IN THE COURT OF APPEAL OF THE DEMOCRATIC 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 and terms of High Court of Provinces (Special Provisions) section 19 of 1990.

Case No. CA-HCC-387/2018
High Court of Gampaha
Case No. HC 98/2004

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Atapattu Hewawasam Malwattage Wijesena alias Bandara

Accused

And Now

Atapattu Hewawasam Malwattage Wijesena alias Bandara

Accused-Appellant

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Prasantha Lal de Alwis PC with Mohan Sellaperuma AAL for the Accused-Appellant

Dileepa Peeris SDSG for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 06.09.2019

By the Complainant-Respondent 31.10.2019

Argued on : 28.03.2022

Decided on : **06.05.2022.**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Gampaha, dated 12.12.2018, by which, the accused-appellant, who is before this Court, was convicted and sentenced to death for having murdered Kariyawasam Ranaweera Kankanamlage Nishantha Anuruddha Ranaweera (the deceased), on the 26.06.2001 and committing the offence of murder, under section 296 of the Penal Code.

The indictment was as follows;

> that on or about 26.06.2001, he committed the offence of murder by causing the death of Kariyawasam Ranaweera Kankanamlage Nishantha Anuruddha Ranaweera which is an offence punishable under section 296 of the Penal Code.

The accused-appellant pleaded not guilty to the charge levelled against him and had informed the court that he opted to take up this matter before the learned High Court Judge and not before a jury. The trial had commenced on 18.02.2009, during which the prosecution had, led evidence of seven witnesses, marked documents and production as පැ 1 to පැ 4 and produced a knife as X-1. Once the prosecution had closed its case, the accused-appellant had made a statement from the dock.

After the trial, the accused-appellant had been found guilty and sentenced to death. The learned President's Counsel for the accused-appellant stated the grounds of appeal as follows:

(i) The learned trial Judge has failed to provide reasons as per section 283 of the Code of Criminal Procedure Act.

(ii) The learned trial Judge has erred in law by admitting the extra-judicial confession made by the accused.

(iii) The learned trial Judge failed to appreciate the relevant considerations that ought to be taken into account in analysing circumstantial evidence.

(iv) The learned trial Judge failed to consider the well-established principle 'suspicious circumstances do not establish guilt'.

(v) Non-compliance with section 48 of the Judicature Act No 02 of 1978.

The following witnesses gave evidence on behalf of the prosecution.

(i) PW1 - Padma Preethikumari Ranasgallage (mother of the deceased)

(ii) PW2 - Dinidu Tharanga Ranaweera (a cousin brother of the deceased)

(iii) PW4 - Priyantha Rukman Pathiraja (a friend of the deceased's father)

(iv) PW5 - JMO.

(v) PW9 - Sunil Padmasiri (Police sergeant - Veyangoda Police station)

(vi) PW7 - Senarath Bandara Diyakelinawala (OIC - Veyangoda Police station)

(vii) Court Interpreter Mudlier.

The deceased was 21 years old, disabled and unmarried. He lived in the village of Balabowa with his mother. Preethikumari Ranasgallage (PW 1) is the mother of the deceased. She last saw her deceased son on 26.06.2001. On the said day at around 7 pm, the deceased had left home informing his mother that he was going to participate in the almsgiving of a neighbour. The said house of Elbert Singho is situated three blocks away from her house. Since the deceased did not return home, she went to search for her son. Before reaching the house of almsgiving, the witness had gone to the boutique of Kularathna. The shopkeeper Kularathna had told her that her deceased son was still at the house where the almsgiving was held.

On the following day, that was 27.06.2001, the witness had to attend a court case in Magistrate Court, Attanagalla. After returning home from court, she noticed that the deceased son had not returned home. Thereafter, she had gone again in search of her deceased son. The villagers who attended the almsgiving told her that the deceased did not stay at Elbert Singho's house during the night. Thereafter, she inquired a relative named Tharanga Ranaweera (PW 2) about her son's whereabouts. PW 2 informed her that, he saw the deceased talking with the accused on 26.06.2001 at around 7.30 pm. Thereafter, she decided to complain to the Veyangoda Police Station.

Tharanga Ranaweera (PW 2) was a 13-year-old boy at the time of the incident. He knew the deceased as a neighbour. The deceased had a disability in walking. He says that on 26.06.2001 at around 7.30 pm, he saw the accused and the deceased talking to each other closer to the house of the almsgiving.

Rukman Pathiraja (PW 4) is the most vital witness for the prosecution in this case. He is a resident of an adjoining village Naiwala. On the day in question, he had gone in search of a friend name Amila who was a resident of the deceased's village. On that day Amila too had gone to the almsgiving. Thereafter, he met a friend named Upali Ranaweera alias Sudda, who was an illicit liquor seller. Whilst he was having Kasippu with Upali Ranaweera, the accused had arrived at the place. The accused too had joined them. A little later the accused left the place saying that he wanted to buy some cigarettes. The accused returned.

After some time, the accused inquired whether he trusted him. Having been responded positively, the accused said "පිහියෙන් ඇනල මම බෙබිව මැරුවා". He ignored the said statement of the accused-appellant since the accused used to lie in some instances. The following day, he got the news of the murder of the deceased. But he decided to keep the incident a secret due to his mental condition and fear. He narrated this incident to two other friends. A few months later he had to visit Veyangoda Police Station regarding an accident. The mother of

the deceased who was present at the police station pointed him to the police officers. Thereafter, the police officers questioned him about the incident. As a result, he had to divulge the actual incident to the police.

The statement of this witness is belated. But he gives a clear, justifiable and reasonable explanation for the delay in stating the police. It is in fact, a coincidence that the police were able to record a statement from this witness. It is human nature that a person will not come forward to state in respect of a crime. He was not interested and he was a person who could be much reluctant to get involved in a legal process. The defence in cross-examination challenged the credibility of the said witness.

The defence suggested that the witness in his statement had never mentioned whether the accused had told him "පිහියෙන් ඇනල මැරුවා". But the witness consistently had maintained that the accused had told him the exact way the deceased was murdered. The fact remains that the accused confessed to these witnesses that he murdered the deceased. During the trial, the knife recovered, based on the statement given by the accused to the police was shown to the witness. He could not identify the said knife as belonging to the accused. When testifying he had said that he had seen the accused person always carrying a knife attached to his waist.

He had further said that he had a close relationship with the accused. His son had attended the wedding of the accused’s son as a page boy. To prove the said fact, he had marked a photograph of the wedding as P 2 at the trial. The witness had also stated that his elder sister's daughter previously had a love affair with the accused. According to his evidence, the accused had confessed to him about the murder in a firm voice.

The evidence of PW 2 and PW 4 strongly corroborate the fact that the accused was present in the vicinity. The deceased's body with 14 stab injuries was recovered 300 meters to 350 meters away from the house of the almsgiving. The houses of the accused and the deceased were situated nearby.

The learned Senior Deputy Solicitor General for the respondent argued that there was absolutely no reason for PW4 to wrongly or maliciously implicate the culpability of the accused. Hence, he further stated that the confession made by the accused to PW 4 was evaluated by the learned trial Judge according to the provisions of law. The chief investigating officer (PW 7) recovered a knife based on the statement given by the accused-appellant. He had made observations at the crime scene.

District Medical Officer Dr. Hewapathirana (PW 5) had conducted the post mortem. He observed fourteen stab injuries on the deceased's body. He opined that the death was caused due to the injuries inflicted on the neck and chest regions and excessive loss of blood.

The accused, in his dock statement has denied any involvement but has not challenged the evidence of PW 4.

The learned counsel for the respondent stated that the learned trial Judge having duly considered the evidence led before him had come to a correct legal finding. He had given reasons for his Judgement as stipulated in section 283 of the Code of Criminal Procedure Act.

The learned trial Judge had further admitted an extra-judicial confession made by the accused by the provisions of the law.

The learned Senior Deputy Solicitor General for the respondent argued that the learned trial Judge had analysed the items of circumstantial evidence according to law. There were no suspicious circumstances led in evidence by the prosecution in this case. The prosecution led the evidence of credible witnesses who had no malice, animosity or prejudice against the accused. The items of circumstantial evidence led closely linked the accused's involvement to the crime committed. The accused had failed to explain the strong and cogent evidence led against him. Therefore, the learned counsel for the appellant stated that the principles of the Ellenborough dictum should apply in respect of the accused.

It was informed to this Court by the learned counsel for the respondent that the ground of appeal in respect of section 48 of the Judicature Act is due to be determined in a pending matter before the Supreme Court.

The story of the prosecution was that the dead body of a disabled person called Nishantha Anurudda Ranaweera was found inside a "kohila wala" near a well on a bare land on 28.06.2001. According to the evidence of ASP Diyakelinawala (PW 7), the dead body was identified by the mother (PW 1) of the deceased. On 27.06.2001 the mother (PW 1) of the deceased made a complaint to the police that her son named 'Nishantha Anurudda Ranaweera' was missing.

The post mortem took place on 29.06.2001. The father and the uncle of the deceased too had recognized the dead body.

The following injuries were found on the dead body;

(i) 3 stab injuries on the left side of the front of the neck,
(ii) 8 stab injuries on the left side of the front chest and
(iii) 3 stab injuries on the back.

The learned President's Counsel for the accused-appellant argued that the learned trial Judge has failed to, provide reasons as per section 283 of the Code of Criminal Procedure Act and state whether the accused had committed a murder or a culpable homicide not amounting to murder. In a case of homicide, the prosecution has to prove its case whether it is a murder which comes under section 294 of the Penal Code or culpable homicide not amounting to murder. Thereafter, the learned Judge should analyse the evidence and indicate as to why he decides the relevant case does not fall under the category of a culpable homicide not amounting to murder, but a murder which comes under section 294.

In the case of Farook v. AG 2006 (3) SLR 174, It states as follows;

> "As regards the attempt to bring the case to one of culpable homicide not amounting to murder mainly on the basis that there is no intention to cause death. The intention that is required is to cause the injury inflicted. If the intended injury is sufficient to cause death in the ordinary course of nature, the offence is murder;"

It is important to be noted that the prosecution has not put the question to the Judicial Medical Officer whether the said injuries are sufficient to cause death in the ordinary course of nature.

In Ariyadasa vs. AG 2012(1) SLR 84 it was held, the prosecution must prove that the injury is sufficient to cause the death in the ordinary course of nature among the following facts:

(i) It must establish quite objectively that a bodily injury is present.

(ii) The nature of the injury must be proved. These are purely objective investigations.

(iii) It must be proved that there was an intention to inflict that particular body injury.

(iv) That is to say that, it was not accidental or unintended or some other kind of injury was intended.

Once the aforesaid 4 elements are established only, then the offence of murder under section 294 is established. If the prosecution was not able to prove even a single condition amongst the above, then the offence of murder will not be proved.

If the accused committed a murder, then under which limb should he be liable? When a learned Judge decides a homicide to be a murder, he has to provide reasons under which limb of section 294 of the penal code the accused is liable for committing an offence of murder. In the present case, the learned trial Judge has merely stated that the accused had committed the murder stipulated in the indictment but the learned Judge has failed to explain under which limb of section 294, the accused had been convicted for murder. It is to be noted depending on the limb of section 294, the proof of each murder case will be different.

The first limb in section 294 states that culpable homicide is murder if the act in which death is caused is done to cause death. The second limb deals with acts done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom, that harm is caused. The third limb discards the test of subjective knowledge. It deals with acts done to cause bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. The fourth limb comprehends generally, the commission of imminently dangerous acts which must in all probability cause death.

In the judgment of Vithana and another v. Republic 2007(1) SLR 169 it was held that, to prove a charge of murder under the 3rd limb of section 294, the following ingredients must be proved;

(i) The accused inflicted a bodily injury on the victim.
(ii) The victim died as a result of the above bodily injury.
(iii) The accused had the intention to cause the bodily injury.
(iv) The above injury was sufficient to cause the death of the victim in the ordinary course of nature.

Therefore, depending on the limb of section 294, the burden of proof is different for the prosecution. In the present case, the prosecution has not proved the offence of 'murder' as per the provisions of section 294 of the penal code. The learned trial Judge failed to appreciate the burden cast on the prosecution in establishing a case entirely based on circumstantial evidence. Since there were no eyewitnesses to prove the offence of murder, this matter was solely based on circumstantial evidence and on an extra-judicial confession which was made to Priyantha Rukman (PW 4).

The following evidence was taken into consideration as circumstantial evidence by the learned High Court Judge when arriving at his decision;

(i) The evidence of the mother (PW 1).
(ii) Last seen with the accused- as per the evidence of PW 2.
(iii) The extra-judicial confession made to PW 4.

The evidence of PW 1 was that at about 7 pm on 26.06.2001 the deceased had gone to an almsgiving of his neighbour Elbert Singho which took place nearby. Since the deceased had not come home that night, PW 1 went to Kularatne's shop which was before the house of almsgiving at 5.30 am on 27-06-2001.

According to the evidence of PW 1, Kularatne had stated that the deceased was in the house of almsgiving.

Pages 70 and 71 of the appeal brief is as follows;

> ප්‍ර : පාන්දර 5.30 ට පුතා සොයා ඇල්බට් සිංඤොගේ ගෙදර යන්නේ නැතිව කුලරත්නගේ කඩේ ළගට ගියේ මොකද?
>
> උ : එයා එතන හිටියා. එයා ඇහුවා මොකද කියලා. මම පුතා කෝ කියලා ඇහුවා. පුතා ඇල්බට් සිංඤොගෙ මලගෙදර ඉන්නවා කියල කිව්වා. එම නිසා මම ආපහු යන්න ආවා.
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> උ : ඔව්, කුලරත්න කිව්වා ඇල්බට් සිංඤොගෙ ගෙදර පුතා ඉන්නවා කියල.
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> උ : කුලරත්න අයියා කිව්වා ඇල්බට් සිංඤොගෙ ගෙදර පුතා ඉන්නවා ගෙදර යන්න කියලා. එම නිසා මම ගෙදර ආවා. (At page 72)

However, the mother had last seen the deceased with PW 2 on the road to Elbert Singho's house. Therefore, according to the mother's evidence, there is nothing to implicate the accused-appellant. It is evident that the distance between the house of the deceased and the said house of almsgiving was very short, in the sense, the houses were less than 5 minutes away on foot.

PW 2 stated in his evidence that the dead body was recovered 2 kms away from the place where the deceased was met. The learned Judge has considered the said fact in the evidence of PW 2 as improbable. (page 345)

Page 345 of the appeal brief is as follows;

> **"මෙය දෝෂසහගත මෙන්ම විය නොහැකි සාක්ෂියකි. එනම් සාක්ෂිකරු නිසි අවබෝධයකින් තොරව දී ඇති සාක්ෂි කණ්ඩයක් ලෙස සඳහන් කල යුතුය. එසේ වූ පමණින් මෙම සාක්ෂිකරු අසත්‍ය පවසන බවට නිගමනය කළ නොහැකිය."**

The dead body was recovered 350-400 meters away from the house of the deceased and the house of almsgiving was 3 houses away from the house of the deceased. PW 2 is a relation of the deceased and he lived in the same village. Therefore, it is not safe to disregard the aforesaid fact that he stated that the dead body was recovered 2 km away from the house of almsgiving since PW 2 lives in the same surroundings. Apart from the said improbable fact in the evidence of PW 2, major contradictions were marked in his evidence as follows;

* 2V1 - the deceased had a deck piece (VHS tape cassette)
* 2V2 - the deceased said that he was waiting till Hemapala Ayya comes to watch the deck piece.

The learned trial Judge disregarded the aforesaid contradictions, it was important to investigate who Hemapala Ayya the deceased had been waiting for, was. It also reflects a suspicion about the fact of whether another person had an opportunity to murder the deceased. Hence, the fact that the deceased was talking to the accused-appellant cannot be considered as the time when the deceased was last seen since Kularatne (the shop owner) had seen the deceased at the house of almsgiving. Therefore, the evidence of PW 2 is not safe to act upon and his evidence cannot be considered corroborative evidence to accept the extra-judicial confession. It is pertinent to note that the dead body was found after 2 days from `daane gedara' and the post mortem was done after 3 days from the said 'daane gedara'. However, the JMO in his evidence had stated "the deceased had died 4 days ago".

The fact that the deceased was last seen in the company of the accused-appellant cannot be considered circumstantial evidence. It is trite law that where the case is based on circumstantial evidence and the prosecution is relying on the last seen theory, it is incumbent upon the prosecution to fix the exact time of death.

In the case of Tikiri Bandage Siripala vs AG CA 127/2010 decided on 23-10-2015, the following judgments were cited about the said legal position;

In King vs. Appuhamy 46 NLR 128 it was held thus, "in considering the force and effect of circumstantial evidence, in a murder trial, the fact that the deceased was last seen in the company of the accused loses a 410 considerable part of its significance of the prosecutor has failed to fix the exact time of death of the deceased."

In State of U.P. vs. Satish - Appeal (Crl.) 256-257 of 2005 and Ramreddy Rajeshkarna Reddy vs. the State of A.P. - Appeal (Crl.) 997 of 2005; it was held that the last seen theory comes into play when the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible.

> "We find that the instance case revolves around the last seen theory, it was incumbent upon the prosecution to the fix the exact time of death to narrow the time gap between the time that the deceased was seen with the appellant and the time of

> death, thereby excluding the possibility of a 3rd party being the perpetrator of the crime."

In the instant case, the Judicial Medical Officer has failed to define the time of death. In the said circumstances, the prosecution has failed to fix the exact time of death and in that backdrop, the fact that the deceased was last seen in the company of the accused cannot be considered as an incriminating item of evidence against the accused. Considering the evidence placed before the Court by the prosecution to prove the offence of murder, the only circumstantial evidence that the prosecution had were, the confession made to PW 4 and the evidence of PW 2.

Since the evidence of PW 2 is not safe to act upon due to the aforementioned reasons, the Court must consider whether the circumstantial evidence led by the prosecution is enough to prove the case against the accused beyond reasonable doubt. Our legal system has developed several rules about the applicability of circumstantial evidence through a plethora of judicial decisions. According to the said authorities when a criminal case is dependent on circumstantial evidence, the following rules ought to be considered by a learned trial Judge;

(i) The Court must look at the question of whether the several items of circumstantial evidence taken together, have the cumulative effect of establishing the charges against the accused.

 - King v.Gunaratne 47 NLR 145

(ii) The cumulative effect of such evidence should lead to the irresistible inference that the accused committed the offence in question and no one else.

 - Don Sunny v. AG 1998(2) SLR 1 (Amarapala murder case)

When a charge is sought to be proved by circumstantial evidence, the proved items of circumstantial evidence when taken together must irresistibly point towards the one and only inference that the accused committed the offence. On account of all the evidence, the only inference that can be arrived at should be consistent with the guilt of the accused only.

In 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. 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.

It was held in Queen v. Kularatne;71 NLR 534 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 only if the proved items of circumstantial evidence are consistent with their guilt and inconsistent with their innocence.

It was decided in Gunawardane vs. Republic of Sri Lanka 1981 (2) SLR 315; in a case resting on circumstantial evidence the Judge in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt must give a further direction in

express terms that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are-

(a) consistent with the guilt of the accused; and
(b) exclude every possible explanation other than the guilt of the accused.

In a case of circumstantial evidence, the facts given in evidence may be taken cumulatively to be sufficient to rebut the presumption of innocence, although each fact, when taken separately may be a circumstance of suspicion. Each piece of circumstantial evidence is more like a rope composed of several cords. One strand of rope may be insufficient to sustain the weight but three-stranded together may be quite sufficient.

When no prima facie case has been made against an accused, he need not explain. It is open to the accused to rely safely on the presumption of innocence or the infirmity of the evidence for the prosecution.

If the cumulative effect of the totality of the evidence is one of suspicion, however grave, it is an insufficient basis for conviction, and cannot take the place of positive proof.

The Court must be convinced that the cumulative effect of the evidence does not leave any other possibility of any other person other than the accused himself of committing the offence. The evidence taken together should be sufficient to rebut the presumption of innocence and negative any innocent explanation by the accused. - King vs. Abeywickrama 44 NLR 254.

"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." - King vs. Appuhamy 46 NLR 128.

In order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis of his guilt. In considering the force and effect of circumstantial evidence, in a murder trial, the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance if the prosecution has failed to fix the exact time of the death of the deceased." - Podisingho vs. King 53 NLR 49.

"In a case of circumstantial evidence, the trial Judge has to tell the jury that such evidence must be inconsistent with the innocence of the accused and must only be consistent with his guilt."

Muniratne vs. The State 2001(2) SLR 382

Chuin Pong Sheik vs. Attorney General 1999(2) SLR 277

Premawansha vs. Attorney General 2009(2) SLR 205

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

SC TAB 02/ decided on 02.04.2014 2012 (Angulana murder)

Don Shamantha Jude Anthony Jayamaha v. Attorney General (Royal Park murder case) CA 303/2007, CALA 321/2006

The evidence, placed before the Court by the prosecution taken together,

(i) has no cumulative effect of establishing the charges against the appellant;

(ii) does not lead to one and the irresistible inference that the appellant murdered the deceased;

(iii) leaves room for the possibility that any other person other than the appellant may have committed the offence (since the body was recovered after 2 days of the day of the almsgiving);

(iv) is not consistent with the guilt of the appellant and inconsistent with any reasonable hypothesis of his innocence;

(v) does not rebut the presumption of innocence.

In Hanumant vs. State of M.P AIR 1952 SC 343; 1953 Cri LJ 129 have laid down the following conditions which must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established;

(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, that should not be explainable on any other hypothesis except that the accused is guilty;

(iii) The circumstances should be conclusive;

(iv) They should exclude every possible hypothesis except the one to be proved.

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These conditions are not fulfilled in the present case and therefore the appellant is entitled to the benefit of the doubt. Even though the present case is solely dependent on the circumstantial evidence, the prosecution has not proved their case according to the aforesaid measurements used to prove a case based on circumstantial evidence. The learned trial Judge has erred in law by admitting the extra-judicial confession made by the accused,

It is important to note that PW 4 stated in his evidence that the accused had come to the place where they were consuming liquor and stated as follows;

> “එයා කිව්වා බේබිව මැරුවා කියලා. (page 174)”
>
> “තමා විසින් බේබිට පිහියෙන් ඇන්න බව ප්‍රකාශ කර සිටියා බණ්ඩාර විසින් (page 196)”
>
> “මම බේබිට පිහියෙන් ඇන්නා කියා කිව්වා (page 196)”

However, the clause 'stabbed by a knife' has been marked as a contradiction on page 200 of the appeal brief.

'Confession' described in section 17 (2) of the Evidence Ordinance is as follows;

> ‘A confession is an admission made at any time by a person accused of an offence stating or suggesting the inference that he committed that offence.’

Confessions may be either judicial or extra-judicial. Extra-judicial confessions are confessions that are not made before a Magistrate or in Court but elsewhere. In the present case, according to PW 4, the confession had been made to him by the accused-appellant. However, PW 4 had revealed the said confession only after 3 months from the incident. PW 4 had gone to the police station for another case and at that time the mother of the deceased had shown PW 4 to the police officers.

Only PW 4 has revealed the said confession to the police officers. As per the said circumstances, a reasonable doubt has arisen whether the revelation of the confession by PW 4 is voluntary or not. As per the evidence of PW 4, he had informed about the said confession to a sister of the accused and a well-reputed person in the village. However, the prosecution had not called any of them to establish the said fact.

According to E.R.S.R Coomaraswamy, The Law of Evidence, Vol I page 395, before a confession can be acted upon by a Court, it must satisfy the following tests;

> Test of voluntariness.
> Test of truth.
> Test of sufficiency.

As per the evidence of PW 4, the accused made the said confession as soon as he had murdered the deceased. The accused had come with the same clothes which he was wearing before he had left the place where they were consuming liquor to meet with the deceased. As per the evidence of PW4, the accused came back to the place where they were consuming liquor within 30-60 minutes and he had stated that he did not see any bloodstains on the accused's clothes.

Page 197 and 198 of the appeal brief is as follows;

> ප්‍ර : බණ්ඩාරගේ ඇඟේ තුවාල ලකුණු තිබුණේ නැහැ නේද?
>
> උ : නැහැ.
>
> ප්‍ර : ෂර්ට් එක ඉරිලා තිබුණේ නැහැ නේද?

උ : එහෙම නැහැ.

ප්‍ර : ඇගේ ලේ සලකුණු තිබුණේ නැහැ නේද?

උ : මම දැක්කේ නැහැ.

Around 14 stab injuries were on the body of the deceased. If the accused had stabbed the deceased 14 times from both sides, then the accused's clothes must have had some bloodstains. Strangely, the accused did not have any bloodstains on his clothes. Therefore, the evidence of PW 4 is improbable.

Coomaraswamy in his book describes the test of truth on page 397 as follows;

a confession must be found true before the Court applies the test of sufficiency. The unnatural nature or improbability of a description given in a confession is a factor to be considered when deciding the question of whether the confession can be accepted as true and reliable. - Ram Chandra vs. State of Uttar Pradesh AIR (1957) SC 381, (1957) CHLJ 5591.

According to Coomaraswamy, it is not illegal to base a conviction on the uncorroborated confession of an accused person, provided the Court is satisfied that it is voluntary and true in fact. But as stated by Bentham, the Court must consider the following invalidating considerations in extra-judicial confessions;

(i) Mendacity;
(ii) Misinterpretation;
(iii) Incompleteness.

The said confession is incomplete and most importantly, the revelation of the confession is belated by 3 months. Therefore, it is not safe to act based on the said confession.

In the case of Sumanasena vs. Attorney General 1999 (3) SLR 137 at 140 states that, just because the witness is belated the Court ought not to reject his testimony on that score alone and that a court must inquire into the reason for the delay. If the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness, the Court must also in considering the testimony of PW 4 determine two critical tests before considering belated evidence as reliable evidence; firstly, what were the reasons for the delay? And secondly, are those reasons justifiable?

In the present case, the reason for the belated statement made by PW 4 was that "he was scared". The said reason is neither valid nor justifiable to explain the delay.

Desai's "Law relating to confession and dying declaration" stated; if the circumstance was doubtful and if this circumstance was not to be taken into consideration, then based on other circumstances even if they were accepted, the case against the accused did not stand established. In the case of circumstantial evidence, all the circumstances should be established by independent evidence and they should form a complete chain bringing home the guilt to the accused without giving room to any other hypothesis. In the said case, the Court found many missing links. The appeal therefore was allowed.

Rahim Beg vs. the State of U.P (1972) SCC 759; 1972 CriLJ 1260 stated that an extra-judicial confession is a very weak piece of evidence - AIR 1988 SC 1705.

To accept such evidence, it must be plausible and must inspire the confidence of the Court; State of Punjab vs. Bhajan Singh AIR 1975 SC 258; 1975 CriLJ 282

In the instant case, since, the revelation of the confession is 3 months belated and does not corroborate other independent evidence, no conviction can be founded merely on the said confession. In (1983) 2 SCC 251, it was held that if a conviction can be based on other evidence on record, then, of course, the confessional statement can be used to lend corroboration or assurance to such evidence on record.

The said extra-judicial confession of the accused is weak and had not been corroborated with the circumstantial evidence in this case.

The well-established legal principle 'suspicious circumstances do not establish guilt' was seriously considered in Pahala Polgasdeniya Mudiyanselage Ajith Karunaratne and Others Vs Hon Attorney General - CA HC 355-357/2017, decided on 11.01.2019. it was held while citing King v. Appuhamy 46 NLR 128 "the prosecution failed to fix the exact time of death of the deceased, and the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance."

The body of the deceased was found after 2 days since he was last seen alive by PW 2. JMO has not specifically stated the time or date of the death. In the absence of other supportive evidence, the prosecution has failed to exclude any third-party intervention during these 2 days.

Karuppiah Servai v. The King 52 NLR 227

The Queen vs. M.G. Sumanasena 66 NLR 350

Muniratne v. The State 2001(2) SLR 382

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. The burden of establishing circumstances which not only establish the accused's guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial and is the same in a case of circumstantial evidence as in a case of direct evidence.

It is my view that though there may be suspicious circumstances, it does not establish that the accused committed the aforesaid murder. It is the paramount duty of courts to act well within the bounds of admissible evidence and not to act on mere conjecture and surmise. Where the prosecution has failed to establish the charge beyond a reasonable doubt, the benefit of the doubt should always be given to the accused.

It was argued by the learned President's Counsel for the accused-appellant that non-compliance with section 48 of the Judicature Act no 02 of 1978 is also important. The evidence from 21.02.2018 was taken without adopting the previous evidence which led before the

predecessors of the new Judge who had taken over the trial. However, after concluding the evidence of PW 9 and PW 7 investigation officers, the learned trial Judge had adopted the evidence. Therefore, provisions of section 48 of the Judicature Act had not been complied with when the evidence of PW 9 and PW 7 were led in the present case.

The proviso to section 48 is specifically for criminal trials and it was enacted to ensure a fair trial for the accused. According to section 48 of the Judicature Act, the accused must be given an opportunity either to consent to adopt the proceedings and continue with the trial or to make an application to start the *trial de novo* when a successor of the previous trial Judge was appointed to hear the trial. Therefore, it is intensely relevant to note that the learned high court Judge must follow the 'Cardinal Rule' of affording a fair trial to the accused.

<u>Basnayake Mudiyanselage Gunaratne vs The Attorney General - CA HC 36-37/2016,</u> decided on 26.06.2018 has specifically explained how the non-compliance of section 48 would violate the right to a fair trial of an accused.

> "On a plain reading, section 48 makes transitional provisions from one Judge to another. The Succeeding Judge is expected to read the brief and acquaint himself with the evidence, satisfy themselves with the proceedings, so far recorded and decide whether he or she wishes to continue with the proceedings or not. If the Judge wishes to continue with conditions, such as re-calling witnesses for cross-examination, they can do so. If the Succeeding Judge is satisfied with the available materials to continue, the Judge is entitled to proceed. The Succeeding Judge is given the right to clarify whether to proceed or not to proceed. What is expected out of this action is, in my view, the intent of the legislators to ensure that the accused receives a fair trial."

The non-compliance with section 48 of the Judicature Act is a failure of justice. Section 48 is not a mechanical process and therefore, one cannot avoid the instances of non-adoption of section 48 since it is a statutory right of an accused. The right to a fair trial is a fundamental right guaranteed under the Constitution of our country and apart from the Constitution of Sri Lanka, this is a concept accepted worldwide vide article 10 of the Universal Declaration of Human Rights and Article 14(1) of the International Covenant on Civil and Political Rights.

Sri Lanka is a signatory country to the International Covenant on Civil and Political Rights (ICCPR) and it was enforced in Sri Lanka by the Act, No. 56 of 2007. Article 13(3) of the Constitution guarantees this right in no uncertain terms. In this case, the learned trial Judge who heard the crucial independent evidence from 21.02.2018 onwards had not complied with the mandatory requirements of adopting the proceedings formally. Therefore, the accused-appellant should be acquitted of all charges.

I must mention that It is the cardinal principle of criminal justice that graver the crime higher the proof required to establish its commission. A golden thread which runs through the web of administration of criminal justice is to the effect that if two views are possible on the evidence adduced, one pointing to the guilt of the accused and the other to his innocence, the latter is to be adopted. This principle has special relevance in a case where the guilt of the accused is sought to be established by circumstantial evidence.

It must be emphasized that the Ellenborough dictum should not be drawn haphazardly to bolster the sagging fortunes of an otherwise weak prosecution case as in the present case. The prosecution should as a pre-requisite establish strong and incriminating evidence against the accused. The rationale behind this is to allow an innocently accused person to explain away the circumstances of guilt which was in his power to do so.

In the present case, the learned trial Judge had failed to perceive, that the chain of circumstantial evidence against the accused persons was impregnated with lacunas on several vital aspects in that it was insufficient to point an unwavering finger of guilt at the accused on a charge of murder. The learned Senior Deputy Solicitor General who appeared for the respondent specifically indicated that he cannot justify the conviction, showing the great spirit of the Attorney General's Department. Based on the above, the contention raised on behalf of the appellant has to be resolved in their favour. Therefore, the above-mentioned items of circumstantial evidence do not satisfy the required criterion, and the accused was erroneously found guilty of the murder of the deceased

For the foregoing reasons, I allow the appeal and set aside the conviction and sentence under section 296 of the Penal code imposed on the accused-appellant by the learned High Court Judge of Gampaha on 12.12.2018 and acquit the accused-appellant of the charge of murder under section 296 of the Penal Code.

The registrar is directed to inform the prison authorities accordingly and to forward a copy of this judgement along with the main case record to the High Court of Gampaha, forthwith.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal