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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:
CA/HCC/ 0038/2022

Somasundaram Suresh

High Court of Nuwara Eliya
Case No. HC/25/2016

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Ershan Ariyaratnam for the Appellant.**
Dishna Warnakula, DSG for the Respondent.

ARGUED ON : **27/03/2023**

DECIDED ON : **26/05/2023**

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JUDGMENT

P. Kumararatnam, J.

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

On or about the 24th of October 2014 the accused-Appellant committed the murder of Emshiya Suresh at Ragala which is an offence punishable under Section 296 of Penal Code.

The trial commenced before the High Court Judge of Nuwara Eliya as the Appellant opted for a non-jury trial. The prosecution had led 09 witnesses and marked production P1-13 and closed the case. The Learned High Court Judge having satisfied that evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the accused. The Appellant made a very brief dock statement and closed his case.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant as charged and sentenced him to death on 04/08/2020.

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 his consent to argue this matter in his absence due to the Covid 19 pandemic. At the hearing, the Appellant was connected via Zoom platform from prison.

In his solitary ground of appeal, the Learned Counsel contended that the prosecution failed to prove a conscious and voluntary act on part of the Appellant.

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

On the day of the incident, PW2 Pathmawathi, the mother of the Appellant had gone to Ragala Hospital to bring medicine for the son of the Appellant. She had left the deceased Emsia the daughter of the Appellant under the Appellant's care. When she returned home the deceased was not to be seen. At that time, the Appellant was under the influence of liquor. First, she had gone to a nearby house in search of the deceased. As the deceased was not there, she had gone to her sister's house in search of the deceased. Thereafter, PW2's sister and her son also went in search of the deceased.

PW3 Devaletchumi was the landlord of the house where the Appellant's family lived. Hearing the that the deceased was not to be seen, she had gone to the Appellant and inquired about the deceased. The Appellant first had told her that the deceased had been taken to S.O.S School Nuwara Eliya. Thereafter he had told that he killed the deceased and dumped her body into the toilet pit.

PW7 is the son of PW3 who had also spoken to the Appellant regarding the deceased. The Appellant had told him that he sent the deceased to an appropriate place. Thereafter this witness had searched the house and found the deceased under a bed. Her body had been covered with a Urea bag. When he carried the body, he had seen reddish patches around the deceased's

neck. Having felt that the deceased was still alive, he had taken the deceased to Ragala Hospital in a three-wheeler first. From there she was taken to Nuwara Eliya Hospital but pronounced dead on admission.

PW8 the three-wheeler driver also had noted reddish patches around the deceased's neck when he transported the deceased to the hospital.

PW6 Sivalingam is the brother of the landlady of the house where the deceased lived. On the day of the incident, he had repaired the roof of the Appellant's house. He had seen Appellant's mother and his son were leaving the house in the morning. The Appellant had also climbed to the roof to assist this witness. The Appellant had assisted him up to 10.00 am, went for tea and not returned thereafter. This witness had seen PW3 and Appellant's son returning home at about 11.00am. According to him while he was on the roof no outsider had entered the house of the Appellant. The rear door of the Appellant's house had been permanently closed during that time.

PW13, the JMO who carried out he post-mortem opined that compression of neck due to ligature strangulation had caused the death of the deceased.

The Appellant had been referred to a Psychiatric and a report was obtained before the trial started. According to report of PW14, he had stated that he is fit to plead and stand for trial. The report was issued on 14/11/2014 i.e., after about 18 days of the incident. The doctor also stated that he needs further information to reconstruct his mental state at the time of the alleged incident. Therefore, he could not comment on his criminal responsibility at the time of the examination.

In this case, the injuries sustained by the deceased play a decisive role in determination of this case as to whether the Appellant had actuated the murderous intention or not. Hence, the circumstantial evidence pertaining to injuries found on the deceased's body need to be discussed in detail.

