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/0054/2018

High Court of Gampaha

Case No: HC/99/2010

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Samasundara Hettige Chamil Pradeep Kumara

ACCUSED

AND NOW BETWEEN

Samasundara Hettige Chamil Pradeep Kumara

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: Sampath B Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Palitha Fernando, P.C. with Neranjan Jayasinghe, Harshana Ananda and Dulshan Katugampola for the Accused Appellant
	: Dileepa Pieris, SDSG for the Respondent
Argued on	: 24-02-2022
Written Submissions	: 08-10-2018 (By the Accused-Appellant)
	: 20-02-2019 (By the Respondent)
Decided on	: 06-04-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) challenging the conviction and the sentence of him by the learned High Court Judge of Gampaha.

The appellant was indicted before the High Court of Gampaha for causing the death of one Vithanage Siripala, along with some others who are unknown to the prosecution on 18th February 2007, an offence punishable in terms of section 296 of the Penal Code.

After trial without a jury, the appellant was found guilty as charged by the learned High Court Judge by his judgment dated 23-03-2018, and was sentenced to death accordingly.

At the hearing of the appeal, the only ground of appeal urged by the learned President's Counsel on behalf of the appellant was that the items of circumstantial evidence relied on by the prosecution were highly insufficient to prove the case beyond a reasonable doubt against the appellant. Therefore, the conviction of the appellant by the learned High Court Judge was bad in law.

Before considering the ground of appeal urged, I would now forcus my attention to the facts, as revealed in evidence.

The deceased Vithanage Siripala was a caretaker of a hotel owned by PW-01, Nandana Kularatne. He has received a call from the PW-02 Pradeep, who was a driver by profession and a person who used to regularly stay in the hotel in the night. PW-01 has been informed that the deceased was found fallen with injuries in the front garden of the hotel. As the hotel used to close for business by 10.00pm, the deceased was alone at that time. After reaching the hotel on the information received, he has found the deceased fallen with injuries. Although he was alive at that time, he could not talk. The deceased has succumbed to his injuries nine days after the admission to the hospital without gaining consciousness.

The main witness relied on by the prosecution was PW-02 who first found the deceased fallen in the garden of the hotel. It was his evidence that he came to the hotel as usual to stay for the night at about 9.30pm. After having his meals, he has left for the boutique which was in front of the hotel in order to have some fruits as it was his usual habit. Returning to the hotel about five minutes before 10.00pm as it was the closing time of the hotel, the witness has observed a butter-coloured three-wheeler leaving the hotel gate. As he had heard a sound like someone being assaulted while in the boutique, the witness has noted down the number of the vehicle as JN 6514. He has then seen the deceased fallen in the front garden of the hotel with injuries to his head.

Later, the police have traced the owner of the three-wheeler as Malini Perera (PW-05). It was her evidence that she rented the vehicle to the appellant for a 200/-per day rent, and it was the appellant who was using the vehicle at the time of the incident to earn his living. On the day in question the appellant has taken over the vehicle as usual and had returned in the afternoon. After informing her that he could not find sufficient income for the day, he has taken the three-wheeler again, saying that he wants to do some night hires as well.

However, the appellant has failed to return the vehicle that night. Subsequently, she has been informed by her son (PW-03) that there had been an issue involving the vehicle when it went on a hire to a hotel. The three-wheeler has been found by the son parked behind a boutique and had brought it home, but has seen the appellant only after his arrest few days later. She has not seen any particular damage to the three-wheeler.

According to the evidence of the son of PW-05 Chaminda Kumara, he has come to know that the front windscreen has been broken in the three-wheeler belonging to them via a third party at around 7 or 8 in the night. He was unable to remember the exact date on which he received the information, but has found the vehicle abandoned near a coffee shop. On inspection he has found the front light of the vehicle broken. The appellant to whom the vehicle was given to be used for hiring purposes was not there to be found. The witness who has taken the abandoned vehicle home has later surrendered it to the police. He has got an opportunity to question the appellant only when he was released on bail after some time. The appellant has informed the witness that he went on a hire to a hotel and the vehicle got damaged due to a brawl that took place there.

At the trial, an extract of the statement made by the appellant to the police when he was arrested ten days after the incident, which led to the discovery of a stool (the item marked P-03) has been marked as P-02 in terms of section 27 of the Evidence Ordinance. This item is said to have been recovered near the place where the deceased was found injured. The postmortem report dated 28-02-2007 by PW-13, the Judicial Medical Officer of Colombo has been admitted by the parties.

During the investigations as to the crime, seven other persons have also been arrested and charged along with the appellant. After the conclusion of the non-summary inquiry before the Magistrate, all others have been discharged due to lack of evidence.

Consideration of the Ground of Appeal

As there had been no eyewitness to the actual incident where the deceased had suffered injuries which led to his death, this is a matter that had been decided based on the circumstantial evidence.

It is therefore necessary to consider the way any available circumstantial evidence should be looked at by a trial Court in order to conclude whether the case has been proved beyond reasonable doubt against an accused person.

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.

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."*

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."*

When it comes to the facts in the case under consideration, there cannot be any argument that the deceased has died as a result of the injuries he suffered due to an assault occurred just before Pradeep (PW-02) found him fallen in front of the hotel where he worked. The evidence of Pradeep has clearly established that it was the three-wheeler JM-6514 that left the hotel at that time. As Pradeep has heard some commotion from the direction where the

deceased was found fallen just before he saw the three-wheeler leaving the hotel compound, it can be assumed that it was someone who came in the three-wheeler who caused the injuries to the deceased. However, PW-02 Pradeep has not identified anybody who was inside the three-wheeler or even whether there were persons inside the vehicle or who was driving the vehicle at that time.

It can be safely assumed that it may be the appellant who was driving the vehicle because of the evidence of PW-05 who was the owner of the vehicle and that of PW-03 the son of the owner, who found the vehicle left abandoned behind a boutique.

I find that in this context, what the appellant has told PW-03 the son of the owner when asked by him as to what happened should also be relevant. He has told him that the vehicle got damaged as a result of an issue when he went on a hire to the hotel. Other than that, he has not divulged any other detail as to what happened. The evidence of PW-03 also confirms the fact that the appellant wanted to take the vehicle for hire on that evening because he could not earn enough money during the day.

In my view, the above facts, taken cumulatively, are strongly suggestive of the fact that the appellant may have gone to the hotel where the incident took place taking some passengers, as for his usual livelihood.

Under the circumstances, it cannot be said that the available circumstantial evidence only points to the irresistible conclusion that it was the appellant who has committed the crime, as there may be some others who were involved in the brawl which caused injuries to the deceased. I find that the learned High Court Judge was factually wrong when he determined that the only inference that can be reached is that it was the appellant who has caused the injuries to the deceased, given the fact that there were seven others who were charged before the Magistrate.

Although the production marked P-03 has apparently been recovered based on the section 27 statement of the appellant, that is not definitive proof of the fact that it was the appellant who committed the crime, as it only shows the that the appellant had the knowledge as to the productions whereabout. The fact of discovery must be supported by other supporting evidence in order to prove a charge against an accused.

In the Indian case of **Pulukuri Kottaya Vs. Emperor A.I.R. (1947) P.C. 67 at 90** it was stated:

> *"The section seems to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true. Accordingly, it can be safely allowed to be given in evidence, but clearly the extent of information admissible must depend on the exact nature of the fact discovered to which such information is required to relate."*

When it comes to the evidence relating to the recovery of the production marked P-03, the said stool was said have been recovered by PW-08, police inspector Chandrageeva at the place of the incident, which was in front of the hotel mentioned upon the statement made by the appellant. He has observed blood like stains in the stool as well. The said statement has been recorded ten days after the incident upon the arrest of the appellant.

In this context, I find it interesting to observe that it was the PW-09, sub inspector of police Wijetunga who has conducted the investigations into the incident and had inspected the place of the incident soon after the first information was received in the morning of the day following the incident. He has observed blood like stains on the ground in front of the hotel office and some pieces of glasses on the ground as well.

If the stool recovered by the PW-08 based on the statement made by appellant ten days after the incident at the place of the incident was there, and if it had blood like stains as well, I find it rather strange as to why the PW-09, who was the officer who went there soon after the incident and conducted his investigations failed to see the same and take it into his custody as a production relevant to the incident.

In view of the above, I find that the evidence as to the recovery of a stool based on the statement of the appellant was a piece of evidence clouded with doubt, which should not have been relied on by the learned High Court Judge as reliable evidence against the appellant.

The appellant's failure to return the vehicle as usual to the owner and abandoning the vehicle with damages to it are, though highly suspicious circumstances against the appellant of some involvement, that alone cannot be a reason to find the appellant guilty as suspicious circumstances alone are not a reason to come to a finding of guilt against an accused.

In the case of **The Queen Vs. M.G.Sumanasena 66 NLR 350**, held:

> *"In a criminal case suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give evidence."*

I am of the view that although suspicions may direct at the appellant, the considered circumstantial evidence does not go far enough to conclude beyond reasonable doubt that it was only the appellant who committed the crime and no one else.

For the reasons adduced, I hold that it is not safe to let the conviction of the appellant to be allowed to stand. Therefore, allowing the appeal, I set aside the conviction and the sentence and 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