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

In the matter of an Appeal under and in terms of section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No. HCC/64/19

High Court of Rathnapura Case No. 197/2013

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

Complainant

Vs.

Gamhewage Sunil Shantha

Accused

AND NOW BETWEEN

Gamhewage Sunil Shantha

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**
WICKUM A. KALUARACHCHI, J

COUNSEL : Darshana Kuruppu with Thanuja Dissanayake for the Accused-Appellant

Azard Navavi, DSG for the Respondent

WRITTEN SUBMISSION
TENDERED ON : 07.10.2019 (On behalf of the Accused-Appellant)
03.01.2020 (On behalf of the Respondent)

ARGUED ON : 25.05.2022

DECIDED ON : 16.06.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Rathnapura on the charge that he committed the offence of murder on or about the 05th of April 2012, by causing the death of the deceased Denika Samanthie, an offence punishable under Section 296 of the Penal Code. After the trial, the learned High Court Judge convicted the appellant and imposed the death sentence. This appeal is preferred against the said conviction and sentence.

Written submissions on behalf of both parties have been filed prior to the hearing. At the hearing, the learned counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions.

The learned counsel for the appellant conceded the fact that the prosecution has a strong case. He also admitted that the evidence of the prosecution witnesses was not challenged in cross-examination. However, the learned counsel pointed out the relevant items of circumstantial evidence and invited this court to see whether that circumstantial evidence is sufficient to prove the charge beyond a reasonable doubt.

The accused- appellant in this case was a barber who operated a salon near the shop of PW 3. PW3 was the father of the deceased. The appellant was on rent in the salon where PW 3 was his landlord. The deceased was also operating a communication center near the salon of the accused-appellant. It was revealed that the appellant made several attempts to start an illicit affair with the deceased. The deceased, her husband, and her father had lodged several complaints with the police against the accused-appellant and the appellant had left the salon about eight months prior to the incident because of the said complaints.

On the day of this ill-fated incident, the deceased was at her residence with two of her children, one being PW 1, Widanage Pubudu Prasanna who was the eight-year-old second child of the deceased. On the day in question, he had not attended school and was at home with his mother since he was unwell. On that day, the husband of the deceased had left to work. When Pubudu wanted to go to the toilet around 10.00 a.m., he saw the appellant hiding under a bed in a room in their house. He informed the deceased about this, but she directed Pubudu to proceed to the toilet. During the time that Pubudu was in the toilet, the murder took place. Accordingly, Pubudu or any other person did not witness the deceased being attacked and murdered. However, Pubudu saw the appellant leaving the scene with a sword and the deceased with bleeding injuries when he came out of the toilet after two to three minutes.

In the circumstances, there are no eyewitnesses in this case. The prosecution case is based on circumstantial evidence. Therefore, first I consider the relevant legal position in determining a case on circumstantial evidence. There is a long line of judicial authorities that explain how a criminal charge has to be proved on circumstantial evidence.

In the case of King Vs. Abeywickrama - 44 NLR 254 and in Junaiden Mohomed Haaris Vs. Hon. Attorney General - SC Appeal 118/17, decided 09.11.2017, it was held that "*It was incumbent on the prosecution to establish that the circumstances the prosecution relied on, are consistent only with the guilt of the accused-appellant and not with any other hypothesis*".

In King Vs. Appuhamy – 46 NLR 128, it was held that "*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 explaining upon any other reasonable hypothesis than that of his guilt*".

It was also held in the case of Podisingho Vs. King – 53 NLR 49 that "*In a case of circumstantial evidence, it is the duty of the trial judge to tell the Jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt*".

In Don Sunny Vs. Attorney General (Amarapala murder case) – (1998) 2 Sri L.R. 1 it was held that "*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 only inference that the accused committed the offence. On a consideration of all the evidence, the only inference that can be arrived at should be consistent with the guilt of the accused only*". It was held further in the said case 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 and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence".

Hence, it is settled law that the prosecution must prove beyond a reasonable doubt that no one else other than the accused had the opportunity of committing the offence, and the circumstantial evidence adduced in the case must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt.

According to the Judicial Medical Officer who performed the autopsy, the cause of death was multiple cut injuries to the face, neck, and arm involving bones. Examining the sword marked P1, the doctor expressed his opinion that those injuries could be caused by a sword of that nature. When Pubudu was giving evidence, he was shown the sword marked P1 and he stated that the appellant, whom he called "Shantha mama" possessed this kind of sword when he saw the appellant leaving the place.

Undisputedly, all these parties were known to each other. Even in cross-examination, the said fact was not disputed. Therefore, the identification of the appellant by PW1, Pubudu is unchallenged and could be accepted without any reasonable doubt. It is to be noted the fact that PW 1 saw the appellant leaving the place of the incident with a sword was also not challenged in cross-examination. In addition, PW1 stated that apart from the appellant, nobody else was there at the time of the incident. (This item of evidence is found on page 57 of the appeal brief) Therefore, it is apparent that the injuries that led to the death of the deceased were caused within the very short time that PW 1 went to the toilet. Just before going to the toilet, PW 1 saw the appellant under a bed in a room of their house. When PW 1 came out of the toilet after two-three minutes, he saw the appellant leaving the place with a sword. The Judicial Medical Officer testified that the

injuries of the deceased could be caused by a sword like P1. Taking into account the evidence that there was no one else in that place, the injuries of the deceased could have been caused by a sword like P1, and the appellant left the place with a sword like P1 soon after the murder, the only conclusion that could be reached is that the accused-appellant and no one else committed the murder.

The other circumstantial evidence that comes from the other witnesses strengthens the aforesaid inference. PW 2 was a three-wheeler driver. In his vehicle, the appellant arrived at the scene and also left after the incident. He stated that the appellant carried an object covered with a newspaper. He explained further, that the object that was in the hand of the appellant was about one and a half feet long. It is to be noted that when PW 1 identified the sword marked P1, he showed the length of the sword as two to three feet.

In addition, the most important piece of evidence elicited from PW 2 is the confession made by the appellant to PW 2 about the murder, on his return journey. PW 2 stated in his evidence that the appellant had worn a long trousers and when the appellant got into the three-wheeler, he saw mud on the appellant's hands and knees. According to PW 2, a person who was called "Rupe" or "Bhanu" was also in the three-wheeler at that time. PW 2 stated that when he drove the three-wheeler, Shantha (appellant) showed his hands to 'Rupe' and said, "There is blood on my hands."("ශාන්ත අත් දෙක පෙන්නුවා. මේ අත් දෙකේ ලේ කියා රූපෙට පෙන්නුවා" – Page 94 of the appeal brief)

Not only that, the appellant had told the PW2 that he killed the daughter of Piyasena according to the evidence given by the PW2 in the High Court. The said item of evidence, found on page 95 of the appeal brief, appears as follows.

ප්‍ර: තමා යන අතරතුර ත්‍රීවීල් රථය තුළ මොනවා හරි කතා කළාද?

උ: මට කිව්වා රූපේ එක්ක කතා කර කර එතැනින් යද්දී ඕනි වැඩේ හරි කියා, පියසේනගේ දුව මැරුවා කිව්වා.

ප්‍ර: කව්ද එහෙම තමාට කිව්වේ?

උ: ශාන්ත.”

Piyasena is the third prosecution witness in this case, and he has stated that the deceased was his elder daughter.

The aforesaid item of evidence precisely shows that the accused-appellant himself has confessed that he killed the deceased. When cross-examining PW 2, it was brought to the notice of the court as an omission that PW 2 had not stated in his police statement that the appellant had told him that he killed the deceased. The learned High Court Judge has perused the witness's statement in the police information book to ascertain whether there is in fact an omission. The learned counsel for the appellant contended that the learned High Court Judge perused the police statement and held that the said omission does not go to the root of the case, but an omission of this nature should be adduced to greater importance as this evidence of the witness suggests the fact that he is trying to implicate the appellant. In addition, the learned counsel for the appellant invited this court to consider whether it is proper to peruse the statement of the witness to come to a conclusion about this omission.

The aforesaid confession of the appellant is a very important piece of evidence in adjudicating this case. If the witness said what had not been told by the appellant, it can be inferred that the witness tried to falsely implicate the appellant. However, if what the witness said is true, this is very strong evidence against the appellant. Therefore, the learned High Court Judge has very correctly ascertained whether there was in fact an omission or not before coming to a conclusion on the omission. However, it is equally vital to examine whether the trial judge

is entitled to peruse the statement of the witness in an instance like this. In the case of King V. Cooray – 28 NLR 74, *the accused were charged with the murder of an Inspector of Police. At the trial the Presiding Judge, at the instance of the jury, called a witness, who, it was alleged, had heard the accused call to a police constable, traveling in a passing 'bus, to the following effect: " There, your Inspector is killed." When the witness denied that he heard such a statement, the Judge read out the statement made by him and recorded in the Police Information Book.*

It was held that the statement did not amount to a confession within the meaning of section 25 of the Evidence Ordinance and ***a Court is entitled to use the information book to assist it in elucidating points which appear to require clearing up find are material for the purpose of doing justice*** *(Queen Empress v. Manu (supra)).* (Emphasis added)

In addition, in the case of K. B. Muttu Banda V. The Queen – 73 NLR 8, it was held that *where, in a statement made by a witness to a police officer in the course of an investigation under Chapter 12 of the Criminal Procedure Code, the witness omitted to mention a material fact narrated by him in evidence subsequently at the trial, the statement to the police as recorded in the Information Book may be utilised by the Court under section 122 (3) of the Criminal Procedure Code to aid it at the trial in order to discredit the witness.*

The following observations were also made in the said case: *The failure of the witnesses to mention in their Police statements that the deceased handed the gun to 'Indranee' before he was attacked is an omission on a vital part of the transaction. In Queen v. Raymon Fernando [(1962) 66 N. L. R. 1] it was held that an omission to mention in a statement a relevant fact narrated by the witnesses in evidence subsequently, does not fall within the ambit of the expression "former statement" in Section 155 of the Evidence Act. How then could this vital matter be brought to*

the notice of the jury? ***Under Section 122 (3) of the Criminal Procedure Code, it is the Court that has overall control over the statements recorded in the course of a Police investigation and the Court has a right to utilise the statements to aid it at the inquiry or trial.*** *………We are therefore, with all respect, not inclined to adopt the decision in the case of Raymon Fernando. The proper approach to the cross-examination of witnesses from the statements recorded in the course of a Police investigation is found in the observations of Garvin A.C.J. in the Divisional Bench case of King v. Cooray [(1926) 28 N. L. R. 74 at 83.]* (Emphasis added)

Consequently, the Court of Criminal Appeal did not follow the decision of Queen v. Raymon Fernando and the decision of King v. Cooray was followed. Accordingly, it was held that the trial judge is entitled to peruse the statements recorded in the course of the police investigations in order to properly adjudicate the case.

The aforesaid judicial authority refers to section 122(3) of the old Criminal Procedure Code. Sections 110(3) and 110(4) of the present Code of Criminal Procedure Act contain comparable provisions to those found in Section 122(3) of the Old Criminal Procedure Code. The relevant sections of the old Criminal Procedure Code and the present Code of Criminal Procedure Act are reproduced here for convenience.

<u>Section 122(3) 0f the Old Criminal Procedure Code</u>

122(3) *than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court; but if they are used by the police officer or inquirer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer, the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply.*

Nothing in this subsection shall be deemed to apply to any statement falling within the provisions of section 32 (1) of the Evidence Ordinance, or to prevent such statement being used as evidence in a charge under section 180 of the Penal Code.

Sections 110(3) and 110(4) of the present Code of Criminal Procedure Act 15 of 1979.

110(3) A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in court:

Provided that a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time.

Anything in this subsection shall not be deemed to apply to any statement falling within the provisions of section 27 of the Evidence Ordinance or to prevent any statement made by a person in the course of any investigation being used as evidence in a charge under section 180 of the Penal Code

110 (4) Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Save as otherwise provided for in section 444 neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court but if they are used by the police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer or witness the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply :

It is to be noted that the learned High Court Judge has specifically stated in his judgment that he perused the police statement for the sole purpose of ascertaining whether there was in fact an omission. It is apparent from the decisions of the aforesaid judicial authorities that the law permits the trial judge to peruse a statement of a witness to ascertain whether an omission brought to the notice of the court is in fact an omission.

Furthermore, I am of the view that perusing the statement of the witness in this instance is important and worthwhile to come to a fair decision in this case. After perusing the police statement, the learned High Court Judge found that PW 2 stated in his police statement that the accused-appellant had told him that “මම මිනියක් මරලා ඉන්නේ”. Therefore, the learned judge correctly found that PW2 had not falsely implicated the appellant, but this slight difference occurred since he gave evidence after four years of the incident. That is why the learned High Court Judge was of the view that the said omission does not go to the root of the case. I am also of the view that the learned Judge has carefully considered the omission brought to the notice and has come to a correct conclusion that the omission does not go to the root of the case because the appellant went away with a sword in his hand from the place where the Piyasena’s daughter was murdered, , got into the PW2’s three-wheeler and confessed “මම මිනියක් මරලා ඉන්නේ”. If the appellant said that “මම මිනියක් මරලා ඉන්නේ” or “පියසේනගේ දුව මැරුවා”, both statements suggest without any doubt that he spoke about the killing of the deceased.

PW 4 was a person who was trained in hair cutting under the appellant. When he was having his lunch on the day in question, the three-wheeler in which the appellant was going had stopped. So, PW 4 invited the appellant to have lunch. When having the lunch, according to the evidence of the PW4, the appellant had told him “මම ගේම ගහලා ආවා”. In cross-examination, the said piece of evidence has also not been challenged. Further, PW 4 stated in his evidence that the appellant told him one day that he would kill Piyasena’s daughter. Although a suggestion has been made in cross-examination that the said fact of killing Piyasena’s daughter was not stated in the police statement, no such omission was brought to the notice of the court in that respect. Hence, PW 4’s that piece of evidence has also not been challenged in an acceptable manner.

PW 3, Piyasena, who is the father of the deceased, stated in his evidence that the appellant tried to have an illicit affair with his daughter and several complaints were made to the police by him, her daughter, and the husband of his daughter. In that way, PW 3 explained the possible motive for the appellant to commit the murder. It is to be noted that when the opportunity was given to cross-examine this witness, no single question was asked on behalf of the appellant, and thus his evidence has also never been challenged.

As explained previously and admitted by the learned counsel for the appellant, the evidence of the other prosecution witnesses was also unchallenged. The Indian judgment of Sarvan Singh v. State of Punjab (2002 AIR SC (iii) 3652) pages 3655 and 3656, was cited in the case of Ratnayake Mudiyanselage Premachandra v. The Hon. Attorney General C.A Case No. 79/2011, decided on 04.04.2017 as follows:

" It is a rule of essential justice that 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 that issue ought to be accepted."

In the case of Himachal Pradesh v. Thakur Dass (1983) 2 Cri. L. J. 1694 at 1701 V.D Misra CJ held that *"whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed.* Similarly in Motilal v. State of Madhya Pradesh (1990) Criminal Law Journal NOC 125 MP it was held that *"Absence of cross-examination of prosecution witness of certain facts, leads to inference of admission of that fact."*

The learned High Court Judge has evaluated the evidence of all prosecution witnesses and stated reasons in the judgment, how this evidence of prosecution witnesses corroborates each other and how the circumstantial evidence of the case draws the only inference of the guilt

of the accused-appellant. The appellant has just denied his involvement in the offence in his short four-line dock statement. Therefore, it is obvious that no reasonable doubt is created on the strong prosecution case as a result of the dock statement, which cannot be believed.

In summarizing the aforesaid circumstantial evidence; PW 1 had seen the appellant in their house under a bed when he was going to the toilet. After two to three minutes, PW 1 saw his mother (deceased) with bleeding injuries and the appellant leaving the place with a sword. Thereafter, when the appellant was going in PW 2's three-wheeler, PW2 saw the appellant carrying an object covered with a newspaper. The appellant confessed to PW 2 about the murder. Several complaints made by the deceased, the husband of the deceased, and the father of the deceased, and also the threat made by the appellant to kill the deceased, as stated by PW 4, demonstrate the motive behind the crime, although the prosecution has no liability to establish the motive to commit the murder. There is no iota of evidence regarding the involvement of a third person in the murder. The PW 1 specifically stated that there was no any other person at the place of the incident when the incident took place.

Taking the entirety of the aforesaid evidence, it is apparent that the evidence, in this case, is consistent only with the guilt of the appellant and not with any other hypothesis of his innocence. Also, the only inference that can be arrived at is consistent with the guilt of the accused-appellant only, and it is apparent from the aforesaid evidence that no one else other than the appellant had the opportunity of committing the murder. Accordingly, I hold that the learned High Court Judge is correct in convicting the appellant for the offence of murder.

Accordingly, the judgment dated 13.12.2018, the conviction, and the sentence are affirmed.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL