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. 88/2012 **Vs,**

Pathirana Mudiyanselage Medagedara Nawarathna Banda

Accused

And Now Between

Pathirana Mudiyanselage Medagedara Nawarathna Banda

Accused-Appellant

High Court of Kegalle
Case No. 2738/07 **Vs,**

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before : **S. Thurairaja PC, J &**
A.L. Shiran Gooneratne J

Counsel : K. A. Upul Anuradha Wickremaratna for the Accused-Appellant
Yasantha Kodagoda PC ASG for the Complainant-Respondent

Judgment on : **31st May 2018**

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Judgment

S. Thurairaja, PC. J

The accused appellant (hereinafter sometimes referred to as the appellant) was indicted by the Attorney General, before the High Court of Kegalle for robbery and murder. The trial held before the High Court Judge of Kegalle on the 21st of June 2012 and concluded on the 2nd of July 2012 and on the 5th of July 2012 the learned trial judge found the accused not guilty for the charge of robbery and found guilty for the charge of murder accordingly, the judge has imposed death sentence.

Being aggrieved with the said order the appellant preferred an appeal to the Court of Appeal and submitted the following grounds of appeal:

1. he was denied of fair trial

2. the trial judge failed to analyse items favourable to the appellant.

3. prosecution failed to establish the case beyond the reasonable doubt.

The prosecution led the evidence of W. P. S. Tilakaratne Wickremasinghe, W.P.E.K.K. Wickremasinghe husband and daughter of the deceased respectively, Chief Inspector Nanayakara, Inspector H.U. Priyantha, Assistant Suprindent of Police D. Danawardane, Sub Inspector Seneviratne, Dr. K. Vijayasaami, Police Seargent L.R. Tilakaratne, Assistant Registrar of Fingerprint Lakshman Perera, Ranjith P. Herath, Police Constable R. S. Suvandaratne, Sub Inspector G.D.S. Jayasinghe and Police Constable J.M.S. Sampath gave evidence for the prosecution. When the defence called the accused appellant gave evidence on his behalf and closed his case

It will be prudent to summarise the facts of the case. On the 19th August 2002 deceased Edirisinghe Mudiyanselage Imali Wickremasinghe was found murdered in her own house. Her husband W. P. S. Tilakaratne Wickremasinghe who was residing at 523, Kandy Road, Mahena, Warakapola as usual gone for his employment in Colombo in the morning when he returned in the evening around 5.45 pm he found the house was closed and he didn't see his wife. He looked around since he didn't see his wife he called the neighbour and asked whether she saw the wife, the answer was negative then he asked the other neighbour Randil Fonseka he also said that he didn't see her the witness then telephoned his daughter who is living little away from their house. She said the mother didn't come there. With the help of the neighbour Randil Fonseka, they searched the surrounding and found the house was locked outside, then they opened and found that the deceased lying fallen dead. Thereafter they called the police and the investigations commenced. The police couldn't find any lead to the killer. On the 8th of November 2003 the accused appellant was arrested by the special investigation unit of Kandy office. There among other findings they got a lead to this

case they have recovered certain bedsheets and other items at his mother's house under his control. The Warakapola police took over the appellant and conducted further investigations. During the investigation it was found his finger prints were matched with the finger print found in a glass tumbler at the scene of crime thereafter the investigation was concluded and a non-summary inquiry was held and the Attorney General forwarded an indictment after the trial he found guilty.

Considering the first ground of appeal the council submits that Section 195 (g) of the Code of Criminal Procedure Act (CCPA) being violated

> *195. Upon the indictment being received in the High Court, the Judge of the High Court presiding at the sessions of the High Court holden in the judicial zone where at the trial is to be held shall –*
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> *(g) where the accused on being asked by court so requests, assign an attorney-at-law for his defence.*

Perusing the court record, on the 28th of April 2008 the appellant was present and unrepresented, indictment was served on the appellant. When he was asked whether he want the assistance of a counsel he categorically said he does not want further he had stated that he will arrange a counsel for him. The appellant pleaded not guilty for the charge and opted a non-jury trial. The learned trial judge had assigned a counsel for the appellant. Then the matter was postponed to 22nd September 2008, then 22nd June 2009 and 10th March 2010 they couldn't reach trial in this case. Thereafter the trial was postponed to the 15th July 2010 the accused was present and he was represented by his assigned counsel. That day also the trial was not reached and the trial was fixed for 11th and 12th of July 2011. On the 11th the accused was present and unrepresented notice was issued on his counsel and the matter was fixed for trial on 8th March 2012. On that date he was represented by his counsel. That day also it was not reached and the trial was postponed to the 20th of June 2012 for which he was represented by a council. Since witness's number 1 and 4 didn't come trial couldn't be reached and re-fixed to the next date. On the 21st June 2012 the accused was present and represented by his assigned counsel. On that day indictment was read and the jury option was also given again. Trial commenced on the 21st and continued till 2nd of July 2012 and the judgment was delivered on the 5th July 2012.

The above details obtained from the appeal brief reveals that the accused appellant was given the right to have legal representation further he declined to have a council assigned by the court and submitted that he will retain a counsel for him. this clearly demonstrates that the accused was made aware of his right and the learned trial judge had gone further and provided the service of an assigned council to the appellant from

the beginning. The trial court record revealed that the council for the appellant was present in court and actively involved in defending the appellant.

This Court is also having information from the trial brief that the accused appellant was at certain time of his life voluntarily ordained as a Buddhist monk thereafter he left and lived as an ordinary person. He joined in the Sri Lanka police force and was trained in law, service and weaponry. Further he worked as a marketing officer, trainer and organiser of civil societies.

The indictment was served on the 28th of April 2008 trial commenced on the 21st of June 2012 the appellant was complaining of delay in taking up the trial further the trial judges were given directions from the Judicial Services Commission to minimise delay they were to take up the trial on a day to day basis.

The learned trial judge had considered these two factors which were favourable to the appellant and proceeded with the trial.

It is also observed that is after the prosecution led the evidence of 4 material witnesses the appellant attempted to move for dates and delay the proceedings of the trial.

The above facts reveal that there is no violation of Section 195 (g) nor Article 13 of the Constitution. Therefore, we conclude that there is no merit in this ground of appeal.

Considering the nature of the second and third grounds of appeal namely the High Court failed analyse items favourable to the appellant and prosecution failed to establish their case beyond reasonable doubt.

The incident occurred on the 19th August 2002 at Warakapola which comes under the supervision of Deputy Inspector General of Police of Sabaragamuwa Province. The appellant was arrested on the 8th November 2003 in Kandy by Special Investigation Unit of DIG of Central Province. The original investigators from Warakapola couldn't find the culprit but they collected the evidence from the scene of crime and they were continued with their investigation. When the accused was arrested the SIU of Central Province obtained many information regarding this crime among other. They recorded the statement of the appellant and recovered bedsheets and jewelleries from the appellant kept in a cupboard under lock and key which was at his mother's place. 27 (1) statement was produced at the trial. The appellant denies such a statement in his evidence. The productions were shown to the husband and daughter of the deceased and they have identified the same as the belongings of the deceased.

The appellant says that there was another fingerprint on a polythene sheet was found at the scene of crime which was not identified and that creates a doubt and he submits that he is entitled for the benefit of the doubt.

There were two fingerprints found at the scene of crime, one is on a glass tumbler and the other was on a polythene sheet. The finger print on the glass tumbler matched 100% certainly with the fingerprint of the appellant. The registrar of fingerprint gave evidence and explained the presence of the fingerprint of the appellant on the glass tumbler which was obtained from the scene of crime which was not much challenged at the trial.

Regarding the finger print of the polythene sheet the police officers and the investigators explained that they have found this sort of unidentified fingerprints at the scene of crime that maybe due to several reasons including the polythene sheet could have moved from one place to another.

At this juncture it would be preferable to recall part of the evidence of the husband of the deceased who went to the scene of crime first Wickremapathiranalage Upali Tilakaratne Wickremasinghe said that on the 19th August 2002 as usual he left for his employment in the morning around 6.15 am and returned around 5.45 pm in the evening. When he came the windows and doors were completely locked he broke open one of the window with the help of his neighbour and entered the house and found the dead body of the deceased wife. It is observed by him and the police that all the doors and windows except the front door was locked inside. The front door was locked outside and the keys were found on their flower garden.

The accused appellant owes an explanation for the presence of his fingerprint at the scene of crime. The appellant gave evidence and submitted that he was involved in the training of marketers who are involved in direct marketing attached to Sanko Marketing. He would have gone to this house in 2002 but he cannot remember. He was contradicted with his previous statements where he told that the company was closed in 2000. The Additional Solicitor General advanced the argument that if the company was closed in 2000 how could he go on training or direct marketing in 2002. Which creates a serious doubt on credibility of his evidence.

The Attorney General preferred indictment under Section 380 of the Penal Code for robbery and Section 296 for murder.

The learned trial judge after considering the evidence acquitted the appellant from the first count for robbery this shows that the learned trial judge did not arbitrarily convict the appellant. She evaluated evidence before the court admissibility and credibility of the witnesses and concluded that he is guilty for only the murder of the deceased.

ARUNA ALIAS PODI RAJA VS. ATTORNEY GENERAL *(2011) 2 Sri LR 44 Sisira de Abrew J held;*

"When prosecution established a strong incriminating evidence against an accused in a criminal case the accused in those circumstances is required to offer an explanation of the highly incriminating evidence established against him and the failure to offer such explanation suggests that he has no explanation to offer".

In ***R. v Cochrane-*** *Gurneys Report 479, Lord Ellenborough held "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but nevertheless, if he refused to do so where a strong prima facie case had been made out and when it is in his power to offer evidence, if such exist in explanation of such suspicious appearances, which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."*

Considering all we are of the view that the appellant's grounds of appeal fails on its own merits. We carefully consider the judgment of the learned trial judge and we find that it is reasonable for the trial judge to come to the said conclusion and therefore we have no reason to interfere with the findings of the learned High Court Judge. Accordingly, we affirm the conviction and the sentence and dismiss the appeal.

Appeal Dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL