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) and (4) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution.

The Democratic Socialist Republic of Sri Lanka

Complainant

C.A. Case No. 048-19

High Court of Anuradhapura

Case No. 162/2009

Vs.

Rajapakse Subasinghe Pathiranage Cyril Shantha

Accused

AND NOW BETWEEN

Rajapakse Subasinghe Pathiranage Cyril Shantha

Accused –Appellant

Vs.

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

BEFORE	**:**	**K. PRIYANTHA FERNANDO, J (P/CA)** **WICKUM A. KALUARACHCHI, J**
COUNSEL	**:**	D. Weerasuriya, PC with Pasan Malinda for the Accused-Appellant Riyaz Bary, SSC for the Respondent
WRITTEN SUBMISSION TENDERED ON	**:**	01.10.2019 by the Accused-Appellant 03.05.2021 by the Complainant–Respondent
ARGUED ON	**:**	02.02.2022
DECIDED ON	**:**	03.03.2022

WICKUM A. KALUARACHCHI, J.

The Accused-Appellant who was a Lance Corporal of the Sri Lanka Army attached to the Palali Camp was charged for having shot and caused the death of Serjeant Major U. V. Wickrmasekara on 21.01.2006 and thereby committed the offence of murder punishable under Section 296 of the Penal Code.

The appellant was tried without a Jury and after the trial, the learned High Court Judge of Anuradhapura convicted the accused-appellant for the charge of murder by his Judgment dated 12.02.2019. This appeal has been preferred against the said judgment.

At the trial, eight witnesses have given evidence on behalf of the prosecution. After the prosecution case was closed, defence was called and the accused-appellant made a dock statement. Prosecution witness No. 4 had been considered as an adverse witness and the learned High

Court Judge decided to disregard his evidence. Apart from that, the learned High Court Judge did not consider the entirety of the evidence of witness No. 5 in determining this case because of the confessionary statement made by the appellant to the 5th witness.

There are no eyewitnesses in this case. Undisputedly, the prosecution case is based on circumstantial evidence.

Prior to the hearing, written submissions have been filed on behalf of the appellant as well as the respondent. At the hearing of the appeal, the learned President's Counsel for the appellant advanced several arguments. The said arguments could be summarized as follows:

I. The requirement of subsection 195(ee) of the Code of Criminal Procedure act has not been sufficiently/adequately complied with.
II. The requirements of the provision of Section 48 of the Judicature Act have not been properly complied with.
III. Inadmissible and prejudicial/damaging evidence to the accused of a confession has been permitted to be recorded and thus denied a fair trial.
IV. The learned trial judge has misdirected himself by casting the burden of creating a reasonable doubt on the evidence of the prosecution upon the appellant.
V. The credibility of the prosecution witnesses has not been properly assessed, dock statement has not been properly considered and failed to evaluate the evidence properly.
VI. Vital rules pertaining to the circumstantial evidence have not been followed by the learned high court judge.

Now, I proceed to deal with the aforesaid grounds of appeal.

<u>The requirement of subsection 195(ee) of the Code of Criminal Procedure Act has not been sufficiently/adequately complied with</u>

What Section 195(ee) of the Code of Criminal Procedure Act states is that "if the indictment relates to an offence triable by a jury, inquire from the accused whether or not he elects to be tried by a jury." On 18.06.2015, jury option was given to the accused-appellant and the learned High Court Judge recorded that "ජූරි සභාවක් රහිත නඩු විභාගයක් විත්නි පාර්ශවය විසින් තෝරාගනී." Therefore, it is apparent that the jury option had been given to the accused-appellant and he opted to have the trial without a jury. Hence, I hold that the requirement of Section 195(ee) of the CCPA has been complied with.

<u>The requirements of the provision of Section 48 of the Judicature Act have not been properly complied with</u>

I regret that I am unable to understand why the learned President's Counsel advanced this argument. In his written submission, he pointed out pages 105 and 127 of the appeal brief and states that section 48 of the Judicature Act has not been properly complied with.

In perusing the High Court case record, it is apparent that the Learned High Court Judge Dammika Ganepola (as he then was) had commenced the trial of this case. When the Learned Judge Manjula Thilakarathne heard this case first on 08.09.2016, it was recorded on page 105 of the appeal brief as follows: "මාගේ පූර්වගාමී විනිසුරුතුමා ඉදිරියේ සාක්ෂි දුන් සාක්ෂිකරුවන් නැවත කැඳවා නැවත සාක්ෂි විමසීම අනවශ්‍ය බව දෙපාර්ශවයේ නීතීඥවරුන් දන්වා සිටී. ඒ අනුව එම සාක්ෂි මත ක්‍රියාකරමි."

Thereafter, the learned High Court Judge M. W. J. K. Weeraman heard this case from 27.08.2018. On that day also, the learned High Court Judge adopted the evidence so far led, as follows (at page 127 of the appeal brief): "මෙම නඩුවේ පූර්වගාමී විනිසුරුතුමන්ලා ඉදිරියේ මෙතෙක්

මෙහෙයවන ලද සාක්ෂි මා ඉදිරියේ පිළිගෙන නඩුව ඉදිරියට පවත්වාගෙන යාමට දෙපාර්ශවය එකඟ වේ. ඒ අනුව නඩු විභාගය ආරම්භ කරමි".

Therefore, the Learned High Court Judges who heard this case had expressly adopted the evidence and there had been no violation of section 48 of the Judicature Act. Hence, there is no merit in that argument.

Inadmissible and prejudicial/damaging evidence to the accused of a confession has been permitted to be recorded and thus denied a fair trial

The contention of the learned President's Counsel for the appellant was that the judge's mind would be prejudiced, as the inadmissible confessionary items of evidence had gone into the case record. The learned President's Counsel submitted the case of Appuhamy Vs. Palis – (1917) 4 CWR 355 in substantiating the aforesaid argument. However, in the said case, the learned Magistrate had admitted in evidence a statement in the nature of a confession made by the accused to, or in the presence of a Police Constable. In such circumstances, the court held; that evidence should not have been admitted, and must necessarily have exercised an influence on the mind of the Magistrate. The said judicial authority has no relevance to the case before us because in the instant action, although the evidence in the nature of the confession was recorded, the learned High Court Judge categorically disregarded the entire evidence of prosecution witness No.5.

I am of the view that recording inadmissible or prejudicial evidence is not a reason to set aside a judgment because judges are trained to disregard inadmissible evidence and rely only upon admissible evidence in adjudicating cases. What is wrong is taking into consideration the inadmissible or prejudicial evidence in determining the action.

On the other hand, if the argument of the learned President's Counsel is accepted, whenever inadmissible or prejudicial evidence comes to the case record, that particular Judge could not hear that case and the case has to be transferred to some other Judge. This cannot be practically done; this has never been done in our courts and there is no necessity at all to do that according to my view.

In the instant action, the learned High Court Judge who delivered the Judgment has clearly stated that he would not consider the entirety of the evidence of witness No. 5 to whom a confessionary statement was made by the appellant. The learned judge has not only stated so in his judgment but also not considered any item of evidence of witness No. 5. In perusing the impugned judgment, it is apparent that the evidence of witness No. 5 has not been taken into consideration in any manner when the learned High Court Judge came to his findings. Hence, a fair trial has not been denied in any manner and there is no substance in that argument.

<u>The learned trial judge has misdirected himself by casting the burden of creating a reasonable doubt on the evidence of the prosecution upon the appellant</u>

I accept this argument of the learned President's Counsel to a certain extent because some of the observations of the learned High Court Judge in his judgment are not accurate. The observation that it is essential to create a reasonable doubt on the prosecution evidence by the dock statement (page 214 of the appeal brief) is not correct in law. Also, the learned judge has observed that the accused-appellant had failed to challenge the prosecution case (page 218 of the appeal brief). This observation is also not correct because the law presumes the innocence of the accused until proved his guilt. Therefore, the accused has no burden to challenge the prosecution case. If the prosecution presents a strong case, creating a reasonable doubt on the prosecution

case, when the defence is called, is sufficient to come to the verdict of not guilty.

Although these defects are in the impugned judgment, this court has to examine whether these infirmities affected the findings of the learned High Court Judge. If his conclusion could be substantiated by the evidence adduced in the case, there is no reason for this court to interfere with the judgment merely because of these infirmities. I would consider in a while whether the findings of the learned High Court Judge are correct in law.

Aforesaid other two grounds of appeal

Above mentioned last two grounds of appeal could be considered together. These are the two most important grounds of appeal on which the decision to convict the accused is challenged.

There is no dispute on the fact that when a charge is sought to be proved by circumstantial evidence, the prosecution must prove that no one else other than the accused had the opportunity of committing the offence. There is a long line of judicial authorities such as Junaiden Mohamed Haaris Vs. Hon. Attorney General – SC Appeal 118/17, decided on 09.11.2017; King Vs. Abyewickrama – 44 NLR 254; King Vs. Appuhamy – 46 NLR 128; Podisingho Vs. King – 53 NLR 49; Gunawardena Vs. The Republic of Sri Lanka – (1981) 2 Sri L.R. 315; Don Sunny Vs. Attorney General (Amarapala murder case) – (1998) 2 Sri L.R. 1 where it was held that it is incumbent on the prosecution to establish that the circumstances the prosecution relied on, are consistent only with the guilt of the accused-appellant and inconsistent with any reasonable hypothesis of his innocence.

Within this legal framework, I proceed to examine whether the guilt of the accused-appellant has been established on the circumstantial evidence of this case.

In this case, circumstances pertaining to the incident are disclosed from the evidence of witnesses No. 1, Major Chathura Ranaweera (at the time of the incident he was lieutenant) and witness No. 3 authorized officer, K.V. Sarath Udawithana. According to their evidence, the appellant was seen following the deceased into the area where the incident took place. The deceased had gone behind a building which was an office from one side and the appellant had gone behind the same building from the other side. Soon after that, witnesses heard some gunshots and shouting the phrase, "බුදු අම්මෝ". PW 3 says that when he looked through the said office, he saw the deceased lying on the floor with blood flowing from his chest and hand and the appellant was seen in the position of firing a shot. PW 1 has also said in his evidence that he saw the accused-appellant with a weapon and told him to place it on the ground but the appellant went towards the military police barracks.

In addition, the PW 1 stated that "කට්ටිය කෑ ගහන සද්දේ ඇහුනා ලාන්ස් කෝප්‍රල් සිරිල් ශාන්ත ස්ටාෆ්ට වෙඩි තිබ්බා කියලා. The learned Senior State Counsel for the respondent pointed out that the above item of evidence is admissible in terms of Section 06 of the Evidence Ordinance and the learned President's Counsel for the appellant did not disagree with that argument. Section 06 illustration (a) states "A is accused of the murder of B by beating him. Whatever was said or done by A or B or **the by-standers** at the beating or so shortly before or after it as to form part of the transaction is a relevant fact." (Emphasis added) Accordingly, I agree with the argument of the learned Senior State Counsel that the aforesaid item of evidence is admissible.

However, three main arguments advanced by the learned President's Counsel for the appellant have to be considered in evaluating prosecution evidence. These are the crux of the contentions of the learned President's Counsel.

I. Seven cartridges found at the scene have not been fired from the gun handed over by the appellant according to the Government Analyst.
II. The credibility of the prosecution witness No.3, Sarath Kudawidane is in question.
III. Not excluding the possibility of any other person's involvement to commit the murder.

The learned High Court Judge observed that there were many empty cartridges in the area where this incident took place. In fact, this was elicited from the evidence of witness No.7. Undoubtedly, the Government Analyst's report and his evidence do not support the prosecution case. However, the Government Analyst's opinion does not create doubt in the prosecution case because the evidence adduced on behalf of the prosecution that there were many other empty cartridges in that place, was not challenged on behalf of the appellant. As an Army officer, the appellant was very familiar with this place but he did not challenge the fact that empty cartridges were scattered in that area. So, there was a possibility of not collecting the cartridges fired from the gun handed over by the appellant. However, in these circumstances, an inference cannot be drawn based on the Government Analyst Report that gunshots were fired from the gun possessed by the appellant. Under these circumstances, the Government Analyst report is neither favorable nor unfavorable to the prosecution or the defence. Hence, the Government Analyst report and his evidence do not help to reach conclusions in this case.

The learned President's Counsel for the appellant also challenged the credibility of the PW 3. His contention was PW3's version that he saw the part of the incident that he explained to the court could not be believed. The learned President's Counsel pointed out that according to the evidence of the PW 3 when he looked through the office, he had seen the deceased falling crying and injuries on his chest and hands. The

learned President's Counsel raised the question if it is so, at what time the fatal head injury was caused.

There is merit in this argument. If the witness saw the deceased falling on the ground and his injuries on the chest and hands, there was no time to cause the fatal head injury after falling. If the head injury had been caused previously, he was unable to stand at the time of the chest and hand injuries were being caused. In reply, the learned Senior State Counsel pointed out that the said witness has also stated in his evidence that he saw the deceased, after falling on the ground.

There is no doubt on the fact that the death occurred as a result of gunshot injuries. According to the post-mortem report, the cause of death is "fatal brain laceration due to discharged from a rifled firearm". It is to be noted that bullets can cause injuries in a matter of seconds. PW 1 stated that he heard about six- or seven gunshots. Although PW 3 has stated about hearing "බුදු අම්මෝ" and the deceased being fallen on the ground, when he was cross-examined, a clear question was asked by the learned counsel for the appellant himself. The question and answer are as follows:

ප්‍ර: තමුන් වික්‍රමසේකර දකින අවස්ථාවේදි වික්‍රමසේකර වැටිලා ඉන්නවා දැක්කේ ?

උ: ඔව්.

The above item of evidence clearly shows that the witness saw the deceased after falling on the ground.

The 3rd witness saw injuries on the chest and the hand. He has not seen the fatal head injury. It is manifest from the evidence that PW 3 or PW 1 did not have a close look at the deceased. So, the PW 3 may have seen only the injuries on the chest and hand. However, PW 1 says that there was a head injury. Thus, these items of evidence are consistent with the medical evidence.

Therefore, it is apparent that the gunshot injuries explained by the Judicial Medical Officer could be caused by the appellant and the incident the 3rd witness described as having seen is apparent to be true. So, there could be no doubt regarding the credibility of the prosecution witness No. 3.

The last matter to be considered is that the prosecution did not ask a direct question whether any other person was there with a gun other than the accused in order to exclude any other person's involvement in shooting.

I have explained previously the legal position pertaining to the circumstantial evidence. Accordingly, the prosecution must prove that no one else other than the accused had the opportunity of committing the offence as decided on Don Sunny Vs. Attorney General – (1998) 2 Sri L.R. 1. Therefore, it is the duty of the prosecution to eliminate the involvement of a third party. Now, the issue is to exclude the involvement of any other person, is it essential to pause the specific question "whether any other person was there at that time?". In other words, whether the accused-appellant cannot be convicted on the circumstantial evidence without the aforesaid specific question being asked.

The learned Senior State Counsel for the respondent contended that when considering the totality of the evidence adduced by the prosecution, in this case, the only inference that can be drawn is that the accused-appellant and no one else has committed the offence.

It is my considered view that to establish the fact that the circumstances are consistent only with the guilt of the accused-appellant and inconsistent with the innocence of the accused, the specific question of whether any other person was there need not be

essentially asked. Other circumstantial evidence could be led to come to the only conclusion that no one else but the accused-appellant committed the offence.

On the other hand, even though a specific question has been asked whether any other person was there and the witness answers "no", involvement of a third person cannot be excluded on that question and answer alone, if the evidence reveals that there was a possibility for the involvement of a third person. Therefore, what is important is not mere statement of exclusion of a third person's involvement but the circumstantial evidence that sufficient to invite the court to come to the only conclusion that no one else but the accused-appellant committed the offence of murder. Hence, I hold that although there is no specific question and answer to exclude the involvement of a third person, entirety of the circumstantial evidence could exclude a third person's involvement.

In the instant action, as explained previously, the appellant followed the deceased into the area where the incident took place. Witnesses saw the accused carrying a gun. Soon after the shouting "ඛුදු අම්මෙප්" and gunshots, both witnesses say the appellant was in a standing position. They explained further that he was in a firing position. On behalf of the appellant not only the said items of the evidence had not been challenged but also the appellant stated in his dock statement that they were ordered to be in the standing position always. That clearly shows even the appellant admits the fact that he was in a standing position at that time.

In addition, PW 3 said explaining the situation moments before the incident, "suddenly after a while, we moved on. We thought something was going to happen". They felt that something would happen, when he saw the way, the appellant followed the deceased. Immediately they heard the gunshots, the deceased was fallen in gunshot injuries and

the appellant was in firing position. Thereafter, the appellant handed over his weapon to a higher officer of the Army.

I am of the view that the aforesaid chain of events is sufficient to exclude the third person's involvement and come to the only conclusion that the accused-appellant has committed this murder.

Evaluation of Dock Statement

It was a contention of the learned President's Counsel that the learned High Court Judge has not analyzed the dock statement and merely dismissed the same. He submitted the case of The Queen Vs. D.G. de S. Kularatne and 2 others - 71 NLR 529 and contended that it was held in the said case that "the jury must be directed that if the dock statement raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed". There is no doubt that is the correct legal position in dealing with a dock statement.

Therefore, at this juncture, I wish to analyze the dock statement as well. While denying the shooting by him, the appellant said that he went to barrack to inform about the shooting incident. At the same time, he admits that he handed over his gun to the higher officer. This is a story that does not match each other in any way. There is no reason for a person who went to inform about the shooting incident to hand over his gun. Apart from that, the appellant states in his dock statement that they keep the weapon ready to fire at any moment and if they do not do so, action would be taken against them. By making this statement, the appellant corroborates the prosecution version that he was there in a firing position. Another impossibility in his story is that according to him, someone else has shot the deceased and he was the person who went to inform about the shooting but it is strange to see that he was also in the firing posture during this commotion. Under these circumstances, it is obvious that the unbelievable dock statement does

not create any doubt in the prosecution case. Thus, the defence could not succeed in this case.

Although the learned High Court Judge has not analyzed the dock statement extensively, his decision not to believe the dock statement is correct.

It is important to pay attention to the following observation made in the case of Gunawardena Vs. The Republic of Sri Lanka reported in (1981) 2 Sri L.R. 315 in determining this action. "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 of suspicion. Each piece of circumstantial evidence is not a link in a chain for if one link breaks the chain would fail. Circumstantial evidence is more like a rope composed of several cords. One strand of rope may be insufficient to sustain the weight but three strands together may be quite sufficient".

In considering the entirety of the circumstantial evidence of this case and the aforesaid legal position, I hold that the learned High Court Judge is correct in holding that the only inference that could be drawn is that no one else but the accused-appellant committed this murder.

For the foregoing reasons, I hold that there is no reason to interfere with the Judgment of the Learned High Court Judge. Although there are some questionable observations in the judgment, those observations would not affect the conclusion of the learned High Court Judge.

Accordingly, the conviction and the sentence dated 12.02.2019 are affirmed.

The appeal is dismissed.

The Registrar is directed to send a copy of this Judgment together with the original case record to the High Court of Anuradhapura.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL