IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal No:
CA/HCC/0065/2017

Hadille Gedara Sugath
Chandrawansha alias Janaka

High Court of Kurunegala
Case No: HC/134/2011

ACCUSED-APPELLANT

vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Yalith Wijesurendra for the Appellant.**
Maheshika Silva, DSG for the Respondent.

ARGUED ON : **09/05/2022**

DECIDED ON : **03/06/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Kurunegala under Section 296 of the Penal Code for committing the murder of Ukkuwa Dewayalage Chaminda Sampath Kularatna on or about 12th July 2009.

The trial commenced before the High Court Judge as the Appellant had opted for a non-jury trial. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellant had made a dock statement and closed the case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant under section 296 of the Penal code by his judgment dated 29/03/2017 and sentenced him to death.

Being aggrieved by the aforesaid conviction and sentence, the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via Zoom platform from prison.

Counsel appearing for the Appellant has submitted the following as a ground of appeal: the evidence presented by the prosecution is contradictory and the

consequent effect on the credibility of its evidence does not justify the conviction under Section 296 of the Penal Code but, if at all, only justify under Section 297 of Penal Code.

Background of the Case *albeit* **briefly is as follows**

According to PW1 Kumarasinghe, the Appellant is his cousin. He was also familiar with the deceased as the latter was a friend of the Appellant. On the day of the incident the Appellant had confessed to the witness that he had killed the deceased. As he did not believe him and when he questioned him further, the Appellant had confirmed that he had killed the deceased. At that time the Appellant had possessed a long knife which was blood-stained and warned the witness to not to follow him. The witness had observed that the Appellant was quite agitated. He had been made aware of the death of the deceased only the following morning.

According to PW2 Niluka Sanjeewani who is the wife of the deceased, the Appellant had set off with the deceased to Urumaditha on the date of the incident. They have left her house around 7.30 p.m. Around 9.00 p.m., the Appellant had returned and told her that the deceased was drunk and had asked her to take him home. Thereafter, she had gone to the fence and the Appellant had then told her to switch off the lights but she had not complied. She had proceeded to call out her husband's name but there had not been a response. Then the Appellant had left in the direction of where he had claimed the deceased to be. Thereafter she had gone up to the fence again, this time accompanied by PW3 and continued looking for her husband. However, neither the deceased nor the Appellant were to be found there at that time. The following morning the body of the deceased had been found about 200 meters away from the deceased's house in a forest area.

PW3 Romanis, the father of the deceased, also corroborated the details narrated by PW2 as stated above.

The prosecution had closed the case after leading investigation evidence and marking the Post Mortem Report and the Government Analyst Report. When the defence was called the Appellant made a dock statement and closed the case.

In his dock statement the Appellant had denied confessing to PW1 Kumarasinghe and had taken up the position that he has had a land dispute with PW1 and his family and therefore, this is a false allegation made against him.

But this position was never suggested to PW1 when he was subjected to cross examination. A contradiction was marked on the evidence of PW1 but it failed to create any doubt on the evidence given by PW1. PW1 reiterated that the Appellant had told him that he killed the deceased and that he had seen the Appellant carrying a long knife which had blood on it, and these had not been contradicted.

In **Dharmasiri v. Republic of Sri Lanka** [2010] 2 SLR 241 the court held:

> "*Credibility of a witness is mainly a matter for the trial Judge. Court of appeal will not lightly disturb the findings of trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong. This is because the trial Judge has the advantage of seeing the demeanour and deportment of the witness.".*

Hence, relying on PW1's evidence has not caused any prejudice to the Appellant.

PW2 the wife of the Appellant and PW3 the father of the deceased had both confirmed that the deceased was last seen accompanied by the appellant. On the date of the incident the Appellant had gone to the deceased's house and

accompanied him to a place called Urumaditha. This had been confirmed by PW2 and PW3. The Appellant also had returned around 9.00 p.m. and had informed them that the deceased being highly intoxicated had fallen down and was lying on the ground. At this point the Appellant had told PW2 to come towards the fence after switching off the rear side light.

In a very recent judgment of the Indian Supreme Court **Surajdeo Mahto v. The State of Bihar (Cr A 1677 of 2011 decided on 4th August 2021-Indian SC) (Citation: LL 2021 SC 351) Surya Kant J (with CJ N.V.Ramana, Aniruddha Bose, J.)** At page 18 the court held:

> *"Briefly put, the last seen theory is applied where the time interval between the point of when the accused and the deceased were last seen together, and when the victim is found dead, is so small that the possibility of any other person other than the accused being the perpetrator of crime becomes impossible…."*

Hence, the Appellant owes an explanation as to the circumstances in which he departed from the company of the deceased within the time frame of about one and half hours.

After the Appellant's revelation that the deceased was lying fallen being intoxicated, PW2 and PW3 had walked in the said direction but were unable to find the Appellant on that night. Hence, PW2 and PW3 had lodged a complaint with the Grama Niladhari (PW5) on the following day and promptly informed him that although the deceased had left with the Appellant last night, he had failed to return home. PW5 in his evidence endorsed these facts.

The Appellant in his dock statement admitted that he left with the deceased and consumed liquor with him.

According to PW2, the Appellant had threatened both the deceased and herself with death as the deceased had bullied him regarding a rumour that the Appellant's wife was having a clandestine affair with somebody else. Neither the deceased nor this witness had taken the threat seriously. During cross examination this witness had admitted that she did not tell this to the police as the deceased had told her to disregard it as the Appellant was drunk when he made the threat. Therefore, the two omissions which had been highlighted by the defence fail to create an impact on the evidence of PW2.

In the case of **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** [1983] AIR SC 753 the court held that:

> *"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses".*

In the case of **AG v. Sandanam Pitchai Mary Theresa** (Supra) the court held that:

> *"Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are material to the fact in issue".*

PW13 CI/Sanjeewa Bandara had conducted the investigations, visited the scene of crime and taken steps to record statements from the witnesses. At the scene of crime, he had recovered a knife sans any blood stains. Further

evidence revealed that the recovered knife belonged to the deceased. The said knife was marked as P4 in the trial.

PW10 IP/Nihal had arrested the Appellant on 13/07/2009 and recorded his statement. Based on his statement a knife was recovered which had been marked as P3 in the trial. The Appellant was produced before a doctor and the report do not mention any injury on the Appellant.

The Appellant in his dock statement denied that a knife was recovered based on his statement to the police. But PW10 in his evidence without any contradiction confirmed that a knife was recovered upon his statement.

The legality of the recovery made under Section 27(1) Evidence Ordinance has been discussed in several cases in our jurisdiction.

According to Section 27(1) of the Evidence Ordinance-

> "When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

The Supreme Court in the case of **Somaratne Rajapakse Others v. Hon. Attorney General** (2010) 2 Sri L.R. 113 at 115 stated that:

> *"A vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been discovered would be permitted in evidence. 'There should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. A discovery made in terms of Section 27 of the Evidence Ordinance*

discloses that the information given was true and that the Accused had knowledge of the existence and the whereabouts of the actual discovery."

Even though the Appellant stated in his dock statement that he was subjected torture and he had singed the statement which led to the discovery of the knife only under duress, not a single question was directed at the police witnesses on that point when they gave evidence in the trial. Hence it is very clear that the Appellant had taken up that position in his dock statement after deliberation.

In this case the defence had admitted the Post Mortem Report of the deceased and the Government Analyst Report under Section 420 of the Code of Criminal Procedure Act No.15 of 1979. As such the prosecution did not call PW7 and PW9 to give evidence in the court. At the end of the trial the said Post Mortem Report and the Government Analyst Report were marked as X and Y respectively through the court interpreter. (But the Appellant's Medico Legal Report had also been marked with the same letter -X. Page 93 of the brief).

In **Perera v. Attorney General** (1998) 1 SLR 378 the court held:

"An admission could be recorded at any stage of the trial, before the case for the prosecution is closed. The purpose of recording an admission is to dispense with the burden of proving the fact at the trial"

When a document is admitted under Section 420 of the Code of Criminal Procedure Act No.15 of 1979 and accepted as evidence the contents of the document will be considered as evidence in the trial. At the same time the

prosecution will dispense with the burden of proving the fact at the trial. Accordingly, in this case, the Post Mortem Report and the Government Analyst Report had become evidence.

In the Post Mortem Report four external injuries and corresponding internal injuries were clearly mentioned by the JMO. Further, the JMO had opined that the death was caused due to haemorrhage and brain injuries in consequence of cut injuries to the face. Although the Appellant contended that both had consumed liquor, the Post Morten Report of the deceased did not reveal any smell of alcohol emanating from the stomach.

The Government Analyst Report has further strengthened the prosecution case, as a human blood sample had been identified on the knife which had been recovered based on the statement made by the Appellant.

Considering the recovery of evidence under Section 27(1) of the Evidence Ordinance, the prosecution has established the nexus between the alleged recovery of the knife and the injuries on the deceased.

It was contended on behalf of the Appellant that the prosecution has failed to prove the guilt of the Appellant beyond reasonable doubt as they rely on unreliable circumstantial evidence and therefore, moves this court to acquit the Appellant from the charge of murder.

It is well settled law that when the conviction is solely based on circumstantial evidence, the prosecution must prove that no one else but the Appellant had committed the crime. The below cited authorities set out the position succinctly.

In **King v. Abeywickrema Et Al** 44 NLR 254 the court held that:

> "*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."*

In the case of **Tamil Nadu v. Rajendran** Appeal (Cr.L) 917 of 1996 the Indian Supreme Court observed that:

> *"In a case of circumstantial evidence when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete."*

In this case the deceased was last seen leaving with the Appellant and was found dead with cut injuries about 200 meters away from his house. The deceased's father and his wife had looked for the deceased after the Appellant informed that the deceased was lying close to the fence after consuming liquor. The Appellant had gone to PW1's house and confessed that he killed the deceased carrying a blood-stained knife. A knife was recovered upon the statement of the Appellant and was sent to the Government Analyst Department for analysis. According to the Government Analyst Report human blood had been identified on the knife which had been marked as P3. On the date of the incident the Appellant had told PW2 to come near the fence after switching off the rear side light. This amounts to suspicious conduct on the part of the Appellant as he had already threatened both the deceased and PW2 with death on a previous occasion.

Considering all the circumstances, the only cogent inference that can be drawn is that the Appellant had committed the offence.

The Appellant in his dock statement denied the allegation levelled against him. Though he has not been bound by law to offer any explanation, he failed to offer an explanation when strong and incriminating evidence had been led against him.

In the case of **Somaratne Rajapakse Others v Hon. Attorney General** (2010) 2 Sri L.R. 113 Justice Bandaranayake observed that:

> *"With all this damning evidence against the Appellants with the charges including murder and rape the Appellants did not offer any explanation with regard to any of the matters referred to above. Although there cannot be a direction that the accused person must explain each and every circumstance relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound to offer any explanation of his conduct there are permissible limitations in which it would be necessary for a suspect to explain the circumstances of suspicion which are attached to him."*

In this case the prosecution had led strongly incriminating circumstantial evidence against the Appellant and the circumstances established were consistent with the Appellant's guilt and inconsistent with his innocence. Hence, I proceed to dismiss his appeal.

The Registrar is directed to send a copy of this judgment to the High Court of Kurunegala along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL