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/0340/2017

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Jaffna

Case No: 1794/2015

Jegatheeswaran Karikaran

ACCUSED

AND NOW BETWEEN

Jegatheeswaran Karikaran

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: Sampath B Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Tenny Fernando for the Accused-Appellant
	: Riyaz Bary, SSC for the Respondent
Argued on	: 09-03-2022
Written Submissions	: 07-02-2022 (By the Accused-Appellant)
	: 27-10-2021 (By the Respondent)
Decided on	: 05-04-2022

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 Jaffna, where he was sentenced to death.

The appellant along with the 2nd accused mentioned in the indictment was indicted before the High Court of Jaffna for causing the death of one Velupillai Sasiruban on or about 25th January 2009, and thereby committing the offence of murder, punishable in terms of section 296 read with section 32 of the Penal Code.

After trial without a jury, the appellant was found guilty as charged, while the 2nd accused was acquitted of the offence.

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

(1) The learned High Court Judge had failed to evaluate the circumstantial evidence available against the appellant in its correct perspective in the judgement, although the concept of circumstantial evidence has been discussed at length in the judgment.

(2) The prosecution had failed to establish a proper nexus between the available evidence and the appellant and hence, the conviction was not safe.

(3) The learned trial judge had failed to properly evaluate the dock statement of the appellant in relation to the available evidence.

Facts in brief: -

PW-01 Shanthasvaruban was the brother-in law of the deceased. The deceased has borrowed the bicycle belonging to him at about 3 p.m. on the 25th of January 2010, but has never returned. He has lodged a complaint in this regard to the Kilinochchi police and had continued to search for him. On the 27th of January, the body of the deceased has been found in a well, about 30-35 meters away from the house of the brother of the deceased.

Later he has identified his bicycle at the Mankulam police station (the production marked as P-01 at the trial). In his evidence, although he has stated that he identified it about one and half years after it was borrowed, he has admitted that it was on the 18th of February 2010, when questioned based on his statement to the police in that regard.

It was the evidence of PW-04 that the son-in-law of Thangavadivel, whom he has identified as the appellant, along with the 2nd accused and another person came to his shop and the appellant wanted to purchase goods to a value of Rs. 1000/- by keeping a wrist watch (the production marked as P-02 at the trial) as security for the payment of the money. He has confirmed that it was the appellant who removed the wrist watch from his hand and handed it over to him. However, no evidence has been led as to when this incident took place. Later, the brother of the deceased namely, Pirabakaran Rooban (PW-10) has identified the wrist watch as the wrist watch belonging to his brother, the deceased.

PW-09 Ganeshwarachandiran was the person who has purchased a bicycle from a person called Kanagaratnam around 07-02-2010. He has identified the production marked P-01 as the bicycle he purchased.

PW-12 was the Judicial Medical Officer (JMO) who performed the postmortem on the deceased on 28-01-2010 at the District Hospital Vavuniya, the report of which has been marked as P-05 at the trial. Through him the prosecution has marked a wooden plank as P-03, which the JMO has opined that the injuries to the skull may have been inflicted, and two pieces of glass as P-04, which the JMO has opined that the injuries observed on the face could have been inflicted.

Sub Inspector of Police Chandrathilaka (PW-17) was the police officer who has arrested the appellant as well as the 2nd accused. Based on the statement made to him by the appellant he has recovered the two pieces of glass marked as P-04. The relevant extract of the statement has been marked as P-07 in terms of section 27 of the Evidence Ordinance. Although it was his evidence that the said pieces of glass were recovered from the scene of the crime, he has failed to give any details as to the place of recovery. According to the evidence of PW-17 he has recovered the wrist watch marked as P-02 as a result of the statement made to him by the 2nd accused in the case. However, no extract of the statement has been marked by the prosecution in order to prove that fact.

PW-20 Wickramanayake was an officer serving at the Mankulam police station at the time relevant to this action. It was he who has recovered the bicycle marked P-01from the possession of PW-09.

When asked for the defence at the conclusion of the prosecution case, the appellant has made a statement from the dock. It has been his position that he went to harvest paddy with one Thirupathi Koneswaram alias Kamal and was not paid his salaries due for his labour in full by the said Kamal. As he was not paid, when the father of the appellant went and met him in that regard, it was Kamal who has pawn a bicycle and given Rs. 5000/-to his father was his statement. Clarifying further, he has claimed that it was the same Kamal who removed the wrist watch he was wearing and gave it to the shop owner for the goods purchased and not he. The appellant has denied that he has anything to do with the murder of the deceased.

Consideration of the grounds of appeal

Since the three grounds of appeal urged are interrelated, the mentioned grounds will be considered together.

It was the contention of the learned Counsel for the appellant that the available circumstantial evidence was hardly sufficient for the learned High Court Judge to come to a finding of guilt against the appellant. It was his position that the learned High Court Judge was misdirected as to the facts as well as the relevant law as to how circumstantial evidence should be looked at in a criminal trial, although in the judgment the relevant law has been mentioned at length. He urged the Court to consider quashing the conviction as it was bad in law.

The learned Senior State Counsel (SSC) for the respondent, after giving careful consideration to the evidence made available at the trial and the way the investigations have been conducted, conceded that he is in no position to support the conviction. This Court would like to express appreciation for the learned SSC for the views expressed by him in this regard as it is the paramount the duty of all the parties which includes the prosecution to ensure that the Court reaches a just and a correct decision be it in an appeal or in the original Court.

Our law in relation to the way the circumstantial evidence should be looked at in a criminal case is well defined. An accused can be found guilty based on circumstantial evidence only if the only inference that can be drawn from such evidence is that it was the accused who has committed the crime and no other inference.

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.*

It needs to be noted that there had been another accused who was charged before the Magistrate at the non-summary inquiry held in this regard. He was the person the appellant refers to as Koneswaram alias Kamal in his dock statement. It appears from the Magistrate Court case record that he too had been committed to stand trial along with the two accused mentioned in the indictment before the High Court by the learned Magistrate of Kilinochchi. After he was committed to stand trial, he has been enlarged on bail by the High Court of Vavuniya on 20-09-2011, with several conditions which includes the reporting to the police on the 1st and the 15th of every month.

It is apparent that the Attorney General has decided not to indict him in the High Court, although he too was committed to stand trial by the Learned Magistrate of Kilinochchi.

This Court was unable to find any record which indicates that the relevant discharge order has been communicated to the learned Magistrate of Kilinochchi as it was the duty of the Hon. learned Attorney General to take steps to ensure his discharge from the case in view of deciding not to indict him before the High Court. He may even be still reporting to the police as per the bail conditions imposed on him without knowing that there was no action filed against him. I find that this is a matter that needs the urgent attention of the Hon. Attorney General

Be that as it may, when turning my attention to the evidence made available against the appellant before the High Court, I find that they are of poor circumstantial value given the way the investigations have been conducted as correctly argued and agreed.

The body of the deceased had been found in a well near the house of his brother. There is no evidence as to who this brother was and whether the police inquired how it was possible to dump the body of the deceased without members of that household been able to notice what happened. As argued correctly, the prosecution has failed to establish any nexus between the accused including the appellant and the deceased or the items of circumstantial evidence adduced at the trial. The bicycle which was marked as a production (P-01) has been recovered from a person called Ganeshearachandiran (PW-09) who has testified that he purchased it from a person called Kanagaratnam. The police have failed to record a statement from the said person nor any nexus between him and the appellant has been established by the prosecution. It was the appellant who in his dock statement has identified him as his father. However, the fact remains that there was no evidence as to how he came into the possession of the bicycle.

Similarly, the evidence as to the wrist watch marked P-02 is also sketchy in my view. PW-04 from whom the said item has been recovered has stated in his evidence that it was the appellant who came with two others and gave him the watch without specifying when. It was the position of the appellant that it was

not him but Kamal, the person who was not indicted, that removed the watch from his wrist and gave it to PW-04.

Although the appellant has not given evidence under oath at the trial, that does not mean that his dock statement can be disregarded as our Courts have consistently held that such a statement too has evidential value subject to the inherent infirmities it carries.

In the judgment of **The Queen Vs. D.G.DE.S.Kularatne and two others 71 NLR 529** it was held:

> …
> *(ix) That when an unsworn statement is made by the accused from the dock, the jurors must be informed that such statement must be looked upon as evidence, subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony. But the jury must also be directed that,*
>
> *(a) If they believe the unsworn statement, it must be acted upon,*
> *(b) If it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed.*

Even if the defence cannot be accepted, but cannot be rejected either, the benefit of that should go to an accused is a matter that has to be considered when evaluating the evidence. A weak defence put forward by an accused does not mean that the case has been proved against him, since the onus is always with the prosecution to prove the case beyond reasonable doubt.

The recovery of two pieces of glass allegedly with blood like stains on the statement made by the appellant to the police is considered, the prosecution has failed to lead evidence as to from where the said pieces of glass were recovered. Although the witness has stated it was from the scene of the crime, there are no evidence as to where the incident has taken place. Even though the doctor who conducted the postmortem has given evidence stating that the injuries found on

the face of the deceased could have been inflicted by the pieces of glass marked as productions, as correctly agreed by the learned SSC, such injuries could have been inflicted in many other ways also.

Sending the items recovered for DNA matching also has not produced any results that the prosecution can rely upon in proving the case against the accused.

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."*

As agreed rightly by the learned SSC, although there are circumstances that directs the suspicion towards the appellant of some involvement, such suspicion alone would not be sufficient to conclude that the charge against him has been proved beyond reasonable doubt.

I am of the view that there was no basis for the learned High Court Judge to come to a finding of guilt against the appellant and the conviction and the subsequent sentence of the appellant was bad in law. Hence, I set aside the conviction and the sentence dated 07-12-2017 and allow the appeal.

Accordingly, I acquit the appellant from the charge preferred against him.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal