

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

In the matter of an Appeal under Section 154(P) of
the Constitution read with Section 331 of the
Criminal Procedure Act No 15 of 1979.

**CA Case No:
HCC 120/16**

Kirilla Liyanage Don Nicholas Pradeep
Sampath alias Kirinda Liyanage Don Nicholas
Pradeep Sampath,
No.301,
Kerawalapitiya Road,
Hadala, Wattala.

**HC Negombo
Case No: 405/2011**

Accused-Appellant

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

Respondent

Before : **Devika Abeyratne,J**
P.Kumararatnam,J

Counsel : Neranjan Jayasinghe with Isansi
Danthanarayana for the Accused-Appellant
Sudharshana de Silva, DSG for the Respondent.

Written
Submissions On : 26.10.2017(by the Accused-Appellant)
02.03.2018 (by the Respondent)

Argued On : 05.03.2021

Decided On : 01.04.2021

Devika Abeyratne,J

The Accused-Appellant in this case was convicted for the murder of *Hathurusinghe Wasantha Chandralal Sathurusinghe* and was sentenced to death.

This appeal is against the said conviction and the sentence.

The grounds of appeal preferred by the appellant are as follows;

1. The two items of circumstantial evidence namely
 - i. The dying declaration made by the deceased
 - ii. Identification of the Accused Appellant about 30 meters away from the place where the deceased was found

create a reasonable doubt to the prosecution case and the conclusion reached by the Learned High Court Judge that the above items of circumstantial evidence has proved the case beyond reasonable doubt is wrong in law.

2. Identification of the Accused at the identification parade is doubtful.
3. Rejection of the dock statement of the Accused Appellant is wrong in law.

The facts of the case *albeit* briefly are as follows;

On 30.05.2010 around 01.45 pm when Home Guards PW 01 *Abegoda Liyanage Anura Kumara* and PW 02 *Katandola Mudiyanseelage Pitiye Gedara Mahesh Lakmal* were on duty on the main *Negombo-Katunayake* Road at *Kerege Pokuna* Security Point, a woman travelling towards *Colombo* in a three wheeler had informed them that a person was being assaulted in *Samagi Mawatha*. Both witnesses have walk about 50 meters towards *Negombo* when they witnessed 3 people with clubs getting into a green coloured cab which was stopped near the bus halt. Two people have got in from behind and one person to the front seat, and the vehicle had made a U turn and had headed towards

Negombo. Both witnesses had looked around for about half an hour and not coming across any injured person, they have returned to their security point.

About half an hour later a *Buddhist Monk* and a civilian have come and informed that there was an injured person in the temple premises which was about 150 to 200 meters from the security point. They have seen a young man with an injury on his head under the hood of the temple. After checking his Identity Card they have gathered he is from *Kegalle*.

According to PW 2 *Mahesh Lakmal* when he questioned the injured person whether he recognized the person who assaulted him, he had said it was the husband of *Nilanthi*.(in page 52 of the brief.)

ප්‍ර : ඊට පස්සේ තමුන් කතා කලාද එම පුද්ගලයාට?

උ : අපි ඇහුවා ගහපු අයව හඳුනාගත්තද කියලා?

උ : ඊට පස්සේ කිවුවා කාන්තාවගේ මහත්තයා කිවුවා ගැහුවේ.

ප්‍ර : මොන කාන්තාවගේද?

උ : නිලන්ති කියන අයගේ ස්වාමීපුරුෂයා.

And when further questioned in page 54 of the brief has stated as follows;

ප්‍ර : තමා මෙම පුද්ගලයාගෙන් ඇහුවාද කවුද මේ නිලන්ති කියා ?

උ : ඔව් . එයා කිවුවා එයා ඉස්කෝලේ යන කාලේ ඉඳලා යාලු වෙලා දන්නා කෙනා කියා.

එයාගෙ පුරුෂයා තමා ගැහුවේවේ කියා කිවුවා.

The above facts are not reflected in the statement to the police although PW 2 testified that he informed the police that the injured told him it was *Nilanthi's* husband who assaulted him. He has taken part in the identification parade but failed to identify any person.

PW 1 *Anura Kumara* has testified that he witnessed three people getting in to the vehicle with clubs in their hands. He had observed the person who got in to the front of the vehicle with a club and has identified him at the Identification Parade, and later identified him as the accused in the dock.

PW 1 in page 88 in the brief has testified that the injured has stated that he was assaulted by the people connected to the girl he was having an affair with.

ප්‍ර : එම තැනැත්තා මොකද කිවුවේ ?

උ : මේ අයගෙන් මොකද වුනේ කියලා ඇහුවුවා. ඇයි ගැහැවුවේ කියලා ඇහුවා. නිකම් මනුෂ්‍යයෙකුට ගහන්නේ නැහැනේ කියලා කිවුවා. එතකොට කිවුවා ගැහැණු ළමයෙක්ගේ ප්‍රශ්නයක් මතයි කියලා කිවුවා. ගහපු අය හඳුනනවද කියලා ඇහුවා. ගැහැවුවේ ගැහැණු ළමයාගේ අයයි කියලා කිව්වා. නිලන්තිගේ මහත්තය ගැහැව්වා කියලා කිව්වා.

PW 1 and PW 2 have taken the injured in a three wheeler to the police post at *Mahabage* and after filing an entry there, had dispatched the injured in another three wheeler to the hospital. According to the evidence of PW 1 and PW 2 the injured was able to speak at that time.

PW 4 *Sunil Fernando* is the three wheeler driver who admitted the injured to the hospital. According to him, two Home Guards who were near the *Welisara* Police post have asked him to take the injured to the *Ragama* Hospital. The injured who had been seated on the ground had come limping and got in to the three wheeler and told him to take him to the *Peliyagoda* Police Station to make an entry. When they reached the *Peliyagoda* Police Station, the injured had not been in a condition to get off the vehicle and a police officer who saw him has advised the witness to take him to the hospital. When he could not get out of the vehicle in *Peliyagoda*, the injured had told the three wheeler driver that it was *Nilanthi's* husband who assaulted him. This witness was not cross examined.

The father of the deceased PW 3 has testified that he got to know that his deceased son was having an affair with one married woman named *Nilanthi* of *Malwatthe Kande*, whom he has seen, but never spoken with, who is the wife of *Pradeep* of *Malwatthe Kande*. He had got to know about the affair three months prior to the incident. It was obvious from his evidence that he was not aware of the details of the affair, only the fact that the deceased had some connection with a person called *Nilanthi*. Neither has he associated with any member of *Nilanthi's* family except stating he knows *Nilanthi's* mother. He has seen the accused only after coming to court and had no prior knowledge about him.

PW 7 *SI Sarath Wickramaarchchi* has testified that the incident has occurred on the *Colombo- Negombo* road near the bus stand and that witness statements have been recorded. However, with the available evidence it is unclear on what information the place of incident was identified and from which witnesses, whereas even PW 1 and PW 2 who are alleged to be the first persons who were informed about the incident have not testified about a definite place of incident. The available evidence does not disclose a place where the deceased was assaulted. He was found in the temple premises. In these circumstances, the alleged place of incident has not been established by the prosecution.

Be that as it may, the officer had been asked whether any information was disclosed regarding *Nilanthi*, to which question he has answered in the affirmative and has stated that it transpired that the accused was the husband of *Nilanthi*. However, it appears that even the full name of the person called *Nilanthi* has not been disclosed. Neither has she been questioned regarding the incident. This police witness has not been cross examined.

From the evidence of PW 11 *DIG Randeniya* it was disclosed that, when case No B 725/10, the case pertaining to this incident was called in the *Wattala* Magistrate's Court, the appellant had surrendered himself to court on that day. It is PW 11's evidence that as the witnesses who were to be called that day for the inquiry and the members from the aggrieved party were not present in Court, the application to produce the accused appellant

for an Identification Parade was allowed by the learned Magistrate. In his Dock Statement, the appellant has stated he was in the Cell inside Courts for about one and a half hours before the Identification Parade was conducted. (Page 201 of the Brief)

PW 09 Dr *Edirisinghe* the JMO, has testified explaining that the Glasgow Coma Scale (GCS) was at 15 which means up to the time of death that the deceased was in a position to speak coherently. As documented, he has been admitted to hospital at 3.45 pm and had died at 4.20 pm. The doctor has observed 8 injuries on the head, face, near the eyes, left arm, left shoulder, on the chest, and the left thigh. It is in evidence that all the injuries observed has been caused by blunt force and that there had been internal bleeding and the cause of death is given as hemorrhage and shock due to the rupture of the spleen. This witness too has not been cross examined.

In the dock statement of the accused he has denied his involvement in the incident and has stated that as his name was mentioned regarding the incident he surrendered to Court. He has also stated that another suspect who was previously taken in to custody on suspicion had been released.

The learned trial judge in her judgment has accepted the dying declaration made by the deceased to the three independent sources as believable and that the prosecution has established that it was *Nilanthi's* husband who was responsible for the assault. The identification of the accused by PW 1 also has been considered in favour of the prosecution case. The dock statement has been rejected after consideration and in page 10 of the judgment it is stated as follows;

“මෙම නඩුවේ පැමිණිල්ල මගින් විත්තිකරුට එරෙහිව ප්‍රබල නඩුවක් ඉදිරිපත් කොට ඇත. අපරාධ නඩුවකදී විත්තිකරුවෙකු සාක්ෂි දීම අත්‍යාවශ්‍ය නොවුනද, තමාට එරෙහිව ප්‍රබල නඩුවක් පැමිණිල්ලෙන් ඉදිරිපත් කොට ඇති අවස්ථාවකදී විත්තිකරුට තම නිදේර්ශ්‍ය භාවය ඔප්පු කිරීම සඳහා හරස් ප්‍රශ්න වලට ලක් වෙමින් සාක්ෂි ඉදිරිපත් කිරීමට හැකියාව ඇත. නමුත් මෙම විත්තිකරු

පැමිණිල්ලේ අයව ඔහුගේ නම සැක සහිත බවට පැමිණිලිකරුවන් පොලිසියට සඳහන් කිරීම නිසා අධිකරණයට පිළිගත නොහැක්කේ මෙම නඩුවේ ස්වාධීන සාක්ෂිකරුවන් වන පැ.සා.01, 02 සහ 04 මෙම මරණකරු විසින් ඔවුන්ට කරන ලද මරණාසන්න ප්‍රකාශය අනුව මෙම වූදින පහර දුන් බව ඉදිරිපත් වූ සාක්ෂි මගින් තහවුරු වී ඇති බැවිනි.”

At the hearing of the appeal, the Counsel for the accused-appellant submitted that the prosecution has not established beyond reasonable doubt, that the person referred to as ‘*Nilanthi*’ by the deceased, is the wife of the appellant.

It is trite law that the burden is always on the prosecution to prove the case against the accused appellant beyond reasonable doubt.

One of the main issues for consideration is the identification of *Nilanthi*, referred to by the deceased.

It is apparent that the witnesses who gave evidence of the dying declaration did not know any of the parties personally. That is the deceased, *Nilanthi* or the accused appellant. They have without any reservation testified what they were told by the deceased who is a stranger to them. No evidence has surfaced that they are partisan witnesses.

The evidence of the police officer PW 7 in pages 144 and 145 of the brief is that from his investigation he was satisfied that the accused is the husband of *Nilanthi* to whom the deceased had referred. But there is no cogent **evidence** submitted by the prosecution to establish that fact.

The evidence in the above pages is as follows.

ප්‍ර : මහත්මයා ප්‍රදීප් සම්පත්ගේ විවාහය සම්බන්ධයෙන් කරුණු අනාවරණය වුනාද?

උ : නිලන්ති යන අය සමග විවාහ වී ඇති බවට අනාවරණය වීමක් වුනා.

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ප්‍ර : මහත්මයා විමර්ශන වලදී නිලන්ති කියන අය සම්බන්ධයෙන් අවධානය යොමු වීමක් වුනාද?

උ : අවධානය යොමු වීමක් වුනා. ඇය පොලිසියට ඉදිරිපත් වුනේ නැහැ .

ප්‍ර : මහත්මයාගේ විමර්ශනයේදී පැහැදිලිව අනාවරණය වුනා නිලන්ති කියන්නේ මෙම විත්තිකරුගේ භායරාව කියලා?

උ : ඔව්

It is abundantly clear that the evidence above does not establish that the person referred to as *Nilanthi* by the deceased is the wife of the accused.

The evidence of the father of the deceased PW 3 is that he knew that the son was having an affair with a girl called *Nilanthi* from *Malwattakanda*. He was not aware when the affair started. He has never spoken with her but has seen her. No evidence is divulged how and when or how many times he has seen her, *Nilanthi* was never identified in Court. The accused was also a stranger to him. He has seen the accused only after coming to Court. His evidence was that he had **heard** that the accused was the husband of *Nilanthi* with whom his son was having an affair. It stand to reason that if PW 3 saw the accused only after coming to Courts, and if *Nilanthi* was not present in Court, his knowledge that *Nilanthi* and the accused were husband and wife has to come from a third party. That information has not been divulged. Is this evidence sufficient to establish the identity of *Nilanthi* and her connection to the accused?

On perusal of the evidence adduced in the instant case, it is abundantly clear that there has been no attempt by the prosecution to establish with cogent evidence that the

person named *Nilanthi* that the deceased was referring to is in fact, the wife of the accused and no one else.

Therefore, it is abundantly clear that the prosecution has not identified or established with cogent evidence, the person named *Nilanthi* who was having an affair with the deceased. Merely stating that the deceased was having an affair with *Nilanthi* does not establish that it is the same person who is married to the accused. Careful perusal of the evidence adduced reveals that there is absolutely no evidence to establish the nexus between *Nilanthi* referred to by the deceased and *Nilanthi* the wife of the accused. Therefore, I am of the view that there is no evidence established beyond reasonable doubt that the person called *Nilanthi* the deceased has been referring to, has any connection to the accused in this case.

In *Queen vs Sumanasena 66 NLR 351* it was held that;

“.... suspicious circumstances do not establish guilt nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence....”

In *Iyamperumel Ashokumar Vs. The Attorney General (2010 III ACJ 15) (CA 167/07)* decided on 23.08.2010, their Lordships’ held *“that it is trite law that suspicious circumstances, even if it amounts to a large number, do not establish guilt. Nor does the proof of any number of suspicious circumstances relive the prosecution of its burden of proving the case against the accused beyond reasonable doubt”*.

It appears that the learned trial judge inferred that the reference to ‘*Nilanthi*’ as stated in the dying declaration referred to the wife of the accused, without any cogent or substantial evidence.

The witnesses to the dying declaration were unaware of the existence of a person called '*Nilanthi*' with whom the deceased had a relationship. It is my considered opinion that merely mentioning that the person who assaulted was *Nilanthi*'s husband does not suffice to justify an inference that it was the accused who assaulted the deceased.

As there is no conclusive proof that *Nilanthi* who was referred to by the deceased is the wife of the accused I hesitate to agree with the conclusion of the trial judge. Therefore, I am of the view that it is not safe to act on the dying declaration made to three witnesses, to come to a finding that the person called *Nilanthi* referred to by the deceased, is the wife of the accused, when that fact has not been established beyond reasonable doubt.

Another issue to be considered is, whether there was a positive identification of the accused appellant as the person who inflicted the injuries to the deceased. The indictment refers to the accused and two others who are unknown to the prosecution. Only PW 1 had identified the accused as one of the 3 people who were with clubs. PW 2 who was with PW 1 at the same place was unable to identify the accused, the reason being the distance that he saw the three people. It can be presumed that the eye sight of people may vary from person to person.

However, considering the background to the holding of the Identification Parade, that is the appellant being in open court and thereafter, in the cell for over one and half hours, on an inquiry date where it is safe to assume that interested parties to the case may be present in Court. The only evidence is Police witness stating that the witnesses and other interested parties were not present in Court when the appellant surrendered himself to Court. That day being a day the case was scheduled to be called the non availability of the witnesses has not been established by the prosecution. Therefore, in the absence of any material evidence of this factual position, I am cautious to rely on the identification by PW 1 of the accused at the Identification Parade.

The case against the appellant is dependent on circumstantial evidence. Therefore it is necessary to consider whether the items of circumstantial evidence presented by the prosecution justify an inference of guilt against the accused.

In *Queen vs Kularatne* 71 NLR at page 534 The Court of Criminal appeal quoted with approval what *Watermeyer, J* held in *Rex vs Blom*.

Two cardinal rules which govern the case of circumstantial evidence in a criminal trial,

- 1. The inference sought to be drawn must be consistent with all the proved facts. If it does not, then the inference cannot be drawn.*
- 2. The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they had not excluded the other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.*

In *Don Sonny V Attorney General* (1998) 2 SLR 1, Court has held that the following principles should apply in considering a case presented on circumstantial evidence;

1. When a charge is sought to be proved by circumstantial evidence, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.
On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.
2. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.

3. If, upon a consideration of the proved items of circumstantial evidence, the only inference that can be drawn is that the accused committed the offence then they can be found guilty.
4. The prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

Justice *Sisira de Abrew* in *R.M Amarasiri Vs The Republic of Sri Lanka* CA Appeal 107/2005 decided on 26.11.2009 has held that “*In a case of circumstantial evidence, if two decisions are possible from the proved facts, then the decision which is favourable to the accused must be taken*”.

The learned Deputy Solicitor General appearing for the Respondent has referred to this court several judicial decisions in support of his contention that the testimonial trustworthiness of witnesses is a matter for a trial judge and a considered finding of a trial judge will not be disturbed by an Appellate Court lightly. (*King Vs, Gunaratne 14 Ceylon Law Recorder 174, Fradd Vs Brown & Company 20 NLR 282 at 283, State of Uttar Pradesh Vs M.K. Anthony [1984] SCJ 236/[1985] CRI L.J. 493 at 498/499 ,Oliver Dayananda Kalansuriya alias Raja Vs Republic of Sri Lanka CA 28/2009 (13.02.2013)*)

The Counsel has also referred to the following judicial authorities basing his argument that the evidence given on material points were not challenged as some of the prosecution witnesses were not cross examined , and accordingly it has to be concluded that the evidence that was not disputed is accepted. (*B.R.R.A. Jagath Premawansa V. Attorney General CA Appeal No. 173/2005 decided on 19.03.2009, Sarwan Singh V. State of Punjab 2002 AIR Supreme Court(iii) 3652 at 3655 and 3656 ,Bobby Mathew V, State of Karanataka (2004) 3 Cri.L.J. page 3003, Himachal Pradesh V. Thakur Dass (1983) 2*

Cri. L.J. 1694 at 1701, Motilal V. State of Madhya Pradesh (1990) Cri.L.J. NoOC125 MP, James Silva V Republic of Sri Lanaka 1980 2 SLR 167)

In the *Solicitor General v Nadarajah Muthurajah* 79 (1) NLR 63 it was held:

“...that an appellate court has the power to review at large the evidence upon which the order of acquittal was founded and to reverse that decision having given due weight to the opinion of the trial judge. A court is justified in interfering with the lower court’s decision where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific fact.”

From the conclusion of the learned trial judge, it is abundantly clear that she has erroneously decided that it had been established by the prosecution, that *Nilanthi* referred to by the deceased is the wife of the accused-appellant and has accepted the dying declaration made to the three witnesses on that assumption.

As stated above, it is our considered opinion that it will be dangerous and unsafe to agree with the conclusion of the trial judge to convict the accused-appellant for murder, when there is a doubt about the identity of *Nilanthi* referred to by the deceased.

Having considered the evidence presented by the prosecution and the relevant judicial authorities cited above that pertains to circumstantial evidence, we are of the considered view that the trial Court has erroneously found the accused-appellant guilty of the murder of *Hathurusinghe Wasantha Chandralal Sathurusinghe*.

Accordingly, allowing the appeal, we set aside the conviction and sentence imposed on the accused appellant and acquit him from the charge of murder.

The Registrar is directed to send a copy of this judgment together with the original case record to the High Court of *Negombo*.

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL