did not offer any explanation with regard to any of the matters referred to above. Although there cannot be a direction that the accused person must explain each and every circumstance relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound to offer any explanation of his conduct, there are permissible limitations in which it would be necessary for a suspect to explain the circumstances of suspicion which are attached to him.

In Prematilake vs. The Republic of Sri Lanka 75 NLR 506, held that a conviction could be based upon the telling evidence of a mass of eloquent circumstances remain unexplained by the accused, no reasonable judge could have any verdict other than that of guilt. In Ariyasingha and others vs. The Attorney General (2004) 2 SLR 357 held, when a prima facie case is tendered

against a person in the absence of a reasonable explanation prima facie evidence would become presumptive.

In this case when the appellant called for his defence, he had made a short dock statement denying any knowledge about this murder. Perusal of the dock statement reveal that no specific plea of evidence such as an alibi has been raised by the appellant but only a brief blanket denial of involvement. Dock statement is an unsworn statement lacking the probative value of formal evidence tested and filtered through cross-examination, it is still evidence of a lesser weight recognized in our law. However I am of the view that the dock statement of the accused is insufficient to raise any doubt in the prosecution case.

The Courts in Sri Lanka have applied the principle commonly known as "Ellenborough Dictum" in Rex vs. Lord Cochrane, Gurneys Report 479. The principle laid down in that case do not place a legal or a persuasive evidence on the accused to prove that he committed no offence but this decision on proof of a prima facie case and on proof of highly incriminating circumstances when he had both the power and opportunity to do so. (Ajith Samarakoon vs. The Republic of Sri Lanka (2004) 2 SLR 209).

By applying the dictum of Lord Ellenborough, I am of the view, it was obligatory on the accused to offer an explanation of the circumstances of suspicion which are attached to him in this case. He has refrained from doing so. Then it would justify the conclusion that the evidence so suppressed or not adduced would operate adversely to his interests. (R. Vs. Cochrane and Others).

In this case the prosecution has not proved any motive of the accused. The motive which includes a man to do a particular act known to him and to him alone. Therefore, the prosecution is not bound to prove a motive for the offence to prove a charge.

When relying on circumstantial evidence to establish the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offences. The prosecution has excluded the possibility that the proved facts are consistent with the innocence of the accused.

On consideration of the judgment of the learned High Court Judge, it seems to me that the circumstantial evidence has been judicially analysed and evaluated by the learned High Court Judge and convicted the appellant for both counts.

The Counsel for the appellant contended that there is no evidence either direct or circumstantial as to the manner in which Welage Rankira came to his death. He further contended that the prosecution had failed to prove that two incidents had taken place in the course of the same transaction and at the same time. Further contended it is doubtful that the injury caused to the father had been caused by the accused appellant or someone else.

It is important to remember PW 1 in his evidence consistently maintained that it was only the deceased, appellant and he who were present together throughout the incident. The defence has failed under cross-examination of this witness or by any other evidence to assail the credibility of the witness. His evidence was un-contradicted and uncontroverted and had

not been shaken by the defence at the trial. The evidence placed before the Court with regard to the recovery of the weapon (P3) was not challenged and contested. This item of evidence links the appellant to both counts.

Evidence with regard to the injuries of PW1, Medico Legal Report corroborate his evidence. Both doctors opine that the injuries found on the body of the deceased and PW 1, could have been caused by kathy marked as P3. With all these damning evidence against the appellant, he did not offer any explanation. Accordingly every reasonable hypothesis is inconsistent with the innocence of the accused on both counts. Further, I am of the view that the prosecution has established that the death of the deceased occurred in the course of the same transaction. The learned Trial Judge in coming to her conclusions has properly evaluated the evidence.

For the aforementioned reasons I am of the view that there is no merit in any of the grounds urged by learned Counsel on behalf of the appellant. I therefore affirm the convictions and the sentences of the accused – appellant and dismiss the appeal.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne, J.

Anil Gooneratne, J.

I agree

JUDGE OF THE COURT OF APPEAL