

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.

Ratnayake Mudiyansele
Premachandra

Accused-Appellant

C. A. Case No. : 79/2011

H.C. Monaragala Case No.: 389/2005

V.

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

Complainant-Respondent

**BEFORE : M.M.A.Gaffoor, J &
K. K. Wickramasinghe, J**

**COUNSEL : Jeffry Zeinudeen for the Accused-Appellant.
Haripriya Jayasundera DSG for the Attorney General.**

ARGUED ON : 05th May 2016

DECIDED ON : 4th April 2017

K. K. WICKRAMASINGHE, J.

The accused-appellant (here in after referred to as "Appellant") in this case was indicted in the High Court of Monaragala for causing the death of one Wannisekera Mudiyanseelage Ranmenika on or about 02.03.2005 and thereby committing an offence for murder, punishable under sec. 296 of the Penal Code. The appellant opted to have the case before the learned High Court Judge without a jury. At the conclusion of the trial on 08.09.2011 the learned High Court Judge convicted the appellant for committing murder and sentenced him to death.

The Appellant being aggrieved by the said judgement and said sentence he has preferred this appeal on question of law on the following grounds:-

(a) The statement of the deceased cannot be considered as a dying declaration and the prosecution relied to prove their case on circumstantial evidence without an eye witness.

(b) Witness Gamini Attanayake's statement was a belated statement since he made it after 12 days of the death of the deceased.

© The Learned High Court Judge has made a wrong finding by stating that the witness called by the defence has proved the prosecution case. He has not considered the fact that the burden of proof lies on the prosecution and it should be proved beyond reasonable doubt.

(d) The Learned High Court Judge has not evaluated the evidence of the police officer who brought the tracker dog and also relied on the tracker dog which was brought to the scene of crime after two days of the incident. Prosecution has failed to prove that only the Appellant was staying in the house traced by the tracker dog.

Background of the case:-

The deceased was a widow living alone and cultivating fruits and vegetables in her garden. She used to take them to market for sale. The deceased had a habit of keeping the key at one Thushari's house. On the day of the incident, she had not gone there. Since she didn't go to her place, several villages were alert about her and went in search of her. They found that her dead body was hanging inside the house.

The prosecution relied on the evidence of a neighbour Kapila Jayawardena (PW1). He testified that, on the 02.03.2005 evening, as the deceased was not seen around, he has visited her house with few villagers including Thushari and Niroshana. He had noticed that both the front and the rear doors were locked (one door was padlocked from outside). Also observed that the house was not been broken into and the windows were closed. Then he had peeped inside the house, through the gap between the wall and the roof, he had seen partly washed rice, some plantains and canes in one room. After removing the polytheen ceiling, he had seen the deceased hanging from the roof.

After arrival of the police he had entered the house and found the deceased hanging from the rafter with a rope that was made of synthetic material (tangus). The bed and the chair were seen about four feet away from her. The cloths line which was normally fixed in the compound was found cut. Thereafter has made a statement to the police. He has identified the clothes worn by the deceased and the tangus rope at trial. The defence was unable to mark any contradiction in his cross examination and he was consistent.

According to Gamini Attanayake(PW2) the deceased was living about 200m away from his house and the Appellant lived at the adjoining land. On the 02.03.2005 around 4.30-5 in the morning, this witness had heard a noise coming from the house of the deceased (known as Mirisarawe Gedera).It was sound like squeezing of a trapped wild boar which was followed by cries "Nilame mawa Maranawo".He had identified it to be a female voice and the cries have lasted for about 15 minutes. He has heard the person screaming utterances about 4 to 5 times. He had also testified that the Accused appellant was called by that name. After hearing that voice, he had never seen the deceased

Around 7.30 am as the fellow villagers refused to accompany him, he has gone on his own to the compound of the deceased and has found the clothes line been cut with the two ends still tied to the poles. This witness has revealed about the previous enmity between the Deceased and the Appellant, also many instances that the Appellant tried to harm her. He had identified that the remaining parts of clothes line were similar to the rope that has been used for hanging. This witness confirmed that the two doors were locked and one door padlocked from outside. On that day it self this witness had informed about the cries of the deceased to the inmates of Thushari's house who had been closely associating the Deceased. It is observed that though he was delayed in making a statement to the police, he had given evidence at the inquest which was held on the following day of the incident. In explaining the delay in making the statement, the witness has said that he went to the police on several occasions but asked to come later and further mentioned that he was involved in agricultural work and that too contributed to the delay. He further said that he had a fear in coming forward to give evidence in a murder case.

Kusuma (PW3), a neighbour of the deceased who associated the deceased closely, has stated how the deceased often used to express her fear of being harmed by the Appellant. In cross

examination she said that Thushari is her sister in law. She further said that witness Gamini can hear what happens at the house of the deceased and also given the locality of their houses are situated. It is pertinent to note that no omissions or contradictions marked by the defence.

According to the evidence of Thushari (pw4) who associated the deceased very closely divulged that the deceased who was known as 'Mirisarawe gedera' was living in constant in fear of the Appellant. On the day in question they had awaited the arrival of the deceased on her way to the village fair(the day that the weekly fair was held) since the deceased had a habit of leaving the house key at her place. As the deceased had not gone to her place on that day, she had gone in search of her with Kapila(pw1) and found the house locked. It was the time that Kapila has found that the deceased was hanging inside the house. She further said that the house of the deceased was at the vicinity of Gamini's house at her cross examination. It is noted that even her evidence is without any contradiction or omission.

Niroshana Dammika(PW5) who visited the house of the deceased had corroborated the above evidence.

Sumanasena(PW6) has seen the Appellant boarding a bus that morning in a hurry.

According to IP Bandara (PW11) the first complaint has been made by Kapila Jayawardena (PW1) on the 02.03.2005 at 20.25 hrs. During investigation it was revealed that the house of the deceased was padlocked from outside and the other door was locked from inside. They had forced opened the door and entered the house. It was found that the deceased was hanging in a room. They observed injuries on the dead body and the knot of the cloth (cheethaya) worn by the deceased was from behind. Police had found bunch of keys on the table but unable to open the padlock from those keys. It is pertinent to note, that the police had observed the striking similarity between the two ends of the clothes line rope and the rope that was used for the hanging. Considering the evidence of SI Ranaweera (PW10), the tracker dog had traced the Accused Appellant's house. The crime scene was guarded by PC Karunaratne.

According to medical evidence the JMO(pw9), 24 injuries (contusions and abrasions) have been observed on the dead body. The JMO had come to the conclusion that the dead body was hanged after strangulation. Further he was of the opinion that it was a manual strangulation where maximum pressure had used and as a result the neck bone was fractured. As there were no injuries caused by the ligature found around the neck, he had ruled out that the death was not due to hanging .Since there were resistance injuries, the JMO categorically stated that the death was due to strangulation .According to the PMR (marked as P5) neck injuries were necessary fatal. Therefor it is evident that the deceased was hung after killing.

When the defence was called, the Accused Appellant in his doc statement stated that he had nothing to do with the crime, no reason to commit this crime and he was a businessman living alone.

SSP Mahinda, who was a defence witness, said that the tracker dog can even pick up the scent of one person out of 1000 and his skills to pick up a scent is very sharp. He had also explained how the tracker dog ends up at a person who has a connection with the crime.

The Learned High Court Judge in his evaluation has observed the evidence of the lay witnesses to the fact that both the Deceased and the Appellant were not in good terms and the Deceased apprehended death all the time in the hands of Appellant. The Appellant was called Nilame in the village and living in the adjoining land to the Deceased and there was evidence of opportunity. Also had considered the evidence of Gamini (PW2) who heard the cries of distress coming from the house of the deceased and that was in the early hours of the day in question. The JMO also have confirmed the time of death of the deceased. It is evident that the learned High Court Judge had considered the belatedness of the complaint and the reason given. It is apparent that the witness was a genuine witness.

In the case of **Ajith Samarakoon Vs The Republic (Kobeigane case) [2004] 2SLR 209 at 228**, N. Jayasuriya J. held that *"just because the statement of a witness is belated the Court is not entitled to reject such testimony. In applying the test of spontaneity, the test of contemporaneity and the test of promptness the court ought to scrupulously proceed to exercise the reasons for the delay. If the reasons for the delay are justifiable and probable the trial judge is entitled to act on the evidence of a witness who had made a belated statement."* pertinent observations have been made in the case of **Pauline de Croose Vs The Queen at 180** by T.S. Fernando J. and also in **Narapal Singhe Vs The State of Hariyana**.

In the case of **Rex Vs Appuhamy XLII CLW at page 04**, the mother of the deceased stated in evidence (a) that two or three days prior to her death the deceased complained that the appellant made an improper suggestion to her and she did not agree to it and she did not want the Appellant to come to her house. The witness soon after the complaint went to the Appellant and asked him not to come to her house. It was contended in appeal that the statement alleged to have been made by the deceased to her mother was not admissible in evidence. In the Court of Appeal it was held that the statement was admissible in evidence as it indicated some of the circumstances of the transaction which resulted death.

In **Mudalihami's** case it was held that the statement admissible under sec.32 (1) of the Evidence Ordinance may be made before the cause of death has arisen or even before the deceased has any reason to anticipate being killed.

When perusing the Judgement it is very clear that the Learned Trial Judge has discussed the applicability and the admissibility of a dying declaration and held that utterance heard by witness Gamini amounts to a dying declaration.

Further in the case of **Sarvan Singh Vs State of Punjab 2002 AIR SC (iii) 3652 at 3655 and 3656**, Indian Supreme Court held that, *"It is a rule of Essential Justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted"* This case was cited in the case of **Bobby Mathew Vs State of Karnataka (2004) 3 Criminal Law Journal page 3003**.

In **Motilal Vs State of Madhya Pradesh (1990) Criminal Law Journal NOC 125 MP**, It was held that *"Absence of cross examination of prosecution witness of certain facts, leads to inference of admission of that fact"* Further in the case of **Himachal Pradesh Vs Thakur Dass (1983) 2 Cri.L.J. 1694 at 1701** V.D.Misra CJ held: *"Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed"*

The cases referred above have been cited and approved in the case of **Jagath Premawardena Vs AG CA Appeal 173/2005**, decided on 19.03.2009 by Sisira de Abrew J. held that,

"When considering the evidence there was no evidence either direct or circumstantial or no clue about an indication of a third party. The only irresistible inference that one can be drawn is that only the Appellant and the Appellant alone was involved in commission of this crime".

In the case of **Sajeewa alias Ukkuwa and others Vs The Attorney General (Hokandara Case) (2004) 2 SLR 263 at page 278-279**, where in discussing the law pertaining to circumstantial evidence has stated that the use of circumstantial evidence, Her Ladyship Justice Bandaranayake stated that *"E.R.S.R.Coomaraswamy (The Law of Evidence, Vol. 1, page 18) in considering the value and advantages and demerits of circumstantial evidence has stated that the use of circumstantial evidence is criticized on the ground that it is not reliable evidence, However, he is of the view that,*

"But it would be going too far to say that it is near safe to trust circumstantial evidence in the entire absence of direct, for there are many crimes which are committed under circumstances which preclude the possibility of direct evidence being given, but which yet allow of a perfectly safe inference being drawn from surrounding circumstances. The risk of perjury is minimized, since circumstantial evidence, unlike direct evidence, does not depend on the veracity of witnesses. It is less capable of fabrication"

English decisions have evolved a set of Principles and rules of caution which have been followed in Sri Lankan cases. Consideration of circumstantial evidence has been vividly described by **Pollock C.B. in R Vs Exall** cited in **King Vs Gunaratne** in the following words:

"It has been said that circumstantial evidence is to be considered as a 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 a rope might be insufficient to sustain the weight, but three strands together may be quite 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"

In the case of **Kahandagamage Dharmasiri Bogahahena Vs THE Republic of ri Lanka SC Appeal 04/2009 dcided on 3rd February 2012**, Her Ladyship Thilakawardena J. held that, *"A criminal trial is meant for doing justice to the accused, victim and the society so that law and order is maintained. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presided to see that a guilty man does not escape. One is as important as the other. Both are public duties.[Ambika Prasad and another Vs Sate (Delhi Administration) 2000 SCC Cri 522]*

Therefor it is abundantly clear that the death of the deceased was caused by no one else other than the Accused appellant.

Considering above reasons, I uphold the conviction and the sentence imposed by the Learned High Court Judge.

Hereby the Appeal is dismissed.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I Agree

Judge of the Court of Appeal

Cases referred to:-

- (1) Ajith Samarakoon Vs The Republic (Kobeigane case) [2004] 2SLR 209 at 228
- (2) Sajeewa alias Ukkuwa and others Vs The ATTORNEY General (Hokandara Case) [2004] 2 SLR 268 at pages 278-279
- (3) Kahandagamage Dharmasiri Bogahahena Vs THE Republic of ri Lanka SC Appeal 04/2009 decided on 3rd February 2012
- (4) Sarvan Singh Vs State of Punjab 2002 AIR SC (iii) 3652 at 3655 and 3656
- (5) Croose Vs The Queen at 180
- (6) Narapal Singhe Vs The State of Hariyana
- (7) Rex Vs Appuhamy XLII CLW at page 04
- (8) Jagath Premawardene Vs AG CA Appeal 173/2005, Decided on 19.03.2009
- (9) King Vs Mudalihamy 49 NLR 139

(10)Himachal Pradesh Vs Thakur Dass (1983) 2 Cri.L.J. 1694 at 1701

(11)Bobby Mathew Vs State of Kernatake (2004) 3 Criminal Law Journal page 3003

(12) Ambika Prasad and another Vs Sate (Delhi Administration) 2000 SCC Cri 522