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:

HCC-0092-2019

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court Anuradhapura

Case No:

HC/ANU/94/2009

H. M. Abeyratne Dissanayake

ACCUSED

AND NOW BETWEEN

H. M. Abeyratne Dissanayake

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: K Priyantha Fernando, J. (P. /C.A.)
	: Sampath B Abayakoon, J.
Counsel	: Nihara Randeniya for the Accused-Appellant
	: Chethiya Gunasekara, P.C., ASG for the Respondent.
Argued on	: 13-08-2021
Written Submissions	: 03-12-2019 (By the Accused-Appellant)
	: 30-01-2020 (By the Respondent)
Decided on	: 16-09-2021

Sampath B Abayakoon, J.

This is an appeal by the accused-appellant (Hereinafter referred to as the appellant) on being aggrieved by the conviction and sentence of him by the learned High Court judge of Anuradhapura.

The appellant was indicted before the High Court of Anuradhapura for committing the offence of murder by shooting of one Amara Thennakoon who was his wife, an offence punishable under section 296 of the Penal Code.

This is an offence said to have been committed on 18th January 2001. After trial without a jury, the appellant was found guilty as charged by the learned High Court judge by his judgment dated 01-04-2019, and was sentenced to death accordingly.

As there were no eye witnesses to the actual crime, this is a matter that has been determined entirely on circumstantial evidence.

At the hearing of the appeal, the learned counsel for the appellant urged the following grounds of appeal for the consideration of the Court.

(1) That the learned trial judge erred in law by failing to consider the well settled law and judicial pronouncements relating to a case entirely based on circumstantial evidence.

(2) That the learned trial judge wrongly applied the Ellenborough principle.

(3) That the learned trial judge failed to consider suspicious circumstances does not establish guilt.

(4) That the learned trial judge did not evaluate the defence evidence from the correct perspective and rejected the same in the wrong premise.

Before considering the grounds of appeal in detail, I would now briefly summarize the relevant facts of the matter.

The appellant and his wife, the deceased, lived in the village of Maha Kakirawa in the Kakirawa area with their two children. According to the evidence of Palisge Wimalaratne (PW-06) who was a neighbour and a relative, on the early morning of the day of the incident (18-01-2001) he received a message that the appellant Dissanayake's wife was shot dead. It was his evidence that on the 16th of January the appellant came to meet him and sought his help to secure a gun saying that he is in need of a gun to protect a treasure available in his paddy field. As the owner of the paddy field he was cultivating, namely Ranasinghe, has a gun, it was PW-06 who has persuaded the said Ranasinghe (PW-07) to handover the gun to him on the pretext of needing the same to protect the crops of the paddy field. After taking over the gun from its owner, the PW-06 has handed it over to the appellant and had received the information of the death of the deceased the following morning. The witness says that he and his family went to the house of the deceased, but he did not

enter the compound and waited outside. It was his evidence that the appellant attempted to speak to him several times and when he eventually spoke to him, he asked the appellant what was done. In reply, the appellant has informed the PW-06 that the gun is near the Katakala tree in the paddy field belonging to Prithi's mother and asked him to remove it from that place.

After daybreak, PW-06 has gone to the place indicated by the appellant to find the gun as indicated, which he has not touched. Subsequently the owner of the gun (PW-07) had come looking for his gun upon hearing of the shooting and after being informed that the gun was given to the appellant and the place where it can be found, it was Ranasinghe (PW-07) who has retrieved the gun and taken it to his house.

It was the evidence of PW-07 the owner of the gun that because of the constant pleading of PW-06 who was his tenant cultivator, he gave the gun to him in order to protect the crops on the 17th at around 8.00 pm along with some cartridges. After receiving information that the wife of Dissanayake has been shot dead the following day, and suspecting some foul play, he has gone looking for his gun and has been informed by PW-06 about the place where the gun can be found. After retrieving the gun from where it was, (production marked P-01 at the trial), it has been cleaned by the witness and has handed over to the Police subsequently when the Police came looking for it.

PW-02 Ranjith Dissanayake was the son of the appellant and the deceased, who lived with his parents and the sister in the house where the shooting took place. He was about 16 years of age at the time. He has gone to bed as usual on the fateful day and in the early hours of the 18th he was awakened by an echoing sound from inside the house. He has found that there was no electricity in the house. Later he has been informed by his sister that their father informed her that the mother has been shot. Upon informing the incident to his relatives who lived nearby, the witness has found that the electrical cutout which was near the electricity meter had been removed. He

had seen his mother with bleeding injuries inside a mosquito net (P-02) laid onto the bed where she was sleeping with his father. The witness has also seen a wooden pole near the open window of the room. He has also spoken about the disputes his mother and father had due to an illicit relationship of his father.

Confirming the evidence of PW-02, his sister PW-03 has stated that when she went into the parents' room hearing a loud noise, she found her father in the room with a torch as there was a power outage. Upon inquiry, he had informed her that somebody shot the mother and he is going to find a vehicle before leaving the house.

The evidence of PW-12, IP Gamini Fernando, who was the Officer in Charge (OIC) of Kekirawa Police crime investigation division at the time of the incident is of paramount importance in this matter. He has received the first complaint regarding the shooting incident from the appellant and has conducted the main investigation as to the matter. He has found highly suspicious the appellants information as to what happened on that day. Although the appellant has explained that someone from outside shot at his wife from the open window of the room, on inspection, he has found that was not possible as the window was at a much higher elevation than the ground. Furthermore, when comparing the burn mark that was visible on the mosquito net and the wound of the deceased, he has found that the firing has to be from inside the room from towards the door and not the window as claimed by the appellant. After arresting the appellant, the PW-12 has taken steps to record his statement, and as a result has found the cutout of the electrical connection hidden near the house.

The relevant part of the appellant's statement that led to the discovery of the cutout has been marked under the provisions of section 27 of the Evidence Ordinance as P-04, and the said cutout as P-05 at the trial.

PW-13 was the then OIC of the Kekirawa Police. He has also well explained the findings of PW-12, and was also the person who recovered the weapon marked P-01 from the possession of PW-07 Ranasinghe.

PW-10 was the Judicial Medical Officer (JMO) who has conducted the post-mortem examination on the deceased. He has found that the death was due to gunshot injuries suffered by the deceased. After examining the entry wound of the deceased, he has found that the firing has to be from a close range of about 18 inches from the body of the deceased. He has also ruled out the possibility of someone from outside the room window from firing at the deceased. I find that the JMO has well explained his findings before the High Court using his professional expertise as a Judicial Medical Officer.

When the appellant was called for a defence at the conclusion of the prosecution case, he has chosen to make a statement from the dock and to call a witness. In his statement he has admitted that he persuaded PW-06 to obtain the gun from PW-07, but has taken up the position that it was obtained to be given to one Wijeratne, and he left the gun near the house of Wijeratne for him to take and went home to retire to bed. According to the appellant, he has heard a gun shot in the night while sleeping and had found his wife who was sleeping alongside him with bleeding injuries. It was his stand that there was no power at that time and after seeing the wife's injuries he went to his neighbour Godakanda madam's house in order to seek her help. It was his position that as she refused to come out of the house he went to the Police with the help of another neighbour and lodged a complaint. He has claimed that although he informed the Police that he suspects Wijeratne to whom he gave the gun, police arrested him and got his signature to a document after assaulting him.

Giving evidence for the defence, the above mentioned Pathmalatha Godakanda who was a neighbour and a medical practitioner of the area has confirmed that the appellant came to her house on the day of the incident and informed that

his wife has met with an issue and his house has been burgled, seeking her help. She has refused to come out of the house since it was night time and has been informed subsequently that the wife of the appellant has been shot dead.

It appears that the stand taken throughout the trial by the appellant was that someone shot his wife from outside the house and he has nothing to do with it. However, the learned High Court judge has found that his stand has not created any doubt on the evidence presented by the prosecution as to his culpability to the crime. Based on the circumstantial evidence, the appellant was found guilty as charged by the learned High Court judge.

Grounds of Appeal

As the first three grounds of appeal urged by the learned counsel for the appellant are interrelated, I will now consider them together in order to consider whether they have any merit.

1st 2nd and the 3rd Grounds of Appeal: -

I am unable to find any material contradictions *inter say* or *per say* on the evidence led in this action. I do not find any reasons to believe that the witnesses were not telling the truth or making any attempt to distort their version of events. There are no reasons to disagree with the professional opinions expressed by the JMO and the Government analyst who inspected the gun used in the crime, or reasons to disbelieve the observations of the Police officers who conducted investigations into the crime.

With the above factual situations in mind, I now consider the legal principles that should be considered by a trial judge in an action of this nature, where the matter has been decided principally on circumstantial evidence.

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.*

A trial judge also has to be mindful that suspicious circumstances do not establish guilt and the burden of proving a case beyond reasonable doubt against an accused is always with the prosecution.

In the case of **The Queen Vs. M.G. Sumanasena 66 NLR 350** it was held:

> *"In a criminal case 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"*

However, in considering the circumstantial evidence, what has to be considered is the totality of the circumstantial evidence before coming to a firm finding as to the guilt of an accused, although each piece of circumstantial evidence when taken separately may only be suspicious in nature.

In the case of The **King Vs. Gunaratne 47 NLR 145** it was held:

> *"In a case of circumstantial evidence, the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion.*
>
> *The jury is entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt."*

In the case of **Regina Vs. Exall (176 English Reports, *Nisi Prius* at page 853)** Pollock, C.B., considering the aspect of circumstantial evidence remarked;

> *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in a chain, but that is not so, for then, if any one link brock, the chain would fall. It is more like the of a rope composed of several cords. One strand of the rope might be*

insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

I find that in this action the circumstantial evidence can be separated as to what happened before the actual shooting and what happened afterwards. The appellant in his dock statement has admitted that it was he who persuaded PW-06 to secure a gun for him, and how it was secured. Although it was his position that it was given to a third person, when the relevant witnesses gave evidence, that proposition has not been put to them on behalf of the appellant.

On the day of the incident when the daughter of the appellant went into the room of the house where the parents occupied after hearing a loud sound, the appellant has been in the room and there was no electrical power in the house. The appellant has informed his daughter that the mother was shot by someone and has left the house apparently to seek help. It was the appellant who has made the first complaint to the Police, claiming that someone shot his wife through the window of the house.

However, it has been found that there was no possibility for someone to fire at the deceased from outside the house through the window as claimed by the appellant in his complaint to the Police as the window was of much higher elevation from the ground. Upon further investigation, the inquiring officer has found that the actual firing has been from within the room itself. He has formed this opinion by observing the burn marks of the bullet entry point of the mosquito net which covered the bed of the victim and her wounds. The JMO who conducted the post-mortem has opined that the victim has been shot from a range of about 18 inches of her body which has confirmed the observations of the Police. PW-06 has given clear evidence that after the incident, the appellant came to him and informed where the gun can be found and requested that the gun be removed from the place where it was. PW-07, who was the owner of the gun has confirmed the evidence of PW-06 as to the finding of the gun. It clearly appears that the appellant's stance in his dock

statement that he left the gun for some other person to collect was an afterthought in order to counter the evidence of PW-06.

The appellant's own son PW-02 has given evidence as to the relationship the appellant had with his wife, although he has made an attempt to show that everything was fine between them. The son's evidence had not been counted in any acceptable manner, and when taken together with other circumstantial evidence, although it is not necessary to prove the motive, I find enough motivation for the appellant to remove his wife from his life.

Although it was the contention of the learned counsel for the appellant that the learned trial judge has failed to consider the circumstantial evidence in its correct perspective and the judgment has been based on suspicious circumstance, I am unable to agree. It is very much apparent from the judgment that the learned trial judge was mindful of the relevant legal principles emphasized before. There is no basis to consider that the verdict has been reached based on suspicious circumstances as the learned trial judge was mindful that such circumstances do not establish guilt. I am of the view that this is a case where all the circumstantial evidence when taken cumulatively points directly towards the culpability of the appellant for the crime and nothing else.

It is well settled law that in such a scenario, an accused person only has to create a reasonable doubt as to the evidence against him, or at least offer a reasonable explanation, since there is no duty cast on an accused in a criminal trial, and it was the prosecution who must prove its case beyond reasonable doubt.

I do not find any basis to consider that there was any doubt as to the evidence led in this action or any reasonable explanation given as to the incriminating circumstantial available evidence against the appellant.

For the aforementioned reasons I find no merit in the three grounds of appeal urged.

4th Ground of Appeal: -

It was the contention of the learned counsel for the appellant that the learned trial judge has failed to consider the evidence led on behalf of the accused, as the learned trial judge has considered the evidence on the basis that the appellant has failed to call any evidence to support his stance taken at the trial. It was his stand that even the dock statement has not been considered in its correct perspective as the learned trial judge has gone on the basis that the appellant claimed that he was unaware about the shooting of his wife, whereas it was not.

It was his view that this obvious non consideration of evidence has caused a great prejudice to the appellant, which amounts to a denial of a fair trial, and hence, this is a matter that should be sent for a re-trial.

It was the position of the learned ASG for the Attorney General that what needs to be considered is whether these lapses on the part of the learned trial judge have caused any prejudice to the appellant. Citing the proviso to Article 138 of the Constitution, which confers the appellate jurisdiction to the Court of Appeal from the Courts of first instance and the case of **Mannar Mannan Vs. The Republic of Sri Lanka (1990) 1SLR 280** and other relevant legal principles, it was his argument that there exists no need for a retrial. Even if the dock statement and the evidence called on behalf of the appellant was considered in the proper manner, it was his view that there cannot be a different outcome to the judgment of the learned trial judge as it would not have created a reasonable doubt or a reasonable explanation as to the evidence against the appellant.

The proviso of Article 138 of the Constitution reads as follows;

> **"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."**

In **Mannar Mannan Vs. The Republic of Sri Lanka** (Supra):

In a trial on a charge of murder, two eyewitnesses testified to seeing the accused appellant fire one shot with a gun at the deceased in the night. The accused in a statement from the dock denied he was anywhere in the vicinity of the shooting. The trial judge failed to direct the jury that it was sufficient for the appellant to secure an acquittal if the statement from the dock raised a reasonable doubt in regard to the allegation of the prosecution that it was the appellant who shot the deceased.

Held:

The enacting part of sub-section (1) of section 334 mandates the Court to allow the appeal where-

(a) The verdict is unreasonable or cannot be supported having regard to the evidence; or

(b) There is a wrong decision on any question of law; or

(c) There is a miscarriage of justice on any ground.

The proviso vests discretion In the Court and recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. There is no warrant for the view that the Court is precluded from applying the proviso in any particular

category of wrong decision or misdirection on questions of law as for instance, burden of proof.

There is no hard and fast rule that the proviso is inapplicable where there is non-direction amounting to misdirection in regard to the burden of proof. What is important is that each case falls to be decided on the consideration of

(a) The nature and intent of the non-direction amounting to a misdirection on the burden of proof

(b) All facts and circumstances of the case, the quality of evidence adduced and the weight to be attached to it.

In the case of **Lafeer Vs. Queen 74 NLR 246,** H.N.G.Fernando, C.J. stated;

"There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."

Both the above mentioned are cases where the trial at the High Court was before a jury, and decided in appeal under section 334 of the Criminal Procedure Code, which has similar provisions to Article 138 of the Constitution in the section itself. I find that the principles discussed in the said appeals are of equal relevance to a determination of an appeal under the provisions of section 335 of the Criminal Procedure Code of a trial held without a jury before the High Court in view of the Proviso to Article 138 of the Constitution.

When it comes to the appeal under consideration, it is true that the learned High Court judge has misdirected himself as to the stand taken by the appellant in his dock statement and on the witness called on behalf of the accused.

In his judgment, the learned trial judge has wrongly determined at page 11 of the judgment (page 282 of the brief), that the appellant's stand was that he did not know anything about the shooting. Whereas, his stand throughout the trial had been that someone shot his wife from outside of the house through the open window.

Although the learned trial judge has determined that the appellant failed to call any witnesses, in fact, one Pathmalatha Godakanda who was a medical practitioner and a neighbour of the appellant has testified that on the day of the incident, the appellant came to her house in the night. He had informed that his house had been burgled and his wife faced with an incident, wanting to have her van. She has declined because it was night time and she was alone, telling the appellant to go and seek help from some other person.

In view of the above, what has to be determined in this appeal is whether the mentioned lapses by the learned trial judge have occasioned a failure of justice, which warrants the intervention of this Court.

As discussed before, there are overwhelming circumstantial evidence against the appellant beyond reasonable doubt as to his guilt of the crime. Even if the dock statement and the stand taken by the appellant at the trial was to be considered on its merits, no acceptable explanation or any doubt would have been created as to the evidence of the prosecution. When it comes to the evidence of the witness called by the appellant, if considered, it would only show that the appellant went to the house of the witness after the incident.

This appears to be an attempt to show that he was a concerned husband and to mislead.

For the reasons as stated above, I find no merit in the ground urged either, as it has not caused any material prejudice to the appellant and occasioned a failure of justice.

The appeal therefore is dismissed. The conviction and the sentence affirmed.

Judge of the Court of Appeal

K. Priyantha Fernando, J. (P./ C.A.)

I agree.

President of the Court of Appeal