

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

In the matter of an application for
Revision in terms of Section 331 of the
Code of Criminal Procedure Act No. 15 of
1979 as amended.

CA Case No:
CA HCC 98/2018

High Court of Colombo
Case No: 6900/2013

Hon. Attorney General
Attorney General's Department
Colombo 12

Complainant

Vs.

Premathilake Balasuriya
No: 52/2
New Galle Road
Koralawella
Moratuwa

Accused

And Now Between

Premathilake Balasuriya
No: 52/2
New Galle Road
Koralawella
Moratuwa

Accused-Appellant

Vs.

Attorney General
Attorney General's Department
Colombo 12

Respondent

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

Counsel : Nayantha Wijesundara for the Accused-
Appellant Janaka Bandara, SSC for the State

Written

Submissions On : 05.02.2019 (by the Accused-Appellant)
10.05.2019 (by the Respondent)

Argued On : 27.07.2021

Decided On : 26.10.2021

Devika Abeyratne,J

The accused appellant was indicted and after a *non jury* trial was convicted for the murder of *Kosmulgodage Lional alias Podi Malli* and sentenced to death.

Being aggrieved by the conviction and sentence the appellant has preferred this appeal to this Court.

The accused appellant was connected via zoom platform and it was informed that the he has given consent and instructed his Counsel to argue the matter in his absence due to the Covid Pandemic.

The main ground of appeal on behalf of the Appellant is that the circumstantial evidence adduced by the prosecution does not prove the guilt of the accused appellant beyond reasonable doubt.

There were no eye witnesses to the incident and the case rested mainly on circumstantial evidence.

The deceased was employed as a watcher in a Saw Mill that belonged to PW 1. The accused appellant is the machine operator of that Saw Mill who was occupying a room upstairs in the partially built two storied building that was in the premises of the Saw Mill. The watcher, (the deceased) according to PW 1 is on duty from around 5.00 pm until 8.00 am the following morning. He is stationed on the ground floor where his dead body was discovered on 12th September 2010.

The wife of the deceased PW 2 *Nandani Silva* had been informed of her husband's death on the morning of the 12th of September by a telephone message. She has testified that on the previous afternoon when the deceased left for work around 4.00 pm, he has stated that the dispute with the *Baas* had to be sorted out. The reason for the dispute has not been divulged. In pages 35 and 36 of the brief it is set out in the following manner.

ප්‍ර : ඒ අන්තිමට ස්වාමි පුරුෂයා රැකියාවට ගිය දවසේ කියට විතරද රැකියාවට ගියේ?

උ : හවස 3.45 ට විතර.

ප්‍ර : 3.45 ට විතර රැකියාවට යන්න කලින් තමුන්ට කතාබහ කලාද?

උ : ඔව්.

ප්‍ර : මොනවද කිවුවේ?

උ : මට කිවුවා මෝලේ බාස් එක්ක කතා බහක් වුනා. අද ඒක දෙකෙන් එකක් බේරගන්න ඕනේ කියලා කියලයි ගියේ.

ප්‍ර : ස්වාමි පුරුෂයා ඔබට එක කියු වචනවලින්ම කියන්න මතකයිද?

උ : එහෙම තමයි කිවුවේ මෝලේ බාස් එක්ක ප්‍රශ්නයක් වුනා. ඒක අද බේරගන්න ඕනේ දෙකෙන් එකක් කියලා ගියේ.

ප්‍ර : ඔය බාස් කියන පුද්ගලයා කවද කියලා ඔබ ඒ වන විට දැන සිටියාද?

උ : නැහැ.

ප්‍ර : මෝලේ බාස් කියලා තමයි ඔහු කියා සිටියේ ?

උ : තට්ටේ තිබෙන මෝලේ බාස් කියලා කියා සිටියේ.

ප්‍ර : එහෙම කියලා ස්වාමි පුරුෂයා රැකියාවට ගියා එදින?

උ : එහෙමයි.

ප්‍ර : ගිහිල්ලා පසුවෙනිදා උදේ 7-8 වෙනකොට ආවද?

උ : නැහැ.

It is apparent from the above that no name or specific identification was given of the person the deceased had a dispute with. It is clear that PW 2 did not personally know the *baas* referred to by her husband or the reason for the dispute.

PW 1 the owner of the Saw Mill had seen the watcher at work when he left at 8.00 pm, the night before the body was discovered. The accused appellant according to PW 1 had gone out to buy liquor, which apparently is his habit every night. The following morning around 6.30 and 7, one of the nephews of PW 1 has informed that the watcher was not talking and after seeing him fallen on the ground at the Saw Mill PW 1 had lodged a complaint with the Police and found out that the watcher was dead. PW 1 has testified about an issue between the deceased and the appellant over ten rupees that had not been returned by the appellant, but has not elaborated on it. Neither has the Prosecution attempted to discover more information of that alleged dispute. No other evidence has transpired regarding any other existing animosity between the accused appellant and the deceased.

The only contradiction V1 has been marked in page 56 of the brief that PW 1 in his police statement has stated that the watcher was on duty from 6 pm to 6 am, whereas in evidence has stated that the duty is from 5 pm to 8 am. This is not a material contradiction that goes to the root of the case and the credibility of the witness is not affected in any manner by that contradiction.

In the Dock Statement of the accused appellant he has stated that around 6.30 am on the 12th when he was descending from the upper floor, a person named *Thushara* had informed that the watcher was dead. Appellant has denied any involvement in the incident. The police after inquiring who was in the premises has arrested and assaulted him and produced him as an accused for the offence of murder.

From the evidence of PW 1 and the Dock Statement of the appellant it appears that the person who discovered the body and informed both PW 1 and the accused of the death of the watcher was a person called *Thushara* who is not a witness in this case.

The Prosecution's failure to call *Thushara* as a witness is surprising as his presence at the scene of the incident should have been explained. There is no material before Court to consider whether the investigators ruled out the possibility whether he was a person of interest as there are no eye witnesses to the incident.

According to PW 7 the Medical Officer, the cause of death is due to complications of blunt force trauma to the head and neck. Twenty one injuries of lacerations and abrasions have been described. There had been a delay of pronouncing the cause of death which has been done after some blood samples were examined. The time of death is given as within a day when the *post mortum* was performed which was at 12 noon on the 13th of September. (page 67 of the brief).

When this evidence and the fact that the deceased was found to be dead at 6.30 in the morning of the 12th is considered, it reiterates the importance of the

evidence of the presence of *Thushara* . The failure to call *Thushara* as a witness by the prosecution has to be considered in favour of the appellant.

The prosecution has relied on a Section 27 recovery where an '*Athakoluwa*' was discovered.

It was submitted by the Counsel for the Appellant that at a Saw Mill any amount of pieces of wood resembling an '*Athakoluwa*' could be found.

PW 7 who was shown the *Athakoluwa* marked as P 4 has stated that the injuries could have been caused by such an object. However, there is no forensic report regarding P4. Therefore, it had not been established beyond reasonable grounds that P4 was used to cause injury to the deceased.

In such circumstances it is not established that it was in fact the object used to kill the deceased. If at all the recovery of P4 only proves that the appellant had knowledge of P4 being in that place. (*Etin Singho and another vs Queen 69 NLR 353*)

The investigating officer PW 5 has testified that on the direction of the appellant P4 was found among some stacked timber at the Saw Mill. As stated above it being found in a Saw Mill where any amount of *Athakoluwas* can be found is a relevant fact to be considered in favour of the accused.

It was contended on behalf of the appellant, that the Prosecution has failed to prove the guilt of the appellant beyond reasonable doubt relying on circumstantial evidence and that the learned High Court Judge has misinterpreted the evidentiary value of the purported items of circumstantial evidence and thereby the conviction is erroneous.

It is well settled law that when the conviction is solely based on circumstantial evidence prosecution must prove that no one else but the Accused-Appellant committed the crime. The following authorities set out the position very succinctly.

Rex v Blom, cited in ***Queen v Kularatne (71 NLR 529 at 534)*** states two cardinal rules of logic governing circumstantial evidence cases.

- “i. The inference sought to be drawn must be consistent with all the proved facts. If it does not, then the inference cannot be drawn.*
- ii. The proved fact s 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 Sunny vs Attorney General [1998] 2 Sri. L R 1*** it was held “*where 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.....if upon a 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”*

Kusumadasa Vs. State 2011(1) SLR 240 Sisira de Abrew J held that;

“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.”

In ***Sarath Fernando Vs. Attorney General 2014(1) SLR 16*** it was held that;

“In order to justify the inference of guilt from purely circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

In ***Samantha Vs. Republic of Sri Lanka 2010 (2) SLR 236*** the court stated that; *“ In a case of circumstantial Evidence, if an inference of guilt is to be draw against the accused such inference must be the one and only irresistible and inescapable inference that the accused committed the crime.”*

On a perusal of the judgment in the instant case, it appears that one of the positions the learned trial judge has considered is the last seen theory. It is important to consider that the usual place of abode for the appellant and the deceased at night is the Saw Mill. Therefore it is not unusual if they were at the Saw Mill that night. When PW 1 left at 8 pm that night only the watcher had been there and PW 1 had assumed that the appellant had gone out to buy liquor. Thus, there is no cogent evidence that the deceased was last seen in the company of the appellant. Therefore, the trial judge’ s conclusion that PW 1 has seen the deceased together with the appellant is contradictory to the evidence led at the trial.

If the prosecution is relying on the last seen theory, it is incumbent that the exact time of death of the deceased to be established. But in the instant case, the

exact time of death has not been established beyond reasonable doubt. It is also to be considered that the Saw Mill is an open place accessible to any outsider. The learned judge has failed to appreciate all these important facts in his analysis and evaluation.

It appears that the learned trial Judge has considered PW1 stating that the deceased and the appellant had a dispute over Rs 10, together with the evidence of PW 2 stating that the deceased informed her of a dispute with a *baas* the previous day. Who this *bass* is not established. It has also not been established whether there was a dispute over ten rupees. However, the learned trial judge has considered these facts as the proved circumstantial evidence against the appellant, to come to a conclusion that it was the motive for the killing.

In the case of ***AG Vs. Potta Naufer & others 2007(2) SLR 144 Thilakawardena J*** held;

“When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.”

It is settled law that if upon a consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence he can be found guilty. However, it is incumbent on the prosecution to 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 his guilt and inconsistent with his innocence.

Emperor v Browning in 1917 18 Criminal Law Journal 482, Court held “ *The Jury must decide whether the facts proved exclude the possibility that the act was done by some other person and if they have doubts, prisoner must have the benefit of those doubts.*”

Karunaratne V AG 2005 2 SLR 233 (Balapatabendi J)

(At Page 237) “*There is no uniform rule for the purposes of determining the probative value of circumstantial evidence. This depends on the facts of each case. In State UP v Dr. Ravindra Prakash Mittal (1992 2 SCJ 549) it was held that the essential ingredients to prove guilt of an accused person by circumstantial evidence are,*

1. *The circumstances from which the conclusion was drawn should be fully proved*
2. *The circumstances should be conclusive in nature;*
3. *All the facts so established should be consistent with the hypothesis of guilt and inconsistent with innocence.*
4. *The circumstance should; to a moral certainty, exclude the possibility of guilt of any person other than the accused.”*

Therefore, it was incumbent on the prosecution to prove beyond reasonable doubt that it was only the accused appellant who had the opportunity to commit the murder.

In the instant case as stated above the body of the deceased was found in an open area where anyone could have entered without any obstruction. There is also a doubt as to whether it was only the appellant and the deceased who were in the premises as the presence of ‘*Thushara*’ is unexplained. As such, it appears that the evidence that was considered as proved evidence by the learned trial

judge is not sufficient to come to a conclusion that no one else other than the accused appellant had the opportunity of committing the offence.

After considering the evidence elicited it is apparent that the evidence is insufficient to base a conviction that on the proven facts a justifiable inference can be drawn about the guilt of the accused appellant.

On consideration of the above. this court is of the view that the case against the appellant was not proved with certainty in order to justify a verdict of guilt.

Accordingly, we set aside the judgement dated 07.08.2018 of the learned High Court Judge of *Colombo* and allow the appeal. The appellant is acquitted of the charge.

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL