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 Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0290/17

High Court of Chillaw Case No:

HC/27/2007

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Rankoth Pedige Nishantha Premarathna
2. Rankoth Pedige Sadith Premadasa

ACCUSED

AND NOW BETWEEN

Rankoth Pedige Nishantha Premarathna

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: Sampath B Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Anil Silva, P.C. for the Accused-Appellant
	: Vasantha Perera, SSC for the Respondent
Argued on	: 24-01-2022
Written Submissions	: 11-05-2018 (By the Accused-Appellant)
	: 29-10-2018 (By the Respondent)
Decided on	: 25-02-2022

Sampath B Abayakoon, J.

This is an appeal by the 1st accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Chilaw, where the appellant was sentenced to death upon conviction.

The appellant, along with another, was indicted before the High Court of Chilaw for committing the murder of W. Thilini Niroshani Fernando on 16th February 2005, an offence punishable in terms of section 296 read with section 32 of the Penal Code.

After trial without a jury, he was found guilty as charged and sentenced accordingly, and the 2nd accused, indicted, who was the brother of the appellant was acquitted of the charge.

At the hearing of the appeal, the learned President's Counsel for the appellant pursued the following two grounds of appeal in his submissions before the Court.

(1) The prosecution has failed to prove the charge beyond reasonable doubt.

(2) The learned trial judge has failed to consider whether the charge of murder can be maintained.

Facts in brief: -

The appellant was the paramour of the deceased's mother. The appellant while living with the mother of the deceased, started an affair with her as well, and eloped with her and commenced living together in the house where the incident took place, while maintaining contact with the mother of deceased as well. The deceased was a teenager and the mother never knew that it was with her paramour, her daughter has eloped, until she came to know about her death.

The owner of the land and the house where the deceased and the appellant who worked as a toddy tapper lived, (PW-01) has come to know about the death of the deceased at around 5.30 in the evening of 16th February 2005.

When he visited the scene, he has seen the deceased's body on the floor of the house and the appellant who was crying had wanted him to take the deceased to the hospital. He has also observed a rope hanging from the rafter of the house and he has been informed by the appellant that the deceased hanged herself and in order to bring her down he cut the rope.

Later, he has informed the Grama Sevaka of the area about the incident. He has not seen any issues between the appellant and the deceased previously.

The mother of the deceased (PW-02) has stated in her evidence that it was only after the death of her daughter, she came to know about the illicit relationship the appellant had with her. She has observed several scratch marks when she saw her body at the mortuary.

PW-03 was a fellow toddy tapper who worked with the appellant. On the day of the incident, while passing the house of the appellant, he has seen the brother of the appellant (the 2nd Accused) at the house and has also seen the deceased standing near the front door of the house and talking to him. Later, when he heard the news about the incident and reached the house of the appellant, he has seen the deceased on the floor and the appellant near her crying and trying

to revive her. He has also sought his help to take her to the hospital. However, he has realized that she was already dead. Upon inquiry, the appellant had informed him that the deceased hanged herself. He has also seen a part of the noose on the floor.

PW-10 was the police officer who arrested the 2nd accused, who was the brother of the appellant some two months after the incident upon a tip off. It was his evidence that although the 2nd accused was notified to appear before the police he never did. PW-10 has recovered the letter marked P-01 from his possession. The letter which is supposed to have been written by the appellant to his brother contains instructions to him as to what he should say to police with regard to what happened on the day of the incident. Upon the discovery, he has instructed PW-09 (PS 41159) to record a further statement from the appellant at the remand prison.

PW-09, in his evidence has produced and marked the production marked P-03 which was an equipment used by toddy tappers called 'මල් කැළෙම', recovered based on the statement of the appellant. He has marked the relevant extract of the statement which led to the discovery as 'Y' under the provisions of section 27(1) of the Evidence Ordinance at the trial. It has been suggested to the witness by the defence that the said statement was obtained by him after threatening the appellant in front of the prison officials, which he has denied.

PW-11 was the Judicial Medical Officer (JMO) who has conducted the postmortem examination (the report marked P-04) of the body of the deceased. He has been informed that the deceased was found hanging by the appellant. Since he had observed that the rope alleged to have been used for the hanging has been cut, the JMO has inquired about it as he has found it important for the postmortem.

He has been informed by the appellant that due to a quarrel he had with the deceased, he squeezed her neck, assaulted her towards the back of the neck using his right hand and pushed her, which resulted in her falling. It has been his explanation to the JMO that after the incident he left the house and when

he returned in about half an hour later, he found the deceased hanging. Explaining further, he has stated that as the body was bent at the knees, he was able to get hold of the body and lift it and cut the rope using his toddy tapping knife, which resulted in her falling onto the floor and receiving injuries to her left side of the face. He has also explained the steps he took to remove the noose from the neck of the deceased.

The JMO was an experienced medical officer who has conducted a large number of postmortems on suicides by hanging and murders by strangulation. After observing the rope marks and the other marks on the neck of the deceased, he has come to the conclusion that it was not a voluntary self-hanging and the deceased had been strangled first and hanged thereafter. He has well described his observations on the neck at the trial. (At page 166 of the appeal brief)

Upon inspecting the place of the incident, he has observed that given the maximum reach the deceased would have had because of her height, it was not possible for her to reach the rafter that is alleged to have been used by the deceased to hang herself without getting on to something else. He has observed that there was nothing in the room where the body of the deceased was found that could have been used by her to reach the rafter, if it was a voluntary hanging as claimed.

The JMO has opined that the death was due to strangulation. And it has been after the deceased became static a rope has been used to hang her, and the rope marks he observed in the neck was due to the tightening of the rope around the neck before being hanged. When question further by the learned trial judge the JMO has well explained the reasons for his conclusions. (At pages 169,170 and 171 of the brief)

The JMO has further clarified his opinion and has also stated that the injury he observed on the face of the deceased was not a result of a fall, but in all possibilities a result of an assault using a blunt object. He has opined that such an injury can be caused using the blunt side of the production marked P-

03 and it is possible that a person who receives a blow from such an object to fall unconscious. He has observed 11 injuries in total on the body of the deceased.

PW-07 and PW-08 are police officers who inspected the scene of the incident. Both of them have been firm in their evidence that there was nothing in the room that could have been used as an aid to reach the rafter where the deceased supposed to have been hanged herself.

PW-04, the sister of the appellant and PW-05 the mother of the appellant has confirmed that the letter marked P-01 was given to PW-04 by the appellant when she visited the prison asking that it be given to the 2nd accused who was not under arrest at the time. After receiving it from PW-04, it was the mother of the appellant who has given it to the 2nd accused. However, they also confirm that the appellant is a person who cannot read or write.

When called upon for a defence at the conclusion of the prosecution case, both the accused had made dock statements. The appellant has taken up the position that the death of the deceased was a result of a suicide due to the quarrel he had with her on the day of the incident. Interestingly, his dock statement was in line with what is stated in the letter marked P-01.

By his judgment dated 10-10-2017 the learned High Court Judge has found the appellant guilty on the basis that the prosecution has proved the case beyond doubt. He has dismissed the appellant's explanation as it has not created any doubt or provided any reasonable explanation as to the case of the prosecution.

Consideration of grounds of appeal

As pointed out correctly by the learned President's Counsel, since there is no direct evidence to the hanging of the deceased, this is a matter that has to be considered based on the circumstantial evidence and the medical evidence of the JMO.

It was the contention of the learned President's Counsel that there was no evidence to suggest that the appellant and the deceased had any previous

quarrels among them, and on the day of the incident PW-03 has seen them chatting with the brother of the appellant in front of their house. It was his position that the appellant has admitted that he assaulted the deceased because of the crosstalk they had due to the delay of her preparing meals for his brother and left the house thereafter. When he returned, he found the deceased hanging and it was he who took her down, alerted the others and wanted her to be taken to the hospital.

The learned President's Counsel admitted that the letter marked P-01 was sent by him to his brother, because he wanted to reveal what really happened and what was stated in the letter was in line with his stand at the trial and the dock statement. Even to the JMO the appellant has given the same explanation when questioned by him was his stand.

The learned President's Counsel contended that had the learned trial judge considered the above-mentioned proven facts, there would not be a basis to convict the appellant for murder as it would have created a clear doubt that this may also be a case of suicide. It was his position that since the benefit of such a doubt has to be given to the appellant, the conviction was not safe to be allowed to stand.

While maintaining the above position, it was also the position of the learned President's Counsel that even if it is considered that the evidence against the appellant have been established, when considered with the stand of the appellant and the medical evidence, a conviction under section 296 cannot be sustained.

Making his submissions based on the Concurrence Principle advanced in **Chapter 4 of the text Criminal Law of Sri Lanka by Wing-Cheong Chan, Michael Hor, Neil Morgan, Jeeva Niriella, and Stanley Yeo,** and also in **General Principles of Criminal Liability in Ceylon by Prof. G.L.Peiris at Chapter 3,** where the above principle has been discussed, it was his view that this is a fit case where the said principle should be considered.

However, citing the case of **The King Vs. Loku Nona 11 NLR 04,** he admitted that our Courts have never recognized such a principle, although it has been adopted by Indian Courts as relevant.

It was the contention of the learned Senior State Counsel (SSC) for the respondent that the judgment has been pronounced on the evidence adduced before the court. It was his position that there was circumstantial evidence beyond reasonable doubt as to the culpability of the appellant for the murder and the medical evidence has proven that it was a strangulation, and the hanging had been to mislead that the deceased hanged herself.

Commenting on the suggested concurrence principle, it was the position of the learned SSC that it is on mere speculation that submissions are being made and not on proven facts even to consider such a situation. It was submitted that the appellant, although was an illiterate, the evidence clearly establishes that he was intelligent enough to attempt falsifying the facts.

Admitting that the learned High Court Judge has not given sufficient reasons for the dismissal the dock statement of the appellant, he was of the view that even if considered, it would not have any effect on the judgment as there was no basis for his dock statement to create any doubt of the prosecution case nor it was a reasonable explanation of the incriminating evidence against him.

1st Ground of Appeal: -

This is a matter that has been decided based on circumstantial evidence against the appellant as there had been no eyewitnesses to the actual incident. It is well settled law that to find an accused guilty based on circumstantial evidence, the evidence must directly point to the guilt of the accused and nothing else.

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.*

In assessing such circumstantial evidence, 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.

The appellant has been living with the deceased at the house where the body of the deceased was found. He himself had admitted that he assaulted the deceased due to a quarrel he had with her because of her failure to cook meals for him and his brother, who was visiting the house. The fact that the brother being there had been established by the evidence of the fellow toddy tapper who happened to pass the house at that time. However, it was the appellant's position that when he came home later after leaving the house, he found the deceased hanged by herself.

The evidence led in this action clearly establishes the fact that the appellant was not an innocent illiterate toddy tapper as he was attempting to portray, but a master manipulator of the circumstances.

He was the paramour of the mother of the deceased who had a child with that union. The deceased was just coming out of her teenage years when he eloped with her after starting an affair with her too. He was smart enough to maintain both the mother and the daughter at two houses, without the mother knowing that he is living with her daughter as well, until she found out about her death.

It is clear from the evidence of the investigating police officers and the JMO who visited the scene as a part of his postmortem examination that the rafter the deceased was supposed to have used to hang herself was beyond her reach, given her height. There had been nothing that could have been used as an aid to reach the rafter in the room where the body of the deceased was lying when the police and the JMO visited and even the neighbours and the owner of the estate where they were living, came to the scene of the incident.

The appellant crying and pleading with the others to take the deceased to the hospital cannot be taken as evidence suggestive of his concern on the wellbeing of the deceased as claimed. I find that it may well be an attempt by the appellant to mislead the persons gathered to show that it was a suicide.

The evidence of the JMO clearly establishes that the appellant had been very careful to explain the major injuries that were visible on the body of the decease to him. Upon being questioned by the JMO as to what happened, he has explained that due to the quarrel he had with the deceased, he squeezed her neck and pushed her and hit to the back of her neck using his right hand. He has explained further, saying that when he found her hanging, he lifted her and cut the rope using his toddy tapping knife, and the left side of her face hit the cement floor when she fell as a result, and received injuries to the face.

However, the JMO has come to a firm finding that the death cannot be a suicide as claimed. It was his view that the deceased had been strangulated by the use of a rope and later she has been hanged by using the same rope to look

like it was a suicide. He has well explained the reasons for his conclusions, which has not been dented by cross examination.

The JMO has observed a total of 11 injuries in the body of the deceased, and has opined that the injury number 04, namely, the injury he observed just below the left ear of the deceased cannot be due to a fall, but in all probabilities due to an assault using blunt force, which may result in the victim being fallen unconscious. He has opined that such an injury can be caused if assaulted using the blunt side of the handle of the production marked P-03.

The appellant who admittedly being the only person last seen with the deceased and the only person who was with her when the neighbours came to the scene after the incident, the only conclusion that can be reached is that it was the appellant who is culpable for the death of the deceased.

This has been further established by the way he has acted even after he was arrested and remanded as a suspect for the murder. He has got a fellow inmate in the prison to write the letter marked P-01 to his brother who was seen in the company of him and the deceased on that day, instructing him how to give his statement to the police.

As admitted by the learned President's Counsel in his submissions before this Court, the dock statement made by the appellant was also in line with what was stated in the letter, which goes on to establish that the appellant is a person who can plan things beforehand in order to get over situations as he has done in this instance to portray that the death was a suicide.

The learned SSC in his submissions admitted that the learned High Court Judge has not reason out adequately as to why he rejected the defence of the appellant. However, in my view for that to be considered relevant, it needs to be established that it has caused prejudice to the appellant which amounts to a positive miscarriage of justice.

It is still an accepted legal principle in our country, although it has been done away in almost all of the commonwealth jurisdictions that a dock statement of

an accused has some legal value attached to it, subjected to the infirmities that it was not made under oath and not subjected to the test of cross examination.

It was held in the case of In **Queen Vs. Kularatne (1968) 71 NLR 529,** that while jurors must be informed that such a statement must be looked upon as evidence, subject, however, to the infirmities that the accused statement is not made under oath and not subject to cross examination.

Held further;

1. If the dock statement is believed it must be acted upon.
2. If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and;
3. It must not be used against another accused.

The learned High Court Judge in his judgment at page 14 (Page 315 of the Brief) has considered the dock statement in the following manner:

> "තීන්දුවේ සාකච්ඡා කර ඇති පරිදි හා 01 චුදිත සාක්ෂි දෙමින් මරණකාරිය සියදිවි හානි කරගත් බවට චුදිත පාර්ශ්වය වෙනුවෙන් කරුණු දක්වා ඇතත් විබාගයේදී ඉදිරිපත් වී ඇති සක්ෂියන් හා එම කරුණු දැක්වීමේ ගැලපීමක් නැත. විය හැකි බවයේ පරික්ෂණ සමත් නොවේ.
>
> පැමිණිලිකාර පාර්ශවය වෙනුවෙන් ඉදිරිපත් වී ඇති සාක්ෂි පිලිගන්නා අතර චූදිත පාර්ශ්වය වෙනුවෙන් ඉදිරිපත් වී ඇති සාක්ෂි ප්‍රතික්ෂේප කරුනු ලැබේ."

It may be correct to say that the learned High Court Judge should have elaborated more on the dock statement of the appellant with the infirmities it carries in his mind. However, I find that the learned High Court Judge has analyzed the evidence with a clear understanding of the defence of the appellant. In my view had it been considered any further, it would have been in anyway rejected as it has not caused any doubt on the evidence of the prosecution nor it was a reasonable explanation of the incriminating evidence against him.

It is my considered view that when taken the evidence in its totality, the charge against the appellant has been proved beyond reasonable doubt and the judgment need no interference by this Court.

2nd Ground of Appeal: -

Examples of concurrence principle adduced by the learned President's Counsel can be found in the following Indian cases**. (At page 54 of Criminal Law of Sri Lanka-supra):**

1. **Queen-Empress Vs. Khandu Valad Bhavani (1890) ILR 15 Bom 194**
2. **Palani Goundan Vs. Emperor (1919) ILR 42, Mad 547: MLJ17 (F.B.)**

In both these cases the accused struck the deceased with the intention to kill. The deceased fell unconscious, but did not die. Believing that the person was dead the accused disposed the body, in the first case by setting him on fire and in the second case by hanging the deceased to make it look like a suicide.

Giving reasons based on intention on both these instances the court held that it was not murder but attempt to commit murder.

However, in **Queen-Empress Vs. Valad Bhavani (Supra) Parsons. J.** (dissenting) held that;

> *"The accused with the deliberate intention of causing the death of his father-in law gave him three blows on the head. He then took the body, put a…box under his head, and set fire to the hut in which it was. The result was that the father-in-law, who had not been killed but only stunned by the blows, was burnt to death. … acts so closely following upon and so intimately connected with each other that they cannot be separated and assigned the to one intention which prompted the commission of those acts and without which neither would have been done. In my opinion, the accused in committing those acts is guilty of murder."*

The only case in Sri Lanka that considered the above principle was the case of **King Vs. Loku Nona (Supra)**, where the Supreme Court followed the dissenting

view expressed by Parsons,J. in **Queen- Empress Vs. Khandu Valad Bhavani.** where it was stated that;

> *The accused struck C a blow on the head with a club and C fell senseless. The accused believing that C was dead ordered the body to be put in to sea, where the body sustained certain wounds. According to medical evidence it was possible that C was not dead when she was thrown into the sea, and that death was caused by concussion of the brain from contact of the body with a rock in the sea.*
>
> ***Held:***
>
> > *The Accused was guilty of murder, even if the deceased was not dead when thrown into to the sea and the death was by the body coming into contact with a rock in the sea.*
>
> *Judgment of the majority of the Court in Khandu (Supra) disapproved.*

It is therefore clear that the concurrence principle has no place in our law, as it has never been recognized by our Courts, hence, no merit in the contention of the learned President's Counsel.

For the reasons aforementioned, I find no merit in the appeal. The appeal therefore is dismissed. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararathnam, J.

I agree.

Judge of the Court of Appeal