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

In the matter of an Appeal under Section 331 of the Criminal Procedure Code.

C.A. Appeal No. 236/2008
H.C.Panadura No. 1757/2003

Alankarage Lal Gunawardana.
Accused-Apellant

Vs.

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

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BEFORE : **DEEPALI WIJESUNDERA, J.**
ACHALA WENGAPPULI, J.

COUNSEL : Indika Mallawarachchi for the Acccused-Appellant.
Thusith Mudalige D.S.G. for the Respondent.

ARGUDE ON : 19.03. 2018 and 21.03.2018

DECIDED ON : 04th May, 2018

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ACHALA WENGAPPULI, J.

The accused-appellant is present in Court, produced by the Prison Authorities

The accused-appellant was indicted before the High Court of Panadura for the murder of one *Amarasinghe Arachchige Udaya Kanthi Shyamalie.* After a trial without a jury, he was convicted as charged and was imposed death penalty.

Being aggrieved by the said conviction and sentence, the accused-appellant sought intervention of this Court to set the said conviction and sentence aside on the following grounds of appeal;

i. the trial Court was in error when it failed to evaluate the evidence of the defence witness, which resulted in a serious prejudice to the accused-appellant,

ii. the trial Court was in error when it failed to consider the unreliable evidence in relation to identity of the accused-appellant,

iii. the trial Court was in error when it failed to hold that the prosecution has failed to establish the exact time of death of the deceased as it has based its case on "last seen" theory,

iv. the trial Court was in error in applying the principles governing the prosecutions based on circumstantial evidence,

v. the trial Court was in error when it failed to hold that the items of circumstantial evidence are wholly inadequate to support a conviction,

vi. the trial Court was in error when it applied the Ellenborough principle which is wholly unwarranted in the instant case,

vii. the trial Court is in error when it held that the weakness of the defence corroborates the prosecution case.

The prosecution sought to prove its case to the required level of proof by adducing several items of circumstantial evidence against the accused-appellant.

To consider these several grounds of appeal, raised by the accused-appellant in its proper perspective, it is necessary to refer to these items of circumstantial evidence which were placed before the trial Court by the prosecution. Following is an attempt to reorganize these several items of circumstantial evidence in a chronological order.

a. the deceased is the eldest daughter of her family and her father is a retired principal of a school,
b. the deceased was employed at a garment factory in Attidiya since 1991 and

c. in 1993, the deceased told her mother that she got married to the accused-appellant, their marriage certificate is kept in the accused -appellant's house,

d. she also tearfully told her mother that she is pregnant with accused-appellant's child,

e. the accused-appellant came to live with the deceased at her residence and occupied its front room for four months until August 1993. The deceased's brother insisted on their getting married as no marriage certificate was ever produced. This led to an argument and the accused-appellant has punched the deceased's brother and left their house never to return.

f. The deceased's mother then went to *Grama Niladhari* of the area where the accused-appellant resides and made a written complaint of a broken promise of marriage. When inquired by the *Grama Niladhari* the accused-appellant brought his mother and another woman who he introduced as his wife. He also told *Grama Niladhari* Nandasiri that he severed his relationship with the deceased from 1st April, as her "character" has become questionable.

g. The accused-appellant arranged a meeting with the deceased and promised to marry her,

h. The accused-appellant gave Rs. 10.00 to Prasanna, a 11 year old school boy and instructed him that it to be given to the deceased. He also wanted Prasanna to convey a message to the deceased that she should come to "hospital".

i. on 8th September 1993 at about 7.00 or 7.30 a.m., the deceased left home stating that she needed to go to Pimbura Hospital to attend its "clinic".

j. The deceased did not return home thereafter and her mother went to hospital in search of her daughter. At the tea boutique of Dies Singho, located near the hospital, she learnt that the deceased has got into a bus with the accused-appellant, having had a cup of plain tea at the boutique. Dies Singho knew the accused-appellant prior to this instance as the conductor of the "Sumihiri" bus.

k. Deceased's mother thereafter returned home. Later, as the deceased did not return, her brother made a complaint to Bulathsinhala Police.

l. On the 13th September 1993,the accused-appellant came to the boutique of Asoka Navaratne, which was located about 3 miles from Nachchimale stream, accompanied with a pregnant woman at about 5.00 a.m. and had two rolls and tea. They then left his boutique.

m. On the same morning at about 8.30 or 9.00 a.m. the accused-appellant came alone to Karundadasa's tea boutique located with its back facing Nachchimale stream. He had a plain tea and was munching a sponge cake for about ½ hour to ¾ hours. The accused-appellant told Karunadasa that a dead body of a woman was seen in the stream. As Karunadasa did not respond, the accused-appellant repeated the news and had then left his

boutique after putting something in a brown paper bag, leaving a half-eaten sponge cake.

n. Ingiriya Police received the 1st information on the discovery of the decease's body on 13th September 1999 at about 5.30 p.m. and recovered a body of the deceased floating in the stream. It was a lonely spot.

o. The deceased was dressed only in undergarment on her upper body while she wore a skirt on her lower part. The Police also recovered a note written by the deceased dated 7th September 1993. It was secured by placing stones to prevent it being blown away. A bottle containing poison was also located with several other items. OIC of Police noted several injuries on the body including three nail marks on her neck.

p. The accused-appellant was arrested on the same day at Halwatura at about 6.55 p.m. along with few items including a shirt and several letters.

q. Same evening both Navaratne and Karunadasa have learnt from different sources that a woman was killed at Nachchimale. Navaratne later went to see the body of the woman when it was brought to hospital, but could not identify it. He was told by the Police that they have arrested the person responsible for the murder and wanted him to make a statement. Upon seeing the accused-appellant in the Police cell, he recognised the deceased. Both Navaratne and Karunadasa have identified the accused-appellant at an identification parade.

At the close of the prosecution the trial Court has called for defence from the accused-appellant. The accused-appellant made a brief statement from the dock, admitting his relationship with the deceased. He further stated that later he realized that the deceased was involved with a soldier and he has stopped visiting her on that account. He denied his involvement in the death of the deceased and called Ms. Manel Gunatillaka, the Acting Magistrate as a witness. In her evidence she stated that when she visited the crime scene, she was told that the Police has already recovered several items of productions and removed them to the Station.

In support of the first ground of appeal, learned Counsel for the accused-appellant submitted that the evidence of the prosecution that PC 11932 Piyaratne has recovered several items from the place where the body of the deceased was recovered, in the presence of the lady Acting Magistrate, has been contradicted by the defence when accused-appellant has called her as one of his witnesses. It was submitted that therefore the failure of the trial Court, in evaluating this conflicting evidence, which in effect is favourable to the defence, resulted in a serious prejudice to the accused-appellant.

Learned Deputy Solicitor General, who appeared for the Attorney General, conceded this ground of appeal and invited this Court to act on the proviso to Section 334(1) of the Code of Criminal Procedure Act No. 15 of 1979.He relied on the Supreme Court judgment of ***Mannar Mannan v Republic of Sri Lanka***(1990) 1 Sri L.R. 280 in support of his contention.

Learned Counsel for the accused-appellant also invited the attention of this Court to a judgment of the High Court of Australia in ***Weiss v The Queen*** [2005] HCA 81, on the applicability of such a proviso.

In view of the invitation of the learned Deputy Solicitor General that this Court to consider applying the provisions contained in the proviso to Section 334(1), it is appropriate to consider the nature of the evidence placed by the prosecution in relation to the items discovered during investigation.

The prosecution has placed evidence before the trial Court that a button was recovered from the crime scene and this button could have come off from a shirt with a missing button, which was recovered after the arrest of the accused-appellant. A report to that effect by the Government Analyst was tendered before the trial Court marked as P18.

In fact, the trial Court has considered this inconsistency in its lengthy judgment. It has considered the evidence of Chief Inspector Mendis and concluded that the Police have initially ruled the death of the deceased as a suicide and only after the post mortem examination, they conducted investigations in to the death of the deceased, treating it as a homicide. PC 11932 Piyaratne has died at time of trial. The original information books also were not available at the time of the trial and the Police witnesses have given evidence after refreshing memories by perusing the notes made by the deceased witness.

Proviso to Section 334(1) of the Code of Criminal Procedure Act reads thus;

> "Provided that the Court may, notwithstanding that it is of opinion that the point raised in the appeal might be

decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

In laying down the principles on which an appellate Court could act on the proviso to Section 334(1), **a fuller bench** of the Supreme Court has adopted the judgment of ***Stirland v DPP*** (1944) A.C. 315 at 321, where it is stated that the applicable criterion would be that;

> *"A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible without doubt convict."*

This imposes a duty on the appellate Court to consider the evidence placed before the trial Court as a whole and ask itself the question *"whether on the evidence, a reasonable jury, properly directed on the burden of proof, would without doubt have convicted the appellant ?"*

Mannar Mannan v Republic of Sri Lanka(supra) was decided on a non-direction on the burden of proof which amounted to a misdirection. In the appeal before us, the accused-appellant's contention is that in view of the erroneous non- consideration of the defence evidence amounted to an error on the burden of proof. That being the complaint of the accused-appellant, then the test adopted in the said ***Mannar Mannan v Republic of Sri Lanka*** is applicable to his appeal. Their lordships found that the case

for the prosecution in the said appeal is a "formidable" one in considering the totality of evidence and decided to act on the proviso.

Since the applicability of the proviso to Section 334(1) requires consideration of the evidence in its totality, it is proposed to deal with the first ground of appeal, after consideration of the fourth to sixth grounds of appeal which in effect overlaps these considerations.

In relation to the second ground of appeal that the trial Court was in error when it failed to consider the unreliable evidence in relation to identity of the accused-appellant, learned Counsel contended that identification of the accused-appellant by the witness Navaratne at the identification parade is negated as the witness clearly admitted seeing him in the police cell before the parade. It was emphasized for the accused-appellant that when the witness admitted that he has seen the accused-appellant prior to his identification at a parade, the trial Court should not have placed any reliance on that evidence. According to the accused-appellant the trial Court has acted on the identification of the accused-appellant at the parade, and thereby it has fallen into a grave error.

Learned Deputy Solicitor General sought to counter this submission on the basis that witness Navaratne knew the accused-appellant prior to the incident, and therefore, his seeing the accused-appellant at the Police cell did not in any way affect the accuracy of his identity and in any event, it has caused no prejudice.

The evidence of Navaratne is clear that he knew the accused-appellant as a person who comes to Ingiriya town although he does not know him by the name. In relation to the early morning incident on the

day he learnt that a woman was killed in Nachchimale stream, the witness could even describe the clothing of the accused-appellant. However, he could not recognize the dead body, until he saw the accused-appellant in the cell. Then only he could recollect that it was the same woman who accompanied the accused-appellant to his boutique. The witness identified the deceased only upon his recognition of the accused-appellant.

It is clear from his evidence that it was he who confirmed the identity of the accused-appellant to the Police and not the other way around. It is also clear that the Police already knew that the accused-appellant and the deceased have had tea at his boutique. In view of these factors the claim that the Police shown the accused-appellant to the witness and artificially induced his identification could not be accepted.

The witness maintained the same position even in his cross examination as he affirmatively answered the question put to him by the accused-appellant that the Police asked him whether the person who had tea is the person they have arrested. Considering the probability of the claim of the witness that it is upon seeing the accused-appellant only he recollected the identity of the woman who accompanied the accused-appellant. This Court accepts this explanation.

In order to recall the identity of the deceased, he must first recognize the accused-appellant. Then only he could connect the mental image of the woman who accompanied the accused-appellant to his boutique to the one he saw at the hospital. He also clarified that it was her state of pregnancy that attracted his attention. This is a very plausible explanation for his failure to identify the dead body. It is obvious that the appearance of her

dead body would have appeared different to the witness. It is this factor that lends credence to the claim that the witness made an independent identification of the accused-appellant, despite the unwarranted introduction made by the Police that they caught the man who killed the woman. The consideration of procedural fairness in holding identification parade has little or no significance under these circumstances. **Archbold** (2015 Edition at 14-17) recognizes the need to give a "general warning even in recognition cases where the main challenge is to the truthfulness of the witness. The first question for the jury is whether the witness is honest; if he is, the next question is the same that which must be asked of every honest witness who purports to make an identification, namely, whether he is right or might be mistaken."

It was never suggested to the witness during cross examination that he made a mistake in identifying the accused-appellant that morning and it is clear from his testimony that there was no mistake in him identifying the accused-appellant that morning. Thus, it is clear from the witness's testimony that it is an instance of recognition of already known person rather than an identification of a total stranger in a fleeting moment or under difficult circumstances.

Therefore, the identification of the accused-appellant by witness Navaratne does not add any weight to his evidence other than his consistency on the issue.

It must also be noted that an identification parade might not be the only mode of identifying the identity of an accused. It was observed thus in ***The Attorney General v Joseph Aloysius and Others*** (1992) 2 Sri L.R. 264;

> *"Section 124 of the Code of Criminal Procedure Act referred to above, which requires a Magistrate to hold an identification parade, provides for the means by which it could be established that a witness identified the accused as the person who committed the offence. Identification can take place, depending on the circumstances, even where in the course of an investigation the witness points out the person who committed the offence, to the Police. That evidence too would be relevant and admissible subject however to any statutory provision that may specifically exclude it at the trial."*

As already noted identification of the accused-appellant by the witness at the cell is not an identification but clearly an instance of recognition. Such a situation has already been dealt with by the oft quoted judgment of ***Regina v Turnbull and Another*** [1977] 1 Q.B. 224 at 228, on the question of identity.

In ***Regina v Turnbull and Another***(ibid), it was held that;

> *"Recognition may be more reliable than identification of stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."*

Lord Widgery C.J further held (at p. 229) that;

> *"In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by relative, a neighbour, a close friend, a workmate and the*

like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution."

Learned High Court Judge, in her judgment has extensively dealt with this issue. Having analyzed the evidence in the light of the position suggested by the accused-appellant that he was "shown" the accused-appellant whilst being detained in the Police cell, learned High Court Judge has concluded that no prejudice was caused as a result since the witness already knew the accused-appellant and in addition that the witness was emphatic that he has made a positive identification of him.

Perusal of the analysis and the reasoning of the judgment, it is clear that the learned High Court Judge was well aware of the applicable legal principles quoted and reproduced above. Although the judgment specifically made no reference to the possibility of a mistaken identity, it is apparent that the trial Court was mindful of this consideration and then accepted the claim of the witness that he made a positive identification of the accused-appellant.

In view of the above reasoning, we are of the considered opinion that his ground of appeal fails as it has no merit.

The third ground of appeal is that the trial Court was in error when it failed to hold that the prosecution has failed to establish the exact time of death of the deceased as it has based its case on "last seen" theory. It was

submitted by the learned Counsel for the accused-appellant that the prosecution has failed to prove the exact time of death and therefore the reliance of the prosecution on the last seen theory in presenting its case and the conviction of the accused-appellant by the trial Court based on that theory are erroneous.

Learned Deputy Solicitor General, in his reply, informed this Court that the prosecution did not rely on the last seen theory to prove its case but has presented a strong case based on items of circumstantial evidence. In fact, it is evident that the relevant and admissible facts presented before the trial Court by the prosecution through its witnesses, revealed not only that the accused-appellant was with the deceased in the early morning of 11th September 1999 (when she was last seen alive) but he also had knowledge of the facts that the deceased was dead by mid-morning and her body is in the Nachchimale stream. Of course, the learned trial judge made a passing remark to the last seen theory in her judgment, in evaluating the credibility of each witness. However, in the latter part of the judgment, learned High Court Judge has devoted significant space in her judgment to reproduce the proven primary facts and to record the inferences and conclusions that she has drawn from them and she made no reference to last seen theory.

Therefore, we are of the view that in convicting the accused-appellant on a charge of murder, the trial Court has considered only the whole body of circumstantial evidence without placing reliance on the last seen theory.

It is also relevant to note that in the judgment of ***King v Appuhamy***46 NLR 128, where it was held that "*... the fact that the deceased was last seen in the company of the accused loses considerable part of its significance if the prosecution fails to fix the exact time of death of the deceased.*" Even if the prosecution has relied on the last seen theory, the time of death could easily be inferred upon the clear evidence to the effect that the accused-appellant told Karunadasa the deceased was dead. But he was with her, when she was alive, a little over three hours ago. Therefore the accused-appellant is not entitled to succeed on this ground of appeal. The third ground of appeal also therefore necessarily fails.

The fourth to sixth grounds of appeal could be considered together as their scope tends to overlap. The basis of the fourth and fifth grounds of appeal is the consideration of the case presented before the trial Court, based on items of circumstantial evidence. The fourth grounds concerns with the applicable principles to such a case and the fifth ground concerns whether the prosecution has proved its case to the required degree of proof.

The complaint by the accused-appellant that the trial Court was in error in applying the principles governing the prosecutions based on circumstantial evidence is based on the alleged failure of the trial Court to apply the several tests that had to be satisfied before entering a conviction on a case of circumstantial evidence as per the judgment of the Supreme Court of India in ***Reddy v State of Andra Pradesh and Others*** (1989) Indlaw SC 31.

The applicable principles that had to be utilized in circumstantial evidence cases in our jurisdiction has been clearly laid down recently in 2009. In ***Samantha v Republic of Sri Lanka*** (2010) 2 Sri L.R. 236, it was held after considering the judgments of ***King v Abeywickrema*** 44 NLR 254,***King v Appuhamy***46 NLR 128 and ***Podisingho v King*** 53 NLR 49 that;

> *"In a case of circumstantial evidence if the 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."*

This principle has been applied by the trial Court to the items of circumstantial evidence presented by the prosecution before it. Having applied the principle on the available evidence, it has concluded that the inescapable inference that it could draw from the evidence is that it was the accused-appellant and no other has caused the death of the deceased.

The fifth ground of appeal is based on the witness Navaratne's evidence that he could not exactly remember the day on which the accused- appellant and the deceased came to his boutique and according to his recollection he has given his statement after two days since the incident. It was elicited in cross examination that his statement was recorded on 17th September 1993. Based on this portion of evidence, the accused-appellant seeks to impress upon this Court that therefore the witness has seen the accused-appellant with the deceased on 15th September. Since the deceased was already dead by the evening of 11th September, his evidence become unreliable owing to this deficiency.

It is correct that Navaratne in his evidence stated so and repeated the same evidence in cross examination. Obviously, there is a discrepancy with regard to the date on which the witness has seen the couple in the morning, if one were to consider this item of evidence only.

However, the witness has clearly stated in his examination in chief that he learnt the death of the deceased on the evening of the very day the couple had tea. This unchallenged item of evidence dispels any doubt in relation to dates made by the witness, which could easily be attributable to his faulty memory. This factor alone would not render his evidence unreliable.

In view of these considerations, this Court finds that the submissions in relation to the fourth and fifth grounds of appeal could not be accepted.

The seventh ground of appeal is based on the complaint that the weakness in the defence has been considered by the trial Court as corroboration of the prosecution case. This submission is based on an erroneous reading of the judgment of the trial Court. At page 399/401 of the appeal brief, the trial Court has held that when there is a prima facie case is established by the prosecution and if the accused opted not to offer any explanation, such failure could be considered as corroboration of the prosecution case. The trial Court has referred to the judgments of ***Bandara v State*** (2001) 2 Sri L.R. 63 and ***Abeysinhe and Others v The Attorney General*** (2004) 2 Sri L.R. 357 to derive this principle. Therefore, it is our view that this ground of appeal is ill conceived.

The sixth ground of appeal revolves round the applicability of Ellenborough principle. It is the accused appellant's submission that since

the prosecution failed to establish a strong prima facie case against him, the reliance placed on the said principle by the trial Court in convicting him becomes erroneous. He relied on the judgment of ***Gunawardena v Republic of Sri Lanka***(1985) 2 Sri L.R. 315in support of this contention.

Applicability of the dictum of Lord Ellenborough was considered in the judgment of ***Kusumadasa v State*** (2011) 1 Sri L.R. 240, where it was held that;

> *"To apply the dictum of Lord Ellenborough it is incumbent on the prosecution to put forward a strong prima facie case against the accused. When the prosecution has not put forward a strong prima facie case the dictum of Lord Ellenborough cannot be applied. Dictum of Lord Ellenborough cannot be used to give life to a weak case put forward by the prosecution."*

In the impugned judgment, the trial Court utilized the dictum of Lord Ellenborough to impute liability on the accused-appellant. Therefore, it is incumbent upon this Court to consider whether the prosecution has established a strong prima facie case against him.

Learned Deputy Solicitor General, in his submissions addressed us on the existence of a strong motive for the accused-appellant to commit the offence he was charged with. According to the submissions, the family members of the deceased were tightening their grip on the accused-appellant to legalize his relationship with the deceased by marrying her. Then the accused-appellant found an excuse to get away from the deceased's house after assaulting her brother over this dispute. They have made a complaint to the *Grama Niladhari* of the area to intervene. The

accused-appellant then presented a woman claimed to be his legal wife although he failed to confirm his marriage to her by producing the certificate of marriage. The deceased's party was advised to seek legal remedy against the accused. The pregnancy of the deceased was maturing in to its 32nd week. In order to pacify the deceased, the accused-appellant met her and reassured that he would only marry her. The prosecution claims that therefore the accused-appellant was compelled to take a decision about the deceased and then decided to find a permanent solution. Upon consideration of the evidence of the prosecution, we are inclined to accept this submission.

When the evidence presented by the prosecution taken as a whole, there is no doubt that it has put up a strong prima facie case against the accused-appellant. The accused-appellant was accompanying the deceased in the early hours of the day, her body was recovered and then after about three hours, he was seen alone at a boutique located closer to the place where the body was found. His knowledge about the deceased being dead by that time, her body was in the nearby stream, his failure to inform any authority about it and his behavior at the boutique are strong items of circumstantial evidence. Her death was due to manual strangulation. But the suicide note reveals their joint decision to take poison. This note was secured by stones. When these factors are taken together with the strong motive, we find that there are sufficient circumstances to draw the inescapable and irresistible inference that it was the accused-appellant who caused the death of the deceased.

In these circumstances, the reliance placed on the dictum of Lord Ellenborough as per the Supreme Court judgment in ***Ajith Fernando and***

Others v The Attorney General (2004) 1 Sri L.R. 244 is justified. In the light of this determination, this Court must now consider the applicability of the proviso to Section 334(1).

If this Court were to answer the question posed by his Lordship Justice Tambiah that "whether on the evidence, a reasonable jury, properly directed on the burden of proof, would without doubt have convicted the appellant?, our answer is undoubtedly yes.

Therefore, we are of the view that the conviction of the accused-appellant on the charge of murder is well justified on the available evidence and this is a fit case to act on the proviso of the section 334(1) of the Code of Criminal Procedure Code Act No. 15 of 1979 since the Respondent has conceded the first ground of appeal.

Accordingly, the appeal of the accused-appellant is dismissed and his conviction and sentence of death are affirmed by this Court.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL