

**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 of 1979 read with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of
Sri Lanka.

COMPLAINANT

Vs

1. Panambarage Lal Jeewantha
Fernando
2. Colombage Edward Mahinda
Fernando

ACCUSED

Case No. CA 258-259/2017

HC (Negombo) Case No. HC 441/09 AND NOW BETWEEN

Panambarage Lal Jeewantha Fernando
1ST ACCUSED – APPELLANT

Colombage Edward Mahinda Fernando
2ND ACCUSED – APPELLANT

Vs

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

RESPONDENT

BEFORE

: Deepali Wijesundera J.

: Achala Wengappuli J.

COUNSEL

: K. Kugarajah for the 1st Accused -
Appellant

Nalin Ladduwahetty P.C. with

H. Faariz and Lalani Silva for the

2nd Accused – Appellant

Lakmali Karunanayake S.S.C.

for the Respondent

ARGUED ON

: 12th November, 2018

DECIDED ON

: 23rd November, 2018

Deepali Wijesundera J.

The appellants were indicted in the High Court of Negombo for murder under section 296 read with section 32 of the Penal Code. After the conclusion of the trial both appellants were found guilty and was sentenced to death. This appeal is from the said conviction and sentence.

This is a conviction based on circumstantial evidence. A recovery was done under section 27 (1) of the Evidence Ordinance subsequent to statements made by the appellants. The second appellant while giving evidence from the dock has stated that the police came to his house in the night and took the items marked as P7 and P8 in the High Court from his house. His evidence has gone unchallenged. The learned senior state counsel conceded that the case against the second appellant was not proved beyond reasonable doubt. Therefore the second appellant has been convicted without evidence and we are of the view that he should have been acquitted by the learned High Court Judge.

According to the prosecution evidence the second accused appellant is alleged to have an illicit love affair with the deceased's wife. The first appellant's sister is married to the second appellant. According to prosecution witness number two Kalubowila who was employed by the deceased in his garage, deceased was last seen alive on 15/03/2005 and he had received a phone call from the second appellant's wife and left to meet her at the grounds, he had not returned to the garage that night. The next morning he has found the body of the deceased in the grounds.

The medical evidence reveals 25 injuries out of which 7 are cut injuries on the head. The Judicial Medical Officer while testifying in the

High Court had said it is difficult to say whether one or more weapons have been used to cause the injuries. A knife was recovered after the statement of the first appellant under section 27 (1) of the Evidence Ordinance.

The first appellant had made a dock statement denying his involvement in the incident. After the second appellant made his dock statement the first appellant made another dock statement admitting that he committed the offence.

The argument of the counsel for the first appellant was that the evidence of the prosecution was not sufficient to convict the first appellant for the said murder and that the prosecution has failed to prove the charge beyond a reasonable doubt. The learned counsel for the first appellant argued that he has been convicted on his own dock statement which was made consequent to his first dock statement denying the crime. Judgment delivered by this court in CA 11/2015 was cited by the counsel for the first appellant where Lalith Jayasuriya J had stated that the accused was convicted on his own evidence and that such a conviction cannot stand.

In the instant case the first appellant was convicted after he made a second dock statement in which he had said "මට බයයි. මගේ අතීන් තමයි මෙම අපරාධය සිද්ධ වුනේ" an accused is allowed to make a dock statement where he has the liberty to say anything without being cross examined but nowhere does it say an accused can make further dock statements which are contrary to the earlier dock statement.

In **King vs H.R.S. Fernando 48 NLR 249** Barden of proof has been discussed and it was held;

"where a prima facie case is made out by the prosecution and the accused by his defence offers an explanation, the Jury should be directed that the burden of proof that the offence charged has been committed is still on the prosecution, and that if, upon a review of the evidence on both sides, they are in doubt, they ought to acquit. It is a misdirection to tell them that because the evidence for the prosecution established a prima facie case, the burden of proof is shifted to the accused."

The onus of proving the guilt of an accused rests solely on the prosecution and an accused can not be convicted on his own statement given as evidence.

The deceased was last seen alive by prosecution witness number two and he has left after he received a phone call from the first appellant's sister and the second appellant's wife to meet her with whom he was alleged to have been having an illicit love affair. The prosecution failed to establish this evidence.

The knife recovered after recording a statement of the first appellant under section 27 (1) of the Evidence Ordinance was not identified by the witness and the learned High Court Judge has been misdirected when she said the evidence established the fact that the weapon was identified by the witness. The learned High Court Judge has failed to evaluate the evidence of the prosecution witness in the correct perspective thereby has erred in law.

The learned High Court Judge has also failed to consider the law relating to a case entirely based on circumstantial evidence which is that the circumstances leads to no other inferences than that of guilt of the accused.

For the afore stated reasons we decide that the conviction and sentence dated 25/09/2017 can not stand. We set aside the judgment dated 25/09/2017 and acquit the first and second appellants.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Achala Wengappuli J.

I agree.

JUDGE OF THE COURT OF APPEAL