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

Ratnayake Liyanarachchilage Piyaratne

ACCUSED-APPELLANT

C.A 203/2007

H.C. Ratnapura 106/2004

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &
P.R. Walgama J.

COUNSEL: Indika Mallawaratchy for Accused-Appellant

Harippriya Jayasundara D.S.G. for Complainant-Respondent

ARGUED ON: 01.10.2014

DECIDED ON: 20.01.2015

GOONERATNE J.

This was a murder case. Incident occurred on or about 09.03.1998. The Appellant was convicted on 28.06.2007. Deceased and the Appellant were security guards at a place described as 'Silver Ray' building located near the Ratnapura-Colombo main road. This is a case of circumstantial evidence and the murder took place at the above place called 'Silver Ray building. Prosecution witness Kularatne testified that he lives about 75 meters away from the said building and at about 3.15 a.m he woke up due to distress cries of a person who shouted 'Budu Ammo Mava Beraganne'. Witness opened the door and was able to identify the Appellant who told him that three robbers entered the building and that two robbers who entered through the main gate gave chase. A little while later (5/10 minutes) both went to the scene of the crime. Witness requested the Appellant to go inside and call the other security guard on duty. Having said so to the Appellant, he came out and informed witness Kularatne that the other person was lying fallen on the ground. Witness testified that he saw the deceased lying inside the security hut on a pool of blood.

The above witness's version give a description of what took place on the night of the incident. It would be convenient for this court to refer to the other items of evidence at least the gist of it, to ascertain whether all items of evidence could be linked together in such a way to show the guilt of the Appellant, or if it cannot be properly linked the Appellant need to be acquitted? Prema Ranjani the girl friend of the deceased identified two gold rings and a gold chain at the non-summary inquiry. Jewellery which had been worn by the deceased on the day of the incident (productions destroyed in a fire whilst in court custody).

Then another security guard attached to the Seylan Bank (within the premises) also gave evidence but did not hear a commotion until in the morning he heard the voices of people. Medical evidence reveal that the injuries would have been caused by a blunt heavy weapon, like and iron rod . Fracture to the skull and the brain was contused. More than one blow had been dealt.

Two police witnesses testified and Chief Inspector Basildus gives details of the area, a hotel in close proximity to the scene of the crime, open for 24 hours. Blood stains observed inside the security hut and found part of a gold chain. Place fully lit with high powered bulbs. No signs of damage, fight

or robbery. (witness not subject to cross-examination) As a consequence of the statement made to the police, by the Appellant a recovery of 2 gold rings from the Appellant's house, a chain pawned to a Rural Bank, and a nickel club in a swamp closer to the scene of the crime was recovered by the police.

All recovered items were identified at the non-summary inquiry. (jewellery). Prosecution makes a point that the defence did not challenge the evidence pertaining to recovery. Further Chief Inspector Basildus was also not cross-examined. Manger Rural Bank also gave evidence regarding pawning of jewellery by the Accused-Appellant (receipt produced P3). The grounds of appeal suggested by learned counsel for the defence are:

Grounds of appeal –

1. Learned trial Judge has erred in law on the principles relating to section 27 recovery of a nickel rod.
2. Items of circumstantial evidence are inadequate
3. The learned trial Judge has failed to evaluate the items of circumstantial evidence.
4. Prosecution has not excluded the possibility of a third party committing the crime.

What would be important for the case in hand is to ascertain, whether the items of circumstantial evidence, when linked, would demonstrate the guilt or whether the link collapse, to demonstrate the innocence of the Accused-Appellant. I would, having studied the case of both parties list the following items of evidence and the undisputed facts/uncontradicted evidence.

(a) The deceased and the Accused were security Guards at a place called 'Silver Ray' building. It cannot be denied that both were on duty on the night in question.

(b) Police evidence which are uncontradicted shows that the area was well lit with powerful bulbs.

(c) A night café/restaurant adjacent to the above 'Silver Ray' building.

(d) Witness Kularatne heard a distress call as stated above in the early hours of the morning and woke up. He saw and identified the Accused. He was informed by the Accused-Appellant that three robbers entered the building and one gave chase.

(e) Both the Accused-Appellant and witness after a while proceeded to the scene of the crime.

(f) Witness Kularatne testified that he saw the deceased in a pool of blood in the security hut. Distance according to the police, between the security hut and the gate to the building was 18 feet.

(g) Blood stains observed and found in and around the security hut. No blood stains found or detected in any other place within the premises. No other signs of disturbance (police evidence) in and around the scene of the crime.

(h) Recoveries made as a result of the Section 27 statement (P2) by the police

(1) recovery of a gold chain and two gold rings.

(2) recovery of a nickel rod in a swamp closer to the scene of the crime.

(i) Fiancee of the deceased identified the gold chain and the two gold rings, worn by the deceased on the day in question

(j) The chain in question was pawned to a Rural Bank 10 days after the incident and the corresponding receipt recovered. Manager of Rural Bank testified and the name on the receipt tally with the name of Appellant. Police recovered the chain from the pawning centre.

I observe that the Accused-Appellant had not challenged certain vital Items of evidence. i.e recovery of above items from the possession of the Accused and from the Rural Bank. The Appellant in his dock statement admits having taken over from the deceased, at the hospital, the chain and two rings. This court observe that in the context of this case the normal acceptable conduct of a lay person would have been to admit the patient to hospital and either hand over the belongings to persons in authority or to the next of kin

(soon or within a very reasonable time). Instead the Accused-Appellant either knowingly or unknowingly or willingly took charge of valuable items belonging to the deceased. Only after the Accused-Appellant was arrested (after a period of time from the date of murder) that the above items surfaced. At this point I state the probability and the improbability of Accused conduct would have to be projected and any court cannot be faulted for drawing certain adverse inferences from above, which points in the direction of his guilt. There is no plausible explanation placed by the Appellant before the trial court to enable the trial Judge to give his mind towards the innocence of the Appellant.

I agree with the learned Deputy Solicitor General's view that the recovery under Section 27 of the Evidence Ordinance of the nickel rod from a swamp and closer to the scene of the crime, which evidence remains unchallenged and the provisions contained in Section 27 are not violated. i.e Accused had the knowledge and whereabouts of the fact discovered. Prosecution no doubt was handicapped due to loss of productions as a result of a fire. That would not however, harm the prosecution case in view of above described items of evidence. It lead us to the conclusion that the Accused-Appellant himself hid the nickel rod. In *Ariyasinghe Vs. A.G 2004 (2) SLR 357 at 386*, the three ways on which an Accused could gain knowledge would be

(1) Accused himself hid

(2) Accused saw another person concealing the items

(3) A person who had seen another person concealing the items in certain place told the Accused.

In the context and circumstances of the case in hand (1) above matters. Medical evidence reveal that the head injuries caused to the deceased could have been caused by a heavy blunt weapon. No weapon was available and I agree that as a result the Doctor could not be shown the nickel rod. Defence did not challenge the medical evidence. In fact the Accused party seems to have played a passive role at the trial. Injuries are consistent having being caused by an iron rod. When vital material points in a case remains unchallenged, it would lead to an inference of admission of fact. I had the benefit of perusing the judgment in CA 173/2005; H.C. Kegalle 1576/2001 dated on 16.3.1009. In this judgment reference is made to the following case law.

Sarwan Singh Vs. State of Punjab 2002 AIR Supreme Court (iii) 3652 at 3655

Indian Supreme Court held:

> "It is rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted"

Himachal Pradesh Vs. Thakur Dass (1983) 2 Cri. L.J. 1694 at 1701 V.D. Misra CJ 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.

Absence of cross examination of prosecution witness of certain facts leads to the inference of admission of that fact." Vide Motilal Vs. State of Madhaya Pradesh (1990) Cri. L.J NOC 125 MP.

On the question of non-production of the weapon, I am guided by the principles laid down by *Jayasooriya J. in Sudu Banda Vs. A.G 1998 (3) SLR at pg. 378*

However, in proviso 2 to section 60 of the Evidence Ordinance he has made provision for the adduction of real evidence subject to a condition. Section 60 proviso 2 sets out thus: "Provided also that if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection. "Likewise, the court could act in this respect again in the exercise of its power enshrined in section 165 of the Evidence Ordinance". Thus, there is a definite change in the law as far as the Evidence Ordinance is concerned when one compares it with the English law. Even in England there are a series of decisions which have taken the view that the non-production of the material object is not necessarily fatal to a conviction. Vide the following cursus curiae – Hichin v. Ahquirt Brothers. Lucus v. William and Sons, Rex v Francis at 132 for the observations of Lord Coleridge, it appears that

Stephen has followed this line of reasoning manifested in these English cases that I have adverted to. In the circumstances, the contention that as the gun was listed as a production in the indictment, its non-production at the trial is fatal to the conviction, is an untenable proposition certainly as far as the law of Sri Lanka is concerned.

In this Judgment, I do not wish to repeatedly refer to the undisputed items of evidence. However my attention has been drawn to the presumptions contained in Section 114 of the Evidence Ordinance. As observed the defence did not attempt to dispute or offer an explanation for the continued possession of jewellery belonging to the deceased. Nor has the Accused disputed the pawned items of jewellery. A Judge is free to exercise his power of inference and either draw the presumption or call for proof of fact (Section 4(1). The main Section 114 dealing with presumptions entitles court to presume (word used is 'may') of an existence of fact which is likely to have happened due to common course of natural events, human conduct and public and private business. The ordinance connect 8 illustrations to the main Section 114, which are not exhaustive and other similar presumptions can be drawn. To this I would add, a recent possession of stolen goods the nature of the property, the facility with which it would pass from hand to hand. If and when the presumption is drawn the Accused party should be called upon to explain

his possession (section 114 a). The Accused is requested to give a reasonably true explanation which is consistent with his innocence, vide *King Vs. Jayasena 48 NLR 241; Banda Vs. Andre Appu 25 NLR 218: 5 CWR 236; 7 NLR 327.* I note that there was no reasonable explanation forthcoming from the Accused party. The dock statement is devoid of a reasonable explanation as to how, he continued to possess until arrest. This court note that the deceased's girl friend in her evidence described the items of jewellery worn and identified same.

I will not include in this judgment all and every aspect pertaining to presumptions since this is not an exercise on jurisprudence, but refer to a Judgment of the *Amaratunge J. in the case of Ariyasinghe Vs. A.G (2004) 2 SLR 357 at 398-399* to demonstrate that such a presumption is not restricted in its application.

Thus it is quite clear from the cases I have referred to above, that the validity of any inference as to the existence of any facts, drawn from the proved facts, depends on the facts of the particular case. The broad general principle, couched in broad language giving a wide discretion to a trier of fact to be used, having regard to the common course of natural events, human conduct and public and private business in their relation to the facts of a particular case, cannot be curtailed of restricted by reference to an illustration provided to illustrate the application of the general principle laid down in section 114 of the Evidence Ordinance.

In Cassim v Daya Mannar (supra) Wijeyawardene, J. (as he then was) cited with approval the following passage from Taylor on Evidence which shows that the application of the general principle contained in section 114 and the presumption to be drawn thereunder is not confined to any particular category of offences.

"The presumption is not confined to cases of theft but applies to all crime even the most penal. Thus on indictment for arson proof that property which was in the house at the time it was burnt, was soon afterwords found in the possession of the prisoner has been held to raise a probable presumption that he was present and concerned in offence. A like inference has been raised in the case o f murder accompanied by robbery, in the case of burglary and in the case of possession of a quantity of counterfeit money." (12th Ed – para 142 emphasis added)

Section 114 of Evidence Ordinance is a reproduction of section 114 of the Indian Evidence Act. drafted by James Fitzjames Stephen, Q.C. In moving the draft Act before the Legislative Council on 5th March 1872, he had stated that he had put into writing what he had to say on the subject dealt with in the Act and that he proposed to publish what he had written by way of a commentary upon or introduction to, the Act itself. His notes have been subsequently published under the title "An introduction to the Indian Evidence Act. The Principles of Judicial Evidence." In this work referring to section 114 he has stated as follows. "It declares, in section 114, that the Court may in all cases whatever draw from the facts before it whatever inference it thinks just." (2nd impression 1904, page 181, emphasis added)

The words 'may in all cases whatever draw' in the above quotation indicate that Stephen intended to make section 114 applicable, when it is to be invoked in criminal cases, to all offences without limiting it to any category of offences. With the words used in section 114 Stephen has effectively given expression to his intention.

Thus the categories of offences in respect of which a presumption under section 114 may be drawn are not restricted or closed. The Courts are left with an unfettered discretion in all cases to presume, if so advised, the existence of any fact 'which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case'.

We therefore hold that on the proved facts of this case, it was open to the learned trial Judge to draw, in his discretion, any presumption of act, having due regard to the particular facts of this case.

No attempt was made to rebut the presumption. In any event when somewhat of a passive role is played by the Accused party without probing and examining on material points, it would weaken the defence case and substantiate and advance the prosecution case.

The entire case is based on circumstantial evidence and there is a value that could be attached to same. It would be in order to refer to a Judgment of former Chief Justice *Shirani Bandaranayake in Sajeewa alias Ukkuwa and others Vs. A.G 2004 (2) SLR 263 at page 278-279.*

"E.R.S.R. Coomaraswamy (The Law of Evidence, Vol. 1 pg. 18) in considering the value and advantages and demerits of circumstantial evidence has stated that the use of circumstantial evidence is criticized on the ground that it is not reliable evidence, however, he is of the view that,

"But it would be going too far to say that it is never safe to trust circumstantial evidence in the entire absence of direct, for there are many crimes which are committed under circumstances which preclude the possibility of direct evidence being given, but which yet allow of a perfectly safe inference being drawn from surrounding circumstances. The risk of perjuring is minimized, since circumstantial evidence, unlike direct evidence, does not depend on the veracity of witnesses. It is less capable of fabrication."

It is also to be borne in mind that the English decisions have evolved a set of principles and rules of caution which have been followed in Sri Lankan cases. Consideration of circumstantial evidence has been vividly described by Pollock C.B. in R v Exall (1) cited in Kign v. Gunaratne (2) 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 of 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 quite 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."

It was stressed by learned counsel for Accused-Appellant that the evidence placed before the trial court is inadequate to support a conviction. In view of the conclusion arrived by me I am not in agreement with such a view. In a case of circumstantial evidence the all important link from the beginning to the end has to be carefully viewed and analysed. It need not depend on a

veracity of witnesses and by its very nature this type of evidence is less capable of falsehood. The case law stated just above fortify evidence of this nature. I have nothing more to add. The next question raised by learned counsel, of judicial evaluation, is no doubt a matter to be considered. Learned trial Judge refer to the evidence of prosecution witnesses and express his views on the dock statement of the Accused-Appellant and reject same to be false. The Judgment I observe is not totally devoid of reasoning. Failure of the Accused to challenge material points in cross examination support the findings reached by the learned High court Judge. Further the possibility of a third party getting involved is very much improbable. If at all the evidence on either side strongly suggest only three persons to be on guard duty, in a secured building where there is evidence of a front gate at the entrance of the building, and the Seylan Bank and the other establishment, being guarded by Moradeniya, (Bank) Accused and deceased in charge of 'Silver Ray' building. Both establishments situated in one premises. The material placed before the trial court does not suggest the presence of a 3rd party. In fact the *so called robbers* who were supposed to have entered the premises in the manner suggested to have entered the premises and in the manner suggested by the Accused party were never apprehended nor did the Accused-Appellant though

it fit to make a distress call to the persons inside the night restaurant situated adjacent to the building in question? Instead he ran to the house of witness Kularatne along the direction of the Pelmadulla Road, 75 meters away from the scene of the crime. The improbability of the Accused's version which suggest falsehood fortify the prosecution case. In these circumstance the prosecuting State Counsel cannot be called upon to search for a 3rd party and exclude such possibility, from the available facts.

I have considered in this Judgment the principles relating to Section 27 statement recovery of a nickel rod. Section itself embody only the knowledge of the existence and whereabouts of the facts discovered. This is an item of evidence connecting the link required to establish circumstantial evidence. What the trial Judge seeks to explain at folio 129 of the record is only the fact that list of productions include the pole used for the commission of offence. At a glance one could get misled that the production of the nickel rod goes beyond knowledge contemplated under Section 27. It cannot be so. It is arguable that the trial Judge has erred to this extent. As stated above all other items of evidence support the conviction. (a - j).

In all the above facts and circumstances we are not inclined to interfere with the Judgment of the learned High Court Judge. We affirm the conviction and sentence. Appeal dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama J.

I agree.

JUDGE OF THE COURT OF APPEAL