

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

In the matter of an Appeal under  
Section 331 of the Code of Criminal  
Procedure Act No.15 of 1979.

**C.A.No. 103/2012**  
**H.C. Panadura No. 1846/2004**

Vithanage Nuwan Nishantha alias  
Gas Nuwan

**Accused-Appellant**

**Vs.**

Hon. Attorney General  
Republic of Sri Lanka

**Respondent**

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

**COUNSEL** : Yalith Wijesurendra for the Accused-Appellant  
Haripriya Jayasundera D.S.G for the respondent

**ARGUED ON** : 25<sup>th</sup> May, 2018

**DECIDED ON** : 06<sup>th</sup> July, 2018

ACHALA WENGAPPULI J.

The accused-appellant was indicted for committing rape on *Maddumage Misihamy* and for committing her murder. After trial without a jury, he was convicted for rape as charged but in relation to the count of murder, the High Court convicted him for culpable homicide not amounting to murder. He was sentenced for 12 years of imprisonment and a fine of Rs. 15,000.00 for each of the two offences and in default of the fine, he was to serve a term of imprisonment of six months.

Being aggrieved by the said conviction and sentence, the accused-appellant sought to have them set aside on the basis that the trial Court has failed to consider the case presented by the prosecution, based purely on items of circumstantial evidence, is incapable to support the inescapable inference that he alone has committed these offences.

The prosecution presented evidence before the trial Court that the 90-year-old widowed deceased woman lived alone in the house in which her dead body was discovered apparently by the villagers in the morning of 22<sup>nd</sup> April 1999. Witness *Susilawathie* was her immediate neighbour who made string hoppers for living. On the same morning of the discovery of the deceased's body, the accused-appellant came to her house at about 7.00 a.m. and sat on a half wall in front of her house. He requested some water to drink. The witness asked him to draw water from the well as she was busy making string hoppers. The accused-appellant then told the witness

that the deceased was sleeping covering herself with several clothes. In addition, the accused-appellant told witness that he had entered the deceased's house by removing few roof tiles and left. She did not see him thereafter.

The accused came to the witness's house for the first time that morning and the witness has never seen him employed by the deceased woman. But she knew him well as the person who plucked coconuts and arecanuts in her village and was generally known as "*Gas Nuwan*".

After about 15 minutes, when the witness finished her morning chore, she went over to her neighbour's house. There were several people already gathered and she saw through a partly open window that the deceased was "sleeping" covered herself with several pieces of clothing including her face. She was lying on the floor, but would normally sleep on her bed. Later the witness noted that several roof tiles were removed.

The prosecution also led the evidence of *Alice Nona*, a 73-year-old woman, as she was the deceased's sister-in-law who regularly visited her. According to this witness, she had complained to her that *Gas Nuwan* had entered the deceased's house through the tiled roof and had removed some packets of milk powder and a *Cheeththa*. She does not know the identity of the accused-appellant. She identified a *Cheeththa* cloth shown to her as one of the *Cheeththas* that her deceased sister-in-law wore. This item

of production was recovered upon the information provided by the accused-appellant after his arrest from his house and the prosecution has led that evidence under Section 27(1) of the Evidence Ordinance.

The medical evidence revealed that the deceased woman had died due to manual strangulation and the injuries seen in her genitals confirm that there was vaginal penetration probably by an erect penis.

Learned Counsel for the accused-appellant was emphatic in his submissions that the evidence of *Susilawathie* depicts an improbable claim and it is due to the prompting by the prosecutor that she reluctantly said that the accused-appellant told her that he got into the deceased's house through its tiled roof. As admitted by the witness, there was no animosity between the deceased and the accused-appellant and it was he who spread the news around the village about the death of the deceased.

Learned Counsel then posed the question that, would the accused-appellant, having raped the woman and removing some items from her house, return to the same neighbourhood and confess about it ?

He further contended that in the absence of any finger print evidence or DNA evidence to link the accused-appellant to the incident, these items of circumstantial evidence are insufficient to impute criminal liability on him.

Learned Deputy Solicitor General sought to counter the submissions of the accused-appellant based on his admission of knowledge of the death of the deceased and that she was covered with several layers of clothing. She further submitted that there was no challenge to the evidence of *Susilawathie* and there was no cross-examination of the evidence of *Alice Nona* who identified a knife and a *Cheeththa* cloth that belonged to the deceased and later recovered from his house. In addition, there was no challenge to the item of evidence that the deceased had told the witness that it was the accused-appellant who removed these, having entered her house through its roof. Coupled with the admission that the accused-appellant had entered the deceased's house in the morning, her body was discovered, strongly suggest that it was only the accused- appellant and no one else has had the opportunity to commit the two offences.

She also referred to the subsequent conduct of the accused-appellant as he was arrested at about 2.00 a.m. on the 24<sup>th</sup> April 1999, hiding in a jungle where he had spent the night. He resisted arrest.

The evidence placed before the trial Court had to be examined by this Court in the light of the ground of appeal raised by the accused-appellant.

It is clear that by 7.00 a.m. on 22<sup>nd</sup> April 1999, the accused-appellant knew that the deceased was lying in her house covered by several layers of clothing. He had admittedly entered through the tiled roof of the house. He then informed the immediate neighbour about it. After a gap of 15

minutes, when *Susilawathie* went over to her neighbour's house, she found there were already several people who have gathered and she saw the deceased through a partly open window. The accused- appellant elicited from this witness and the investigating officer that it was he who spread the news to other villagers. However, the accused-appellant did not accompany *Susilawathie* and the purpose of visiting her was to ask for some water.

If one could see the deceased by the window, then there is no need for one to creep through the roof to verify the condition of the deceased. The accused-appellant did not say that he saw the deceased through the window. If there were inquisitive villagers who have already gathered at the deceased's house, then the accused-appellant should have got to know of the death of the deceased prior to the villagers. This fact justifies drawing an inference that it was the accused-appellant who first came to know about the fate of the deceased.

It is also reasonable to infer that he came to know about it before 7.00 a.m. and before the villagers have gathered around the house. The timing is important in this context. *Susilawathi* came to know about the deceased through the accused-appellant and that was about 7.00 a.m. This fact is consistent with her claim that she was making string hoppers for the eatery in her village. The Consultant JMO, in his evidence placed the probable time of death between 6.00 p.m. of 21<sup>st</sup> April to 7.00 a.m. on the

22<sup>nd</sup> April 1999. This could lead to an inference that the accused-appellant may have entered the deceased's house when she was alive.

Since the accused-appellant was the first person to know of the death of the deceased, then why he did not wait with the crowd and reveal what he saw to the Police when they arrived at the scene by 9.00 a.m.? Instead, he went missing until his arrest. He was sleeping in a jungle despite having a house to sleep in the village. Then he knew whereabouts of the *Cheeththa* cloth and *manna* knife that went missing from the deceased's house barely a week ago.

The fact that the deceased told *Alice Nona* that the accused-appellant has removed packet of milk powder and her *Cheeththa* cloth only supports a suspicion entertained by the deceased woman about him. But this suspicion was confirmed when the cloth was recovered from the house of the accused-appellant after his arrest. The accused-appellant had admittedly entered through the tiled roof in the very morning the deceased had died and when he was examined by the Consultant JMO after arrest, he had an injury which may have resulted in while creeping through a roof as per his Medico Legal Report.

Learned High Court Judge, in her judgment was mindful that the case presented by the prosecution is entirely a one based on circumstantial

evidence. She has correctly applied the legal principles that are applicable to such a case as indicative by her reference to them in the judgment.

In *Karunaratne v Attorney General* (2005)2 Sri L.R. 233, this Court re-emphasized the following principles;

*"In the case of State of V.P. vs Dr. Ravindra Prakash Mittal(1992) 2 SCJ 549, it was held that the essential ingredients to prove guilt of an accused person by circumstantial evidence are:-*

1. *The circumstances from which the conclusion was drawn should be fully proved;*
2. *The circumstances should be conclusive in nature;*
3. *All the facts so established should be consistent with the hypothesis of guilt and inconsistent with innocence;*
4. *The circumstance should; to a moral certainty, exclude the possibility of guilt of any person other than the accused.*

*In the case of Podi Singho vs. King 53 N.L.R. 49 it held that "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 of the accused and must only be consistent with his guilty. In the case of King Vs. Appuhamy 46 N.L.R. 128, Keuneman J. held that in order to justify the inference of guilt purely on circumstantial evidence, the inculpatory facts must be incompatible with the*



*innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. "In the case of State of Tamil Nadu vs Rajendran 1999 Cri.J. 4552, justice Pittanaik observed that" In a case of circumstantial evidence when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstance to make it complete"*

The Learned High Court Judge arrived at the correct finding by applying these principles of law governing cases presented on items of circumstantial evidence that it was the accused-appellant and no other who caused the death of the deceased and who penetrated her vagina and thereby committing the offence of rape. She has rightly rejected the statement of denial made by the accused-appellant from the dock.

Learned Deputy Solicitor General did not challenge the conviction of the accused-appellant for culpable homicide not amounting to murder and therefore this Court need not venture to examine the validity of the said determination by the trial Court.

In view of the above reasoning, it is our considered view that the ground of appeal of the accused-appellant is devoid of merit and therefore, the conviction entered by the High Court and the sentences imposed by it,

should be affirmed. Accordingly, we make order dismissing the appeal of the accused-appellant. The conviction and sentences of the High Court are affirmed.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL