

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

In the matter of an Appeal in
terms of Section 331(1) of the Code
of Criminal Procedure Act
No.15/1979.

C.A.No.105/2017

H.C. Polonnaruwa No.HC 48/2010

Thiththalapitige Rohana Presil
Kumara

Accused-Appellant

Vs.

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

Respondent

BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULI J.

COUNSEL : Amila Palliyage with Sandeepani Wijesooriya for
the Accused-Appellant.

A.R.H. Bary S.S.C. for the respondent

ARGUED ON : 09th July, 2018

DECIDED ON : 18th Septemer, 2018

ACHALA WENGAPPULI J.

The Accused-Appellant (hereinafter referred to as the "Appellant") was indicted before the High Court of Polonnaruwa for committing murder of his wife *Herath Mudiyanseelage Ruvini Takshila* on or about 14th July 2004. After a trial without a jury, as per the election of the Appellant, he was found guilty as charged and was sentenced to death. Being aggrieved by the said conviction and sentence, the Appellant sought to challenge its validity on the following grounds of appeal;

- i. the trial Court failed to consider that a conviction could not be based purely or solely on "*last seen theory*" as the prosecution did not prove the exact time of death,
- ii. the trial Court erred by comparing the contents of the dock statement with the prosecution case,
- iii. the trial Court erred when it concluded that the prosecution has proved its case before the Court considered his dock statement,
- iv. the trial Court erred when it accepted the evidence in relation to the complaint to Police by the deceased against the accused, as the motive,

Since these several grounds of appeal requires consideration of the evidence presented before the trial Court in its entirety, it is helpful to refer to the nature of evidence led by the prosecution and the Appellant.

The prosecution case is based essentially on items of circumstantial evidence. The Appellant and the deceased were married for over 12 years and had two children. The Appellant was a soldier of Sri Lanka Army. At the time of the death of the deceased, they were living with the deceased's mother in Dummalasuriya Police area. According to the mother of the deceased and her brother, the deceased had left her home at about 8.00 am on the 14th July 2004 with the Appellant to attend an inquiry conducted by Polonnaruwa Police. The deceased had made a complaint against the Appellant but the details of the complaint is not known to witnesses. The deceased did not return home thereafter and after three days, upon being notified by Polonnaruwa Police, they identified her body at Polonnaruwa Hospital.

On 14th July 2004, the security officers who manned the entrance to the ruins of *Galviharaya* site called up the Appellant and the deceased as they entered the site and their appearance aroused some concern. The security officers had already been directed by the Police to record the details of couples who enter the site on foot, since there was a spate of "murders" that had taken place in the archaeological area. Acting on this direction *Wasantha Kumara* recorded the name and number of the identity card issued to the Appellant by Sri Lanka Army. As the deceased had no

identification only her name was recorded in the book maintained for that purpose. The officers noted that the sturdy Appellant was dressed smartly with a T shirt and a denim while the relatively thin deceased with a darker complexion, who was introduced to the officers as the wife of the Appellant was shabbily dressed. When they saw the couple entering the sacred site, the deceased was lagging behind the Appellant in about 50 feet in distance between them. The time of recording of the entry is 5.49 p.m.

The sacred site is open to visitors from 6.00 a.m. to 6.00 p.m. and accordingly the Appellant was advised by the security officers to leave the site as it was closing time. However, the couple went in the direction of the "Palace".

On the 15th July, witness *Priyadharshari*, a resident of the area went to have a bath at about 2.00 p.m. in the nearby canal that brings water from *Parakrama Samudra* to the paddy lands. She was alerted by another of seeing a body of a human in the water. She saw a body floating under water and when another person brought it to the canal bank, she covered it with a cloth. The body is of a woman. When some of the security officers got to know about it they identified it as the body of the deceased whom they saw the previous evening with the Appellant. Her clothing was identified by the witnesses. They were the clothing she wore when she left her house in the previous morning. The body also had a wrist watch.

It is stated in evidence that the canal runs along the land area belongs to the Archaeological Department where the *Galvihara* ruins are

located and the body was recovered downstream to this land area. The prosecution evidence is that the Appellant is last seen with the deceased in the same area at 5.49 p.m. when the Security Officers had told them to leave since its closing time.

The medical evidence revealed that the deceased had died due to vagal inhibition which in turn caused by strangulation by ligature. The suicide by hanging was excluded owing to the nature of injuries on the neck since the medical officer observed several injuries which she termed as imprint abrasions. She could not pronounce exact time of death as the post mortem examination was performed only on the 19th July 2004, but places the time since death sometime beyond 1 ½ days prior to her examination.

It is also revealed that the Police were alerted by the villagers about the discovery of a body and during their investigations they received information about the Appellant who accompanied the deceased the previous evening. The Appellant was traced to *Giritale* Army Camp where he was arrested on 16th July 2004 at about 2.20 p.m.

After the Appellant was produced before the Magistrate's Court, an identification parade was held, and he was identified by the security officers, who recorded his personal information, as the person with whom the deceased was last seen alive. The identification of the Appellant at the

parade was recorded as an admission under Section 420 of the Criminal Procedure Code.

At the conclusion of the prosecution case, the trial Court called for his defence. In his statement from the dock he denied any involvement with the death of the deceased and took up an *alibi* stating that he attended the inquiry at Dummalasuriya Police upon a complaint against him by the deceased as he could not return home for few months due to exigencies of his service. He further stated that having come to Polonnaruwa with the deceased, after inquiry and visited the sacred area on her request, he boarded a bus from *kaduruwela* at about 2.30 p.m. to reach his camp. Before leaving her he has instructed the deceased to return home on her own. He later came to know that he is accused for her death.

It is against this backdrop of evidence, we should proceed to consider the several grounds of appeal of the Appellant.

In support of the first ground of appeal, learned Counsel for the Appellant submitted that a conviction for murder could not be solely based on the last seen theory and as such the trial Court fallen into error in convicting the Appellant for murder. It could be reasonably inferred that this submission is essentially based on the assumption that the only item of evidence led before the trial Court is the fact that the deceased was last seen alive in the company of the Appellant. This particular item of evidence, presented by independent witnesses, substantiated by contemporaneous official record, no doubt is the strongest item of

evidence that the prosecution presented before the trial Court and relied upon.

But that is not all the evidence presented by the prosecution. As reproduced above in summery form, there were other items of evidence in relation to the Appellant's previous and subsequent conduct, in addition to this evidence. The perusal of the Judgment of the trial Court revealed that it had referred to all these items of evidence to arrive at the inescapable and irresistible inference that was drawn against the Appellant's presumption of innocence. Therefore, the Appellant's first ground of appeal fails.

This finding leads to the consideration of his second ground of appeal. The Appellant's contention is that the trial Court had compared the evidence led before it, by the prosecution and the Appellant, side by side and thereby imposing a burden of proof on the Appellant.

It is clearly seen upon perusal of the Judgment what the trial Court has done with the evidence presented by the parties is to have them compared with, in order to arrive at a conclusion as to the credibility of the evidence. In fact, the Appellant, in his statement from the dock, had admitted and even explained certain items of evidence presented by the prosecution. When the mother of the deceased gave evidence, she had no idea about the nature or the contents of the complaint her daughter had

made to the Police. She was under the impression that in fact it was made to Polonnaruwa Police. But the Appellant, in his statement said that the deceased had lodged a complaint with Dummalasuriya Police over his long absence from matrimonial home and he was directed to attend an inquiry. He further admitted that he did attend the inquiry with the deceased. He further admitted that thereafter they came to Polonnaruwa and, upon the request of the deceased, visited the ruins.

This shows that the Appellant, having admitted part of the prosecution evidence, sought to dispute its most damning item of evidence by stating that he left the deceased by 2.30 p.m. since he had to report back to his camp, which is in total conflict with the prosecution's evidence that he was with the deceased at 5.49 p.m. at the entrance to the ruins. It is in these circumstances that the trial Court considered the evidence in the way it did and finally concluded that the Appellant's claim that he left the deceased at 2.30 p.m. on the 14th July 2004 could not be accepted as a truthful version of events.

In the light of these considerations it is appropriate to consider the last two grounds of appeal at the same time.

The trial Court had itemised the several items of circumstantial evidence presented before it by the prosecution. When the prosecution evidence is considered in its entirety, as the trial Court correctly did, it satisfies the criterion laid down in *King v Appuhamy*⁴⁶ N.L.R. 128 as it was held,

“ ... 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 than that of his guilt.”

In a more recent judgment of *Karunaratne v Attorney General* (2005)2 Sri L.R. 233, this Court re-emphasised the following principles in relation to the prosecutions based on circumstantial evidence ;

“In the case of State of Y.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.*

The Court proceeded to cite another Indian judgment to high light another relevant consideration in relation to prosecutions based on circumstantial evidence as it reproduced the following quotation;

"In the case of *State of Tamil Nadu vs Rajendran* 1999 Cri.L. 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 Apex Court, in its judgment of S.C. Appeal 232/2014 - S.C. M. of 11.07.2017, quoted the same passage from the judgment of Supreme Court of India in *Tamil Nadu v Rajendran* (1999) Cr. L.J. 4552 as the Court of Appeal did in *Karunaratne v Attorney General*.

The prosecution has presented a strong prima facie case against the Appellant.

It is already noted that the Appellant, in his statement from the dock stated that he left at 2.30 p.m. for his camp leaving the deceased in Polonnaruwa. This is in relation to an *alibi* he presented before the trial Court. The presence of the Appellant with the deceased at 5.49 p.m. on the 14th July 2004, at the entrance to the ruins was well established by the prosecution beyond a reasonable doubt. This is a fact in issue, which was to be decided by the trial Court. When the Appellant, having had the benefit of listening to the evidence presented by the prosecution, stated in his dock statement that he had left Polonnaruwa by 2.30 p.m. for the first time in Court only in his dock statement. In *Gunasiri and two Others v*

Republic of Sri Lanka (2009) 1 Sri L.R. 39, it was held that "failure to suggest the defence of alibi to the prosecution witnesses who implicated the accused indicates that it was a false one."

When he lied in Court that he was elsewhere, that fact provided "an additional link in the chain of circumstances" as per the judgment of *Tamil Nadu v Rajendran*. It is in consideration of all these items of evidence that we reach the irresistible and inescapable inference that the Appellant is guilty of murder, as the cumulative effect of the several items of circumstantial evidence does not support any other hypothesis other than the guilt of the Appellant.

The complaint that the trial Court erred when it concluded that the prosecution has proved its case before the Court considered the dock statement is a mistaken notion based on the way the trial Court sought to present its reasons for convicting the Appellant. The trial Court had segmented the two cases and after the prosecution's case, it had stated that the case was proved against the Appellant. The trial Court, then proceeded to consider the case for the Appellant. If the trial Court had already arrived at a conclusion about the guilt of the Appellant, then it need not consider the case presented by him.

The other complaint that the trial Court erred when it accepted the evidence in relation to the complaint to Police by the deceased against the

accused, as the motive, is a reasonable inference from the available evidence. When the deceased lodged a complaint against the Appellant, who was her husband for the past twelve years and a soldier attached to a camp in the operational area, compelling him to attend an inquiry in a distant Police station, would naturally create a resentful feeling in his mind. This item and the inference that could be drawn from it would not suffice to sustain a conviction of murder, if taken in total isolation from the rest of the evidence. However, in this instance, it is a reasonable inference to draw, when taken in conjunction with the evidence of the security officers that the couple's behaviour in that evening is not of a normal behaviour observed from the others.

In consideration of the submissions of the Appellant, it is our view that the several grounds of appeal raised by him cannot be considered as grounds of appeal with some merit, that would have the effect of vitiating his conviction. Therefore, we affirm the conviction and sentence imposed by the High Court.

The appeal of the Appellant is dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL