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 211/2010

Vs,

1. Samarappuli Baala Arachchige Piyadasa
2. Samarappuli Baala Arachchige Namal
3. Samarappuli Baala Arachchige Dharmasari
4. Samarappuli Baala Arachchige Bandara

Accused

And Now Between

1. Samarappuli Baala Arachchige Piyadasa [1st Accused]
2. Samarappuli Baala Arachchige Dharmasari [3rd Accused]

Accused-Appellants

High Court of Embilipitiya
Case No. HCE 120/07

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

Counsels : Dr. Ranjit Fernando 1st Accused Appellant
Indika Mallawarachchi for the 3rd Accused-Appellant
Rohantha Abeysuriya SDSG for the Respondent

Judgment on : 16th January 2018

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Judgment

S. Thurairaja PC J

The Accused appellant above mentioned had preferred an appeal against the conviction of Murder and Death sentence by the learned High Court Judge of Embilipitiya, and they submitted following grounds of appeal.

i) The learned trial judge applied an erroneous principle of law which deprived a fair trial.
ii) The evidence of the third accused was not evaluated.
iii) Failure to compartmentalise evidence against each accused.
iv) Circumstantial evidence is insufficient to convict the accused persons.

It will be appropriate to familiarise with the facts of this case. Hon. Attorney General had preferred an indictment against 4 persons namely Samarapuli Baala Archchige Piyadasa, Samarapuli Baala Arachchige Namal, Samarapuli Baala Arachchige Dharmasiri and Rajasinghe Mudiyanselage Ajith Bandara.

The first count was under section 113B, 102 and 296 of the Penal Code against all four accused persons, the second count was against the 1st and the 3rd Accused persons under section 296 to be read with section 32 of the Penal Code, the third count was against the 2nd Accused under section 296 to be read with section 102 of the Penal code and the fourth count was against the 4th accused under section 296 to be read with section 102 of the Penal code.

After the trial, the learned High Court Judge had acquitted the 2nd and the 4th Accused for want of evidence. 1st and the 3rd accused-appellants were acquitted on the 1st count and convicted on the 2nd count, accordingly, both were sentenced to death.

Available evidence reveals that these four accused persons were inter-related;

i) The 1st accused is married to the sister of the 3rd accused.

ii) 2nd accused is the son of the 1st accused.

iii) 4th accused is the Son in Law of the 1st accused.

According to the Prosecution Witness Patty on the 17/06/2002, he was working at the Brickmaking place, at around 10.55am he heard the sound of lighting of crackers. After about 45 minutes, he had witnessed the 1st accused appellant Piyadasa and the 2nd appellant Dharmasiri (3rd accused) were coming there. The 1st accused-appellant had shouted at them saying "Dogs don't make bricks go away" ('බල්ලෝ ගඩොල් කපන්න එපා පලයන් කියලා) The witness had seen that the 3rd accused Piyadasa was carrying a head of a human in his hand. The witness was shocked and fled away from that place.

Prosecution witness Karunaratne also says, that at around 11 to 11.30 am he heard several sounds like firing of crackers. Thereafter he had seen the 1st accused-appellant was walking away with a tea pruning knife. Further, he had also noticed that the said 1st appellant was clad in a red colour tee shirt. After a while, the 1st accused had told this witness "now eat lokka". **(ලොක්කා කන්න කලා)** Further, he also observed a trail blood on the way.

Prosecution witness Chandraratne gave evidence and said that he saw deceased was working in the paddy field on that fateful day, and saw a person running away dressed in red tee shirt at that time.

The 1st accused-appellant was arrested and a statement was recorded by the Police investigator. The 1st accused appellant had guided the Police and they had recovered a T56 gun and unspent cartridges under the cemented floor. It was revealed those gun and cartridges were hidden under the floor in a deep hole covered with soil and cement. According to the police officers, no one can find those productions if the accused had not helped them.

The Prosecution called officials from Sri Lankan Army and established that this weapon and the bullets were belong to them and those went missing from a soldier few weeks before this incident. It is worthy to note that the 4th accused was a soldier serving in the same camp and he was on duty at the time of disappearance of the weapon. The officers of Army had identified the T56 gun by the serial number in the registration. Anyhow there was no direct evidence to link the 4th accused to the weapon and the incident.

The learned trial judge had considered all available evidence before him and found 2nd and 4th accused not guilty and convicted the 1st and 3rd accused appellants for murder of Wijendrage Chandrasri.

Analysing the reasons given in the judgment, we have to consider whether the trial judge was satisfied with the following factors among others;

a) Death of the deceased Wijendrage Chandrasri
b) Identity of the accused
c) Actus-reus
d) Mens-rea
e) Motive, if available

It is the duty of the Prosecution to submit evidence before the trial court that the deceased Wijendrage Chandrasri was died of the action of the accused appellants. It can be through direct or circumstantial evidence.

In the present case there is no eye witness to the incident, therefore the Prosecution was relying on Circumstantial evidence. It will be appropriate to consider the concept of circumstantial evidence developed by our courts.

I wish to quote the citations from **SIGERA VS. ATTORNEY GENERAL** 2011 (1) 201;

In ***THE KING v. ABEYWICKREMA et al.*** *44 NLR 254 SOERTSZ S.P.J held that,*

...... in order to base a conviction on circumstantial evidence they must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence.

Don Sunny Vs Attorney General 1998 - 2 Sri LR at 1 it was held that proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence and that if an inference can be drawn which is consistent with the innocence of the accused the accused cannot be convicted.

Bassanayake CJ held **THE QUEEN v. K. A. SANTIN SINGHO** 65 NLR 445

The rule regarding circumstantial evidence and its effect, if not explained by the accused, is admirably stated in the judgment of Chief Justice Shaw in an American case-Commonwealth v. Webster- quoted in Ameer Ali's ' Law of Evidence '. ' Where probable proof is brought of a statement of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered though not alone entitled to much weight, because the. burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstance is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstance can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is such that the proof, if produced, instead of rebutting, would tend to sustain the charge .....

Another passage in Willis on Circumstantial Evidence *also has been quoted here. Lord Chief Justice Abbott said this: ' It follows from the very nature of circumstantial evidence, that in drawing an inference or conclusion as to the existence of a particular fact from other facts that are proved, regard must*

always be had to the nature of the particular case, and the facility that appears to be afforded either of explanation or contradiction.

In **King vs Appuhamy** 46 NLR 128 KEUNEMAN J. held that "*In order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable-hypothesis the that of his guilt.*"

In **Udagedara Hewaga Justin alias Kumarasinghe** Accused-Appellant vs Attorney General, CA 122/2015 Decided on 15th November 2017, this court discussed the concept of circumstantial evidence in detail and we wish re affirm the citations and our view expressed in the said decision.

In the present case it becomes necessary to discuss about section 27 (1) of the Evidence Ordinance, Prosecution relied on recoveries made on the information and guidance of the 1st accused appellant.

Section 27 (1) of the Evidence Ordinance states as follows;

> *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 thereby discovered may be proved.*

In **SIGERA VS. ATTORNEY GENERAL** 2011 (1) 201 at 217

> *Another important item of circumstantial evidence is the recovery of a firearm from the hideout of the Accused Appellant consequent to a statement made by the accused which is admissible under section 27 of the Evidence Ordinance. Under the guidance of the accused a pistol was recovered by the investigation officers concealed in a box of clothes where the Appellant was found. The police recovered four spent cartridges from the scene of the crime shortly after the commission of the offence. The said cartridges with the firearm recovered consequent to the statement of the Accused Appellant were sent for examination and report by the Government Analyst. As per the report of the Government Analyst which is marked as P9, the opinion of the Government Analyst was to the effect that all ammunition found at the scene had been fired*

from one weapon. On a scientific analysis (ballistics) the Government Analysts has also concluded that these Bullets had been fired from the firearm recovered consequent to the section 27 statement of the Accused Appellant. Furthermore, on the day the prosecution led the evidence of the Government Analyst the defence had admitted the entire chain of productions right up to the handing over of the same to the Government Analyst.

ARIYASINGHE AND OTHERS V ATTORNEY GENERAL (G. C. Wickremasinghe Abduction Case) 2004 (2) Sri L.R 357 at 386 Amaratunga J held that;

According to the analysis, there were three ways in which the accused persons could have acquired their knowledge about the places where G/66 notes were found. The following are the three ways.

i. The accused himself concealed those G/66 notes found in the place where they were found.

ii. The accused saw another person concealing the notes in that place.

iii. A person who had seen another person concealing those notes in that place has told the accused about it.

Both accused appellants had not raised any objections regarding the recoveries made under Section 27(1) of the Evidence. Anyhow we consider the acceptability of the said process in our determination.

When analysing the law and the decided cases it is clear that if the accused had a knowledge of the production (fact), depending on the production, place it is recovered the Court can presume the link between the accused and the production. Which will make the accused to offer an acceptable explanation for the link or the knowledge.

In the present case it is revealed that the productions (fact) recovered were a T56 automatic weapon bearing serial number 1440576 which belongs to the Sri Lankan Army. This weapon had gone missing from a soldier who was on duty on the 28th April 2004. After about one and half months namely on the 17th June 2004 this same gun was used to fire the deceased. Ballistics experts from Government Analyst Department

confirms that the cartridges found at the scene were fired from this weapon. Police investigators had recovered this Gun and a magazine contained 14 live cartridges wrapped in a fertiliser bag, concealed in a pit under a newly cemented floor. The 1st accused not only gave the information but also guided the police to find these items.

Considering the Law, decided cases and facts of this case it is clear that the 1st accused appellants owes an explanation to the court. The first accused, exercising his statutory rights and made a statement from the dock and stated that 'he is not involved in this murder and he is not guilty.' **(ගරු උතුමාණනි, මට කියන්න තිබෙන්නේ මේ මිනී මැරීමට මම සම්බන්ධ නැහැ කියලා. මම නිවැරදිකරු කියලා. එපමණයි.)** Other than a flat denial there is no explanation offered by the 1st accused. It should be noted that the incident occurred on the 17th June 2002, arrest and recovery was done on the 18th June 2002. It was on the following day of the incident. There is no specific denial nor explanation for the recovery of the said weapon by the 1st accused appellant.

It is the submission of both appellants that the trial judge has considered the Lucas principle. The learned trial judge has considered all ingredients of the charges, It appears that the Lucas principle also mentioned there

As indicated in R v Lucas (1981) 1 QB 720 at 724, 73 Cr App R 159 at 162, that the lie must be deliberate and must relate to a material issue, that they had to be satisfied that there was no innocent motive for the lie, and they should remember that people sometimes lied, for example, to bolster up a just cause, or out of shame, or a wish to conceal disgraceful behaviour.

Considering the facts and the ratio decidendi of the said case we are of the view that the said Lucas principle is not applicable to this case. When reading the entire Judgment, we find that the trial judge had referred to many legal theories and principles. On a careful Scrutinisation, we observed that the trial judge has just mentioned the Lucas principle but he had not relied on the said principle. Which could have been avoided but mentioning makes no prejudice to the appellants. Therefore, we find that there is no merit in this ground of appeal.

The next ground of appeal is the evidence of the 3rd accused appellant was not considered. The learned trial judge had reasonably considered the evidence of

the 3rd accused appellant at page no 47 of the judgment. We carefully read the evidence of the 3rd accused appellant, there we found that the appellant had taken certain position, of which never taken up or even suggested to the prosecution at any time. Considering the evidence of the 3rd accused appellant we are of the view that none of those facts had created any reasonable doubt in the prosecution case, hence this ground of appeal also fails on its own merits.

The next ground of appeal is the learned trial judge had not compartmentalised the evidence. Both appellants were convicted under section 296 to be read with section 32 of the Penal code. Further to our reference above, the law itself requires the judge to consider and evaluate all the evidence together. In a case of circumstantial evidence if the Judge evaluate every fact separately there won't be any case be proved against the culprits.

There is no fair trial offered to the accused appellants is the next ground of appeal. There were four accused persons before the trial court, even though all four were closely related and some other materials were available against them the trial judge found there is no sufficient evidence against the 2nd and 4th accused persons and acquitted them. Perusing the proceedings, we find that the accused appellants were given all the rights and privileges enshrined in the Constitution and other laws. There is no specific allegation made by the Counsel and it appears to a general ground of appeal. After considering all we find there is no merit in this ground of appeal.

The last ground of appeal is that the Circumstantial evidence is insufficient to convict both accused appellants. We have already discussed the evidence and the concepts earlier, briefly recalling the evidence it reveals as follows. Prosecution witness Patty had heard sounds of lighting crackers, after about 45 minutes the 1st and the 3rd accused appellants were seen walking together, the 3rd accused appellant was carrying a human head (beheaded head of the deceased) in his hand, the 1st accused appellant had threatened the witnesses to run away from the place. A weapon was recovered with help of the 1st accused appellant. The headless corpse of the deceased Wijendrage

Chandrasiri had gunshot injuries on the body, spent cartridges were found were sent to ballistics experts at the Government analysts department and it is confirmed those bullets were dispensed from this gun. The 3rd accused had a dispute with the deceased. Although there are many other matters that may be mentioned, anyhow we find the Prosecution had submitted sufficient evidence to prove the case beyond reasonable doubt. Therefore, this ground of appeal also fails on its own merit.

After careful consideration we find there is no merit in the appeal hence we dismiss the appeal and affirm the conviction and the sentence.

Appeal dismissed

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J

I agree,

JUDGE OF THE COURT OF APPEAL