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

In the matter of an Appeal made under 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.

Court of Appeal No:
CA/HCC/ 0208/2016

High Court of Anuradhapura
Case No. HC/44/2009

Rathnayake Mudiyanselage Sunil Shantha alias Chootiya

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Tenny Fernando with Sahan Weerasinghe for the Appellant.**
Janaka Bandara, DSG for the Respondent.

ARGUED ON : **03/10/2022**

DECIDED ON : **31/10/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General for committing the offence as mentioned below.

On or about the 15th January 2005 in Maithreegama the accused-Appellant committed the murder of Dingiri Bandage Kusumawathie which is an offence punishable under Section 296 of Penal Code.

As the Appellant opted for a jury trial, the trial commenced before a jury. The prosecution had led thirteen witnesses and marked production P1-8 and closed the case. The Learned High Court Judge having satisfied that evidence presented by the prosecution warrant a case to answer, called for the defence and explained the rights of the accused. Having selected the right to make a statement from the dock, the Appellant had proceeded to deny the charge by way of his dock statement.

After the summing up, the jury retired for deliberation and returned the verdict of guilty to the charge of murder with a 6:1 majority decision. The Learned High Court Judge had convicted the Appellant as charged and sentenced him to death on 05/12/2016.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. At the hearing the Appellant was connected via Zoom platform from prison.

In his solitary ground of appeal, the Appellant contends whether the DNA evidence was sufficient to convict the Appellant for the charge of murder.

The background of the case *albeit* **briefly is as follows:**

In this case no direct evidence is available but the case rests on circumstantial evidence, especially on the DNA evidence.

PW4 Soma Ranatunga was a neighbour of the deceased at the time of the incident. On the day of the incident, the Appellant also was also a neighbour of the deceased, had come to her house as usual and left in about ten minutes time. After his departure, at about 7.00 p.m. the deceased had come to PW4's house to give some fish curry which she had cooked. After some time, she went back home. At about 10.00 p.m. she had heard cries similar to a child from the direction of the deceased's house. The witness, her husband and her son came out to check who was crying. This witness's husband had called the Appellant's father also to the scene. As the shouting ceased, the Appellant's parents had gone to inform this unusual happening to the deceased's daughter as she was living alone in her house. According to her evidence the Appellant was not present at the scene at that time.

According to PW6 Wagirasena, one of the daughters of the deceased, when she was at home on the date of the incident, at about 9.30 p.m. the Appellant's father had come and informed about the cries heard from the deceased's house. Immediately she had gone with the Appellant's father to check with her mother. When she went to her mother's house, she had seen her deceased mother was lying on the bed. When she called her mother and touched her body, she had realized that her mother had passed away

already. Other witnesses and village people also arrived there and the message was sent to the police.

According to PW6, the Appellant was not in good terms with the deceased as the deceased had told this witness that the Appellant had resisted her decision to clean the rear side of the land.

Police officers from Galenbindunuwewa Police Station had arrived at the scene of crime at about 3.00 a.m. and conducted the inquiry.

PW14 Damitha Perera was the Officer-in-Charge of Galenbindunuwewa Police Station. He too arrived the scene and conducted investigation. A small knife was recovered under the body of the deceased. As per the information received, he arrested the Appellant at his resident at about 5.30 a.m. At the time of the arrest, the Appellant was wearing a white coloured short sleeve shirt and a pair of shorts. A blood like stain was found on the shirt of the Appellant. This witness had noticed fresh cut injuries on the thumb finger of left hand and on third finger of the right hand. The shirt and the short were handed over to reserve police officer on duty on that day under production No.45/05.

All the witnesses who had come to the scene of crime on that day said that the Appellant was not to be seen there until he was arrested by the police at 5.30 a.m.

According to the JMO who held the post mortem, the deceased had died due to constriction of neck due to manual strangulation. He further opined that the few cut injuries which were found on the body which were not sufficient to cause death, but they were suggestive of struggle with the assailant and attempts of defence.

The Appellant had made a dock statement after the closure of the prosecution case. According to him, hearing the cries of the deceased's daughter, he had gone to the deceased's house which is situated very close to his house. He went to the room where the deceased was lying and

examined the deceased whether she was dead or alive. After attending necessary work at the deceased's house, went home at around 2.30 a.m. as he felt sleepy.

The Appellant had not put the stance he had taken in his dock statement to any of the prosecution witnesses. All the witnesses had stated that he was not at the scene until he was arrested by the police. According to the police evidence, they had reached the place of crime at about 3.00 a.m.

The Appellant in his only ground of appeal contends that relying on the DNA evidence has caused great prejudiced to him. He further contends that the whole case for the prosecution based on DNA evidence which is at best can only be considered as mere expert evidence and cannot be considered as conclusive evidence especially in the absence of other probative evidence.

In this case, the white coloured short sleeve shirt of the Appellant and the blood sample obtained from the deceased's body had been sent for DNA analysis. Upon a court order being issued, the Genetech Institution had conducted the DNA test and submitted their findings to the court. According to the report dated 23/09/2010 under reference No. GC981/01/03/2010, the results of the DNA test established that the biological material contained in the tested stains on the white colour short sleeve shirt marked as P1 originated from the individual whose biological material was on the gauze swabs marked as P2.

PW15 who prepared the DNA report under the court order had given comprehensive evidence as to the applicability and accuracy of a DNA report in a criminal case. The said DNA report was marked as P4 by the prosecution.

This witness was cross examined regarding the accuracy of the report by the defence. In this case, the items subjected for DNA analysis had been handed over to court on 27/01/2005. But the said productions were sent to Genetech on 01/03/2010, after about five years. Answering to court PW15

had said that if correct procedure had followed the DNA could stay more than five years on any production.

The use of DNA evidence in the criminal justice system has been regarded by scholars as "probably the greatest forensic advancement since the advent of fingerprinting".

In **The Attorney General v. M. N. Naufer alias Potta Naufer and Others** [2007] 2 SLR 144 the court held that:

> *"An individual's genetic constitution is unique in so much as there are no two individuals who have the same DNA. By analysing DNA of an individual, it is possible to say that the chances of finding another person with matching DNA is less than one in a trillion. This is analogous to hand finger printing techniques and that is why DNA finger printing has received the degree of acceptability which is similar to hand fingerprinting in courts the world over".*

DNA evidence has now been accepted by our courts as a science upon which expert evidence could be led in terms of Section 45 of the Evidence Ordinance.

Section 45 of the Evidence Ordinance states:

"When the Court has to form an opinion as to foreign law, or of science, or art, or as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, the opinions upon that point of persons specially skilled in such foreign law, science, or art, or in questions as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, are relevant facts."

How that expert evidence should be considered by a trial judge is discussed in several decided cases in our criminal justice system.

In **Mark Antony Fernando v. AG** CA/84/97 decided on 08/10/1998 the court held that:

"…the judge has to decide (…) whether there was a very great antecedent probability of the injury resulting in death as opposed to a mere likelihood. That function cannot be delegated to the expert. The judge is expected to decide this issue assisted by the evidence of the expert but independently of the opinion expressed by the expert."

PW15 Dr. Ruwan J. Illeperuma, an expert in DNA Technology elaborates in his article titled "**DNA, THE BIOLOGICAL TOOL FOR CRIME INVESTIGATION IN SRI LANKA**" as follows:

> "Because each person's DNA is different from that of every other individual (except for identical twins) examining variations in genetic material among human individuals, by DNA technology is the most powerful method for accurate human identification. DNA can be isolated from a number of biological samples, such as hair, saliva, blood, bone, teeth etc. The technology currently being applied is so sensitive that even a miniscule amount of bodily fluid or tissue can yield accurate DNA information. Therefore, this technology has a wide application in identifying perpetrators of crime and in confirming familial relationships of humans. (…..). The level of accuracy achievable guarantees absolutely no risk of convicting the wrong person and thereby establishing the innocence of those wrongly convicted."

Therefore, an expert in DNA analysis plays a vital role in criminal cases. As in this case, their expert knowledge might help prosecuting authorities to identify the person against whom criminal charges should be filed. Their opinions are also very helpful to the court in properly adjudicating of the case.

As the Learned High Court Judge had meticulously considered and deliberated to the jury the acceptable evidence along with the DNA evidence properly, I conclude that the ground of appeal also does not have any merit.

When analysing entirety of the evidence presented, the only irresistible and inescapable conclusion that can be arrived with the proved items of circumstantial evidence is that the Appellant had committed the murder of the deceased.

Therefore, I conclude that the prosecution had proven the case against the Appellant beyond reasonable doubt. Hence, I affirm the conviction and sentence imposed on him by the Learned High Court Judge of Anuradhapura.

Appeal is dismissed.

The Registrar of this court is directed to send a copy of this judgment to the High Court of Anuradhapura along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL