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

In the matter of an Application for an Appeal under and in terms of Section 33 1 of the Criminal Procedure Code.

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

CA Case No: 171-174/2018 **Complainant**

HC Homagama Case No: 02/2017 **Vs.**

1. Matara Kulasooriyage Vijith Premalal
2. Korala Arachchige Priyangika Shyamali
3. Muththettuwage Chaminda Perera alias Lokka,
   No.181/21, Thalahena, Malabe.
4. Keragala Arachchige Suranjith Wasana Priyadarshana Perera alias Manju

Accused

And Now

1. Matara Kulasooriyage Vijith Premalal
2. Korala Arachchige Priyangika Shyamali
3. Muththettuwage Chaminda Perera alias Lokka,
   No.181/21, Thalahena, Malabe.
4. Keragala Arachchige Suranjith Wasana Priyadarshana Perera alias Manju

Accused Appellants

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Kalinga Indatissa, PC with Neranjan Iriyagolla AAL, R. Indatissa AAL and Razana Salih AAL for the 1st accused-appellant

Amila Palliyage AAL with Sahan Weerasinghe AAL and Sandeepani Wijesooriya AAL for the 2nd accused-appellant

Darshana Kuruppu AAL with Sajini Elvitigala AAL for the 3rd accused-appellant

Neranjan Jayasinghe AAL for the 04th accused-appellant

Rohantha Abeysuriya, PC, ASG for the respondent

Written Submissions: By the accused-appellants on 15.05.2019

By the complainant-respondent 03.07.2019

Argued on : 02.09.2022 & 09.09.2022

Decided on : **15.09.2022**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Homagama, dated 30.10.2018, by which, the accused-appellants, who are before this Court, were convicted and sentenced to death for having murdered Koralage Heenmenike (the deceased), committing the offence of simple hurt on Withana Arachchilage Chamila Priyadarshani Pushpakumari, under section 315 of the Penal Code.

After the trial, the 1st and the 2nd accused-appellants were given additional 3 years of rigorous imprisonment and compensation of Rs. 100,000/- each and in default 2 years simple imprisonment.

There were 2 charges in the indictment. They are as follows;

(a) Count 1

that during the period of 01.06.1998 - 04.06.1998 within the jurisdiction of this court at Thalangama North the 1st and the 2nd accused voluntarily caused hurt to Withana Arachchilage Chamila Priyadarshani Pushpakumari and thereby committed an offence punishable under section 315 of the Penal Code read with section 32 of the Penal Code.

(b) Count 2

That at the same time place and during the course of the same transaction, the 1st to 4th accused committed the offence of murder of Koralage Heenmenike and thereby committed an offence punishable under Section 296 of the Penal Code read with section 32 of the Penal Code.

At the trial, 10 witnesses gave evidence on behalf of the prosecution namely;

(i) Makumbure Gedara Wengappurage Vidana Arachchilage Chamila Priyadarshani Pushpa Kumari (PW 02)
(ii) Helissage Lal Ananda Kaldera (PW 06)
(iii) Hettiarachchige Don Neranjan Abeywardena (PW 07)
(iv) Sumathi Idya Rajasingham (PW 11)
(v) Balasooriya Mudiyanselage Senevirathne (PW 08)
(vi) Ranjith Upali Dharmawardena (PW 10)
(vii) Thawalampitiya Mudiyanselage Jayasundara Bandara (PW 09)
(viii) Don Hendrik Lalithsiri Velansius Jayamanne (PW 12)
(ix) Samaranayakage Ravindra Priyalal Samaranayake (PW 13)
(x) Court Interpreter - Mohammed Abdeen Mohammed Pasaseer

At the conclusion of the prosecution case all four accused-appellants made dock statements denying the charges against them set out in the indictment and led the evidence of following Police witnesses;

(i) Maddumage Don Ariyathilake (DW 05)
(ii) Subasinhage Bimbisara Bandusiri Sirikamal (DW 04)

The Learned Trial Judge delivered his judgment dated 30.10.2018 convicting the 1st and the 2nd accused for the first count in the indictment and 1st to 4th accused for the second count in the indictment. The Learned Trial Judge sentenced the 1st and the 2nd Accused to 3 years rigorous imprisonment and a compensation of Rs. 100,000/- each, carrying a default sentence of two years simple imprisonment for the first count, and the death sentence was imposed on the 1st to 4th accused for the second count in the indictment.

Being aggrieved by the above conviction and sentence of the Learned Trial Judge the accused-appellants preferred this appeal.

The Grounds of Appeal are as follows;

(i) The learned Trial Judge who delivered the judgment has failed to adopt to proceedings of his predecessors as per section 48 of the Judicature Act.
(ii) The Trial Court was in error when it has failed to consider that the prosecution has not established the identity of the corpus.
(iii) The Trial Court was in error when it has failed to fix the exact time of death thereby failing to rule out the possibility of a third party committing the offence or the deceased committing suicide.
(iv) The Trial Court was in error when it has failed to evaluate the credibility and the reliability of the evidence of PW 02 - Chamila Pushpa Kumari in the absence of her testimony being corroborated by medical evidence.
(v) The Trial Court was in error when it has failed to consider the defective nature of the investigations thereby denying the 3rd accused-appellant of a right to a fair trial guaranteed by Article 13(3) of the Constitution.
(vi) The Learned Trial Judge has failed to analyse and evaluate the evidence of the prosecution and defence witnesses in his judgment thus causing serious prejudice to the 3rd accused-appellant.

(vii) The Trial Court was in error when it has convicted the 3rd accused-appellant for murder in the absence of any direct or circumstantial evidence.

The learned President's Counsel who appeared of behalf of the 1st accused-appellant argued the matter requesting from courts and from the Hon. Attorney General to see whether there is any possibility for a shortcut, considering the circumstances of this case as well as the evidence which were led before the trial court. His contention was that the charge of murder has not been proved beyond reasonable doubt and the 1st to 4th accused-appellants should be acquitted for the said charge as the court cannot maintain the conviction for murder.

Learned Additional Solicitor General who appeared on behalf of the respondent requests more time to consult Hon. Attorney General before he takes a final decision. Thereafter the case was adjourned for a short date and when it was resumed on the 09.09.2022 the learned Additional Solicitor General address this court an informed that he is conceding that he cannot sustain the conviction for murder. He further says that:

> There are several items of circumstantial evidence led by the prosecution. But cumulative effect of all those items of evidence insufficient to satisfy the requirements in a case based on circumstantial evidence, based on those judgments of the Supreme Court and the Court of Appeal. It is a fact that the deceased was at the residence of the 1st and 2nd accused till about, 8 o'clock or 9 o'clock on the 4th of April of that particular year. Thereafter where she went, with whom she was, what she did, nobody knows.

Learned Additional Solicitor General submitted that she was last seen at the residence of the 1st and 2nd accused by the daughter of the victim and thereafter we do not know what happened. Her dead body was found two days later on information provided by some informant to the police. The police went and recovered the dead body which was floating in a canal. The dead body was recovered in the presence of the Magistrate. The prosecution will have to establish in some nexus between the dead body and the acts of the accused persons. With regard to where the deceased might have been after she was attacked or assaulted at the residence of the 1st and 2nd accused persons, we have no evidence except two or three items of circumstantial evidence.

It is evident that PW 2 has stated that the very next day, the day after both of them were assaulted, two persons known to the deceased, had visited the residence of the 1st and 2nd accused persons to make inquiries about the deceased and the 1st accused had told those two persons, "we do not know she went at about 8 o'clock. She left this place. We do not know where she is now."

The learned President's Counsel for the respondent submitted that unfortunately, that evidence of those two visitors, not being led. So, we really do not know exactly where the deceased ought to have been if not for this incident, probably she is a beggar woman without a permanent place. She did not have a permanent place of staying.

The learned ASG address the court as follows;

> There is another item of circumstantial evidence that in my view, is relevant under Sub Section 2 of the Section 8 of the Evidence Ordinance subsequent conduct of the 2nd accused and the 3rd accused. Day after the body was recovered the 2nd accused, i.e. the wife (the female accused) had told the prosecution witness No.2 to go up to a particular farm or some

location, for the reason that her mother would be coming there. The 2nd accused person has said “you go and meet your mother, you go there.”

“The 3rd accused was requested to take away PW2 to that particular location. She went with the 3rd accused. She waited. But her mother never came. The mother was dead. Then she returned. She came back to the residence of the 1st and 2nd accused in the company of the 3rd accused. When she came, the 2nd accused, had told the daughter to hide. The reason was not given. But then she, on the pretext of answering a call of nature had gone to the toilet and locked herself in. From the bottom of the door, she observed outside the toilet several persons wearing shoes similar to police shoes and she heard voices. Then wanted to draw their attention, she had softly coughed. That drew the attention of the visitors and those visitors happened to be police officers who were conducting investigations into, the disappearance and possible murder of the deceased woman. The police officers said when they visited the residence of the accused, initially the 1st and 2nd accused have told the police that this girl is not there. So that is another item of circumstantial evidence led before the High Court by the prosecution to establish the charge of murder. Those are, I think, the two main items of circumstantial evidence.”

“Then, in addition to that, your lordships' may recall, my learned friend Mr. Indatissa, P.C. referred to a three-wheel driver. Now, according to the testimony of that particular person who is the owner of the three-wheeler, he is in the neighbourhood of the 1st accused. The 1st accused was in the habit of borrowing the three-wheeler of this particular witness. So, there was nothing unusual or uncommon about the accused on a particular day borrowing this three-wheeler. But that witness says, why he came to borrow it at around 10.30 in the night which he thought was little unusual. Late in the night the three-wheeler was returned at around 4 o'clock or 4.30 in the morning. Now, my lords, that is the evidence of that particular witness. Unfortunately, he was not in a position to enlighten Court as to exactly when that three-wheeler was last borrowed. So, it could have been prior to the death or two weeks prior to the death or one week prior to the death.”

I think that the prosecutor has done his level best to narrow down the time period by referring to the date on which the statement of that witness was recorded because she might have died on the 4th and I presume that the statement was recorded on the 8th just a time gap of 4 days. So, the prosecutor would have thought, surely this man ought to remember that the incident took place just two to three days prior to the recording of the statement. But that witness has not co-operated with the prosecution. He said 'I don't know. I cannot remember.' So, because of that, the said item of evidence of borrowing a three-wheeler become somewhat of a neutral item of evidence. It would not advance the case for the prosecution beyond a particular point.

“I also observed the fact that, there is another aspect to the evidence of the three-wheel driver. That is the fact that he has stated that the 1st accused did not come alone. He might have come in the company of somebody else. I think, that is the suggestion made by the prosecutor. The question has been put in such a way that the prosecutor has suggested that somebody came, but be that as it may, the request of the 1st accused according to this witness is from the witness to come with the accused in the three-wheeler. If somebody wanted to hide the dead body transport it using that three-wheeler it might be, those

unlikely that he would want to create another witness by requesting that person also to come. Under normal circumstances he had borrowed the three-wheeler without the owner, because he can drive. So, because of that, that item of evidence, I cannot rely on hear, to reinforce the case for the prosecution."

There was another controversy with regard to the stone. It is a fact that at the time of recovery of the body in the presence of the Magistrate. According to the police the dead body was tied to a stone or a rock which was covered in another bag, tied with a particular type of a rope. There is an issue with regard to the identification of that object because one of the police officers who was involved with the recovery of that object has testified in Court to the effect that what was recovered was a rock or a stone which weigh about 15kgs. There again, no evidence is available with regard to how it was measured. Did he just lift it up? It is guesswork or there is no evidence of any weighing scale being used. He has said "කිලෝ 15ක් පමණ".

"Then what happened was, when the item seemed to have been taken into police custody when that was produced at the police station, the police officer reserved had stated that it was about 1 kg in weight. I think that was what was referred to by my learned friend, President's Counsel for the 1st Accused. So how did this 15 kg stone yet reduced to 1 kg. To make matters worse, at the trial the prosecutor had attempted to mark this particular object as a production and the police officer who recovered it testify to the effect that this is not the stone I recovered. Therefore, I cannot identify this, So, that item of evidence also is of no value to us."

"Then there was another issue. One of the police officers in the process of inspecting the residence of the accused had observed that there was one paving stone missing from a particular pathway in the compound of the 1st and 2nd accused-appellants, I believe it leads to a toilet. Then he got the right idea of comparing the stone which supposed to have been recovered from the dead body by process of superimposition physically bring it to the house of the accused and place it there in order to see whether the edges of that stone would tally or match that empty space. Then he says he did that and it was according to him a perfect match. But unfortunately, I do not know whether I can rely on such an experiment. It ought to have been done by Government Analyst who would have conducted a scientific experiment. So, my lords, I am not in a position to rely on that of evidence as well. Primarily, due to the reason that there is a doubt as to what was recovered which is a 15kg stone or 1 kg stone."

"Then, my lords, we come to the other aspects, the identification of the dead body. On that score, I am at variance with the views expressed by my learned friends. I think my learned friends relied primarily on the items of clothing worn by the deceased because the PW 2 says, when I last saw my mother, she was attired in this particular item of garment, a pink colour frock with a floral design on it. But what was recovered is two items of garment according to police. Firstly, reddish top according to one police witness and a blue colour denim skirt. The red colour top was shown to the witness PW 2, that is the daughter but I found unfortunately the blue colour denim skirt which was marked as P10, if I am not mistaken was not shown to PW 2. Be that as it may, my respectful submission is that it is very clear when one leads the evidence of PW 2 that she identified the dead body not with

the aid of the clothes but with the aid of the stainless-steel bangle. She has categorically stated more than once, I identified the body with the aid of this white colour stainless-steel bangle."

My learned friend also submitted that the Hon. High Court Judge has imported into the judgment certain evidence which is not borne out. The facts I disagree, because I found that PW 2 has categorically stated when answer to a question posed by the learned Trial Judge that this particular bangle, apparently her mother, the deceased had inherited it. PW 2 said "පරම්පරාවෙන් ලැබිච්ච වලල්ලක් බව අම්මා මට කියල තියෙනවා.''. That is, I can give the page number. So, with regard to the identity I respectfully submit there is no issue with regard to identity. Then, I do concede that the bangle was never produced as a production at the High Court Trial. Due to very good reason the doctor says so, the police officers, PW 2, all state that, that bangle could not be dislodged from the hand. It has got firmly embedded and even the learned Trial Judge has referred to some suggestion made by from counsel to the effect that the police should have chopped off the hand of the deceased and taken the bangle.

Some counsel moved to that extent, such ridiculous extent to defend the accused. You cannot desecrate dead bodies like that, my lords. The proper course of action should have been to take photographs of the bangle and then mark it as a production. You cannot remove it. But I don't see any photograph has been marked. But, with regard to the identification of the body, I variance with my learned friend that have been identified.

"Then my lords, another issue is medical evidence. The doctor who testified about the post-mortem report, the probable cause of death is given as drowning. He has used the word 'probable'. Probably due to drowning. In that column in which the doctor has to mention the cause of death, he has also referred to the fact that there were several other injuries, just one sentence. Several other injuries also have been observed on the body of the deceased. If it was drowning, that is where the problem lies. We are not in a position to connect the incident of drowning to the accused. We do not know under what circumstances that body happened to be in the waterway. Was she pushed into the waterway after attaching a stone while she was still alive or was, she dumped in the waterway when she was unconscious after attaching this stone or did she attempt to commit suicide? We do not know. The available evidence may not be sufficient to explain that. We do not know under what circumstances that person happened to be there, the dead body. It is also not a Section 27 recovery, the dead body, my lord. The police have received information and unfortunately, I also observe the fact that when the doctor testified, he had not sufficiently explained the effect, some of those injuries might have had on the death. From a little bit of medical knowledge I have, those are not very serious injuries. I did not observe any head injuries, subject to correction there were no injuries to the head. So, that's another bit of a grey area we are unable to explain how exactly her body was found in the canal."

"Since there are 4 accused persons, we do not know whether it is the 1st and the 2nd only who 'transported the body' or whether all 4 got together. There is total paucity of evidence with regard to what happened to her from the time she might have either left the residence of the accused persons or thrown out. Because there again my lords there is another problem. PW 2 says after she was assaulted, I think may be momentarily she would have

suffered the concussion or she has also lost consciousness, and then she had fallen asleep. When she woke up it was the following day morning. Of course, she had inquired from the accused, where is my mother and they have said that your mother went at around 8.30. So, PW2 also did not see what happened to the mother. Was she thrown out or was she grabbed, tied up or what state was the mother, we really do not know my lords. So, that's another grey area which we are not in a position to sufficiently explain before your lordship's Court. Of course, the 'prosecution' has also relied on another item of circumstantial evidence, I suppose that it's tied up with sub-Section 2 of Section 8 of the Evidence Ordinance."

"Subsequent conduct of the accused i.e., the 1st accused because when those two visitors came on the following day, the younger sister of the deceased and another person known to them. The 1st accused supposed to have told them though the deceased have left at about 8 o'clock last night and when she was going, she told us to look after the daughter and to deposit her salary into the bank passbook and those were the passing comments of the deceased. I find it most improbable. Because she was mercilessly assaulted. If we were to believe PW2 she was mercilessly assaulted inside the house. So, such a person would not be inclined to request the accused to look after the daughter and deposit her salary into her passbook which they have not done up to that point. The daughter says I was never paid the salary. So that's another item of circumstantial evidence rely on by the prosecution. My difficulty here, is when one takes separate the more acceptable items of circumstantial evidence from those items which are of neutral value or no value at all, it is not quite possible for me to get the conviction from charge of murder, 296 sustained. That is why, my lords, we have taken into account those factors and that is why we are not supporting the conviction of murder."

"With regard to Section 315, I state with responsibility that there is ample evidence to establish that this girl was tortured because she says that they used a warm heater to burn her, they used hot water to burn her. The doctor who prepared the medico legal report has identified those burn marks and the other injuries are compatible essentially with what she has testified with regard to her injuries. My lords, if one were to believe her version all this cruelty was inflicted on this 13-year-old girl. I do not want to get emotional or I don't want to take lean advantage of the indigence circumstances of that girl but her father was totally blind and the father was dead at the time of this incident. Her mother was a beggar, begging on the street. But that does not mean that anyone has the right to torture somebody inside their own house, just because Rs.1,500/= had gone missing from the residence of the 1st and 2nd accused person. That is the immediate reason for this cruelty. So, it is that because her parents are beggars. It was the 1st accused himself, it's not that the mother parked the daughter at the residence or requested the 1st accused to look after her daughter. The 1st accused took the initiative, met the mother and requested the mother to give her daughter to them to be looked after and to attend to household matters."

"She has come out with incense of sexual molestation. She was asked to sleep in the drawing room of the house and then the clothes were removed and then she had requested for a separate room to sleep because the 1st accused was molesting her. Then a room was given and then the 1st accused has broken the door lock of that room. So that the door cannot be locked. Then there is also allegation of rape but I do concede as submitted by my learned

friend, the Hon. Attorney General forwarded an indictment for rape due to some reason. I have not gained access to that particular file that indictment has been withdrawn. But be that as it may, there was a serious allegation levelled against the 1st accused by PW2 and the Attorney General also forwarded an indictment. So, under those circumstances, I think PW2 should be adequately compensated. Very unfortunately, I am not in a position to support the conviction of murder, but at least let the daughter receive some reasonable compensation. I believe she is now married and having children of her own. Those are my submissions and I thank Your Lordships."

Learned President's Counsel for the 1st accused appellant states as follows:

> "I am very grateful to my learned friend having pointed out the infirmities in the prosecution case being the highest tradition to the Attorney General's Department. Whatever items of circumstantial evidence highlighted by my learned friend will not get to the point where your lordships' Court have held continuously that the presumption of innocence could be rebutted."
>
> "The cumulative effect, my lords', it does not do so. At least there is no evidence. I am thankful to my learned friend for conceding that the conviction on the murder cannot be maintained. On the 1st count 315, the entire matter of compensation I leave it to your lordships'. Your lordships' see the conviction was on the 30.10.2018, sentences were for 3 years. They have served the sentence plus one more year by October 2022. So, what I say is even, when I spoke to my learned friend, we will not at any point bargain on the compensation. Because there is an incident which has taken place. We are also answerable at the end of the day."

On behalf of the 2nd accused-appellant learned Counsel states as follows:

> "I am associating with the submissions made by the learned President's counsel for the 1st Accused-Appellant and as far as the evidence that had been led at the trial, I am also of the view that I cannot find compelling grounds to challenge the conviction on the 1st count of the indictment. Therefore, I leave the question of sentence and also the compensation with the hands of Your Lordships'. And also, my lords', I am making an application on behalf of the 2nd accused-appellant in terms of Section 359 of the Criminal Procedure Code Your Lordships' may please to direct the Prison Authorities under Section 359 to implement the sentence with effect from the date of conviction, namely 30.10.2018."

On behalf of the 3rd accused-appellant learned Counsel states thus:

> "All what I want to say is, I am very grateful to my learned Additional Solicitor General and my Lords', no charge against 3rd accused under Section 315 and he can be acquitted from the charge of murder."

On behalf of the 4th Accused-Appellant learned Counsel states thus:

> "Learned President's Counsel is conceding that he cannot sustain the conviction for murder. Then, there is no charge against the 4th accused-appellant regarding simple hurt. So, your Lordships be pleased to acquit the 4th accused-appellant from the charge of murder."

Considering the circumstances of this case we are of the view that this court cannot sustain the conviction for murder. The prosecution has failed to prove the case beyond reasonable doubt regarding the offence under section 296 of the Penal Code. Learned additional Solicitor General concede that the prosecution has not proved the case beyond reasonable doubt regarding the murder charge.

Therefore, we set aside the conviction and the death sentence against the 1st to 4th accused-appellants. All appellants are acquitted and discharged from the 2nd count (charge of murder).

The first count is only against the 1st and the 2nd accused-appellants.

There is ample evidence against the 1st and the 2nd accused persons to convict them for the charge of simple heart under section 315 of the Penal Code. There is no reason to interfere with the said conviction. But we decide to impose a fine of Rs. 10,000/- each in default 1 month simple imprisonment. At the same time, we wish to increase the compensation up to Rs. 250,000/- each in default 3 months simple imprisonment.

The 1st and the 2nd accused-appellants should pay together Rs. 500,000/- as compensation to PW 2 namely, Makumbure Gedara Wengappurage Vidana Arachchilage Chamila Priyadarshani Pushpa Kumari (PW 02). They are permitted to pay the fine of Rs. 20,000/- and deposit the said compensation Rs. 500,000/- in the High Court of Homagama, before they should be released.

Three years jail term imposed by the learned High Court Judge against the 1st and the 2nd accused-appellants should be remained as it is. But considering the period which they were incarcerated, we order that the jail term should be backdated with effect from the date of conviction namely, 30.10.2018 in terms of section 359 of the Criminal Procedure Code.

Appeal allowed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal