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

In the matter of an application for an Appeal in terms of section 331 of the Criminal Procedure Code Act No.15 of 1979.

Hon: Attorney General,
Attorney General's Department,
Colombo 12.

Court of Appeal Case No: CA 196/2016
H.C. Chilaw Case No: 221/2005

Complainant

-Vs -

1. Chandra Boss Ravi
2. Murugesu Kumaran allias Kurrupan Murugas Kumaran
3. Gampolage Srimal Fonseka
4. Seven Selvar Kumara

Accused

AND NOW BETWEEN

1. Chandra Boss Ravi

Accused Appellant

-Vs –

Hon: Attorney General,

Attorney General's Department,

Colombo 12.

Complainant- Respondent

Before: **N. Bandula Karunarathna J.**

&

A.L.Shiran Gooneratne J.

Counsel: Indika Mallawaratchy with K.Kugaraja
for the Appellant.
and Shanaka Wijesinghe, DSG for the Respondent

Written Submissions: By the Accused- Appellant on 29.01.2018 and on 06.05.2019
By the Complainant - Respondent on 08.11.2018

Argued on: 29/04/2019

Judgment on: **13/06/2019**

N. Bandula Karunarathna J.

The First Accused-Appellant in this case was indicted with three others in the High Court of Chilaw under two counts. In the first count he was indicted for committing the murder of one Warnakulasuriya Dabarera on or about 16/07/2001, an offence punishable under section 296 of the Penal Code. In the second count he was indicted with 3 others in the course of the same transaction, the said accused caused hurt to Warnakulasuriya Sebastian Fernando using a knife, thereby committing an offence punishable under section 315 of the Penal Code.

At the conclusion of the trial, by judgment dated 31/10/2016 the accused were convicted and sentenced in the following manner;

Count 1 – First accused (A1) convicted and sentenced to death. Second (A2), Third (A3) & Fourth (A4) accused were acquitted and discharged.

Count 2 – All 4 accused convicted and sentenced to 2 years Rigorous Imprisonment.

Fine of Rs.7500/- carrying a default term of 6 months Simple Imprisonment.

Compensation in a sum of Rs.7500/- carrying a default term of 6 months Simple Imprisonment.

The First Accused-Appellant has appealed to this Court against the said conviction and the sentence.

The case for the prosecution is that the deceased and the victim (PW1) had met at the Chilaw town on 16.07.2016 near the Pearl Cinema situated at the roundabout. After they met, the deceased went to buy a packet of rice, while the victim Sebastian Fernando (PW1) went to a nearby pharmacy which was situated near the roundabout, opposite the Pearl Cinema.

When the victim came out of the pharmacy he had seen the deceased going to a small boutique situated close by to buy Betel. He was then suddenly assaulted by the four accused, whom he knew and with whom he and the deceased had a dispute regarding some fishing nets. According to PW 1, he was assaulted by the 1st accused Appellant with a knife while the rest of the three Appellants assaulted him with poles. When he was about to faint due to the assault he had seen the four Appellants chasing the deceased.

The prosecution also relied upon the evidence of One Murugadas (PW2) a man who was selling "Kadala" in a cart near the Pearl Cinema. According to him he has seen only the 1st and the 3rd Appellants assaulting the injured with their hands. However, he has not seen the deceased in the vicinity. This witness has further testified that when the victim was being attacked he had admonished the accused not to attack the victim and latter subsequent to being assaulted had lost his consciousness at which point the witness had attended on him.

The other witness Chaminda Saratchandra (PW3) has heard a knock on his door and had seen the deceased fallen on the step of his shop, where he sells traditional (Ayurveda) medicine. It was the evidence of this witness that he did not see what happened but he had seen the deceased lying fallen on the road.

According to one Lakshman Fernando (PW10) the 1st Appellant threw a knife and ran away when he was at Lalith Milroy's boutique. He identified this knife at the trial. This witness has categorically testified that he did not see the stabbing.

It is important to note that no contradictions or omissions have been marked from these witnesses. They have been hardly cross examined. But it is the duty of this court to analyze whether the prosecution has proved their case beyond reasonable doubt.

The First ground of appeal urged by the appellant was that the learned Trial Judge has failed to address his judicial mind to the conflicting and contradictory evidence of PW 1 and PW 2 on a critical issue of fact causing serious prejudice to the Appellant.

It was the evidence of PW 1 namely Sebastian Fernando that he was attacked with a knife and sticks and subsequently when he was on the verge of losing consciousness, he had seen the 4 accused giving chase to the deceased. However, contrary to the aforementioned evidence, it was the evidence of witness Murugadasa that he had seen A1 and A3 assaulting the deceased with his bare hands and it was his position that the deceased was near him, at the scene in the vicinity.

The said Murugadasa had in-fact tried to intervene and prevent the assault on the victim and had even attended on him when he was lying unconsciousness which amply demonstrates that the witness had been at the scene until conclusion of the attack.

In the backdrop of the afore-mentioned evidence of PW 1 and PW 2 there appears to be a glaring contradictory position between PW1 and PW2 relating to an item of Circumstantial Evidence relied upon by the Learned Trial Judge, namely the fact that the Appellant chased after the deceased.

In the said circumstances it is very clear that the Learned Trial Judge had been totally oblivious to the fact that 2 important witnesses of the prosecution have testified contradictorily on a very salient factor and in the said circumstances the said item of Evidence cannot be considered as an incriminating item of Circumstantial Evidence against the Appellant and the Learned Trial Judge seriously flawed by relying upon same, consequently causing serious prejudice to the Appellant.

Second and Third grounds of appeal were on Evaluation of Circumstantial evidence. To examine the guilt of the Appellant, we must appreciate the evidence adduced by the prosecution.

The present case being a case of circumstantial evidence, it is a well settled law that where there is no direct evidence against the accused and the prosecution rests its case on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused.
In other words, there must be a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. All the links in the chain of circumstances must be complete and should be proved through cogent evidence.

The prosecution led evidence to establish the charge of Murder against the 1st appellant on the following basis;

- The first Appellant and three others ran after the deceased after the attack took place on the victim (PW1).
- The 1st Appellant throwing a knife on the foot step of the shop of Lalith Milroy Perera. This was witnessed by Lakshman Fernando (PW10) who subsequently identifies the knife at the trial.
- Recovery of a knife from the said shop.
- Dr.Chandrapala (PW11) confirms that the only stab injury (the other 3 injuries were abrasions) Could be caused by the said knife.
- According to PW2 the deceased was fallen about 250m from where the other victim (PW1) was fallen.
- This is further confirmed by the police witness (PW12) who says that the deceased was fallen about 100m away from the Pearl Cinema where the first incident of stabbing of the victim (PW1) took place.

- There was a dispute between the two parties regarding some fishing nets and that would be the Motive for this crime.

The prosecution story is that none of the above facts were challenged in cross examination. No contradictions or omissions have been marked from the prosecution witnesses. Under the above circumstances these facts point the finger showing the guilt only of the 1st Appellant. These facts are incapable of any other reasonable explanation other than the guilt of the 1st accused Appellant. But the contradictory evidence given by two prosecution witnesses on the fact that the Appellant along with the other accused were seen chasing after the deceased as set out in ground 1. In my view, that evidence cannot be considered as an incriminating item of Circumstantial Evidence against the Appellant. The knife that was recovered on a Sec.27 statement of the Appellant was not blood-stained.

Since the case is based on Circumstantial Evidence the said knife has not been identified by anyone, as the knife used by the Appellant to inflict injuries on the deceased. In the said circumstances' prosecution has failed to establish the link between the knife and the crime.

It is trite law that when a fact is discovered in consequence of a statement made by an accused, such a statement is only evidence of the fact that the accused knew where the article discovered was and nothing more. Thus, in the said circumstances it is my view that the finding of the Learned Trial Judge that the knife which was recovered on a Sec.27 statement had been used to inflict the injuries on the deceased is legally flawed.

In the case of Etin Singho vs. The Queen 69 NLR 353 it was held that where the Trial Judge directed the Jury as follows;

"Then the other matter is the finding of the club.

You will remember the police officer said something which resulted in finding the club. What he said was proved and the police officer went and found the club, if you are satisfied that this is the club that was used you see, witness says that this is the club; it is a factor to be used against the accused. Witness said that he saw a club like this and the accused showed this club and that this a factor that you will take into consideration against the accused."

The Court of Criminal Appeal in setting aside the verdict, in the above mentioned case held that "if the Jury believed that the accused made the statement, P17, all that was proved was, that he had the knowledge of the whereabouts of the club P1, the fact discovered as a consequence of P17 was confined to that knowledge on the part of the accused. There was no proof before court that P1 was in fact used in the assault on the deceased. The Jury should have been told that the accused person's knowledge of the whereabouts of the club should not be treated by them, as an admission that he used that club to attack the deceased."

In the case of Ranasinghe Vs. AG 2007 (1) SLR 218 it was held thus "the conclusion reached by the trial judge about the recovery of the iron club removed from a well is erroneous since discovery in consequence of a Sec.27 statement only leads to the conclusion that the accused had the knowledge as to the weapon being kept at the place from which it was detected."

When considering the above authorities, the discovery of some weapon compatible with the injuries on the body of the deceased on a statement made by the accused also do not necessarily indicate that he committed the murder. In the said circumstances,

I have to stress that, finding of the Learned Trial Judge that the murder weapon had been recovered on a Sec.27 statement of the Appellant is wholly erroneous.
Thus, the Learned Trial Judge considering same as an item of Circumstantial evidence against the Appellant had been prejudicial to him.

In a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance, by way of reliable and clinching evidence, and the circumstances so proved must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached. Undoubtedly, suspicion, however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an accused guilty, solely on the basis of the circumstances proved before it.

The Learned Counsel for the Appellant argued that the Learned Trial Judge failed to apply the principles governing the evaluation of circumstantial evidence in the present case. The Learned Counsel stated further that the following guidelines should be applicable in evaluating items of circumstantial evidence against the Appellant.

1. That proved facts must only be consistent with the guilt of the Accused. King vs. Abeywickrema 44 NLR 254.

2 Proved facts must be inconsistent and incompatible with the innocence of the accused. Podisingho vs. King 53 NLR 49.

3 Proved facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. King vs. Appuhamy 46 NLR 128.

4 If an inference is drawn from a proved fact it must be a necessarily, inescapable and irresistible inference and it should be the one and only inference.

5 Suspicious circumstances do not establish guilt. The proof of any number of suspicious circumstances relieve the Prosecution of its burden of proving the case against the accused beyond reasonable doubt. Munirathne and Others vs. the State 2001(2) SLR 382.

6 In Emperor vs Brownrig (1917) 18 Criminal Law Journal 482 it was held thus " the Jury must decide whether the facts proved exclude the possibility that the act was done by some other person and if they have doubts, prisoner must have the benefit of those doubts,"

7 In Don Sunny vs. the Attorney General 1998 (2) SLR 1 it was held "that the prosecution must prove that no one else other than the accused had the opportunity of committing the offence,

8 In R v Clarke (1995) 78 A Crime R 226 it was held that "If evidence raises a reasonable possibility that the circumstances pointed to someone other than the accused being guilty of the offence, then a direction should be given even if the evidence is very slight, if it could be interpreted as raising a reasonable possibility of innocence.

In Padala Veera Reddy v. state of A.P. and Others 1989 Indlaw SC31 it was held "that the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused and that the circumstances taken cumulatively should form a chain so complete that there is no escape committed by the accused and none else."

A perusal of the judgment of the Learned Trial Judge amply demonstrates that the Learned Trial Judge has totally failed to apply the said above mentioned guidelines when evaluating the Circumstantial Evidence against the Appellant. Whilst it is conceded that trial judge being possessed vast judicial experience and a judicially trained mind need not put the guidelines in black and white, yet a perusal of the judgment should indicate that the said law had been applied to the facts. It is my opinion that in the present case, the judgment is devoid of any such judicial evaluation.

The Learned Counsel for the Appellant argued that Learned Trial Judge flawed on the principles relating to burden of proof on the Prosecution. In his final conclusion the learned Trial Judge has come to a finding that whilst he accepts the Prosecution version, the Defense version is rejected.

It is trite law that where a case is based on Circumstantial Evidence it is incumbent upon the Learned Trial Judge initially to see whether the prosecution has established a strong, cogent, prima facie case against the Appellant warranting an explanation and once that pre-requisite has been fulfilled and the explanation has been given, learned Trial Judge must apply the principles governing the evaluation of Circumstantial Evidence cases and see whether a necessary, inescapable, irresistible and one and only inference that the Appellant committed the crime can be reached, upon the evidence led at the trial.

It is important to note that consideration of circumstantial evidence has been vividly described in R Vs Exall (1866)4F&F 922 , cited in King Vs Gunaratne 47 NLR 145, in the following words;

"It has been said that circumstantial Evidence is to be considered as a chain, and each peace as link in the chain, but that is not so for them if, any one of that link broke the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the rope might be insufficient to sustain the weight, but three strands together may be quire of sufficient strength. Thus, it may be circumstantial evidence that there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than mere suspicion but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit "

In the said circumstances the finding of the Learned Trial Judge that he accepts the prosecution version falls far short from establishing beyond reasonable doubt the guilt of the Appellant and Learned Trial Judge has seriously flawed on the principles relating to burden of prove on the prosecution.

The Learned Counsel for the Appellant strongly urged that, conviction on count 2 cannot be supported in the absence of medical evidence and contradictory evidence between PW 1 & PW 2. The ingredients in count 2 is that the accused had inflicted injuries on the victim using a knife. Whilst the victim in his evidence has testified that he was attacked with a knife and sticks, PW 2 Murugadas has categorically testified that Accused 1 and 2 had attacked the PW1with their bare hands.

Witness Murugadas has further consistently testified that he did not see any accused armed with any weapon. It is pertinent to note that the prosecution has not led any medical evidence in respect of count 2

It is further submitted for the Appellant that prosecution has failed to lead police evidence to the effect that the injured victim too had suffered cut injuries.

In the backdrop of the afore-mentioned contradictory evidence between PW1 and PW2 coupled with the absence of medical evidence, it is my view that conviction for count 2 cannot be sustained.

The items of circumstantial evidence referred to earlier in this case, in my opinion are insufficient to sustain the weight of the rope. Further the totality of the evidence led in this case does not lead to an inescapable and irresistible inference and conclusion that it was the first accused Appellant who inflicted the fatal injury on the deceased. The prosecution has failed to prove this case beyond reasonable doubt and rebut the presumption of innocence.

The conviction of the Appellant is ill-founded due to paucity of evidence coupled with the erroneous judicial evaluation on the part of the Learned Trial Judge. For the reasons enumerated by me, on the facts and the law, in the foregoing paragraphs of this Judgement, I set aside the conviction and sentence, of the learned High Court Judge of Chilaw dated 31/10/ 2015 and acquit the first accused Appellant.

JUDGE OF THE COURT OF APPEAL

A.L.Shiran Gooneratne, J.
I agree.

JUDGE OF THE COURT OF APPEAL