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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA/ 67/2011

HC/Avissawella/120/2007

Jayasinhage Sanjeewa Deepal Jayasinghe

ACCUSED

And,

Jayasinhage Sanjeewa Deepal Jayasinghe

ACCUSED-APPELLANT

Vs,

Attorney General

Attorney General's Department

Colombo 12.

RESPONDENT

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

H.C.J. Madawala J

Counsel: N.A. Chandana Sri Nissanka for the Accused-Appellant

Rohantha Abeyesuriya DSG, for the AG

Argued on: 22.10.2015, 23.03.2016

Written Submissions on: 05.06.2016

Decided on: 11.11.2016

Order

Vijith K. Malalgoda PC J

The accused-appellant Jayasinhage Sanjeewa Deepal Jayasinghe was indicted before the High Court of Avissawella for

01. Causing the death of Malani Rathnayake Subasinghe on 17th September 2003 an offence punishable under section 296 of the Penal Code and
02. Committing the offence of Robbery of Jewellary in the course of the same transaction, an offence punishable under section 383 of the Penal Code.

When the indictment was served on the accused on 21st January 2008 the accused elected to be tried before a Judge without a Jury and during the said trial the prosecution had relied on the evidence of several witnesses including the husband of the deceased Don Jayatunge Subasinghe and the Daughter of the deceased Janitha Madavi Subasinghe.

At the conclusion of the prosecution case, when the accused was explained his rights, he elected to make a statement from the dock and closed the case without leading any evidence. In his dock statement having admitted that he was arrested by Mirihana Police, he denied any involvement to the charges leveled against him. The Learned High Court Judge who had the opportunity of following the evidence of the entire prosecution and the defence case, had convicted the accused-appellant on both counts against him and imposed death penalty on the 1st count against him and sentenced 10 years Rigorous Imprisonment and a fine of Rs. 10,000 with a default term of 6 months Simple Imprisonment on the second count.

Being dissatisfied with the above conviction and the sentence the accused-appellant had preferred the present appeal before this court.

As observed by this court the prosecution case was totally depend on circumstantial evidence. The deceased Malani Ratnayake Subasinghe was married to one Gamaralalage Don Jayathunga Subasinghe who is a medical practitioner having his dispensary at Hanwella.

During the period relevant to this case the deceased and her husband were living in their house in Ihala Bomiriya Kaduwela and all four children they had from their marriage were living separately. According to the evidence of witness Jayathunga Subasinghe he had gone to his dispensary as usual around 8.00 am on 17.09.2003 and returned home for lunch around 2.30-3.00 pm. Around 9.00 am when he was in the Dispensary the accused came to meet him and asked for Rs. 80/- to buy some electrical parts from Malwatta Road. The accused is the son of his driver and he used to do odd jobs at his place and do some repairs for his electrical items. However he has refused to give any money to him on that day. When he returned home he saw his wife with bleeding from her mouth fallen between a cupboard and the writing table in the front room.

Even though the witness was a Medical Practitioner he could not remember what he did at that time but only remember calling his front door neighbour and thereafter informed his daughter about the incident.

The next witness relied upon by the prosecution was the daughter of the deceased Janitha Madavi Subasinghe. According to the said witness, after her marriage she was living separately with her family and the deceased mother and the father were living in their house at Ihala Bomiriya. When the father went for work, mother was alone at the house. During this period her father had a driver by the name Wilbert who was working for her father for nearly 8 years. She could also remember Wilbert accompanying his two children including the accused in the present case in order to clean their estate at Mathugama.

According to this witness, it was around 5.30 pm she managed to come to the house and at that time there were several people in the house but the police did not allow her to go to the room where the body was lying and therefore she could not had a close look of her mother prior to the body was removed from the house.

However once the funeral was over and when she was cleaning the house she found the rare portion of an earring worn by her mother, from the room the body was found and immediately thereafter she handed over the same to Navagamuwa Police.

This witness was asked about the Jewellary worn by the deceased at the time of her death, and she had given detailed answers to the said questions but I will discuss the said evidence separately.

Prosecution had led the evidence of one Dampahalage Don Chandrasiri who had visited the scene of crime on the request of the husband of the deceased around 3.00 pm on that day. According to him the witness's house was just opposite the house of the deceased and around 3.00 pm the doctor had come to his house in an exited manner and requested the witness to come to his house and informed that his wife is fallen near a table with bleeding.

When he visited the house, he observed the deceased fallen inside the front room and at that time the deceased's husband had wiped her face with a piece of cloth. Witness had requested the doctor to inform police but at that time they found that the telephone was disconnected.

Another neighbor who visited the scene after hearing the cries had taken the doctor to the police station and he remained at the house until the police arrived in 10 minutes, but nobody went inside the house until the police arrived.

The evidence of Inspector of Police Galappaththi Waduge Lal Ravindra was led in the place of Inspector Mangala Dehideniya Officer in Charge of Nawagamuwa Police Station who visited the

scene immediately after the first complaint, with a police party consist of IP Ravindra, PS Abeyrathne, PC Sukumaran, PC Dammika, PC Piyatissa and PC Bandara.

As revealed before the trial IP Mangala Dehideniya who conducted the investigations of this incident was abroad on an official assignment, and therefore the prosecution has decided to lead the evidence of IP Ravindra with regard to the investigation carried by IP Dehideniya with his assistance.

This witness had identified the notes made by IP Dehideniya and confirmed that he had the opportunity of going through them during the investigations.

According to the evidence of witness Ravindra the following observation had been made with regard to the house. The house was situated at Ihala Bomiriya facing the main Awissawella- Kaduwela Road and there was a wall six feet in high around the house with a gate to enter the garden.

At the main door they had observed a blood patch for about 1 ½ feet high. The room in which the body was found, the fan was working and the Television was on. The deceased was wearing a frock at the time and there was a blood patch of about 2 ½ feet near her body. They could not found any Jewellary on her body and since they observed a bottle of sprite and a glass, steps were taken to check for finger prints but that was not successful.

It was further revealed from the evidence that the subsequent investigation with regard to the arrest of the suspect and the recoveries made thereafter had been done by the Special Investigation Unit of Mirihana Police Station. This witness further confirmed that the handing over of a part of an earstud after the funeral by the daughter of the deceased and by that time no arrest was made by any police station.

According to the evidence of Sub-Inspector of Police Vithanage Nimal Jayantha Perera, he was attached to the Special Investigation Unit Mirihana during the time relevant to this case. On an information received by Sgt. Hemantha of his unit, he had gone to Pahathgama with a police party

consist of PS 27829, 27856 PCC 38013, 3984, 21284, 1523 and RPC 9102 on 25.09.2003 in order to arrest a suspect. Subsequent to the arrest of the suspect namely, Sanjeewa Deepal Jayasinghe a statement had been recorded from him, at 11.45 am and some recoveries were made with the help of his statement. The statement which helped him to make those recoveries to the effect, "....පිහිය..... නිවස ඉදිරිපිට ඉඩමේ ඇළ අද්දර කළුගල යට ..... එම ස්ථානය මට පෙන්වාදිය හැක..... ලබාගත් රන්බඩු මගේ ලහ තිබී ප්‍රෝස්ප්‍රෝට් හෙයා ජෙල් හිස් භාජනයක දමා ගෙයි පිටුපස ලී ගොඩ යට ....තිබේ. මට එයත් පෙන්වාදිය හැකිය...."was marked P-11 and the following items had been recovered from using the said statement.

1. One Diamond cut gold chain 22 inches long
2. A pendent in the shape of a flower
3. A pair of earrings –in one of them the rear stud was missing
4. A ring with a white stone
5. A ring with a blue stone
6. Another plain ring
7. A knife with a carved handle

said items were recovered at 12.20 pm and thereafter steps were taken to hand over the suspect with productions recovered to the Nawagamuwa Police.

As observed in the evidence of witnesses Don Jayatunga Subasinghe and Janitha Madavi Subasinghe, both these witnesses had identified the said Jewellary as the Jewellary worn by the deceased on that day.

Before the said Jewellary was shown to witness Madavi the following questions were put to her by the prosecution,

Page 67,

ප්‍ර: දැන් ඔය කාලේ වෙනවිට තමාගේ මව එදිනෙදා පලඳින ආභරන ගැන අවබෝධයක් තිබුනාද?

උ: මාලය දාගෙන හිටියා

ප්‍ර: මාලය සම්බන්ධයෙන් තමාට මතකද?

උ: ඩයමන්ඩ් කට් මාලයක්

ප්‍ර: ඒක නිකම්ම මාලයක්ද?

උ: පෙන්ඩන්ට් එකක් එක්ක දාල තිබුනා

ප්‍ර: කොයි වගේ පෙන්ඩන්ට් එකක්ද?

උ: මලක් වගේ

ප්‍ර: ඒවා දුටුවොත් අඳුනාගත හැකිද?

උ: පුළුවන්

ප්‍ර: ඊට අමතරව මොනවද පැළඳගෙන තිබුනේ?

උ: කරාබු දෙකක් දාගෙන හිටියා මංගල මුදුව සමඟ මුදු තුනක් තිබුනා

ප්‍ර: මංගල මුදුව කොයි වගේද?

උ: හීන් ප්ලේන් මුද්දක්

හාට් එක තිබෙන නිලපාට ගලක් ඇල්ල 1ක් තිබුනා

සුදු ගලක් තිබෙන මුද්දක් තිබුනා ඔක්කොම මුදු 3 යි

ප්‍ර: කරාබු දෙක ගැන මතකයක් තිබෙනවාද?

උ: මලක් වගේ කරාබු දෙක

From the above answers it is clear that the witness had clearly remembered the Jewellary worn by her deceased mother and identified them with a clear description. The rear portion of the earring which she found when cleaning the house was also identified by the witness at the trial.

In addition to the Jewellary recovered on the statement made by the accused, this witness was able to identify the knife recovered on the statement made by the accused as a knife used by the accused. Her evidence with regard to this fact reads thus.

Page 68,

ප්‍ර: ඒ තමාගේ රියදුරුගේ සීවෙනි පුතාද?

උ: ලොකු පුතා

ප්‍ර: එයාට තමා කතාකරන්නේ කවුරු කියලද?

උ: තාරක

ප්‍ර: මතුගමවත්ත සුද්දකරන්න කොච්චර වෙලාවක් ගතකලාද?

උ: දින 3,4 ක්

.....

ප්‍ර: තාරක අතේ මොනවා හෝ තිබුනාද?

උ: පිහියක් තිබුනා

ප්‍ර: ඒ පිහිය දැක්කද තමා

උ: ඔව් කුඩැල්ලන් කපනවිට මම ඇහුවා මොනවද කරන්නේ කියා

ප්‍ර: මිට කැටයම් කල උල් පිහියක්ද?

උ: ඔව්

ප්‍ර: එය දුටුවහොත් හඳුනා ගතහැකිද?

උ: ඔව්

Page 71,

ප්‍ර: තමන් කිව්වා තාරක වත්ත සුද්දකරනවිට පිහියක් පාවිච්චි කලාකියා?

උ: ඔව්

ප්‍ර: මෙය තමාට අඳුනාගත හැකිද?

උ: මෙය අඳුනාගත හැකියි කුඩැල්ලන් කපනවිට තමා මම දැක්කේ

In the absence of any direct evidence in the case in hand, the case for the prosecution is mainly relied on the circumstantial evidence placed before court. In this regard the prosecution has mainly relied on the evidence with regard to the recoveries made on the statement made by the accused. As

observed by this court it is necessary for this court to consider the recoveries made with regard to the Jewellary worn by the deceased at the time of her death comes within the illustration (a) of section 114 of the Evidence Ordinance.

Section 114 of the Evidence Ordinance which permits the court to presume the existence certain facts reads thus,

> "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."

The existence of the above facts were illustrated under eight important categories and illustration (a) to the said section which is relevant to the present case reads as follows,

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

In the case of ***Cassim V. Uday Mannar (1943) 44 NLR 519*** the court cited with approval the following views of Taylor on evidence. The presumption is not confined to cases of theft but applies to all crimes even the most Penal.

> "Thus on indictment on arson proof of 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 in the case of murder accompanied by robbery, in the case of burglary and in the case of possession of a quantity of counterfeit money."

However in the absence of any direct evidence with regard to the recovery of the items belonging to the deceased from the custody of the accused, this court will have to analyze the extent to which a

recovery made under section 27 (1) of the Evidence Ordinance can be extended in a case of this nature.

Section 27 (1) of the Evidence Ordinance reads thus,

> "Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information whether it amounts to a confession or not, as relates distinctly to the fact hereby discovered may be proved."

It is observed by our courts as to how an accused person could have acquired the knowledge when he points out a place where an item is concealed, and identified 3 ways that he could have gain the relevant knowledge,

a) The accused himself concealed those items
b) The accused saw another person concealing those items
c) A person who had seen another person concealing those items has told the accused

From the evidence led at the trial it was revealed that, specially the Jewellary items were recovered from the backyard of the house of the accused which is far away from the house of the deceased. Amongst the recovered Jewellary, there was a part of an ear stud without the rear portion and the said portion was with the Nawagamuwa Police prior to the recovery of the Jewellary items by the officers of Mirihana Police Station.

It is further observed by this court that witness Madavi Subasinghe has clearly identified the knife as a knife used by the accused on previous occasions and this knife was also recovered using the same statement made by the accused.

However the accused-appellant had failed to offer an acceptable explanation to bring his case within the position set out in the two positions referred to as (b) and (c) above. In this regard this court is

further convinced from the fact that the arrest and the recoveries referred to above had been made by completely a deferent unit outside Nawagamuwa Police Station which was involved in probing the crime committed.

In the said circumstances I would like to follow the views expressed by Amaratunga J in ***Ariyasinghe and others V. Attorney General (2004) 2 Sri LR 357 at 387*** to the effect that,

> "However no explanation came from 1st to the 12th accused to bring their cases within the positions set out in No. 2 and 3 above. In law they are not bound to explain but in certain circumstances failure to explain damming facts may become in law, presumptive evidence against them (see Seetin v AG)
>
> And, when concluded that, 'having considered the places where the money was found concealed, the Learned Trial Judge had held that all accused had possession of G/66 Notes. The facts of possession and the intention to posses were both established. We agree with the conclusion of the trial judge.'

In the said case of ***Ariyasinghe and Others V. Attorney General 2004 (2) SLR page 358*** Amaratunga J when referring to the presumption contained in section 114 of the Evidence Ordinance had further concluded,

> "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 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 section 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.

In the said circumstances we see no reason to interfere with the findings of the Learned Trial Judge when she concluded to act under the presumption in section 114 of the Evidence Ordinance

In addition to the strong circumstantial evidence with regard to the recoveries made, this court is further mindful of the following important items of evidence revealed during the High Court Trial. According to the evidence of Jayatunga Subasinghe and Janitha Subasinghe it was revealed that the accused used to attend to odd jobs at their place and he is the eldest son of their driver. In these circumstances it is clear that he is a person known to the inmates of the deceased family. As observed by the police, when they visited the house they found an opened sprite bottle and a glass in the house and they in fact made an attempt to recover finger prints from the said items but were not successful. However the fact that the police observed the opened sprite bottle and the glass reveals that somebody known to the deceased had come to the house in the absence of her husband during that morning for her to offer a soft drink.

It is further observed by this court from the evidence of witness Dampahalage Don Chandrasiri that the telephone was disconnected when they tried to call the police from the deceased's house. This fact too confirms that the person who was involved in the murder had a knowledge of the place for him to disconnect the telephone line.

When these two items of evidence taken separately will not help the prosecution to establish the prosecution case against the suspect, but taken along with the evidence I have already discussed with regard to the recoveries made from the accused within few days from the incident, the above evidence will certainly strengthen the prosecution case.

According to the Medical evidence led at the trial the deceased who was around 64 years of age at the time of her death had 38 post mortem injures on her body.

As observed by this court majority of these injuries were found on the chest, neck, face and the arms of the deceased and they are either cut or stub injuries and some of them were defensive injuries caused when resisting an attack. Out of the said injuries the doctor had bound two fatal injuries caused to the neck which were necessaraly fatal to the deceased.

The doctor who examined the knife which was recovered from the statement made by the accused-appellant had given an opinion that it was possible to cause both the cut and stab wounds found on the body of the deceased using the said weapon. In this regard the doctor had said,

Page 130,

ප්‍ර: අනෙකුත් කැපුම්, ඇනුම් තුවාල තිබෙනවා අත්වල,ගෙලේ, පිටුපස ප්‍රදේශය අතවලට තුවාලයක්වීමට සාමාන්‍යයෙන් මම ඔබතුමාගෙන් මතයක් විදියට අහන්නේ ඔය ආයුධ සම්බන්ධයෙන් මතයක් ඉදිරිපත් කලා තියුණු තලයක් සහිත ආයුධයක් වියහැකි බවට. තියුණු තලයක් සහිත උල් පිහියෙන් මෙවැනී තුවාලයක් සිදුවීමට හැකියාවක් තිබෙනවාද?

උ: තිබෙනවා

ප්‍ර: මෙම අවස්ථාවේ මතයක් සම්බන්ධයෙන් කරුනුවිමසීමට දැනටමත් පැ 8 ලෙස සලකුණු කර ඇති නඩුහාන්ඩය පෙන්වාදී සිටී. වෛද්‍යතුමණි ඔබ සඳහන් කරන ආකාරයේ මා පෙන්වාසිටින ආයුධයකට මෙවැනී තුවාල සිදුකිරීමට හැකියාවක් තිබෙනවාද?

උ: හැකියාවක් තිබෙනවා

ප්‍ර: මේ ආයුධයේ තිබෙන ලක්ෂණ මොනවාද?

උ: විශේෂයන්ම මෙවැනි තලයක ස්වරූපයක් ගන්නා තියුණු ආයුධයක් මෙහිතිබෙන තුවාලවල දිගපළල ගත්විට මේ තලය සමඟ සැසඳෙන නිරීක්ෂන තිබෙනවා

As observed above, the present case is entirely depending on circumstantial evidence. In this regard the Learned Trial Judge had correctly analyzed the strong circumstantial evidence available in this

case. When analyzing the said evidence this court is mindful of the principles identified in the case of ***Don Sunny V. Attorney General (1998) 2 Sri LR 1*** to the effect,

1. When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

   On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.
2. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.
3. If upon a consideration of the proved items of circumstantial evidence if the only inference that can be drown is that the accused committed the offence then they can be found guilty.
4. The prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

When considering the evidence discussed above, it is our considered view that the only irresistible inference that can be arrived by this court is that the murder of Malani Rathnayake Subasinghe and robbery of Jewellary worn by the deceased at the time of murder was committed by the accused-appellant Jayasinhage Sanjeewa Deepal Jayasinghe and not by any other person.

In this regard we observe that the Learned Trial Judge had carefully evaluated each and every item of circumstantial evidence in the present case before coming to the conclusion. Even though she has not specifically referred to the principle behind it, this court is mindful of the fact that the

trial judge with a trained legal mind was alive and mindful of the relevant principles of law and has applied them in arriving at his conclusion.

In the case of ***Dayananda Loku Galappaththi and Eight Others V. The State 2003 (3) Sri LR 362*** this position was discussed as follows;

> "In a Jury trial an accused is tried by his own peers. Jurors are ordinary laymen. In order to perform their duties specified in section 232 of the Code, the Trial Judge has to inform them of their duties. In a trial by a Judge of the High Court without a jury, there is no provision similar to section 217. There is no requirement similar to section 229 that the Trial Judge should lay down the law which he is to be guided. In appeal the Appellate Judges will consider whether in fact the Trial Judge was alive and mindful of the relevant principle of law and has applied them in arriving at his conclusion. The law takes for granted that a Judge with a trained Legal mind is well possessed of the principles of law, he would apply."

For the reason set out above we see no reason to interfere with the findings of the Learned High Court Judge. We therefore confirm the conviction and sentence imposed on the accused-appellant.

Appeal dismissed, Conviction and Sentence is affirmed.

President of the Court of Appeal

H.C.J. Madawala J

I agree,

Judge of the Court of Appeal