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

Bulathsinhalage Chaminda.

Court of Appeal
Case No. CA 12/2017

Accused

Vs.

And Now Between

Bulathsinhalage Chaminda.

Accused-Appellant

High Court of Anuradhapura.
Case No. HCC 156/ 2011.

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 : Harishka Samaranayake Attorney at Law for the Appellant.

Madhawa Tennakoon SSC for the Respondent.

Written Submissions : Accused Appellant- 22nd September 2017.

Complainant Respondent-11th December 2017.

Argument on : 1st November 2018.

Judgment on : 7th November 2018.

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JUDGMENT

S. Thurairaja, PC. J

Honourable Attorney General had preferred an indictment against the Accused-Appellant, Kaluarachchige Kulasiri (hereinafter sometimes called and referred to as the Appellant) for committing the murder of Punchiralalage Kusumawathie, which is punishable under Section 296 of the Penal Code. After the trial the Apppellant was found guilty and sentenced to death.

Being aggrieved with the said conviction and the sentence the Appellant preferred this appeal to the Court of Appeal and submitted following grounds of appeal.

1) Learned Trial Judge had failed to analyse the evidence before himself.
2) Injuries do not suggest manner in which PW3 explain how the incident had taken place.
3) No evidence to connect digging hoe to the murder weapon.
4) Wrong application Ellenborough Principle.
5) Failure to consider calling PW1 and document listed under item no 5.
6) The learned judge misapplied the law and burden of proof.

The Senior State Counsel had filed written submissions on behalf of the Attorney General, regrettably, has merely narrated the facts revealed at the trial and not specifically addressed any of the grounds of appeal, submitted by the Appellant.

When the appeal was taken up Counsel for the Appellant addressed and confined his argument to one ground of appeal only, namely the Government Analyst Report which was mentioned as a production on the indictment was not produced. He moves to Court to make a presumption under Section 114 (f) of the Evidence Ordinance.

The prosecution has led the evidence of Aponsu Perera Kankanamalage Siril Basil, Adhikari Pathiranage Seneviratne, Appuhamige Ariyaratne, Judicial Medical Officer Ajith Samantha Jayasena, Police Sergent Meril Gnanasiri.

It will be appropriate for us to consider the facts of the case.

According to the prosecution witnesses, on 31st March 2011 the eye-witness who was the neighbour, was working at his paddy field, heard a cry of a woman saying, "don't hit, don't hit..". When he came out, he saw the deceased was running with cries. The Appellant was chasing her with a mamoty in his hand. The deceased got entangled her feet on an edge of the paddy field and fell. There the Appellant had assaulted five blows on her with the mamoty. The deceased had pleaded not to hit. Children of them, who came running were hung on to the Appellant. After the assault the Appellant sat on a higher elevation. Somasiri ,the brother of the Appellant and few others tried to approach the Appellant, he had a knife (Cathy- දෑකැත්ත) and kept the same against his neck and threatened, that he will cut his neck. Being scared, his brother and the others, withdrew from the place. Ariyaratne, who was attached to the Civil Defence Force (Gramarakshaka) heard the cry, rushed to the place. He immediately called to the Police Station and Police Officers came there within 15 minutes. The Appellant was arrested promptly and the productions were recovered. After the non-summary inquiry, he was committed to the High Court. The honourable Attorney General had preferred an indictment for murder.

The Appellant when the defence called at the High Court opted to make a statement from the dock and not called witnesses on his behalf.

Even though the Learned Counsel for the Appellant confined himself to a single ground of appeal, we thought, to be appropriate to consider the grounds of appeal mentioned in the written submission.

The 1st ground of appeal is that, the Learned Trial Judge had failed to analyse the evidence before him. Judgment consists of 19 pages. Initially narrated the evidence of the prosecution witnesses and thereafter analysed individually and collectively. Further he had analysed the dock statement with the evidence and evaluated the evidence of each and every witnesses and came to his own conclusion.

The 2nd and 3rd grounds of appeal namely Injuries do not suggest manner in which PW3 explain how the incident had taken place (sic) and No evidence to connect digging hoe to the murder weapon, can be taken together. The eye-witness who was the neighbour claims that he knew that the Appellant and the deceased for more than three months since they were living together with children. He presumed that they are husband and wife but he did not know whether they are married or not. But he had seen both of them working in the paddy field. The eye-witness is not a relative or an interested party to the deceased nor Appellant. He had seen the Appellant was attacking the deceased with the blunt side of the mamoty (not the cutting edge but where the handle connects with the blade). The Judicial Medical Officer (JMO), who had conducted the post mortem, scientifically analysed and informed Court that the deceased was attacked with a blunt force. Because he had not seen any cut injury. When the mamoty was shown, he said it is possible with the blunt edge of that weapon. That mamoty is capable of causing those injuries. The evidence of the eye-witness is amply corroborated by an expert witness namely the

Judicial Medical Officer. Under these circumstances there is no necessity for the Trial Judge to look for further corroboration.

The Counsel for the Appellant submits that there is no fracture of skull. It appears to be incorrect because the Judicial Medical Officer had clearly described the injuries, which includes depressed fractures; membranes are torn corresponding to the depressed fracture to the skull and subarachnoid haemorrhage present over the right cerebral hemisphere. Further injuries were found on the head.

Considering the evidence of the eye-witness, injuries he described were corroborated with the Judicial Medical Officer and the other witnesses. Accordingly, I find that this ground of appeal fails on its own merits.

The 5th ground of appeal is that, Failure to consider calling PW1 and document listed under item no 5.

The Counsel for the Appellant submits that the prosecution failed to call the 1st witness. We perused the proceedings and find on 6th March 2014 the Appellant had agreed to admit the fact that the 1st and 2nd witnesses had identified the body. This fact is not challenged and admitted under Section 420 of the Code of Criminal Procedure Act. When the matter is agreed under the relevant section, it is not necessary the State to call witness. Therefore this ground of appeal fails on its own merits.

It appears that a Government Analyst Report is mentioned on the back of the indictment but it was not submitted at the trial. Therefore, the Counsel for the Appellant submits to Court to make a presumption against the prosecution, under Section 114 (f) of the Evidence Ordinance. It will be useful to re-produce the relevant Section 114 (f) for easy reference.

"114. the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.

The Court may presume-

(f) that evidence which could be and is not produced would if produced, be unfavourable to the persons who ***withholds*** *it, "*

(emphasis added)

Considering the submissions of the Counsel the operative clause in the above section which is relevant to this case is "who withholds it". Will the honourable Attorney General mentioning a name of a witness or a document on the back of the indictment and not calling the said witness or not producing the document be treated as "Withholding"?

In **Attorney General V. Devunderage Nlhal** [2011 - Volume 1 ,Page No – 409] R.K.S. Suresh Chandra J ,

"On the question whether a prosecutor is obliged to call all the witnesses on the back of the indictment or at least to tender those not called for cross-examination, that court decided to follow the principle enunciated in ***King v. Seneviratne (38 NLR 221)*** *and summed up the decision as follows: "It must, therefore, be regarded as well-established now, that a prosecutor is not bound to call all the witnesses on the back of the indictment, or to render them for cross-examination. That is a matter in his discretion, but in exceptional circumstances, a Judge might interfere to ask him to call a witness, or to call a witness as a witness of the court. It must, however, be said to the credit of*

prosecuting counsel today, that if they err at all in this matter, they err on the side of fairness."

The above principle was approved and adopted by the Full Bench of the Supreme Court in ***Ajith Fernando and others v. Attorney General – [(2004) 1 Sri L.R. 288]***.

As **G.P.A.Silva, S.P.J**. observed in **Walimunige John v The State** (76 NLR 488 at 496) that,

"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution, and the failure to call such witness constitutes a vital missing link in the prosecution case, and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness' evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114(f) of the Evidence Ordinance."

Now the law is well settled in this issue. Mentioning names of a person or a document on the back of the indictment, does not mean that the prosecution is compelled to call or produce the same. It is the prerogative of the prosecuting officer to call the witnesses of his choice. The Learned Trial Judge will evaluate the evidence before him and come to a conclusion. The Learned Trial judge or even this Court sit in appeal will not make any presumption against the prosecution under Section 114(f) of the Evidence Ordinance. Therefore this ground of appeal fails on its own merits.

The 4th and 6th grounds of appeal are that, wrong application Elenborough Principle and the learned judge misapplied the law and burden of proof.

The Counsel submits that the Elenborough dictum was wrongly applied and the burden of proof was shifted. We carefully considered the facts of the case and the defence submitted by the Appellant. The evidence before the Court was consistent and corroborated by independent official witnesses on salient factors. Considering the prosecution evidence alone, it is fair for the Learned Trial Judge to conclude that there is cogent evidence against the Appellant. Hence it is reasonable for the Learned Trial Judge to expect an explanation from the Appellant.

Learned Trial Judge applied the dictum of Lord Elenborough in **Rex v. Cochrane, Garney's Reports, page 479**. Elenborough dictum states:

> *" 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 refuses to do so where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances 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".*

This dictum was applied in several cases including The King Vs. L. Seeder de Silva (41 NLR page 337) , The King Vs. Geekiyanage John Silva (46 NLR 73) , Queen Vs. Seetin (68 NLR 316), Republic Vs. Illangathilaka (1984 2 SLR page 38), ChadradasaVs. Queen (72 NLR page 160).

This dictum could be applied in cases where there is a strong prima facie case made out against the Accused and if he refrains from explaining suspicious circumstances attach to him when it is in his own power to offer evidence. In such a situation an adverse inference can be drawn against the accused.

When the defence called the Appellant made a brief dock statement and stated that there is no displeasure between him and Kusumawathie. Therefore, he had no reason to kill Kusumawathie. Therefore (sic) he is innocent and he be discharged.

The Learned Trial Judge had sufficiently considered the dock statement in his judgment. I do not see any reason to state the decision of the High Court Judge is incorrect. Therefore, this ground of appeal also fails on its own merits.

The Appellant had stated that he had no motive to kill the deceased. Section 8 (1) of the Evidence Ordinance deals with the motive and the relevant section is reproduced for easy reference.

> *"any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact".*

It is a well settled law that the prosecution need not prove motive. But if it is available, it will further strengthen the case for the prosecution.

In **Sumanasiri V. Attorney-General** [1999 - Volume 1, Page No - 309] Jayasuriya J. held that,

> *"There is no burden on the prosecution to prove motive as a matter of law. As a matter of fact when the evidence of eyewitnesses is clear and easily intelligible the necessity to prove motive does not arise."*

"The prosecutor and the prosecution witnesses have no opportunity of peering into the mind of the accused and therefore are not in a position to give affirmative evidence in regard to motive. Therefore, the law does not require the prosecution to establish motive.

The principle was laid down that as a matter of law the prosecution is not bound to assign or prove a motive as to why a criminal act was done. But as a matter of fact, however, where the facts are not clear the absence of an intelligible motive may have the effect of creating a reasonable doubt in favour of the accused. But if the evidence is clear the question of a motive does not arise for consideration".

In **Sumanasena v. Attorney General [1999 SLLR (3) 137]** it was held that,

"Though the prosecution is not required to establish motive once a cogent and intelligible motive has been established that fact considerably advances and strengthens the prosecution case.."

In the present case the act of the Appellant, assaulting a woman with a mamoty for more than five times and seated next to her and not allowing anybody to approach them speaks a volume. The prosecution by not advancing motive, in my view does not create any doubt in the case for the prosecution.

Considering the judgment, the Learned Trial Judge had sufficiently analysed the dock statement and reached a reasonable conclusion. Therefore, this ground of appeal also fails on its own merits.

As we discussed above, all grounds of appeal failed on its own merits. Therefore, we dismiss the appeal. Accordingly, we affirm the conviction and the sentence.

Appeal Dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL