

**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.*

**Court of Appeal No:**

Democratic Socialist Republic of Sri Lanka

CA/HCC/0080/14

**COMPLAINANT**

**Vs.**

**High Court of Puttalam**

Mohomad Naufi

**Case No:** HC/158/05

**ACCUSED**

**AND NOW BETWEEN**

Mohomad Naufi

**ACCUSED-APPELLANT**

**Vs.**

The Attorney General,

Attorney General's Department,

Colombo 12

**RESPONDENT**

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

**Counsel** : Indica Mallawaratchy for the Accused Appellant  
: Rohantha Abeysuriya, P.C., ASG, for the Respondent

**Argued on** : 22-09-2022

**Written Submissions** : 19-01-2018 (By the Accused-Appellant)  
: 01-11-2018 (By the Respondent)

**Decided on** : 31-10-2022

**Sampath B Abayakoon, J.**

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and sentence of him by the learned High Court Judge of Puttalam.

The appellant was indicted before the High Court of Puttalam for causing the death of one Gafoor Paththila Umma on or about 2<sup>nd</sup> May 2003 and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

After trial without a jury, the learned High Court Judge by his judgement dated 17-07-2014 found the appellant guilty as charged, and he was sentenced to death.

The facts that led to the conviction in brief are as follows.

PW-01 Mohamad Riaz was a teacher by profession and a person well known to the appellant as both of them lived in the same village. On the day in question, he has gone to a boutique which was near his house around 9 p.m. and was having a chat with some of his friends when an intercity bus coming from Kalpitiya direction stopped near them. The driver and the conductor has got down from the bus and after showing a photocopy of a National Identity Card,

had inquired whether he knows the person in the photograph. The witness has recognized the person shown in the photograph as the appellant. Inquiring further as to why they are looking for the appellant, the witness has been informed that a female has come in their bus looking for the person shown in the photocopy of the identity card. When he and his colleagues got into the bus to inquire, he has seen a female of about 19-20 years old seated while crying. When inquired from her, she has informed that she is looking for her husband and has stated that she got married to him at Muttur, and about a week after the marriage, he left her and now she wants to meet him.

As the witness knew that the appellant was living with another woman whom he thought was his wife, and realizing the seriousness of the situation, he and the others gathered have decided to accompany the female to the Chairman of the Mosque Committee who lived about 100 meters away. He has decided to take this course of action because he was the Secretary of the Mosque Committee at that time. As the Chairman of the Mosque Committee was not at home, he and the others have decided to take the female to the house of one Muhadeen, who was the person assigned to call the public for prayers at the mosque. It was his evidence that their intention was to help and do some justice to the female and that is why they decided to act in this manner. When they went to Muhadeen's house, he and his family members had been there and after leaving the female at Muhadeen's house, PW-01 has gone to the appellant's house and has informed him that a female has come to meet him claiming to be his wife and had asked the appellant to come and meet her. At that time, the appellant's mother and his wife had been at the house, and after hearing what the PW-01 said to the appellant, the wife has started to run towards the road while crying. However, the PW-01 has accompanied the appellant to the house of Muhadeen and the appellant has talked to the female. She has cried and accused the appellant for abandoning her after getting married.

When the PW-01 questioned whether she has a marriage certificate, she has claimed that she got married to the appellant after making a complaint to the

Muttur police and had also given a phone number for him to verify. While this was taking place, the appellant's mother and wife has come to the house while shouting and scolding. After some time, the witness has seen the appellant leaving with the female who came to meet him.

Being inquisitive as to what happened, PW-01 has given a call around 11 a.m. on the following day and he has been informed that the female has left. Around 3 p.m. on the same day he has come to know about the death of the female who came to meet the appellant and has seen her body in a ditch behind the house of the appellant. It has been his evidence that although he could not recognize the face of the dead female, he was able to recognize the clothes she was wearing at the time he saw her.

Under cross-examination, it has been brought to the notice of the Court, although it was the evidence of the witness that the appellant and the deceased left the house of Muhadeen and he did not see where they went, in his statement to the police, he has stated that they went towards Puttalam. The witness has admitted that what he stated to police may be correct. However, it appears that the relevant portion of the statement has been marked as contradiction V-01.

He has denied the suggestion made on behalf of the appellant that he was lying about the incident stating that he has no reason to tell the untruth to Court. It has been suggested that it was he who was instrumental in taking the female from the bus and he was trying to falsely implicate the appellant to the crime for which he has answered saying that he acted according to his conscious.

The PW-02 called at the trial had been the father of the appellant. In his evidence he has stated that he came to know that his son came home with a female , but he did not see her and since it was night and he was drunk, he went to sleep. He has also stated that a female was found dead in a ditch and he cannot identify whether it was the same female.

Because the witness has given evidence detrimental to the prosecution, he has been treated as a hostile witness and had been subjected to cross-examination in terms of section 154 of the Evidence Ordinance.

PW-04 Gafoor Mohamed Nahir was the brother of the deceased, and it had been his evidence that his sister got married to the appellant and were living in Muttur at their house and says that seven days after the marriage, her husband left her and never returned. He has come to know that his sister had gone to Puttalam looking for her husband and later had come to know through Kalpitiya police that his sister was found dead. He has identified her body later.

PW-05 Mohamad Suhail, is another person who had been with PW-01 when the driver and the conductor came and inquired about the appellant, he has corroborated the evidence of PW-01 at all material points. It had been his evidence that the appellant accompanied the female saying that he is going to take her to Puttalam to a house of one of his relatives and left with her around 10.45-11.00 on that night. He has also stated that when he met the female along with others, she was carrying a blue-coloured bag and was wearing a red salwar dress. He has identified the bag carried by the female at the trial which has been marked as P-02, but has failed to positively identify the salwar the deceased was wearing.

PW-11 Mohamed Hussaideen was another witness who has confirmed and corroborated the evidence of PW-01 and the other witnesses as to what happened on that day, however, the learned High Court Judge has decided not to consider his evidence for his judgment as he has not been subjected to cross-examination on behalf of the appellant at the trial.

The Judicial Medical Officer (JMO) who has conducted the postmortem as to the death has expressed the opinion that the deceased had died due to strangulation, and has expressly ruled out any other cause of death.

According to the evidence of PW-08, who was the main investigating officer, after receiving the information of the dead body and upon visiting the place as directed

by the appellant, he has found the dead body in a ditch behind the house of the appellant, and has recovered the bag P-02 about 10 meters away from where the body was. It was also his evidence that the first information as to the death was provided by the appellant and also has stated that he observed an attempt had been made to cut a pit and due to the seepage of ground water, it had not been successful.

At the end of the prosecution case, and when the appellant was called upon for a defence, he has chosen to make a statement from the dock. The appellant has made a lengthy statement from the dock. He has admitted that a female who befriended him in Muttur came to his village looking for him, but has denied that he accompanied her that night, and had denied that he killed her.

### **The Grounds of Appeal**

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

1. The prosecution relied on the last seen theory against the appellant but it has not been proved beyond reasonable doubt that it was the deceased who was last seen with the appellant.
2. The items of circumstantial evidence are wholly inadequate to support the conviction.
3. The prosecution has failed to eliminate the possibility of a third party being the perpetrator of the crime.
4. The learned High Court Judge has failed to follow the principles that govern circumstantial evidence.
5. The trial Court was flawed by remanding a prosecution witness during the trial.

## **Consideration of the Grounds of Appeal**

The 1<sup>st</sup> ground of appeal is a ground based on an item of circumstantial evidence led at the trial. Since the 2<sup>nd</sup> and the 3<sup>rd</sup> grounds of appeal are also grounds based on circumstantial evidence, where it was argued that there was insufficient circumstantial evidence in order to find the appellant guilty and the learned trial judge failed to follow the principles that govern circumstantial evidence, all the above-mentioned grounds will be considered together.

The law that should be applicable and should be considered in a case where circumstantial evidence has been relied upon by the prosecution to prove a case against an accused is well settled in our country.

In the case of **The King Vs. Abeywickrama 44 NLR 254** it was held:

Per Soertsz J.

*“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 hypotheses of his innocence.”*

In **Don Sunny Vs. The Attorney General (1998) 2 SLR 01** it was held:

- 1) *When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards only inference that the accused committed the offence. On consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.*
- 2) *If on a consideration of the items of circumstantial evidence, if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.*
- 3) *If upon consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the*

*offence, then they can be found guilty. 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 if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.*

A trial judge also has to be mindful that suspicious circumstances do not establish guilt and the burden of proving a case beyond reasonable doubt against an accused is always with the prosecution.

In the case of **The Queen Vs. M.G. Sumanasena 66 NLR 350** it was held:

*“In a criminal case suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence”*

However, in considering the circumstantial evidence, what has to be considered is the totality of the circumstantial evidence before coming to a firm finding as to the guilt of an accused, although each piece of circumstantial evidence when taken separately may only be suspicious in nature.

In the case of **The King Vs. Gunaratne 47 NLR 145** it was held:

*“In a case of circumstantial evidence, the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion.*

*The jury is entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt.”*

In the case of **Regina Vs. Exall (176 English Reports, Nisi Prius at page 853)** Pollock, C.B., considering the aspect of circumstantial evidence remarked;



*“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in a chain, but that is not so, for then, if any one link brock, the chain would fall. It is more like the of a rope composed of several cords. One strand of the rope might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.”*

In the appeal under consideration, it is clear that the deceased had died due to strangulation and the JMO has confirmed that fact. Her body was found in the compound where the appellant lived with his wife and parents and it was found about 38 meters away from the house in a ditch.

There is no eye witness account to suggest that it was the appellant who strangled the deceased. Therefore, it is correct to argue that the prosecution has relied on circumstantial evidence to establish the charge against the appellant.

It was the contention of the learned Counsel for the appellant that the prosecution has relied on the last seen theory to fix the appellant to the crime. In other words, the prosecution has relied on the evidence that the deceased was last seen going away in the company of the appellant and her dead body was found later in the compound where the appellant lived.

It was the argument of the learned Counsel that in order to prove a charge against an accused person based on the last seen theory, it is incumbent upon the prosecution to fix the exact time of death of the deceased.

The learned Counsel relied on the case of **The King Vs. Appuhamy 46 NLR 128**, which reads thus;

*“In order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable-hypothesis that of guilt.*

*In considering the force and effect of circumstantial evidence, in a trial of murder, the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance if the prosecution has failed to fix the exact time of the death of the deceased. Among other points which may be emphasized in favour of the accused are;*

- (1) The absence of any motive whatever for the accused to murder the deceased and;*
- (2) A reasonable explanation given by the accused fairly promptly after his arrest.”*

It was her contention that the JMO who performed the postmortem on 5<sup>th</sup> May 2003, has given an opinion that the death may have been 2-3 days prior to the postmortem, which has not been calculated by any forensic methods. It was the position of the learned Counsel that the evidence which shows that the appellant was seen in the company of the deceased when she was seen alive for the last time, in itself, cannot be considered as sufficient proof of the fact that it was the appellant who is responsible for her death. Another point taken by the learned Counsel was that the prosecution has failed to establish that the body found was that of the female last seen with the appellant.

It was the contention of the learned Counsel that the learned High Court Judge has failed to consider the evidence in line with the legal principles that govern circumstantial evidence and therefore had come to wrong conclusions in that regard. It was her position that the circumstantial evidence considered does not lead to the only inference that it was the appellant who committed the murder and therefore, inadequate to come to a finding that the prosecution has proved the case against the accused appellant.

I am in no position to agree with the argument of the learned Counsel that the prosecution has failed to establish the exact time of death and therefore it is material for the applicability of the last seen theory to the facts of this case. I find that even in the case of **The King Vs. Appuhamy (supra)**, the view expressed

by the Court had been that if the prosecution fails to establish the exact time of death, the fact that the deceased was last seen with the accused would lose a considerable part of its significance, and not that it is a factor that entirely negate the significance of that fact. In the said case, the Court has considered the fact that the accused had no motive and he has given an explanation promptly as factors that should have been considered in favour of the accused.

I am of the view that the facts of the matter under appeal are very much different to the facts of the case relied on by the learned Counsel. There is solid evidence given by several witnesses that the deceased came to their village around 9 p.m. looking for the appellant claiming that he got married to her in Muttur and abandoned her after about a week. PW-01 and several others, as responsible members of the community have decided to take the female who came looking for the appellant to the house of a village elder. They have taken steps to get down the appellant to that house so that the female can confront him. It was in evidence that when PW-01 and others went to the house of the appellant and informed him about the arrival of a female looking for him, the wife who was living with him at that time and his mother have got agitated as a result. The evidence shows that they have come to the house of the village elder and had created a commotion there as well.

The evidence also clearly establishes that as a result of this situation, the appellant has accompanied the female and gone out of the house of the village elder stating that he is going to take her to a relative's house. According to the evidence of PW-05, the appellant was last seen with the said female around 10.45-11.00 in the night. The witnesses are also clear that the female who accompanied the appellant was wearing a red-coloured salvar and also carrying a blue-coloured bag.

On the following day, PW-01 being the person who was instrumental in taking the female to the house of the village elder has inquired about the said female and had been informed that she left the village for Muttur.

It had been the appellant who has provided the first information to the police claiming that his wife has died due to drowning. This complaint has been made at 3.30 p.m. on 03-05-2003. It is clear from the evidence that the female who left with the appellant was a total stranger to the village, therefore, there was no way for her to know the whereabouts of the house of the appellant. The body that was found based on the complaint made by the appellant was 38 meters away from the house of the appellant and within the compound of his house.

I do not find any basis to the argument that the prosecution has failed to prove that the deceased was the female who was last seen with the appellant. According to the witnesses, when they saw the body, it was in a ditch which had water and, in a face down position. PW-01 has seen the deceased wearing the same salwar he saw in the previous night although he has not seen her face. PW-05 has identified the blue-coloured bag marked as P-02 as the bag carried by the female.

Besides that, when the relevant witness gave evidence, no questions or suggestions have been made to them on the basis that the dead female found in the compound of the appellant was not the female accompanied him on that night. The suggestion had been that it was them who took the female away and now trying to implicate the appellant for the crime. In fact, the question of identity was not an issue at any stage of the trial before the High Court.

It is trite law that the position of an accused must be put to the relevant witness and confront them at the appropriate time, so that the witness can explain their position in that regard. I find that the stand taken at the hearing of the appeal was an afterthought, which has no merit.

I find that the motive is also a relevant factor that needs to be considered given the facts and the circumstances of this matter, as rightly considered by the learned High Court Judge.

*“A motive is that which moves or influences the mind. It has been said that an action without a motive should be an effect without a cause. Austin stated that motive indicates the reason why a man consciously shapes his*

*conduct so as to bring about a certain event and therefore pursues his selected course of conduct so as to achieve it (Austin, Jurisprudence 4<sup>th</sup> Edition, 1, 431-442)*

*In short, it is something so operating upon the mind as to induce or tend towards inducing a particular act or course of conduct (C. Gangaram Vs. Emperor 62 I.C. 545)”*

The motive for a crime is not a necessary factor that needs to be proved in a criminal case in order to establish the charge. But motive, if proved is a very much relevant factor in criminal cases.

**E.R.S.R. Coomaraswamy** in his book **The Law of Evidence Vol 1 at 224** discusses the relevancy of the motive in the following manner;

*“Though motive is not a necessary fact, the presence of motive is intensely relevant, as tending to establish either the actus reus or mens rea, or both, except perhaps in certain statutory offences. If a substantive case as to the motive has been put forward, the evidence must be considered. The existence of motive may explain facts which would be otherwise difficult to explain. It is also relevant and important on the question of intention.”*

When it comes to the proven facts in the case under consideration, it becomes clear that the appellant had contracted a marriage with the deceased, unknown to his family members and has abandoned her after one week. It is clear that at that time, the appellant also had a wife living with him in his home village. It is also apparent that the fact that he has contracted another marriage was unknown to his wife who lived with him in the village and the family members until the deceased appeared suddenly and confronted him. It is also in evidence that the mother and the wife of the appellant also have come to the house where the appellant and the deceased were talking to each other in the presence of the other villagers and had created a commotion. This has prompted the appellant to take the deceased away stating that he is going to take her to a relative's house in Puttalam. However, on the next day, her body was found in the compound

where the appellant lived. If one takes the whole episode in its totality, it is abundantly clear that only the appellant had the need to get rid of the deceased and no one else, in order to get over the difficult situation he was facing.

I find no basis for the argument that the learned High Court Judge has failed to follow the principles that govern circumstantial evidence. Although the learned High Court Judge has not specifically mentioned about the principles of circumstantial evidence, if one takes care to read the judgement in full, it becomes very much clear that the learned High Court Judge was very much mindful of the evidence he must look at to come to a finding based on circumstantial evidence. He has well considered the evidence in order to determine whether the evidence points only towards the guilt of the accused and nothing else. I do not find any basis to suggest that the circumstantial evidence adduced in this action was inadequate to support the conviction.

As I have stated before, the evidence taken together irresistibly points towards the only inference that the accused committed the offence.

Hence, I find no merit in the considered grounds of appeal.

The third ground of appeal preferred by the learned Counsel was that the prosecution has failed to eliminate the possibility of a third party being involved in the crime. It appears that the basis for this argument is the involvement of PW-01 and other villagers in initially taking steps to accompany the deceased to the house of a village elder and steps taken by them to assist her in her hour of need. It also may be this argument is based on the suggestion made to the witnesses that it was PW-01 and others who are responsible for taking away the deceased at that night. I find that this is a position that has no basis whatsoever. The evidence led in this action clearly establishes that other than the appellant, no one else has had any hand in the death of the deceased. The question of the possibility of a third party being the perpetrator of the crime was never a fact that has come up during the trial. Therefore, I find no merit in the 3<sup>rd</sup> ground of appeal as well.

The last ground of appeal was that the trial Court was flawed by remanding a prosecution witness during the trial. The proceedings show that the father of the appellant who was PW-02 named in the indictment has been remanded after he being treated as a witness detrimental to the prosecution and cross-examined under section 154 of the Evidence Ordinance. He has been remanded on the basis that he has given false evidence in Court and he would be prosecuted in that regard in terms of the provisions of the Code of Criminal Procedure Act. However, the case record bears testimony that, on the next day where the trial was taken up for hearing, he had been released on a Rs.5000/- cash bail. For that course of action, to have a bearing on the case, there must be reasons to believe that the witnesses called thereafter to give evidence had been influenced by this fact and therefore it has caused material prejudice to the appellant. There is no material to come to such a conclusion and the learned High Court Judge has not considered that fact as relevant in his judgement, hence, no basis for the 5<sup>th</sup> ground of appeal.

I am of the view that the learned High Court Judge has considered the evidence placed before the Court in its totality and has come to a correct finding as to the guilt of the appellant to the crime he has been charged with. I find no basis to interfere with the conviction and the sentence of the accused appellant as I have considered before.

Accordingly, the appeal is dismissed, as it is devoid of any merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal