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

In the matter of an appeal against the Order of the High Court under section 331 of the Code of Criminal Procedure Act No.15 of 1979 as amended.

Mohamed Sameem Mohamed Akram

Accused-Appellant

C.A.Case No:-76/2013

H.C.Matara Case N0:-11/2009

V.

Hon. Attorney General

Attorney General's Department,

Colombo 12.

Respondent

Before:- H.N.J.Perera, J. &

K.K.Wickremasinghe, J.

Counsel:-Niranjan Jayasinghe for the Accused-Appellant

Shanil Kularatne S.S.C. for the Respondent

Argued On:-12.05.2015/21.05.2015

Written Submissions:-29.05.2015

Decided On:-17.07.2015

H.N.J.Perera, J.

The accused-appellant was indicted in the High Court of Matara for two counts, for committing the murder of one Uyanahewa Mangalika an offence punishable under section 296 of the Penal Code and for committing the offence of robbery punishable under section 380 of the Penal Code. After trial the accused-appellant was convicted for the first count and sentenced to death on 03.05.2013. Being aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

The prosecution case rests solely and squarely on circumstantial evidence.

According to the prosecution on 6th September 2006 deceased left the house around 8.00 a.m saying that she was going to Kataragama with her friends, and was found murdered on the 9th September 2006. According to the witness the mother of the deceased the deceased was unmarried and on 06 .09.2006 left the house in the morning at about 8 a.m saying that she is going to Kataragama with some of her friends. The accused-appellant was married to her elder daughter Kanthi and was her son-in law and was living with them in the same house.

According to witness the mother of the deceased she came to know that the deceased had not gone to Kataragama. It is her position that the accused-appellant had inquired from the factory where the deceased worked and later had gone to the police station with the father of the deceased to make a complaint.

The mother of the deceased had very categorically stated that the accused-appellant was living with them and she did not find him missing from the house any time.

It is well settled law that when the conviction is solely based on circumstantial evidence prosecution must prove that no one else but the accused committed the offence.

In Podisinghe V. King 53 N.L.R 49, it was held that in the 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 Don Sunny V. The Attorney General 1998 (2) S.L.R 1, it was held that the charges sought to be proved by circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.The fact that the accused had the opportunity to commit the said murder is not sufficient. The prosecution must prove that the act was done by the accused alone and must exclude the possibility of the act done by some other person.

In the Queen V. Kularatne 71 N.L.R 534, the Court of Criminal Appeal quoted with approval the dictum of Whitemeyer, J. in Rex V. Blom as follows:-

"Two cardinal rules of logic governs the use of circumstantial evidence in the criminal trial:-

(1)The inference sought to be drawn must be consistent with all the

Approved facts. If it does not, then the inference cannot be drawn.

(2)The proof of 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."

There is no direct evidence in this case. The items of evidence relied by the prosecution is purely circumstantial.

The other item of circumstantial evidence on which the prosecution relied on was the recoveries made by the police under section 27 of the Evidence Ordinance. It was contended by the Counsel for the accused-appellant that the statement marked and produced as P13 is contrary to section 27 of the Evidence Ordinance. And according to section 27 of the Evidence Ordinance .What can be led in evidence is the part of the statement that distinctly relevant to the fact discovered. He contended that section 27 statement had not been properly admitted in evidence. The accused-appellant had been represented by Counsel at the trial and when the learned prosecuting State Counsel made an application to mark in evidence these portions of the statements in consequence of which certain items had been discovered by the police, no objection had been raised by the Counsel for the accused-appellant. We have carefully perused the evidence pertaining to the recording of the statement of the accused-appellant by the police and the discovery of the said items and we are not satisfied with the said evidence led at the trial.

In Etin Singho V. The Queen 69 N.L.R 353, it was held that if the Jury believed that the 2nd accused made the statement P17, all that was proved was that he had knowledge of the whereabouts of club P1. The fact discovered as a consequence of P 17 was confined to that knowledge on the part of the 2nd accused .There was no proof before the court that P1 was in fact used in the assault on the deceased.

Held further, that the Jury should have been told that the 2nd accused's knowledge of the whereabouts of the club should not be treated by them as an admission that he used that club to attack the deceased.

According to the mother, the deceased was wearing 4 rings, 2 chains, 2 bracelets, 1 bangle and a pair of ear rings at the time she left the house. It is very clear that she had given a list of jewellery which the deceased owned or had at the time of her death. She had stated that the deceased was wearing all the above items at the time she left the house.

According to her evidence police had come on 15.09.2006 and taken a bracelet which was in their custody. According to her evidence the bracelet was pawned by the accused-appellant on 22. 08.2006. That is on a date much prior to the date the deceased is said to have committed this offence. This evidence clearly contradicts the evidence given by the mother of the deceased to the effect that she saw the deceased wearing the said bracelet when she left the house on 6th September 2006. The learned Counsel for the accused-appellant contended that therefore the police evidence regarding the section 27 recoveries is highly suspicious and create a reasonable doubt.

It was also submitted that the fact that the chain was also recovered by the police in consequent to the statement made by the accused-appellant is also highly suspicious and unacceptable. According to the police this particular chain was discovered in the premises belonging to Freelan Institute and no person from the said Institute was called to give evidence. It is also highly suspicious whether a person who had committed murder and had obtained a chain from the possession of the deceased would keep the chain in an unsafe place as mentioned in the evidence. It was further submitted that said chains are very common and there is no evidence as to special characteristics which enable the mother of the deceased to distinguish the said chain from the other chains.

According to witness Fahim the two rings which was given to him by the accused-appellant had been given to a person named Upul Udayaratne. According to Udayartne he states that he melted them and made new items and the police came and recovered the jewellery which was in his shop. The said witness Fahim had stated that he cannot recollect the date he received the rings from the accused-appellant. The witness Udayaratne too had failed to mention the date on which he had received the said rings from witness Fahim.If in fact the accused-appellant had made the statement P13 to the police, all that was proved was that he had knowledge of the whereabouts of

the said articles. The fact discovered as a consequence of P 13 was confined to that knowledge on the part of the accused-appellant.

As stated earlier the mother's evidence as to the identification of the jewellery owned by the deceased is highly unsatisfactory. The mother of the deceased had very categorically stated that the deceased was wearing the said bracelet when she left the house on 6th September 2006. But the evidence led in this case clearly establish the fact that the said bracelet was in the custody of the Pawn Shop and that it had been pawned on 22.08.2006 a date prior to 6th September. As submitted by the Counsel for the appellant it is also doubtful whether a person going on a trip would wear such an amount of jewellery as mentioned by witness Vinitha.

Witness Kanchana Priyadarshini claims to be the last person who had seen the deceased. She had been a close friend of the deceased. The said chain was not shown to her or evidence had been led as to the jewellery which the deceased was wearing at the time she met the deceased.

The deceased mother's evidence clearly establish the fact that the accused-appellant was living with them at her residence. The said witness does not state that the accused-appellant was found missing or was not at home during the said period. This establishes the fact that he had been living with the deceased's family from 6th September till the time the body of the deceased was discovered. There is evidence to show that the deceased's mother or anybody else suspected the accused-appellant about the disappearance of the deceased. The evidence led in this case also confirms the fact that the accused-appellant had gone to the work place of the deceased and inquired about her whereabouts. The accused-appellant had also gone to the police station with the father of the deceased to make a police complaint about the disappearance of the deceased.

Consideration of circumstantial evidence has been vividly described by Pollock C.B in R. V. Exall [1866] 4 F & F 922 at page 929, cited in King V. Guneratne [1946] 47 N.L.R 145 at page 149 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, if any one link breaks, the chain would fall. It is more like the case of a rope comprised of several chords. One strand of rope might be insufficient to sustain the weight, but three strands together may be quire of sufficient strength. Thus it may be circumstantial evidence- there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit."

The items of circumstantial evidence referred to earlier in this case in my opinion are insufficient to sustain the weight of the rope. Further the totality of the evidence led in this case does not lead to an inescapable and irresistible inference and conclusion that it was the accused-appellant who inflicted injuries on the deceased. The prosecution has failed to prove the case beyond reasonable doubt and rebut the presumption of innocence. For the reasons enumerated by me, on the facts and the law, in the foregoing paragraphs of this judgment, I set aside the conviction and sentence of the learned High Court Judge of Matara dated 03.05.2013 and acquit the accused-appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K.K. Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL