

240/2013

**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
No. 15 of 1979 as amended.

P.R.Nandana Pushpakumara

Accused-Appellant

C.A.Case No:-240/2013

H.C.Kegalle Case No:-2855/09

V.

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

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

K.K.Wickremasinghe, J.

Counsel:-Indica Mallawarachchy for the Accused-Appellant

Dileepa Peeris S.S.C. for the Respondent

Argued On:-13.05.15/30.07.2015

Written Submissions:-12.10.2015/20.11.2015

Decided On:-03.02.2016

H.N.J.Perera,J.

The accused-appellant was indicted in the High Court of Kegalle for having committed the murder of one S.P.G.Cyril alias Raja on 24.09.2006 an offence punishable under section 296 of the Penal Code. After trial the accused-appellant was convicted and sentenced to death. Aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

According to the prosecution the accused was an Army Soldier and the deceased was the driver of the van bearing No.54-4313. The deceased was last seen in the company of the accused by his wife Nandawathie and by another fellow driver one Rathnayake on the day in question. According to witness Nandawathie the deceased was last seen alive on the 04.09.2006 when he had left home around 7 a.m. stating that he had a wedding hire. Thereafter the deceased had called her around 7.20 a.m. and requested her to bring Rs.3000/- and the witness had gone to the place mentioned by the deceased to hand over the said money at which point she had seen a person seated in the front seat of the van whom she later identified as the accused-appellant at the identification Parade and as well in court. Since the deceased failed to return home she had lodged a complaint at the police station and the body of the deceased was discovered thereafter.

witness Rathnayake who was a driver by profession also knew the deceased as they parked their vehicles in the same parking place. According to him the accused-appellant had approached him and had discussed a hire to Thanamalwila on 03.09.2006 and on 04.09.2006 6.30 a.m the accused-appellant had arrived to proceed to Thanamalwila as arranged.

It was his evidence as the accused-appellant did not have sufficient money to pump petrol and intimated to him that he will settle the hire when he reached home. As he was not satisfied with the said arrangement, he offered the said hire to the deceased and saw the deceased leaving the park with the said person. He too identified the accused-appellant at the Identification Parade as the person who took the deceased on a hire on the morning of 04.09.2006.

There is clear evidence in this case by two witnesses that the deceased went on a hire on the 4th morning with the accused-appellant. The said two witnesses, the wife of the deceased witness Nandawathie or the witness Rathnayake has not seen the deceased thereafter. Although the said two witnesses had not seen the deceased after leaving with the deceased in the morning, there is evidence of the witness Bandara that he had seen the deceased in the company of the accused-appellant around 7.00.p.m On 04.09.2006.

The said witness Sandaruwan Bandara knew the deceased from his childhood. It was his evidence that on 04th September 2006 he was playing a game of cards with Asanka and Ranabahu near the Nagahamulla boutique in the evening when the accused-appellant had come and spoken to him for about five to ten minutes. He has further testified that the accused-appellant having spoken to him has gone toward the direction of his house and that the witness too had accompanied him around 7 p.m. According to witness Bandara his residence was situated about $\frac{1}{4}$ a kilo meter away from said boutique and one has to pass his house and go about one kilo meter to reach the house of the accused-appellant. The said witness has testified that an unknown person had been in the company of the accused-appellant. He has further testified that the accused-appellant and the unknown person were talking to each other whilst walking along the road and that there did not appear to be any animosity between them. Next day morning

around 9.30-10.00 a.m he was informed of a murder and identified the person as the person who was in the company of the accused-appellant the previous night. From this evidence it is very clear that the said deceased had been seen in the company of the accused-appellant around 7.00 p.m on 04.09.2006. The deceased was last seen in the company of the accused-appellant by the said witness Bandara and had walked toward the house of the accused-appellant around 7.00 p.m. The witness Bandara has not stated anywhere that he saw a white van or that he has seen the deceased and the accused-appellant travelling together in a van. There is evidence to establish the fact that the deceased was last seen alive and was with the accused-appellant around 7.00 p.m. On 4.09.2006. The said witness Bandara has stated that the deceased and the accused-appellant walked towards the house of the accused-appellant talking to each other.

The other witness called by the prosecution has testified to the fact that when he was playing cards at the Nagahamulla boutique, the accused-appellant who had been standing outside a van opposite side had called out to him and wanted to go on a hire to Mawanella bus stand and that he had dropped him at Mawanella bus stand around 8.30 p.m. He has not seen the driver or any other person in the said van. This evidence shows that the accused-appellant had come again to the boutique where they were playing a game of cards about an hour later after going towards his house with the deceased. This time the accused-appellant was seen alone and had been dropped by the witness Ranabahu in his three wheeler at the Mawanella bus stand. The accused-appellant in his dock statement has stated that he went on a hire to his village in the van which was driven by the deceased and thereafter parted company and hired a three wheeler to go to Mawanella. The fact that the accused-appellant travelled in the three wheeler to Mawanella at around 8.30 p.m on 4.9.2006 is corroborated by the evidence of the said witness

Ranabahu. Under these circumstances it is incumbent upon the prosecution to fix the exact time of death of the deceased.

One of the grounds of appeal urged by the Counsel for the accused-appellant was that the learned trial Judge has misdirected herself on critical issues of fact and law causing serious prejudice to the accused-appellant.

The learned trial Judge when evaluating the evidence of witness Ranabahu has come to a factual finding that the said witness has stated that whilst he was playing cards the accused-appellant had come there in a van and that there was another person in the said van whom the accused-appellant had introduced as Nandana and that when he heard about the murder the following day he had gone to witness the dead body and had identified him as the person who was in the company of the accused-appellant. On a perusal of the evidence given by the witness Ranabahu it is very clear that the said witness has categorically testified that there was no one else in the van and that he had dropped the accused-appellant at Mawanella bus stand around 8.30.p.m. The learned trial Judge's finding that the deceased was last seen in the company of the accused-appellant by the said witness Ranabahu is therefore clearly contrary to the evidence led at the trial.

The deceased was last seen in the company of the accused-appellant around 7.00 p.m on 04.09.2006 by witness Bandara.. The accused-appellant was seen again at the boutique by the witness Ranabahu around 8.30 p.m. Was the deceased murdered between 7.00 and 8.30 p.m on 04.09.2006? Or was it after 8.30 p.m on 04.09.2006?

In The King V. Appuhamy 46 N.L.R 128 it was held that

“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 prosecutor has failed to fix the exact time of death of the deceased.”

The last seen theory comes to play when the time gap between the point of time when the accused-appellant and the deceased were last seen alive and when the deceased was found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. State of U.P V. Satish 2005 Indlaw Sc 83.

Therefore it is very important to establish the exact time of death of the deceased which will enable the court to determine the time at which the said offence was committed whether it was between 7.00-8.30 or after 8.30 p.m on 04.09.2006.

The evidence led in this case shows that the accused-appellant had the opportunity of committing the said offence between 7.00 and 8.30 p.m. on 04.09.2006. Or was the death of the deceased was caused after 8.30 p.m. on 04.09.2006?

This is a case mainly based on circumstantial evidence. And the instant case revolves around the last seen theory. Therefore it was incumbent upon the prosecution to fix the exact time of death so as to narrow the time gap between the time the deceased was seen with the accused-appellant and the time of death.

The medical officer Dr. M.Siva subramaniam was not able to express an opinion as to the exact time of the death of the deceased. He has stated that he is unable to do so because the body of the deceased was refrigerated. He could only say that the death has occurred on or about 04.09.2006. The prosecution has clearly failed to elicit evidence to prove the exact time of death of the deceased.

The evidence of the witness Ranabahu indicates that he had seen a white van parked with the hood-light of the driver's seat switched on. A

person who was standing near the van had called out to him and when he went the said person had introduced himself as Nandana and wanted to go on a hire with the witness to Mawanella. There is no clear evidence to show whether the van parked with the hood lights on was the van that belonged to the deceased or whether the deceased was seen around the said area. But the evidence of witness Ranabahu clearly shows that when the accused-appellant got in to the three wheeler to go to Mawanella a white van was parked with the hood lights on in the opposite side of the boutique. This creates a doubt as to whether the deceased was alive at the time when the accused-appellant left to Mawanella with the said witness Ranabahu. If the said white van is the same vehicle belonging to the deceased and if he has been somewhere near the place although not seen by the witness Ranabahu then certainly the death of the deceased would have been caused after the accused-appellant left to Mawanella in the said three wheeler with the Witness Ranabahu after 8.30 p.m on 04.09.2006. The evidence clearly establish that the fact that the accused-appellant had left alone in the three wheeler with witness Ranabahu and got himself dropped near the clock tower in Mawanella. The evidence clearly shows that when the accused-appellant left the said place with witness Ranabahu a white van with the hood lights on was last seen at that place near the Nagahamulla boutique. This creates a doubt as to whether the death of the deceased was caused by some other persons after the accused-appellant had left the said place after 8.30.p.m. On 04,09.2006. Therefore the failure of the prosecution to prove the exact time of death of the deceased is a very important fact that should be considered in favour of the accused-appellant. Although a white van was seen parked opposite the boutique there was no evidence to show as to who removed the said vehicle after the accused-appellant had left the place in a three wheeler at about 8.30 p.m on 04.09.2006.

The Dr.M.Sivasubramaniam has testified that the deceased sustained 22 injuries out of which 1-9 were cut injuries and 10-15 were stab injuries and it was his evidence that there is a possibility that the said injuries could be caused with the knife marked P2.In cross examination the D. has admitted the possibility of the said cut injuries could have been caused by a different weapon and the said stab injuries from another different weapon. He admitted that the said injuries could have been caused by a number of weapons. The evidence of this witness clearly shows that there could be a possibility of number of persons committing or causing the said injuries to the deceased. This evidence is certainly not in favor of the prosecution, on the contrary it creates a reasonable doubt in the prosecution case.

In (SC) PLD 1965 SC 44 Azim it was held that:-

Circumstantial evidence for a conviction must be authentic. Facts in the case as alleged, found contradictory to each other and medical evidence indicating possibility of two assailants: Accused acquitted.

In the instant case the prosecution has clearly failed to establish the time of death of the deceased. The evidence clearly shows that the deceased was last seen in the company of the accused-appellant around 7.00 p.m. on 04.09.2006 at the Nagahamulla boutique. Thereafter the accused-appellant had left the said place with the deceased accompanied by the witness Bandara towards the accused-appellant's house. Thereafter according to witness Ranabahu he has met the accused-appellant near the boutique whilst he was playing cards and had taken the accused-appellant to Mawanella town in his three wheeler around 8.30 p.m. The accused-appellant in his dock statement had taken up the position that he went to Mawanella bus stand around 7.30 p.m and got into the bus leaving to kataragma at about 8.10 p.m. The fact that the accused-

appellant proceeded to Mawanella around that time is corroborated by the prosecution witness Ranabahu.

The police has recovered a knife marked P2 from the accused-appellant. The said knife has been recovered by the police on a section 27 statement made by the accused-appellant. The prosecution has failed to establish a link between the weapon marked P2 and the crime. There was no proof before court that P2 was in fact used in the assault on the deceased. The fact that the said knife marked P2 was recovered on a statement made by the accused-appellant to the police under section 27 of the Evidence Ordinance is only sufficient to prove that the accused-appellant knew where the said knife was and nothing more. Dr. M. Siva subramanium's evidence clearly shows that there is a doubt as to whether the said injuries found in the body of the deceased was inflicted by the said knife alone or other weapons too were used to inflict the said injuries.

Further the nature and the number of the injuries found in the body of the deceased clearly creates a doubt whether in fact the said cut and stab injuries were inflicted by one person or several persons.

Even the identification of the mobile phone (P1) is unsatisfactory. The court could only attribute knowledge to the accused-appellant.

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

The finding of the learned trial Judge that the deceased was last seen alive in the company of the accused-appellant by the witness Ranabahu is a major misdirection in law consequently causing grave prejudice to he accused-appellant.

The only evidence relied by the learned trial Judge to form the basis for conviction against the accused-appellant was that the deceased was last

seen in the company of the accused-appellant and the recovery of a knife and mobile phone under section 27 of the Evidence Ordinance.

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-appellant committed the crime.

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 charges ought to be proved by circumstantial evidence the items of 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.

Consideration of circumstantial evidence has been vividly described by Pollock C.B. in *Regina 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 the rope might be insufficient to sustain the weight, but three strands together may be 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.”

The items of circumstantial evidence referred to earlier in this case in my opinion is insufficient to sustain the weight of the rope. Further totality of the evidence led in this case does not lead to as 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 Kegalle dated 15.10.2013 and acquit the accused-appellant.

Appeal is therefore allowed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL