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:

CA/HCC/0296/2013

High Court of Negombo

Case No: HC/99/2002

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Sembu Kutti Arachchige Pious Rohith Shirantha De Silva

ACCUSED

AND NOW BETWEEN

Sembu Kutti Arachchige Pious Rohith Shirantha De Silva

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Shanaka Ranasinghe, P.C. with Sandamali Peiris and T. Manchanayake for the Accused Appellant
	: Shanil Kularatne, SDSG for the Respondent
Argued on	: 10-01-2023
Written Submissions	: 20-03-2018 (By the Accused-Appellant)
	: 29-04-2019 (By the Respondent)
Decided on	: 22-02-2023

Sampath B. Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on the basis of being aggrieved of his conviction and the sentence by the learned High Court Judge of Negombo, where he was found guilty as charged and sentenced to death.

The appellant was indicted before the High Court of Negombo for causing the death of Inoka Delrin Selesthina De Silva, who was his legally married wife on 20-07-1995, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

In this matter, the appellant has never appeared before the High Court for his trial and had absconded the Court. Accordingly, the necessary steps had been taken in terms of section 241 of the Criminal Procedure Act, and the trial had proceeded against the appellant in his absence. However, he has been represented right throughout the trial by a learned President's Counsel.

After trial without a jury, the learned High Court Judge of Negombo found the appellant guilty as charged by his judgement dated 20-09-2013, and accordingly he was sentenced as above.

Facts in Brief

The appellant along with his deceased wife and the 3-year-old child lived in his ancestral house where his parents also lived. The household had a female servant as well as two male servants.

On the day of the incident, namely, 20th July 1995 around 3 a.m. in the morning, his neighbour PW-03 Meril Nishantha has heard someone shouting several times that "හොරු පැන්නා නෝනට වෙඩි තිබ්බා." Being a neighbour, he has recognized the voice of the appellant and as a result, he has gone to the house of the appellant with his sister to inquire. Entering the compound, he has seen the servants of the house and the appellant outside. He has seen the appellant wailing and appeared to have fainted. When the witness approached the appellant, he has asked for some water and has requested the witness to find a vehicle and also has informed the witness that thieves entered his house and fired at his wife.

While the witness was attempting to find a vehicle, the appellant's relatives, including his parents have come and people who gathered has taken steps to take the injured to the hospital. He has seen the deceased on a bed with bleeding injuries.

According to the evidence of Marie Walliyamma Pushpa (PW-02), who was the female servant of the house, she along with the appellant and the deceased has watched a movie until 12.30 p.m. on that night, and gone to sleep thereafter. She has slept in the kitchen area and the appellant has instructed her to lock the doors carefully which she has complied with. Thereafter, she has been awakened by a gunshot sound and later, she has been informed by the appellant that a thief entered the house and shot at the deceased.

However, after investigations, the appellant had been arrested on the evening of the same day as a suspect, and was later indicted for causing the death of his wife.

In this matter, the main investigating officer (PW-08) has given evidence to explain why he could not accept the version of events as narrated to him by the appellant. He has found no evidence of forced entry to the house and later had found a gun behind a curtain of a door near the room occupied by the deceased and the appellant. He has found one spent cartridge inside the barrel of the gun and another cartridge in a trophy that was among the trophies found on a cabinet nearby.

He has concluded that it was not possible for someone outside of the room to shoot at the deceased in the way the appellant described the incident, which has led to the suspicion being attracted towards the appellant. It has been his observation that the shot had been fired from within the room and not from outside. The witness has given reasons for his conclusion.

PW-06, the Judicial Medical Officer Dr. Lalantha De Alwis has given evidence producing the postmortem report marked as X-5. He has opined that the death was due to a firearm injury caused to the head of the deceased. He has well explained that the shot has been fired from a very close range of about 3 feet away and it may have been done in a kneeled position. He has expressed his opinion by studying the path of the bullet entry and exit wounds and by giving comprehensive reasoning for his conclusions.

The Government Analyst, Ranasinghe Arachchige Don Kumarawickrama, (PW-05) who was an expert in ballistics has also given evidence in this action. He has examined the scene of the crime and the productions, including the gun found and the cartridges found by PW-08, in submitting his report marked X-6. For the purposes of this report, it was the appellant who was not under arrest as a suspect at the time, who has shown and described the incident took place to the Government Analyst.

The Government Analyst has expressed a clear opinion in his report and in his evidence before the Court that the incident could not have happened in the way the appellant described the incident to him. He too has expressed the opinion

that the firing has taken place from a very close range from the deceased and the firing could not have happened from outside of the room.

In his description of the incident to the Government Analyst, the appellant has claimed that when he heard that somebody was trying to open his room door, he took out the gun he kept with him under the bed for protection, opened the room door and found a person outside of it. According to the description, the intruder was carrying a sawed-off gun and had fired at him. However, simultaneously, the appellant also had fired a shot at the intruder. The shot fired by the intruder had struck his wife who was sleeping in the room. The Government Analyst has given evidence expressing his professional opinion that this version of events cannot be the truth. He has found that two shots had been fired from the shotgun found at the scene of the crime, and the cartridge found in the trophy which was on top of the cabinet nearby was one of the cartridges used, and the other cartridge was the one found inside the barrel of the gun. He has opined that the injury caused to the victim as well as the bullet marks found on the wall opposite of the room had been fired by the same weapon.

It appears from the proceedings that the appellant has not taken up any particular line of defence other than cross-examining of the witnesses extensively. When called for his defence, he has called Delisinghe Mudiyanselage Sirithilake who was a retired Sub-Inspector at that time, as well as two other witnesses on behalf of him.

Sirithilake has been serving as a Police Sergeant attached to Kochchikade police at the time relevant to this incident. While on routine patrol duty with several other officers on the early morning around 4.25 a.m., of the day of the incident, he has been informed by a reserve police officer at his police station that the appellant's house has been robbed and a shooting incident has taken place, which had prompted him to visit the house of the appellant. He had been the first police officer to enter the scene of the crime. When he inquired from the appellant as to what happened, he had been informed that some robbers entered

the house and fired injuring his wife. He has been informed that a single person entered and fired.

Upon hearing this, he has observed the scene of the crime where he has seen a large blood stain on a bed in the room and some pellet marks on the bed. He has also seen some bullet marks on a wall outside of the room and some pellets fallen on the ground. He has recovered seven pellets. While searching further, he has recovered a gun kept behind a curtain of a door nearby. Inspecting it, he has smelled gunpowder on the weapon. After making these observations, he has made steps to protect the scene of crime.

Subsequently, the officer-in-charge of the police station has come and taken over the investigations. In his evidence, the witness has stated that he did not observe a spent cartridge inside a trophy that was kept on a cabinet nearby.

The next witness called by the defence, namely, Lution Tissa Silva Samarawickrama is a relative of the appellant. It had been his evidence that, on the day of the incident around 4 a.m. he was given a telephone call by the appellant's brother's wife stating that their house has been robbed and the appellant's wife had been shot. Upon receiving the information, he has come to the residence of the appellant, where he has been informed by him that his wife was shot. But he has not explained as to how the incident happenad. The witness is the person who has taken the deceased to the hospital. He has stated further, that the appellant and his wife maintained a peaceful married life and he did not observe any issues in their marriage.

The other witness who has been called on behalf of the appellant was one Tudor Wijeratne, who was a neighbour of the appellant. According to him, the appellant has called his name saying that they were fired at. When he went to the house, he has been informed that the appellant's wife had been shot. While he was looking for a vehicle to take her to the hospital, he has seen her being taken in another vehicle. Upon questioning, he has told the Court that about four months

before this incident happened, some thieves had attempted to enter his house, but that attempt had failed.

The Grounds of Appeal

At the hearing of this appeal, the learned President's Counsel for the appellant urged the following grounds of appeal for the consideration of the Court.

1. Has the prosecution proved its case beyond reasonable doubt.
2. Was there a proper investigation carried out against the appellant.
3. The learned High Court Judge failed to consider that the prosecution did not present expert evidence in terms of the guidelines required by law.
4. Did the learned High Court Judge fail to consider the evidence favourable to the accused in arriving at his conclusions.

Making submissions extensively on the basis that the shooting of the deceased may have been an act of an outsider, and the prosecution has failed to prove that it was the appellant who committed the crime, it was the submission of the learned President's Counsel that the conviction of the appellant was not according to the law.

It was his position that since there had been no eyewitnesses to the incident, the prosecution has failed to establish by way of circumstantial evidence, that this was an act committed only by the appellant and no one else. He was of the view that the prosecution has failed to prove the essential elements of circumstantial evidence in that regard.

Referring to the evidence of the Retired Sub-Inspector Sirithilake, who was listed as a prosecution witness number 11, but not called by the prosecution and later called by the defence, it was his contention that he should have been considered as the first investigating officer as he was the police officer who reached the scene of the incident initially and recorded his observations.

He pointed out that he has not observed that there was a spent cartridge kept in a trophy that was on the cabinet near the place where the gun was found. Indicating that a doubt has been created whether a proper investigation was conducted in that regard, or even that may have been a late introduction, it was the position of the learned President's Counsel that the learned High Court Judge has failed to consider the evidence of Sirithilake in his judgement, and had failed to consider the evidence that directs in favour of the appellant.

Commenting on the evidence of the Government Analyst, the learned President's Counsel relied heavily on what the appellant has told the Government Analyst when he was conducting his inspection, which appears to indicate that it was the position taken as the defence put forward by the appellant.

It is noteworthy to mention that the appellant has not taken up any particular defence as I have stated before, when the relevant witnesses gave evidence before the trial Court. Relying on what the appellant has allegedly stated to the Government Analyst, the learned President's Counsel made submissions on the premise that there was evidence before the Court to establish that an intruder had entered the house and shot at the wife of the appellant.

Commenting further on what the appellant has stated to the Government Analyst that he heard somebody turning the key of the room door around 3 a.m., which prompted him to wake up, it was his position that the investigating officers have failed to properly investigate that aspect.

Although there was evidence to show that fingerprint experts have been called to the scene of the crime, not calling for a fingerprint report, and lead that as evidence was also argued as a reason to consider that the investigations have not been conducted properly.

Commenting on the evidence of PW-08, where he has stated that when he went to the scene of the crime, he found few drops of blood outside of the room of the deceased, it was the position of the learned President's Counsel that the police have failed to take samples of the blood found there and investigate whether that

belongs to someone other than the deceased, since there was a possibility that the intruder may also have gotten injured as the appellant fired at him.

Commenting on the evidence of PW-08, where he has stated that when the appellant described the incident to him, he showed it by acting as to what happened (රඟපෑමක් කලා), it was the position of the learned President's Counsel that the investigating officer has been prejudiced against the appellant from the very outset and that is the reason why he has referred to the explanation given by the appellant as an incident of acting.

Making submissions furthermore, the learned President's Counsel was of the view that the findings and the opinion of the Government Analyst was wrong and not based on scientific evidence.

Relying on the decided case of **W.M.R.B.Wijeratne and Others Vs. The Attorney General, SC AppealNo-TAB1/2007 decided on 24-07-2009**, it was the position of the learned President's Counsel that a trial Court should not merely accept the findings of an expert witness but must evaluate and give clear reasons before accepting such evidence. He was of the view that the learned Trial Judge has failed to evaluate the Government Analyst's evidence and the evidence of the JMO as well, before accepting their reports as evidence, which has caused prejudice towards his client.

Commenting on the judgement, it was his submission that apart from the above infirmities, the learned High Court Judge has failed to consider whether it was probable for the appellant to shoot at his wife as alleged by the prosecution while his own son was sleeping next to her. It was his position that this was a judgement that is unsafe to be allowed to stand given the mentioned infirmities.

Submission of the learned Senior Deputy Solicitor General (SDSG) was that this is a case where the prosecution has proved beyond reasonable doubt by way of circumstantial evidence, the culpability of the appellant to the crime. Pointing to the fact that there had been no evidence of forced entry and it was only the accused, his deceased wife and the small child who were present when this

incident had happened, it was his view that given the strong circumstantial evidence against the appellant, this was a clear case where the Ellenborough dictum shall become applicable.

It was his view that even the last seen theory and the lucus principle shall also become applicable in this matter.

This is a case where the accused has absconded and failed to offer any explanation against the charge preferred against him. It was the position of the learned SDSG that even without considering the overwhelming scientific evidence, there was sufficient evidence to prove the case beyond reasonable doubt against the appellant.

Commenting extensively on the scientific evidence produced through the Government Analyst and the JMO, it was his contention that there was no evidence to accept that an intruder has shot at the deceased, but the evidence points directly towards the appellant beyond reasonable doubt that he was the person who committed the crime.

The learned SDSG pointed to the Court that even though proving a motive to a crime is not necessary in a criminal matter, the prosecution has established a clear motive as well, for the appellant to commit this crime. He pointed out to the fact that the evidence shows that the appellant was carrying on an illicit affair with a close relative of the deceased and there were family disputes over this. Subsequent to the death of his wife, the appellant has got married to the same female and has another child with her was a factor that strengthened the prosecution evidence further was the contention of the learned SDSG.

It was his submission that there was no basis to call for a fingerprint report as the evidence clearly shows that by the time the investigators arrived, the fingerprints had clearly been contaminated. Similarly, as there was no evidence to show that any intruder entered the house, there was no material for the investigators to further examine the few drops of blood found outside the room was his position. It was his position that the PW-08 was correct when he

determined that the few drops of blood found were that of the deceased and had been dropped when she was taken out of the room to be taken to the hospital.

Stating that the appellant is now attempting to create a defence based on a concocted story, it was the view of the learned SDSG that the conviction and the sentence need no disturbance from this Court.

Consideration of the Grounds of Appeal

Since all the grounds of appeal urged by the learned President's Counsel are interrelated, I will now proceed to consider the said grounds as a whole.

This is a matter where the prosecution has relied entirely on circumstantial evidence to prove the case against the appellant as there had been no eyewitnesses to the incident. The law in relation to how a criminal case should be proved based on circumstantial evidence is well settled in this 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.*

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."*

As I have stated before, the appellant has not taken up any particular line of defence when the prosecution led evidence to prove its case. As the appellant

had absconded right throughout the trial, when a defence was called by the learned High Court Judge at the end of the prosecution case, three witnesses had been called, apparently in order to establish a doubt in the prosecution case.

The fact that when this incident happened, it was only the appellant, his wife the deceased, and their child was occupying the bedroom where the deceased was shot is not a disputed fact, neither the fact that the deceased died due to gunshot wounds she sustained to her head.

The evidence has clearly established that at the time of the incident, the female servant was sleeping in the kitchen area of the house while two male servants were sleeping in a room outside of the main house. The parents of the appellant who were also members of the same household had not been at home as they had gone to the appellant's brother's home to stay the night.

According to the evidence of the female servant Walliamma Pushpa, she, along with the appellant and the deceased had watched a television film until 12.30 in the midnight and all of them have gone to bed thereafter.

The next evidence available is the hearing of the cries by the appellant and neighbours coming to inquire. The appellant had informed the neighbours who came that thieves entered the house and his wife was shot at.

It is clear from the evidence of the main investigating officer PW-08 as well as the retired sub-inspector Sirithilake who was called as a defence witness, but named as PW-11 in the indictment, when they reached the place of the incident, the appellant as the husband of the deceased has maintained the same storyline.

Although, retired Sub-Inspector Sirithilake had not been called as a prosecution witness, his evidence establishes that he was the first police officer to arrive at the scene. Since he has been informed by the appellant that some thieves came into the house and a shooting took place which injured his wife, it appears that as a responsible police officer, he has conducted a preliminary observation. It

was the appellant who has informed Sirithilake as well as the chief investigating officer who came later, what happened at the scene of the crime.

According to the main investigating officer, the appellant has claimed that around 3 a.m., he heard someone attempting to open the door which alerted him. It is clear from the evidence that the door shown to the investigating officer was the entrance to the bedroom where the deceased and the appellant slept with their child. As for the photographs produced in Court as evidence, it is clear that the mentioned door is a two-way door. The appellant has described to PW-08 his actions after he allegedly heard the attempt to open the room door. He has informed that he took the gun he had kept ready in his room and opened one side of the two-way door and saw an intruder in front of him a few feet away in the living area.

The appellant had informed the investigating officer that he fired at the intruder and the intruder too fired at him. It has been informed that the weapon carried by the intruder was a sawed-off weapon which indicates that it may be an illegally manufactured or modified weapon for easy carrying. The pictures produced before the Court show that the side door had a curtain as well.

According to the appellant's version of events to the main investigating officer, it was the shot fired by the intruder from outside of the room that had struck the head of his sleeping wife.

According to the evidence of PW-08 as well as the retired Sub-Inspecter Sirithilake, a shotgun had been found behind a curtain of a nearby door. There had been a spent cartridge in the weapon. There had been bullet marks and pellets in front of the wall of the room door which indicates that apart from the shot fired at the deceased, another shot had been fired from the direction of the room or just outside of it.

Upon inspecting further, PW-08 has recovered another spent cartridge inside of a trophy that was kept on a cabinet nearby. Pictures marked as Y-12 and Y-6 ඊ establish that the recovered gun had been kept behind the cabinet covered by a

curtain. The picture marked Y-6 ඵ establishes that the 2nd cartridge found by PW-08 was kept in a trophy that was among several other trophies.

I am in no position to agree with the contention that failure by Sirithilake to observe a second cartridge as a failure in proper investigations or even a subsequent introduction. Sirithilake, in his evidence has stated that he had no experience in conducting murder investigations or recording observations. This had been his first visit to a scene where a murder has taken place. Under the circumstances, it is clear that Sub-Inspector Sirithilake was not the officer responsible for recording the observations, although he has made his notes in that regard. It may not be possible for a person to observe a cartridge in a trophy among several similar trophies under normal circumstances. Therefore, there is nothing improbable in PW-08 observing the 2nd cartridge at the scene of the crime when he was conducting his investigations.

Any investigator with experience can come to a preliminary finding as to whether a person is telling the truth or otherwise by comparing an explanation to the observations and the evidence available before him. When the appellant claimed that an intruder came inside the house, fired at him, which hit his wife and fled, any investigator would look whether there are signs that a person has forcibly entered the house as claimed. The investigator had not found any signs of forced entry or signs of someone going out of the house.

As the appellant has claimed that the intruder fired from in front of his room towards him who was inside of it, the investigator has to check whether when such a firing was done, the possibility of it striking the head of the deceased who was sleeping on the bed.

I am in no position to agree with the learned President's Counsel's contention that the PW-08 saying in his evidence that the appellant acted and showed him how the incident occurred, would amount to showing that the investigator looked at it as only a piece of acting, and did not believe it from the very outset with a prejudiced mind.

If one reads the evidence of the witness in its correct perspective, what he had meant by saying "රඟදක්වා" was not that he was pretending or acting in its strict literal sense, but it was the way he showed it to him.

For matters of clarity, I would like to reproduce what the witness has stated.

> ප්‍ර : මොකක්ද පෙන්වා සිටියේ මේ කාමරය තුල කොයිවගේ ස්ථානයක්ද විත්තිකරු පෙන්වා සිටියේ?
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> උ : ඒ කාමරයේ දොරේ සිට අඩි දෙකක් පමණ කාමරයට ඇතුලට වෙන්න විත්තිකරු සිටිය කියල තමයි පෙන්වා දුන්නේ. කාමරයේ දොරේ සිට සාලය පැත්තට අඩි තුනක් විතර ඉදිරියට ආ විට මංකොල්ලකරු සිටියා කියලා මට රඟදක්වා පෙන්වා සිටියා.
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> ප්‍ර : යම් රඟපෑමක් කළා ?
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> උ : ඔව්.
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> (Page 764 of the appeal brief)
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> ප්‍ර : ප්‍රශ්න කිරීමක් කරාමද විත්තිකරු ස්ථානය පෙන්වීම කලේ ?
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> උ : ඔව්.
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> උ : කොල්ලකරුවන් ආ බව රඟදක්වා පෙන්වා සිටියා. මට පෙන්වන්න කිව්වා. ඔහු ඒ විදිහට පෙන්වා දුන්නා.
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> (Page 766 of the appeal brief)

Another argument advanced by the learned President's Counsel to contend that the investigations have not been done properly was that the investigator's failure to send samples of the blood drops found in the living room just outside of the room where the deceased had been to Government Analyst, and not producing the fingerprint report of the prints taken as part of the investigations.

When the chief investigator conducted his investigations, there had been no evidence to suggest that although the appellant claimed he shot at an intruder, such a person got injured as a result. If such a person got injured as a result of a firing from a very close range, there must be more blood stains in the place where the appellant has claimed that the intruder was when he fired the shot, and at least up to the place where the intruder may have escaped. Since there had been no evidence of forced entry or a person going out of the house after the described incident, the only inference that can be drawn on the few drops of blood found just outside the room would be that it belonging to the deceased, as she had been taken out of the room to be taken to the hospital.

When it comes to the fingerprints, the investigator has admitted that he called fingerprint experts to the scene of crime, which is a routine procedure when it comes to a serious crime of this nature. It is obvious that fingerprint experts had scrutinized the prints recovered by them. It is very much clear that fingerprints can play no important part in establishing the prosecution case. The evidence clearly establishes that after this incident, several persons, including close relatives and the neighbours of the appellant had entered the house from the main door of the house. Obviously, they may have entered the room where the deceased was found as well, which shows that any fingerprints found would be of no evidential value. Hence, I find no basis for the argument advanced by the learned President's Counsel.

The learned President's Counsel submitted that the Government Analyst's investigations and the report were faulty. He contended that since the appellant has admitted he fired a shot at the intruder to the Government Analyst, there was no reason for him to compare the cartridges found with eight other different types of weapons as stated in evidence other than the shotgun found at the scene.

According to the Government Analyst's evidence, when he went to inspect the scene, it was the appellant who has explained what happened to him. At that time, he was not treated as a suspect.

He has given a similar explanation he gave to PW-08 as to what happened. He has explained that the alleged intruder fired at him from a close range and he too fired at the intruder which means that two shots had been fired. The appellant had further explained that the gun used by the intruder was a sawed-off gun which is indicative that it may have been a locally manufactured weapon or a modified weapon as determined by the Government Analyst using his expertise.

Since such a weapon was not to be found at the scene, the Government Analyst as he should have, has conducted several tests using similar types of weapons to eliminate any doubt that one of the cartridges found may have been used in a weapon other than the gun found near the scene of the crime. It is after such tests and conducting tests with regard to the gun found and the two cartridges found in a scientific manner, the Government Analyst has prepared his report to express the opinion that both the cartridges found had been fired using the gun found near the scene of crime. The Government Analyst has well explained before the trial Court the procedure he followed in that regard and the scientific theories upon which he is basing his findings.

I am unable to find any merit in the argument that the learned High Court Judge has failed to analyze the Government Analyst Report in its correct perspective other than merely admitting the report as expert evidence.

As I have determined before, the Government Analyst's evidence amply demonstrates that he has conducted a thorough investigation as he should have. As an expert on ballistics, he has given detailed evidence in Court in that regard. The learned High Court Judge has accepted his report as evidence only after well considering the matters placed before him and the other circumstantial evidence that supports the report.

The Government Analyst has well explained the distances he has given as to the distance from which the firing at the deceased had taken place. He has well explained the entry point found on the mosquito net and the head of the deceased and the exit wound. His opinion that the shot has been fired from a very close-range, contrary to the claim made to him by the appellant that it was fired from outside the room had been based on scientific findings which have not been shaken at any point.

In his evidence, the Government Analyst has well explained that he did not rely on what the appellant said, but relied on his expert knowledge to come to his findings, for which I find no reason to disagree with.

Apart from the evidence of the Government Analyst, the Judicial Medical Officer Dr. Alwis, who was one of the most experienced Judicial Medical Officers of the country at that time, too, has given clear evidence to establish that the shot had been fired at a close range which indicates that it has been fired from within the room.

I am in no position to agree with the contention that the learned trial Judge failed to consider, matters in favour of the appellant as the matters pointed out as matters that favoured the appellant are not evidence that can be considered as favourable to the appellant, or else, has created any doubt in the evidence presented by the prosecution.

As contended correctly by the learned SDSG, I am in agreement that this is a clear-cut case where the dictum, what is known as the Ellenborough dictum, which in my view has now become a part of our law of evidence, should come into play.

The said Ellenborough dictum attributed to **Lord Ellenborough** in **Rex Vs. Cocharane (1814 Gurneyes Report 499)** reads:

> *"No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but nevertheless but if*

he refuses to do so where a strong prima facie case had been made out and when it is in his power to offer evidence, if such exist in explanation of such suspicious appearances, which would show them to be fallacious and explicable consistency with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

Abott J. in Rex Vs. Burdett (1820) B & Ald 161 at 162 observed that:

"No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation to contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to it the prima facie case tends to be true and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."

The evidence presented in this case clearly shows that it is only the appellant that can explain the circumstantial evidence placed before the Court and no one else, since it is abundantly clear beyond reasonable doubt that it was only he, who was present at the time when this incident occurred. Not only he has failed to offer any plausible explanation, but has even failed to appear before the Court by absconding the trial. Evidence called on behalf of him does not create any doubt as to the circumstantial evidence placed before the Court against him or provides any explanation that can be considered as a reasonable explanation.

I am also in agreement with the contention of the learned SDSG that since the appellant was the person last seen with the deceased by their servant before they retired to bed around 12.30 that night, the last seen theory also comes into play in the instant action. There again, there had been no plausible explanation by the appellant.

At this juncture, I find it necessary to comment on the grounds of appeal advanced on behalf of the appellant claiming that there were serious infirmities in the evidence and that creates reasonable doubts as to the prosecution case.

As I have stated before, there had been no reasonable doubts whatsoever of the evidence presented before the Court.

In the case of **Ramakant Rai Vs. Madan Rai AIR 2004 SC at 84**, it was stated,

> *"A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary trivial or a merely possible doubt: but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. The concepts of probability, and the degree of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and ultimately, on the trained intuitions of the Judge. While the protection given by the criminal proceeds to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice."*

In the case of **State of Punjab Vs. Karnail Singh (2003) 11 SCC 271**, it was held,

> "*Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice according to law. Prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. Vague hunches cannot take place of judicial evaluation. 'A judge does not preside over a criminal trial, merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties.' (Per Viscount Simon in Stirland Vs. Director of Public Prosecution (1944 AC(PC) 315) quoted in State of U.P. Vs. Anil Singh (AIR 1988 SC 1998). Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth.*"

I am unable to find any infirmity in the evidence presented by the prosecution in order to establish the charge against the appellant. As determined correctly by the learned High Court Judge, I am of the view that the evidence points at the culpability for the crime towards the appellant beyond reasonable doubt. There is no doubt it was he committed this heinous crime and no one else, and had attempted to mislead the investigators, of which he has failed.

For the reasons set out as above, I find no merit in the grounds of appeal advanced by the learned President's Counsel.

The appeal, therefore, is dismissed. The conviction and the sentence affirmed.

The learned High Court Judge is directed to re-issue the open warrant against the appellant and to give a direction to the relevant authority that it should take necessary steps to execute it through Interpol if necessary. It is also directed that the Controller of Immigration and Emigration should also informed of the warrant issued against the appellant.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal