

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

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

Democratic Socialist Republic of  
Sri Lanka

**C.A. Case No. 157-19**

**Complainant**

**High Court of Homagama**

**Case No. 46/2018**

**Vs.**

1. Ishwara Arachcige Raveendra  
Hemantha
2. Palagedara Arachchilage Alias  
Makulukotunnage Bandula  
Sudathsiri Perera

**Accused**

**AND NOW BETWEEN**

Palagedara Arachchilage Alias  
Makulukotunnage Bandula  
Sudathsiri Perera

**2<sup>nd</sup> Accused –Appellant**

**Vs.**

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

**Respondent**

**BEFORE** : **K. PRIYANTHA FERNANDO, J (P/CA)**  
**WICKUM A. KALUARACHCHI, J**

**COUNSEL** : Harishka Samaranayaka AAL for the  
Accused-Appellant  
Harippriya Jayasundara PC, A.S.G.  
with Maheshika Silva, SSC for the  
Respondent

**WRITTEN SUBMISSION**

**TENDERED ON** : 07.10.2021 (On behalf of the  
Respondent)

**ARGUED ON** : 19.01.2022

**DECIDED ON** : 24.02.2022

**WICKUM A. KALUARACHCHI, J.**

The Accused-Appellant along with the deceased 1<sup>st</sup> accused, Ishwara Arachchige Ravindra Hemantha was indicted for committing the murder of Sriyani Wijerama on or above 31.01.2001 punishable under Section 296 of the Penal Court. The first Accused, Ravindra Hemantha had passed away during the trial. Thereafter, the trial proceeded against the second Accused-Appellant.

The prosecution led the evidence of 19 witnesses and documents P1 to P21 were marked. After the prosecution case was closed, a defence was called by the Learned High Court Judge. The Accused-Appellant made a dock statement and called 3 other witnesses on behalf of the Defence. After the trial, the Learned High Court Judge convicted the Accused-Appellant for the offence of murder and imposed the death sentence on him. This appeal was preferred against the said conviction and sentence.

Prior to the hearing of this appeal, written submission was filed only on behalf of the respondent. Although several grounds of appeal have been stated in the petition of appeal, no written submissions were filed on behalf of the appellant. In perusing the grounds of appeal, it appears that the same ground has been reproduced in some instances. However, when the appeal was taken up for hearing, the Learned Counsel for the appellant informed the court that he relies on grounds b, f, g, h, j, p and q stated in the petition of appeal.

One of the contentions of the learned counsel for the appellant was that the Learned High Court Judge has not complied with section 283 of the Code of Criminal Procedure Act. The learned counsel pointed out that in the impugned judgment, points for determination and the reasons for the decisions are not set out. The Learned Counsel contended that the judgment without reasons should not be allowed to stand.

In addition, the learned counsel for the appellant pointed out the following defects in the judgment.

- I. Proved circumstances were not given in the judgment.
- II. Irrelevant and inadmissible evidence was allowed to be led.
- III. The dying declaration has not been evaluated carefully.

- IV. The fact of not proving the time of death had not been taken into consideration in concluding that the appellant has committed the murder.

Answering the aforesaid arguments raised on behalf of the Appellant, the Learned Additional Solicitor General for the respondent submitted the motive for committing the murder, previous conduct of the appellant, the fact of some items being missing from the house on the day that deceased was last seen alive, events took place on 31.01.2002 and contended, on that circumstantial evidence, it has been proved beyond reasonable doubt that the accused-appellant had committed this murder.

There is no dispute on the fact that this case is entirely based on circumstantial evidence. Proved circumstantial evidence could be summarized as follows:

- I. The Accused-Appellant was a Karate instructor. The deceased was the wife of the Accused-Appellant who lived separately at the time of the death.
- II. Kanthi Wijerama, the sister of the deceased observed on 17.01.2002 that the face of the deceased was swollen and the deceased had informed Kanthi that the appellant had assaulted her.
- III. Three weeks before the death, the deceased had asked her brother, Ajith Wijerama to assist her to accompany her to file a divorce case and he had asked her to be patient.
- IV. The deceased had called her nephew Rangajeewa on 30.01.2002 and said that the deceased had filed a complaint against the accused-appellant at the Women's Bureau that the accused-appellant strangled and assaulted her. The accused-appellant had threatened the deceased to withdraw the complaint failing which he will kill her first and then kill her relatives.

- V. The accused-appellant has forced the deceased to leave the house that she occupied and convey the property in his name.
- VI. Wasanthi who was boarded at the house of the deceased has last seen the deceased alive on the 30<sup>th</sup> or 31<sup>st</sup> of January 2002.
- VII. Wasanthi had gone to work on the day that Wasanthi had last seen deceased alive. When she returned from work, the deceased was not there and some items of furniture and some other items were missing.
- VIII. On 31.01.2002, the deceased called her brother's house and requested to speak to her brother but he was not at home and the deceased told her sister-in-law that she cannot talk and asked her to come to the house of the deceased.
- IX. Nuwan Dushantha testified that he transported a TV, TV stand, roofing sheets and some other items from the house of the deceased to the appellant's ancestral home by his lorry on 31.01.2002.
- X. There is no evidence that the deceased was alive after 31.01.2002.
- XI. The appellant made a complaint to the Homagama Police that the deceased is missing.
- XII. The Accused-Appellant made a dock statement and admitted that he went to the house of the deceased on 31.01.2002 and took away some goods. Thereafter, he had left for Japan on 02.02.2002.

Before considering the other arguments advanced on behalf of the Appellant, I propose to consider whether the circumstantial evidence adduced before the High Court is sufficient to prove the charge of murder beyond reasonable doubt against the 2<sup>nd</sup> accused-appellant. There is no doubt that there is strong evidence against the deceased first Accused. This court has to examine whether there is substantial evidence against the 2<sup>nd</sup> accused.

In considering the aforesaid items of circumstantial evidence, no doubt there is a pretty much possibility for the 2<sup>nd</sup> accused-appellant to commit this murder. However, the appellant cannot be convicted only on possibilities. Whether it is the evidence of eye-witnesses or the circumstantial evidence, a criminal charge should be proved beyond reasonable doubt and not on possibilities. The entire burden of proving the charge lies on the prosecution.

There is a long line of Judicial Authorities that explain how to prove a criminal charge on circumstantial evidence.

In Junaiden Mohomed Haaris Vs. Hon. Attorney General - SC Appeal 118/17, decided 09.11.2017, it was held that “*It was incumbent on the prosecution to establish that the circumstances the prosecution relied on, are consistent only with the guilt of the accused-appellant and not with any other hypothesis*”.

In the case of King Vs. Abeywickrama - 44 NLR 254, it was held that “*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 hypothesis of his innocence*”.

In King Vs. Appuhamy – 46 NLR 128, 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 explaining upon any other reasonable hypothesis than that of his guilt*”.

In considering the circumstantial evidence of this case, an inference could be drawn that the appellant has committed this murder. However, that is not the only inference that can be drawn. There were opportunities for any other person to come and kill the deceased when Wasanthi had gone to work leaving the deceased alone in the house. No one saw what had happened in the house of the deceased during that time. Only when Wasanthi returned home in the evening after work,

she found that the deceased was not there. Committing this murder by some other person during those few hours, cannot be excluded. It was also held in the case of Podisingho Vs. King – 53 NLR 49 that “*In a case of circumstantial evidence, it is the duty of the trial judge to tell the Jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt*”. In the instant action, the evidence led in the High Court is not totally inconsistent with the innocence of the Accused.

In Don Sunny Vs. Attorney General (Amarapala murder case) – (1998) 2 Sri L.R. 1 it was held that “*when 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*”. It was held further in the said case 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 view of the decision of the aforesaid case of Don Sunny Vs. Attorney General also, the appellant in the instant action could not be found guilty because the opportunity for someone else other than the accused to commit the offence could not be excluded for the reasons stated above. As explained previously, on the evidence of this case, the only inference that can be arrived at is not consistent with the guilt of the appellant only.

On this circumstantial evidence, one can have a suspicion that the accused-appellant murdered the deceased when she was alone in the house and thereafter, he removed some goods from the house. But that is only a suspicion. It was held in The Queen Vs. M.G. Sumanasena –

66 NLR 350 that *“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”*.

On the other hand, the date on which the death of the deceased occurred has not been established. Although Wasanthi had last seen the deceased alive on the 30<sup>th</sup> or 31<sup>st</sup> of January, no evidence discloses the date of the death. The Judicial Medical Officer who conducted the post-mortem and the Judicial Medical Officer who gave evidence were also unable to form an opinion regarding the date of the death. Therefore, even the medical evidence does not substantiate that the death occurred on 31<sup>st</sup> January 2002. Hence, it cannot be concluded that the deceased was not alive after the 31<sup>st</sup> of January 2002.

If the possibilities are considered, there is a possibility for the deceased to leave the house for some reason on 31<sup>st</sup> January. As there was no one in the house, the appellant could have removed some goods from the house on that day. Then someone else could have committed the murder on a subsequent day. There is no substantial basis to exclude all these possibilities. Therefore, it is precisely clear that the accused's guilt is not the only inference that can be drawn on this circumstantial evidence.

In view of the legal position established by the aforesaid line of judicial authorities and on the available circumstantial evidence of this case, I hold that there is no sufficient evidence against the 2<sup>nd</sup> accused-appellant to convict him for the charge of murder.

In the aforesaid circumstances, the necessity does not arise to consider the other arguments advanced by the learned counsel for the appellant.



Accordingly, I set aside the conviction and the death sentence imposed on the Appellant. The 2<sup>nd</sup> Accused-Appellant is acquitted from the charge of murder.

Appeal allowed.

**JUDGE OF THE COURT OF APPEAL**

K. Priyantha Fernando, J (P/CA)

I agree.

**JUDGE OF THE COURT OF APPEAL**