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

In the matter of an Appeal against an order of the High Court under Sec. 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Krishnamurthi Ravishanker,

Welikada Prison,

Colombo-09

Accused-Appellant

C. A. No : 144/2013

H. C. Puttalam No : 45/2008

V.

The Hon. Attorney General

Attorney General's Department,

Colombo 12.

Respondent

BEFORE : **H. N. J. Perera, J. &**

K. K. Wickremasinghe, J.

COUNSEL : Dr. Ranjit Fernando for the Accused-Appellant.

Chethiya Gunasekera D.S.G. for the Attorney General.

ARGUED ON : 05th May 2015

DECIDED ON : 09th September 2015

K. K. WICKREMASINGHE, J.

The accused-appellant (2nd accused), in this case was indicted in the High Court of Puttalam for committing the murder of one Wanninayaka Mudiyanselage Premasiri on or about 08.05.2005, which is an offence punishable under the s.296 of the Penal Code.

The trial proceeded against the 1st accused in his absence after leading evidence under s.241 of The Criminal Procedure Code. The 2nd accused (hereinafter referred to as the accused-appellant) was present during the trial and at the conclusion of the trial, he was found guilty for committing murder and the death sentence was imposed on 19.11.2013.

This appeal lies against the aforesaid conviction and the sentence.

The grounds for appeal are as follows:

1) There was no compelling motive to cause the death of the deceased.
2) They were living/ working together with ample opportunity to murder the deceased surreptitiously if they so desired, rather than openly announce their departure with the deceased.
3) Medical evidence giving the cause of death as drowning with the contusion injuries which were not even grievous in nature, raises a doubt with regard to the "murderous intention" of whoever was responsible for what happened to the deceased ultimately.
4) Even if the evidence raises a suspicion, it would not be sufficient to satisfy the legal criteria for guilt in a case based on "Circumstantial Evidence".

According to the prosecution, the incident had taken place as follows:

The deceased was a farmer residing in Leekolawewa. According to the testimony of the daughter of the deceased: Aasha Harshani (Witness No.2), the 1st and 2nd accused had come to her residence at around 9pm on 08.05.2005 and invited the deceased (her father) to have a drink with them. She stated that while the 1st accused came into her house and called the deceased, the 2nd accused was on the road. She also stated that before the deceased left with the 1st and 2nd accused he had instructed Harshani to sleep at her aunt's house that night. (pg. 111 of the brief)

Harshani testified that the following morning when she had returned to her house, her father was not present. After returning from school, as her father had still not returned, she went to the house of the 2nd accused to inquire about her father. Upon doing so, the 2nd accused had told her that after they had drinks that they sent the deceased to his house. After this, Harshani along with her grandfather (the father of the deceased: Wanninayaka Mudiyansalage Herath Hamine Kalubanda) had reported this incident to the police. This narration of facts is corroborated by the testimony of Kalubanda. (Witness No.1) (pg.'s 97,100, 105 of the brief)

Harshani also testified that a day prior to the disappearance of the deceased, that he had an argument with the 2nd accused. (pg. 114 of the brief)

According to the testimony of the brother of the deceased: Wanninayaka Mudiyansalage Wijesignhe (Witness No.3), on 08.05.2005 he had heard an individual scolding another, but he was unable to recognize who they were. He had gone to the road to see who they were, then he had seen the two accused and the deceased walking together towards the house of the 2nd accused.

Abeysundara Herath Mudiyanselage Gunadasa testified as to an argument that had occurred between the deceased and the 2nd accused on 06.06.2005 at the paddy field where they worked. He stated that after lunch, the deceased and the 2nd accused got into an argument and that the 2nd accused had hit the deceased for something the deceased had said. (pg. 144 of the brief) He further stated that after the fight that the deceased and the 2nd accused did not remain angry and had parted in a friendly manner.

According to the testimony of Tikiri Manika (Witness No.7), who was a relative of the 2nd accused, the two accused and the deceased had come to her residence on 08.05.2005 and had left shortly after.

According to the medical evidence provided by the Judicial Medical Officer (JMO): Dr. Deeptha Kumara Wijewardana, the cause of death was identified as drowning. Thus the deceased was alive at the time he fell into the water. (pg.'s 200 and 201 of the brief) The medical evidence also revealed that there were 16 injuries identified on the body of the deceased, which were caused by a blunt object. The

stomach content of the deceased had been smelling of liquor. Dr. Wijewardana ruled out any possibility of the deceased falling into the water by accident based on the injuries and the fact that his legs were tied. (pg. 206 of the brief)

The evidence submitted by the Police Officers indicate that the body was discovered in a lake upon receiving the complaint. (pg. 221 of the brief) The evidence also reveals that the Police Officers were able to identify and examine the place where the deceased had been assaulted, which was behind the house of the accused-appellant. (pg. 222 of the brief) They also discovered a club behind the house of the accused-appellant, in consequence of the statement given by the accused-appellant to the police on 11.05.2005.

The accused-appellant had given a dock statement whereby he denied having any knowledge of the events in question or being involved in such events. The accused-appellant further stated that although he had fought with the deceased, that there was no animosity between them.

When we analyse the evidence before us- such as the testimony of the witnesses who stated that the deceased was last seen with both the accused, the recovery of the club in consequence to the statement made by the accused-appellant to the police, the identification of the place where the deceased was assaulted as an area behind the house of the accused-appellant, the state in which the body was found: with injuries and his legs tied (which rules out any possibility of an accident)- it is evident that the prosecution had established a strong *prima facie* case against the accused-appellant. However the dock statement given by the accused-appellant does not explain the events which led to the death of the deceased or the evidence discovered thereafter.

In the case of ***Krishantha De Silva Vs. AG 2003 (1) SLR 162***, *Edirisuriya, J.* held that *"In the circumstances the learned trial Judge has correctly held that a prima facie case was made against the accused. It is noted that even though the accused made a statement from the dock he was silent as to what happened after the deceased was placed on the bed. I am of the view that the statement of the accused that he did not know anything about the incident cannot be accepted. An accused person is entitled*

to remain silent but when the prosecution has established strong and incriminating evidence against him he is required to offer an explanation of the highly incriminating circumstances established against him. The accused has failed to give an explanation of such circumstances established against him. In the circumstances I hold that the learned trial judge was entitled to draw certain inferences which he deemed proper from the failure of the accused to give an explanation of incriminatory circumstances. I am of the opinion that the principle laid down by Lord Ellen borough in Rex v. Cockroinei is applicable to the facts of the instant case. This dictum has been followed with approval and applied in Sri Lanka."

The case of ***Sumanasena Vs. Attorney General 1999 (3) SLR 137*** held as follows: *"The prosecution has established a strong and incriminating cogent evidence against the accused and the accused, in these circumstances, was required in law to offer an explanation of the highly incriminating circumstances established against him. The accused has failed to give evidence or to make any statement from the dock. In these circumstances, the learned trial Judge was entitled to draw certain inferences which he deemed proper from the failure of the accused to give evidence in explanation of such circumstances."*

Further in the Supreme Court case of ***Attorney General Vs. D. Seneviratne 1982 (1) SLR 302***, Weeraratne J. held as follows: *"In my view, the cumulative effect of the aforesaid items of evidence is that a strong prima facie case is made out against the accused. In the face of this evidence, the accused was content to make a statement from the dock stating, 'I am not guilty, I know nothing about this.' The presence of his foot prints in blood on the newspaper is certainly an item of evidence peculiarly within his knowledge and is a matter which calls for an explanation from him. This however does not mean that there is a burden on the accused to prove his innocence. The trial judge has quite properly commented on the failure of the accused to give an explanation, having regard to the particular facts of this case."*

Furthermore in the case of ***Seneviratne*** it was held that *"Where there are special circumstances which only the accused can explain and which call for an explanation from him, there is an evidential burden on him - see the decisions in* ***The King Vs. Geekiyanage John Silva*** *and* ***Albert Singho Vs. The Queen****. In no part of his*

summing up did the learned trial Judge shift the persuasive burden of proof, that is the burden of proving charges beyond reasonable doubt, from the prosecution. The trial judge's comments on the failure of the accused to offer an explanation regarding the circumstances which needed explanation from him are unexceptionable."

Thus in the light of the cumulative effect of the strong and incriminating cogent evidence established against the accused-appellant and the failure of the accused-appellant to offer an explanation for such evidence, this court is led to the reasonable inference that such an explanation could not be made innocently.

Considering the circumstantial evidence, in the case of ***Krishantha De Silva Vs. AG 2003 (1) SLR 162,*** the Court of Appeal held as follows: *"It is admitted that this is a case of circumstantial evidence. In such a case circumstances relied upon should be consistent with the guilt of the accused and inconsistent with his innocence. If the circumstantial evidence relied upon can be accounted for on the supposition of innocence then the circumstantial evidence fails. Circumstantial evidence can be acted upon only if from the circumstances relied upon the only reasonable inference to be drawn is the inference of guilt.*

Further in the case of ***Gunawardena Vs. The Republic of Sri Lanka 1981 (2) SLR 315***, it was held as follows: *"In a case resting on circumstantial evidence the judge in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt must give a further direction in express terms that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are- (a) consistent with the guilt of the accused ; and (b) exclude every possible explanation other than the guilt of the accused."*

"In a case of circumstantial evidence the facts given in evidence may, taken cumulatively be sufficient to rebut the presumption of innocence, although each fact, when taken separately may be a circumstance of suspicion. Each piece of circumstantial evidence is more like a rope composed of several cords. One strand of rope may be insufficient to sustain the weight but three stranded together may be quit sufficient."

There is clear and cogent evidence by witnesses Harshani (Witness No.2), Kalubanda (Witness No.1) and Wanninayaka Mudiyansalage Wijesignhe (Witness No.3) who had seen that the deceased was last seen in the company of the 1st and the 2nd accused. In the case of ***King Vs. Appuhamy 1945 (46) NLR 128*** it was held *"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 the that of his guilt. In considering the force and effect of circumstantial evidence, in a trial for murder, the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance if the prosecution has failed to fix the exact time of the death of the deceased. Among other points which may be emphasised in favour of the accused are (1) the absence of any motive whatever for the accused to murder the deceased, and (2) a reasonable explanation given by the accused fairly promptly after his arrest."* In the present case, the accused-appellant had failed to give an explanation to the evidence led against the accused by the prosecution.

In these circumstances, the learned High Court Judge was entitled to draw the necessary inferences and compelling inferences from the circumstance, that is from the failure of the accused to offer an explanation when highly incriminating evidence established against the accused by the prosecution. We also hold that the dictum of Lord Ellenborough is equally applicable to the facts of the instant case. Though there is a right to silence conferred on an accused person in law ***(R Vs. Naylor 1932 (23) CAR 177)***, when there is highly cogent and incriminating facts established by the prosecution against the accused-appellant, the exceptions to that general rule were applicable in that instant case- Vide for the exception to this general rule- ***Rex Vs. Jane Blatherwick (6) CAR 281, Republic Vs. Gunawardena (78) NLR 209 at 212, Republic Vs. Lionel - SC 165/75 H.C. Kandy Minutes on 20.12.76.***

Therefore I see no merit in any of the grounds urged by learned counsel on behalf of the appellant. When considering the judgement of the learned High Court Judge it is very clear that the learned High Court Judge had very correctly evaluated the evidence according to law and arrived at the decision.

In these circumstances I affirm the conviction and the sentence imposed by the learned High Court Judge of the High Court of Puttalam.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA J.

I agree

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

1. Krishantha De Silva Vs. Attorney General 2003 (1) SLR 162
2. Sumanasena Vs. Attorney General 1999 (3) SLR 137
3. Attorney General Vs. D. Seneviratne 1982 (1) SLR 302
4. The King Vs. Geekiyanage John Silva (1945) (46) NLR 73
5. Albert Singho Vs. The Queen (1969) (74) NLR 368
6. Gunawardena Vs. The Republic of Sri Lanka 1981 (2) SLR 315
7. King Vs. Appuhamy 1945 (46) NLR 128
8. R Vs. Naylor 1932 (23) CAR 177
9. Rex Vs. Jane Blatherwick (6) CAR 281
10. Republic Vs. Gunawardena (78) NLR 209 at 212
11. Republic Vs. Lionel - SC 165/75 H.C. Kandy Minutes on 20.12.76.