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/0262/2016

High Court of Ampara

Case No: HC/1628/2014

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Kumarasinghe Arachchilage Samantha

ACCUSED

AND NOW BETWEEN

Kumarasinghe Arachchilage Samantha

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 Accused Appellant
	: Rohantha Abeysuriya, P.C., ASG for the Respondent
Argued on	: 14-03-2022
Written Submissions	: 01-11-2018 (By the Accused-Appellant)
	: 26-11-2018 (By the Respondent)
Decided on	: 26-05-2022

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 sentence of him by the learned High Court Judge of Ampara.

The appellant was indicted before the High Court of Ampara for the robbery of cigarettes and prepaid phone cards from the possession of Subasinghe Arachchige Piyasena on 25th February 2011, an offence punishable in terms of section 380 of the Penal Code, and for committing the murder of the said Piyasena in the same transaction, an offence punishable in terms of section 296 of the Penal Code.

After trial without a jury, the learned High Court Judge found the appellant guilty on both counts preferred against him by his judgment dated 08-11-2016, and the appellant was sentenced to 10 years rigorous imprisonment on count one and death sentence was imposed on him on count two.

The relevant facts in brief: -

The deceased Piyasena was found by his daughter (PW-03) and others after being informed by a neighbour that there is a painful cry emanating from

inside his shop. He was found with injuries in the area where he used as a kitchen adjacent to the small boutique he ran. This was around midnight on the 25th of February 2011. He was unconscious when found, and had died at the hospital without gaining consciousness. PW-03 has identified in the trial, the sarong her father was wearing at that time marked P-02 and the Nokia brand mobile phone used by him marked P-03 and the box of the phone, which was found on a rack inside the boutique, marked P-04. It is clear that the witness has made a positive identification of the items of productions marked P-03 and P-04 through the IMMI numbers that was found in the phone and the phone box. She has also identified a black coloured outer cover of a Nokia mobile Phone as a one similar to that of the phone used by his father. (Marked P-05 at the trial). PW-03 has identified the appellant as a person who ran a tea shop near the shop of her father.

PW-28 Sumith Aththanyake is the husband of PW-03 and one of the persons who reached the scene after receiving the information. He has found the back door of the kitchen opened and the deceased with head injuries fallen inside the kitchen.

PW-05 Karunawathi was a person lived near the boutique belonging to the deceased and it was she who has let the shop where the appellant ran a tea shop. She has seen the appellant using the water tap outside of her house at about 11 p.m. in the night of the incident, and going towards his shop. According to her it was not unusual for the appellant to come to the tap that late in the night as he was in the habit of coming to the tap in that manner.

Witness Sanjeewa Hewa Kandambi was a sales representative for the mobile phone operator Diolog during the relevant period. Giving evidence in the Court, he has stated that he identified the phone cards shown to him by the police as the cards sold by him to the deceased. He has identified the cards by going through the details available with him at that time with regard to serial

numbers of the cards sold by him to the shop of the deceased. However, at the trial the said phone cards have not been produced or marked as evidence.

Delgoda Gamage Chandrapala (PW-27) has seen the appellant who was known to him knocking at the door of the closed boutique of the deceased at around 7.00-7.30 p.m. on the day of the incident. When asked, the appellant has replied that the shop is closed. The witness who was riding a motorbike at that time has seen the appellant walking towards his own shop when he looked back after passing the boutique.

The Judicial Medical Officer (JMO) who conducted the postmortem on the deceased has confirmed that the death was due to the serious injuries suffered by the deceased to his forehead. He has also observed fractures to the right collarbone and the ribs as well as blunt trauma to the right chest and the lung area. He has opined that such injuries can be inflicted by the use of a heavy blunt instrument and had identified the axe shown to him as a possible weapon used.

Chief Inspector of Police Amarasena was the Officer-in-Charge of Damana police who has arrested the appellant on 28-02-2011 at the house of one R.M.Sunil on suspicion of committing the murder of the deceased. After the arrest, he has instructed Sub-Inspector of Police Lakshman to record his statement. It had been the contention of the appellant at the cross examination of the witness that the arrest was made at the police station when the appellant arrived at the station with his brother-in-law when informed by the police to come, which has been denied by the witness.

Police Inspector Ratnayake (PW17) was the officer who inspected the scene of the crime after receiving the first information in that regard. He has observed that the door of the kitchen where the deceased was found fallen can only be opened from inside and that it had been forced open by breaking the lock. He has also observed a broken handle of a mamoty near the body.

PW-10 Vasantha Kumara was a person who had a shop during the time relevant to the incident. On 26th February 2011 after closing his shop for the day, he was at his home watching television. Although he does not open the shop at night, as his neighbour Ratnasekara wanted him to open the shop, he has opened it. Ratnasekara was with one Tharaka who is also known to him. Tharaka has requested the witness to buy some phone cards and cigarettes he said that belonging to a friend of his. He has explained the reasons to sell the items saying that his friend is planning to close down the business he was having and move elsewhere. After agreeing to buy the items from him, he has purchased the above-mentioned items from the said friend of Tharaka who was unknown to him. He has identified that person as the appellant while giving evidence in the Court. Even though there had been no identification parade in that regard and the said identification amounts to a dock identification, that has not created any doubt as to the identity of the appellant as the person who introduced him to the witness namely, Tharaka, has given evidence in the action. He has testified that it was with the appellant, he went and met the witness. Later, when the police, accompanied by the appellant came to the shop he has handed over the items he purchased from the appellant.

The above-mentioned Tharaka (PW-11) has confirmed the evidence of PW-10 Vasantha and has stated that the appellant went with him in his three-wheeler to the tea shop he was running in the night where the sale of the items took place, and brought the items that were inside the shop. It was his evidence that because he was informed by the appellant that he is going to close down the shop and wanted to sell the phone cards and the cigarettes, he facilitated the said sale. He has testified that after the sale, he dropped the appellant at the house of his brother-in-law around 10 p.m. in the night. Before the above events took place the witness had been asked to come to the house of the brother-in-law of the appellant by him and the appellant and some of his friends had consumed liquor at two places.

PW-19 Lakshman was the police officer who recorded the statement of the appellant after his arrest on the 28th of February. Police have recovered several items marked as productions as a result of the statement recorded. The relevant extracts of the statement have been marked as P-09, P-10, and P-11 at the trial in terms of section 27 of the Evidence Ordinance. After the recoding the statement, a police party led by PW-19 and as directed by the appellant has first gone to the shop ran by him. The appellant has opened the shop and has led the police to an axe, sarong and a shirt which was behind a fridge. The said items had been marked as P-12, P-13, and P-14 respectively. The witness has identified blood like stains in the cloths he found. Apart from the above discovery the appellant has led the police to the house of his sister where he also lived. On the direction of the appellant, the mobile phone marked P-03 has been recovered from under the mattress of the bed in the room of the appellant. The relevant extract of the statement has been marked P-15. Similarly, police have also recovered parts of an outer cover of a mobile phone from a place near a church in the area, which has been identified by the witnesses as the cover of the phone belonging to the deceased. This witness has also recovered the earlier mentioned prepaid phone cards and the cigarettes from the shop of PW-10.

The learned Counsel who represented the appellant before the High Court has challenged the evidence of the witness in his cross examination on the basis that the appellant never made such a statement and after assaulting the appellant his signature was obtained to some blank papers, which the witness has denied saying that he had nothing personal against the appellant. The position of the appellant had been that the axe and the cloths were taken from the house of his sister and not from his shop and the mobile phone was never recovered from his possession.

In this action Dr. Ruwan Illeperuma a scientist from GENETECH, Sri Lanka's premier Scientific Institute in relation to Deoxyribonucleic Acid (DNA)

technology, has given evidence in relation to his findings on the items of evidence sent by the Court to its lab for examination. The report in relation to that has been marked as P-16 at the trial. After examining the items marked as P-11 (axe), P-12 (sarong) and P-13 (Shirt) at the trial, it has been his opinion that blood found on the above-mentioned items match the blood that was in the blood sample sent marked P-04 to him. In his evidence before the Court the scientist has well explained the science of DNA technology and the methodology adopted in testing the samples received at his laboratory.

When the appellant was asked for his defence at the conclusion of the prosecution evidence, he has chosen to make a dock statement. It had been his position that he went to the shop of the deceased in order to purchase some goods, but returned to his shop as the shop of the deceased was closed. Since he came to know about the death of the deceased, he did not open his shop as the deceased was a relative of the owners of his shop and he is unaware as to how the deceased died was his contention. It was his position that he went to the police station when informed by the police to come and he was arrested, assaulted and asked about the death but could not reveal anything as he was unaware of it. Further, he has contended that he was taken to his shop by the police but they could not find anything, and subsequently he was taken to his sister's house and the axe belonging to him and some of his clothes as well as his pair of sleepers were taken from the house.

Several witnesses have been called on behalf of the appellant at the trial. Rathnayaka Mudiyanselage Sunil, who was his brother-in-law has stated that after receiving a note that the appellant should come to the police, he dropped off the appellant at the police station in the evening of 27th February 2011. It has been his evidence that he was informed by the police later that his brother-in-law is suspected of the murder. He has claimed that he was unaware of the recovery of any items of productions from his house by the police.

Although he has claimed that he was unaware that anything was recovered by the police from his house, under cross-examination, he has admitted that the police came to his house with the appellant and recovered a phone from a garden hedge near his house as shown by the appellant, and his wife informed him that an axe was also recovered. He has claimed that it was an axe belonging to them which they used to cut firewood, and the phone recovered had been a phone given to one Sureka by the appellant, which she had thrown to the place where it was found.

The witness Seelawathi called on behalf of the appellant has not revealed anything relevant to this action. Earlier mentioned Sureka has also given evidence and has stated that she was at the house when the police came and inquired about the axe and took it from the sister of the appellant. She has claimed that she was unaware of anything about a phone.

The sister of the appellant who was the wife of earlier mentioned Sunil has stated in her evidence that her brother went to the police station on the 27th when the police came to her house and informed that the appellant has to come to the station to give a statement. It was her evidence that on the same night the police came to the house and checked the whole house and took a shirt belonging to the appellant that was washed and hanged to dry. On the following day, that was on the 28th, the police came again and took the axe that was behind the door was her evidence. Strangely, she has been silent of the recovery of the phone until cross-examined in that regard. It was her evidence also that the phone had been thrown to the garden hedge by Sureka after it was given to her by the appellant.

At the conclusion of the evidence and after listening to the submissions of both sides the learned High Court Judge found the appellant guilty as charged and sentenced him accordingly.

Grounds of Appeal

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

(1) The learned High Court Judge failed to consider the defence witnesses on the same yardstick he considered the prosecution witnesses.

(2) The learned High Court Judge was misdirected by his failure to address the fact that the circumstantial evidence relied on by the prosecution could have been easily introduced by the police and depending on such circumstantial evidence was not safe. Hence, the conviction was bad in law.

(3) The learned High Court Judge was misdirected by his failure to consider the material contradictions in respect of the custody of the productions that were sent to DNA analysis and therefore, admitting such evidence was bad in law.

As the first ground of appeal urged is a one that needs to be considered last, I would now proceed to consider the 2nd and the 3rd grounds of appeal urged to find whether there is merit in the same.

This is a matter that has been decided entirely based on circumstantial evidence and evidence produced in terms of section 27 of the Evidence Ordinance as there had been no eye witness evidence as to the manner the deceased received his injuries. It is clear from the judgment that the learned High Court Judge was well possessed of the way any circumstantial evidence should be considered before a Court of law. I find that before proceeding to evaluate the evidence the learned High Court Judge has addressed his mind to the legal principle that presumption of innocence is always with an accused until proven beyond reasonable doubt the charge or the charges against him, and also the value that can be attached to a dock statement and the evidence

of the defence. I find that this was the correct approach that should be adopted by a trial judge in a criminal case.

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 instant action, the learned High Court Judge has considered several items of circumstantial evidence that were made available to the Court to conclude that it was the appellant who committed the crime and no one else.

Although I am in agreement with the learned High Court Judge in the way the evidence was looked at, I am unable to agree with the conclusion that the DNA evidence led at the trial also points to the culpability of the appellant to the crime beyond reasonable doubt.

Scientist Dr. Illepreuma's evidence had clearly established the nexus between the productions, axe, sarong, and the shirt and the blood sample sent as P-04 to him. However, I find that the prosecution has failed to lead any evidence to establish that the sample of blood sent as P-04 was a sample of blood taken from the deceased or at least from blood collected from the crime scene. The JMO who testified has not stated that he obtained a blood sample from the body of the deceased either.

It appears that although several police witnesses have been listed in the indictment, they have not been called to testify to prove this vital fact of connecting the blood sample compared by the scientist to that of the deceased. I find this as a clear case of negligence by the prosecution, which will ultimately benefit the appellant when it comes to the DNA evidence as it was the duty of the prosecution to lead evidence that would repel any doubt in relation to that. I find that the learned High Court Judge was misdirected when he decided to accept the DNA evidence as a piece of circumstantial evidence that connects the appellant to the crime.

However, that does not mean that the prosecution has failed to prove the charges against the appellant as there had been several other circumstantial evidence that had been considered.

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."

PW-03 Karunawathi and PW-27 Chandrapala has seen the appellant at the vicinity of the boutique of the deceased at the time relevant to his death. As observed correctly by the learned High Court Judge, although this was nothing unusual given the fact that the appellant was also a person who had a shop nearby and he used to come to the water tap of PW-03 late in the night, this evidence establishes the fact that the appellant was present in the vicinity when the attack where the deceased suffered fatal injuries took place.

The evidence of PW-10 who purchased some phone cards and cigarettes from the appellant late in the night of 26th, a day after the murder and that of PW-11, the person who took the appellant to PW-10 in that night have not been contradicted or challenged in any manner with regard to the material points relevant to this action. Hence, their evidence is unchallenged evidence. The prosecution has sufficiently proven the fact that the deceased in fact sold phone cards in his shop, although the cards that had been recovered from the possession of PW-10 had not been produced at the trial. At no point the appellant has taken up the position that he too sold phone cards and cigarettes in his shop. If the said items were his, and if he intended to close down the shop he operated at that time, I am unable to find any possible reason for him to not to wait till the daylight rather than selling the items late in the night by taking them to PW-10 as described by him in his evidence, and through an intermediary.

The prosecution has led evidence to establish that based on the statement made by the appellant several items of evidence were recovered. According to the evidence led, an axe (P-11), the sarong and the shirt (P-12 and P-13) belonging to the appellant had been recovered. The appellant has challenged this evidence and had called his sister and the brother-in-law and some of their

neighbours to testify on behalf of him to claim that the axe and the cloths were in fact taken from the house where the appellant lived at that time and not from his shop as the police witness claimed. However, even if one accepts that version of the appellant in that regard, the appellant has never challenged the fact of the recovery of the mobile phone belonging to the deceased from the house where he lived. Even the witness testified on behalf of the appellant had admitted that fact, the only difference being that according to their evidence it was recovered by the police from the garden hedge of the house. The fact that the appellant was present when the recovery was made and the police came and searched his room was an admitted fact by the witnesses called by the appellant.

This establishes the fact that if not for the statement made by the appellant to the police, there would have been no possibility for the police to know the whereabouts of the mobile phone of the deceased and the outer cover of the same which had been recovered from another location based on the same statement. I am unable to accept the argument that these items of evidence are items that may have been introduced by the police, given the clearly established evidence to the contrary.

In the Indian case of **Saundraraj Vs. The State of Madya Pradesh (1954) 55 Cr. L.J.257,** it has been held that in cases where murder and robbery were shown to be part of the same transaction, recent and unexplained possession of stolen articles, in the absence of circumstances tending to show that the accused was only a receiver would not only be presumptive evidence on the charge of robbery but also on the charge of murder.

In the case of **Ariyasinghe and others Vs. Attorney-General (Wickramasinghe abduction case) (2004) 2 SLR 357** held:

i) *"In deciding to presume the existence of any fact, the court can take into account the common course of natural events, human conduct and*

public and private business in the relations to the facts of the particular case. On the proved facts of the case, it was open to the trial judge to draw in his discretion any presumption of fact having due regard to the particular facts of this case.

Per Amrathunga J,

"A presumption is an inference which the judges are directed or permitted to draw from certain state of fact in certain cases and these presumptions are given certain amount of weight in the scale of proof. Some presumptions are conclusive and established. Some presumptions are presumptions of fact which can be rebutted by facts inconsistent with presumed fact.

When strong prima facie evidence is tended against a person, in the absence of a reasonable explanation prima facie evidence would become presumptive."

In this matter, as I have stated before, the appellant has failed to challenge the evidence of PW-10 and PW-11 or has challenged the recovery of the mobile phone belonging to the deceased when that was marked as a production through the police witness.

The appellant has failed to challenge those material evidence nor has he provided any explanation as to the evidence. If the witnesses were not telling the truth, those evidence on the material points should have been challenged when the relevant witnesses gave evidence.

In the case of **Sarwansingh Vs. State of Punjab (2002) AIR Supreme Court (iii) 3652 at 3655** the Indian Supreme Court held thus:

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

In the case of **State of Himachalpradesh Vs. Thakur Dass (1983) 2 Criminal Law Journal 1694 at 1701,** V D Visva C.J held:

> *"Whenever a statement of fact made by a witness is not challenged in cross examination it must be concluded that the fact in question is not disputed"*

Having considered the circumstantial evidence that was made available to the trial Court against the appellant, I find that even if DNA evidence was excluded the prosecution has established a strong *prima facie* case against the appellant as to his culpability to the crime.

Although proving a case beyond reasonable doubt against an accused person rests entirely with the prosecution and an accused need not prove nothing, once cogent and strong prima facie evidence has been established against an accused, he owes a duty to provide a reasonable explanation as to the said strong evidence which connects him to the crime.

In the case of **Rex Vs. Lord Cochrane and others (1814) Gurneys Reports 479 Lord Ellenborough** held:

> *"no person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attached to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out and when it is in his own power to offer evidence if such exists, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence it is a reasonable and justifiable conclusion he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate advertly to his interest."*

Abott J. **in Rex Vs. Burdett (1820) B & Ald 161 at 162 observed that:**

> *"No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation to contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to it the prima facie case tends to be true and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."*

I am unable to conclude that by making a dock statement and by calling evidence on behalf of him any doubt as to the prosecution case or a reasonable explanation has been provided that creates reasonable doubt in relation to the trustworthiness or the credibility of the evidence relied on by the prosecution.

For the aforementioned reasons, I find no merit in the 2nd and the 3rd grounds of appeal.

I am unable to agree with the ground of appeal that the learned High Court Judge failed to give equal consideration to the defence evidence as he gave to the prosecution evidence either. It is correct to argue that the defence evidence should be treated equally and if such evidence is believed the accused is entitled to be acquitted.

In the case of **Ariyadasa Vs. The Queen 68 NLR 66,** it was held:

1. If the jury believed the accused's evidence he is entitled to be acquitted.
2. Accused is also entitled to be acquitted even if his evidence though not believed, was such that it caused the jury to entertain a reasonable doubt in regard to his guilt.

In the Indian Supreme Court judgement in **D.N. Pandey Vs. State of Uttar Pradesh AIR 1981 Supreme Court 911** it was held:

> *"Defence witnesses are entitled to equal treatment with those of the prosecution and Courts ought to overcome their traditional instinctive disbelief in defence witnesses. Quite often they tell lies but so do prosecution witnesses."*

I find that in the judgment the learned High Court Judge has well considered the defence evidence with the relevant legal principles in mind. At no point in the judgment the defence evidence has been looked at with a squint eye, but with the value that can be attached to the evidence and the dock statement of the appellant.

I find that when considering the circumstantial evidence even with the exclusion of the DNA evidence, there was sufficient evidence for the learned High Court Judge to come to a finding of guilt against the appellant on both the charges preferred against him.

The appeal therefore is dismissed, as I find no reason to interfere with the conviction and the sentence imposed upon the appellant.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal