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

C.A.No.177/2017

H.C. Negombo No HC 142/2010

Warnakulasuriya Roshan Thushara Fernando

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI, J.

COUNSEL : Indica Mallawarachchi with K. Kugaraja for the Accused-Appellant.

Janaka Bandara S.S.C. for the respondent

ARGUED ON : 01st April, 2019

DECIDED ON : 07th June, 2019

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ACHALA WENGAPPULI, J.

The appellant was indicted before the High Court of Negombo for the murder of his wife *Rajapaksha Nadeeka Damayanthi* and also of his 7-year-old daughter *Warnakulasuriya Achala Roshini* on or about 4th April 2009 at *Kochchikade.*

At the conclusion of the trial without a jury, the appellant was convicted on both counts of murder and sentenced to death. Being aggrieved by the said conviction and sentence, the appellant sought to challenge its validity on the following grounds of appeal;

a. the items of circumstantial evidence wholly inadequate to support the conviction,
b. the trial Court erred in failing to apply the principles governing the evaluation of circumstantial evidence,

c. the prosecution failed to exclude the possibility of a 3rd party committing the deaths,
d. when evaluating the defence evidence the trial Court erred in examining its legality and tenability in the light of prosecution case,
e. the trial Court reversed the presumption of innocence when it shifted the burden of proof on the appellant in his defence of denial,
f. the trial Court has relied on inadmissible evidence,
g. the trial Court failed to consider evidence favourable to the appellant.

In view of the scope of these several grounds of appeal, it is necessary to refer to the evidence presented before the trial Court by the parties, *albeit* briefly, for correct appreciation of them in the proper context.

The prosecution case is based entirely on items of circumstantial evidence.

Of the several lay witnesses, whom the prosecution had relied upon in order to prove its case before the trial Court, three of them, namely *Rohana Lal Silva, Dinesh Kumara Fernando* and *Roshan Fonseka* were neighbours of the appellant, while the other witness *Rajapaksage Antony* is his father-in-law. IP *Haroon Doole* and SI *Milton Kumaranayaka* of *Kochchikade* Police have conducted investigations. Consultant Judicial Medical Officers *Channa Perera* and *Ajit Tennakoon* had given evidence in relation to the post mortem examinations they conducted on the bodies of

the deceased. Witness *Peduru Fernando* was also called by the prosecution as a witness in rebuttal.

Lal Silva was woken up from his sleep by his wife at about 4.00. or 5.00 in the morning of 4th April 2009 as she heard a scream of a woman coming from the direction of appellant's house. The witness had then run towards that house. On his way he saw the wife of the deceased running towards him. She then collapsed on the road. Witness saw she was bleeding from her face. He immediately sent for a vehicle to rush her to a hospital. When he was about to lift her to the vehicle, the appellant raised cries that his daughter was cut. Hearing this, the wife of the appellant had run back to the house. At the same time her daughter with a bended head came running out of it. She collapsed at the feet of one *Wimalawathie* who used to care for her. The girl had her neck slashed. When the wife of the appellant went inside the house, there was a sound of some disturbance in the kitchen. Later the witness saw the wife of the appellant lying in a pool of blood in the kitchen.

The appellant was also seen inside the house apparently crying over the incident.

Witness *Roshan* is the immediate neighbour of the appellant who shared a common boundary with him. On the day of the incident, he too was woken up to a screaming of a woman. He looked through his window. There was a sound of a smash of a plate rack which came from the kitchen of the appellant's house. He gauged from the sound of the screaming, the woman was running towards the front of the house. He too came out of his house to have a look as to what was happening. At that

point, he saw the 7-year-old daughter of the appellant collapsing near their gate and died. She was holding her neck.

The witness saw *Lal Silva,* one of his neighbours, there. A crowd of villagers also have gathered in front of the appellant's house by this time. The appellant, who was inside his house, shouted at them not to come into the house.

However, after awhile when the noises subsided *Roshan* went inside the appellant's house with *Lal's* son. He saw the appellant seated on the floor holding his head. He also saw the wife of the appellant lying on the kitchen floor in a pool of blood. The appellant told *Roshan* that two persons who held him at gun point had killed his wife using a "pointed stake for husking coconut" ("පොල් ඇඹ") and his daughter and thereafter fled through the back door.

Dinesh Kumara Fernando too is a neighbour of the appellant who rushed to the appellant's house after hearing the scream of the latter's wife. He saw her fallen on the road. It was *Lal* who directed him to bring his lorry to take the injured woman to hospital. When he returned with the vehicle, he heard the appellant's shout that his child was cut and they [the assailants] had left. At that time the appellant's wife was not there where the witness saw her a few minutes ago.

Then he got off from the vehicle and walked up to the appellant's house. He saw the appellant's daughter fallen in front of the house and her neck had been cut. Since the appellant claimed that his family was attacked by intruders, the witness and the others who have gathered there

had mounted a search in the surrounding area including the rear side of his house, but it yielded no clue as to any intruder's presence.

Witness *Antony* is the appellant's father-in-law. His evidence relates to the activities of the appellant and his wife in the previous evening. His daughter, having spent the day with him, had left in the evening at about 9.00 p.m. with the appellant, who came there to accompany her. The appellant, then requested the witness to keep his hand phone switched on, so that he could contact him if there is an emergency. At about 5.00 a.m. in the following morning, the appellant called him on his phone in order to break the news that his daughter and granddaughter were cut to death by intruders. This was the first time that the appellant had ever contacted the witness over the phone.

Referring to the marriage of his daughter to the appellant, the witness said there were regular problems in their relationship and when the murdered grand-daughter was born, the appellant did not visit the hospital to see her. It was the witness who had to accompany the wife of the appellant and her new born baby to the appellant's house since he showed no interest in taking them home.

Consultant JMO, Dr. *Channa Perera* had performed the post mortem examination on the body of the daughter of the deceased. Of the two injuries seen on her body, there was one 16 cm long deep cut injury on her neck severing her trachea and gullet. It also damaged her carotid vein. This injury could have been inflicted with the manna knife marked P2A and the probability of using the manna knife to inflict the said injury was "very high". After receiving the said injury, the deceased could have walked a

few feet although she was unable to speak due to her tracheal injury. Her death was clearly due to this injury.

He also observed another 14 cm long contused abrasion below the deep cut injury on the neck.

Post mortem examination of the wife of the appellant was performed by Consultant JMO. Dr. *Ajit Tennakoon*. There were 14 injuries on her body. 1st to 6th injuries were located on and around head while 7th to 13th injuries were seen on her torso and legs. She had a 15 cm long cut injury on top of her head with a contused margin. Corresponding to this external injury, internally her skull was fragmented damaging her brain. There were 5 cm and 4 cm long two superficial cut injuries on her face and neck.

Of the injuries noted on her torso, there was 18 cm long curved cut injury on her chest and another 7 cm long cut injury on the shoulder. She had grazed abrasions on her hands and legs. The 12th, 13th and 14th injuries were cut injuries on her hands which are termed by the Consultant JMO as defensive injuries. Her death was due to injuries caused to her head with sharp and blunt weapon. The head injuries suffered by the deceased are sufficient in the ordinary course of nature to cause death. The Consultant JMO is of the opinion that the 1st to 3rd injuries on her head, could have been caused by attacking with the "මහල් ඇල", marked P6 by the prosecution, when she was in an upright position. The cut injuries could have been inflicted with the manna knife marked as P2A.

It was IP *Doole* who conducted investigation into this incident. He received the first information about the incident on 04.04.2009 at 5.10 a.m. The police party led by him arrived at the scene which was located about 2 ½ km from the Station and within half an hour of receiving information. The house in which the two deceased have sustained cut injuries was standing on a ten perch land which had three of its boundaries secured with barbed wire fences. No damage to the barbed wire fence was noted by the witness. The rear boundary was a 6 feet high parapet wall. The surrounding area of the house was kept well lit at that time with the light of two bulbs.

The main entrance to the house was a door secured to its door frame with clamps. The rear door of the kitchen had a bolt and both these doors had no signs of any forcible opening by an intruder. The witness also examined the roof of the house covered with Calicut tiles. His examination of the fence, the parapet wall and the roof indicated that there were no signs of any entry by an outsider.

In the bed room, there was a triple bed which lined up with a single bed and a mosquito net covering both these beds. IP *Doole* observed large blood patch on the bed, blood stains on the net and another blood patch on the floor of the room. The net had no damage and the witness was of the view that fact negates any surprise attack on the victims. There was a blood stained sarong in the same room.

He noted a trail of blood, left by a person with a bleeding injury who may have moved very swiftly away from the room in the direction of the

main door. He also saw blood stained foot prints of a small child also in the same direction.

In the kitchen, between the plate rack and a table, a large blood patch was noted and at its corner a blood stained "පොල් උල", which had been kept against the wall was found.

When he visited the scene, the appellant, who was clad in a pair of trousers, was also there. He had no visible injuries on his person.

IP *Doole* directed his officers to record appellant's statement and thereafter to record statements of others who had taken the two deceased to hospital. After the initial investigations were over, IP *Doole* decided to record another statement from the appellant. This was due to the faint trail of blood he noted starting from the kitchen and ending at the fire wood shed located closer to the kitchen. The appellant was questioned at length at that point of time and was arrested at 4.00 p.m. Thereafter the 2nd statement was recorded from the appellant at 4.35 p.m. and a blood stained manna knife (P2A) which had been kept concealed under set of roofing tiles of the fire wood shed was recovered, upon being pointed out by the appellant. A bottle of "poison" was also recovered from a suitcase which was kept at a different location which claimed to have used on the cow the appellant reared

IP *Doole,* in his evidence said that he made investigations about a man from gas depot with multiple references as ("ගෑස් කඩේ මිනිහා/කොල්ලා/පුතා") during investigations before he arrested the appellant that evening. The person who is referred to as "ගෑස් කඩේ මිනිහා " is one *Ahamed Uvais Ahamed Ismail.* He was married to a Sinhalese woman called

Kariyakarawanage Mary Susan Krishanthi Fernando and was operating a dealership of LP gas distribution from a depot adjoining the Police Station. He had broken his hand about a week prior to this incident in a motor cycle accident and was in bandages when the witness made enquiries about him that afternoon. The witness was emphatic that said *Ahamed Ismail* was incapable of carrying out such an attack due to his injuries to hand following the motor cycle accident.

SI *Kumanayaka's* participation in this investigation is limited to recording of the 2nd statement of the appellant after his arrest, on the instructions of IP *Doole*. The relevant portion of the appellant's statement, which led to the discovery of a manna knife, was tendered by the prosecution marked P12. This witness too confirmed that the appellant had no injuries on his person at the time of making this statement.

When the trial Court ruled that the appellant had a case to answer, he opted to offer evidence under oath.

It is the appellant's position that his wife had assaulted the wife of *Ismail* over an accusation of monetary fraud which had in turn angered her husband. The assault by the appellant's wife led to a criminal prosecution which was subsequently referred to the Mediation Board. There were death threats to his wife and two weeks prior to the incident a complaint was lodged in this regard at the Police Station.

On that night, the appellant was woken up by *Ahamed Ismail* who then took him to the pantry. There was another person with him. The appellant was threatened by pointing a pistol at him and was assaulted "inhumanly" by the two intruders. They also used the "බොල් ටෙ" in

assaulting him. When he shouted out due to these assaults, his wife came to the pantry. She was also assaulted by the other person. When he struggled with his attackers, he was hit with the pistol on his head and due to this he lost consciousness. When he regained his senses, he saw his wife lying in a pool of blood in the kitchen. He then got up and walked out of the house from the front entrance of his house. Although there were people who have gathered at the gate, no one came in due to fear. Again the appellant went inside. At that point of time, his daughter came out calling his wife and was hit once by an assailant in his presence.

At the police, he was arrested and assaulted, forcing him to accept liability to the murder. The police obtained his signature to a 19 page document. Then they took him to his house and returned with a bottle. No recovery of a manna knife was made by the Police.

The prosecution called the father of the appellant, who filed an affidavit in support of the application for bail filed in the trial Court as a rebuttal witness. His evidence is that it was his lawyer who did everything in Court and his affidavit did not contain an averment indicating any 3rd party involvement.

With this factual background in mind, it is appropriate to deal with the several grounds of appeal that had been urged before us at the hearing of the instant appeal and the contention of the learned Counsel for the appellant in support of them.

It was the submissions of the learned Counsel that the trial Court had fallen into error when it evaluated the defence evidence for legality and tenability in the light of prosecution case in violation of the principles

enunciated in the judgments of ***James Silva v Republic of Sri Lanka*** (1980) 2 Sri L.R. 167 and ***Addara Arachchi v The State*** (2002) 2 Sri L.R. 312.

The judgment of the trial Court begins with the factual positions that had not been challenged by the appellant. The fact that only the two deceased, the appellant's infant son and the appellant were in the house at the time of the incident is not disputed. The death of the two deceased were due to the injuries they received and the type of weapons used in the said attack was also not disputed. The trial Court had, thereafter considered the pivotal question the prosecution placed before it being whether it was the appellant who inflicted those injuries to the two deceased. The trial Court, in the same process of analysis also considered the claim of the appellant that whether it was the two intruders who inflicted those injuries and not him.

In ***James Silva v Republic of Sri Lanka*** (supra) the statement of the trial Court that had been frowned upon by their Lordships is *"I had considered the defence of the accused and I hold that it is untenable and false* ***in the light of the evidence led by the prosecution"*** (emphasis original). In view of this approach adopted by the trial Court, their Lordships then stated;

> *"It is a grave error of law for a trial Judge to direct himself that he examines the tenability and truthfulness of the evidence of the defence in the light of the evidence led by the prosecution. Our criminal law postulates a fundamental presumption of legal innocence of every accused till the contrary is proved.*

This is rooted in the concept of inviolability of every individual in our society; now enshrined in our Constitution. There is not even a surface presumption of truth in the charge with which an accused is indicted. Therefore, to examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence.

A satisfactory was to arrive at a verdict of guilt or innocence is to consider all matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalising and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."

In the matter before us, the trial Court had considered the claim of 3rd party involvement of the appellant by applying the test of probability on it. Having considered the evidence as a whole, the trial Court had rejected the appellant's evidence.

Learned Counsel for the appellant mounted another challenge on the validity of the conviction on the basis that the prosecution failed to exclude the possibility of a 3rd party involvement in the incident.

Therefore, it is convenient to deal with this ground of appeal along with the one we have already commenced.

The considerations that had been utilised by the trial Court in its decision to reject the appellant's claim of 3rd party involvement and the items of circumstantial evidence upon which his conviction to the double murder is based upon are clearly inseparably interwoven.

It is clear that the trial Court had first rejected the evidence of the appellant before it ventured to consider the question whether the prosecution had established its case against him. The judgment of course had not dealt with the evaluation process it had undertaken of the evidence of the appellant.

In applying the tests of spontaneity and consistency of his claim of 3rd party involvement, it is seen from the evidence of the appellant during his examination in chief that he did not disclose the alleged involvement of the "ගැස් කඩේ ගැනිගෙ මිනිහා" until the whole incident is over. He claims that he went out of the house during the short interval just before his daughter was attacked. However, although there were people gathered in front of his house, he did not shout that "ගැස් කඩේ ගැනිගෙ මිනිහා" had attacked him and his wife. He did not complain about "ගැස් කඩේ ගැනිගෙ මිනිහා" initially to the police officers who arrived there early morning. Having visited the hospital and learnt that his daughter was killed, he never thought it fit to lodge a formal complaint with the Police implicating "ගැස් කඩේ ගැනිගෙ මිනිහා" but has opted to return home after his wife was transferred to Colombo National Hospital. He did not mention in his evidence that he ever disclosed the identity of the assailants to any of his neighbours.

It is stated by the appellant that he was "inhumanely" assaulted with a pistol on his head and then with the "පොල් උල" by the assailants.

Strangely, the appellant had no injury on his person after this sustained inhumane attack. When challenged during cross examination, the appellant had watered down his claim of "inhumane" attack by stating that he did not suffer any injury after the attack as he was not assaulted with any weapon. His claim of losing consciousness after a pistol attack on head therefore becomes only a figment.

The appellant's version of events clearly seemed improbable one when considered in the light of average human conduct. The appellant's unexplained failure to call out for help, when he regained his senses to see that his wife was fatally attacked by the "ගෑස් කඩේ ගැනිගෙ මිනිහා" and another, is not the conduct of an average person if placed under similar circumstances. The circumstances under which his daughter claims to have suffered a necessarily fatal cut injury on her neck also tainted with improbabilities. The appellant's position is that the assailants have attacked his wife after he lost his consciousness. She was attacked in the kitchen. His daughter was in their bed room and came out in search of her mother. The appellant, although standing right there did not prevent the child going to the assailants and thereby receiving the fatal cut injury.

The appellant mounted no challenge to the evidence of his neighbours as to the conduct attributed to him during the incident. Of course he did implicate the person from the gas depot to his neighbours when they entered the house after the wife of the appellant was found in the kitchen. But the motive attributed to "ගෑස් කඩේ ගැනිගෙ මිනිහා" to kill his wife, even if it is accepted as probable one, has not disclosed to them and

it does not explain the deliberate attack on his daughter, totally an innocent victim who posed no threat to anyone. There was no reason to attack the small girl as the initial attack on the wife had clearly failed. When she attracted attention of others with her scream any assailant would have fled the scene after this failed attempt. The appellant's claim that he was assaulted and was physically overpowered therefore seemed an improbable explanation for his failure to make even a nominal attempt to act in self-defence.

The judgment of ***Ariyasinghe and Others v The Attorney General*** (2004) 2 Sri L.R. 357 provides clear guidance that are applicable to Courts in presuming the existence of a fact, when considered in the light of normal human conduct. *Amaratunga* J states thus;

> *"When section 114 of the Evidence Ordinance is closely examined, a very significant feature, which is highly relevant to the exercise of the discretion available to Court, becomes apparent. In deciding to presume the existence of any facts, the Court can take into account the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Those highlighted words indicate the guiding factor. Those words clearly indicate that the reasonableness and the correctness of the Court's decision to presume the*

existence of any fact would depend on the particular facts of that case. The question of drawing presumption of a fact is a matter to be considered on a case by case basis. The use of words "in their relation to the facts of the case" prevents the Courts from laying down any general guidelines regarding the situation in which a Court may be justified on drawing a presumption under section 114 of the Evidence Ordinance. It is the unenviable task of an appellate Court to examine the validity of the trial Judge's conclusion in the light of particular facts of the case."

The trial Court, in coming to its conclusion that the evidence of the appellant could not be accepted owing to its inherent weaknesses, had applied the principle laid down in the said judgment. This Court, having carefully considered the evidence of the appellant and the reasoning adopted by the trial Court in rejecting it, concurs with the conclusion the trial Court has reached that it should be rejected.

In convicting the appellant on two counts of murder, the trial Court had considered the several items of circumstantial evidence that had been placed before it by the prosecution.

Before this Court considers the question whether the trial Court applied the correct legal principle in coming to the said conclusion, it is relevant to consider the nature of the evidentiary burden that had been

imposed on prosecution in proving a charge upon items of circumstantial evidence.

In ***Rajapakse and Others v Attorney General*** (2010) 2 Sri L.R. 113, it is stated by the Supreme Court that:

> *"Circumstantial evidence is evidence of facts where the principal or the disputed fact, or factum probandum could be inferred".*

Archbold Criminal Pleadings, Evidence and Practice (2015 Ed at p.1469) sought to define the instances where such inference or presumptions that could be drawn upon proof of a particular fact, on following terms;

> *"A presumption arises where from the proof of some fact the existence of another fact may be naturally be inferred without further proof from the mere probability of its having occurred. The fact thus inferred to have occurred is said to be presumed, i.e. is taken for granted until the contrary is proved by the opposite party ... and is presumed the more readily, in proportion to the difficulty of proving the fact by positive evidence, and to the facility of disproving it or proving facts inconsistent with it, if it never really occurred."*

The judgment of ***Ukkuwa and Others v The Attorney General*** (2004) 2 Sri L.R. 263, the apex Court adopted the below quoted pronouncement of the English judgment of ***R v Exall*** ;

> *" 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 any one link breaks, the chain would fall. It is more like the case of rope comprised of several chords. One strand of rope might be insufficient to sustain the weight, but three strands together may be quite of sufficient strength. Thus, it may be in circumstantial evidence there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion, but three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit."*

The Court of Appeal has a long line of judicial precedents dealing with the principles upon which a trial Court should decide the culpability of an accused on prosecutions presented on circumstantial evidence.

In ***Kusumadasa v The State*** (2011), a divisional bench of this Court considered these principles. *Sisira De Abrew* J has reproduced the applicable principles, as laid down in these precedents, as follows;

> *"In the case of* ***King v Abeywickrama*** *Soertz J remarked as follows. "In order to base a conviction on*

circumstantial evidence the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence."

In ***King v Appuhamy*** *Keuneman J held that " 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 ***Podisingho v King,*** *Dias J held that "in a case of circumstantial evidence it is the duty of the trial judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt."*

In a judgment pronounced in 1989 by the Supreme Court of India, their Lordships have crystallised the applicable principles in relation to prosecutions based on items of circumstantial evidence. It is stated by *Pandian* J, in ***Reddy v State of Andra Pradesh*** AIR 1990 SC 79 that;

"When a case rests upon circumstantial evidence such evidence must satisfy the following tests;

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) *those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

(3) *the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else;*

(4) *the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."*

These principles were re-iterated by the Supreme Court of India by its recent judgment of ***Navaneethakrishnan v The State by Inspector of Police***- Criminal Appeal No. 1134 of 2013 - decided on 16.04.2018.

It is on these principles of law, the case presented by the prosecution against the appellant must be considered and decided.

Of the many items of circumstantial evidence that had been placed before the trial Court by the prosecution, the following are reproduced below in a chronological sequence;

i. the appellant had continued problems with his wife since the birth of their daughter,

ii. on the previous evening, the appellant wanted his father-in-law to have his hand phone switched on at all the times, in

case he needed to call him. The appellant has never contacted his father- in -law over the phone or made a similar request prior to this incident.

iii. appellant's neighbours woke up to screaming of a woman coming from the appellant's house,

iv. appellant's immediate neighbour heard a crashing sound from the kitchen and realised that the screaming woman was running towards the front of the house,

v. appellant's wife ran out of the house and collapsed on the road with a bleeding injury on her face,

vi. as the neighbours making preparations to transport the injured woman to hospital, the appellant raised cries that his daughter is cut ("දුවව කැපුවා"),

vii. hearing this, appellant's wife had run back into the house,

viii. as she entered the house, appellant's daughter ran out and collapsed at the front of the house. She had a deep cut injury on her neck,

ix. the appellant told his neighbours not to come into his house,

x. a noise, coming from the house, was heard by the neighbours who later saw the appellant's wife lying in a pool of blood on the floor of the kitchen. She had a gaping wound on her forehead. A "ඔපාල් ටල" was seen kept at a corner of the appellant's kitchen, which had its door open to the back yard. No manna knife was seen in the vicinity.

xi. the appellant was dressed in a pair of shorts and was apparently crying but did not do anything to take his wife and daughter to hospital. He had no injuries. He told the neighbours that he was held at gun point by the "ගැස් කඩේ ගැනිගෙ මිනිහා" who attacked his wife with the "පොල් උල" and had then escaped through the back door. The appellant did not cry out for help but on the contrary he had prevented his neighbours coming into the house,

xii. the neighbours who have gathered with the scream of the woman did not see any intruder in the visinity although they unsuccessfully mounted a search upon the appellant's claim. The appellant's land was secured with barbed wire fence on three sides and a 6 feet high wall at its back. His garden was well lit. Clearly there were no signs of any forceful intrusion into the appellant's house,

xiii. The appellant calls his father-in-law on his hand phone to inform him of the incident,

xiv. The Police arrived at the scene and conducted their investigations. There were blood patches in the bed room and kitchen. Trails of blood which originated in the bed room and leading to the front of the house were noted. Small foot prints in blood were also noted originating from the bed room and ending at the front of the house,

xv. the "පොල් උල" was kept in a corner of the kitchen where the body of the woman was lying.

xvi. a faint trail of blood was seen leading to the firewood shed from the kitchen and a blood stained manna knife was recovered from there, kept hidden under a roofing tile upon information provided by the appellant. Its highly probable that the manna knife could have been used to cause fatal injuries to the small girl. It could also have been used to cause some of the injuries to her mother who had other injures which may have been caused using a "pointed stake for husking coconut" which also had a blood stained blade,

xvii. "ගැස් කඩේ ගැනිගෙ මිනිහා" having met with an accident in the previous week, had a broken arm and therefore could not have mounted an attack due to this physical disability,

xviii. there was no confirmation of a complaint by the appellant to Police over the alleged death threats to his wife received to his hand phone.

xix Government Analyst confirms human blood on the blades of manna knife and "පොල් උල"

It is appropriate at this stage to consider the contention of the learned Counsel for the appellant that the prosecution had failed to exclude the possibility of a 3rd party involvement in the murder.

The evidence relied upon by the prosecution clearly indicated that the neighbours who have gathered around the appellant's house were vigilant of the appellant's claim about an attack mounted on his family members by two assailants. They have arrived there before the death of the daughter of the appellant and before his wife received her gaping wound

on her forehead. The slashing of the neck of the small girl had taken place when the neighbours were already knew that the wife of the appellant was attacked by someone as she ran out of the house to save her life. It could well be due to her maternal instinct that she ran back to the house, when the appellant had cried out that her daughter was cut. At that point of time the neighbours have already made preparations to take the woman to a hospital. When the child ran out of the house with the wound on her neck and dropped dead at the gate, it is clear that her assailant was still inside the house. The wife of the appellant had not sustained any fatal injury as yet. The appellant did not call out for help or claimed that "ගැස් කඩේ ගැනිගෙ මිනිහා" is killing them. Strangely he did not want any of his neighbours to come inside of the house. At that time the prosecution witnesses have gathered right in front of the house.

There is no possibility exists that two of the assailants getting away through a barbed wire fence or upon scaling a 6 feet high wall without being seen by the group of people who have gathered after the woman's scream. They knew that some acts of deadly violence is taking place inside the house and were on high alert. The attack on the wife of the appellant took place in the kitchen when the neighbours have gathered around the body of the girl. The neighbours have only seen the appellant inside the house.

The appellant's knowledge as to place of the blood stained manna knife could be found, a weapon which had been used to slash the neck of the girl as per the expert evidence, which had been kept concealed under

set of roofing tiles, when considered in conjunction with the fact that there was a faint trail of blood starting from the kitchen and ending at the fire wood shed, gives rise to the reasonable inference that it was the appellant who left this weapon there until its subsequent recovery as per the reasoning in ***Ariyasinghe and Others v The Attorney General*** (supra). The appellant had to put it there before the neighbours could come into his house, who later saw his seriously wounded wife with a gaping hole on her forehead. The neighbours were inside the house after the wife was found in a pool of blood in the kitchen. The Police too had arrived there soon after. After the wife was seen by the neighbours in the kitchen, the appellant absolutely had no opportunity to put the manna knife under a set of tiles in the firewood shed without being seen by them. The neighbours who have already gathered in large numbers were around the house at that time. In the circumstances it is reasonable to infer that the appellant did not want any of them to come in before his daughter and wife were sufficiently wounded because he is the only person inside the house and he did not want others to see what was happening to them.

This inference is further fortified with the fact that after the initial attack on his wife and after the slashing of the neck of his daughter the manna knife was not used. The medical evidence is that the death of the wife of the appellant was due to injuries that may have been caused using a "මොළේ ටෙ". The opening of the kitchen door is explained with the trail of blood leading to fire wood shed. It had been kept open by the appellant to have access to the fire wood shed in order to conceal the manna knife after he cut his daughter's neck. He was only left with "මොළේ ටෙ" as a

weapon when his wife returned to the house unexpectedly. Clearly the kitchen door was not left open by the alleged assailants to make their getaway after the attack but by the appellant himself in his attempt to conceal the manna knife.

The appellant's claim of the involvement of "ගැස් කඩේ ගැනිගෙ මිනිහා" is clearly a fiction he created unsuccessfully to ward off suspicion that would otherwise have justifiably pinned on him. The appellant had the motive, opportunity and the ability to carry out the attack on the two deceased. His claim of attack on his wife at the kitchen and not at the bed room does not fit in with the observation of several large blood patches inside the bed room.

Perusal of the judgment of the trial Court confirms that it did consider the claim of 3rd party involvement in great detail.

The appeal of the appellant revolves around an interesting question of law. The prosecution presented a case based on items of circumstantial evidence against him. The prosecution sought the trial Court to draw an inescapable and irresistible inference on the guilt of the appellant of the two murders on those items of circumstantial evidence.

The appellant, on the other hand relied on his alleged eye witness account of the sequence of events culminating with the deaths of his wife and daughter. It is his position that the husband of the woman who operated a gas distribution depot in the company of another stranger, had attacked them in his presence injuring them fatally after having entered their house that night surreptitiously. This attack, the appellant claimed,

was due to a previous incident of assault by his wife on the said woman who operated a gas depot, upon an allegation of financial fraud.

It is clear that, therefore the appellant did not rely on any of the items of circumstantial evidence that had been placed before the trial Court by the prosecution, in order to substantiate his version of events. As already noted he relied on his eye witness account by which he adduced direct evidence in support of his position.

The trial Court had correctly rejected his evidence.

In the appeal, the appellant did not challenge the decision of the trial Court, in rejecting his evidence. Instead, he now seeks to impress upon this Court that certain items of circumstantial evidence that had been presented by the prosecution, supports an inference of a 3rd party involvement in the alleged crime and therefore he is entitled to the benefit of the said alternative inference which made the inference of guilt that had been drawn against him by the trial Court is not the "irresistible, necessary and inescapable inference guilt" as required by law, in order to found him guilty in a case based on circumstantial evidence.

A similar contention has been considered in an English judgment of ***R v Danells*** [2006] EWCA Crim 628 by Lord Kay. The contention before their Lordships was " ... *the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it because the circumstances, whilst consistent with the prosecution case, are also consistent with the defence case as disclosed in interview by the appellant.*"

Their Lordships have dismissed the appeal by rejecting this contention, after considering the passages from the speech of Steyn LJ in ***Moore*** (unreported, 92/2101.Y3, 20 August 1992) where it is said that in order to succeed, the appellant's position should be " *equally possible*" and since the inference sought to be drawn on behalf of the appellant in that instance is a " *... certainly a possible inference but it would be a logical jump to say that it was the only reasonable inference*".

The speech of Lord Morris in ***Mcgreevy v DPP*** [1973] 1 WLR 276, which states that;

> *"It requires no more than ordinary common sense for a jury to understand if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion",*

This part of the speech was considered by Lord Kay in ***Dannels*** and recognising that Lord Morris's said statement "*... gave birth to the standard direction on circumstantial evidence which is advised by the Judicial Studies Board*". The pronouncement of Steyn LJ is that the inference invited on behalf of the appellant in ***Moore*** was a "*... reasonable one about one which any jury, properly directed, would bound to have a doubt*".

Reverting to the appeal before us, the inference that should be drawn upon the items of circumstantial evidence as invited by the appellant on the involvement of a 3rd party in the crime, should be a "... *reasonable one about one which any jury properly directed would bound to have a doubt*". Whether the said contention of the appellant did satisfy the said test is the issue we must consider next.

The prosecution, through its witnesses had adequately explained the improbability of the claim of the appellant that it was the husband of the woman who operated the gas distribution depot, who is responsible for the two murders. The appellant's evidence on that too had been rightly rejected.

In these circumstances, learned Counsel for the appellant now seeks to highlight the fact that the prosecution has failed to explain the presence of a pair of slippers and a blood stained sarong at the scene of crime and therefore the said failure should be resolved in his favour. It is also her contention that in order to exclude the person from the gas depot from the accusation levelled by the appellant, he should have been called by the prosecution as a witness.

The blood stained pair of slippers and a sarong that were noted by IP *Doole* does not justify inferring that it belongs to the assassin who attacked the two deceased that night. *Doole* concedes that he did not conduct investigations as to the ownership of the slippers whether it belonged to the wife of the deceased, the appellant or any other. There was

no suggestion to the witness that the appellant pointed to them as the pair of slippers belonged to the assassin who murdered his wife by attacking her with a spiked instrument. The blood stained sarong was seen inside the bed room. The bed room floor was stained with patches of blood. There is nothing unusual about finding a sarong inside the appellant's bed room and its blood stains could easily be explained due to the amount of blood that were found inside the room. The only individuals who could testify before the trial Court as to whether these two items are not of the inmates but the appellant and his wife. His wife is not among the living and the appellant remained silent on this issue.

The failure to call the alleged murderer, as per the position taken up by the appellant, has little or no significance to the instant appeal, in view of the circumstances that were presented before the trial Court. The direct evidence of such an involvement of a 3rd party had been rejected and the alternate interference that could be drawn from the items of circumstantial evidence that were highlighted by the appellant clearly failed to satisfy the test as enunciated by ***Moore.***

After a careful consideration of the evidence before the trial Court as a whole, we are satisfied that they easily satisfy the requirements as laid down by the superior Courts in the judicial precedents referred to above. Therefore, we are convinced that the facts proved by the prosecution are quite sufficient to draw the *"one and only irresistible and inescapable inference"* as to the guilt of the appellant and that they are inconsistent with his innocence.

In conclusion we hold that the several grounds of appeal, as raised by the learned Counsel, are without any merit. The conviction and sentence of the appellant is affirmed by this Court and therefore his appeal stands dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL