

**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, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

**Complainant**

**CA - HCC 189/2018**

**Vs.**

High Court of Gampaha  
Case No. 0318/2006

1) Uggallage Upul Priyantha Kumara

**Accused**

**And Now Between**

1) Uggallage Upul Priyantha Kumara

**Accused-Appellant**

**Vs.**

The Honourable Attorney General,  
Attorney General's Department,  
Colombo 12

**Complainant-Respondent**

BEFORE : N. Bandula Karunaratna, J.  
: R. Gurusinghe, J.

COUNSEL : Nayantha Wijesundera  
**For the Accused-Appellant**  
Sudharshana De Silva, DSG  
**for the Respondent**

ARGUED ON : 07/06/2022

DECIDED ON : 27/07/2022

R. Gurusinghe, J.

The Honorable Attorney General has indicted the first accused and the second accused (the appellant) in the High Court of Gampaha for having committed the murder of one Dharmadasa, an offence punishable in terms of section 296 read with section 32 of the Penal Code.

After trial, the learned High Court Judge found the appellant guilty as charged and sentenced him to death. The first accused was acquitted.

Being aggrieved by the said conviction and sentence, the appellant preferred this appeal.

The appellant relied on two grounds of appeal.

1. As the prosecution case entirely depends on circumstantial evidence, the prosecution must prove that only the appellant had the opportunity to kill the deceased, which the prosecution has failed to fulfil.

2. The appellant was not given the Jury option as required by section 195 (ee) of the Code of Criminal Procedure Act.

**The prosecution case is as follows:**

As per the evidence of the mother of the deceased PW2, the appellant (son of the deceased's sister) came on the 01<sup>st</sup> of December 2001, in the evening and asked the deceased to join him to bring arrack. The deceased who left with the appellant had not returned home thereafter. His body was found on the following day morning, in a paddy field where PW3 cultivates. The deceased usually consumes liquor in the evening. Both the accused and the appellant, lives within a walking distance of 10 minutes, between their residence.

As per the evidence of PW3, on the 02<sup>nd</sup> of December 2001, when he came to his paddy field in the morning, he saw somebody was obliquely leaning on the bund of a small canal in the field. When he went close and looked, he noticed flies in his mouth and realized that the person was dead. He identified him as "Master", whom he had known for about 25 years.

Next witness is PW4 Somaratne, the brother of the deceased, who lived in a house close to the ancestral house, where his mother and the deceased lived. At about 7.30 or 8.00 in the morning, PW3 Wilson informed PW4 that the deceased was lying in his paddy field. Then PW4 immediately went to the place where the dead body was lying. The body had only a banyan and a trunk underwear. The sarong was not to be seen. The deceased had injuries on his head. The place where the body of the deceased was found was close to the house where the two accused lived. As his mother had told him that Upul Priyantha (the appellant) fetched the deceased, he went to the house of the appellant along a *niyara* (a small bund-like path).

When he was going towards the appellant's house, he noticed blood stains on the grass and also the marks of dragging something along the *niyara*. He also

spotted blood in the front yard of the house and inside the house of the appellant. He also noticed that sand was put on the front portion of the house. PW4 also noticed that the first accused was sweeping the yard at that time. When PW4 asked the first accused where the appellant was, he said that the appellant was sleeping. PW4 went inside and asked the appellant, "where is master uncle". Then the appellant replied that the deceased had left around 9.00 - 9.30 the previous night to go to his home. This witness had shown the blood stains and dragging marks to the police.

PW1, a son of the deceased, testified that when he came home at about 9.00 p.m., his father was not there and his grandmother PW2 informed him that the appellant had fetched the deceased in the evening. The following morning PW 3 Wilson informed him that the deceased was lying in his paddy field. When he went to that place, he saw an injury on the head of the deceased. He thereafter informed the incident to the Pugoda police. PW1 also stated that the deceased was addicted to liquor. He had shown a distance of 104 meters to the court, as the distance between the place where the body was found and the house of the appellant. PW1 further stated that his father the deceased, and the appellant came to Dekatana at about 5.30 p.m. where he was at that time, and asked him for 100/- to pay for the three-wheeler, which he gave to him.

The police discovered a blood-stained mamoty in consequence of the statement made by the first accused to the police.

The items of circumstantial evidence are that;(1)the deceased was last seen together with the appellant, (2) there were blood stains in the house of the appellant, (3) sand was put on the blood in the house, (4) the proximity of the place where the body was found, and (5) the trails of small blood stains from the appellant's house to the place where the body was found. The police came in search of the appellant and the first accused after the body was discovered. However, both had gone missing from their house. The body of the deceased had signs of being dragged. The doctor was of the opinion that a weapon like

a mamoty caused the death of the deceased. The floor of the house of the appellant had been washed when the police arrived there.

All these items of evidence lead to the inference that the deceased was killed in the appellant's house, and the body was dragged to a nearby paddy field.

The learned High Court Judge had acquitted the first accused. The appellant (the second accused) was convicted on the basis that the second accused did not give an acceptable explanation for the incriminating circumstances mentioned above. It is proved that the deceased was killed in the house of the appellant, and the body was dragged to the paddy field. This could have been done by the appellant, or the appellant's father the first accused, or both of them.

In this case, there were no eyewitnesses to the murder of the deceased. The case entirely depends on circumstantial evidence. In the case of King vs Abeywickrema 44 NLR 254, it was held thus; *"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 Podi Singho vs The King 53 NLR Dias S.P.J.held as follows: *"in a case of circumstantial evidence, such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt."*

Counsel for the appellant pointed out that the first accused (the father of the appellant) who was acquitted, had the same opportunity to kill the deceased. This can be considered as a correct argument. The learned High Court Judge observed that, as per the circumstantial evidence, at the time of the death of the deceased, both the first accused and the appellant lived in the same house where the murder took place. Also it is evident that when the brother of the deceased came to the appellant's house in the morning, the first accused was

sweeping the garden. Further, the first accused told the witness that the appellant was sleeping. Therefore, it is clear that the first accused was there at that time and had the opportunity to kill the deceased.

The Learned Trial Judge had correctly evaluated all circumstantial evidence. However, the fact that how he excluded the first accused from liability and how he came to a conclusion that the appellant was guilty is not very clear.

In the case of Kularatne vs Queen 71 NLR 529 Court Of Criminal Appeal held that; *"when the evidence led for the prosecution lends itself to a reasonable inference that either of two persons could have committed an act, the burden is on the prosecution to exclude one person effectively if seeks to attach responsibility for that act to the other person."*

The prosecution did not try to attach the responsibility only to the appellant. The Attorney General has indicted the acquitted first accused and the appellant as the second accused, attributing common intention.

In the case of Karuppiyah Sevai vs The King 52 NLR 227 DiasS.P.J. stated this; *"the situation in which the prosecution found itself may be reduced to the following proposition:- X (the person who strangled the deceased) may be A, B, or C. In order to secure the conviction of A, the prosecution had to establish beyond reasonable doubt that X is not B or C. It is then, and only then, the guilt of A can be said to have been established beyond reasonable doubt."*

The only reason for the Trial Judge to convict the appellant and acquit the first accused is that the appellant had fetched the deceased in the evening. As per the evidence, there was no animosity between the deceased and the appellant. There was no apparent motive to kill the deceased.

As per the evidence of PW1 and PW2, who had seen the deceased with the appellant on the evening of that fateful day, the meeting of the deceased and

the appellant were on amicable terms. As such, the circumstances last seen cannot give much weight.

The learned High Court Judge has decided that, the deceased was last seen together with the appellant and the dock statement of the appellant had not described how the deceased and the appellant parted that day. But in this case, as the case entirely depends on circumstantial evidence and there was an equal opportunity for the first accused to kill the deceased, the last seen theory does not help single out the appellant. The theory of last seen together does not necessarily infer that the accused committed the murder.

The decision of the learned High Court Judge on the acquittal of the first accused is as follows:

(in paragraph 35 of the judgment.)

**35)** 1 වන විත්තිකරු එම නිවසේම පදිංචිව සිටි 2 වන විත්තිකරුගේ පියාවුවද 1 වන විත්තිකරු මෙම මරණකරුගේ මරණය සිදුකරන අවස්ථාවේ සිටි බවට හෝ ඔහු යම්කිසියාවක් කළ බවට හෝ කිසිදු ඡායාමයක් ඉදිරිපත්වී නැත. 1 වන විත්තිකරුට විරුද්ධව ඉදිරිපත් වී ඇති එකම ඡායාමය වන්නේ ඔහුගේ ප්‍රකාශය මත උදැල්ලක් සොයා ගැනීමය. රසපරීක්ෂකවරයා වෙත යවන ලදනඩු හාන්ඩ් රසපරීක්ෂක කාර්යාලයේ දිගිනි ගෙන විනාශ වී විශ්ලේෂණය කිරීමට ඒ අනුව නොහැකි වී ඇති බවට කරුණු ඉදිරිපත්වී ඇත. කෙසේ වෙතත් 1 වන විත්තිකරුගේ ප්‍රකාශයමත උදැල්ලක් සොයා ගත් පමණින් 1 වන විත්තිකරු එම මරණය සිදුකිරීම සඳහා යම් කිසියාවක් කළ බවට හෝ දායක වූ බවට අධිකරණයට තීරණයකල නොහැක.

This observation is equally applicable to the appellant, except for the fact that the deceased was last seen together with the appellant. However, as established by the circumstantial evidence, the murder occurred at the house of the first accused. The other factors, such as the appellant being the son of the first accused and both living in the house where the murder took place, suggest that one of them or both of them together had the equal opportunity to kill the deceased.

As the evidence is insufficient to say that the first accused did not have the opportunity to kill the deceased, the case against the appellant was not proved beyond reasonable doubt.

Based on this reason, the appellant is acquitted. As the appellant is acquitted, the second ground of appeal will not be dealt with.

For the reasons set out above, the appeal is allowed.

Judge of the Court of Appeal

**N. Bandula Karunarathna, J.**

I agree.

Judge of the Court of Appeal