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/125/2004
H/C Badulla18/1999

Attanayake Mudiyanselage Dammika Chandana Attanayake

ACCUSED

And,

Attanayake Mudiyanselage Dammika Chandana Attanayake

ACCUSED-APPELLANT

Vs,

Attorney General

Attorney General's Department

Colombo 12.

RESPONDENT

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

S. Devika de. Livera Tennakoon J

Counsel: A.S.M. Perera PC for the Accused-Appellant

Shanil Kularatne DSG for the State

Argued on: 19.01.2016, 08.03.2016, 28.03.2016, 13.05.2016, 29.07.2016, 12.10.2016, 30.11.2016

Written Submissions on: 09.12.2016, 14.12.2016

Decided on: 24.03.2017

Judgment

Vijith K. Malalgoda PC J

The accused-appellant Attanayake Maduyansekage Dammika Chandana Attanayake was indicted before the High Court of Badulla with three others on two counts of conspiracy to commit robbery and murder, a count of robbery and two counts of murder.

When the indictment was served on the said accused on the 21st July 1999, the accused elected to be tried by the High Court Judge without a jury.

At the conclusion of the said trial, the Learned High Court Judge, Badulla had acquitted the 4th accused on all the charges against him, but convicted the 1st accused on counts 3, 4 and 5 and acquitted him from counts 1 and 2. The 2nd and the 3rd accused were convicted on count 3 and acquitted from counts 1, 2, 4 and 5.

After the said conviction, the 1st, 2nd and 3rdaccused were sentenced by the Learned High Court Judge as follows;

Count 3 (1st, 2nd and 3rd accused) - 7 years Rigorous Imprisonment with a fine if Rs 2424474/- in default a jail term of 3years Rigorous Imprisonment

Count 4 and 5 (1st accused) - death sentence

Being dissatisfied with the said conviction and the sentence, the 1st to 3rd accused have appealed to this court, but the said 2nd and the 3rd accused-appellants had subsequently withdrawn their appeals and therefore the only remaining appeal before this court is the appeal submitted by the 1st accused-appellant.

When the appeal preferred by the 1st accused-appellant was taken up for argument before us, the Learned President's Counsel for the accused-appellant informed that he will restrict his appeal to the two convictions on counts 4 and 5 only.

As observed by this court the entire case with regard to the two murder counts are dependent solely on circumstantial evidence.

In this regard this court is mindful of the principles that should be applied by court in analyzing circumstantial evidence as 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 drawn 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 establishing the case against the three accused above named including the accused-appellant, the prosecution relied on the evidence of several witnesses. Even though the Learned Counsel for the accused-appellant restricted his appeal to the two murder counts, during the trial in the High Court, evidence was led to establish the entire case for the prosecution and therefore it is not possible to restrict the evidence led only with regard to the two murder counts, when considering the appeal before us.

It is further observed by us that, the prosecution in this case had heavily relied on the motive to commit the murder of the 1st deceased R.M. Punchirala by the accused appellant and therefore the evidence led with regard to the count of robbery too had direct bearing on the two murder counts.

As revealed before this court the accused-appellant was one time, the manager of the Petrol Filling Station belonging to Multi Purpose Co-operative Society Badulla (here in after referred to as MPCS Badulla) and was removed on 17.03.1998 and replaced by R.M. Punchirala the 1st deceased in this case. At the time of his removal, the accused-appellant had served nearly one year and three months in that capacity and the reason for the said removal was a shortage of money, which was taken place during his tenure as the Manager, to the value of Rs17,00000,/-.

In addition to the above position held, the accused-appellant was running an agency for Gold Light Cakes for Badulla along with his two brothers and the father, who were the other accused in this case. Their agency was situated right opposite the Petrol Filling Station and the accused-appellant had a lorry for the purpose of distributing cakes in the area.

As revealed before the High Court, the alleged robbery at the Filling Station had taken place on 14.04. 1998, the Sinhalese New Year Day. With regard to the events took place on 14th and thereafter at the Petrol Filling Station, the prosecution relied on the evidence of two pump attendants worked at the said filling station namely Gamini Yasapala Perera and Sumudu Chinthaka. These two witnesses

were originally taken into custody as suspects in this case and thereafter were pardoned by the Attorney General.

According to the evidence of witness Yasapala Perera, he was working as a pump attendant at the Filling Station owned by MPCS Badulla during the time relevant to this case. On 13th April the witness did not report for working and when he was at home, the 3rd accused had come to his house and wanted him to go for work at the Petrol Filling Station in the evening. When he went to the cake shop around 5.30 p.m. the 2nd accused wanted him to come back around 7.00 p.m. Once again he had gone back to the cake shop around 7.30 pm and remained in the upstairs on the request of the 1st and 2nd accused watching a cricket match. After some time the said two accused informed him that the "job cannot be done that day and asked him to go home."

On 14th morning around 10.30 a.m witness Yasapala and Chinthaka had come to the Filling Station to offer beetles to the Manager, but Manager Punchirala had not been there at that time. Yasapala and Chinthaka had gone to the 1st accused's place and offered beetle to the 1st accused and the 4th accused who is the father of 1st accused and was also a Director of the MPCS Badulla.

At that time the 2nd accused asked him to report to work on that evening. When the witness came back to the 1st accused's shop around 7.00 pm, the 1st, 2nd and 3rd accused informed him that they need money to reimburse the shortfall at the shed and requested him to open the door of the office room with the key the accused were having and to knock off the lights. When the witness refused to do so, he was threatened and the accused went to meet Chinthaka leaving this witness at the upstairs of the cake shop. 15-20 minutes later the 2nd and 3rd accused returned to the shop and 3rd accused had a black school bag with him and the said bag was given to the 1st accused. At that time the 1st accused informed the witness that he too is entitled to a share.

At that time the accused wanted the witness to come with them to go to Ella but the witness refused to join them. All three accused left in the lorry towards Muthiyangana Temple driven by the 2nd accused.

Witness did not go to the Filling Station at that time but went home and returned to work on 15.04.1998 around 7.45 a.m. but the Manager Punchirala was not at the Filling Station. He had seen some currency notes scattered inside the office floor through the locked door. After about ½ an hour time Punchrala's son came in search of his father and informed that his father had not come home the previous night. Thereafter the 1st accused had told the witness that he need not worry about the robbery, since the police is with them and informed him not to tell anything to the police. The 1st and 2ndaccused told him that the "Manager will never return" and requested him not to divulge it to anyone.

Witness admits informing everything to the police after his arrest and also making a statement before the Magistrate before receiving the pardon.

According to the evidence of Sumudu Chinthaka, he did not report to work on 13th but had come to the Filling Station on 14th morning to offer beetles to the Manager. The Manager was not there at that time and therefore he had gone to the 1st accused's place and offered beetles to the 1st and the 4th accused. At that time the 1st accused asked him as to who will be on duty on that night. Witness informed that he would be there.

This witness had reported to work in the afternoon and the Manager Punchirala was at the Filling Station at that time. The Manager had remained at the Filling Station till about 6.35 pm and left after locking the office room with a padlock. The key for the padlock was taken away by the Manager and the lights were on inside the office at that time.

When he was at work in the evening, he was called by witness Yasapala to come to the shop belonging to the 1st accused. At the shop 1st to the 3rd accused insisted the witness to open the padlock of the office room of the filling station and forced the key to him. He was further told by them that they need this money to settle the dues to the society.

Due to the pressure excerted by them, he opened the door and switched off the lights inside the office room and the 2nd and 3rd accused who came up to the office in their lorry had parked the lorry covering the office room and the 3rd accused who went inside the office room had opened the safe and packed the money to a black color bag he was carrying at that time.

Witness continued to work till the following morning and in the morning he saw some currency notes scattered inside the office floor. Manager Punchirala did not report to work on the following day but his son came in search of his father around 8.00 am.

In the morning he met the 1st accused (accused-appellant) in front of his shop and the 1st accused told the witness "ආයේ පුංචිරාළ කෙනෙක් එන්නේනැ උඹලා බයනැතිව හිටපල්ලා."

The fact that currency notes were found scattered inside the office room, but the door and the safe was found properly locked was elicited before the trial court by Ithihamy Mudiyanselage Gunapala, the General Manager of the MPCS Badulla.

According to his evidence the 1st accused had a shortage of Rs. 1700000/- and out of the said shortage there was around Rs. 350000/- outstanding when the alleged incident took place on 14th night. Until 18th the deceased Punchirala did not report to work and on 18th morning the office room was break open in the presence of the police and at that time the safe was found property locked but there was money scattered all over the floor. He found Rs. 19,500/- scattered over the floor and when the safe was opened he found only Rs. 6615.50.

According to this witness, the key for the office and the safe was with Punchirala and it is only Punchirala who could open the said doors using his keys.

The prosecution had further relied on the evidence of one K.A. Sunil Dayarathne who was a Director at MPCS Badulla. According to him he met the deceased on 14th afternoon around 12.00 noon and he took him to the filling station. Thereafter around 6.45 once again he met the deceased at Viharagoda and he wanted the deceased to take a society van to go home. At that stage the deceased had informed him that he had asked for a three-wheeler to come and wanted to inform the three-wheeler and come to the filling station. Witness waited for the deceased at the filling station for some time but he did not return. During this time he met the 2nd accused and when the witness informed the 2nd accused that he is waiting for the deceased, the 2nd accused informed him that he sent the deceased home in a three-wheeler. Witness had informed this to the van driver and decided to go home.

The next witness the prosecution had relied upon, is one R.M. Premachandra a security guard attached to a private security firm. On 14th evening he was on duty and was engaged in checking the security points around 10.30 pm. He had left Telecom Office after checking its points and was on his way to Governors Residence. At that time he had seen some people loading something similar to a log to the rear side of the Gold Light lorry which was parked near the Gold Light Shop.

After loading the said item, the door was closed and the lorry proceeded towards Central Hospital at very high speed.

The lorry driver of the Gold Light lorry, the lorry belonging to the accused-appellant was also called as a witness for the prosecution. According to his evidence, he took leave for Sinhala New Year on 10th April and returned to work only on 17th April. When he took over the lorry on 17th he observed some paint patches inside the lorry and when inquired, the accused-appellant had informed him that some paint was spilled inside the lorry.

The Government Analyst who examined the lorry in question had discovered human blood underneath the paint patches.

The next important item of evidence relied by the prosecution was the evidence of ASP Karavita who conducted the investigations in to this case. According to the evidence of ASP Karavita, the 1st to 3rd accused in this case were arrested consequent to the statements of Yasapala and Chinthaka on 21.04.1998 and their statements had been recorded in the following sequence,

1st accused- at 18.40 hrs on 21st April

2nd accused-at 19.25 hrs on 21st April

3rd accused-at 20.10 hrs on 21st April

After recording their statements, based on the statement of 1st accused (accused-appellant in the present case) bodies of the two deceased had been recovered by the police. The portion of the statement of the accused-appellant which helped to recover the two bodies, was marked during the High Court Trial under section 27 of the Evidence Ordinance.

With regard to the said recovery ASP Karavita's evidence was very specific and the recoveries were made only using the statement of the accused-appellant and not using the others.

According to witness Karavita, he got involved in this investigation only on the 21st and prior to this, the investigation was carried out by IP Liyanage of the Crime Branch of Badulla Police Station and therefore ASP Karavita had first visited the Filling Station on his way to recover the bodies with the accused-appellant. The above evidence of witness Karavita was challenged by the Learned President's Counsel who represented the accused-appellant before this court but, we have no reason to reject ASP Karavita's evidence on his visit to the Filling Station for the reasons given by ASP Karavita himself.

According to the evidence of ASP Karavita, after visiting the Filling Station, he has gone on Ella-Wellawaya Road nearly 25 miles on the directions of the 1st accused and finally reached a place where there is a deep precipice, around 11.30 pm. They had got a bad smell coming from the precipice but could not see anything at that time. After leaving two police officers on guard, he left for the police station and on the following day around 3.30 pm. they reached the scene along with the Magistrate.

The precipice had been so steep, the investigator had not seen the bottom. Two bodies were located at a depth of about 170 feet. The witness in his evidence has explained as to how difficult it was to reach the place where the bodies were lying and the effort made by his officers to bring the bodies that were in highly decomposed state, to the main road. The witness had further said that a person travelling on the road would not have seen the bodies since the two bodies were dumped on to the precipice.

As observed earlier in this judgment the accused-appellant did not challenge the charge of robbery before us and the 2nd and 3rd accused who were convicted only on robbery count did not challenge the said conviction before us. In the said circumstances it is important to note that the evidence of witnesses Yasapala and Sumudu Chinthaka with regard to the charge of robbery was unchallenged before this court. In addition to the charge of robbery the said witness's evidence clearly established a motive to commit the offence of robbery as well as murder.

According to the evidence of Sumudu Chinthaka, the 1st and the 2ndaccused, whilst insisting him to open the front door of the office room using the key given by them, had told him that they need to take money in order to settle dues to the co-op society by the 1st accused. (accused-appellant)

This fact is corroborated by the evidence of Gunapala the General Manager of MPCS and according to him the accused-appellant had to settle around Rs.350000/- at the time the alleged robbery took place. According this witness both keys to the office room and the safe were with the deceased

Punchirala and when he entered the office room by breaking the padlock, the padlock and the safe were both intact and there were no signs of breaking the locks.

As further revealed from the evidence of witnesses Gunapala, Dayarathne and ASP Karavita the initial suspicion was with the deceased since he was missing since 15th morning. The arrest of witnesses Yasapala and Chinthaka had got delayed because the police had been under the impression that, the "deceased had been responsible for removal of cash" since he had gone missing after 14th evening. Hence until the arrest of Yasapala and Chinthaka the focus of the investigation had not shifted away from the deceased.

When all these matters are taken together, it is clear that the prosecution had managed to establish a strong motive for the accused-appellant to kill the 1st deceased Punchirala.

In the case of ***Chandra Prakash Shahs V State of UP [2000] 5 SCC 152*** the importance of the motive was observed as follows; "Motive is the moving powers which impels action for a definite result or which incites or stimulates a person to do an act"

In the case of ***Nathumi Yadev V. State of Bihar (1998) 9SCC 288*** the extent to which the motive can be established in a criminal trial was discussed as follows; "Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see in to the mind of another. **Motive is the emotion which impels a man do a particular act.** Such impelling needs not necessarily be proportionally grave to do grave crimes. Many murders have been committed without any known or prominent motive. It is quite possible that the aforesaid impelling factors would remain undiscoverable. Though, it is sound proposition that every criminal act is done with a motive, **it is unsound to suggest that no such criminal act can be presumed unless motive is proved.** In some cases, it may not be difficult to establish motive through direct evidence, while is some other cases inferences from circumstances may help in discerning the mental propensity of the person concerned.

There may also be cases in which it is not possible to disinter the mental transaction of the accused which would have impelled him to act. (Emphasis added)

The day after the robbery at the Filling Station the 1st accused (accused-appellant) had told witness Sumudu Chinthaka "Not to worry, Punchirala will never come and the police is in our hand" and warned the witness to keep quite.

The above evidence of Sumudu Chinthaka reveals another important item of circumstantial evidence against the accused-appellant.

The fact that the Government analyst found human blood underneath the paint patches of the lorry taken together with the evidence of Gunasekara the driver of the lorry to the effect that he observed fresh paint marks on the deck of the lorry and the evidence of the private security Guard R.M. Premachandre who saw, something like a log being loaded to the Gold Light lorry belonging to the accused-appellant confirms the fact that a body of a human or an injured person had been transported in the lorry in question on the 14th night

Even though the accused-appellant whilst making a dock statement took up the position that there were instances that the helpers cut their fingers while transporting bottles in the lorry, this position was never put to the permanent driver of the lorry Gunasekara when he was giving evidence and therefore the said position taken up by the accused-appellant had not created any doubt on the prosecution evidence.

In this regard this court is mindful of the decision in the case of ***Gunasiri and Two Others V. Republic of Sri Lanka [2009] 1 Sri LR 39 at 45*** Sisira de. Abrew J with Abeyrathne J agreeing observed,

"Although the 3rd accused –appellant took up the position that he was at the temple at the relevant time with the priest, he never asked for summons on the priest nor did he file a list of witnesses

indicating the name of the priest. The trial commenced on 29.11.2011 and the defence case was concluded on 19.09.2013. Thus during a period of 2 years he failed to move court to get summons on the priest. Although the 3rd accused –appellant raised an alibi in his dock statement, he failed to suggest this position to prosecution witnesses. The Learned Counsel who appeared for the defence did not suggest to the prosecution witnesses the alibi raised by the 3rd accused-appellant. What is the effect of such silence on the part of the counsel. In this connection I would like to consider certain judicial decisions. In the case of Sarwan Singh V. State of Punjab 2002 AIR SC iii 3652 at 3656 Indian Supreme Court held thus; "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 judgment was cited with approval in Bobby Mathew V. State of Karnataka, 2004 Cr. LJ 3003. Applying the principles laid down in the above judicial decision. I may express the following view. Failure to suggest the defence of alibi to the prosecution witnesses, who implicated the accused, indicates that it was a false one. Considering all these matters I am of the opinion that the defence of alibi raised by the 3rd accused –appellant is an afterthought."

The next important circumstantial material placed before the trial court was the section 27 Recovery of the two dead bodies, on the statement made by the accused-appellant.

As observed earlier, the said recovery was made by using the statement of the accused-appellant alone and not by the other suspects. According to the evidence this court had already discussed, that clearly establishes the fact that the bodies had been at a location where an ordinary person who travels on the road wouldn't have seen. The evidence establishes that in view of the location where the bodies were found a person should have a "special knowledge" of the place.

In this regard this court will have to first consider the relevant legal provisions applicable to the case in hand. 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 here by 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, 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

When considering the material already discussed with regard to the location the two bodies were found, at a depth of about 170 feet in a precipice, it is clear that the said bodies couldn't have been recovered unless the person who provided the said information had a special knowledge with regard to the place from where the bodies were recovered.

In this regard this court is further mindful of the decision by the Supreme Court in the case of ***Ajith Fernando alias Konda Ajith and others v. Attorney General [2014] 1 Sri LR 288 at 306*** where Ismail J had observed; "In this connection, the learned Solicitor General has appropriately referred to the observations made by Fernando J when he considered this principle in *Chuin pong Shiek V. The Attorney General.* In this case was sought to be argued that the discovery of six screws in the pocket of the jacket was improperly admitted contrary to section 27 of the Evidence Ordinance because that part of the Petitioner's statement did not refer to the contents of the bag. Fernando J observed as follows;

"The Court of Appeal rejected that submission, and I would venture to summarize its reasoning as follows. The bag was the 'fact' discovered; it was deposed to as having been discovered in

consequence of the Petitioner's statement; so much of that statement as related distinctly to the bag- the 'fact' discovered- could therefore be proved. The 'fact' discovered was the bag including its contents. Accordingly as held in *R v. Krishnapillai and Etin Singho v. The Queen*, the Petitioner's statement established that he had knowledge of the place at which was found the bag containing the jacket and the screws. The Petitioner failed to explain how he had acquired that knowledge. In my view, no question of law arises in relation to the interpretation or application of section 27 (1)."

Learned Counsel for the appellant submitted while dealing with the evidence regarding the discovery of the body, that the judges of the High Court at Bar erred in law in attributing more than the knowledge of its whereabouts. He referred in particular to the finding that the accused were present during the disposal of the body and that they were aware of her death. In this connection the observations of the *Privy Council in Pulukuri Kottaya v. Emperor,* [(3)] has an important bearing. It was held that "it is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced. The 'fact discovered' embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact". The finding of the High Court at Bar was not unreasonable considering the other items of evidence led in this regard. The information provided by the 2nd and 3rd accused which led to the discovery of the body confirmed their knowledge of the whereabouts of the body which was not clearly visible and was found submerged in water covered with a thick growth of water hyacinth. The three accused were identified by the husband as the only persons who forcibly took the deceased away shortly prior to her death. The finding of the judges arrived at on the basis of the cumulative effect of the entirety of the evidence besides the evidence relating to the discovery of the body is not unreasonable and is justified. The submissions of counsel in regard to the discovery of the body cannot therefore be accepted."

As further revealed before us, the prosecution had relied heavily on the evidence given by witnesses Yasapala and Sumudu Chinthaka on whom the Attorney General had given a pardon.

Granting a conditional pardon to a person and making him a witness is provided subject to certain restriction by our courts. It is an accepted legal principle that it is unsafe to act on uncorroborated testimony of a witness who was given a conditional pardon.

In the case of ***Ram Prasad V. State of Maharashtra 1999 Cr LJ 2889 SC*** it was decided that, the evidence of an accomplice has to pass the test of reliability and must leave adequate corroboration before the same can be acted upon.

We observed that the Learned Trial Judge was mindful of this requirement and in fact had referred to this position in his judgment. This court has already discussed the extent to which the evidence given by the two accomplice witnesses had been corroborated by the independent evidence and therefore we see no reason to reject the evidence given by the said witnesses.

When considering the items of circumstantial evidence available in the case in hand with regard to the two murder counts, it is clear that the only inference that can be drawn from the said evidence is only consistent with the guilt of the accused –appellant and inconsistent with the innocence. In the said circumstance we see no reason to interfere with the decision of the Learned High Court Judge with regard to the conviction on counts 4 and 5 of the indictment. The Learned Counsel for the accused-appellant did not challenge the conviction and sentence imposed on the accused-appellant for the count 3 above. We therefore dismiss this appeal and affirm the conviction and sentence imposed on the accused-appellant by the High Court Judge of Badulla.

Appeal dismissed. Conviction and sentence affirmed.

President of the Court of Appeal

S. Devika de. Livera Tennakoon J

I agree,

Judge of the Court of Appeal