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.

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

C.A. Case No. 191-192/19 **Complainant**

High Court of Balapitiya

Case No. 634/03 **Vs.**

1. Ilandari Dewa Gunadasa *alias* Gotti Gunaya
2. Punchahakuru Gunaratne *alias* Soththiya

Accused

AND NOW BETWEEN

1. Ilandari Dewa Gunadasa *alias* Gotti Gunaya
2. Punchahakuru Gunaratne *alias* Soththiya

Accused –Appellant

Vs.

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

Respondent

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

COUNSEL : Nagitha Wijesekara for the 2nd Accused-Appellant

Riyaz Bary, DSG for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 05.02.2020 (On behalf of the 1st Accused-Appellant)

03.02.2020 (On behalf of the 2nd Accused-Appellant)

23.04.2021 (On behalf of the Respondent)

ARGUED ON : 18.07.2022

DECIDED ON : 09.08.2022

WICKUM A. KALUARACHCHI, J.

The 1st and 2nd accused-appellants were indicted in the High Court of Balapitiya for committing the offence of murder on or about the 07th of April 1999, by causing the death of one Hewa Hakuru Amila Gunawardhana, an offence punishable under Section 296 of the Penal Code. After the trial, the learned High Court Judge convicted the appellants and sentenced them to death. This is an appeal against the said conviction and sentence.

Prior to the hearing, written submissions were filed on behalf of the 1st and 2nd accused-appellants and the respondent. The first accused-appellant died before the appeal was heard. Therefore, the learned counsel for the second accused-appellant (hereafter referred to as the "appellant") and the learned Deputy Solicitor General for the respondent made oral submissions at the hearing.

According to the deceased's wife, PW1, she had seen the deceased in their house around 10 a.m. on the day in question when he arrived to collect money to engage in gambling activity in the village. Later, a neighbor informed her that the deceased had been found dead about 250 meters away from the house.

PW7 Sannie Senarathne, the main witness to the incident, was 14 years old boy at the time of the incident. According to the said witness, the deceased had arrived at Sunil Maama's house to engage in gambling. He had seen the deceased in the same place at or around 11.25 a.m. Several other people were also gathered in the same place to engage in the said gambling activity. As the police came to raid this gambling place, the crowd including PW7 dispersed in various directions. When PW7 stepped onto the road, he witnessed the deceased being assaulted by two people whom he identified as the first and second appellants in this case. After a short while, the PW7 saw the deceased lying on the ground. PW7 was shocked by seeing this incident and he ran away.

Since the first appellant died after filing this appeal, this court has to consider the merits of the appeal in respect of the second accused-appellant. Although, three grounds of appeal have been mentioned in the written submissions tendered on behalf of the appellant, the learned counsel for the second appellant confined his arguments only to one ground. Hence, the only ground to consider in this appeal is whether the conviction is contrary to the evidence led at the trial.

The main contention of the learned counsel for the appellant was that the only eye witness, PW7 who stated that he saw the appellants assaulting the deceased did not see the appellants holding any weapon. If he saw the incident, the learned counsel contended further, that PW7 should have seen the appellants armed with cutting weapons because the allegation against the appellants was that they caused the death of the deceased by using cutting weapons.

The learned counsel for the appellant also contended that medical evidence should be substantiated by other evidence, but there is no evidence that the appellants caused cut injuries to the deceased by using cutting weapons. Therefore, he contended that PW7 had not seen this incident. The appellant took up the same position when cross-examining PW7 in the High Court suggesting that he did not see the incident.

At the same time, the learned counsel for the appellant advanced another argument that there was a possibility for a third party to cause these fatal injuries. The learned counsel raised this argument based on PW7's testimony that he closed his eyes for about a minute due to shock and fear. The learned counsel for the appellant contended that these fatal injuries could have been caused by a third party within the said short period, and the benefit of that doubt should be given to the appellant.

In considering the arguments advanced by the learned counsel for the appellant, it appears that once he took up the position that PW7 had not seen the incident. According to the other argument he raised, PW7 saw a certain part of the incident, but there was a possibility of a third person being involved when he closed his eyes for a short while. Although the said two positions are contrary to each other, both these arguments would be considered by this court, as the prosecution bears the burden of proving the charge beyond a reasonable doubt.

Undisputedly, the deceased died as a result of fatal cut injuries. Nobody saw the appellants or anyone else cause cut injuries to the deceased. PW7 witnessed the appellants assaulting the deceased. He then witnessed the deceased lying on the ground. Therefore, the charge against the appellant has to be proved on PW7's evidence as well as circumstantial evidence.

As decided in King V. Abeywickrama 44 NLR 254, King V. Appuhamy 46 NLR 128, Don Sunny V. Attorney General – (1998) 2 Sri L.R. 1, and several other cases, in proving a case on circumstantial evidence, 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.

In the circumstances of this case, the inference could be drawn that the appellants committed the murder because they assaulted the deceased, after about a minute the deceased was laid on the ground with cut injuries, and the deceased died as a result of the said cut injuries. The cause of death has never been challenged by the appellants. However, in order to find the appellants guilty of the offence, PW7's evidence should be credible and the involvement of a third party has to be excluded.

First, I proceed to consider whether PW7's evidence is credible. He said that he saw the appellants assaulting the deceased but did not see any weapon in their hands. He also stated that his eyes were closed for a split moment due to the shock. The learned Deputy Solicitor General for the respondent drew the attention of this court to the fact that PW7 was a 14 years old child at the time of the incident. He has stated in his evidence that closed his eyes for a moment because of the shock and fear. In such a situation, it's not strange that he saw the appellants assaulting the deceased but did not notice any weapons in their hands. If he gives false evidence, he could have easily said that the appellants were armed with

some kind of cutting weapons. It is reasonable to expect a 14-year-old child to be shocked by such an incident, and he may have closed his eyes for a brief moment as a result of the shock. When he opened his eyes just after one minute, he saw the deceased lying on the ground and he ran away. The learned High Court Judge has correctly observed that this could be the nature of a 14-year-old child who witnessed such an incident.

Furthermore, it should be noted that when this witness testified, he was 33 years old. He testified 19 years after the incident occurred. During his testimony, the case was referred to the Honorable Attorney General for consideration of certain issues. For the said purpose, the case was again postponed for two years. Then only PW7 was cross-examined. Even under these conditions, there was no single contradiction in his evidence. The only omission brought to the notice of the court is also not a material omission. In the circumstances, I hold that PW7 is a credible witness. Therefore, I regret that I am unable to accept the argument of the learned counsel for the appellant that PW7 is not a witness who saw the incident.

Now, I proceed to consider the other argument, the possibility of a third party being involved. The appellants have never asserted in the High Court, the involvement of a third party. When they made dock statements, they took the position of total denial. The first and the second accused stated that they did not go to the place where the incident took place.

However, when the prosecution seeks to prove the case on circumstantial evidence, it is the duty of the prosecution to exclude the involvement of a third party. PW7 clearly stated that no other person was present at that place when the appellants assaulted the deceased. According to PW7, only villages in the vicinity of the incident were present but not at the place where the appellants assaulted the deceased. Soon after the assault, PW7 had seen the deceased lying on the ground. Even at that

time, when the deceased was lying on the ground, there was no evidence that a third party had been present at that place. Therefore, there was no way for a third person to arrive within the minute that the PW7 closed his eyes, causing about 16 cut injuries to the deceased and vanish because the doctor who performed the autopsy stated in his evidence that apart from the injury number 14 he explained, other injuries are cut injuries. He described 17 injuries on the body of the deceased. Therefore, I am unable to agree with the second argument advanced by the learned counsel for the appellant regarding the possibility of a third person's involvement.

In the circumstances, the learned High Court Judge had no reason not to conclude that the charge against the appellants was proved beyond a reasonable doubt. It is to be noted that an accused person could get the benefit of reasonable doubt and he is not entitled to get the benefit of every kind of doubt as decided in Wijesekera (Excise Inspector) V. Aranolis – (1940) 17 CLW 138. It was held in the said judgment that "*An accused person could claim only the benefit of a reasonable doubt. It is always possible to conjure up a doubt of a very flimsy nature. But an accused person cannot be acquitted on the ground of such doubt*".

It was also held in the case of Veerasamy Sivathasan V. Hon. Attorney General – SC Appeal 208/2012, decided on 15.12.2021 that "*A reasonable doubt is a real or actual and a substantial doubt as opposed to an imaginary or flimsy doubt that may arise in the mind of the decider of facts (Judge or the Jury, as the case may be), following an objective consideration of all the attendant facts and circumstances. It is a doubt founded on logical and substantial reasoning (well-founded) which a normal prudent person with not less than average intelligence and learnedness in men, matters and worldly affairs, would naturally and inevitably develop in his mind following a comprehensive, objective, independent, impartial and neutral consideration of the totality of the evidence and associated attendant circumstances. It is a doubt that makes*

the case for the prosecution significantly less probable to have occurred than in the manner purported to have occurred".

The facts and circumstances of this case, including the dock statements, cast no reasonable doubt on the prosecution case, according to the decisions of the aforementioned judicial authorities. The facts and circumstances of this case, including the dock statements, cast no reasonable doubt on the prosecution case, according to the decisions of the aforementioned judicial authorities. Although the PW7 did not state that he saw a weapon on the appellants' hands, his evidence and other circumstantial evidence of this case lead to come to the only conclusion that the first and the second accused-appellants have committed the murder. The learned High Court Judge has come to the said correct conclusion.

Therefore, the conviction and 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