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 Case No:
CA/HCC /0024/2016
High Court of Jaffna
Case No. HC/1684/2013

Nagarasa Sivaseelan

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE	:	**Sampath B. Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**Indica Mallawaratchy for the Appellant.** **Dileepa Peiris, SDSG for the Respondent.**
ARGUED ON	:	**24/11/2022**
DECIDED ON	:	**26/01/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Jaffna under Section 296 of the Penal Code for committing the murder of Sivaseelan Jesutha on or about the 09th of February 2006.

The trial commenced before the High Court Judge of Jaffna as the Appellant had opted for a non-jury trial. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellant had made a dock statement and closed his case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant under section 296 of Penal code and sentenced him to death on 25/02/2016.

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

The learned Counsel for the Appellant informed this court that the Appellant has given consent for this matter to be argued in his absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via Zoom from prison.

Background of the Case

According to the evidence led at the trial, the Appellant and the deceased were husband and wife and they were blessed with a 09-year-old daughter at the time of the demise of the deceased. Their married life was not stable as constant fights erupted caused by the inebriated Appellant. The Appellant

used to beat the deceased when he was under the influence of liquor. Nobody had visited the deceased including her mother out of fear for the Appellant. On the night in question, the witnesses had heard the Appellant beating the deceased despite her pleas not to harm her. The deceased's naked body was found wrapped in a mat inside her house on the following day.

According to the Judicial Medical Officer the deceased had sustained several cut injuries on her neck region and shock and hemorrhage due to Primary Brain Damage and Transection of Spinal Cord due to multiple cut injuries were declared as the cause of death.

Following appeal grounds were advanced by the Appellant.

1. The Learned High Court Judge has flawed in law by imposing a burden on the Accused-Appellant to support his plea of alibi.
2. The Learned High Court Judge has factually misdirected himself when evaluation the dock statement, thereby causing serious prejudice to the Accused-Appellant.
3. The Learned High Court Judge has misdirected himself on the burden of proof on an accused by imposing a burden on the Accused-Appellant to rebut the prosecution version.
4. When the prosecution has not established a link between the weapon recovered from the scene and the accused, the Learned High Court Judge has arrived at a conclusive finding that the Accused-Appellant had murdered the deceased using the said weapon.
5. The prosecution has totally failed to establish the time of death, which is vital in the backdrop of the defense of alibi embarked upon by the Accused-Appellant.
6. The Learned High Court Judge has erroneously applied Section 106 of the Evidence Ordinance.
7. Accused-Appellant has been denied a fair trial as the prosecution has failed to conduct the investigations with due diligence by

sending the blood-stained sarong and shirt to the Government Analyst.

8. Items of Circumstantial evidence are wholly inadequate to support the conviction.
9. Application of the Ellenborough principle is wholly unwarranted.

As the appeal grounds first, third and fifth are interconnected, the said grounds will be considered together.

In the first appeal ground the Counsel for the Appellant contended that the Learned High Court Judge has erred in law by imposing a burden on the Accused-Appellant to support his plea of alibi.

In order to tender plea of alibi certain pre-conditions has been laid down in the Code of Criminal Procedure Act No.15 of 1979.

Section 126A of the Code of Criminal Procedure Act states as follows:

> (1) No person shall be entitled during a trial on indictment in the High Court, to adduce evidence in support of the defence of an alibi, unless he has-
>
> (a) stated such fact to the police at the time of his making his statement during the investigation; or
>
> (b) stated such fact at any time during the preliminary inquiry; or
>
> (c) raised such defence, after indictment has been served, with notice to the Attorney-General at any time prior to fourteen days of the date of commencement of the trial:
>
> Provided however, the Court may, if it is of the opinion that the accused has adduced reasons which are sufficient to show why he delayed to raise the defence of alibi within the period set out above, permit the accused at any time thereafter but prior to the

> conclusion of the case for the prosecution, to raise the defence of alibi.

According to the above-mentioned section, the defense has to fulfil one of the three conditions laid down in the that section. But the proviso to Section 126A permits the Court to exercise a discretion in allowing an alibi notwithstanding the fact that the accused has delayed raising an alibi as set out in the section.

In this case the Appellant took up the plea of alibi in his dock statement. According to him he had brought the deceased home and went for work at Kokkuwil on the night of the date of the incident.

When an accused person raises plea of alibi there is no burden on him to prove it. The burden is always on the prosecution to rebut such a defense beyond reasonable doubt.

In **Jayatissa v. The Attorney General [2010] 1 SLR 279** the court held that:

> "…. the trial judge has gone on the wrong assumption that burden of proof of alibi is on the defense".

Hence, in this case the Learned High Court Judge has erred in law by imposing a burden on the Accused-Appellant to support his plea of alibi.

In **Hakkini Asela De Silva v. AG SC Appeal No.14/2011**, decided on 16.01.2014 the court held that even if the learned Trial Judge had misdirected himself with respect to the plea of alibi, the conviction should stand if it can be reasonably concluded that the accused persons were guilty of the offence beyond reasonable doubt.

Hence, in this case proper evaluation of evidence should be carried out to see whether the Appellant could succeed in his plea of alibi even though he had only taken it up in his dock statement.

According to PW1, Kannan, the deceased had come to his house to watch a teledrama on that fateful day. Around 7.45 p.m. the Appellant accompanied the deceased to his house which is situated about 300 meters from his house. On the following day, which was a Friday, he had visited the temple and only upon his return home around 3.00 p.m. had he come to know about the death of the deceased.

PW3, Lalithambal was the immediate neighbor of the deceased. On the night of incident some relatives had visited her house. From about 8.30 p.m. she could hear the Appellant beating the deceased and the deceased shouting pleadingly not to harm her. The deceased also pleaded the Appellant not to shout as visitors had come to her neighbor's house. Despite of the pleading of the deceased the Appellant had continued beating her until around 10.30 p.m. At one point the witness had heard the deceased shouting that the Appellant was going to kill her. She did not take any action as the Appellant used to abuse in filth if anybody interferes with their affairs.

As the wailing of the deceased subsided after about 11.00 p.m., this witness had looked for the deceased around 3.00 a.m. but the search was futile as the gate of the deceased's house was closed. As her relations were inside her house, she did not proceed any further until 1.00 p.m. on the following day. As the deceased was not to be seen, this witness along with another neighbor called Kili had gone to the deceased's house and found the deceased's naked body wrapped in a mat.

PW2, Puwaneswari's evidence also corroborated PW3's narration of events.

PW4, Saroja is the mother of the deceased. According to her, the deceased had a 9-year-old daughter at the time of her demise. She was aware that the Appellant used to beat her daughter. As the deceased did not come for the birthday party which this witness attended, the witness had gone to the deceased's house and inquired as to why she was unable to attend. The deceased had told her that the Appellant had not allow her to go. Further she requested her to take her daughter away as the Appellant is expected

home intoxicated. Hence, she accompanied the deceased's daughter who was 9 years old at that time.

PW7, IP/Wijeratna was the chief investigator of this case. When he received the first complaint about the murder from PW1, he had visited the scene along with a team of police officers. In the course of the investigation, a group of people brought the Appellant to the scene of crime. After initial inquiry, he was arrested as a suspect for the death of the deceased. At the time of arrest the Appellant carried a bag along with him. A blood-stained shirt and a sarong were inside the bag. The said items along with other items were taken into PW7's custody for further investigation.

When the defense was called, the Appellant made a dock statement. According to him, on the date of the incident, after accompanying the deceased home, he had gone to Kokkuvil for mason work after dinner. On the following morning after work, he had gone to a bar to consume liquor at 5.00 a.m. Around 2.00 p.m. while consuming liquor he was caught and severely beaten by the relations of the deceased. Hence, his position was that he was elsewhere after dinner on the previous night.

In this case the Appellant did not follow procedures laid down under Section 126A of the Code of Criminal Procedure Act No.15 of 1979 when he pleaded an alibi in his dock statement. Further he had not raised a single question regarding his alibi defense to lay witnesses who gave evidence about beating the deceased from 8.30-10.30 p.m. on that fateful day. Hence, the only conclusion that this court can reach is that the stance taken by the Appellant in his dock statement is a clear after-thought. Further consuming liquor from 5.00 a.m. in a bar, is a blatant lie uttered by the Appellant.

In **Gunasiri and Two Others v. Republic of Sri Lanka [2009] 1 SLR 31** the court held that:

> *"(4) Although the 3rd accused appellant raised an alibi in his dock statement, he failed to suggest his position to the prosecution witnesses. It is a rule of essential justice that whenever the*

opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted. The failure to suggest the defence of alibi to the prosecution witnesses who implicated the accused, indicates that it-was a false one".

Similarly, in this case too, the Appellant's failure to suggest his plea of alibi to prosecution witnesses clearly indicate that he had falsely advanced the plea of alibi which only suggest that it only amounts to an afterthought.

In **Hakkini Asela De Silva v. AG (Supra)** the court further held that:

"Even if there is a misdirection on the alibi, still a conviction can be entered if the Court forms a view that a reasonable jury properly directed would come to the same conclusion".

Hence his first ground has no merit at all.

The Appellant in his third and fifth grounds of appeal contends that the Learned High Court Judge has misdirected himself on the burden of proof on an accused by imposing a burden on the Accused-Appellant to rebut the prosecution version and the prosecution has totally failed to establish the time of death, which is vital in the backdrop of the alibi embarked upon by the Accused-Appellant.

These grounds of appeal also fail as these are interconnected with ground number one for which it was already held that no merit was established by the Appellant.

Next, I consider it appropriate to consider the fourth and seventh grounds of appeal together as its related to the productions marked by the prosecution.

The Appellant in his fourth ground of appeal argues that when the prosecution has not established a link between the weapon recovered from the scene and the accused, the Learned High Court Judge has arrived at a conclusive finding that the Accused-Appellant had murdered the deceased using the said weapon.

The investigating officer had recovered an axe from the scene of crime. According to his evidence the axe which had been marked as P2 was recovered from very close proximity to the dead body. The blade of the axe is about 7 inches in length and 3 inches in width. The handle is 3 feet and 05 inches in height. Blood patches were found on the axe blade and the handle. According to PW04, the mother of the deceased, the Appellant had borrowed her axe two weeks prior to the incident. At the trial she had identified the axe which had been recovered from the crime scene with patches of blood. During the cross-examination not a single question was put to this witness regarding the axe by the defense.

As the JMO who submitted the Postmortem Report had gone abroad pending trial before the High Court, PW9, Dr. Ratnasingham has given evidence on behalf of the doctor who had performed the autopsy. The postmortem had revealed serious injuries caused to the neck region of the deceased. According to the report multiple deep cut injuries were seen in the posterior neck region with fracture of vertebral column between 2nd and 3rd vertebra. Multiple cut injuries were seen on Posterior Occipital scalp. Brain substance was expelled out. Multiple fractures were noted below the cut injuries. Damaged subdural and subarachnoid hemorrhage were seen on both sides of the brain. Contusions were seen on the left posterior shoulder.

According to the doctor the death had been caused due to shock and hemorrhage due to primary brain damage and transection of spinal cord due to multiple cut injuries.

The Learned State Counsel who led the evidence of the doctor had failed to show the axe to the doctor to get his opinion. Although this is a serious lapse on the part of the Prosecution, the defense had questioned about the injuries sustained by the deceased during cross-examination. The doctor had answered that all the injuries noted on the neck region are cut injuries.

In the seventh ground of appeal the Appellant contends that the Accused-Appellant has been denied a fair trial as the prosecution has failed to conduct

the investigations with due diligence by sending the blood-stained sarong and shirt to the Government Analyst.

PW7, the investigating officer of this case explained as to why he had taken the productions into his custody in this case. This has been because he reasonably suspected that the productions, namely the axe, the shirt and the sarong would have a direct connection to the crime committed.

In **Mannar Mannan v. The Republic of Sri Lanka [1987] 2 SLR 94** the court held that:

> *"No prejudice was caused by the failure to send the accused's shirt for examination to the Government Analyst in view of the Police Sergeant's evidence regarding blood stains on accused's shirt because the Judge gave the direction that one did not know what the stains were thus stressing the uncertainty, of the stains to the jury".*

Even though the said production were not sent to the Government Analyst or the prosecution had failed to adduced such evidence will not affect the right to a fair trial as the Learned High Court Judge had correctly considered all other evidence available to come to his decision. Hence, the appeal grounds raised above have no merit.

In the second ground of appeal the Appellant contended that the Learned High Court Judge has factually misdirected himself when evaluating the dock statement, thereby causing serious prejudice to the Accused-Appellant. The Learned High Court Judge after considering the legal position in accepting the dock statement of an accused in our criminal jurisdiction, accurately considered and analyzed the dock statement of the Appellant before he could reject the same. He had given plausible reasons as to why he decided not to act on the dock statement of the Appellant. Hence, it is incorrect to say that the Learned High Court Judge had factually misdirected

himself when he evaluated and considered the dock statement of the Appellant. Therefore, this ground also has no merit.

In the sixth ground of appeal the Learned Counsel contends that the Learned High Court Judge has erroneously applied Section 106 of the Evidence Ordinance.

Section 106 of the Evidence Ordinance states:

> "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".

Although the Learned High Court Judge had considered Section 106 of the Evidence Ordinance in his judgment, he has not shifted the burden of proof on to the Appellant. He has merely stated that the Appellant should have explained as to what happened following the fight at his residence. The defense taken up by the Appellant in his dock statement was not put to the prosecution witnesses in the cross examination.

E.R.S.R. Coomaraswamy in The Law of Evidence Vol II (Book-1) "Limitations of Section-106" at page 264 states:

> "(c) The Section must be read in the light of the overall burden on the prosecution. It cannot override the presumption of innocence or be used to cast the burden on the accused.

In **Sanitary Inspector, Mirigama v. Thangamani Nadar 55 NLR 302** the court held that:

> "*The presumption of innocence casts on the prosecution the burden of proving every ingredient of an offence even though negative averments be involved therein".*

As the Learned High Court Judge had not shifted the burden of proof on the Appellant in this case, mentioning Section 106 of the Evidence Ordinance in

the judgement has not caused any prejudice to the Appellant. Hence, this ground also lacks merit.

Under the eighth ground of appeal the Learned Counsel for the Appellant contends that the items of circumstantial evidence are wholly inadequate to support the conviction.

In this case in order to find the Appellant guilty of the charge, all the circumstances must point at the Appellant to show that he is the one who committed the murder of the deceased and not anybody else. It is the incumbent duty of the prosecution to prove the same beyond reasonable doubt.

The Appellant in this case admitted that he brought the deceased home from the house of PW1 in the night on the date of the incident. PW2 and PW3 gave evidence to the effect that the Appellant had assaulted the deceased on that night till 10.30 p.m. PW3 had heard the deceased desperately pleading with the Appellant not to harm her. She had also requested the Appellant not to shout as some visitors were present next door. The Appellant not only assaulted the deceased but he had scolded her too. Witness PW3 had last heard the desperate wailing of the deceased around 10.30 p.m. Thereafter, nothing was heard from the deceased or the Appellant. The deceased's naked body was found in her house on the following afternoon.

The Appellant had brought an axe from PW4, the mother of the deceased two weeks prior to the incident. The investigating officer had recovered the said axe from close proximity to the deceased's body with blood stains. PW4 had identified the said axe during the trial.

According to the doctor extensive cut injuries were seen on the neck region of the deceased. Her spinal cord also had been severed.

The Appellant was arrested by the investigation officer when he was handed over to him by the villagers. A blood-stained shirt and a sarong were found inside a bag carried by the Appellant.

The Appellant although has raised an alibi in his dock statement, he had not posted any question in the cross-examination for any of the prosecution

witnesses. The position taken up by the Appellant that he was consuming liquor in a bar from 5 a.m. after work on the following day, proved to be a blatant lie.

In the case of **C.Chenga Reddy and others v. State of A.P**.(1996) 10 SCC 193 the court held that:

> *"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence".*

In the case of **Attorney General v. Potta Naufer & others** [2007) 2 SLR 144 the court held that:

> *"When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence".*

As discussed under appeal ground number eight, the prosecution had adduced strong and incriminating circumstantial evidence against the Appellant. The Learned High Court Judge had accurately analyzed all the evidence presented by both parties and concluded that all the circumstances are consistent only with the hypothesis of the guilt of the Appellant and totally inconsistent with his innocence.

In the final ground of appeal, the Learned Counsel contends that the Application of the Ellenborough principle is wholly unwarranted.

The Learned High Court Judge, though in the judgment cited judgments in which the Ellenborough Principle had been considered, had not relied on

that principle. He only considered the dock statement of the Appellant in detail and came to the conclusion to reject the same. Therefore, it is incorrect to argue that the Learned High Court Judge had applied the Ellenborough Principle in this case.

Considering the evidence presented by both parties in this case, I conclude that the prosecution has presented highly incriminating circumstantial evidence against the Appellant. But he has failed to offer a reasonable explanation against the incriminating circumstances which had only pointed at the Appellant as the perpetrator of this case.

As the Learned High Court Judge had rightly convicted the Appellant for the charge of murder, I affirm the conviction and dismiss the Appeal of the Appellant.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL