# 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 section 331 of the Code of Criminal Procedure Act No 15 of 1979 being an Appeal against an order / Judgment of the High Court of Panadura.**

Harankahawatte Vidanelage Ranjith Kumara

(Presently incarcerated at Welikada Prison)

**ACCUSED-APPELLANT**

**CA/179/2009**
**(H. C. Panadura**
**CA No 2201/06)**

**Vs,**

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

**RESPONDENT**

Before : **Vijith K. Malalgoda PC J (P/CA)**
**&**
**H. C. J. Madawala J**

Counsel : **Dr. Ranjith Fernando and Samanthi Rajapaksha for the Accused Appellant**
**R. Abeysuriya , DSG**

Argued on : 07 /09 /2015

Judgment Date : 17 /11 /2015

## H. C. J. Madawala J

The Accused- Appellant was indicted in the High Court of Panadura under following counts.

**Count 1** – That on or about the 21st of August 2001 at Kiriwaththuduwa, together with a another unknown to the prosecution, did cause the death of Hengodagedera Gunasekara thereby committing an offence contra sec. 296 read with section 32 of the Penal Code.

**Count 2** – During the course of the same transaction the Accused together with the said other unknown to the prosecution did commit the offence of robbery of a Van (Reg. No. 52-8984/valued at Rs. 550,000/=) thereby committing an offence contra sec.380 read with section 32 of the Penal Code.

After trial the Accused-Appellant was found guilty and was sentenced as follows,
Count 1 – Death Sentence
Count 2 – 10 years Rigorous Imprisonment with a fine of Rs.5000/= in default six month simple imprisonment
The above conviction and sentence was imposed by the High Court on 17/07/2009

Being aggrieved by the said convictions and sentence the accused appellant preferred this appeal.
The entire case for the prosecution depended on circumstantial evidence.

Prosecution case was that the van belonging to the deceased had been hired by the accused and another. Thereafter the deceased had been found murdered and the van was robbed. The incident

had occurred on 21st August 2001. The body of the deceased had been found near a bridge in the same area 4 days later on 25th August 2001 with cut and stab injuries.

The victim was a driver of a hiring van registered in his wife's name and on 21st of August 2001 had been at the Kottawa junction awaiting a promised hire. Thereafter on 25th of August 2001 an anonymous call led to the discovery of the partially putrefied body of the victim on the side of the Kiriwaththuduwa – Kithulawala Road in Kahathuduwa police area. The body was found to contain 18 stab and cut injuries of which several according to the medical evidence was fatal in the ordinary course of nature. The doctor based on the extent of putrefaction has estimated that the death could have happened on or about 21st of August 2001. The police investigation failed to find the missing van till the wife of the victim travelling in a bus on 16th October 2001 had seen the van parked near a shop named "Sithumina Stores" at Homagama. The wife of the victim immediately informed the nearest police station which was that of Homagama and the police arriving shortly apprehended the accused. At the time of the arrest the police had recovered the following items from the custody of the accused

1. Driving License of H.G. Gunasekara
2. National Identity card bearing no 4431021242V
3. Insurance Certificate is the name of M.D. Gunawathi for the vehicle 54-8984
4. Revenue license for vehicle 54-8984 in the name of M.D. Gunawathi
5. Passport No L.I. 1043367 issue to K V Ranjith Kumara

According to the evidence of I P Jayawardena who recovered the said productions from the custody of the accused, he had produced the said production at the reserve on the same day under PR 88/01. Subsequent to the said arrest and the recoveries made from the Accused, Homagama police had not conducted any further investigation but, handed over the investigations to Kahathuduwa police.

According to the evidence of Eric Rohitha who was OIC –Crimes at Kahathuduwa Police Station, several items removed from the van including a Hood Rack and a seat had been recovered from a statement made by the Accused which was admissible under section 27(1) of the Evidence Ordinance; from a private Garage belonging to one Yasapala.

We observe that the accused had not challenged the said recoveries by Kahathuduwa Police on a statement admissible under section 27(1) of the Evidence Ordinance.

The accused appellant whilst denying the charges against him took up the position that all parts and documents referred to by the prosecution relating to the van had been found at Yasapala's garage. This position had been suggested to Police Officer Jayawardane but we observe that the documents recovered from the Accused –Appellant had been properly produced at Homagama Police Station under P.R. 88/01 which was not challenged at the trial. We further observe that the evidence with regard to the recovery of parts of the van under section 27(1) statement was not challenged by the defence at the trial.

Counsel for the Accused- Appellant raised the grounds of appeal as follows,

- By failing to apply the legal criteria and principles to be borne in mind when evaluating a case based on circumstantial evidence where the evidence where the eventual inference a court could draw should be "an irresistible inference from which there is no escape and further that such an inference should only be consistent and compatible not only with his guilt but incompatible with any other inferences / hypothesis suggesting innocence.
- By failing to correctly apply the legal principals set out in respect of the probative value of any productions recovered consequent to a statement made by an Accused under sec. 27 of the evidence Ordinance.
- By erroneously placing a Burden of proof on the Accused on the basis that he failed to explain to the "satisfaction of the court" important items of evidence placed before court by the prosecution in instances where the court expects a clear explanation to the serious allegations made; thereby the accused failing to rebut the case for the prosecution resulting in the bolstering and confirming the allegations made against him.
- By an erroneous application of the " Ellen Bourogh Principles" – notwithstanding the comprehensive dock statement made by the Accused- concluding that the accused was required to given an explanation to the satisfaction of court and if there is none it would bolster and confirm the prosecution case further strengthening guilt.

- By failing to consider the relevance of the time of death and the required necessary "nexus" between the death of the deceased and the fact of the relevance of the Accused being "last seen" with the deceased.

The contention of the accused appellant was that the accused appellant was deprived of a just and fair trial to laid down procedure and principles of law and does not establish the guilt of the accused in respect of the chargers set out in the indictment in this court relating to sec.296 read with section 32 of the Penal Code.

It was submitted by the counsel for the accused appellant that in the instance case the Learned Trial Judge merely draws an inference "simplicitor" notwithstanding the strict principle of evolution laid down by law mentioned above in respect of cases based on circumstantial evidence. Further that the Learned Trial judge has inadvertently misapplied the dicta and principles set out in **Nissanka Vs. The State 2001 (3) SLR 79** i.e. That the guilt for the offence of murder necessarily follows a finding of guilt for offence of Robbery in the same transaction. It was also submitted that the erroneous approach is reflected at page 25 and 26 of the judgment and goes to the extent of stating that under the old Law- only knowledge inferred but under the present law if the deceased property is found murder can be inferred. This would be grievously erroneous approach to legal principles relating to section 27 of the Evidence Ordinance recoveries.

Counsel for the Accused- Appellant argued that the prosecution by not leading the evidence of the garage owner Yasapala and of the owner of the Sithumina Stores, from whom the police admittedly had inquired about the van parked outside the stores, prevented the court from ascertaining that the accused appellant could be a person who had come in to possession of the van at a later date by some innocent manner, or he could have been employed by the owner of the Sithumina Stores. It was submitted that the second position receives some support from the dock statement made by the accused stating that he is an employee at Sithumina Stores and that he never had a van and that it was the van belonged to the owner of Sithumina Stores. The documents of the vehicle was submitted to court by the owner of the Sithumina Stores.

However this position was contradicted by the evidence of Gamage Sumathipala who stated that the accused used to work for him in the month of August 2001 and it was during this period the accused brought the van in question. The witness has during trial identified the van recovered by the police as the same vehicle brought to his bakery by the accused. Witness Sumathipala futher says that the accused removed two blue coloured stickers from the van and changed one digit of the number plate to make it from 52-8984 to 54-8984. The van identified by Gamage Sumathipala has been identified by the wife of the deceased as the van that was registered in her name and that this fact has not been challenged by the accused.

It was submitted that court may apply the presumption contained in section 114 of the Evidence Ordinance pertaining to stolen property to the instance case.

"The court may presume 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."

Illustration (a) of sec 114 of the Evidence Ordinance reads thus,

"The court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing those to be stolen, unless he can account for his possession."

The issue to be determined by this court is as to whether the presumption which would be drown with regard to stolen property is also applicable to any other category of offence such as murder and if it is so whether the appellant would have legally being found guilty of the offence of murder.

In the case of **Ariyasinghe and Others vs. The Attorney General 2004(2) SLR pg 358** it was held:

I. In deciding to presume the existence of any fact, the court can take in to account the common course of natural events, human conduct and public and private business in their relations to the facts of the particular case. On the proved facts of the case, it was open to the trial judge to draw in his discretion any presumption of fact having due regard to the particular facts of this case.

Per Amarathunga, J,

"A presumption is an inference which the judges are directed or permitted to draw from certain state of fact in certain cases and these presumptions are given certain amount of weight in the scale of proof. Some presumptions are conclusive and established. Some presumptions are presumptions of fact which can be rebutted by facts inconsistent with presumed fact.

II. In order to draw a presumption there must be proof of certain basic facts before court."

III. Bare facts necessary for a court to consider the principle contained in sec 114 were before court

IV. When strong prima facie evidence is tendered against a person, in the absence of a reasonable explanation prima facie evidence would become presumptive.

It was also submitted that the applicability of illustration (a) of section 114 is not restricted or confined to cases of theft only but applicable to any criminal offence.

In **Saundraraj Vs. The state of Madya Pradesh (1954) 55 Cri. L.J pg 257**, it has been held that in cases where murder and robbery were shown to be part of the same transaction, recent and unexplained possession of stolen articles, in the absence of circumstances tending to show that the accused was only a receiver, would not only be presumptive evidence on the charge of robbery but also on the charge of murder.

In the case of **Wassim Khan Vs. The State of Uttar Pradesh 1956 AIR 400, 1956 SCR 191 Indian Supreme Court :** held that recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder. All the facts which tell against the appellants especially his conduct indicating consciousness of guilty point equally to the conclusion that he was guilty as well of the murder as of the robbery.

And also in the case of **Cassim vs. Udaya Mannar (1943) 44 NLR pg 519** the court cited with the approval the following views of Taylor of the evidence. The presumption is not confined to cases of theft but applies to all crimes even the most penal. The respondent wishes to cite the following passage from the said book. " thus on indictment for arson proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the

prisoner has been held to raise a probable presumption he was present and concerned in offence. A like inference has been raised I the case of murder accompanied by robbery, in the case of burglary and in the case of possession of a quantity of counterfeit money"

In the case of **Attornry Genaral vs. Senevirathne (1982) 1 SLR pg 302** the Supreme Court applied the presumption contained in Illustration (a) of section 114 of the Evidence Ordinance and upheld the conviction for murder entered by the High Court. Accordingly the respondent submitted that this court may presume that it was the accused appellant is not only guilty of robbery of the vehicle in question but that he also committed the offence of murder.

When considering the above submissions and Authorities placed before this court. I find that the Learned Trial Judge has come to the conclusion that the accused was in possession of the van recovered by the police. The police has investigated in to this matter and has further recovered the documents pertaining to the van which was in the possession of the deceased now found to be in the possession of the accused. The accused had tried to run away that moment however the police has taken him to custody. I observe that the accused has failed to give a reasonable explanation and has failed to establish the facts as to how he came to possess the said document and the van. The accused has accepted the fact that he stated to the police that he drove the van. Accordingly I am of the opinion that the Learned Trial Judge has come to a correct finding as regards the recovery made by the police under section 27 of the Evidence Ordinance. The witness Gamage Sumathipala had testified that the appellant had worked for him during the month of August 2001 and he brought this particular van. He had noticed that the number plate had been altered on the said van and the appellant had stated that he has bought the van. The accused also stated that he wanted to paint the vehicle. Further he also testified and identified the accused as a person living in his wife village. He stated that he often meets him and also has spoken to him. The evidence of witness Gamage Sumathipala had not been challenged by the accused appellant.

Witness Lionel Harishchandra has testified and stated that the van was parked near his king coconut tree in his garden. When he went and looked in to the vehicle, two men were seated on the ground and another person was lying down on the seat. When he switched on the torch and looked and spoke to the two persons they informed him that they have gone to a party and that the

person lying on the seat was drunk and as a result that he had fallen and had hurt his forehead. The witness had observed that the person lying on the behind seat had blood on his forehead. He also has testified to the fact and has identified the van which was produced to court as the vehicle that he saw on that particular day by stating that near a wheel there was a blue colour sticker, even though he has failed to identify the accused, the van in question has been duly identified by this witness.

Dr. Asela Mendis has given evidence and has testified that there had been 18 injuries in the body of the deceased. He also had stated that the said stab and cut injuries has been caused by heavy blunt weapon, which were not only likely to cause death but are sufficient in the ordinary course of nature to cause death. He also testified and stated that injuries caused to the neck, shoulders and to abdomen has brought about the death of the victim. I find that according to the injuries caused on the victim that offender intended to cause the death of the deceased and that he had intentionally caused the said injuries to cause of the death of the deceased person.

I also find that the application of the presumption contained in section 114(a) of the evidence ordinance pertaining to stolen property is applicable in the present case. As discussed by me earlier when the said presumption taken together with the other strong evidence such as recoveries made at the time of the arrest and the subsequent conduct speaks by witness Ariyasena we find that the above circumstantial evidence are over whelming and more than sufficient to warrant a finding of guilt of the accused based on circumstantial evidence. The circumstantial evidence referred to above does not leave any room for any other interpretation other than the guilt of the accused and this evidence is not at all compatible with the innocence of the accused. The only inescapable inference that can be drawn under the circumstances was that the accused was guilty of the offence he was charged.

When the totality of the evidence led by the prosecution and the defence is considered, the dock statement which is only bares denial is not sufficient to create a reasonable doubt in the case for the prosecution. On scrutiny of the dock statement made by the accused I find that the accused appellant had only made a bare denial of the chargers against him and the explanation given by him does not indicate as to how he came to possess the vehicle in question. Further I am of the

view that the failure to lead Yasapala's evidence by the prosecution had not caused any prejudice to the accused appellant. Accordingly I hold that the accused was not deprived of a fair and just trial. I find that the Learned High Court Judge has come to a correct decision in holding that the accused was guilty of both counts of robbery and murder.

Accordingly I hold that for the reasons enumerated above I find no justification to interfere with the conviction or the sentence of the Learned High Court Judge. Accordingly I affirm the conviction and the sentence and dismiss this appeal.

**JUDGE OF THE COURT OF APPEAL**

**Vijith K. Malalgoda PC J (P/CA)**

**I agree.**

**PRESIDENT OF THE COURT OF APPEAL**