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

In the matter of an appeal against an order of the High Court under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No: CA /HCC/0091/2009
HC Kalmunai Case No: HC/01/2008

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

Complainant

Vs.

S.A. Latheef

Accused

And Now Between

S.A. Latheef

Accused-Appellant

Vs.

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

Complainant-Respondent

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

&

R. Gurusinghe J.

Counsel: Indica Mallawaratchy, AAL for the Accused-Appellant

Dileepa Peiris, SDSG for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 09.12.2016

By the Complainant-Respondent 26.01.2017

Argued on : 27.06.2022

Decided on : **26.01.2023.**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Trial Judge of the High Court of Kalmunai, dated 10.06.2009, by which, the 1st accused-appellant, who is before this court, via zoom platform was convicted and sentenced to death along with the 2nd accused person, for having murdered Seiathu Ismail Razeek (the deceased) and committing the offence of murder, under section 296 of the Penal Code.

The 2nd accused person did not appeal against the conviction and the sentence. On 10.02.2020 Deputy Registrar of this court inquired from the Prison Authorities at the Anuradhapura prison whether the 2nd accused person in the High Court Case No. HCEP/KAL/01/2008 at Kalmunai High Court, namely Sinnathamby Gopal preferred an appeal against the conviction and the sentence dated 10.06.2009. This court received a reply from the Anuradhapura Prison on 12.03.2020 indicating that he has never appealed against the said conviction and the sentence.

Thereafter, on directions from this court the Deputy Registrar sent another letter to the Prison Authorities at the Anuradhapura Prison, if the 2nd accused-person is willing to file an appeal against his conviction and sentence he will be permitted to do so on or before 03.07.2020.

The 2nd accused person Sinnathamby Gopal, has informed this court, through the prison authorities that he doesn't want to appeal against the conviction and the sentence dated 10.06.2009. The said letter was written on 25.06.2020 to the Prison Authorities at the Anuradhapura Prison, and if he wanted to tender an appeal it was permitted for him to do so on or before 03.07.2020. As there was no favourable reply for the said last letter this matter was fixed for argument considering the appeal preferred by the 1st accused person.

The charge against the accused persons were as follows;

> that on or around 16.09.1985 they committed the offence of murder by causing the death of Seiathu Ismail Razeek in Akkareipattu, which is an offence punishable under section 296 read with section 32 of the Penal Code.

The accused persons opted for a trial with a jury which commenced before the learned High Court Judge of Kalmunai on 08.06.2009. After the conclusion of the prosecution case both accused persons decided to keep silent. The judgment was delivered on 10.06.2009 and both accused-appellants were convicted and sentenced to death. It is important to note that the prosecution case rests solely and squarely on circumstantial evidence. Deceased was last seen in the company of the 2nd accused person namely S. Gopal going in the direction of the Kalmunai town on 16.09.1985 around 4.00 p.m.

The prosecution mainly relied on the confessions made by the two accused persons. The 1st accused showed the place where the dead body was. The learned counsel for the respondent says that the document marked as P 2 confirms that the 2nd accused person assured to show the dead body and the police recovered the body of the deceased Razeek, consequent to this information. The document marked as P 3 confirms the said recovery. According to the witness Keerthi Athapattu, police found the dead body, when the accused persons were taken there by the police. It was revealed that the accused persons themselves got into the water and brought the body out from the mud, pushing away the Salvinia plants. The police

investigations were carried out depending on the section 27 statement made by the accused persons after recovering the dead body from the water.

Grounds of appeal raised by the learned counsel for the 1st accused-appellant are as follows;

(i) Non-compliance of section 199 (3) of the Criminal Procedure Code which is a mandatory statutory provision necessary vitiates the conviction.

(ii) Learned Trial Judge failed to comply with the provisions of section 200 of the Criminal Procedure Code in its correct perspective.

(iii) Medical evidence was hearsay evidence.

(iv) Learned Trial Judge misdirected the jury on the following;

(a) Principles relating to overall burden of proof and the Ellenborough principle.

(b) Misdirection relating to standard of proof.

(c) Misdirection relating to the principles governing the evaluation of circumstantial evidence cases.

(d) Misdirection relating to the concept of common intention - Pg. 15 (opening address).

(e) Misdirection relating to section 24 of the evidence ordinance.

(f) Misdirection relating to section 27 recoveries.

(v) Non-direction on the part of the Learned Trial Judge relating to the following;

(a) Distinction between murder and culpable homicide not amounting to murder.
(b) Non-direction relating to the general and special exceptions.
(c) Last seen theory.

(vi) Confession made by the appellant is inadmissible in view of section 24 of the evidence ordinance.

(vii) Section 114(f) of the Evidence Ordinance operates against the prosecution by its failure to call prosecution witnesses Nadarajah and Sithravel who were vital witnesses and who would have provided the missing link in the prosecution case and unfolded the narrative of events.

(viii) Since the conviction revolves around the last seen theory, prosecution has woefully failed to establish the time of death.

(ix) Items of circumstantial evidence are inadequate to support the conviction against the appellant.

When this appeal was taken up for argument, learned counsel for the 1st accused-appellant informs court that she will not proceed with the 1st and the 2nd grounds of appeal.

In regard to the 3rd ground of appeal, the learned counsel for the 1st accused-appellant argued that the evidence of the Judicial Medical Officer was a hearsay. The reason for that was, the Doctor who performed the post-mortem examination could not be summoned before the trial Judge, as he was not available in Sri Lanka during the trial. The incumbent Judicial Medical Officer was summoned to give evidence on post-mortem report marked as P 1.

The Doctor gave evidence totally relying on the post-mortem report prepared by Dr. Rahman the Judicial Medical Officer who conducted the post-mortem on the 19.09.1985 at 3:00 pm at Akkareipattuwa hospital. The Doctor who was summoned to give evidence on behalf Dr. Rahman has clearly stated that he can give evidence of observations with regard to the P 1 document as he was serving at that time as the JMO and therefore, he had the expertise on this matter.

It is evident that the deceased Razeek did not sustain any external injuries before his death. The body was decomposed and the bones on the leg was exposed due to wild animals eating the flesh. There was mud in the respiratory tube, the trachea. It is important to note that the cause of death was drowning in water. Due to the absence of oxygen, he suffocated and the functioning of the heart had stopped. In the aforesaid circumstances the incumbent JMO's evidence cannot be considered as hearsay evidence because he has given evidence on the post-mortem report depending on what was written by Dr. Rahman in the report marked as P 1.

The jury had to decide from the evidence which was given before the trial Judge whether this death was a murder and done with an intention of committing a murder. Both accused-persons neither gave evidence in the Open Court nor made any statement from the dock. They remained silent.

It was argued by the learned counsel for the accused-appellant that the High Court Judge has misdirected the Jury by not properly explaining the principles relating to overall burden of proof and law relating to standard of proof.

In regard to the final submission delivered by the learned trial Judge it is clear that the jury was not properly guided. Page 261 of the appeal brief is as follows;

> "…..Further, when these two accused persons were asked by Court to give evidence, they neither gave evidence nor called witnesses to give evidence on behalf of them. They did not even make any statement from the dock. They were silent. If they remained silent, wouldn't it mean that an offence isn't proved? Even the accused didn't have the responsibility to prove it. We can't expect them to accomplish the responsibility of proving the offence. They were not even able to prove that they were not guilty but still the 1st and the 2nd accused persons stand innocent before you. That is law and justice. Until every point of accusation levelled against them is proved beyond reasonable doubt, they must be considered innocent. You have to decide that they are innocent unless the accusations against them are proved. If saying that an

incident is proved we have to think whether that incident occurred beyond reasonable doubt or not, and whether that incident is proved or not."

When the learned trial Judge expressed his views and indicated "If they remained silent, wouldn't it mean that an offence isn't proved" the Jury must have got the implied message to convict the accused-appellants. It is my view that by using the said words the learned trial Judge has misdirected the Jury. Not only that, further the learned counsel for the 1st accused-appellant specifically mentioned that the principle of Ellenborough Dictum was not properly followed and explained to the Jury in his address, by the learned trial Judge.

In considering the force and effect of circumstantial evidence, in a trial for 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. When I consider the items of circumstantial evidence led at the present trial, I am of the view that the prosecution had not put forward a strong case against the appellant. The case put forward by the prosecution against the appellant is very weak. It is necessary to consider whether prosecution case attracts the dictum of Lord Ellenborough. In Rex vs. Cochmne and others, Lord Ellenborough remarked;

> "No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him, but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistent 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 interests."

In 1938, the Supreme Court of Ceylon in Inspector Arendstz vs. Wilfred Pieris, 10 Ceylon Law Weekly 121 laid down that;

> "once the prosecution has made out a strong prima facie case, and when it is within his own power to offer evidence, if such exist, in explanation of such suspicious appearances which would show them to be fallacious and explicable consistently 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."

The thrust of this passage is that the burden of proof upon the prosecution is merely to establish a "Strong Prima Facie case", and at which point in the proceedings the burden would shift to the defence requiring him to answer that prima facie case established against him. Failure to do so would provide the court with proof of his guilt for the offence charged. This passage is quoted with the authority of a secondary source, namely Wills on Circumstantial Evidence (7th Edition at page 314). Wills claimed that, the said passage which the author quotes from Lord Ellenborough's judgment in Rex vs Lord Cohrane and Others, could be found at page 479 of Gurney's Reports.

Gurney was a scribe who was engaged by the court to report on the proceedings. The complete text of the report expands into just over 600 pages in print and could be found at

the Inner Temple Library, in London. Abridged versions of the report may be found in the English Reports. Neither, at page 479 of Gurney's Report, nor in any one of the pages of the 600 plus pages of his report could the quoted passage be found. Additionally, there is not a single decision in the Common Law lexicon which had referred or followed the Lord Cochrane decision in order to support any particular proposition of law, least of all what Wills had quoted in his time on Circumstantial Evidence. Notwithstanding this lacuna, the Supreme Court of Ceylon and later of Sri Lanka, with unfailing consistency had quoted that passage and had relied on it to affirm convictions obtained even for Capital Offences.

The King vs. Seeder de Silva (1940) 41 NLR. 337;
The King vs. Wickremasinghe (1941) 42 NLR. 313;
The king vs. Peiris Appuhamy (1942) 43 NLR. 412;
Prematilleke vs. The republic of Sri Lanka (1972) 75 NLR. 506;
Illangatilleke vs. The Republic (1984) 2 SLR 38;
Mohamed Niyas Naufar vs. The Attorney General TAB-01/2006;

The last decision before Inspector Arendtz, to follow Woolmington was The King vs. Eliyatamby (1937) 39 NLR. 53. With no reference to the Ellenborough dictum, Abrahams C.J. applied the Woolmington rule and allowed the appeal. In my view that none of the subsequent decisions had made reference to The King vs. Elliyatamby *(supra)* including Inspector Arendszt *(supra)*, which was decided only a year later.

The authority of the Ellenborough dictum continued until today although the Supreme Court was faced with a frontal attack upon the dictum in the Mohamed Niyaz Naufar Appeal, in 2006. The Supreme Court was unable in 2006 to precisely locate the dictum in Ellenborough's direction to the Jury in the Cochrane Case. The Learned judges merely presumed that the said dictum must be somewhere in that direction.

This steady stream of authority had but a single ripple. That was in two cases in which Basanayaka C.J. presided in the Court of Criminal Appeal. That was in The Queen vs. Santin Singho 65 N.L.R. 445 and The Queen vs. Sumanasena 66 NLR 350. There Basnayaka CJ pointed out that the so-called dictum of Ellenborough could not have been uttered by such an experienced Judge, for he would then have been laughed out of court. In 1814 when it is alleged that he had uttered those words, an accused was an incompetent witness to give evidence on his behalf.

To require him to give evidence so as to explain matters which were entirely within his knowledge, under pain of being convicted would have been manifestly unjust and somewhat absurd. For not until 1898, when the Criminal Evidence Act was enacted in England was an accused person become a competent witness on his own behalf. Therefore, the Learned Chief Justice pointed out that the so-called dictum could not have existed. Therefore, its use would be manifestly unjust. It may be pointed out that the dictum which runs contrary to the established rule regarding the burden of proof in Woolmington is firstly untenable as a Rule of Law and secondly is perhaps a product of a misdirection of both law and fact by a colonial Judge presiding in an Indian Court. Wills' book on Circumstantial Evidence was an Indian Text.

To apply the dictum of Lord Ellenborough it is incumbent on the prosecution to put forward a strong and *prima facie* case against the accused. When the prosecution has not put forward

a strong prima facie case the dictum of Lord Ellenborough cannot be applied. Dictum of Lord Ellenborough cannot be used to give life to a weak case put forward by the prosecution. I therefore hold that in the instant case, dictum of Lord Ellenborough cannot be applied.

Another argument raised by the learned counsel for the accused-appellant was that misdirection relating to standard of proof.

Page 17 of the appeal brief is as follows;

> "…. Now the Law says that there is a common intention between these two persons. Now I expect that members of the Jury would have clearly understood what common intention is and what section 32 refers to. Furthermore, when an offence of murder is framed as the charge the prosecution or the State Counsel must prove the charge beyond reasonable doubt by leading evidence. Now you have to understand what evidence is and who the witnesses are, and you have to understand the differences between them. When the witnesses see an incident and preserve it in their mind and get into the witness box and speak about it, then that should be considered as evidences. When doing so, the witnesses will take oath that they will not lie and they will tell the truth. So, you have to take them as evidences. There is another possibility. The accused persons can also give evidence."

Page 22 of the appeal brief is as follows;

> "…It is for the State Counsel to take all actions to challenge the presumption of innocence. This should be applied through the witnesses for the prosecution. What will happen if the prosecution fails to challenge the presumption of innocence? At this point the presumption of innocence comes into effect and the accused persons are freed from all charges against them. Next the important matter that you have to keep in mind is that when a charge of a murder is filed and a trial is in progress, the prosecution should prove it beyond reasonable doubt. This is solely in the responsibility of the State Counsel. If it is so, all the evidences of the witnesses called by him should be proved beyond reasonable doubt."

Page 23 of the appeal brief is as follows;

> "…Now you would think of asking what "beyond reasonable doubt" is. So, I have the duty to explain the term "what beyond reasonable doubt" is. For example, when you travel by a vehicle, the driver of that vehicle drives very fast. At that time, it will create a thought of a possibility of an accident in your mind. This is an ordinary sense of doubt. But when the driver is under heavy influence of liquor and drives really fast, you will have a reasonable doubt of meeting with an accident. Therefore, you would have understood what "beyond reasonable doubt" is. And the "reasonable doubt" is not decided by you. It is a matter decided by you from those circumstances. Therefore, I think I have, in my opening address, sufficiently explained matters pertaining to this case. After completing the prosecution case the State Counsel will inform you that he concludes it."

Even though the learned trial Judge had explained about the standard of proof to the Jury, the above 3 paragraphs reflect that, it was not done properly. In my view the learned trial

Judge has failed to do her duty and responsibility by explaining sufficiently the standard of proof in a criminal trial and therefore, it could be considered as a misdirection.

It was the contention of the learned Judge of the High Court that misdirection relating to the principles governing the evaluation of circumstantial evidence cases.

Page 264 of the appeal brief is as follows;

> "…You have to decide whether they gave false or true evidence from the witness box based on their age and dispositions. During the trial evidence given by an eye witness is considered as primary evidence and direct evidence. That is to say if a person gives evidence that 'I saw the offence occurring' it is called direct evidence. But most of the offences occur unseen. It is very rare for people to be direct witnesses. Offences like murder, sexual molestation, and rape occur where no one sees it. If a person says that 'I saw that' he becomes an eye witness of that incident. Otherwise, circumstances for an offence to occur, evidence to prove this, or the basis to prove this offence is called circumstantial evidence. That is to say that this offence must be proved through the circumstantial evidence such as early activities and plans made by him, and how he behaved after that. You have to keep in mind that the evidence given by these witnesses in respect of this offence are circumstantial evidence."

Page 265 of the appeal brief is as follows;

> "… As it was stated by the State Counsel, it is considered by circumstantial evidence that an offence is proved ascertaining the alleged involvement of the accused persons by linking the evidence as a chain of causation given before this court by the witnesses. If a strong opinion is created in your mind that this offence was committed by these accused persons according to the evidence given, certainly and continuously as a chain of causation, it should be considered as one proved beyond reasonable doubt. If so, you can decide them as guilty. If there are any discontinuance or break in the chain of causation, you have to release them giving them the benefit of doubt."
>
> "Now I wish to explain the law relating to the evidence given by the witnesses in this case. The charge against these two accused persons is that on or about the 16th of October 1985 in Akkaraippattu within the jurisdiction of this court they committed an offence of murder causing death to Razeek, punishable under section 296 read with section 32 of the Penal Code."

The above passage is a clear reflexion of misdirection relating to the principles governing the evolution of circumstantial evidence cases.

It was further argued by the learned counsel for the accused-appellant that the learned trial Judge misdirected the jury relating to the concept of common intention. I do not agree with the said argument. The reason is, during her opening address to the jury the learned High Court Judge has explained sufficiently the legal principle on common intention in a criminal matter.

Page 15 of the appeal brief is as follows;

> "Section 32 is about two or more than two people committing an offence or making preparations to commit that offence, taking part in that offence in some way. That is

to say, there should be a common intention to commit that offence. That is section 32. Next, section 296 refers to the offence of murder. Therefore, when considering those two sections the accused persons have committed an offence with a common intention of committing a murder."

Page 16 of the appeal brief is as follows;

"… Now you would have understood the charges levelled against these two accused persons. I have an obligation to explain the term common intention further. For example, two people work in an office. These two people go to a market together. They buy a thing there. They both have a common intention of buying that thing. When one of them goes to buy that thing, a person sees someone else in front of him. That person may already be angry or have a grudge against this person. He asks his friend, "Since you are my friend you have to help me to assault and kill this person. That is to say you have to help me not to let him run away when I am involved in doing, such an act. So, the friend agrees and both kill the person by way of assaulting or doing, any other act of attack."

"Now the law says that there is a common intention between these two people. I expect that members of the jury would have clearly understood what common intention is and what section 32 refers to."

The above paragraphs are very clear and it shows that the learned trial Judge has sufficiently explained with examples about the common intention.

Learned counsel for the appellant raised another argument considering the misdirection by the learned High Court Judge relating to section 24 of the evidence ordinance.

Section 24 of the evidence ordinance is as follows;

"A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceeding from a person in authority, or proceeding from another person in the presence of a person in authority and with his sanction, and which inducement, threat, or promise is sufficient in the opinion of the court to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

Page 277 of the appeal brief is as follows;

"….The Senior Superintendent of Police Keerthi Attapattu in his evidence explained matters to you by way of documents marked as P2 and P3. He produced the document marked as P2 that the 1st accused showed the place where the dead body was. The document marked as P3 is that the 2nd accused assured to show the dead body and the police recovered the body of Razeek consequent to this information. If you closely observe the evidences given on behalf of the prosecution, no witness gave evidence that he saw the place of Razeek's body in advance. They saw Razeek's body when these two accused persons were taken there by the police and the accused persons

themselves got into the water and brought the body out from the mud pushing away the Salvinia plants. You have to think deeply whether another person can take out a stolen thing if it is kept hidden by someone? It cannot be done. Only that person can take it out. You are married and have children. Can you take out a toy kept by your children or your wife? Only the person who kept it can take it out."

Page 278 of the appeal brief is as follows;

"… Therefore, you have to analyse facts well and take a decision in this case. When giving evidence from the witness box both Aboobackar master and Mohamed Nizar stated some incidents that the 1st accused had told them about. For example, if one says that he did a thing, if it was an ordinary matter, sometimes we tend to accept it. Will anyone come forward to say that he committed a grave offence? At this place they said that Nizar told Aboobackar what these two accused persons had told him about that incident. However, until now these accused persons did not give evidence and no matters were brought before this court whether they accepted their involvement in this incident due to intimidation, or these accused persons were influenced to say so that they would gain something if they said, or these accused persons were given an assurance like this? Therefore, you have to carefully think and see whether these accused persons spoke about this incident voluntarily by themselves…"

Learned Counsel for the appellant submitted that the questioning done by SSP Atapattu as to voluntariness does not satisfy the requirements in section 24 of the Evidence Ordinance and is inadequate to constitute a proper test as to voluntariness. A strong point has been made as to whether the statement is being made voluntarily which appears at the end of questioning, the record does not contain any answer of the accused.

In the case of The Queen vs. Murugan Ramasamy 64 NLR 433, it was held, that the statement fell within the prohibition in section 122 (3) of the Criminal Procedure Code and could not, therefore, be admitted in evidence. A statement by an accused person containing information in consequence of which a fact is deposed to as discovered is not admissible in evidence if the statement was made to a police officer in the course of an inquiry under Chapter XII of the Criminal Procedure Code. A statement which cannot be used under section 122 (3) of the Criminal Procedure Code cannot be proved under section 27 of the Evidence Ordinance.

In the case of The Queen vs. Mapitigama Buddharakkita Thera and 2 others 63 NLR 433 it was held that;

"Section 122 (3) extends to both oral and written statements made in the course of an inquiry under Chapter XII. The result of the decision in Buddharakkita's case is that the oral statement made to a police officer in the course of an inquiry under section 122 can no longer be proved under section 27 of the Evidence Ordinance. We are in agreement with that decision and we are unable to agree with the decision in Rex vs. Jinadasa 51 NLR 529 that although the written statement falls within the prohibition in section 122 (3) the oral statement does not, and may be proved under section 27 of the Evidence Ordinance. Our decision in the instant case is in accord with that in Buddharakkita's case, and the decision in Jinadasa's case must not be regarded any longer as binding."

Section 25 of the evidence ordinance very clearly says that a confession made to a Police Officer not to be proved against an accused person. In the present case the learned trial Judge did not caution the jury regarding the correct legal position which applies under section 24 and section 27 of the Evidence Ordinance. There is no presumption in law that confession made by an accused person to a Police Officer was voluntarily made. Thus, it is the responsibility and the duty of the prosecution to prove and to convince the jury that the confessions made by the accused persons were made voluntarily. In the present case it is my view that there is no proof to say, the two accused persons have made the confessions and the statements on section 27 recovery, were done voluntarily. In my view it is absolute misdirection relating to section 27 recovery and voluntariness under section 24 of the Evidence Ordinance on confessions as they were not sufficiently addressed and explained to the accused persons by the learned High Court Judge.

It was the contention of the learned counsel for the accused-appellant that non-direction on the part of the learned trial Judge relating to the distinction between murder and culpable homicide not amounting to murder, non-direction relating to the general and special exceptions and last seen theory.

However, to decide the cause of death based on evidences given by these witnesses. In addition to this, the court has to decide from the evidences whether this death was a murder and done with an intention of committing a murder. These two accused persons neither gave evidence in the court nor made any statement from the dock. They remained silent. Though, they are not bound to give a statement by law, this court has to see why they remained silent.

The learned trial Judge addressed the jury as follows;

> "You may even Guess and come to a conclusion why they chose to remain silent. As far as law is concerned you have to accept my submission. But you have the unfettered freedom to make a decision based on the evidence. By hearing this the 7 of you may arrive at a unanimous decision or you may have 6:1, or 5:2. If you arrive at a decision 4:3 that decision cannot be accepted. But, I don't say that you don't have the freedom to do so. I don't say that I can't accept it."

It was held in Kusumadasa vs. State CA 72/2005 (DB) dated 28.02.2011;

(i.) In considering the force and effect of circumstantial evidence, in a trial for 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.

(ii.) To apply the dictum of Lord Ellenborough it is incumbent on the prosecution to put forward a strong *prima facie* case. When the prosecution has not put forward a strong prima facie case the dictum of Lord Ellenborough cannot be applied. It cannot be used to give life to a weak case put forward by the prosecution.

(iii.) In a case of circumstantial evidence, if the proved facts are compatible with the innocence of the accused, he cannot be convicted of the offence. Further if the proved facts are not consistent with, the guilt of the accused he cannot be

convicted for the offence. In a case of circumstantial evidence, it is the duty of the trial Judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt.

(iv.) 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 hypothesis of his innocence.

When considering the above authority, I am of the view that in a case of circumstantial evidence if the proved facts are compatible with the innocence of the accused person, he must be acquitted. Further if the proved facts are not consistent with the guilt of the accused, he must be acquitted. For these reasons I hold that evidence relied upon by the prosecution is not in favour of the prosecution but in favour of the appellant. Therefore, the appellant must be acquitted on the above facts alone.

In the case of King vs Abeywickrama 44 NLR 254 held as follows;

> "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 hypothesis of his innocence".

In King Vs Appuhamy 46 NLR 128 held that "in order to justify the inference of guilty 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 than that of his guilt"

In Podisingho Vs King 55 NLR 49 held that "in a case of circumstantial evidence it is the duty of the trial Judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt."

In Emperor Vs Browning 1918 - 18 Cr LJ 482 court held that "the jury must decide whether the facts proved exclude the possibility that the act was done by some other person, and if they have doubts, the prisoner must have the benefits of those doubts."

For the aforementioned reasons, I hold the prosecution has not proved the charge against the appellant beyond reasonable doubt. I therefore set aside the conviction and the sentence dated 10.06.2009.

The 1st accused-appellant is acquitted and discharged from the charge which he was convicted.

Appeal allowed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal.