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-0210-2019

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Kurunagala

Case No:

HC/KU/227/05

(1) Abdul Carder Mohomed Ikram

(2) Abdul Samad Mohomed Nalis

(3) Carder Meera Anisdheen

(4) H.M.Saman Bandara (Deceased)

ACCUSED

AND NOW BETWEEN

(1) Abdul Carder Mohomed Ikram

(2) Abdul Samad Mohomed Nalis

(3) Carder Meera Anisdheen

(4) H.M.Saman Bandara (Deceased)

ACCUSED-APPELLANTS

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 2nd and 3rd Accused-Appellants
	: Rohantha Abeysuriya, P.C., ASG for the Respondent.
	: 1st accused appellant absent and unrepresented
Argued on	: 29-07-2021
Written Submissions	: 18-05-2020 (By the Accused-Appellants)
	: 02-03-2021 (By the Respondent)
Decided on	: 25-10-2021

Sampath B Abayakoon, J.

This is a case where the four accused were indicted before the High Court of Kurunagala for one count of murder, punishable under section 296 of the Penal Code, one count of Robbery of a vehicle punishable under section 380 and another count punishable under section 383 of the Penal Code.

During the trial, the 4th accused had died. The 1st accused has absconded after several witnesses concluded their evidence, which has led to taking steps against him under section 241 of the Criminal Procedure Code. Upon the further resumption of the trial, no counsel has represented the 1st accused before the High Court.

After trial, the learned High Court judge of Kurunegala found the 1st, 2nd and the 3rd accused guilty on the 1st and the 2nd count, while all three were acquitted on the 3rd count.

The learned trial judge, by the sentencing judgment dated 10-06-2019, sentenced the 2nd and the 3rd accused to death on the 1st count and for a term of 10 years rigorous imprisonment each on the 2nd count, apart from the fines imposed. An open warrant has been issued on the 1st accused.

Since this Court was of the view that there is a material irregularity as to the sentence in relation to the failure of the learned trial judge to impose the mandatory death sentence on the absconding 1st accused, this Court directed the present High Court judge of Kurunegala to pronounce the sentence of the 1st accused on the charge of murder after recording his reasons as to why he is unable to act under section 280 of the Criminal Procedure Code. It was also directed to sentence him on the 2nd count, as he was found guilty on that count as well. This direction was given in view of the fact that it is only a High Court that can sentence an accused person to death acting under the powers of its original jurisdiction.

This judgment on appeal is pronounced subsequent to the regularization of the above irregularity of the judgment.

The 2nd and the 3rd accused-appellants have filed their petitions of appeal dated 18-06-2019 through the Jailor of the Bogambara Prison, Kundasale. However, I find that the counsel who appeared for them before the High Court has also filed an appeal on behalf of all four accused, including the deceased 4th

accused and the absconding 1st accused whom he never represented, naming all of them as accused-appellants in his petition of appeal dated 18-06-2019.

As a result of he being an appellant, the 1st accused-appellant (hereinafter sometimes referred to as the 1st accused) was notified of the hearing of the appeal by registered post to his given address. However, the notice issued has been returned with the endorsement that he has left the address. Hence, although the 1st accused appellant has not filed any written submissions or has taken part in the appeal, his appeal will also be considered on its merit. The 2nd and the 3rd accused-appellants (hereinafter sometimes referred to as the appellants) have filed their written submissions and was represented by counsel.

At the hearing of the appeal, the learned counsel for the appellants raised only one ground of appeal on the basis that the trial Court has failed to judicially evaluate the items of circumstantial evidence by applying the standard guidelines.

However, the learned counsel fulfilling her role as a responsible officer of the Court, readily conceded the strength of her appeal in view of the circumstantial evidence available, for which this Court would like to express our appreciation to the learned counsel.

The facts of this action in brief are as follows;

On 3rd November 2002 at 6.15 a.m., the then junior Sub Inspector of Police Dinusha Moraes (PW-18) was on road block duty in the Town of Murukkan along with several other officers. This was a place of about 500 meters away from the area controlled by the LTTE terrorist movement. While on duty, he has observed a van bearing number 252-0384 approaching the checkpoint from the direction of Vavuniya travelling towards Mannar. As the vehicle had no front windscreen the witness has decided to stop the vehicle for inspection as it arose his suspicions.

At the trial, the witness has identified the 3rd accused appellant as the driver of the vehicle while the 2nd accused appellant and the absconding 1st accused as the other occupants of the vehicle. The witness has separated the three occupants of the vehicle in order to question them, and upon questioning as to what happened to the windscreen, they have given contradictory answers which have confirmed his suspicions. When the vehicle was inspected further, the witness has found the broken windscreen on the back side of the vehicle and has also found bloodstains on the windscreen. Suspecting a crime has been committed, PW 18 has arrested the mentioned three persons and has handed them over to the Officer in Charge (OIC) of the Murukkan Police for further investigations.

According to the evidence of PW-01 Chief Inspector Samarasinghe who was the then OIC of the Murukkan police, after the arrest of the three suspects he has proceeded to record statements from them, which led to an information about a crime committed in another Police area. Commencing investigation immediately, he has left the police station at 15.15 hours on the same day along with the three suspects and a team of Police officers to inquire into the information received from the accused. At the direction of the suspects he had in his custody, he has reached the Nikaveratiya town area at 21.15 hours and has inspected the nearby Magallagama tank. As he could not find anything there, and again at the directions of the suspects, he has proceeded to Bulnawa Kanuketiya area in Puttalam and has reached the Mudaththawa tank which was by the side of Kurunegala-Puttalam main road, about four Km away from the Kotawehera Police station. After reaching the tank at 21.40 hours he has commenced searching the tank with the aid of torchlight and has discovered a body of a person floating on the surface of the water.

After the find and alerting the Kotawehera Police as to the crime, he has taken necessary steps to hand over the suspects he had in his custody and the

relevant vehicle to the Kotawehera Police as it was a crime committed in that Police area.

PW-01 has also marked and produced the relevant extracts of the statements made to the police by the three suspects, which led to the discovery of the body of the person he found in the tank as P-01, P-02 and P-03 respectively, under the provisions of section 27 of the Evidence Ordinance. The evidence of PW-01 also reveals that the body was found 142 Km away from the Murukkan Police.

PW-02 was the owner of the vehicle number 252-0384 marked P-03 at the trial, which was used for hiring purposes. He has employed the deceased Ruban Yapa as his driver. The said driver Ruban has taken over the vehicle at around 9.00 am on 02-11-2002 as it was the usual practice to take the vehicle to the vehicle park of Central Market Kandy, which was its normal parking place for hires. PW-02 has observed him wearing a checked red coloured shirt that morning. Since the driver did not return in the evening as usual, the owner of the vehicle has gone looking the next morning and has been informed by the other drivers at the vehicle park that Ruban left for a hire to Kurunegala area. As he had no other information, the owner had lodged a complaint to the Kandy Police and had been informed of the arrest of the vehicle in Vavuniya area and the discovery of a body. Subsequently, he has identified the body which was floating in the tank as the body of his driver Ruban.

PW-03 was a fellow driver who used to hire his vehicle from the Central Market vehicle stand. According to his evidence he has seen the deceased driver speaking to two persons around 3 pm on the day of the incident and has overheard a conversation between them about a hire to Kurunegala.

PW-04 was yet another driver from the same stand who has seen the deceased speaking with two persons about a hire. Upon inquiry, he has been informed by the deceased that he is going on a hire to a place about 6 km away from Kurunagala. As his vehicle was on repair on that day, the witness has requested a lift from the deceased and has travelled with the two persons in the

vehicle driven by the deceased up to Mahaiyawa which was about 1 ½ Km away, and has got down from the vehicle. On the following day, he has come to know about the death of Ruban, the deceased. However, he has failed to identify the persons who hired the vehicle at the identification parade held subsequently.

PW-07 Ranjith Swanathilaka was another fellow driver. On 02-11-2002 he has seen the deceased Ruban sleeping in his vehicle at around 2.30 to 3.00 p.m. in the vehicle park after meals. The witness has been talking to a friend near the van when two persons came and negotiated a hire with the deceased. He has overheard them wanting to go to a place in Wellawa in Kurunagala. It was his evidence that after agreeing on the hire, the deceased left with the two persons who came. He has come to know about Ruban's death on the following day. PW-07 has identified the 2nd and the 3rd accused appellants as the persons who negotiated the hire with the deceased and left with him at the identification parade held before the Magistrate. Although it had been suggested to him that the accused were shown at the Kotawehera Police station, he has denied having seen them anywhere after seeing them at the vehicle stand, until identified at the identification parade.

According to the evidence of the Judicial Medical Officer (JMO) the death of the deceased had been due to strangulation. PW-13, the then OIC of the Kotawehera Police has identified the 2nd and the 3rd accused appellants as well as the absconding 1st accused Abdul Carder Mohamed Ikram as the persons handed over to his custody by the OIC of Murukkan Police. It had been the stand of the accused that they were shown to the witnesses at the Kotawehera Police station before the identification parade held by the Magistrate which PW-13 had denied.

Both the appellants have made dock statements when they were given the opportunity of presenting their defence at the conclusion of the prosecution case.

The 2nd accused appellant's explanation had been that he got into the vehicle in Puttalam because of the 1st accused Ikram's invitation and he has nothing to do with the crime and was unaware of it until he was brought to the Kotawehera Police.

In his dock statement, the 3rd accused has explained that he was a person from Polonnaruwa and he got into the vehicle from his work place in Puttalam because of the 1st accused's invitation to accompany him to Mannar. It was also his position that he was unaware of the crime until arrested by the Police.

As there are no eye witnesses to the robbery of the vehicle and the killing, this is a matter that has been decided entirely on circumstantial evidence. In this context, I find it important to consider the relevant legal principles that a trial judge has to be mindful in analyzing the circumstantial evidence placed before the Court.

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, when 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."

In the instant action, the learned trial judge after considering the evidence of each witness, as seen in page 17 to 20 of the judgment (page 451 to 454 of the appeal brief), has separately commented on the highly incriminating pieces of circumstantial evidence against the appellants and the 1st accused appellant which points only towards them, before considering whether the appellants have offered a reasonable explanation that creates a reasonable doubt as to their culpability to the crime.

As considered correctly by the learned trial judge the vehicle found in the possession of the appellants under highly suspicious circumstances was a vehicle belonging to PW-02. The deceased was the driver employed by him to run the vehicle for hire. PW-07, one of the fellow drivers who used to ply his trade at the market vehicle park at Kandy has seen the 2nd and the 3rd appellants negotiating a hire with the deceased driver and leaving with him in the afternoon of the day of the incident. He has identified the appellants as the persons who left with the deceased at the identification parade held in that regard subsequently.

The appellants have taken the stand that they were shown to the witnesses at the Kotawehera Police station when the parade notes were marked as evidence. However, when they were called for a defence, both of them have failed to explain their identification by the witness in their dock statements. Furthermore, PW-04 was another follow driver who was in the vehicle stand on that day and knew about the hire undertaken by the deceased. As his own vehicle was under repair, he has travelled with the persons who negotiated the hire of the vehicle driven by the deceased driver to a location about 1 ½ Km away before alighting from the vehicle. However, he has failed to identify the appellants at the parade held. I find that if shown to the witnesses before the parade as alleged by the appellants at the trial, there was no reason for PW-04 to not to identify the appellants as the persons who negotiated the hire and travelled with him for a short distance in the vehicle on that day.

I find that the stand taken by the appellants that they were shown to the witnesses was a stand without any merit, which also explains why they failed to maintain the same stand in their dock statements.

When questioned separately by PW-18 as to the broken windscreen of the vehicle which was in the possession of the appellants, they have given different explanations and the shattered windscreen has been found in the back of the vehicle with blood like stains. If not for the directions given by the appellants the investigating officer and his team of officers would have never reached the place where the body of the driver was found, which was a location 142 Km away from the Murukkan Police station.

The JMO has found that the death of the deceased driver was due to strangulation which cannot have any other explanation.

At this juncture, I would like to draw my attention to section 106 of the Evidence Ordinance, which I find relevant when it comes to the facts of the instant appeal. This is a section which has similar provisions to the *Ellenborough dictum,* often-discussed by our Courts.

Section 106 of the Evidence Ordinance reads as follows;

> **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."*

This clearly demonstrates that section 106 of the Evidence Ordinance does not in any manner has intended to shift the burden of proof to an accused person from the prosecution. It has only cast a duty upon an accused person to offer a reasonable explanation as to the proven facts of which only an accused person can explain.

It is abundantly clear that the appellants not only have failed to create any doubt as to the evidence of the prosecution, but also has failed to offer a reasonable explanation to Court with regard to the highly incriminating circumstantial evidence against them.

The learned ASG for the Attorney General in his submissions before this Court brought to the notice of the Court the relevancy of section 114 Illustration (a) of the Evidence Ordinance to the facts of the instant action. Citing several decided cases of the past, it was his view that the presumption envisaged in section 114 should be held operative against the accused since they have failed to adequately account for the possession of the robbed vehicle with them.

Section 114 of the Evidence Ordinance reads as follows;

> **"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and private business in their relation to the facts of the particular case."**
>
> **Illustration (a)**
>
> **"The Court may presume, that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods, knowing them to be stolen, unless he can account for his possession."**

As argued rightly by the learned ASG, there is proof as to the ownership of the vehicle in question, and proof that the vehicle was robbed from the possession of the deceased driver of the vehicle, which was found in the possession of the appellants within hours of the robbery and the discovery of the body of the driver of the vehicle.

In the Indian case of **Saundraraj Vs. The State of Madya Pradesh (1954) 55 Cr.L.J. 257,** It was held that in cases where murder and robbery were shown to be part of the same transaction, recent and unexplained possession of stolen articles, in the absence of circumstances tending to show that the accused was only a receiver, would not only be presumptive evidence on the charge of robbery but also on the charge of murder.

In view of the appellants failure to offer any acceptable explanation and in view of the overwhelming circumstantial evidence available against them in the action, I am of the view that the presumption as pointed by the learned ASG should also held operative against the appellants in the instant action.

For the aforesaid reasons, I am unable to find merit in the stated ground of appeal that the learned trial judge failed to judicially evaluate the items of circumstantial evidence applying the relevant guidelines. On the contrary, I find that the learned trial judge was well possessed of the relevant legal principles that needs to be taken into consideration in evaluating evidence in an action based on circumstantial evidence and has evaluated the evidence judiciously before reaching her judgment.

The appeal is dismissed, as I find no merit in the appeal and the conviction and sentence affirmed.

I would also like to place on record and commend the professional Police duty performed by PW-18 Sub Inspector Moraes, for his alertness and sense of duty. Had he not stopped the suspicious vehicle five hundred meters away from the LTTE controlled area on that day, and if not for the prompt investigations carried out by the then OIC of Murukkan Police, Chief Inspector Samarasinghe, this would have been only a yet another unresolved crime.

Judge of the Court of Appeal

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

I agree.

President of the Court of Appeal