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

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act

The Democratic Socialist Republic of SriLanka.

Complainant

CA/HCC/0205/2018 **VS**

High Court of Puttalam
Case No: HC/10/2018 Edirisinghe Arachchige Chandana Edirisinghe

Accused

And now between

Edirisinghe Arachchige Chandana Edirisinghe

Accused– Appellants

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : K. Kugaraja

for the accused-appellant

Udara Karunatilake, SC

for the respondent

ARGUED ON : 20/05/2022

DECIDED ON : 28/07/2022

R. Gurusinghe, J.

The accused-appellant (the appellant) was convicted for the murder of his own disabled daughter and sentenced to death.

The facts as disclosed in the evidence were briefly as follows:

The appellant and PW1 were married. The deceased girl was the first born of this marriage, and there were two other children, a son, and a daughter. The appellant and PW1 were indigent. The appellant worked as a coconut plucker. When the deceased was about one and a half years of age, she met with an accident at the appellant's workplace. When some people, including the appellant, tried to push a tractor, a big tractor wheel struck the head of the

deceased, which caused severe injuries to her. She was diagnosed as having water accumulated in her head. She became disabled and was unable to walk. She also experienced convulsions very often.

The appellant and PW1 took the deceased to the Lady Ridgeway Hospital and the General Hospital in Colombo for treatment. However, they had not been able to refer the child for medical treatment at the time of the child's death, as they could not afford to come to Colombo. The appellant had burnt all the clinic cards and documents relating to the deceased child's medical treatments. The appellant and PW1 found it challenging to look after the disabled deceased along with the other two children. They had attempted to find a charity home to enter the deceased but failed to find one. The appellant used to say that he would kill the deceased.

One evening, PW1 was washing clothes at the well when she heard the cries of the deceased. When she entered the house, she saw blood on the groin area of the deceased. The appellant was there but he did not allow her to go near the deceased. The appellant had a knife, and he chased PW1 away, threatening to kill her and the other two children. PW1 waited in the garden for about one hour. When PW1 came into the house, the deceased child was not there. The appellant later came out of the shrubs in the jungle with a knife. When PW1 inquired about the child, the appellant told her that it was none of her business and said that he buried the child.

A few days later, as a foul smell emerged, the appellant exhumed the body of the deceased and burnt it in the garden. However, PW1 did not see the body of the child as she was not allowed to come close.

As PW1 was threatened, she had not told anyone about the incident. After about a week, when the appellant was away, her sister inquired about the

eldest daughter. Then PW1 divulged to her sister that the appellant had killed the deceased and buried and later burnt the body. The police was informed about the incident, by the brother of PW1. Thereafter, the police arrested the appellant.

The appellant preferred this appeal against the said conviction and sentence.

The grounds of appeal relied upon by the appellant are as follows:

1. Section 196 of the Code of Criminal Procedure was not complied with.

2. Identification of the Corpse has not been proved beyond reasonable doubt.

3. The evidence of PW1 is not admissible as the age of the deceased has not been proved beyond reasonable doubt.

4. PW1 is not a credible witness.

5. Items of circumstantial evidence are wholly inadequate to support the conviction.

6. The learned Trial Judge has failed to apply the principles governing the evaluation of circumstantial evidence.

Further, the Counsel suggested that what has been stated by the appellant in answer to allocutus can be considered in favour of the appellant in the appeal.

The first ground of the appeal is that the indictment was not read over to the accused. Counsel for the respondent pointed out that this defect was discovered before the Judgment, and the defect was rectified.

In terms of section 196 of the Code of Criminal Procedure Act No.15 of 1979 (the CCPA), the indictment shall be read over to the accused, and he shall be asked whether he is guilty or not guilty of the offence charged.

In this case, the indictment had not been read over to the appellant at the commencement of the trial. However, when the defect was discovered before the case was fixed for Judgment, the indictment was read over to the accused,and he was asked whether he was guilty or not guilty of the charges.

The appellant had pleaded guilty. However, as the charge is one of murder, even if the accused pleads guilty, the trial should proceed as if the accused person had pleaded not guilty. The Counsel for the appellant at that time indicated that the witnesses who had already testified were not required to be recalled.

The proviso to Section 197 (of the CCPA) also would be relevant because the Accused in this matter was indicted on a charge of murder. The proviso to the said section reads as follows; *"Provided that when the offence so pleaded to is one of murder, the Judge may refuse to receive the plea and cause the trial to proceed in like manner as if the accused had pleaded not guilty."*

After reading over the charge to the appellant, the Trial Judge decided to proceed with the trial as the appellant pleaded not guilty.

The Court took the following steps at the point where the indictment was served on the appellant.

a) The journal entry dated 08/02/2018 reflects the receipt of the indictment in the High Court of Puttalam and that the Court ordered, that summons be issued on the accused with a direction to appear before the Court on 27/03/2018.

b) According to the proceedings of 02/05/2018, the accused had been present, and as he was not represented, a Counsel was assigned to appear on his behalf.

It is also recorded that the indictment and the annexes were handed over to him, and the trial was fixed for 11/6/2018, and the appellant elected to have the trial before the Judge without a jury.

After the defect was rectified by the Trial Judge and whether he pleaded guilty or not guilty of the charge, the trial had to proceed as the appellant pleaded not guilty.

The Supreme Court considered the identical issue in the case of *Hiniduma Dahanayakage Siripala alias Kiri Mahaththaya vs The Hon. Attorney General, SC Appeal No.115/2014 SC (SPL) LA Application No. 36/2014* decided on 22/01/2020. In that case, His Lordship Justice Aluwihare decided,*among other things,* as follows:-

(I) It is imperative under Section 196 of the CCPA to have the indictment read and explained to the Accused and to ask the Accused whether he or she is guilty or not guilty of the offence charged.

(II) The non-compliance with Section 196 of the CCPA alone by itself will not vitiate the conviction. If the conviction is to be vitiated, the appellant is required to satisfy the Court that such non-compliance has "caused prejudice to the substantial rights of the Accused" or has "occasioned a failure of justice" as stipulated in the proviso to Article 138(1) of the Constitution.

(III) Non-appearance of the words "indictment read and explained" in the record and the non-recording of the plea of guilty or not guilty

may amount to a non-compliance of section 196 of the Code of Criminal Procedure Act.

(IV) In the context of this case, the omission referred to, is an irregularity.

It was further decided on the following ;

"The threshold to be satisfied to obtain relief from the Court of Appeal in Appeals;

21.With the promulgation of the 1978 Constitution, if relief is to be obtained in an appeal, a party must satisfy the threshold requirement laid down in the proviso to Article 138(1), which is placed under the heading "The Court of Appeal". The proviso to the said Article of the Constitution lays down that; "Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice". (Emphasis is mine.)

22.The proviso aforesaid is couched in mandatory terms and the burden is on the party seeking relief to satisfy the Court that the impugned error, defect, or irregularity has either prejudiced the substantial rights of the parties or has occasioned a failure of justice. It must be observed that no such Constitutional provision is to be found either in the '1948 Soulbury Constitution' or the 'First Republican Constitution of 1972'.

23.The Constitutional provision embodied in Article 138(1) cannot be overlooked and must be given effect to. None of the decisions (made after 1978) relied upon 11 by the Appellants with regard to the issue that this Court is now called upon to decide, appear to have considered the constitutional provision in the proviso to Article 138(1). It is a well-established canon of interpretation, that the Constitution overrides a statute as the grundnorm. All statutes must be construed in line with the highest law. Judges from time immemorial have in their limited capacity, essayed to fill the gaps whenever it occurred to them, in

keeping with the contemporary times, in statutes which do not align with the Constitution. However, such interpretations are not words etched in stone.

42. While the omission of a formal arraignment was unfortunate and regrettable, having taken into account the facts and circumstances peculiar to the case before us, it cannot be said, in my view, that it had prejudiced the substantial rights of the Accused-Appellants, nor can it be said that it had occasioned a failure of justice. In the circumstances, I have answered the questions of law in the manner detailed in paragraph 8 of this judgement and hold that the procedural irregularity referred to, does not have the effect of vitiating the trial."

The circumstances in the present case are identical to the case mentioned above regarding the non-observance of section 196 of CCPA. Since this is a case of murder, the trial should proceed irrespective of the plea of the accused. The governing principle of errors in the charge was described in the case of *Rex vs Amarasekera 29 NLR 33* as follows: *"the accused must not be prejudiced either by total lack of a formal charge or by an error or an omission in the charge".*

Considering the circumstances of the instant case and the above-mentioned case laws, I hold that no prejudice was caused to the appellant.

The second ground of appeal is that the identification of the corpse was not established. However, the Counsel for the appellant informed the Court that he was not pursuing that ground.

As per the evidence, the body of the deceased child was buried and subsequently taken out and burnt to ashes. As the appellant no longer relies on that ground, I refrain from dealing with the same.

The next two arguments are that the evidence of PW1 should not be relied on. Counsel for the appellant argues that the prosecution has not proved the age of the deceased. As PW1 was the legal wife of the appellant, her evidence is not admissible against the appellant unless the age of the deceased, which was proved by the prosecution, was below sixteen years as per the provisions of the Children and Young Persons Ordinance. Further,the Counsel argues that she waited for ten days to divulge the incident to anyone, and her evidence should not be relied upon because of this delay. Further, he argues that PW1 had an affair with another, and as such, she was prone to give evidence against the appellant.

Before considering these contentions, I would draw attention to the answer to allocutus at the conclusion of the trial. The appellant stated that the wife (PW1) had an illicit affair with another, and on the fateful day when he returned home from work, he felt that somebody was with his wife. The door of the house was closed. He took the knife and pushed the door. He saw Prem and his wife, and Prem was on top of her. He threw the knife at them. Unfortunately, it struck the deceased child, and she died.

In the case of Periambalam vs The Queen, 74 NLR 515, the Court of Criminal Appeal held that; an admission made by an accused person in answer to allocutus is a part of the evidence in the case, and the Court of Criminal Appeal cannot ignore the effect of such admission. The appellant has admitted that the deceased died of an injury caused by him. He claims that it was an accident.

The allegation that the evidence of PW1 is not credible, should be considered with the above admission of the appellant.

There was one contradiction in the evidence of PW1. However, the following facts were not disputed by the appellant in cross-examination.

1. When PW1 was washing clothes at the well, only the deceased and the appellant was in the house.

2. The appellant and PW1 were legally married husband and wife.

3. The deceased child was born in 2003 as a result of the marriage.

4. The deceased child was disabled after she had been run over by a tractor.

5. The deceased was not able to walk after the accident.

6. The deceased constantly suffered from convulsions.

7. The appellant and PW1 had to bring the deceased once a month to the National Hospital in Colombo for treatment.

8. As they were so poor, the appellant and PW1 had to give up the treatments to the deceased.

9. The documents relating to the deceased medical treatments were burnt and destroyed by the appellant.

10. The appellant has threatened to kill the deceased child.

11. When PW1 came home from the well, she saw blood in the groin area of the deceased.

12. The appellant did not allow PW1 and the other two children to come inside the house at the time of the incident.

13. After about one hour, when PW1 came to the house, the deceased child was not there.

14. When PW1 questioned about the deceased, the appellant threatened her with death, brandishing a knife, and told her that he had buried the deceased.

15. There was a new heap of earth behind the house.

16. After a few days, the appellant had told PW1 that he had burnt the body because of a foul smell.

17. When inquired about the deceased, the appellant had told PW6 and the brother and sisters of PW1 that the child had been admitted to a children's home.

18. The brother of PW1 had complained to the police about the incident.

Now it is admitted that the deceased had died due to an act of the appellant. The only issue is whether the death of the deceased was intentional and happened as described by the evidence of the prosecution or an accident, as claimed by the appellant, in answer to allocutus.

All the circumstantial evidence that the appellant did not challenge, leads to the inference that the appellant had intentionally killed the deceased.

The position of the appellant in answer to allocutus was that he had thrown the knife when he saw PW1 and Prem together in his house, and as a result the knife struck the deceased and she had died. This position was never put to any of the witnesses of the prosecution.

The only thing that was suggested to PW1 is that she had an affair with a person called Prem, which PW1 denied. The learned High Court Judge has correctly held that if a suggestion was not substantiated by evidence, it was only a suggestion and not evidence.

PW1 stated that the deceased was born in 2003; the appellant did not challenge this position at all. This fact should be considered as an admission. Therefore, the appellant now cannot contest the fact that the deceased was not below 16, and PW1 is not competent to give evidence against the appellant.

In the case of *Gunasiri and two others vs Republic of Sri Lanka* [2009]1 SRI LR 39, Sisira de Abrew J. stated as follows:- *"What is the effect of such silence on the part of the Counsel. In this connection I would like to consider certain judicial decisions. In the case of Sarwan Singh vs. State of Punjab at 3656, Indian Supreme Court held thus: "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." This Judgment was cited with approval in Bobby Mathew vs State of Karnataka)."*

In the case of *Ajith Samarakoon v The Republic (Kobaigane Murder Case*)[2004] 2Sri LR 209, Ninian Jayasuriya, J. stated that *"The principles laid down in these two cases do not place a legal or a persuasive burden on the accused to prove his innocence or to prove that he committed no offence, but these two decisions on proof of a prima facie case and on proof of highly incriminating circumstances shift the evidential burden to the accused to explain away these highly incriminating circumstances when he had both the power and opportunity to do so."*

The appellant had not given evidence or at least made a dock statement.

When considering the evidence of the case and the admission made by the appellant, the case against the appellant was proved beyond reasonable doubt. I see no reason to interfere with the Judgment of the learned High Court Judge.

For the reasons set out in this Judgment, the Judgment of the learned High Court Judge and the sentence imposed on the appellant is affirmed. The appeal of the appellant is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal