

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

In the matter of an Appeal against
an order of the High Court under
Section 331(1) of the Code of
Criminal Procedure Act No.15/1979.

C.A. No. 329/2017

H.C. Negombo No. 119/2008

M. Mohan Kumara Fernando

Accused-Appellant

Vs.

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

Respondent

BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULI, J.

COUNSEL : Indica Mallawarachchi with K. Kugaraja for the
Accused-Appellant.
Sudarshana de Silva D.S.G. for the respondent

ARGUED ON : 28th June, 2019

DECIDED ON : 02nd September, 2019

ACHALA WENGAPPULI, J.

This is an appeal by the 1st accused-appellant (hereinafter referred to as the "appellant") challenging his conviction by the High Court of *Negombo* for committing murder of one *P. Selvam* on or about 10.08.2005 at *Kochchikade* and the consequent imposition of sentence of death. The 2nd accused who was also indicted along with the appellant had been acquitted after trial by the High Court.

The prosecution presented its case based on several items of circumstantial evidence, which had been led through a lay witnesses and official witnesses including Registrar of Finger Prints.

It was elicited through the lay witness *Wasanthi* that the deceased had lived in the adjoining premises in which he operated a scrap iron

collection business. The appellant, who was selling brooms as a door to door salesman to earn a living, used to visit the deceased and was known to the witness as well. He used to bring his merchandise whenever he visited the deceased seeking shelter.

The date of the incident is 10.08.2005, The appellant and the 2nd accused had arrived in the previous evening and spent the night with the deceased in his scrap iron shop. Witness *Wasanthi* had borrowed bedding items for the visitors from another neighbour (*Kalyani*) late in that evening upon the request of the appellant. These items included two pillows and two bed sheets. One of the bed sheets (P1) was identified by the witness as the one she had handed over that evening to the appellant and the 2nd accused.

She woke up in the early hours of the following morning as she heard someone calling her out "*Akka*". The appellant and the 2nd accused had then entered her house forcibly and tried to strangle her. She told them to take whatever they wanted. They took her wrist watch and some cash from the almirah. Then they have tied her hands with a nylon rope and fled the scene.

Later she struggled herself free and went to the deceased's shop seeking his help. The witness then realised the back door of the deceased's shop was left open and when peeped through, seen his naked body lying on the ground. She then alerted her other neighbours and thereafter made a complaint to Police about the death of the deceased and also of the robbery. She subsequently made another statement to the Police implicating the appellant and the 2nd accused and explained her reason.

She said the appellant had threatened her with death and therefore she did not reveal his name when she made her initial statement to the Police.

Kochchikade Police investigated the incident. They received 1st information on 10.08.2005 at 9.55 am from *Wasanthi*. CI *Samarajeewa* visited the crime scene and made notes. The body of the deceased was lying on the floor in the rear part of his scrap iron shop besides a bed. There was a bicycle near the body. Hands were tied at his back with a green colour cloth while his legs were tied with a bed sheet (P1) and in addition a rope had been used to tie both hands and legs together. There was blood on his face. He also noted the brooms and other cleaning instruments allegedly left behind by the appellant and the 2nd accused in the deceased's shop, who had arrived there in the previous evening. He instructed his officers to call for RFP to inspect the crime scene as he found three empty liquor bottles. Officer *Abeyseriya* of RFP visited the crime scene and had found four finger prints. He uplifted two prints from a liquor bottle found in the scrap metal shop, one from a jam bottle found near an almirah in *Kalyani's* house and another one, on the door of the said almirah.

Samarajeewa also visited *Wasanthi's* house, which was located about 15 feet away from the scrap iron shop. He observed a blue coloured nylon rope and an iron bar on her bed. IP *Semasiri* arrested the appellant on 13.01.2006 apparently upon information provided by the 1st informant as to his identity.

RFP *Bandara* confirmed that he found two finger prints from the liquor bottle and another on a jam bottle matching with the finger prints of the appellant that had been forwarded to him by *Kochchikade* Police. One

print that had been uplifted from an almirah, which belonged to the 1st informant, had to be rejected due to its poor quality.

The deceased had been smothered prior to his death from manual strangulation.

With this factual background, this Court could now turn to consider the grounds of appeal raised by the appellant.

At the hearing of the appeal, learned Counsel for the appellant referred to several determinations made by the trial Court on credibility of witnesses and facts. She sought to challenge them on the basis that the trial Court had reached erroneous conclusions over them.

In relation to issue of credibility of the lay witness *Wasanthi*, learned Counsel for the appellant had highlighted the discrepancy in the prosecution that although the witness claimed armed robbery by the appellant and the 2nd accused, there was no investigation upon that complaint undertaken by the Police and, as such, there is no charge contained in the indictment alleging robbery, which is a strong indication of the fact that the prosecution itself was not sure as to the genuineness of the claim of robbery. If that is the case, then the indivisibility of her credibility would render her evidence, in relation to the murder, clearly unreliable.

In addition, learned Counsel contended that the trial Court had failed to consider the probability of the version of events as narrated by this witness on the basis that she made no cries when the intruders have entered forcefully into her house and it is equally improbable that any murderer would think of robbing her after committing a murder since the

natural tendency of such a person has to get away from the scene of crime to prevent discovery of his identity and apprehension. She also complained that the trial Court adduced unjustifiable reasons for downplaying a vital omission marked off her evidence on the footing that the witness had failed to mention the appellant's name in her 1st statement although she knew him well.

Another point raised by the learned Counsel for the appellant is that the trial Court erroneously treated the finding of a matching finger print in the jam bottle had corroborated *Wasanthi's* evidence.

Learned DSG, in his submissions referred to the fact that the witness *Wasanthi* had no reason to implicate the appellant to the murder if it was not the truth and the identification of the bed sheet (P1) by other independent witnesses lend credence to her version of events. He also referred to the items of evidence that reflect the fact not only the local police but also the officers from RFP had visited her house and have even uplifted two finger prints that were there. In replying to the submissions of the appellant on the evidence of a finger print found in the jam bottle is in fact hearsay, learned DSG stated that there is clear evidence that the jam bottle was recovered from the house of the witness and not from the deceased's as the appellant claims and therefore the determination by the trial Court on that point could not be faulted.

CI *Samarajeewa* had visited the three roomed house of *Kalyani* which was located about 15 feet away from the crime scene. He had taken charge of a blue nylon rope said to be used in tying the witness during his

visit. IP *Karunatillaka* too had visited *Kalyani's* house for investigations and found "evidence" that there was intrusion by outsiders.

Abeyhuriya from RFP visited the crime scene and had uplifted a finger print from a jam bottle (referred to as "C") in the "rear section of the building" in which the body was seen. He also uplifted another print from the almirah (referred to as "D") in the 3rd room of that house (as shown in the photograph marked "a9"). Clearly these references are made in relation to *Wasanthi's* house since the official witnesses have referred to her as the "Complainant". CI *Samarajeewa* noted that the body was found inside a 16 x 9 feet partitioned section of the shop which had no doors. *Wasanthi's* house is located towards the back of this shop.

Thus, there was sufficient evidence before the trial Court that the four finger prints were uplifted from two separate locations and therefore making reference to that find as supportive of *Wasanthi's* version on the sequence of events is clearly justified.

It is also clear from the evidence that *Wasanthi* did mention of the robbery when she provided the 1st information to Police. This Court notes with regret that the learned prosecutor, in leading evidence, had appreciation of the fact that there were two separate incidents involved and had blindly led evidence of the witnesses making repeated reference to the "crime scene". It is from witness's detailed answers it could be gathered that there were in fact two places from which two sets of fingerprints were found during investigations.

The indictment contained only the murder charge and as the appellant submitted there was no corresponding robbery charge even

though appellant's finger print was found in a jam bottle from *Wasanthi's* house. The reason for leaving out of a robbery charge by the prosecution is not known. However, that factor alone cannot assail the credibility of *Wasanthi's* evidence since the evidence of the investigators as well as by the RFP confirms that the appellant was present in her house to leave his finger print on a jam bottle in which the witness had kept her valuables. The bed sheet (P1) given by the witness to the appellant the night before and its subsequent find, tied to the body of the deceased, adds to her claim that the appellant was there in the night.

The other complaint by the appellant against the conviction is the alleged failure to state the reasons of the trial Court in rejecting his dock statement.

It is correct that the trial Court rejected the dock statement of the appellant is one sentence as "unacceptable". However, the trial Court did not stop at that point. It further considered the evidence given by witness *Wasanthi* in the next paragraph. The decision to reproduce and analyse her evidence immediately after the Court indicted its mind on the dock statement is significant. The appellant admits having visited the deceased in the previous evening. But he claimed that he had left his shop leaving his merchandise there by about 4.30 or 5.00 p.m. on the same day.

In contrast, *Wasanthi* states that the appellant and the 1st accused was there with the deceased until late into the night consuming liquor and when the appellant requested bedding, having obtained two pillows and two sheets from *Kalyani*, she had handed them over to him. During her

cross examination the appellant never suggested to her that he left by 4.30 / 5,00 p.m. that evening

Why the trial Court considered this aspect of *Wasanthi's* evidence at that stage of the judgment is clearly evident when one peruses it. It was used by the trial Court to highlight the fact that there was no challenge during *Wasanthi's* evidence, when she stated that she saw him at about 9.00 p.m. that night. The request for bedding and seen late in the night with the deceased is sufficient to draw the reasonable inference that the appellant had spent the night in the company of the deceased and therefore his claim of leaving at 4.30 or 5.00 p.m. in the same afternoon is clearly an afterthought brought into the dock statement by the appellant for the first time.

When one applies the probability test also the rejection of the dock statement is justified. The evidence is that the appellant was engaged in a trade as a door to door salesmen carrying a stock of brooms with him (කොසු, ඉදල). He had arrived at the deceased's shop with such a stock of his merchandise. The Police have noted its presence when they visited the crime scene. It is highly unlikely that the appellant would leave his entire stock of merchandise with the deceased for a very long time without coming to claim it. The date of incident is 10.08.2005 and the appellant was arrested at *Tappakotuwa Watta, Kalutara* South on 13.01.2006.

The evidence is sufficient to draw the irresistible and inescapable inference of guilt of the appellant. The reasons provided by the appellant

in his attempt to explain the finger print was rightly rejected by the trial Court. The admitted belatedness to implicate the appellant by the witness is explained and accepted by the trial Court.

In view of the above considerations, this Court is of the view that the appeal of the appellant is devoid of any merit and ought to be dismissed on that account.

The conviction and sentence of death imposed on the appellant is hereby affirmed.

Appeal of the appellant accordingly stands dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL