

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

**In the matter of an appeal under and  
in terms of Section 331 of the  
Criminal Procedure Code Act No. 15  
of 1979.**

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

**Complainant**

**Court of Appeal  
Case No. CA 122/2015**

**Vs,**

Udagedara Hewaga Justin alias Kumarasinghe

**Accused**

**And Now Between**

Udagedara Hewaga Justin alias Kumarasinghe  
**Accused-Appellant**

**High Court of Kurunegala  
Case No. HC 142/2004**

**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 : Indika Mallawarachchi for the Accused-Appellant  
Shanaka Wijesinghe DSG for the Complainant-Respondent**

**Judgment on : 15<sup>th</sup> November 2017**

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## Judgment

### **S. Thurairaja PC J**

This is a case of double murder reported at the Police station of Gokarella. The AG had preferred an indictment against 3 accused persons namely Uagedhara Hewage Justin alias Kumarasinghe, Bastiangamage Nimalaratne Jayathilaka alias Nihal and Bastiangamage Shantha Jayathilake alias Palitha for committing the murder of Wijekoon Mudiyansele Wimalawathi and Kotadurage Vasantha. As per the indictment the offence was committed on 14.11.2001. Almost at the tail end of the case for the prosecution the State Counsel informed the Court that there is no evidence against the 2<sup>nd</sup> and 3<sup>rd</sup> accused, hence he is terminating the case against them. The learned Trial Judge made an order dated 18.12.2014 and acquitted those 2 accused persons.

Prosecution called the Court interpreter and closed the case against the 1<sup>st</sup> accused. When the defence called the accused appellant made a statement from the dock. Trial Judge after hearing the submission of both counsels delivered his judgment on 27.04.2015. Accused was found guilty for double murder and sentenced to death.

Being aggrieved with the said conviction and sentence the accused appellant preferred an appeal to this Court. He had raised the following grounds of appeal (This has been reproduced from the appellant's written submission as follows):

1. The 2<sup>nd</sup> incident which resulted in the deaths of the victims being purely based on circumstantial evidence, items of circumstantial evidence are wholly inadequate to support the conviction for murder.(i.e. to draw a necessary, inescapable, irresistible and one and only inference that it was the appellant and no one else who inflicted the fatal injuries.)

2. Following closely on the heels of ground 1, learned Trial Judge failed to address his judicial mind to the fact that the conviction hinges on circumstantial evidence.
3. Prosecution has failed to exclude the possibility of a 3<sup>rd</sup> party being the perpetrator to the appellant.
4. Learned Trial Judge has misread himself on a critical issue of fact which is wholly prejudicial to the appellant.
5. With regard to the 1<sup>st</sup> incident of attack, evidence led at the trial warrants the consideration of the plea of grave and sudden provocation and/or sudden fight.

It will be appropriate to consider the facts of the case briefly.

The accused appellant was married to the 1<sup>st</sup> deceased Wimalawathi and had two children. On the fateful day i.e. 14.09.2001 he had returned home uninformed in the middle of the night where he found his wife with Wasantha on the bed, stark nude. He was shocked and provoked. He woke his 10 years old son who was sleeping in the adjoining room and he told his neighbour Karunaratne that there was a thief at home. Another neighbour Udhayaratne Bandara on hearing the commotion was present at the scene. The accused bound his wife and her paramour with a nylon thread and proceeded to the parents of his wife which is situated at Matale. He got the assistance of his brother who is the 2<sup>nd</sup> accused in this case to go to Matale. He reached his parents in laws' house at around 3.30 am and told them about the incident. He had told his mother in law that he had assaulted and tied them. All of them returned to the house of the accused. Mother in law Somawathie had noticed her daughter and another man were tied up. This was around 4.00 to 4.30 a.m. The mother had administered the daughter to the effect "See what you have done." (බොහෝම ලක්කැබ් හෙද කරලු වැඩේ.) Deceased daughter pleaded with the mother that she had been assaulted and her hand was injured and to take her to the hospital. But

the mother declined it and went to the Police station with her husband and her son in law, accused appellant.

When they went to the Police station around 6.00 to 6.30 am, the police had not started their work. Therefore they waited there for a while. At that time the father of the deceased had gone to a nearby shop. The accused had told that he wants to go to the toilet. When the mother in law asked him to use the facilities in the Police station he said he will go to a nearby shop and left the station.

The police entertained the complain from the mother of the deceased and proceeded to the scene of crime at around 7.45 a.m.

In the meantime Karunaratne and Udhayaratne Bandara speak to the fact that the accused was there at around 7.00 a.m. and made arrangement for the children to have their breakfast. The 2<sup>nd</sup> and 3<sup>rd</sup> accused persons were also there. When the police went they observed that there was a crowd of 200 people at the scene. When the witnesses and the police entered the house they had found both deceased were in a pool of blood and blood was spattered all over the wall. The accused was not found at the scene. The witnesses spoke to the fact that the accused had taken the children and bought them breakfast and handed them over to his relative to look after. After a short while he handed himself to the police. The other two accused persons surrendered after few days to the police.

Considering the sequence of the events it is clear that there are two episodes unfolded by witnesses. First incident is to cause injuries to one of the deceased Wimalawathie and the second incident is causing injuries and death to deceased persons by some person or persons.

Prosecution has led the evidence of four lay witnesses, three police witnesses and Judicial Medical Officer (JMO). Further they have marked 5 productions which consist of crowbar, knife, nylon cord and two post-mortem reports.

The learned Trial Judge delivered his judgment and found the accused guilty after giving reasons. The Trial Judge had passed only one sentence for two counts of murder.

Considering the judgment and the available evidence the case is based on circumstantial evidence.

Considering the grounds of appeal raised by the Counsel for the accused appellant, it can be reduced as follows:

- (a) Concept of circumstantial evidence was not properly considered.
- (b) The Trial Judge has confused the motive and the actual evidence of and against the accused appellant.

The prosecution witnesses namely the mother of the 1<sup>st</sup> deceased and the son of the accused and 1<sup>st</sup> deceased Wimalawathi, had to be weighed separately from the other two witnesses who were his neighbours.

Salindha Justin Kumarasinghe son of the accused appellant and the first deceased was 10 years old at that time. He was in the house at the time of the incident. He witnessed the accused and both deceased were grappling there. He does not speak of any assault of fatal in nature. He confirms that the father left to his grandparents place and returned with them. He identified the 2<sup>nd</sup> deceased who was little known to him as a tailor in the town. He testified to the effect that his mother was lying fallen on the ground and whimpered saying that "Lahiru son I can't get up." He also said that the neighbour Karune mama (Karunaratne) took them to his house after the incident. He had not witnessed anyone causing fatal injuries to his deceased mother nor the 2<sup>nd</sup> deceased.

The Witness Somawathi who is the mother of the 1<sup>st</sup> deceased and the mother in law of the accused appellant sheds more light into the case. She said that they were living in Matale. The accused appellant had come to their home at the wee hours of the night and told her that the deceased was caught red handed when she was with

her paramour and that he had assaulted and tied them up. There is some discrepancy in her evidence from non-summary inquiry to trial. She returned in the vehicle to her daughter's place in Ibbagamuwa with her husband and the accused appellant. She cannot remember the exact time but it was between 4.00 to 4.30 a.m.

When she came to her daughter's place she had seen her daughter lying fallen on the ground at the entrance to the bedroom. Her hands and legs were bound. She also noticed that another man lay fallen inside the room in a similar manner. These witnesses had admonished her daughter saying 'see what you have done.' The deceased was begging the mother to take her to hospital, but she refused and went to the Police station with her husband and accused appellant (son in law).

The witness (mother of the 1<sup>st</sup> deceased) affirms that the accused had taken them to the Police station and he was there at around 6.30-7.00 a.m. She also says that her husband had gone to a nearby place similarly the accused said that he wants to go to the toilet. When she asked him to use the toilet in the police station, he had told that he will go to a nearby boutique. Thereafter she had not seen the accused appellant at the police station. She lodged the complaint and went to the scene of crime together with the police. There she had observed crowd of people gathered near the house. She went into the house which was opened and noticed both deceased persons in a pool of blood. Further she had observed spattering of the blood all over the wall of the bedroom. She had not seen anybody causing this to the deceased persons.

When considering these two witnesses namely the mother and son of the deceased no one had witnessed the second incident. It is the burden of the prosecution to prove that the accused appellant had caused the death of the deceased persons.

Next two witnesses are Udhayaratne Bandara and R.D. Karunaratne these two are neighbours of the accused and the deceased. Udhayaratne speaks to the fact that on the previous night at around 10.00 and 11.00 p.m. he heard a commotion from the direction of the accused house. When he went he had seen the both the deceased

persons lying fallen on the ground. When he asked what happened she had said "nothing happened." (මොකක් නැතැ අර්ථයේ). Further, the witness testified that the accused had told him that these two were caught when involved in an adulterous affair. Thereafter he had seen the accused leaving to his in laws. This evidence corroborates with the evidence of the first two witnesses.

This witness talks about the second incident where he had seen the accused appellant bring the parents of the deceased to show the wife and the other person and left to the police station.

Thereafter on the following morning the accused brought his two sons and entrusted them to this witness to give breakfast and to look after. At that time the house was open and there was a crowd including the other two accused persons who are brothers of the accused appellant.

He testified to the fact on the first incident when he went in the night he had seen that the deceased persons were alive and there was no blood splatter anywhere.

On the second time he had not gone into the house, when he saw the accused appellant that was around 7.00 a.m. The accused was seen making arrangements to buy string hoppers for the breakfast of his two sons. Further the witness had noticed that the accused was dispersing the crowd and saying that the police will come there. At that time the 3<sup>rd</sup> accused was also there. Thereafter he had seen the accused taking his children in a three-wheeler. Accused appellant was not seen till the police arrived at the scene of crime.

The next witness Karunaratne who is also a neighbour had heard a commotion on the previous night at the house of the accused appellant and had gone there. When he asked what happened, the accused appellant had told that a thief had come. Then the accused appellant had asked this witness what to do. The witness had advised the accused to handover "the person" to the police. He had gone into the house and

noticed the wife of the accused and another person were lying fallen on the ground close to each other.

He also corroborates the above witness.

Both witnesses speak on three episodes. Incident in the midnight on which they have seen both deceased fallen lying on the floor and no injuries noticed. They say that the accused appellant and his in laws were seen going to the police station. The accused was seen again in morning at around 7.00 a.m. attending to the needs of the children, missing from there and surrendering to the police at about 10.00 a.m. Police had come to the scene around 7.45 a.m. All four lay witnesses do not say whether the house was closed and if there was access to any person other than the accused.

The other official witnesses speak about the injuries and investigations.

Considering all evidence, the burden of proof falls upon the prosecution to provide circumstantial evidence to the fact that this accused appellant and he alone committed the offence of murder of the two deceased persons.

Supreme Court of India in **Manivel and Others v State of Tamil Nadu in Criminal Appeal No. 473 of 2001 (2008 INDLAW SC 1239)** on 08 Aug 2008 held that while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the *infirmity of lacuna* in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

- (1) "the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned '*must*' or '*should*' and not 'may be' established;
- (2) ***the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;***

- (3) the circumstances should be of a conclusive nature and tendency;
- (4) they should exclude every possible hypothesis except the one to be proved;
- (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

[Emphasis Added]

In **Padala Veera Reddy Vs. State of AP and ors 1989 Indlaw SC 31** it was laid down that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:

- (1) "The 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 the crime was committed by the accused and none else; and;
- (4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

[Emphasis Added]

In **Samantha Vs Republic of Sri Lanka 2010 SLLR 236** the court stated that:

"In a case of Circumstantial Evidence, if an inference of guilt is to be drawn against the accused such inference must be the one and only irresistible and inescapable inference that the accused committed the crime."

In **Emperor vs Brownrig 1917 18 Criminal Law Journal 482** it was held that:

“the Jury must decide whether the facts proved exclude the possibility that the act was done by some other person and if they have doubts, prisoner must have the benefit of those doubts.”

In **Don Sunny vs. the Attorney General (1998) 2 SLR 1** it was held thus

“that the prosecution must prove that no one else other than the accused had the opportunity of committing the offence”,

In **R v Clarke (1995) 78 A Crim R 226** it was held thus

“if evidence raises a reasonable possibility that the circumstances pointed to someone other than the accused being guilty of the offence, then a direction about the need to exclude such a possibility beyond reasonable doubt should usually be given. Such a direction should be give even if the evidence is very slight, if it could be interpreted as raising a reasonable possibility of innocence.”

In **Akpan v. State (2001) FW I.R [pt. 56] 735**, at page number 749 it was held that

“Circumstantial evidence must lead to only one conclusion to ground conviction. Where there are other possibilities in the case other than that the accused committed murder and there is another person who had the opportunity to commit the offence for which the accused is charged, he cannot be convicted for the offence”

In the instant case as afore-submitted prosecution has failed to establish a strong cogent prima facie case and in the said circumstances the principles enunciated in **R. vs. Burdett 1820 4B Alderman Reports 95**, at page 120 wherein it was held thus

“No person is required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him.....”

In Sri Lanka the position is the same wherein **Gunewardena V The Republic of Sri Lanka 1985 (2) SLR 315** it was held that

“When no prima facie case has been made against an accused, he need not offer an explanation. It is open to the Accused to rely safely on the presumption of innocence or on the infirmity of the evidence of the Prosecution.”

Considering the facts of this case, one can easily conclude that the accused appellant had a strong motive to commit this offence. Further even a layman will conclude that this accused may have committed this offence. When perusing the evidence, hypothetically, if we think that the accused had committed this offence this would be a textbook case for the Trial Judge to consider grave and sudden provocation. Even in certain occasion loss of self control resulting insanity.

When perusing the judgment, I find that the Judge has analyzed the facts and circumstances with the probability of motive of accused. The Judge has not separated the two incidents and addressed his mind to the concept of circumstantial evidence. The simple question to be asked and answered is whether anybody other than the accused had an opportunity to commit this offence?

It is observed that there were three suspects arrested and produced in connection with these murders. Non-summary inquiry was held and the Magistrate was satisfied that there were sufficient evidence against all three suspects to place it before the High Court. The Attorney General also considered all the materials before him and preferred an indictment against all three accused persons. The State Counsel commenced and continued with trial against all three accused persons almost till this end of case for the prosecution. This shows that the Attorney General was convinced that there was substantial evidence against the other two accused whom he moved to discharge later. The trial Judge had not considered and excluded participation of these two accused persons.

I also observe that the Trial Judge had convicted the accused appellants on two counts and passed only one sentence.

Considering all available material and the reasons discussed above, I find that there is no exclusive evidence against the accused appellant for committing murders of 1<sup>st</sup> deceased Wimalawathi and 2<sup>nd</sup> deceased Wasantha. Therefore I find that the conviction for murder cannot be sustained.

Accordingly, we allow the appeal and set aside the conviction and sentence against the accused appellant on both counts.

**Appeal allowed.**

**JUDGE OF THE COURT OF APPEAL**

**S. Devika de L. Tennekoon, J**  
I agree,

**JUDGE OF THE COURT OF APPEAL**