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

In the matter of an appeal under and in terms of the Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 331 of the Criminal Procedure Code and Section 19(B) of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal
Case No. CA/147/2014

Vs,

1. Hemachandra Adikarilage
   Thennakoon Banda alias Hello.
   No.28, Sector 8,
   Kattiyawala, Eppawala.
   (Presently in Remand Prison of
   Pallekale Kundasale.)

And

2. Hemachandra Adikarilage
   Thilakaratne alias Ukkun

Accused

And Now Between

1. Hemachandra Adikarilage
   Thennakoon Banda alias Hello.
   No.28, Sector 8,
   Kattiyawala, Eppawala
   (Presently in Remand Prison of
   Pallekale Kundasale.)

Accused-Appellant

High Court Anuradhapura
Case No. 312/06

Vs,

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before : **S. Devika de L. Tennekoon, J &**
S. Thurairaja PC, J

Counsel : Tenny C. Fernando for the Accused-Appellant
Shanaka Wijesinghe DSG for the Complainant- Respondent

Judgment on : 22nd **September 2017**

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Judgment

S.Thurairaja PC, J

The Honourable Attorney General had preferred an indictment against Hemachandra Adikarilage Thennakoon Banda alias Hello (Accused- appellant) and Hemachandra Adikarilage Thilakaratne alias Ukkun for committing the murder of Wanninayaka Thennakoon Mudiyanselage Bandula Nawaratne at the High Court of Anuradhapura. After the trial, the second accused was acquitted and the first accused was convicted for murder and sentenced to death.

Both the counsels for the accused appellant and the Deputy Solicitor General (DSG) for the respondent, the Attorney General made oral submissions and filed written submissions subsequently.

Both counsels submit that there is no eye witness or direct evidence against the accused appellant. The learned high court judge had convicted the accused appellant based on circumstantial evidence. The prosecution had led evidence of 7 witnesses out of which 4 are lay witnesses, a Judicial Medical Officer (JMO), an investigative police officer and the interpreter of the High Court.

As per the available evidence before the High Court, it is revealed that on the 2nd August 2004, the brothers of the deceased had visited the deceased late in the evening, and around 10pm they left to go to the cultivation. After a while the deceased also went to see his cultivation. He had not returned and was found dead on the next day morning with deep cut injuries on the head near the irrigation bund. Both accused were arrested on suspicion, committed to the High Court, after a full trial the second accused was acquitted and the first accused was found guilty for the murder and sentenced to death.

As we observed there is no direct evidence against the accused appellant. The learned DSG submits following factors as strong evidence against the accused appellant:

a. As per PW1 Gamini Karunasena, brother of the deceased, PW2 Aariyalatha, wife of the deceased had stated that there was a long-standing dispute regarding a sale of a cattle and that was the motive for committing the offence.
b. Few hours before his death the deceased had scratch injuries, said to have inflicted by the accused appellant and his son and also obstructed the deceased and his wife when they were returning to home from Eppawala Police station.
c. According to JMO, the injury could have been caused due to a heavy assault with a heavy blunt weapon.
d. On the night of the day of the incident the accused appellant had told PW4 Kandage Wijesiriwardana that he had a brawl with Ranbanda.
e. Further the accused appellant had confessed to PW10 Nimal that he had a fight and assaulted the deceased
f. The body was found near the house of the appellant.
g. As per the investigative officer (PW8) a club was found on the road which was leading to the house of the mother of the appellant.
h. As per the Government Analyst report the hair found on the club was matching with the hair of the deceased.

The learned trial judge had given reasons for his conclusion. The counsel for the accused appellant made detailed submission and submitted that there is no evidence to connect the accused appellant to the crime. There is no eye witness to the incident. The first witness namely Gamini Karunasena was the brother of the deceased. He gave evidence and said that there was a fight earlier regarding sale of a cattle. The prosecution submits that the dispute of payment of Rs.200 was the motive. As per the evidence of the witness, he says the so-called fight had happened two to three months earlier and it is only an exchange of heated words and he had not heard or seen any fight thereafter. It is important to note that he had not told this to the police or in the non-summary inquiry. That had been observed as a serious omission at the trial. Beyond all, the witness had told in the non-summary inquiry was that there was no fight between the accused and deceased, which is marked as a contradiction (V1). Considering the background, I do not find that PW1 was a credible witness. He contradicted the core issue of his evidence. The trial judge had not considered the evidence of this witness fairly.

The wife of the deceased was talking about the previous enmity and previous conduct of the accused appellant. When she was in hospital for the treatment of her child the deceased husband had told her that the accused had assaulted him but on the same breath she had said when questioning her husband, he had told that he had gone to solve a fight in which he received injuries and she is unable to give a

clear date. At one place, she says this had happened several days ago and subsequently she says it had happened on the previous day. She is not certain of her evidence regarding the so called previous attack.

While her husband and her were returning on the way the accused had travelled in a bicycle very close to them. He had not knocked or caused any physical harm to them. On the day of the incident i.e. on the 2nd August 2004 she confirms that the brothers of the deceased had come home late in the evening and left to the plantain cultivation after few minutes the deceased also went to his cultivation. Since he did not return, she walked up to the bund at around 11.30pm in the night and she couldn't find her husband. She said she had clear visibility, due to moon light. On the following day, in the morning she got to know that her husband is lying dead on the bund. It was about 60feet (Bamba 10) from the house of the deceased. It is also observed, that she says there was a fight between the deceased and his brother Sunil on a previous occasion on which the deceased was hospitalised.

Considering the evidence of Ariyalatha (wife of the deceased) there is no direct evidence to connect the accused to the death of the deceased. On one occasion she says in the night in question she heard a noise of someone slamming a mammotty on the ground. When questioned she couldn't identify who slammed it and further she did not hear any cries of her husband or anyone. Hypothetically if we concede that the accused assaulted the deceased with a mammotty it contradicts the position taken by the prosecution that a club was recovered on a 27(1) statement.

Considering the totality of the evidence of the wife of the deceased, it contradicts the other available evidence specifically; there was a fight between the deceased and his brother earlier. His participation was not questioned or excluded.

The JMO gave evidence and submitted that if treatment was given the deceased could have been saved. Further the fatal injuries could have been inflicted with sharp and blunt weapons. Here one should be mindful that there are two accused indicted and the prosecution has not excluded one person and pin pointed the accused appellant, which creates a doubt.

K. Wijesiriwaradane PW4 gave evidence and stated that the accused had told him that he had a fight with Ranbanda and he wanted him to drop at his sister's place, but he does not say what the fight was for and when and where it happened. He had not observed any blood stain or any other abnormality. Considering his evidence there is no direct link to the culpability of the accused.

H.A. Nimal PW10 gave evidence and said that the accused had told him that there was a fracas between him and the deceased and he had assaulted the deceased. When he was cross examined, he had admitted that he did not reveal this vital

information at the magistrate court, which was noted as an omission and brought to the notice of the trial judge. Further, he says that the date of the incident was on the 3rd August 2004. In court he says that he knows who attacked the deceased, of which, he contradicts with his previous statements. It is also observed that, if the accused appellant was not there his father i.e. the witness's father will benefit the land of the accused appellant. When we consider the entire evidence of this witness we are not clear that whether the witness was giving unbiased evidence.

When the defence was called the first accused-appellant and the second accused (who was acquitted) made dock statements and denied their involvement.

It is time and again established by our courts that 'man may lie but not the facts' that is the golden rule of accepting circumstantial evidence.

In **Rex Vs Blom (1939) AD 188** at 202 & 203 Water Meyer, J.A said that

i. *The inference sought to be drawn must be consistent with all the proved facts. If it is not then the inference cannot be drawn.*
ii. *The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be doubt whether the inference sought to be drawn is incorrect.*

In **H.E. Queen V M.G. Sumanasena 66 NLR 350**, Basanayake CJ at 351 held:

> *"in our opinion, the learned judge's direction is wrong. Suspicious circumstances do not establish guilt. Nor does proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence. We [illegible] able to reconcile what the learned judge said earlier in his summing-up with what he said in the passage to which exception is taken. The burden or establishing circumstances which not only establish the acculed's (sic) guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial and is the same in a case of circumstantial evidence as in a case of direct evidence."*

In **Teper V Reginam (1952) AC 488** at 49 Lord Nomad s[illegible] guidelines to evaluate circumstantial evidence,

(1) Circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established,
(2) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused,

(3) *The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability that the crime was committed by the accused and none else (reference to a chain above has subsequently been modified to a rope)*

In **Pantis v. The Attorney General (1998) 2 Sri LR 148** Wijeyeratne, J stated the following;

> *"As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies Court or at least is sufficient to create a reasonable doubt as to his guilt.*
>
> *As the trial Judge was a trained Judge who would have been aware that the burden of proof was on the prosecution to prove its case beyond reasonable doubt if a reasonable doubt was created in his mind as to the guilt of the accused he would have given the benefit of that doubt to the accused and acquitted him."*

In **M.N.C Bandara Vs The Attorney General CA 61/2001** decided on 02/08/2005, Sisira J.D Abrew, J held that

> *"in a case of circumstantial evidence, if two decisions are possible from the proved facts, then the decision, which is favourable to the accused, must be taken. In a case of circumstantial evidence, if an inference of guilt is to drawn from the proved facts such inference must be the necessary, irresistible and inescapable inference and it should be the one and inference. In a case of circumstantial evidence, if the circumstances found to be as consistent with the innocence as with the guilt of the accused or if an innocent explanation is found from the evidence of the prosecution, no inference of guilt should be drawn. Therefore, if the prosecution seeks to prove a case purely on circumstantial evidence, the prosecution must exclude the possibility that the proved facts are consistent with the innocence of the accused."*

In **Podisingho V the King (1951) 53 NLR 49**, Dias S.P.J held

> *"In a 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 or the accused and must be consistent with his guilt."*

In the King V Appuhamy (1945) 46 NLR 128, Keuneman, J held;

> *"In order to justify the inference of the guilt from purely circumstantial evidence, the inculpatory facts must be incompitable (sic) with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."*

In the King V Abeywickrema *et al.* (1943) 44 NLR 254, Soertsz S.P.J held;

> *"in order to base a conviction on circumstantial evidence jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any other reasonable hypothesis."*

Considering the judgment of the learned trial judge and the evidence before the said court in my view, does not comply with the requirements set out in the above judgments.

Circumstantial evidence is like several strings in a rope; one string alone may not carry the weight of conviction but collectively will hold the weight. It doesn't mean that you need the world's strength to carry a light weight, it is subjective to each and every case. A trial judge when assessing the ingredients of the charge he must select proper strings to make the appropriate rope to carry the weight of guilt of the accused person.

In the present case, the available materials are insufficient to conclude that the accused has committed this offence. Therefore, I find the findings of the trial judge to convict the accused appellant incorrect. Hence, I hold that there is no substantial evidence against the accused, accordingly, I allow the appeal and acquit the accused appellant.

Appeal allowed and the accused acquitted

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J

I agree,

JUDGE OF THE COURT OF APPEAL