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-0299-2019

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Kuliyapitiya

Case No:

HC/12/2018

L A M B Miyuru Lankathilleke

ACCUSED

AND NOW BETWEEN

L A M B Miyuru Lankathilleke

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	: Indika Mallawarachchi for Accused-Appellant
	: S. Balapatabendi, P.C., ASG. for the Respondent.
Argued on	: 20-07-2021
Written Submissions	: 27-08-2020 (By the Accused-Appellant)
	: 22-10-2020 (By the Respondent)
Decided on	: 16-09-2021

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the accused) filed this appeal on being aggrieved by the conviction and sentence of him by the learned High Court judge of Kuliyapitiya.

The accused was indicted before the High Court of Kuliyapitiya for causing the death of one Muhandiramalage Sriyalatha on 23rd October 2013, an offence punishable under section 296 of the Penal Code.

After trial without a jury, the learned High Court judge found the accused guilty as charged by his judgment dated 14-11-2019, and was sentenced to death accordingly.

At the hearing of the appeal the learned counsel for the accused relied on the following grounds of appeal in her arguments before this Court.

(1) The learned trial judge has erred by relying upon suspicious circumstances to form the basis of the convictions.

(2) Items of circumstantial evidence relied on by the learned trial judge are wholly inadequate to come to an inference as to the guilt of the

accused and the learned trial judge has failed to evaluate such evidence in its correct judicial perspective.

(3) The learned trial judge has shifted the burden of proof to the accused thereby reversing the presumption of innocence.

(4) Ellenborough principle has been misapplied.

(5) Application of last seen theory is erroneous.

(6) Dock statement of the accused has been rejected on an erroneous premise causing serious prejudice to the accused.

The facts of the matter as revealed in the evidence briefly are as follows;

The deceased Sriyalatha was the mother-in-law of the accused whose wife was employed in the Middle East at the time of the incident. The deceased lived with her husband and other family members about 1 ½ Km away from the house of the accused, who lived with his two small school going children. According to the evidence of PW-01, the husband of the deceased, although he maintained no connection with the accused for over 12 years, the deceased, obviously due to her maternal instincts, was in the habit of visiting the house of the accused every evening in order to prepare meals for the young children and look after their needs. She used to return home the following day morning. On the day of the incident, PW-01 has received a message saying that his wife has suffered injuries to her hand due to a fall onto a crowbar that used to husk coconut **("ඔසුප් ටෙ")** and on his way to the house of the accused PW-01 has received the message that his wife is no more. It was the evidence of PW-01 that the accused has taken his wife to Dambadeniya Hospital bypassing five hospitals, the nearest hospitals being Katupotha or Narammala. It was his view that the accused took his wife to a faraway hospital in order to make sure that she is dead.

There are no eye witnesses to the incident and this is a matter that has been decided entirely on circumstantial evidence. At the trial, the stand of the accused has been that there was no animosity between his mother-in-law and himself and he found the deceased early morning of the day of the

incident with injuries suffered due to her falling onto the coconut husking crowbar which was outside the house.

The daughter of the accused who was about ten years old at the time of the incident has testified that early morning of the day of the incident, she heard a painful cry from her grandmother from outside the house and her younger sister informed her that the grandmother has suffered an evil spirit. Later she has seen her fallen near the coconut husking bar which was near the house with blood on her body. She has also found the outside lights of the house were on, and her father nearby. Her evidence reveals that it was upon hearing her cry the neighbours have come to the scene.

PW-06 is a neighbour who has testified that at around 4.30 in the morning on the day of the incident he heard a cry of a female and when he went to the house of the accused to inquire, he found the deceased, and it was he who accompanied the accused to take the deceased to a hospital in a van belonging to another neighbour. He has stated in evidence that although it was their intention to take the deceased to the Narammala hospital, which was nearer, it was the accused who wanted the deceased to be taken to Dambadeniya hospital. He has also stated that since the accused was the relation of the deceased, they followed his instructions.

The evidence of PW-02 and PW-03, the daughters of the deceased who lived some distance away and PW-07, the son who lived with the deceased, shed some light into the relationship the deceased and her family members had with the accused and the family life the accused maintained with his wife. According to them, the accused was a person who used to ill-treat and physically abuse his wife and the members of the wife's family did not maintain a close relationship with the accused due to that fact. The deceased, despite the objections of the family members was in the habit of visiting the house of the accused after the departure of her daughter for overseas employment in order to look after the children. The wife of the accused had sent money to the mother and not to the accused and the accused had been pressing the family members of the wife asking them to

convince her to come back. It is also evidence that the accused gave a telephone call to one of the daughters of the deceased (PW-03) and informed her that he is planning to leave the country for employment on 25th October and had said that he is going to conclude things before that. The deceased, who met the PW-03 few days before the incident had informed her about the harassment she has to face at the hand of the accused.

I find that all the witnesses called by the prosecution to testify as to the incident and other surrounding circumstantial evidence have been cross examined by the counsel for the accused at length. However, there are no inconsistency *inter say* or *per say* in their evidence. The cross examination has not created any doubt as to the trustworthiness or truthfulness of their evidence either. Although the defence has cross examined the daughter of the accused and established that one of her aunts coached her to implicate the father at the Magistrate Court inquiry, she has been very much truthful as to what she saw on the day of the incident when she gave evidence at the High Court, which has not created any doubt as to the evidence of the other witnesses.

Even though the defence has made an attempt to show that the deceased had been suffering from various ailments at the time of her death, the evidence led in the action shows that she was a person with no known health issues.

I find that the evidence of PW-15, the Judicial Medical Officer (JMO), who conducted the post-mortem on the deceased and PW-09, the Officer-in - Charge of the Narammala Police on the day of the incident, who was the main investigation officer, of paramount importance as this was a matter decided mainly based on circumstantial evidence.

According to the evidence of the JMO, he has observed 14 injuries on the body of the deceased. Injuries number 01 to 06 are stab wounds caused to the stomach area of the deceased. He has opined that these wounds would necessarily have to be caused by using force and cannot happen under normal conditions like an accident. He has described the possible features of

the weapon used and had identified the coconut husking crowbar marked as P-03 as the possible weapon used.

The JMO has found several cut injuries and abrasions among the other injuries. He was of the view that injuries 09, 12,13 and 14 are abrasions that can happen as a result of dragging the victim while she was fallen face up on the ground. It was also his view that the stab injuries have been caused while the deceased was on the ground as no person can withstand such number of injuries when standing. Apart from the injuries described in detail, the JMO has also found contusions on the upper and lower inside lips of the victim.

The evidence of the main investigation officer was that he received a complaint from the accused that his wife's mother died as a result of injuries she suffered from falling onto a coconut husking crowbar. He has found the complaint questionable as the victim has been taken to the Dambadeniya hospital about 23 Km away, bypassing several hospitals along the way, including the Narammala hospital, which has resulted in him commencing investigations immediately. He has reached the place of the incident as directed by the accused and the accused had pointed the place of the incident which was by the right side of the main door of the house where a coconut husking crowbar was placed. He has observed that it has been removed from the place where it was and on the ground. He has observed further, that an unusual amount of water has been used in the place of the incident and traces of blood on the crowbar and on the washed ground, and had observed the well of the house far away from the place.

Upon questioning, the accused has explained the presence of water saying that he washed the victim's wounds before taking her to the hospital, which was rather strange behaviour in a situation like this. The officer has identified the crowbar he found near the place of the incident as the item marked P-03. On further inquiry as to the surroundings of the house he has excluded the possibility of someone coming from outside into the compound. Investigating further, he has found a plastic bottle with kerosine nearby and

upon inquiry the accused has explained that he used kerosine to clean the rust marks of the crowbar and the injuries of the victim before she was taken to the hospital. With all the highly suspicious circumstances in mind the investigating officer has waited till the conclusion of the post mortem, where the JMO has confirmed that the death was no accident as claimed, but a crime.

I find that it was only after taking into consideration all the circumstantial evidence the accused has been taken into custody by the investigating officer after explaining the possible charge against him.

When called for a defence after the conclusion of the prosecution evidence, the accused has made a statement from the dock where he has taken up the position that on the day of the incident when he woke-up hearing a cry from the deceased, he came out of the house with his youngest daughter who was sleeping with him. And he saw the deceased fallen near the coconut husking crowbar and found blood on the crowbar.

He has stated that after the neighbours came to the scene on hearing the cries of the daughters, it was he who took the deceased to the hospital. Explaining further, it was his position that he took her to the Dambadeniya hospital believing that it has better facilities to treat the patient. He has also admitted that he washed the deceased before she was taken to the hospital, his explanation was that he did it in order to see what were the injuries suffered by the deceased. Denying that he cleaned the wounds and the crowbar with Kerosine oil he has explained that the Kerosine oil found was brought by him to clean the water motor and the Police implicated him wrongly.

Shifting away from the stand taken during witness for the prosecution gave evidence that the deceased's injuries are a result of her falling onto the crowbar, the accused has stated that the crime would have been committed by someone who came into the compound from outside. It has been his stand that he was implicated in the crime by the relatives of the deceased due to the animosities they had with him and he had no reason to harm his

mother-in-law as she was the only person of the family who was in good terms with him. The accused has called no other witnesses on behalf of him.

With the above facts in mind, I now proceed to consider the grounds of appeal urged by the learned counsel for the accused.

The 1st ground of appeal where it was argued that the learned trial judge has considered suspicious circumstances against him and the 2nd ground of appeal where it was argued that the learned trial judge has considered inadequate circumstantial evidence to find the accused guilty are interrelated, hence, the two grounds of appeal will be considered together.

1st and the 2nd grounds of appeal: -

It is well settled law that suspicious circumstances against an accused in itself does not establish guilt.

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"*

It is also well-established law that in order to prove a charge based on circumstantial evidence, the evidence considered must point directly towards the guilt of the accused and nothing more.

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.*

Hence, it becomes necessary to consider whether the learned High Court judge has considered the evidence in its correct perspective when he found the accused guilty as charged.

I am unable to agree with the learned counsel for the accused that the learned trial judge has failed to address his mind to the principles of law as to suspicious circumstances and circumstantial evidence in its correct perspective in the judgment. After considering the suspicious circumstances that led to finger being pointed at the accused the learned trial judge has considered the incriminating circumstantial evidence against the accused to come to a firm finding before considering whether the accused has offered a reasonable explanation on them.

It is the accused who has made the first complaint claiming that his mother-in- law suffered injuries due to her falling onto the coconut husking crowbar. The accused had told the same thing to the son of the deceased (PW-07) in his initial information as to what happened to the deceased. When the neighbour PW-06 came to the place of the incident upon hearing the cries of the daughters of the accused he has uttered the same statement to him.

According to the accused's own admission it was he who has seen the deceased fallen onto the crowbar first. However, if it was so, as observed correctly by the learned trial judge, it was he who should have raised the alarm to seek help from the neighbours. However, it was only after the cry of the elder daughter who came out of the house after hearing a painful cry from her grandmother the neighbours have been alerted and had come for help.

The accused had admitted that he washed the wounds of the deceased and has explained his act, saying that it was done in order to inspect the injuries suffered by the deceased. It is clear from the evidence that the accused has done that before the arrival of the neighbours to the scene of the incident, as the witnesses who came after they were alerted had not spoken about any washing of the wounds of the deceased. There was no reason for the accused to wash the wounds since if he saw the deceased fallen on the crowbar as claimed by him.

The accused who took the mother-in-law to the hospital has chosen to take her to a hospital situated 23 Km away, bypassing several other hospitals. I find that this proven behaviour of the accused is not the behaviour of a person faced with such a situation. Any such person would naturally alert his neighbours as soon as he sees the injured person, and take steps immediately to take the injured to the nearest hospital rather than washing the wounds to inspect the injuries.

I find that these are not suspicious circumstances, but circumstantial evidence that points directly towards the accused in view of the findings of

the JMO in his post mortem examination and in view of the investigative findings of the investigating officer, the then OIC of the Narammala Police.

The learned trial judge has considered the above-mentioned circumstantial evidence in relation to the evidence of the JMO and the Police investigator to come to a firm finding as to the evidence available, before considering whether the accused has offered a reasonable explanation.

For the reasons stated as above, I find no basis for the grounds of appeal considered.

As for the 3rd, 4th and the 6th grounds of appeal, where it was alleged that the learned trial judge shifted the burden of proof to the accused disregarding the presumption of innocence, the application of the Ellenborough principle, and the argument that the learned trial judge has failed to consider the dock statement of the accused in its correct perspective are interrelated, I will now proceed to consider the same together.

3rd, 4th and the 6th grounds of appeal: -

Although the learned counsel for the accused raised several grounds of appeal, it was her main submission that the accused was deprived of a fair trial as the learned High Court judge has shifted the burden of proof to the accused.

She relied on the following passage of the judgment at page 20 of the judgment (page 496 of the brief) to formulate the said argument.

"ඒ අනුව මෙම නඩුවේදී පැමිණිල්ල විසින් ඉදිරිපත් කරන ලද සාක්ෂි සළකා බැලීමේදී මරණකාරියගේ මරණය සිදුවීමට තුඩු දුන් තුවාල පොල් උලකින් ඇන සිදු කරන ලද්දේ තමා නොව වෙනත් අයෙකු බව ඔප්පු කිරීමේ භාරය මෙම නඩුවේදී ඉදිරිපත් වූ සාක්ෂි මගින් ඉහත කී කරුණු මත වූදිත වෙත පැවරී ඇති බව පැහැදිලි වේ."

If taken in its isolation, it appears that the learned trial judge has misdirected himself as to the burden of proof of an accused in a criminal trial as an accused person has no burden in a criminal trial. However,

although the learned trial judge has used a wrong statement in the paragraph, when reading the judgement in its totality, I am unable to agree that the learned trial judge has shifted the burden of proof to the accused in any manner than necessary to find whether the accused has given a reasonable explanation as to the incriminating circumstantial evidence against him.

In the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148** it was held:

> *(1) The judge should have avoided using such language as the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty cast on the accused and it is sufficient for the accused to give an explanation which satisfies court or at least is sufficient to create a reasonable doubt as to his guilt.*
>
> *(2) As the trial judge was a trained judge who would have been aware the burden of proof was on the prosecution to prove its case beyond reasonable doubt if a reasonable doubt was created in the mind as to the guilt of the accused, he would have given the benefit of that doubt to the accused and acquitted him.*
>
> *(3) Further, misstatement has not prejudiced the substantial rights of the parties or occasioned a failure of justice and there was ample evidence to justify the conviction.* (Emphasis is mine)

Similarly, it is my considered view that what is necessary to decide in this appeal is whether the said statement has caused any prejudice to the accused's substantial rights and has occasioned a failure of justice.

It is very much apparent from the judgment that the learned High Court judge has first considered and evaluated all the circumstantial evidence available that points towards the accused, before deciding to consider the provisions of section 106 of the Evidence Ordinance which has similar provisions to the often-discussed ***Ellenborough dictum***.

Section 106 of the Evidence Ordinance reads as follows;

> **Section 106**
>
> **When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.**

The Supreme Court of India, considering the applicability of section 106 of the Indian Evidence Ordinance, which is similar to section 106 of our Ordinance, observed in the case of **Shambhu Nath Mehra Vs. State of Ajmer reported in AIR 1956 SC 404** that;

> *"This lays down the general rule that in a criminal case the burden of proof is on the prosecution and sec. 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" means that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."*

In deciding to apply the provisions of section 106 to the facts of the instant action, the learned trial judge has considered the decided cases **Sanitary Inspector, Mirigama Vs, Thangamani Nadar 55 NLR 302 and Mohomed Auf Vs. The Queen 69 NLR 337** where it stipulates that section 106 do not cast a burden on an accused of proving a fact beyond the burden of the prosecution to prove every ingredient of its case.

It is clear from the judgment at page 21, 22 and 23 (page 497, 498, and 499 of the brief) the learned trial judge has never looked beyond the expected reasonable and acceptable explanation from the accused in considering his defence.

For matters of clarity, I would now reproduce the relevant final conclusions of the learned trial judge at page 22 and 23 which reads thus;

"එහෙයින් පැමිණිල්ල විසින් ඉදිරිපත් කරන ලද සාක්ෂි මගින් ගොඩනඟන ලද පරිවෙෂනයන් මගින් චූදිතගේ නිර්දෝෂිත්වයේ පුර්ව නිගමනය මූළුමනින්ම බිඳ හෙලා ඇත.

ඒ අනුව මරණකාරියගේ මරණයට තුඩු දුන් කරුණු සම්බන්ධයෙන් චූදිත විසින් විත්තිකූඩුවේ සිට කරන ලද ප්‍රකාශයේදී සඳහන් කළ පැහැදිලි කිරීම විය නොහැක්කක් මෙන්ම පිළිගත නොහැකි තත්ත්වයකි. එහෙයින් මෙම නඩුවේදී චූදිත විසින් ඉදිරිපත් කරන ලද ඒකාකාරී නොවූ විත්තිවාචකය අධිකරණයට පිළිගත නොහැකිය.

එහෙයින් පැමිණිල්ල කැඳවූ සාක්ෂිකරුවන්ගේ ඉදිරිපත් වූ අනුමිතින් පිළිබඳව සාධාරන සැකයක් ඉස්මතු කිරීමට චූදිත අපොහොසත් වී ඇත. මෙම නඩුවේ මරණකාරියට තුවාල සිදුවීම් සමන්ධයෙන් පැමිණිල්ල විසින් ඉදිරිපත් කරන ලද සාක්ෂි මගින් ගොඩ නැඟී ඇති පරිවේශනීය අනුමිතීන් මගින් ඉහත කී පරිදි චූදිත වෙත පැවරී ඇති වගකීමෙන් ගැලවීම පැහැදිලි කිරීමට අපොහොසත් වීමෙන් එකී පරිවේශනයන් චූදිතට එරෙහි සාපරාධී වගකීම තහවුරු කර ඇති බව පැහැදිලි වේ.

එහෙයින් ඉහත ඉදිරිපත් වූ පරිවේශන සක්ෂින් අනුව 2015.10.23 වන දින එකී මුහම්දිරලගේ ශ්‍රියාලතා යන අයව පොල් උලකින් ඇන තුවාල සිදු කරන ලද්දේ අන් කවරෙකුවත් නොව චූදිත විසින් බව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු වී ඇති බවට තීරණය කරමි."

It is abundantly clear from the judgment that the learned trial judge has reached his final conclusions not by shifting the burden of proof to the accused as argued by the learned counsel for the accused, but by first considering the evidence of the prosecution with the presumption of innocence rule in mind. After well considering all the circumstantial evidence placed before him and the totality of evidence, the learned trial judge has considered whether the accused has created a reasonable doubt

on the evidence of the prosecution or at least has given a reasonable explanation as to the proven circumstantial evidence against him. I find that it is only in that context the learned trial judge has considered the defence of the accused, which cannot be interpreted in any manner that the learned trial judge has failed to consider the accused's dock statement in its correct perspective.

At this juncture, I would like to reiterate what is stated in the case of **Pantis Vs. The Attorney General** (Supra)

> *"Further misstatement has not prejudiced the substantial rights of the parties or occasioned a failure of justice and there was ample evidence to justify the conviction."*

Mannar Mannan Vs. The Republic of Sri Lanka (1990) 1 SLR 280 was a five judge Supreme Court decision where the learned trial judge failed to direct the jury the value attached to the dock statement of the accused.

Relying on the proviso of section 334(1) of the Criminal Procedure Code, it was held by their lordships of the Supreme Court that although there was a failure of the trial judge to properly direct the jury, even if properly directed would inevitably and without doubt the jury would have returned the same verdict. Therefore, dismissed the appeal on the basis that no substantial miscarriage of justice has actually occurred.

I find that although this was a case tried before a jury, the principles discussed are the same and equally applicable to a determination of an appeal under section 335 of the Criminal Procedure Code in view of the proviso of Article 138 (1) of the Constitution, where the appellate jurisdiction has been vested with the Court of Appeal.

The proviso of **Article 138(1)** reads;

> **"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."**

Accordingly, I find no basis for the contention that the accused was not afforded a fair trial and a failure of justice has occasioned. On the contrary, I am of the view that the learned trial judge has reached his verdict after having considered all the relevant legal principles that is applicable in a criminal trial with clear reasoning, which needs no disturbance from this Court.

For the reasons adduced, I find no basis for the considered grounds of appeal.

5th ground of appeal: -

Although this ground of appeal was raised on the basis that the learned trial judge has applied the last seen theory erroneously, it was not pursued any further by the learned counsel for accused, which need no further consideration.

As I find no basis for the appeal for the aforementioned reasons, the appeal is dismissed.

Judge of the Court of Appeal

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

I agree.

President of the Court of Appeal