According to the JMO, Irregular shaped, scattered abrasions were distributed around the neck of the deceased. Over the right side 4x3cm size

parchment abrasion noted. Over the front side above abrasion continues in a less prominent manner covering the left and back sides of the neck. Scattered abrasions size varies from 0.1 x 5cm to 3x1cm, more than 30 in number distributed around the neck. Close observation revealed ligature mark more prominent on right side of the neck. (Collectively taken).

Abrasions 3 in number around right-side eye close to eye size varies from 3x1 cm to 1x0.5 cm.

Contusion laceration 2x3cm over front of lower lip with laceration placed inner aspect of lip.

These injuries clearly indicated how the deceased had been strangled to death.

It is trite law that the burden of proof is on the prosecution in all criminal cases.

In **The Queen v. K.A. Santin Singho 65 NLR 447** the court held that:

> *"It is fundamental that the burden is on the prosecution. Whether the evidence the prosecution relies on is direct or circumstantial, the burden is the same. This burden is not altered by the failure of the appellant to give evidence and explain the circumstances.*

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

Circumstantial evidence is proof of a fact or even a set of facts from which someone could infer the facts in question. It is a fact that somebody could be convicted of crime based on circumstantial evidence. Further, with the relatively common occurrence of false testimony and mistaken identification, circumstantial proof can be more reliable than direct evidence.

In **Premawansha v. Attorney General 2009 [2] SLR 205** the court held that:

> *"In a case of circumstantial evidence if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapable conclusion that the accused committed the offence".*

In **AG 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".*

The Learned Counsel for the Appellant mainly contended that the Learned Trial Judge had failed to consider the mental condition of the Appellant under the plea of Automatism to establish that the Appellant's performance of actions without conscious thought or intention.

The term "Automatism" refers to the involuntary conduct that the product of a mental state in which the conscious mind is dissociated from the part of the mind that controls action. Accordingly, automatism relates only to the *actus reus* of the offence as it affects the voluntariness of the accused's actions.

The burden is on the accused to prove involuntariness on a balance of probabilities. The accused has the evidentiary burden to adduce evidence to raise the issue for the court and the legal burden of proving the fact alleged.

In **R v. Enns 2016 ONSC 2229 (CanLII**), per Fregeau J, at para 21 stated:

> *"If the accused has laid proper foundation for the defence of automatism and satisfied the evidentiary burden, the trial judge must then determine whether mental disorder or non-mental disorder automatism should be left with the trier of fact".*

In **R v. Stone [1999] 2 SCR 290** the court held that:

> *"The law presumes that people act voluntarily. Since a defence of automatism amounts to a claim that one's actions were not voluntary, the accused must establish a proper foundation for this defence before it can be left with the tier of fact."*

In **Gamini v. The Attorney General [1999] 1 SLR 321** the court held that:

> "*The use of the criterion of external physical factors and internal physical factors to distinguish between plea of automatism and insanity is wholly incongruous in the law of Sri Lanka. Our law is that in a plea of automatism the accused must lay a sufficient foundation for his plea by leading evidence that his mind was not controlling his limits at all at the time of the commission of the offence. It is not sufficient for the accused to lay the foundation and discharge his evidential burden by establishing that his mind was acting imperfectly at that time, if he was still reacting to stimuli and controlling his limbs in a purposive way. In such an event he would fail to lay a sufficient foundation for the plea of automatism. He must establish that his acts were wholly conclusive and not purposive in any manner".*

The Learned Counsel referring to the evidence and the report marked as P12 of PW14 the Consultant Psychiatric, stated that his mental condition at the time committing the offence was not assessed by a doctor. Therefore, convicting the Appellant for murder is not appropriate in this case. The following portion of evidence given by PW14 is re-produced below:

(Page 242 of the brief)

ප්‍ර : ඒ අනුව ඔබ මේ බී. වාර්තාව පරීක්ෂා කිරීමෙන් අනතුරුව මෙම සිද්ධිය වූ අවස්ථාවේ දී මේ පුද්ගලයා සිටි මානසික තත්ත්වය සම්බන්ධයෙන් ඔබගේ මතය කුමක් ද?

උ : ඒකෙදි තමයි මට වැදගත් වෙන්නේ ඔහුට සැකයක් තිබිලා තියෙනවා ඒ ළමය ඔහුගේ ද කියන එක. වැඩිදුරටත් පරීක්ෂා කිරීම අවශ්‍යත් වෙනවා. සමහර මානසික ව්‍යාධී තත්ත්වයන් තුළ එවැනි දෙයක් ඇති වෙන බව. ඒ නිසාම තමයි මම අධිකරණයෙන් ඉල්ලා සිටියේ වාර්තාව සමඟ නැවත වරක් මෙම පුද්ගලයා පරීක්ෂා කිරීම අවශ්‍ය යි කියලා. නමුත් ඒක මට ලැබුණේ නැහැ. මේ බී. වාර්තාව ලැබීමෙන් පස්සේ තහවුරු වන කාරණයක් තමයි තවදුරටත් ඒ සම්බන්ධයෙන් සොයා බැලීමක් කළා නම් මනෝ වෛද්‍ය විද්‍යාවේ දී ඇති වන රෝග තත්ත්වයන් ව්‍යාධී ඊර්ෂ්‍යාව. ඒ රෝගී තත්ත්වය නිසා තමන්ගේ සහකරු හෝ සහකාරිය අයථා සම්බන්ධතා තියෙනවා කියලා රෝගී තත්ත්වය උඩ විශ්වාසයක් ඇති කර ගන්නවා. ඒකට කියනවා ව්‍යාධි ඊර්ෂ්‍යාව. ඉංග්‍රීසියෙන් කියනවා Morbid jealousy කියලා. ඒක මානසික අසනීප තත්ත්වයක් ලෙස සලකනවා.

ප්‍ර : මෙම පුද්ගලයා පරීක්ෂා කළ අවස්ථාවේ දී එවැනි නිරීක්ෂණ සිද්ධ වුණා ද ?

උ : ඔහු පරීක්ෂා කිරීමේ දී එවැනි දෙයක් අනාවරණය වුණා. මට ඔහු ප්‍රකාශයක් කලා ඔහුගේ බිරිඳ වෙනත් කෙනෙක් සමඟ සම්බන්ධයක් තියෙනවා කියලා.

ප්‍ර : එම ප්‍රකාශය මත ඔබ කරන ලද පරීක්ෂණ වලදී එවැනි රෝගී තත්ත්වයක් නිරීක්ෂණය වුණා ද?

උ : පරීක්ෂා කරන අවස්ථාවේ නැහැ. තවදුරටත් විමර්ශනයක් කළා නම් ඥාතීන්ගෙන් සහ වෙනත් අයගෙන් ඒක වඩාත් තහවුරු කර ගැනීමට තිබුණා කියලා මගේ අදහස.

Although PW14 expressed his opinion about mental condition of the Appellant, when he examined the Appellant about 18 days after the incident, he had not found any adverse mental condition of the Appellant.

It is noteworthy to mention that even though the Learned Counsel contended that the prosecution had failed to prove a conscious and voluntary act on part of the Appellant, the Appellant never put his mental condition as his defence during the trial.

Considering case for the defence, it is crystal clear that the Appellant had not laid a sufficient foundation for the plea of Automatism. Hence his contention cannot be contemplated in this case.

As discussed under the appeal ground advanced by the Appellant, the prosecution had adduced strong and incriminating circumstantial evidence

against the Appellant. The Learned High Court Judge had very correctly analyzed all the evidence presented by both parties and had concluded that all the circumstances are consistent only with the hypothesis of the guilt of the Appellant and totally inconsistent with his innocence.

As the Learned High Court Judge had rightly convicted the Appellant for the charge levelled against him in the indictment, 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 Nuwara Eliya along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL