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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal Case No:
CA/HCC /0264/2017
High Court of Panadura
Case No. HC/3368/2016

Kodithuwakku Arachchige Premila Saranga alias Henegama Rathnasiri

ACCUSED-APPELLANT

vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**

P. Kumararatnam, J.

COUNSEL	**:**	**Neranjan Jayasinghe with Harshana Ananda and P.D.K. Katugampola for the Appellant** **Janaka Bandara SSC for the Respondent.**
ARGUED ON	**:**	**08/02/2022**
DECIDED ON	**:**	**22/03/2022**

****

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Panadura under Section 296 of the Penal Code for committing the murder of Dona Sunethra Priyadharshani Kodikara on or about 25th May 2010.

The trial commenced before the High Court Judge of Panadura as the Appellant had opted for a non-jury trial. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellant had made a dock statement and closed his case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant under section 296 of Penal code and sentenced him to death on 10/08/2017.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via Zoom from prison.

Background of the Case

According to the evidence led in the trial, the deceased was expecting to marry the Appellant after a long-term love affair. Initially he was a Buddhist Priest but had given up the robe some time before the incident.

According to PW2 the mother of the deceased, the deceased is an educated woman and was working for Sri Lanka Telecom at the time of her demise. Around 8.45 a.m. on the day of the incident i.e.,25/05/2010 she had told her mother that she was going with her fiancé to buy shoes for him for their wedding. She had further said that her fiancé had asked her to come to Homagama and from there they were to travel together to Colombo. By this time, they had already bought the wedding rings and prepared the wedding dress. In the afternoon around 2.30 p.m. the Appellant had come home crying and told the mother that the deceased was not to be found and suggested that they go to the police and lodge a complaint. He also speculated that the deceased may have been killed by someone. At that time, she had sensed the odour of alcohol emanating from the Appellant. He had left the place after worshiping the mother of the deceased.

In the evening of 25/05/2010 PW4 the police officer had received information about an unidentified naked dead body of a woman which was floating in the Nachchimale lake and he reached the place around 7.00 p.m. According to him the water level was about 4 feet and the height of the deceased was 5 feet and 1 inch.

As nobody came forward to claim the dead body, the police sought the assistance of the public by publishing the photograph of the deceased in the

newspaper. After about a month, on 24/06/2010 PW1 the brother of the deceased had gone to the Kalubowila Hospital morgue and identified the dead body of his sister.

On 28/10/2010 the Appellant was arrested and his statement was recorded. Upon his statement and acting under Section 27(1) of the Evidence Ordinance a pair of slippers, a blouse, a lady underwear, a brassiere which were alleged to have been belonging to the deceased were recovered under a bamboo bush close to the place where the body of the deceased was found.

When the defense was called the Appellant had made a brief dock statement. In his dock statement he had denied having any relationship with the deceased during the material time and any knowledge about the recovered items upon his statement.

Following appeal grounds were advanced by the Appellant.

1. The Learned High Court Judge has wrongly concluded that the items of circumstantial evidence sufficient to come to the conclusion that the Appellant only had committed the murder.
2. The Learned High Court Judge has wrongly refused the dock statement of the Appellant.

According to PW1 the brother of the deceased the deceased was having a long-term affair with the Appellant. Initially the Appellant was a Buddhist priest under the name of Ratnasiri Thero. After the disrobement he had changed his name as Premila Saranga. Three years before this incident the Appellant had gone to Korea at the eleventh hour before the wedding arrangements at that time.

This time, for the deceased's wedding this witness had paid the price for the weddings rings of the couple through his credit card and also bought the wedding attire for the couple.

As the deceased went missing after 25/05/2010, he had lodged a complaint at Homagama Police Station and searched for the deceased. On 24/06/2010 he found his sister's dead body at the Kalubowila Hospital morgue.

A photo copy of a letter allegedly written by the deceased confirming the love affair between the Appellant and the deceased was marked as P1. At that time the Appellant was a Buddhist monk. Further he had identified the dress of the deceased during the trial. A three-wheeler was bought by the deceased for the Appellant and on 17/04/2010 the deceased had given a call to this witness and told him that the Appellant had forcibly taken her to a jungle in Ehaliyagoda area and stranded her.

During the cross examination certain omissions had been marked by the defense in his evidence.

According to PW2 the mother of the deceased, prior to the date of incident the Appellant had twice visited her house but on both days the deceased was not at home. On the fateful day, the deceased had left the house saying that she was going to Colombo to buy shoes for her fiancé. She had also mentioned to her that she was going to meet him at Homagama in the morning. According to this witness the deceased had bought a van for the Appellant in addition to a three-wheeler.

In the first appeal ground the Appellant contends that the Learned High Court Judge has wrongly concluded that the items of circumstantial

evidence are sufficient to come to the conclusion that the Appellant only committed the murder.

In the case of **C.Chenga Reddy and others v. State of A.P**.(1996) 10 SCC 193 the court held that:

> *"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence".*

In the case of **McGreevy v. Director of Public Prosecution** [1973] 1 W.L.R.276the court held that:

> *"There is no requirement, in cases in which the prosecution's case is based on circumstantial evidence that the judge direct the jury to acquit unless they are sure of the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion. The question for the jury is whether the facts as they find them to be_drive them to the conclusion, so that they are sure, that the defendant is guilty".*

In the case of **Attorney General v. Potta Naufer & others** [2007) 2 SLR 144 the court held that:

> *"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".*

In the case of **Kusumadasa v. State** [2011] 1 SLR 240 the court 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 and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence".*

In **Premawansha v. Attorney General** [2009] 2 SLR 205 the court held that:

> *"In circumstantial evidence if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapable conclusion that the accused committed the offence".*

In this case in order to find the Appellant guilty of the charge, all the circumstances must point at the Appellant that he is the one who committed the murder of the deceased and not anybody else. It is the incumbent duty of the prosecution to prove the same beyond reasonable doubt.
In this case according to PW01 and PW2, the Appellant is the person who had an affair with the deceased. This was a long-term affair and according to the witnesses the affair had been in existence since the Appellant was a Buddhist monk. The witnesses clearly mentioned the name of the Appellant before and after his priesthood when they gave evidence. Therefore, not mentioning the name of the Appellant to police will not affect the prosecution case, as the Appellant had admitted in his dock statement that he had an affair with the deceased.

On the day of the incident the deceased had told PW2 that she was going to meet the person whom she was going to marry. She did not tell her mother the name of the person. The counsel for the Appellant argues that not mentioning the name of the Appellant clearly manifests the fact that the

witness was not aware of the name of the Appellant at all material points. But in the cross examination PW2 stated that she was well aware of the name of the Appellant as the deceased had told her everything about her affair with the Appellant. Further the Appellant had come to her house twice in the

absence of the deceased. She had also stated that as she was disturbed due to the disappearance of the deceased, she could not mention all the details in her statement to the police. Hence it is incorrect to say that she was unaware of the Appellant. Hence the marked contradictions V1 and V2 will not affect the root of the case.

The counsel for the Appellant contends that the utterance made by the Appellant to PW2 creates a reasonable doubt as PW2 had not mentioned about the utterance of the Appellant in her first statement to the police but mentioned it for the first time in her 2nd statement which was made after about five months of the incident. Further no explanation had offered for the delay.

PW2 mother of the deceased in her evidence had stated that she was in a state of shock when she gave her first statement to the police. She had given all the details when she gave her statement after finding the dead body of the deceased. Hence, the witness had given valid reasons for the delay in giving a detailed statement.

In the case of **Sumanasena V. Attorney General** [1999] 3 SLR 137 it was held that:

> *"Just because the witness is belated witness ought not to reject his testimony on that score alone, court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the court could act on the evidence of a belated witness."*

The Appellant in his dock statement did not deny that he had an affair with the deceased. According to him the affair was not firm as they used to have differences from time to time. On the day of the disappearance of the deceased, the Appellant had gone to the deceased's house weeping and told PW2 that the deceased was not traceable and suggested they go to the police.

Before PW2 could speculate on anything, he had told PW2 that he suspect that the deceased could have been murdered by somebody. Afterwards, the Appellant had left the house after worshiping PW2. This suspicious conduct of the Appellant as stated by the Learned High Court Judge in her judgment, points the finger at none other than the Appellant. During this utterance, PW2 was not as panicked as the Appellant but had assured him that the deceased had gone to the office and will return later.

The previous and subsequent conduct of the Appellant also gives rise to a reasonable suspicion about the Appellant. Now I consider whether the previous and subsequent conduct of the Appellant are relevant to this case.

Section 8(1) and 8(2) of Evidence Ordinance are read as follows:

> 8 (1) Any fact is relevant which shows or constitute a motive or preparation for any fact in issue or relevant fact.
>
> 8 (2) The conduct of any party, or of any agent to any party, to any suit or proceedings in reference to such suit or proceedings or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

According to both PW1 and PW2 the Appellant had once abandoned the deceased at Ehaliyagoda in the night. According to the witnesses the Appellant had dragged the deceased to a forest area around 10.00 p.m. in the night and abandoned her. This incident had happened on 17/04/2010 as the PW1 had received a call from the deceased that night. The deceased had managed to come to a bicycle garage and called PW1.

On the date of the disappearance of the deceased the Appellant had come to the deceased's house around 2.30 p.m. weeping and informed the PW2 that the deceased had gone missing and requested the PW2 to lodge a complaint with the police. At that time without any basis, he speculated that the deceased may have been killed by somebody. But the PW2 without panicking asked from the Appellant as to why a police complaint was necessary. The Appellant is not a frequent visitor to the deceased's house. But he had come to the deceased's house on the day the deceased went out saying that she was going to buy shoes for her fiancé. Under these circumstances the contradictions marked as V1 and V3 have no effect on the prosecution case. A letter written by the deceased complaining about the Appellant when he was under priesthood was marked as P1 by the prosecution. Even though the Appellant argued that the said letter was marked subject to proof, on perusal of the court record no such application was made by the defense when P1 was marked. At page 59 of the brief the only application made by the defence was to produce the original in court. In response to this application no order was made by the court. Hence, it is incorrect to say that P1 was marked subject to proof.

The Appellant argues that the bank cash deposit slips marked as P7(1), P7(2) and P7(3) by the prosecution cannot be considered as proof for the existence of a love affair between the deceased and the Appellant.

According to PW1 and PW2 all cash deposits, buying a three-wheeler and a van were done in favour of the Appellant with the bona fide anticipation that the Appellant would marry the deceased.

The letter P1 and the bank slips marked as P7(1), P7(2) and P7(3) even though they are related to the case at hand do not go to the core of matter of murder, the documents marked only resulted in the discovery of the 'relationship' but not the murder. The marking of the said documents through the victim's brother led to the discovery of the 'relationship' between the victim and the Appellant which is very well corroborated by PW1 and PW2.

According to the evidence of PW4, the Chief Investigating Officer when he visited the floating naked dead body of the deceased at Nachchimale, the water level of the stream was about 4 feet deep and the height of the deceased was 5 feet and 1 inch. According to PW3 JMO who conducted the post mortem examination his findings were compatible with death due to drowning.

The JMO elaborating further said that the internal organs test revealed that the deceased was alive when she had fallen into the water. He further said that if it was an accidental fall abrasion should be noted on the dead body. Hence the possibility of an accidental fall was excluded by the doctor. He had expressed an opinion that if someone forcibly dumped her into the water death could have happened due to drowning.

In this case the deceased was fully naked when her body was fished out from the stream. Considering her final utterance to her mother suicide cannot be anticipated. But recovery of her clothes consequent to the Appellant's statement and the suspicious conduct of the Appellant it is very reasonable

that the trial judge had come to the conclusion that the Appellant is responsible of the death of the deceased.

The Appellant further argues under the 1st ground of appeal that the evidence regarding the recovery of deceased's clothes after five months from the date of offence near a bamboo bush close to the water stream is highly improbable and unsafe to believe.

The Section 27 of the Evidence Ordinance states that,

> "When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

In **Somaratne Rajapakse and Others v. Hon. Attorney General** (2010) 2 Sri L.R. 113 at 115 it is stated that:

> *"Vital importance of the scope of sec. 27 Evidence Ordnance is that only the facts which are distinctly related to what has been discovered would be permitted in evidence there should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. A discovery, made in terms of the Sec. 27 of Evidence Ordinance discloses that the information given was true and that the accused had knowledge of the existence and the whereabouts of the actual discovery."*

In this case the police had recovered the deceased's clothes upon the statement of the Appellant under Section 27(1) of the Evidence Ordinance.

The investigating team recovered a trouser, a brassiere, a blouse, a pair of slippers and an undergarment from under a bamboo bush.

The Appellant was arrested on 08/10/2010 at Gonapola close to Piliyandala town. He was arrested at 5.10 p.m. His statement was recorded immediately at Gonapola and recovered certain items pertaining to the crime. Answering to the court PW4 had explained why he recorded the statement of the Appellant immediately after the arrest. Vide page 139-140 of the brief. Hence it is incorrect to say that the police had the prior knowledge about the clothes of the deceased.

The Appellant further contends that as the recovery had been made after about 05 months of the crime, and there is a reasonable doubt as to whether the clothes which were uncovered, unprotected would have been there even after 05 months.

The recovery was made after the arrest of the Appellant. If not for the arrest of the Appellant the police could not have recovered anything related to the crime. The truth regarding the dress of the deceased only surfaced upon the statement he made to the police upon his arrest. Had the Appellant not provided this information, the police could not have recovered these items.

Also contends that even though the recovery was made under a bamboo bush, the Learned High Court Judge in his judgment had stated that the recovery was made in the hollow of a tree. He further contends that due to above misdirection the Learned High Court Judge failed to consider whether it was probable to believe that the clothes were recovered even after 05 months.

PW4 in his evidence stated that the place of recovery was covered by trees and the items were recovered from a place like a hollow covered by bamboo trees. The Learned High Court Judge in her judgement mentioned this as recovery was done in a hollow of a tree. She has only omitted to mention about the bamboo tree. According to PW4 the place where the recovery was made was only covered with bamboo. Hence, omitting to mention bamboo tree in the judgment is not a serious misdirection as argued by the Appellant.

The Appellant further contends that despite the contradictions marked as V4 and V5 the Learned High Court Judge wrongly concluded that the Appellant is the person who hid the dress of the deceased.

PW2 in her first statement to police had said that the deceased wore a T-shirt when she left the house on 25/05/2010. But in the court, she had identified a red coloured blouse. Hence this contradiction was marked as V4 by the defence.

Further PW2 in her first statement to the police had said that the deceased had worn green coloured slippers but when she gave evidence had said that the deceased had worn white coloured slippers. This contradiction was marked as V5 by the defence. Hence, the Appellant argues that the recovery of productions upon the statement of the Appellant is doubtful.

PW2, the mother of the deceased is an elderly woman who had lost her daughter. In her evidence she had said that she was greatly disturbed due to her daughter's demise. Further she had given evidence before the High

Court after nearly 10 years of the incident. Hence, it is not possible to remember everything accurately as stated in the police statement.

In the case of **The Attorney General v. Sandanam Pitchi Mary Theresa** (2011) 2 Sri L.R. 292 held that,

> *"Witnesses should not be disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter……..The court observed further, that human beings are not computers and that it would be dangerous to disbelieve the witness and reject evidence based on small contradictions or discrepancies".*

Guided by the above-mentioned judgment, I conclude that the contradictions marked as V4 and V5 by the defence are not contradictions which affect the root of the case.

In the second ground of appeal the Appellant contends that the Learned High Court Judge has wrongly refused the dock statement of the Appellant.

The Learned High Court Judge in her judgement at page 270-271 and 297 of the brief, had discussed the legal basis as to acceptance or rejection of a dock statement. She not only considered the dock statement but had also given reasons as to why she was rejecting the dock statement of the Appellant and accepting the prosecution case. Hence it is incorrect to say that the Learned High Court Judge had wrongly refused the dock statement. Hence this appeal ground also has no merit.

As discussed under appeal ground one the prosecution had adduced strong and incriminating circumstantial evidence against the Appellant. The Learned High Court Judge had very correctly analyzed all the evidence presented by both parties and come to the conclusion that all the circumstances are consistent only with the hypothesis of the guilt of the Appellant and totally inconsistent with his innocence.

As the Learned High Court Judge had rightly convicted the Appellant for the charge of murder, I affirm the conviction and dismiss the Appeal of the Appellant.

The Registrar is directed to send a copy of this judgment to the High Court of Panadura along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL