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

In the matter of an Appeal in terms of section 331 (1) of the Criminal Procedure Code No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0213/2019

High Court of Kalutara Case No:

HC/406/2004

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Rajagopal Gunasekaram

ACCUSED

AND NOW BETWEEN

Rajagopal Gunasekaram

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: K Priyantha Fernando, J.
	: Sampath B Abayakoon, J.
Counsel	: Jagath Nanayakkara for Accused-Appellant
	: Sudarshana De Silva D.S.G. for the Respondent
Argued on	: 08-03-2021
Written Submissions	: 30-06-2020 (By the Accused-Appellant)
	: 07-07-2020 (By the Respondent)
Decided on	: 28-04-2021

Sampath B Abayakoon, J.

This is an appeal by the accused-appellant (hereinafter referred to as the appellant) on being aggrieved by the judgment dated 22-08-2019 by the learned High Court Judge of Kalutara, wherein the appellant was found guilty for the charge of murder.

The appellant was indicted before the High Court of Kalutara for causing the death of one Palaniyandi Santhanam on 09th September 1996 and thereby committing the offence of murder punishable in terms of section 296 of the Penal Code.

After trial, the appellant was found guilty as charged and was sentenced to death by the learned High Court Judge.

The appellant was not produced in open Court due to the prevailing COVID pandemic by the prison authorities. However, he was produced via. Zoom platform for the hearing of the appeal, and he informed the Court that he has no objection for the assigned counsel presenting the arguments of the appeal while he is observing the proceedings via. Zoom platform.

At the hearing of the appeal the learned counsel for the appellant pursued only one ground of appeal, namely, that the learned High Court Judge has failed to evaluate the evidence presented to the Court in its correct perspective.

Making submissions extensively as to the evidence led at the trial, it was his position that several factual contradictions which should have been considered in favour of the appellant have escaped the attention of the learned High Court Judge. It was also his position that since there were no eye witnesses to the actual incident, the circumstantial evidence relied on to convict the appellant are not reliable, as they do not point only towards the appellant, that it was he who committed the offence.

It was the contention of the learned Deputy Solicitor General on behalf of the Respondent that there was sufficient direct and circumstantial evidence before the High Court Judge to conclude beyond reasonable doubt as to the guilt of the appellant for the charge of murder preferred against him, and that there is no basis to interfere with the judgment of the learned High Court Judge.

It is true that no one has seen the actual assault of the deceased by the appellant using a knife. However, PW-03 and PW-04 are persons who came to the scene of the crime immediately after the incident. According to the evidence of PW-04 Kadireshan Angaai, that at around 11am to 12 noon on the day of the incident while coming towards her house after obtaining her salary, she heard a cry “අයියෝ අයියෝ” from the direction of her house and she met the appellant Gunasekaram coming from her house with a knife in his hand wearing a blood-stained shirt, and he went into his nearby house. It was her evidence that when she reached her house, she saw the deceased with cut injuries fallen in the verandah. She has categorically stated that it was only the appellant who came from her house and no one else. It has also been revealed that the appellant was living in a line room and the house of PW-04 was a separate house built in front of the line rooms and was in close proximity to each other

and that there are no other houses nearby and her husband was also not at home at the time as he has also gone to collect his salary.

It is to be noted that while facing lengthy cross examination by the defence and when the Court asked at what time she heard the cry; she has replied that she cannot remember the exact time she heard the sound "අයියා අයියා" (at page 116 of the brief)

PW-03 namely Suppiah Subadra was the sister of the deceased person's wife. According to her evidence, on the day of the incident, she was at her home and upon hearing a cry "අයියා අයියා" she came out of the house and saw the appellant whom she has identified as Guna about 75 feet away from her, holding a knife and the deceased Santhanam kneeling in front of him. In Court she has physically described the way she saw the deceased kneeling with his head down and has stated that the distance between the two was about two feet. She has also stated that she is unaware of any previous enmity between the appellant and the deceased and the knife she saw was about a foot long with a bended edge. Under re-examination, she has stated that what she heard was a cry "අයියෝ අයියෝ".

Both the witnesses have not been questioned as to any motive for the crime. However, the wife of the deceased namely Suppiah Wasantha in her evidence has stated that due to a dispute with regard to her husband providing information about illicit liquor, a person called Appavo Perumal and some other persons including the appellant threatened her husband with death about three months before.

According to the evidence of the Judicial Medical Officer, the deceased has received 11 cut injuries and most of them are to the neck.

At the hearing of the appeal, the learned counsel for the appellant attempted to put much emphasis on the part of the evidence as to what prompted the PW-03 and PW-04 to go towards the place where the deceased was found, arguing that

it was a vital contradiction that goes into the root of the matter. It is true that both of them have stated that what they heard was a cry of "අයියෝ අයියෝ" but it appears that it has also been stated and recorded as it was a sound "අයියා අයියා".

I find that whatever the cry they heard, it was the said cry that prompted both of them to go and look at the direction from where the sound came. Although PW-03 is a relative of the deceased, PW-04 is a person with no connection to the deceased. It is abundantly clear that both the witnesses were telling the truth as to what they saw when both of them said that they did not see the actual attack but the appellant with a knife near the deceased.

It is clear from the judgment, the learned High Court Judge has considered the circumstantial evidence to come to a firm finding as to whether the said evidence points directly towards the guilt of the appellant and nothing else, which I find was the correct approach in considering evidence in a trial of this nature.

In the case of **The King Vs. Abeywickrama 44 NLR 254** it was held:

Per Soertsz J.

> *"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 hypotheses of his innocence."*

In **Don Sunny Vs. The Attorney General (1998) 2 SLR 01** it was held:

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 only inference that the accused committed the offence. On 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 consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence, then they can be found guilty. 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 if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

There is no doubt that the death of the deceased was due to the cut injuries he received from a sharp cutting weapon as the evidence of the Judicial Medical Officer establishes.

The learned High Court Judge in his judgment has considered the undisputed evidence of witness PW-04 who saw the appellant coming from the direction of her house with a knife wearing a blood stained shirt and the evidence of PW-03 who saw the appellant in front of the kneeling deceased with a knife in his hand as circumstantial evidence that points directly towards the appellant to conclude that there can be no other person that can inflict injuries to the deceased than the appellant under proven circumstances. Although the learned counsel for the appellant attempted to portray that there were several contradictions in the evidence of the material witnesses, I am in no position to agree. Even if they are to be considered as contradictions as argued, they do not create any doubt as to the truthfulness of the witnesses. As considered correctly by the learned High Court Judge no witness is expected to have a photographic memory of an incident that happened some years ago. What is important is that whether the evidence of the witnesses can be believed beyond reasonable doubt.

It is settled law that in a criminal action the accused person has no burden of proof and it is up to the prosecution to prove its case beyond reasonable doubt. However, when there is strong and undisputed evidence that points directly towards an accused person that only he can explain, there is a duty cast upon the accused to give a reasonable explanation, which is commonly known as the dictum of Lord Ellenborough.

The said dictum as quoted by **E.R.S.R.Coomaraswamy** in his book **THE LAW OF EVIDENCE Vol-01 page 21** reads as follows;

> "No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which is attached to him; but nevertheless if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence if such exist, in explanation of such suspicious appearances which would show him to be fallacious and explicable consistently with his innocence, it is reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or adduced would operate adversely to his interest." – **Rex Vs. Lord Cochrane and Others (1814) Gurney's Report 479-**

Although there exists a debate among the legal luminaries that there is no such dictum and it is not a part of the law of Sri Lanka and the judgments which applied the dictum are judgments *per incuriam*, this argument was considered extensively in the five-judge bench of the Supreme Court in **The Attorney General Vs. Potta Naufer and Others (2007) 2 SLR 144,** where it was held:

Per Amaratunga, J.

> *"The passage quoted above perfectly fits into the facts of this case where the case against the first accused-appellant rested the entirely on circumstantial evidence. In the absence of an explanation from the first*

accused-appellant in respect of the damning items of evidence available against him, the learned trial judges were perfectly justified in adopting the rule of logic embodied in Lord Ellenborough dictum in deciding the guilt of the first accused-appellant.

"For the reasons set out above, I reject the learned President's Counsel's submission that there is no dictum called the dictum of Lord Ellenborough; that the words attributed to Lord Ellenborough is a fabrication by Wills; and that the views expressed by Lord Ellenborough is not a part of the law of Sri Lanka."

When it comes to the facts of the instant action, the appellant has failed to offer any explanation as to the incriminating circumstantial evidence against him. Other than cross examining the material witnesses as to the time of the incident and as to what they heard just before they saw the appellant with a knife. The circumstantial evidence that links the appellant directly to the crime has not been disputed at any point. When called for a defence, the appellant has remained silent. The trial judge has taken into consideration all these factors in his judgment with clear reasoning. Therefore, I find no reasons to disagree with the learned High Court Judge's evaluation of the evidence and his finding that the charge against the appellant has been proved beyond reasonable doubt.

For the reasons stated above, I dismiss the appeal as it is devoid of merit, and the conviction and the sentence imposed is affirmed.

Judge of the Court of Appeal

K Priyantha Fernando J.

I agree.

Judge of the Court of Appeal