

C.A.83/2013

**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.**

**Meegastenna Gamaralalage Pushpa
Kumara.**

Accused-Appellant

C.A. Case No:-83/2013

H.C. Kegalle Case No:-2677/07

V.

**Attorney General,
Attorney General's Department,
Colombo 12.**

Respondent

**Before:- H.N.J.Perera, J. &
K.K.Wickremasinghe, J.**

Counsel:-Amila Palliyage for the Accused-Appellant

Sudharshana De Silva S.S.C for the Respondent

Argued On:-11.06.2015

Written Submissions:-07.08.2015

Decided On:-10.09.2015

H.N.J.Perera, J.

The accused-appellant was indicted with another in the High Court of Kegalle for committing the offence of the robbery of a Three Wheeler bearing No 205-1437 punishable under section 383 of the Penal Code read with section 32 of the Penal Code and for committing the murder of one Uduwela Arachchige Sarathchandra Uduwela alias Nilame an offence punishable under section 296 read with section 32 of the Penal Code. After trial both were convicted on both counts and sentenced to 20 years Rigorous imprisonment and to a fine of Rs20,000/-and to a term of 5 years imprisonment in lieu of the fine on count 1 and sentenced to death on count 2 on 27.06.2013. Being aggrieved by the said conviction and sentence the 1st accused-appellant had preferred this appeal to this court.

According to the prosecution the deceased was a Three Wheeler driver and was last seen with the accused. The prosecution led the evidence of two witnesses to establish this fact. The witness Asela Nilmini Kumara had seen the deceased last on the 10th or 11th of May 1999 at about 5-5.30 p.m at Bulathwatta junction. He too was a Three wheeler driver. The said witness is known to the accused-appellant and on this day he had seen three others in the three wheeler driven by the deceased. The 2nd accused-appellant had inquired from him about the house of Matale Nenda and three or four days later he was informed about the death of the deceased by the police.

The other witness Nihal Weerakkody is the brother-in law of the said witness Asela. He too had been with the witness Asela when the 2nd accused-appellant inquired as to the directions of Matale Nenda's house from the witness Asela. The said witness Weerakkody had gone to the Pynes jungle and had identified the deceased as the driver of the said three wheeler. Both these two witnesses had identified the two accused at the Identification Parade held on 16.09.1999. The said Parade Notes had been admitted by the defence under section 420 of the Criminal Procedure Code Act.

Witness No 13 Shantha Suraweera , a van driver testified to court that the 1st accused who was not before court was known to him and one day wanted to go to Ruwanwella with him and he agreed. On that day the 1st accused had told him that he along with others had gone on a hire, and had a fight with the driver in the pynes jungle nearby and he needs to go to the hospital. Later this witness had come to know that a boy had been found killed in the pynes jungle. This witness had not been cross examined.

Apart from the evidence of the said witnesses the prosecution relied on a confession made by the 2nd accused-appellant to the learned Magistrate on 13.09.1999.

According to the prosecution case the two accused after inquiring the directions to a house went in the three wheeler driven by the deceased person. The deceased was last seen in the company of another person including the 1st and 2nd accused. The deceased person's body was later found near the three wheeler with deep cut injuries in the Pynes jungle. The deceased person never returned to the three wheeler park or home.

The prosecution also relied on a confession made by the accused-appellant to the learned Magistrate on 14.09.1999.

According to the confession of the 2nd accused-appellant:-

He had conspired with the 1st accused and another person who is now dead to rob the three wheeler.

He had gone with the 1st accused and the other person knowing very well as to what was going to happen.

The three wheeler was stopped at the Pynes jungle, the 1st accused had covered the face of the deceased. Thereafter the 1st accused, the deceased and the other person had all got down from the three wheeler

The second accused-appellant had seen a splash of blood, the other person had hit the deceased with a toy pistol. Then the 1st accused had cut the deceased with a knife and he too had been injured. Thereafter the deceased had been pushed down the slope by the other person and three of them had fled.

The first accused too had made a confession to the learned Magistrate According to the said confession:-

The 1st accused, the 2nd accused-appellant and another person who is now dead had taken a three wheeler along with the driver to the Pynes jungle, having conspired together before to rob a three wheeler. The other person had covered the deceased's face, when the three wheeler stopped in the pynes jungle. Deceased had struggled to remove the covering, but the 1st accused had taken a knife and has cut his neck.

The 2nd accused and the other person who is dead had pulled the deceased out of the three wheeler, knife had been thrown by the 2nd accused to the jungle. All had washed the blood stained clothes and had dispersed. The 2nd accused was injured.

The 2nd accused-appellant had been arrested by the police on 2.09.1999 and had been produced before the learned Magistrate at 3.44

p.m on 13.09.1999 in his chambers by the Prison Authorities. The 2nd accused had been questioned by the learned Magistrate to find out whether the 2nd accused-appellant was trying to make the confession on a promise, threat or inducement of anybody and the accused appellant had answered in the negative. Then the learned Magistrate had given the 2nd accused appellant time to think it over, from 4.00 p.m to 6.05 p.m. The second accused appellant had been produced by the prison authorities again in his chamber and the learned Magistrate had proceeded to question the 2nd accused-appellant to find out whether he wishes to make the confession voluntarily and upon examining the 2nd accused-appellant had being satisfied that it was voluntary. Thereafter the learned Magistrate had proceeded to explain the legal implications of making such a statement and the 2nd accused-appellant had still persisted in making the statement to the Magistrate. Thereafter the learned Magistrate had recorded the statement of the 2nd accused-appellant in his own hands. The said statement had been read over and explained to the 2nd accused-appellant, the Magistrate had duly certified the said statement under the provisions of section 127 of the Criminal Procedure Code Act and the 2nd accused –appellant too had placed his signature to the said statement.

It is clearly seen that the learned High Court Judge had considered the evidence led by the prosecution regarding the confession in detail, considered the relevant provisions of the Code of Criminal procedure Act and the evidence of the learned Magistrate who recorded the confessions of the accused in detail and had come to a clear conclusion that the said confessions had been made by the accused voluntarily and that the relevant procedure had been correctly followed in recording the said confessions of the accused-appellants by the learned Magistrate.

The learned trial Judge had very clearly held in his judgment that according to the two confessions made by the 1st and the 02nd accused, they and the dead person had conspired to rob a three wheeler, and accordingly as planned they have proceeded to do so, and while committing the act of robbery, they have been together, and when the deceased was cut and pushed by the 1st accused and the dead person, the 2nd accused continued to stay with them. It is the evidence of both 1st and the 2nd accused, that the 2nd accused was injured, hence, although he has not actively taken part in cutting the deceased he had been very near and close to the place where the commission of the crime took place and had never departed from the other two, and after, the deceased was pushed and after the completion of the crime, they have all departed together.”

The learned trial Judge had referred to the case Wasalamuni Richard V. The State 76 N.L.R 534, to the dicta of Lord Summer in Barendra Kumar Gosh V. Emperor 1 (1925) A.I.R, P.C.C 1 and also to the dicta of Soertz A.C.J. in The King V. Endoris- 46 N.L.R .498.

In The King V. Endoris, where three accused were charged with committing murder, and the third accused was proved to have been in the presence of the 1st and 2nd accused, who shot the deceased man, in circumstances indicating that he was sharing a common intention with them to cause the death of the deceased, it was held that the third accused, if he wished his presence to be construed as innocent, should have given evidence in explanation of his presence.

It is very clear that in view of the circumstances in this case the 2nd accused-appellant should have given an explanation of his presence at the scene of the crime.

The 2nd accused appellant had made a dock statement and denied any connection to the crime. He had further stated that he made the

statement to the Magistrate because of the pressure and assault from the police.

The 2nd accused-appellant had failed to offer an explanation to the incriminating evidence that had been led against him in this case.

The Ellenborough dictum contained in Lord Cochrane's case and as adopted and developed by courts today provides that "No person accused of a crime is bound to offer any explanation of his conduct or 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 power to offer evidence, if such exist, in explanation of such suspicious appearance which would show them to be fallacious and explicable consistently with his evidence, it is reasonable and justifiable conclusion that he refrains from doing so only from the conviction that evidence so suppressed or adduced would operate adversely to his interest."

Sri Lankan Courts have for the most part applied the principle that while suspicious circumstances alone do not relieve the prosecution of the burden of proving the guilt of the accused beyond reasonable doubt, the existence of a telling evidence of a mass of circumstances, which remain unexplained by the accused, could result in a finding of guilt against the accused. I hold that the evidence led in this case does warrant the application of the Ellenborough principle.

In *Mawaz Kahn V. R* [(1967) All E.R 80 PC] it was held where the circumstantial evidence taken together with the setting up of an alibi by the accused persons might determine the guilt or innocence of the accused in the absence of an explanation. In the instant case, it is evident that a strong case has been established against the accused based on him last seen with the 1st accused and another person with the deceased person and the confession made to the Magistrate.

The evidence led in this case clearly show that the prosecution has put forward a strong prima facie case and it is in the power of the accused-appellant to offer to the said incriminating evidence.

In *Sumanasena V. Attorney General* it was held that:-

“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.”

The evidence led by the prosecution can only mean that the 2nd accused-appellant shared the common murderous intention with his companions to kill the deceased even though he took no active part at the time of cutting. The 2nd accused-appellant travelled in the said three wheeler with the others up to the pynes jungle, was present at the scene when the face of the deceased was covered with a cloth and also was present and did not leave the place even when the neck of the deceased was cut by the other accused and also waited till the body of the deceased was pushed down the slope and fled with the other accused after the incident. The evidence led in this case establish the fact that the 2nd accused-appellant too was injured at that time and the 2nd accused-appellant had simply proceeded to deny his participation at the time the crime was committed. Clearly the evidence led in this case show that there was participatory presence of the 2nd accused-appellant and in those circumstances there was an occasion clearly indicated for the 2nd accused-appellant, if he wished his presence there not to be construed in that manner, to give evidence in explanation of his presence.

The learned trial Judge had considered the evidence led in this case and was of the view that the available evidence is sufficient to establish guilt of the accused-appellant on the basis of common intention. On perusal of the judgment of the learned trial Judge it is clearly seen that he has

given cogent reasons for disbelieving the 2nd accused-appellant's evidence. The learned trial Judge has very correctly analysed the defense evidence to see whether it raised any doubt in the prosecution case. The trial Judge in his judgment specifically gives reasons why the 2nd accused-appellant's evidence is disbelieved by him.

In King V. Musthapha Lebbe 44 N.L.R 505 Court of Criminal Appeal held that:-

“The court of 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 the opinion that on the whole it is safer that the conviction should not be allowed to stand.”

I hold that one and the only, irresistible and inescapable inference that the court can arrive is that the 2nd accused-appellant committed the murder of the deceased person and robbed his three wheeler. For the above reasons, I affirm the conviction and the sentences and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe ,J.

I agree.

JUDGE OF THE COURT OF APPEAL