IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal in terms of Section 331of the Code of Criminal Procedure Act No.15/1979 as amended.

C.A.No.257-258/2015

H.C. Negombo No.405/2003

01. Sinha Mathan Sathyanathan
(a.k.a 'Shakthi)

02. Payagala Sunil Perera

Accused-Appellants

Vs.

Hon. Attorney General

Attorney General's Department,

Colombo 12.

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI J.

COUNSEL : Nayantha Wijesundara for the Accused-Appellants.

Parinda Ranasinghe(Jnr.) A.S.G.,(P.C.) for the respondent

ARGUED ON : 12th November 2018

DECIDED ON : 15th February, 2019

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ACHALA WENGAPPULI J.

The 1st Accused-Appellant and 3rd Accused-Appellant (hereinafter referred to as the 1st Appellant and 2nd Appellant respectively) were indicted with the 2nd Accused and 4th Accused before the High Court of Negombo by the Hon. Attorney General for committing murder of *Kurukularachchige Sumith Nanayakkara* on or about 14th September 1990 and committing robbery of a three-wheeler from the said deceased.

In the same indictment, the 2nd Appellant was also charged under an alternative count of retention of stolen property, an offence punishable under Section 394 of the Penal Code.

At the time of the trial, the 4th Accused was dead.

The two Appellants and the 2nd Accused opted for a trial without a jury. At its conclusion the 2nd Accused was acquitted by the trial Court. The two Appellants were convicted for murder as well as for the robbery of a three-wheeler. The 2nd Appellant was also found guilty to the alternative count as well. They were imposed death penalty for murder of the deceased and on account of the robbery, each of the Appellants were sentenced to a 12-year term if imprisonment. The 2nd Appellant was imposed another 2-year term of imprisonment on account of the alternative count.

Being aggrieved by the said conviction and sentence, the 1st and 2nd Appellants have sought to challenge their validity on following grounds of appeal;

a. two lay witnesses who implicated the Appellants have made statements to Police under duress and therefore their evidence is tainted,
b. items allegedly recovered under Section 27 of the Evidence Ordinance are not linked to the crime,
c. the identity of the dead body and his time of death was not proved by the prosecution,
d. last person who saw the deceased alive was not called to testify.

Since these four grounds of appeal concerns determination of facts by the trial Court, for proper appreciation of them, it is necessary to

consider the evidence presented by the prosecution before the trial Court *albeit* briefly.

On the evening of 14th September 1990, at about 8.00 p.m. the witness *Murthi* and his wife *Sivapakyam* were at home with their children. Their house was situated close to *Hekitta* canal at *Wattala* and there was also shrub jungle in the vicinity. There were no other houses in the surrounding area. However, across the canal, a tile factory was located.

Murthi was sorting some leafy vegetable for his wife, when a stranger who appeared to walk on his knees came up to his door and fell down. He had bleeding injuries on his body and pleaded with the witness " මාව බේරා ගන්න, මගේ ත්‍රීවිල් එක උදුරන් ගියා." The pair of trousers and the belt worn by the stranger caught attention of the witness. Soon after the two Appellants and the 4th Accused came in search of the stranger. Having caught him, they dragged him away. The 2nd Appellant, who had a pointed knife with him, had threatened the witness if this incident is divulged, same fate would befall on him.

Following morning the 2nd Appellant was seen with a cow around the area where the stranger was dragged to, in the previous evening.

The witness's wife *Sivapakyam* supports her husband's claim and added that the hands of the stranger were tied when she saw him first that evening. She too noted the trouser and the belt worn by the stranger.

Both these witnesses claim that the 2nd Appellant kept reminding of his threat and due to fear of reprisals, they had no courage to inform the authorities of what they saw that evening.

After about four or five days since that incident, when *Murthi* returned from work in the evening, he saw a police party near the culvert of the *Hekitta* canal. They have recovered a dead body. It was bloated up and had some parts eaten away by animals. But both *Murthi* and his wife could identify the deceased as the stranger who fell down and was later dragged away by the Appellants that evening, from the trouser and the belt the body had at the time of its recovery from the water. However, they did not volunteer to divulge any information to police at that time.

Since there was no information as to the identity of the body or to the complicity of any suspects who were involved with the death of the deceased, the local police treated this investigation as "C3" as they usually do in such instances.

IP *Norton Silva* was attached to *Peliyagoda* Police during September 1990 and was instructed by his superiors to interview a local politician who had some information about a missing three-wheeler driver who presumably had been murdered. Having verified with the politician, IP *Silva* took charge of the investigation, concerning the recovery of the unidentified dead body from *Wattala* Police who treated it as "C3" since no information on suspects, on 07.10.1990.

He visited the place where the dead body was recovered and he had questioned *Murthi* and his wife. He thought the couple, as the only family to live in the vicinity, might know some information. With reluctance, *Murthi* told him what he saw few days ago but did not want to make a formal statement. Two days later, IP *Silva* persuaded the couple to make statements after assuring them of protection.

Since recording of the statements made by *Murhti* and his wife, IP *Silva* arrested the 1st and 2ndAppellants on 11.10.1990. He then reported facts to the Magistrate's Court of *Wattala* and moved for an inquest. After questioning the two Appellants and recording their statements, IP *Silva* recovered a three-wheeler frame (සැකිල්ල) that had been totally submerged in the waters of *Hekitta* canal, near a "කිරි කොටුව". The 1st Appellant is the person who provided information which led to the recovery of the frame of a three- wheeler. He then pointed out a place in the canal. The canal was covered with thick layer of water hyacinth plants. IP *Silva* was emphatic that without the 1st Appellant pointing out the place, there was no possibility of ever recovering the three-wheeler frame since it was with great difficulty, the submerged frame was recovered. The witness had to employ the members of public who volunteered to get in to water in order to retrieve it.

There was no engine, windscreen, back seat or electrical parts found in the recovered frame of the three-wheeler. There was only one wheel that was found attached to the frame.

The 2nd Appellant also provided information which led to the discovery of a windscreen of a three-wheeler that had been kept under several coconut leaves in a property belonged to an Indian national near the bridge over *Hekitta* canal. In addition, the 2nd Appellant pointed out the place where an engine of a three-wheeler was kept under a heap of empty poly bags. IP *Silva* recovered two wheels of a three-wheeler from a pit, upon information and pointing the place by the 2nd Appellant. These recoveries were made within the distance of about 200 yards from the place where the dead body was found and less than 50 yards to his house.

The several parts of the statement made by the 1st and 2nd Appellants which led to the recovery of these items were tendered in evidence.

Witness *Ganeshan* has bought a tool kit from the 2nd Appellant for Rs. 100.00 which was later handed over to Police when they demanded it.

During investigations, IP *Silva* recorded statements from the witnesses in order to verify the identity of the dead body. He had obtained the trouser and the belt that had been retrieved from the dead body during post mortem examination and kept in *Wattala* Police station as productions of the case and witnesses *Murthi,* his wife, *Dhammika Jayasuriya, Upul Kumara Cooray* and *Vijitha Nanayakkara* were shown these items. The witness had thereafter recorded their statements confirming identification of those items.

During the last stages of the proceedings before the trial Court, the prosecution presented witnesses who identified these items of production and the basis of its identification.

Vijitha Nanayakkara stated in his evidence that he identified the trouser and belt that had been retrieved from the dead body as the items he himself gave to the deceased. There was no cross examination on his evidence.

Witness *Upul Kumara Cooray* is the registered owner of the three-wheeler driven by the deceased who used to pick passengers from *Pettah.* Both these witnesses state that the deceased went missing with the three-wheeler and they unsuccessfully searched for some information. After a notice was inserted in the newspapers seeking information; they received an anonymous letter, informing them of the fate of the deceased. *Cooray*

claims that he identified his three-wheeler when he saw its frame at the Magistrate's Court of *Wattala.*

During initial examination of the body, the medical officer who performed the post mortem examination, has observed that the hands of the deceased were tied behind with a nylon rope and wire at the back. His legs were also found tied. His banion was found tied around his neck. The post mortem examination of the body of the deceased revealed that his death was due to a stab injury measuring 1 ½ X ¾ inches to his neck which resulted in a cut injury to trachea, causing death. there were several other injuries on the body that were due to animal bites.

The complaint by the Appellants that the evidence of *Murthi* and his wife *Sivapakiyam* have implicated them belatedly under duress at the instance of IP *Silva* should be examined by this Court, in order to satisfy itself whether their evidence is truthful and reliable account of the incident when evaluated using the test of spontaneity and therefore proper for a Court to act upon it. This is important since the Appellant's contention is that they were implicated by the witnesses under duress.

It was clearly emphasised by this Court in ***Bandara v The State*** (2001) 2 Sri L.R. 63 that *"... if there is a valid reason or explanation for the delay and if the trial judge is satisfied with the reasons or explanation given, no trial Judge should apply the test of spontaneity and Contemporaneity and reject the testimony of a witness in such circumstances."*

The witnesses claimed that they saw the deceased being dragged away by the Appellants on 14.09.1990. They initially disclosed this to IP *Silva* on 07.10.1990 and made statements only on 09.10.1990. There is a gap

of 25 days since they saw the incident. The prosecution offered an explanation for the considerable delay. According to them, the delay was due to the threats issued by the 2nd Appellant on the witnesses. Understandably, they were reluctant to volunteer information to the authorities due to these threats.

Learned Additional Solicitor General in his submissions in reply highlighted the fact that the witnesses in fact had to relocate themselves due to the continuing threats on them after making statements to Police revealing what they saw that evening.

This explanation should be considered for its validity in the light of the evidence presented before the trial Court seeking to explain their conduct.

It is seen from the evidence of both these witnesses that they entertained legitimate fear over their safety upon the 2nd Appellant's threat they also would face the same fate as the stranger. The 2nd Appellant again threatened *Murhti* when he assisted the police to retrieve the body from the canal telling him "අපි කරා කියල කියන්න එපා". There is clear evidence during cross examination that at one point, after *Murthi* lodged a complaint with *Wattala* Police for threatening him with death, the Appellants have apologised for their actions and promised to refrain from threatening the witnesses; for the fear of their bail being cancelled by Court. Up to that point of time, the 2nd Appellant, through his brothers regularly reminded the witness of the consequences of his action. None of these assertions by the witness was challenged by the Appellants.

These two witnesses were known to Appellants prior to the incident. They live in the same neighbourhood. The isolated location of the witness's house, their young family, and being relative "outsiders" to the majority of their neighbours who speaks a different language would undoubtedly have made them vulnerable to take such a threat seriously.

The trial Court has accepted the explanation offered by the witnesses for the delay in making statement and we are in agreement with the conclusion reached by the trial Court in this regard.

In their submissions, the Appellants contended that in addition to their belatedness, the witnesses' evidence is tainted due to the fact that their names were implicated by the witnesses under duress and at the behest of IP *Silva.*

The Appellants relied on the evidence that *Murthi* was kept in police custody to impress upon this Court that they kept him in detention, until he implicated the Appellants under duress.

Throughout the evidence of these two witnesses, they claim that they did not volunteer information to police due to threats, but what they told police is the truthful account of what happened that evening. The trial Court, in evaluating credibility of the witnesses considered this aspect and decided to accept that evidence as truthful and reliable account of the incident they speak of on the basis that there was not a single inconsistency marked off their evidence. This is significant when one considered the time gap that had elapsed between their statement to police and their evidence before the trial Court. *Murthi* and his wife made statement to Police in October 1990 whereas they gave evidence before the

High Court for the 2nd time in March 2011, after 20 years since what they saw. If they could repeat their evidence without a single inconsistency pointed out after a lengthy cross examination, it is a clear indication that what they saw that evening is clearly etched in their minds and the long gap in time had certainly not faded its details.

In view of these considerations, the first ground of the Appellants necessarily fails as its devoid of any merit.

The second ground of appeal, that the items recovered under Section 27 of the Evidence Ordinance are not linked to the crime.

It was contended by the Appellants that the recovered items under Section 27 have not been connected to the three-wheeler allegedly robbed from the deceased. If each of those items considered individually there is some truth in the said contention. However, in imputing knowledge of the place to each Appellant who provided information that led to the eventual recovery of them could not be overly simplified in that way. In determining the connection, the Court must consider the evidence presented before it in its totality.

In ***Ariyasinghe and Others v Attorney General*** (2004) 2 Sri L.R. 357, the Supreme Court made the following observation in relation to imputation of knowledge on the accused upon recoveries made under Section 27;

> *"... there are three ways in which the accused persons could have acquired their knowledge ... The following are the three ways.*

1. *The accused himself concealed those G/66 notes found in the place where they were found,*
2. *The accused saw another person concealing those notes in that place has told the accused about it,*
3. *A person who has seen another person concealing those notes in that place has told the accused about it."*

In the appeal before their Lordships, since there was no explanation offered by the Appellants in respect of 2nd or 3rd propositions as reproduced above, it was accepted that "... *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.*". Their Lordships have held that in those circumstances "... *facts of possession and the intention to possess were both established.*" A similar approach was adopted by the apex Court in ***Sheik v Attorney General*** (2004) 2 Sri L.R. 357.

The evidence of *Murhti* and his wife have attributed a statement to the deceased. The deceased, in seeking their help, said that his three-wheeler had been robbed from him. After the arrest of the 1st Appellant, a frame of a three-wheeler that had been submerged in water was retrieved. When considering the evidence that a three-wheeler had been robbed at a location in close vicinity of the recovery site and the 1st Appellant being a resident in the area, it is reasonable to infer that this could be the three-wheeler that had been robbed from the deceased. If the 1st Appellant had

the frame of the three-wheeler by some other means, certainly he could have sold it as scrap iron for some consideration, rather than keeping it under water. There is no apparent reason for it to be kept under water, except perhaps to conceal its existence. In the absence of any acceptable explanation by the 1st Appellant, it is reasonable to draw the inference that it was him who sunk the three-wheeler frame in the place from where it was finally retrieved during investigations. In applying the principle that had been enunciated in ***Ariyasinghe and Others v Attorney General*** (supra) drawing of such an inference is justified

Supporting this inference are the recoveries made upon the information provided by the 2nd Appellant. He had knowledge of a windscreen, engine, two wheels of a three-wheeler. He also has sold a tool kit to another person.

It was the evidence of IP *Silva* that when he recovered the frame, it had only one wheel with it. He found its windscreen, engine, rear seat, electrical parts had been removed. When this item of circumstantial evidence is considered in the light of the recoveries made upon the information provided by the 2nd Appellant, it is also reasonable to infer that what had been recovered could well be the parts that had been removed from the robbed three-wheeler. The close proximity of the recovery of the items and the frame of the three-wheeler further supports such an inference.

Certainly, it would have been very much better, if there was forensic evidence as to its chassis and engine numbers which could have been verified against the Certificate of Registration of the three-wheeler. It is

said that the Certificate of Registration had been kept at a private bank as security by its owner, who lent the three-wheeler to the deceased. This seemed a plausible explanation in the light of other attendant circumstances. But it must be emphasised that the prosecution only required to establish its case beyond reasonable doubt and not beyond any doubt. When there are other factors that could serve as items of circumstantial evidence that could be utilised to establish identity of some object or a thing, absolute proof of its identity need not be necessarily presented before a trial Court, if a reasonable inference could be drawn in that regard in the absence of such absolute proof.

In view of the consideration contained in the preceding paragraphs, it is our view that there were sufficient items of circumstantial evidence that are available before the trial Court to determine that the items that were recovered upon the information provided by the Appellants are from the three-wheeler that had been robbed from the deceased. Therefore, we hold that the second ground of appeal also fails.

Thirdly the Appellants contended that the identity of the dead body and his time of death was not proved by the prosecution.

There was clear evidence that the deceased was alive at about 8.00 p.m. on 14.09.1990. The trouser and the belt were identified by *Murthi* and his wife at the time of its recovery after 4 to 5 days from the *Hekitta* canal. These two items were then kept at *Wattala* Police Station and after IP *Silva* took over investigations, they were shown to *Murthi* and his wife. In addition, they were shown to family members of the deceased. There was also the evidence that the hands and legs of the deceased were tied and

there was a stab injury inflicted resulting in his death. *Murthi* saw the deceased making a futile attempt to escape death from his pursuers. His hands were already tied. When the Appellants have caught up with the deceased, it could well be that they tied his legs as well to prevent him making any further attempts to escape.

With their positive and unchallenged identification of the items worn by the deceased, the prosecution has placed sufficient items of circumstantial and direct evidence to establish the fact that in fact it was the body of the deceased that had been recovered from *Hekitta* canal.

Concerning his time of death, there is clear evidence that it could have occurred four or five days prior to the post mortem examination. The medical opinion is therefore no inconsistent with the claim of the prosecution that the death of the deceased occurred in the evening of 14th September 1990. The prosecution did not place its case on the basis of last seen theory. Instead, it relied on items of circumstantial evidence and an admission made by the 2nd Appellant to *Murthi,* soon after the discovery of the body that "අපි කරා කියල කියන්න එපා ".

Lastly, the Appellants contended that the last person who saw the deceased alive was not called to testify as their fourth ground of appeal. This contention was based on the evidence of IP *Silva* who admitted that one *Dhammika Jayasuriya,* wife of the deceased, was the person from whom the Police verified information regarding the disappearance of the deceased. They also enquired from her as to the persons who were with the deceased before his disappearance. *Dhammika Jayasuriya* was not called

as a witness for the prosecution. Even if she was called she would not have added any further evidence as to the last moments of the deceased. It is clear that *Murthi* and his wife were the last witnesses to see the deceased alive, apart from the Appellants. In these circumstances, whether she was called or not would not have made any difference to the respective cases presented by the prosecution or the Appellants. This ground of appeal also accordingly fails.

We are of the considered opinion that there are sufficient items of circumstantial evidence available before the trial Court to find the Appellants guilty of the offence of murder and robbery of a three- wheeler sharing common murderous intention among them since those items of circumstantial evidence satisfy the drawing of the one and only irresistible and inescapable inference that the Accused committed the crime they were charged with as per ***Samantha v Republic of Sri Lanka*** (2010) 2 Sri L.R. 236

Therefore, in view of the above reasoning, we affirm the conviction and sentence imposed on the Appellants by the trial Court in relation to counts one and two of the indictment. The trial Court convicted the 2nd Appellant on the 3rd count, which is a charge of retention of stolen property. Since the 2nd Appellant was found guilty to the robbery charge, his conviction to the 3rd alternative count to the indictment on retention of stolen property is set aside with the sentence imposed on the said conviction.

Appeals of the 1st and 2nd Appellants are therefore dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL