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

In the matter of an appeal in terms of Section 331(1) of the Code of Criminal Procedure Act No 15 of 1979.

**CA No.178/2017**

**HC Gampaha**
**Case No: HC 19/2005**

1. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

2. Officer In Charge,
   Police Station,
   Ragama.

**Complainants**

**Vs.**

1. Batugedara Arachchige Jagath Nanda Kumara

**3rd Accused**

**NOW**

Batugedara Arachchige Jagath Nanda Kumara.

**3rd Accused-Appellant**

**Vs.**

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

**Respondent**

| | | |
|---|---|---|
| **Before** | **:** | **Devika Abeyratne,J**<br>**P.Kumararatnam,J** |
| **Counsel** | **:** | Saliya Pieris, PC with Yohan Pieris for the Accused-Appellant<br>Suharshi Herath, SSC for the State |
| **Written Submissions On** | **:** | 01.08.2018 (by the Respondent)<br>28.02.2018 (by the Accused-Appellant) |
| **Argued On** | **:** | 03.08.2021 and 04.08.2021 |
| **Decided On** | **:** | 29.10.2021 |

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**Devika Abeyratne,J**

In this case the Attorney General indicted three accused in the High Court of *Gampaha* under section 296 of the Penal Code for committing the murder of one *Hewa Maddumage Lester* on or around the 27th of December 2000.

After trial the first and the second accused were acquitted of the charge. The trial against the first accused was conducted in *absentia*. The 3rd accused was convicted and sentenced to death.

Aggrieved by the said conviction and the sentence the appeal of the third accused has been preferred to this Court.

The main grounds of appeal advanced by the appellant are; that the identification of the accused has not been established by the prosecution beyond reasonable doubt; the failure of the learned High Court Judge to consider vital omissions; that the learned High Court Judge failed to evaluate the circumstantial

evidence in that the evidence does not lead to the irresistible inference of the guilt the accused.

The prosecution has led evidence of several witnesses. At the time of trial as PW 2 had passed away her evidence at the *non summary* inquiry was led under section 33 of the Evidence Ordinance.

The appellant had made a Dock Statement admitting being at the railway station where a fight took place stating that he knew both parties and tried to settle the fight, however denied any complicity to the crime.

The deceased had one stab injury but there is no eye witness testimony to conclude anyone witnessing the stabbing. The facts pertaining to this case may be set out briefly as follows;

On the 26th of December 2000, the deceased, his wife PW 2 and their nine month old baby together with his brother PW 1, his wife PW 5, daughter PW 4 and other family members had returned by train to the *Ragama* railway station from Colombo after attending a Christmas party in *Colpetty*. The train had reached the station at around 10.00 pm at night and when this party was waiting to go home, the 1st accused driving a three wheeler had come splashing mud and almost knocking against the leg of PW 1 who was carrying the small child.

PW 1 had asked the 1st accused whether this is the way to drive a vehicle. After scolding in filth the first accused had come out of the three wheeler and had attacked PW 1 with his fists and a brush that was taken out from the three wheeler. Then the second accused had come out from inside the station and had taken a knife from the three wheeler. It was mainly PW 1 who was assaulted by these two accused. It was alleged by the prosecution witnesses that the third accused in the

guise of trying to break up the fight was trying to grab the gold chain PW 1 was wearing. The deceased who is said to be a quiet person at first had been watching what was happening and as PW 1 was being continuously assaulted, had kicked one of the accused and then walked away saying he was going to the Police Station. The testimony of the prosecution witnesses is that third accused was seen walking away with his arm round the neck of the deceased.

There had been sufficient light to identify all the accused from the street light and the lights from the shops nearby, and at the identification parade all three accused had been identified.

In page 74 of the brief PW 1 has testified that the 3rd accused appellant in the guise of trying to settle the fight was trying to grab the gold chain he was wearing in the following manner.

ප්‍ර : ඊටපස්සේ ඔය රණ්ඩුව බේරන්න කවුද ඉදිරියට ආවේ?

උ : මම දැක්කා මෙහා පැත්තේ ඉන්න විත්තිකරු රතු පාට ෂර්ට් එකක් ඇඳගෙන ආවේ බේරන්න ආවා බේරන ගමන් මාල තමයි ඇද්දේ මගේ මාලේ කැඩුනා.

ප්‍ර : තමන්ගේ සහෝදරයාගේ කරේ තිබුණේ මොන වගේ මාලයක්ද?

උ : පවුම් 5 1/2 ක වගේ රත්රන් මාලයක්. එයා බේරනවා වගේ හිටියට ඊට පස්සේ කලේ ගහ ගත්ත කට්ටිය එහාට මෙහාට වෙනකොට මගේ සහෝදරයාව පොලිසිය පැත්තට අරන් ගියා කරට අත දාගෙන.

ප්‍ර : කවුද පොලිසියට ගියේ?

උ : මගේ සහෝදරයා. එයා පිහියක් ඇදලා ගත්තට පස්සේ මම බය වුනා.

After the accused who were attacking PW 1 dispersed, PW 1 had gone looking for the deceased who was last seen walking away with the appellant and came across him fallen on the road bleeding and not able to speak and rushed him to hospital where he was pronounced dead.

The medical officer PW 20 had testified that death was imminent within five to ten minutes of being stabbed. PW 13, the police witness had recovered a broken gold chain from where the deceased was found (page 142) and PW 13 had testified his brother was wearing a gold chain of about five and a half sovereigns. (page 74)

One of the grounds of appeal is that the trial Judge has failed to consider the omissions drawn to the attention of Court which has caused a great miscarriage of Justice. It is submitted that some vital points of evidence of PW 1 and PW 4 are inconsistent with their statements to the Police which the learned trial judge has not evaluated. For example in the evidence the witnesses have stated that the appellant was seen walking with his arm round the neck of the deceased towards the Police Station, when that statement does not reflect in their Police Statement.

The learned trial judge from pages 19 to 23 (pages 251 to 255 of the brief) of the judgment has analysed and evaluated this highlighted omissions and quite correctly concluded that the prosecution has sufficiently established that the 3rd accused appellant was seen walking away with his arm round the neck of the deceased about ten to fifteen minutes before the deceased was found with deadly injuries.

The learned trial judge has also commented that the appellant has not made any attempt to prove through the police witnesses that the omission highlighted was in fact not reflecting in the relevant police statements.

The evidence of PW 2 has been led under section 33 of the Evidence Ordinance (P4) where it is clearly stated that the 3rd accused was seen leaving

with his arm round the neck of the deceased. Answering to a question on behalf of the 3rd accused in page 270 of the brief she has stated;

3 වෙනි විත්තිකරු වෙනුවෙන්
3 වෙනි විත්තිකරු රණ්ඩුව බේරනවා මම දැක්කේ නැහැ. එහිදී 3 වෙනි විත්තිකරු ඇඳ සිටියේ ගඩොල් පාටට හුරු ෂර්ට් එකක්. ඒ වෙලාවේ රණ්ඩුව බේරමින් සිටිය ගඩොල් පාටට හුරු ෂර්ට් එකක් ඇඳ සිටි අය පුරුෂයාගේ කරට අත දාගෙන ගියා කියා මම කිවුවා මරණ පරීක්ෂණයේදී .

It is trite law that a trial judge has no power to utilize the statements made by witnesses to the police, inquest evidence and non summary evidence when they were not properly admitted in evidence.

In ***Punchimahaththaya Vs. The State 76 NLR page 564*** wherein the Court held as follows;

*"Court of Criminal Appeal (or the supreme Court in appeal) has no authority to peruse statements of witnesses recorded by the Police in the course their investigation. (i.e. statement in the Information Book) other than those properly admitted in evidence by way of contradiction or otherwise."*

However, in the instant case the evidence of PW 2 has been admitted as evidence. Thus the consideration of same was not contrary to law. Therefore, the learned trial judge's conclusion that the third accused appellant was last seen walking away with the deceased a few minutes before his body was found is in accordance with the law.

The presence of the accused appellant at the Railway Station is admitted by him. The fight between PW 1 and the accused and the fact that a knife was taken by the second accused from the three wheeler is also unchallenged

evidence. However, there is no eye witness evidence that the appellant was seen attacking the deceased. The appellant's version is that he tried to separate the people who were fighting at the station.

However, as stated above the prosecution witnesses have testified that it was the appellant who was last seen walking away with the deceased before his body was discovered after a few minutes. Since it appears that the knowledge of the said circumstance was exclusively within the appellant, it should have been explained by him. But the accused has not offered any explanation.

It is apparent that the prosecution has led very strong circumstantial evidence against the appellant that he was the last seen person with the deceased a few minutes before the body was discovered. The medical evidence established is that death would occur five to ten minutes after the stab injury. In his very short Dock Statement the appellant has stated that;

ගරු ස්වාමීනි, මම රණ්ඩුව බේරපු බව සහතික ඇත්ත කියන්නේ. කිසිම බොරුවක් නැහැ. ඒ වචනයේ රණ්ඩුව බේරපු එක සහතික ඇත්ත. මගේ තරහකාරයෝ නෙමේ දෙපැත්තම මම හදුනන කට්ටිය. එපමණයි මට කියන්න තිබෙන්නේ.

It is for the prosecution to prove its case beyond reasonable doubt. However when a strong *prima facie* case has been made out by the prosecution although the appellant is not bound by law to offer any explanation, he has failed to explain the strong circumstantial evidence led against him.

In the case of ***State of Tamil Nadu Vs. Rajendran (1999) Cr.L.J.4552*** the Indian Supreme Court observed that *"In a case of circumstantial evidence when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then*

*the same become an additional link in the chain of circumstances to make it complete."*

***Abbot J. in Rex Vs. Burdett (1820) 4 B & Ald 161 at 162*** observed that *" No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the prima facie case tends to be true, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."*

In the case of ***Rajapaksha Devage Somarathna Rajapaksha And Others Vs. Attorney General (SC Appeal) 2/2002 TAB)*** *Justice Bandaranayke* observed that *"With all this damning evidence against the appellants with the charges including murder and rape the appellants did not offer any explanation with regard to any of the matters referred to above. Although there cannot be a direction that the accused person must explain each and every circumstance relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound to offer any explanation of his conduct there are permissible limitation in which it would be necessary for suspect to explain the circumstances of suspicion which are attached to him."*

A very recent Judgement of the Indian Supreme Court ***Surajdeo Mahto V state of Bihar (CrA 1677 of 2011 Decided on 4th August 2021-Indian SC) (Citation: LL 2021 SC 351) Surya Kant J (with CJ N.V. Ramana, Aniruddha Bose J)***

(At P.18) *"Briefly put, the last seen theory is applied where the time interval between the point of when the accused and the deceased were last seen*

*together, and when the victim is found dead, is so small that the possibility of any other person other than the accused being the perpetrator of crime becomes impossible…."*

***Satpal V State of Haryana (2018) 6 SCC 610***

*"……. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."*

***State of Rajasthan v Kashi Ram*** (2006) 12 SCC 254 to assert that *once the fact of last seen is established, the Accused must offer some explanation as to the circumstances in which he departed the company of the deceased. This position of law, as covered under section 106 of the IEA, was duly considered in the case of* ***Satpal Singh*** *(Supra), wherein, this Court clarified that if the accused fails to offer any plausible explanation, an adverse inference can be drawn against the accused. In the instant case also, Appellant No.1 has been unable to offer any explanation as to circumstances in which he departed from the company of the deceased."*

***Godwin Igabele v the State (Supreme Court of Nigeria) [(2006) 6 NWLR (Pt. 975) 100]***

Aloysius Iyorgyer Katsina-Alu, JSC

*"However, there is evidence that the deceased was last seen alive with the Appellant. This was not in dispute. I think good sense and indeed common sense demands that the Appellant should and must put forward some explanation as to what happened to the deceased. But no explanation was forthcoming..... The only irresistible inference from the circumstances presented by this evidence is that the Appellant killed the deceased. See Peter Igho v the State (1978) 3 SC 87; where the deceased as in this case, was last seen with the Appellant. The Supreme Court held at p. 90 as follows:*

*"We can find no other reasonable inference from the circumstances of the case. The facts which were accepted by the Learned Trial Judge, amply supported by the evidence before him, called for an explanation, and beyond the untrue denials of the Appellant, none was forthcoming. Though this constitutes circumstantial evidence, it is proof beyond reasonable doubt of the guilt of the Appellant."*

In the light of the above authorities and considering the prosecution evidence and the dock statement of the appellant, I find no reason to disbelieve that the appellant was last seen with the deceased. The victim was found with deadly injuries a very short time later that the possibility of any other person other than the appellant being the perpetrator of the crime becomes impossible.

Considering all the materials placed before this court we see no reason to disturb the findings of the learned trial judge of *Gampaha*. We affirm the conviction and the sentence. Accordingly, the appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

**P.Kumararatnam,J**

I Agree

**JUDGE OF THE COURT OF APPEAL**