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**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 No:  
CA/HCC/304-306/2017**

**High Court of Kurunegala  
Case No: HC/072/2012**

1. Masakkarahettilage Don  
Ishantha Kumara Masakkara  
alias Kotiya
2. Aththaragama Bogahapawure  
Vidnadurayalage Raveendra  
Kumara
3. Rajamuni Dewage Udaya Kumari  
Rajamuni

**ACCUSED-APPELLANTS**

**vs.**

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

**COMPLAINANT-RESPONDENT**

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

**COUNSEL** : **Tenny Fernando for the 1<sup>st</sup> Appellant.**  
**Nihara Randeniya for the 2<sup>nd</sup> Accused-**  
**Appellant.**  
**Anil Silva, P.C. with Nandana Perera for**  
**the 3<sup>rd</sup> Accused-Appellant.**  
**Madawa Tennakoon DSG for the**  
**Respondent.**

**ARGUED ON** : **10/02/2022**

**DECIDED ON** : **24/03/2022**

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### **JUDGMENT**

**P. Kumararatnam, J.**

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted jointly in the High Court of Kurunegala under Section 296 read with Section 32 of the Penal Code for committing the murder of Agangangoda Acharige Dharmaratna on or about 22<sup>nd</sup> September 2006.

The trial commenced before the High Court Judge as the Appellants had opted for a non-jury trial. After the conclusion of the prosecution case, the

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learned High Court Judge had called for the defence and the Appellants had made dock statements. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants under section 296 of the Penal code and sentenced them to death on 25/07/2017.

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

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

Counsels appearing for the Appellants have submitted their appeal grounds separately.

Grounds of appeal advanced by the 1<sup>st</sup> Appellant are as follows:

1. Learned High Court Judge has misdirected herself causing a failure to assess the legality of the recovery made under Section 27(1) of the Evidence Ordinance.
2. The prosecution has failed to establish beyond reasonable doubt the nexus between the alleged recovery of the weapon and the injuries on the deceased by providing admissible evidence namely failing to call the JMO to establish injuries on the deceased and cause of injury.
3. The prosecution has failed to establish the date and the time of death beyond reasonable grounds.
4. The Learned High Court Judge has misdirected herself causing a failure to apply the principle related to circumstantial evidence and thereby the conviction is not safe.

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The counsels for the 2<sup>nd</sup> and the 3<sup>rd</sup> Appellants filing one ground of appeal contend that using the confession of 1<sup>st</sup> Appellant against the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants is inadmissible and their convictions are illegal and bad in law.

### **Background of the Case**

On the 15th of September 2006 around 9.30 p.m., PW04 Asanka while driving his three-wheeler was stopped by his friend - the first Appellant, close to the deceased's house requesting a lift. This witness had noticed an odor of liquor emanating from the 1<sup>st</sup> Appellant at the time. After getting into the three-wheeler the 1<sup>st</sup> Appellant had told the witness that searching for the deceased was a futile exercise as he with 2<sup>nd</sup> and 3<sup>rd</sup> Appellants had killed the deceased and dumped his body into a well situated close to the deceased's house. The deceased has been missing 2-3 days by this time and the people of the area have been started to looking for him. The 1<sup>st</sup> Appellant had stated further that as the deceased had come to assault 1<sup>st</sup> and 2<sup>nd</sup> Appellants, they had killed him by assaulting with a club before dumping the body into the well. At this time the 3<sup>rd</sup> Appellant was living in the deceased's house and people suspected that she was having an illicit affair with the deceased as the wife of the deceased had gone abroad during this period. This witness had divulged this information to PW1 Upul Perera a Pradeshiya Sabha member, who in return called the Police Emergency Unit (119) and passed this information to the police.

After receiving this information via 119, PW8 Gunaratna had visited the scene around 1 a.m. and noticed that the dead body was floating in the well. Thereafter he had proceeded to arrest the 1<sup>st</sup> Appellant and he was arrested at 3.30 a.m. from his house. Upon further inquiry 3<sup>rd</sup> Appellant was arrested from deceased's house at 5 a.m. and the 2<sup>nd</sup> Appellant was arrested at 5.20 a.m. from the deceased's house. At that time, he was hiding under a bed.

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Upon the statement of the 1<sup>st</sup> Appellant the body of the deceased was fished out from the well in the presence of the Magistrate. A sarong was wrapped around neck of the dead body. Injuries have been observed on the neck and the head. The well is situated 10 meters away from the rear side of the deceased's house. Further an iron bar, a sword with blood like stains and a carpet-like piece of cloth also recovered by the police from a toilet pit situated close to the well.

During the search conducted in the house of the deceased the police had observed washed off blood like stains in the house. Further they had noticed blood like stains on the wall and on the curtains. The bed sheet and the mattresses were in disorderly manner. Nine meters away from the kitchen the police had observed burnt remnants of a sleeping mat.

PW3 Janaki a neighbor of the deceased told the court that earlier the deceased was living in his daughter's house but two months prior to his death he was living in his house with the 3<sup>rd</sup> Appellant. Also, she had noticed that that the son of the 3<sup>rd</sup> Appellant and the daughter of the deceased had fetched water from her well instead of their own. According to her this was unusual.

After the close of the prosecution case the defense was called and dock statements were made by all the defendants and the case was closed for the defense as well.

The 1<sup>st</sup> Appellant in his first ground of appeal complains that the Learned High Court Judge has misdirected herself and failed to assess the legality of the recovery made under Section 27(1) Evidence Ordinance.

The disappearance of the deceased was revealed by the confession made by the 1<sup>st</sup> Appellant to PW4 who had given a lift to the 1<sup>st</sup> Appellant in his three-

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wheeler. Although PW4 had not passed this information to the police but he had promptly divulged the same to PW1 who was a member of the Pradeshiya Sabha of the area. He immediately passed this information to the police which prompted the police to recover the dead body. There is no fault on the part of PW4 for informing PW1 about the confession instead of the police. Evidence against 1<sup>st</sup> Appellant further strengthened by the recovery upon his statement to the police under section 27(1) of the Evidence Ordinance.

According to Section 27(1) of the Evidence Ordinance-

“Provided that, when any fact is proved to be 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.”

Upon his statement the well, in which the deceased body was recovered was discovered by the police. Further a sword and an iron rod were recovered from a nearby toilet pit. The relevant portion of his statement was marked as P1(a) in the trial. The prosecution had led evidence of these recoveries under section 27(1) of the Evidence Ordinance successfully.

During the trial this evidence was not challenged by the defence. Therefore, this ground has no merit.

In the second ground the 1<sup>st</sup> Appellant contends that the prosecution has failed to establish beyond reasonable doubt the nexus between alleged recovery of weapon and the injuries on the deceased by providing admissible evidence namely failing to call the JMO to establish the injuries on the deceased and the cause of those injuries.

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In this case on 21/06/2017 the defence had admitted the Post Mortem Report of the deceased under Section 420 of the Code of Criminal Procedure Act No.15 of 1979. As such the prosecution did not call PW12 who has performed the post mortem examination of the deceased and filed the report in the court. At the end of the trial the said Post Mortem Report was marked as P7 through the court interpreter. Now the 1<sup>st</sup> Appellant contends that the prosecution had to call the JMO to establish the nexus between alleged recovery of weapon and the injuries on the deceased's body.

In **Perera v. Attorney General** (1998) 1 SLR 378 the court held:

*“An admission could be recorded at any stage of the trial, before the case for the prosecution is closed. The purpose of recording an admission is to dispense with the burden of proving the fact at the trial”*

When a document is admitted under Section 420 of the Code of Criminal Procedure Act No.15 of 1979 and accepted as evidence the contents of the document will be considered as evidence in the trial. At the same time the prosecution will dispense with the burden of proving the fact at the trial. Accordingly, in this case, the Post Mortem Report also had become evidence. In the Post Mortem Report four external injuries and corresponding internal injuries were clearly mentioned by the JMO. Further the JMO had opined that the death was caused due to head injury caused by blunt and sharp weapons. Considering the Section 27(1) recovery under Evidence Ordinance, it is incorrect to say that the prosecution has failed to establish the nexus between alleged recovery of weapon and the injuries on the deceased. As such, this ground of appeal too has no merit.

In his third ground of appeal the 1<sup>st</sup> Appellant argues that the prosecution has failed to establish the date and the time of death beyond reasonable grounds.

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According to witness PW4 Senaratna on 24/09/2006 the 1<sup>st</sup> Appellant had confessed that the deceased was dumped in the well. In his evidence he had further said that the 1<sup>st</sup> Appellant had told him that the deceased had died two days prior to his confession to PW4. Hence, as per the confession of the 1<sup>st</sup> Appellant the date of death of the deceased was 22/09/2006. Not establishing the time of death of the deceased is not so vital in this case.

The post mortem examination was done on 26/09/2006. The JMO who had performed the autopsy had stated that the deceased's body was swollen, eye was protrude, skin was white and greasy, Epidermis had been lost in most part of the body. Marbling was also seen. With the changes of the deceased's body and the confession of the 1<sup>st</sup> Appellant the prosecution has established the date of death of the deceased beyond reasonable grounds. Hence this ground also has no merit.

In the fourth ground of appeal the Appellant contends that the Learned High Court Judge has misdirected herself by failing to apply the principle related to circumstantial evidence and thereby the conviction is not safe.

Learned High Court Judge in her judgment at page 181 of the brief very clearly analysed the circumstantial evidence available against the Appellants in this case.

To substantiate her findings against the 1<sup>st</sup> Appellant she had cited the judgment of **King v. Abeywickrama Et Al** 44 NLR 254. In this judgment the court 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.”*



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In the case of **Tamil Nadu v Rajendran** Appeal (1996) 917(Cr.L) 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 becomes an additional link in the chain of circumstances to make it complete.”*

In this case the death of the deceased had surfaced upon the confession to PW4 by the 1<sup>st</sup> Appellant. Further investigations had led the police to recover certain items connected to the death of the deceased upon the statement made under Section 27(1) of the Evidence Ordinance.

The 1<sup>st</sup> Appellant in his short dock statement denied the allegation levelled against him. Though he has not been bound by law to offer any explanation, he failed to offer an explanation when strong and incriminating evidence had been led against him.

In the case of **Somarathne Rajapakse Others v Hon. Attorney General** (S.C. Appeal) 2/2002 TAB) Justice Bandaranayake 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 limitations in which it would be necessary for a suspect to explain the circumstances of suspicion which were attached to him.”*

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In this case the prosecution had led very strong circumstantial evidence against the 1<sup>st</sup> Appellant and it is consistent only with the guilt of the appellant and is totally inconsistent with his innocence. Hence his final ground is also devoid any merit.

Now I am going to consider the appeal ground advanced by the counsels for the 2<sup>nd</sup> and the 3<sup>rd</sup> Appellants that using of the confession made by the 1<sup>st</sup> Appellant is inadmissible against the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants and their conviction is therefore illegal and bad in law.

At this stage Learned President's Counsel who appeared for the 3<sup>rd</sup> Appellant had requested the court to allow his submissions be made prior to the counsel for the 2<sup>nd</sup> Appellant. Accordingly, the application was allowed.

The Learned President's Counsel contended that it is a settled law that the confession of an accused cannot be taken as an item of evidence against the other accused in a criminal trial.

In this case as stated above the death of the deceased was came to light upon the confession made by the 1<sup>st</sup> Appellant to PW4, who in return conveyed the same to PW1. Thereafter, PW1 had called the Police Emergency Unit (119) and the police commenced investigations. Upon the said information the police arrested the 1<sup>st</sup> Appellant first and the 2<sup>nd</sup> and the 3<sup>rd</sup> Appellants thereafter. The reason for the prompt arrest of 2<sup>nd</sup> and 3<sup>rd</sup> Appellants is the confession made by the 1<sup>st</sup> Appellant to the witness PW04.

Section 30 of the Evidence Ordinance reads as follows:

“When more persons than one are being tried jointly for the same offence, and a confession made by one such person affecting himself and some other of such persons is proved, the court shall not take into consideration such confession as against such other person.”

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Based on this section of the Evidence Ordinance our superior courts had delivered several judgments endorsing the Section 30 of the Evidence Ordinance.

In **Vivekanandan v. Selvaratnam** 79I NLR 337 the court held that:

*“Now I come to the third point that an extra judicial confession of an accused cannot be used in evidence against his co-accused under Section 30 of the Evidence Ordinance.”*

In **Joseph v. Peris et al** 24 NLR 485 De Sampayo J held that:

*“I am bound to hold that, in view of that provision the confession made by the second accused to the District Engineer was inadmissible, and does not furnish any evidence against the first accused.”*

As per the Section 30 of the Evidence Ordinance and above considered judicial decisions, it is abundantly clear that the confession made to PW4 by the 1<sup>st</sup> Appellant in this case cannot be used to find 3<sup>rd</sup> Appellant guilty in this case.

Now I consider whether exclusion of the confessionary evidence against the 3<sup>rd</sup> Appellant will exonerate her from the murder charge levelled against her.

The prosecution led evidence that the 3<sup>rd</sup> Appellant was residing with the deceased at all relevant times and therefore she could be responsible for the death of the deceased. But there was no admissible evidence led to the effect that either the 3<sup>rd</sup> Appellant was present at the crime scene or took part in committing the murder. The 3<sup>rd</sup> Appellant being resident in the deceased’s

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house does not by itself lead to an inference that she was involved in the commission of the offence unless the prosecution adduces incriminating evidence against the 3<sup>rd</sup> Appellant.

Further the police evidence revealed that there were blood-like stains on the floor of the deceased's house and on the window curtains. But no any evidence by an analyst was submitted by the prosecution to confirm this. In the absence of analyst's evidence, no evidentiary value could be given to this evidence.

In **Ranjith v. State** [2000] 3 SLR page 346 the court held that:

*“As regards the evidence relating to the recovery of blood-stained clothes it appears that these clothes had not been sent to the Government Analyst for examination and report. Hence, there is no evidential value to consider that item of evidence as an item of incriminating evidence against the accused appellant.”*

When considering the adduced evidence against the 3<sup>rd</sup> Appellant, I conclude that is not sufficient to bring a conviction under section 296 of Penal Code against the 3<sup>rd</sup> Appellant.

After the conclusion of the submissions made on behalf the 3<sup>rd</sup> Appellant, the Learned Deputy Solicitor General appearing for the Respondent, in keeping with the highest tradition of the Attorney General's Department informed this court the he was not going to contest the appeal ground advanced by the 2<sup>nd</sup> Appellant. Hence the counsel who appeared for the 2<sup>nd</sup> Appellant was released from making submissions on behalf of the 2<sup>nd</sup> Appellant.

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In this case the prosecution had led incriminating circumstantial evidence against the 1<sup>st</sup> Appellant and the circumstances established were consistent with the 1<sup>st</sup> Appellant's guilt and inconsistency with his innocence. Hence, I proceed to dismiss his appeal.

As the case against the 2<sup>nd</sup> Appellant was not contested by the Respondent, his appeal is allowed and he is acquitted from the charge.

As mentioned above, no plausible evidence is led against the 3<sup>rd</sup> Appellant. Therefore, her appeal is allowed and she is acquitted from the charge.

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

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree

**JUDGE OF THE COURT OF APPEAL**