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/0376/2017

High Court of Kegalle

Case No: HC/1941/2003

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

K. K. Dinesh Thilina Dhanushka Ariyarathne alias Senavi

ACCUSED

AND NOW BETWEEN

K. K. Dinesh Thilina Dhanushka Ariyarathne alias Senavi

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: Sampath B Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Sahan Kulathunga for Accused Appellant
	: Janaka Bandara, S.S.C. for the Respondent
Argued on	: 22-02-022
Written Submissions	: 05-09-2018 (By the Accused-Appellant)
	: 15-02-2019 (By the Respondent)
Decided on	: 31-03-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence imposed on him by the learned High Court Judge of Kegalle.

The appellant was indicted before the High Court of Kegalle for causing the death of Kiriammalakanda Lekamlage Disna Priyangika Senaviratne between 22nd April 1992 and 27th April 1992, and thereby committing the offence of murder, an offence punishable in terms of section 296 of the Penal Code.

The retrial held against the appellant was before a jury. After the conclusion of the trial, the jury entered a unanimous verdict of guilty against the appellant, and accordingly, he was sentenced to death by the learned High Court Judge of Kegalle by his sentence dated 11-12-2017.

It needs to be noted that the appellant has given his written consent for his Counsel to argue this appeal in the absence of his personal presence in the Court due to the prevailing COVID pandemic situation. However, he was allowed to observe proceedings before the Court via Zoom platform from the prison.

At the hearing of this appeal the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

Grounds of appeal: -

(1) On the material placed before the Court the jury could not have reached a verdict of guilt.
(2) The learned trial judge failed to place material evidence before the jury which amounts to a misdirection.
(3) The learned trial judge misdirected himself as to the evidence led in his summing up.

The facts relating to the incident, briefly, are as follows;

The appellant who was a police officer, developed a love affair with the deceased after visiting their house as a friend of her brother (PW-01). According to the evidence of the brother, his sister left for employment in Abu Dhabi in order to save enough money for her and the appellant to live as they intended to get married. She has sent all the money she saved to the appellant expecting him to build a house in Kurunegala. After she returned from overseas, she was keen to get married to the appellant in order commence a life together. At the instigation of the appellant PW-01 and his sister has gone to Kurunegala and has contracted a marriage between the deceased and the appellant. About fifteen days after the marriage the deceased went overseas again to earn money to build the house the appellant has said that he was building, and has sent her earnings to the appellant for that purpose. However, while overseas, she has come to know through the sister of the appellant that he is already a married man. This has prompted her to return to Sri Lanka and confront the appellant. The marriage between the deceased and the appellant was later found to be a bogus marriage. This has resulted in her making a complaint to the higher police authorities against the appellant. During the period, the deceased had also suffered a miscarriage.

According to the evidence of the PW-01, despite all the problems faced by the deceased and against the advice of the family members to distance from the appellant, the deceased has maintained contact with the appellant.

On 22nd of April 1992 at about 11.00 am. while coming home from the market where he worked, the PW-01 Fransis Senaviratne has seen his sister leaving the house wearing a red-coloured skirt and a brown coloured long sleeved t-shirt and going towards the short-cut road which leads towards Awissawella. When questioned she did not reply, but he has later come to know from their mother that the sister has informed her that she was going to Awissawella.

As the sister has not returned until the following day a complaint has been lodged with the Awissawella police. In the meantime, the witness has come to know from a person called Kalu Malli that through him the appellant gave a call to his sister on the 22nd and it was the reason for his sister to leave the house in order to meet the appellant.

On the 27th of April 1992, the witness has come to know that a body of a female has been found in Kadugannawa. After going to the Mawanella police and inquiring, the body of the deceased has been identified by PW-01 and other family members at the Kandy police mortuary.

PW-03 Sumanawathi was the sister of the deceased who was instrumental in getting her employment in Abu Dhabi where she was also employed. She has confirmed the evidence of PW-01 about the deceased going overseas for employment. It was her evidence that, after her sister was informed by the sister of the appellant who was also employed there, that her brother was a married man, she returned to Sri Lanka. She has known the appellant as the person who got married to her sister. She is one of the relatives who has identified the body of the deceased.

Roshan Rajapakshe (PW-11) was a person who had a timber store near the police kennels in Wehara, Kurunagala. He has come to know the appellant who was a police officer attached to the kennels and had developed a friendship

with him. About three-four days before the appellant was arrested and brought to his timber store, by the police, the appellant has come there with a female and had wanted him to allow them to write a letter, for which he has facilitated. It was the female who has written the letter and they have left after about 20 minutes. He has seen both of them going towards the Kurunegala town.

According to the evidence of Pathirannagalage Rohana (PW-21), the deceased whom he identified as Manike Akka was well known to him. She lived near the shop called Kaburapola Stores, where he worked as a sales assistant for over eight years. As her house had no telephone facilities, she was in the habit of coming to the shop in order to get telephone calls and also to receive. He knew that the deceased had a relationship with Ariyaratne (the appellant) whom he knew as a person worked in the Welikanda police at that time. He had met him at the shop where he worked, and also at the home of Menike Akka the deceased. It had been his evidence that the appellant came to his house in Ehaliyagoda one day and wanted his assistance to contact the deceased over the phone. As he was not working at the shop any longer, he has gone to the Awissawella Post Office with the appellant and had taken a call to the shop where he previously worked. Through the owner of the shop, he has spoken to the deceased and had informed her that the appellant whom he referred to as 'Ari Aiya' has come to meet her. He has given this call to the deceased somewhere between 8.00-9.00 in the morning. Accordingly, the deceased had come to Awissawella and after she met up with the appellant near the hospital bus stop, the witness has returned to his house. He has later come to know through police that her dead body was found. Initially, he was also taken in as a suspect, but later released.

The police officers who conducted investigations into this crime has given evidence in this action and had explained their investigations.

Dr A.B. Senaviratne (PW-27) was the Consultant Judicial Medical Officer (JMO) who held the postmortem on the body of the deceased. He has observed several fractures towards the right side of the temple of the deceased which has extended towards the nose and the upper lip area. He has opined that this injury was the main reason for the death and has clearly ruled out the possibility of any animal bite or fall as the cause of this injury. It was his opinion that this injury was a result of a blunt penetrating trauma. Apart from the above-mentioned injury, the JMO has observed several broken vertebrae among other injuries, which the JMO has attributed to either a result of a fall, accident or an assault. Given the fact that the body of the deceased was found in a partially decayed state and in precipice about 100 feet below the road, the JMO's opinions as to the injuries are well explained by the other evidence.

When called for a defence at the conclusion of the prosecution case, the appellant has chosen to give evidence under oath.

It was his stand that he came to know Fransis Senaviratne who was the brother of the deceased Disna Priyangani in the year of 1986, while serving at the Welikanda police. It was his evidence that he came to know that Disna Priyangani along with one Elisabath Perera and Kalyanawathi ran a business of foreign employment and he too paid a sum of Rs. 65000/- to the deceased in order to secure foreign employment. It was his position that since she could not secure his foreign employment as agreed, she returned a sum of Rs. 28507/56 by post while employed overseas. He has admitted that at the time of the incident he was attached to the police kennels situated in Wehera and was married to one Ajanatha Ediriweera, who was not the deceased. He has contracted that marriage on 17-01-1990 and had a child out of that wedlock.

Explaining his not taking meals from the police mess on 22-04-1992, it was his explanation that as a married officer he was not obliged to stay in the single officers' mess and he obtained his meals from outside.

Admitting that he was arrested on the 30th of April 1992 and taken to Mawanella police, it was his stand that he found another person known as Kalu Malli, later identified as Rohana (PW-21) who was unknown to him and his wife's brother under custody. He has denied any involvement in the death of the deceased and any connection with her in his evidence in chief.

Under cross examination he has stated that after becoming friendly with the brother of the deceased he has visited their house on several occasions and had claimed that he came to know that the deceased got married to a cousin of hers named K.L. Ariyaratne, around 1990. When questioned, he has admitted that he has given calls to her, but has claimed that it was only due to the friendship he had with her brother and for no other reason.

He has admitted that the deceased made a complaint against him to the police headquarters stating that he got married to her and complaining that she gave money and gold jewelry to him and she became pregnant due to him. Further, he has admitted that the deceased came and met him in Kurunegala and they went to the timber shop belonging to PW-11 and the deceased wrote a letter from there. However, he has claimed that he only facilitated the deceased to write a letter because she wanted to withdraw the complaint made against him to the police headquarters. It was his position that after the letter was written she left to hand over the letter and never met her thereafter. In the cross examination, the prosecution has marked several contradictions in the statement given by the appellant to the police.

After calling two other witnesses to support of his version of events the defence case has been closed.

Following the summing up of the case by the learned High Court Judge to the jury, the jury has returned a unanimous verdict of guilty against the appellant.

Consideration of the Grounds of Appeal

As the grounds of appeal pursued by the learned Counsel are interrelated, they will be considered together for the purposes of the appeal.

It needs to be mentioned that in a criminal action, be it before a jury or not, the weaknesses in the defence put forward by an accused should not be a reason to conclude that the prosecution has been proved, and proving the case against an accused beyond reasonable doubt always remains with the prosecution.

In the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148,** it was held:

> "*As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies the Court or at least is sufficient to create a reasonable doubt as to his guilt."*

However, it is also settled law that it is the totality of the evidence that has to be considered in a trial, be it for the prosecution or defence, rather than compartmentalizing the evidence.

It was held in the case of **James Silva Vs. The Republic of Sri Lanka (1980) 2 SLR 167** that;

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters adduced before the Court, whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."*

In the matter under appeal, there are no eyewitnesses to the actual crime. This is a matter that has been decided on circumstantial evidence and evidence consistent with the available circumstantial evidence.

In view of the contention of the learned Counsel for the appellant that there was not enough evidence and the learned High Court Judge failed to place before the jury material evidence and also, he was misdirected in his summing up to the jury, I find it necessary to consider the way a case should be established before a Court of law by way of circumstantial evidence.

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.*

However, in considering the circumstantial evidence, what has to be considered is the totality of the circumstantial evidence before coming to a firm finding as to the guilt of an accused, although each piece of circumstantial evidence when taken separately may only be suspicious in nature.

In the case of The **King Vs. Gunaratne 47 NLR 145** it was held:

> *"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 only of suspicion.*
>
> *The jury is entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt."*

In the case of **Regina Vs. Exall (176 English Reports, *Nisi Prius* at page 853)** Pollock, C.B., considering the aspect of circumstantial evidence remarked;

> *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in a chain, but that is not so, for then, if any one link brock, the chain would fall. It is more like the of a rope composed of several cords. One strand of the rope might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."*

The evidence led in this case provides overwhelming circumstantial evidence that points directly towards the culpability of the appellant for the murder of the deceased. It is clear that after building up a romantic relationship with the deceased, he has taken the maximum advantage of her. It clearly appears that the deceased believed the appellant even after it was discovered that he has deceived her right throughout their relationship.

Although it was the contention of the learned Counsel for the appellant that one of the main witnesses for the prosecution, namely, PW-21 Rohana was an

unreliable witness, I have no reasons to agree. The fact that he was also initially arrested along with the appellant is not a reason to consider him unreliable. I find that the appellant's admission under oath that he met the deceased in Kurunegala on the 22nd of April 1992, perfectly tallies with the evidence of Rohana that it was he who arranged the meeting between the two at the instigation of the appellant. Although the brother of the deceased has stated in his evidence that he saw his sister leaving the house around 10.00 and 11.00 am on that day, he may be wrong as to the time. However, the fact remains that she left the house on that morning in order to meet the appellant and they were seen together in the afternoon by PW-11.

I find no basis for the argument that the time gap between 22nd of April where the deceased was last seen and the discovery of her body on the 27th of April was too far between to point the finger only at the appellant. The evidence of the Judicial Medical Officer (JMO) establishes the fact that the deceased would have received the injuries to her head, which resulted in her death very close to the day on which the deceased was seen in the company of the deceased.

I find no merit in the argument that the learned High Court Judge has failed to place all the material before the jury and was misdirected as to the facts in his summing up to the jury.

It is the duty of a High Court Judge in his summing up to a jury, who are a group of laymen, to explain in plain and simple language the legal principles that they should consider and place the available evidence before them. I find that the learned High Court Judge has done just that. I am unable to find any failure in placing material evidence before the jury as contended. Although the last seen theory has not been put forward by the learned High Court Judge to the jury in its strict sense, that does not mean that he was misdirected as he has placed the evidence in that regard before the jury allowing them to decide. I

find that it was the correct approach in a summing up, as if not, it would even be amounting to influencing the minds of the jurors.

Although there is no burden of proof upon an accused in a criminal case, once the prosecution establishes a very strong prima facie case against him, it becomes necessary to consider whether a reasonable doubt has been created as to the guilt of the accused or a reasonable explanation has been provided in relation to the incriminating evidence against him.

Even though the appellant in his evidence has attempted to explain several instances of incriminating evidence led against him, he has failed to cross examine and confront the relevant witnesses in those lines so that the witnesses have an opportunity to explain when they gave their evidence in Court.

In the case of **Sarwan Singh Vs. State of Punjab 2002 AIR Supreme Court iii 3652 at 3655 and 3656** it was stated that;

> *"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in the cross examination it must follow that the evidence tendered on that issue ought to be accepted."*

I find that in this action the appellant has failed to create any reasonable doubt or to provide a reasonable explanation against the circumstantial evidence available against him.

The only inference that can be drawn beyond reasonable doubt is that it was the appellant who committed the murder of the deceased under the circumstances. He was the only person so involved in her life and it was the appellant who had all the reasons to get released from the issues he had to face because of his own actions.

A jury coming to a decision within a short span of time is not a reason to conclude that they did not deliberate sufficiently as argued by the learned Counsel for the appellant. What is necessary is to come to a correct finding and reaching the right verdict, which I find the jury has correctly reached in this action.

For the reasons aforesaid, I find no merit in the grounds of appeal urged. The appeal therefore is dismissed. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P. kumararatnam, J.

I agree.

Judge of the Court of Appeal