

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

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

The Republic

Complainant

Court of Appeal

-Vs-

Case No. CA 203/2015

Illethamby Prabhakaran & others

Accused

-And Between-

Illethamby Prabhakaran

Accused-Appellant

High Court of Polonnaruwa

-Vs-

Case No. HC 39/2012

The Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

Before : S. Thurairaja PC, J

&

A.L. Shiran Gooneratne J.

Counsel : Anil Silva, PC with Sahan Kulatunga for the Accused-Appellant.

Ayesha Jinasena P.C., ASG for the Respondent.

Written Submissions of the Accused Appellant filed on: 19/12/2017

Written Submissions of the Respondent filed on: 14/12/2017 and

27/08/2018

Argument on: 29/06/2018, 09/07/2018 and 31/07/2018

Judgment on : 20/09/2018

A.L. Shiran Gooneratne J.

The Accused-Appellant, (hereinafter sometimes referred to as the appellant) was indicted together with three others, (the 4th accused, Kabul had passed away at the time of service of indictment) before the High Court of Polonnaruwa, under Section 296 to be read with Section 32 of the Penal Code, for committing the murder of Mohammed Riham. A second charge was preferred against the 3rd accused for retention of stolen property. At the conclusion of the trial without a jury, the 1st Accused-Appellant was convicted as charged on count 1 and was

sentenced to death. The 2nd and 3rd Accused were acquitted from their respective charges.

The case for the prosecution is based on circumstantial evidence. The facts are set out briefly as follows.

On 25/07/2004, at the invitation of the deceased, witness Malhas and Zaharan together with the accused had proceeded to Welikanda in two three-wheelers. At Welikanda, the deceased and the 1st to 4th accused had set off again in a three-wheeler leaving behind Malhas and Zaharan. Since the party who left did not return, Malhas and Zaharan had walked towards the bus stand, where they met the 4th accused Kabul, and was informed that the deceased was at the Polonnaruwa bus stand. However, at the Polonnaruwa bus stand, the 1st, 2nd and the 3rd accused had informed them that the deceased had left to his sister's house in Kurunegala and had wanted them to follow. Since the deceased was not found at his sister's house, a complaint had been lodged at the Welikanda police station. The police commenced investigations and arrested the 1st accused on 29/07/2004, at 14.30hrs. The Mutuwella police post had recorded a statement of the accused at 15.30. hours on the same date, where the 1st accused had provided information which led to the recovery of the deceased body.

Witness Wedage Sampath Muditha Kumara, a three-wheeler driver who knew the 1st, 2nd and 4th accused stated that on the night of 24/07/2007, the 1st and 2nd accused had hired his three-wheeler to proceed to Mutuwella. On the way he

picked up the 4th accused and an unidentified person close to the Mahaweli office. His evidence further reveals that the 3rd accused, who was also known to him did not travel in his three-wheeler to Welikanda on that night. However, this position is contradicted by witness Malhas, who stated that he had seen the 3rd accused in the company of the 1st, 2nd and the 4th accused travelling in a three-wheeler leaving to an undisclosed destination. The 3rd accused in his evidence to Court has also denied that he left to Welikanda in the company of the rest of the accused. In the said background the prosecution has relied strongly on the evidence of Malhas to prove, that the deceased was last seen alive in the company of the 1st accused in order to sustain a conviction based on the last seen theory. Having evaluated the evidence against the 2nd and 3rd accused led by the prosecution and also having considered the dock statement by the 2nd accused and the evidence of witnesses who testified on behalf of the 3rd accused, the learned High Court Judge acquitted the 2nd and 3rd accused from the charges leveled against them.

The learned Presidents Counsel for the appellant has urged the following grounds of appeal before this Court.

1. When there was more than one person involved, has the trial judge failed to consider the restrictions when applying the last seen theory.
2. Can the recovery of the body in terms of Section 27(1) be sustained in law.
3. Can the guilt of the accused be established on the principle of common intention.

When evaluating evidence based on the last seen theory the Court should be mindful to evaluate material evidence reflecting the conduct of the accused which could draw a reasonable inference to his guilt. As pointed out earlier, witness Malhas evidence is that, the 3rd accused was in the company of the 1st, 2nd and 4th accused at the Kaduruwela bus stand, which contradicts the evidence given by witness Ranasinghege Ranjith, who stated that the 3rd accused was at Mutuwella around that time. According to the prosecution witnesses, there are two persons whose identity remain unknown. At page 11 of the judgment, the trial judge considering the evidence of Malhas has concluded that the unidentified person, who travelled with the 1st accused, was the deceased. On the strength of the evidence of Malhas, the Court was convinced that, there was a reasonable inference of guilt which could be attributed to the 1st accused when applying the last seen theory. However, taking into consideration the evidence given by witness Wedage Sampath Muditha Kumara and Ranasinghege Ranjith and also considering the evidence given on behalf of the 3rd accused, the Court was not inclined to apply the same theory to the 2nd and 3rd accused.

The counsel for the appellant argued that, there is no clear evidence that the deceased was last seen with the appellant. The counsel submits that the Court erred when it accepted the evidence of Ranasinghege Ranjith to acquit only the 3rd accused when there was a material contradiction, inter-se in the evidence given by the said witness and witness Malhas, which goes to the root of the case. The

counsel also noted that the Court on the one hand has accepted the evidence given by Malhas to convict the 1st accused and on the other, has rejected the same evidence and acquitted the 2nd and 3rd accused, thereby has disregarded the principle of indivisibility of credibility. On this point it is important to note that at page 8 of the judgment, the Court expresses serious concern about accepting the evidence of Malhas regarding the 2nd and 3rd accused being in the company of the deceased, when applying the last seen theory.

Therefore, it is observed that the trial Judge has selectively applied the last seen theory in respect of the 1st accused notwithstanding the frailty in the evidence given by witness Malhas.

In the case of *King Vs. Appuhamy 46 NLR 128 the Court of Criminal Appeal* held that;

“the prosecution failed to fix the exact time of death of the deceased, and the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance. The presence of rice and curry in the stomach of the deceased also indicates a strong possibility that the death took place some hours after the deceased set out with the accused.”

According to the evidence of Malhas, the deceased was last seen with the appellant on the 24/07/2007, and the deceased body was found on 29/07/2004. The post mortem examination was performed on the 31/07/2004. According to medical

evidence, the exact date of death could not be established and it is possible that the death occurred 3 to 4 days prior to the post mortem examination.

As noted earlier, the Court has observed the infirmities of the evidence given by Malhas to safely conclude that the deceased was last seen in the company of the appellant. According to medical evidence an exact time of death is not established and it is likely that the deceased came by his death at least 3 to 4 days prior to 31/07/2004. Therefore, there is no close proximate relationship between the discovery of the body and the murderous assault.

In all the above circumstance, the inevitable conclusion that can be drawn is that it is unsafe to incriminate the appellant for his failure to offer an explanation on the basis that, he was last seen in the company of the deceased. Therefore, we are inclined to accept the submissions of the counsel for the appellant in relation to this ground of appeal.

Subsequent to a statement given by the 1st accused on 29/07/2004, PW. 13 I.P. Gunatilleke recovered the body of the deceased in terms of Section 27(1) of the evidence ordinance. The Appellant has not raised any infirmity in cross examination in the manner in which the said statement was obtained other than suggesting that the police officer "wrote something which he didn't state." The identity of the Appellant was never in issue. According to the investigating officer, the body discovered was buried in an area which consisted of sandy soil and forest cover, around 500 to 600 meters away from the house of the 1st accused. The 1st

accused has directed the investigating officer to the place where the body rapped in a fertilizer bag was recovered from a shallow grave. The body could not be seen to the naked eye and only on the direction of the Appellant, that the body was recovered. The said evidence stood firm in cross examination with virtually no challenge offered, confirming the fact that the appellant knew where the deceased body was buried. Nowhere in the cross examination had the Appellant raised objection to the trustworthiness the unreliability or fabrication of the said evidence.

In the case of *Ajith Samaranayake Vs. The Republic, (2004) 2SLR 209, Jayasuriya J*, made the following observation;

“The dock statement is highly deficient. The incriminating circumstances established against him gave rise to presumptions and inferences which shifted the evidential burden as opposed to the legal burden to explain away the highly incriminating circumstances”.

The appellant did not make any reference to the recovery of the body of the deceased in his dock statement. Therefore, it is observed that the appellant has failed to explain the highly incriminating circumstances emanating from the recovery of the body of the deceased, which could be attributed to his knowledge.

In the case of *Ariyasena and others Vs, the Attorney General (2004) 2SLR 360*, the Court held that;

“The prosecution case rested on two main pillars – the evidence relating to the identity of the accused and the police evidence relating to the recovery of G/66 notes from the accused. -----in this case the accused were facing serious charges and in the circumstances if they had any innocuous explanation about the manner in which they acquired their knowledge or came to possess those notes one would expect them to give those explanations to exculpate themselves”.

In the said case, the Court considered three ways in which the accused persons could have acquire their knowledge about the places where the objects were found. One of the ways was the accused himself concealing the place where the object was found.

The trial judge was mindful that the evidence against the accused was circumstantial and was cautious when evaluating such evidence to determine the guilt of the accused. Thus, the trial judge’s approach in dealing with circumstantial evidence is not erroneous.

In the case of *M.M.C. Bandara Deegahawathura Vs. Hon. Attorney General C.A. 61/2001*, the Court held that,

“if the prosecution seeks to prove a case purely on circumstantial evidence, the prosecution must exclude the possibility that the proved facts are consistent with the innocence of the accused. If an explanation which is consistent with the innocence of the accused can be seen from

the prosecution case itself then the accused need not offer any explanation because in such an event the prosecution has not proved its case beyond reasonable doubt”.

When evaluating the evidence of recovery of the body, the trial judge has drawn attention to the case of *Ariyasinghe and others Vs. The Attorney General* (Supra), where the Court expanded the scope of inference that could be drawn on such recovery, beyond the knowledge and whereabouts of the object discovered. The intention of the Court was to inquire into the possibilities in which the accused could have acquired such knowledge about the fact where such object was recovered.

One hour after the arrest, the appellant made a statement to the police and disclosed the whereabouts of the body of the deceased. Few hours later on the same day, the appellant directed the investigating officer to the place where the body was recovered. In the circumstances, it is well founded to anticipate an explanation from the appellant as to how he gained such knowledge of the fact discovered. Therefore, the absence of any explanation is consistent with the guilt of the accused and inconsistent with any other reasonable hypothesis of his innocence.

In the case of *Ajith Samaranayake Vs. The Republic (supra)* the following passage was cited with approval;

"but it would be going too far to say that it is never safe to trust circumstantial evidence in the entire absence of direct, for there are many crimes which are committed under circumstances which preclude the possibility of direct evidence being given, but which yet allow of a perfectly safe inference being drawn from surrounding circumstances. The risk of perjuring is minimized, since circumstantial evidence, unlike direct evidence, does not depend on the veracity of witnesses. It is less capable of fabrication."

E. R. S. R. Coomaraswamy (The Law of Evidence, Vol. I, pg. 18)

Consideration of circumstantial evidence has been vividly described by ***Pollock C.B. in R v Exall cited with approval in King v Gunaratne 47 NLR 145,*** in the following words:

"It has been said that circumstantial evidence is to be considered as a chain, and each piece as a link in the chain, but that is not so, for then of any one link breaks, the chain would fall. It is more like the case of a rope comprised of several chords. One strand of the rope might be insufficient to sustain the weight, but three strands together may be quite of sufficient strength."

The appellant is no stranger to the events which took place on the 24/07/2004. The fact that the Appellant was acting in a leading role to the transactions between the parties on that fateful date, should not be compartmentalized or treated in isolation. The evidence must be considered as a whole.

In the circumstances, we are of the view that the strands of the rope are of sufficient strength to uphold the guilt of the accused and well founded, which leads us to the irresistible conclusion that the Appellant is guilty of the offence as charged.

Therefore, we are not inclined to accept the submissions of the counsel for the Appellant in relation to the 2nd and 3rd grounds of appeal.

Accordingly, the conviction entered against the Appellant on 15/10/2015, and the sentence imposed on him upon the said conviction is hereby affirmed.

The appeal of the Appellant is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

S.Thurairaja PC, J

I agree.

JUDGE OF THE COURT OF APPEAL