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/ 0238/2017
High Court of Kegalle
Case No. HC/3544/2015

Dahanaka Ralalage Nimal Dassanayake

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Nayantha Wijesundara for the Appellant.**
Janaka Bandara, DSG for the Respondent.

ARGUED ON : **16/03/2023**

DECIDED ON : **31/05/2023**

****

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Kegalle for committing the murder of Yoda Pedige Indika Ruwan Jayaratna on or about 10th April 2014 which is an offence punishable under Section 296 of Penal Code.

Two other accused were also charged for aiding and abetting the Appellant to commit the murder of the deceased. After trial, the Learned High Court Judge had convicted the Appellant as charged, and sentenced him to death on 30/08/2017.The other two accused were acquitted from the aiding and abetting charge.

The trial commenced before the High Court Judge of Kegalle as the Appellant had opted for a non-jury trial. The prosecution had called 06 witnesses and marked productions P1 to P3. 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.

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

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the

Covid 19 pandemic. Also, at the time of argument the Appellant was connected via Zoom from prison.

The Learned Counsel on behalf of the Appellant had raised only one ground of appeal. The Counsel contended that the Learned Trial Judge had erred in law in consideration of circumstantial evidence in its correct perspective.

Without proper evidence, there is no criminal case and no conviction. There are many types of evidence that all seek to prove different things in cases. One commonly used form of evidence in criminal and other cases is circumstantial evidence. In fact, most of the evidence used in criminal cases is circumstantial. 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 well-established principle that in a case based on circumstantial evidence it is the duty of the trial judge to take into consideration the fact that the evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt. As this case entirely rests on circumstantial evidence, it is necessary to discuss with case laws how this concept has been developed and accepted in our judicial system.

In **Nandasena v. The Republic of Sri Lanka** (1994) 3 Sri LR at page 172 the Court held that;

> *"In a case which turns on circumstantial evidence it is essential that the trial judge should explain clearly to the jury that circumstantial evidence, if it is to support a conviction, must be altogether inconsistent with the accused's innocence and explicable solely on the hypothesis of his guilt".*

In **The Attorney General v. Potta Naufer & Others** [2007) 2 SLR 144 the Supreme 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".*

In the case of **Kusumadasa v. State** [2011] 1 SLR 240 Sisira de Abrew J in the Court of Appeal held that:

> *"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 and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence".*

In **Premawansha v. Attorney General** [2009] 2 SLR 205 the Court of Appeal 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 the case of **Regina v. Exall and Others** [1866] 4F. & F. pages 922 at 929 the Court held that:

> *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in*

the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.

The above cited judicial decisions clearly establish the fact that to find the Appellant guilty to the charge, all the circumstances must point at the Appellant 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.

Background of the Case

According to PW1 Indika, the incident had happened on 10/04/2014 at about 5.45 pm. On that day of the incident, PW1 had received an invitation through a person called 'Danuska' to partake liquor with 2nd suspect, Hasitha. Accordingly, PW1, Danuska and the Appellant had gone to an area called "උඩ තේ කෑල්ල" at around 9-9.30am. When PW1 and others reached the place, had seen several persons including the 2nd suspect, a person called Eranda, PW2 and the deceased. Thereafter, all of them had consumed liquor and PW1 had only one drink.

After consuming liquor for some time, the party consisting of PW1, the deceased, the two accused and the Appellant had left the place in a three-wheeler driven by 1st accused to have a bath to a place called 'Thibbotta'. Although the group left for bath but again started to consume liquor.

After consuming liquor, the same group mentioned above left in the same three-wheeler to have a bath. When they reached a place called 'Kaballawatta' the three-wheeler was stopped after hearing a sound 'bog'. When the three-wheeler was stopped, PW1 had jumped out due to fear.

He had seen a knife was put under the carpet of the three-wheeler by the Appellant when they left the first place of drinking. He had also seen the Appellant bending towards the carpet just before he heard the sound. Further, PW1 had said that the knife was usually carried by the Appellant in the village. Also, he had seen the Appellant carrying the knife in the morning of the incident when he passed PW1's house.

After jumping off from the three-wheeler he had run from the scene as he had seen a knife was held by the Appellant. Suspecting the that the Appellant might cause injury to him as well, he had quickly run away from the place and went to deceased's grandmother's house, and informed what he had seen. The message was passed to PW2, the brother of the deceased immediately. In an hour after the incident PW1 accompanied with PW2 had gone to the place of incident and saw the deceased was lying fallen on the ground and the police officers had come to the place of incident.

PW2 Ajith is not an eyewitness but had said there was an enmity existed between the deceased and the Appellant which was about 12 years old.

PW5 IP/Rohana who had conducted the investigation had gone to the place of incident upon receiving an anonymous call about the murder. He could arrest the Appellant only on 08/06/2014 after about two months of the incident.

PW4 the JMO who held the postmortem of the deceased had noted 12 cut injuries on the deceased's body. Out of 12 injuries, 1st and 4th injuries are grievous injuries. As a result of the first and fourth injuries, airway of the neck has been severed. The death was caused due to the neck opened into the respiratory passage and asphyxiation of blood blocking the respiratory passage.

The Counsel for the Appellant contended that there is a serious doubt as to who caused the injuries to decease as the JMO who held the postmortem had said in the re-examination considering the length of the knife some distance needed to inflict the injuries. Although the JMO had taken up this position in the re-examination, PW1 had clearly seen the Appellant putting

the knife inside the three-wheeler before the journey started and saw the knife was in the hands of the Appellant immediately after hearing the 'Bog' sound.

PW1 under cross examination had said that after seen the knife in the hand of the Appellant and thinking that the Appellant would have caused injury to somebody, he had jumped off the three-wheeler immediately.

Although a contradiction 3V-1 was marked on the statement given to the police, that contradictory fact was corrected by the PW1 in his Non-Summary deposition before the Magistrate's Court. This was brought to the notice of the Trial Judge by Learned State Counsel during the cross examination of PW1 by the Counsel for the Appellant. Hence, the contradiction 3V-1 has no adverse bearing over the evidence given by PW1.

The admissibility of the recovery evidence under Section 27(1) of the Evidence Ordinance had been discussed in several cases decided by the Superior Courts of our country.

The Section 27 of the Evidence Ordinance states that,

> "When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

The Supreme Court in the case of **Somaratne Rajapakse Others v. Hon. Attorney General** (2010) 2 Sri L.R. 113 at 115 stated that:

> *"A vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been discovered would be permitted in evidence. 'There should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. A discovery made in terms of Section 27 of the Evidence Ordinance*

discloses that the information given was true and that the Accused had knowledge of the existence and the whereabouts of the actual discovery."

In this case the Learned High Court Judge had very correctly admitted the recovery of the knife P1 under Section 27(1) of the Evidence Ordinance as the recovery of the knife in consequence to the statement of the Appellant was not objected by the Appellant at the trial.

Further the injuries on the face of the deceased could be inflicted with the knife was not objected by the defence.

After the incident, the Appellant had absconded the area and the police could arrest the Appellant only on 08.06.2014 after about two months. Hence, his conduct is highly suspicious. Conduct of an accused previous or subsequent is truly relevant in a criminal trial.

Section 8(2) of the Evidence Ordinance states:

> "The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto".

In criminal cases the court must consider both the previous and subsequent conduct of the accused pertaining to the commission of the crime. In certain cases, the previous conduct of the accused throws light on whether the accused is innocent or guilty, whereas in some cases it is the subsequent conduct that becomes very important in determining the innocent or guilty of the accused. So, it is the bounded duty of all the concerned courts to analyse carefully both the previous and subsequent conduct of the accused before drawing any definite conclusions.

The conduct of the Appellant absconding immediately after the incident is very much relevant in this case.

In this case the Appellant using his statutory right to make a dock statement, denying the charge level against him, took up several positions which he has not confronted in cross examination with the relevant witnesses.

The Learned High Court Judge has considered this case in keeping with standards that should have been adopted when a case is rest entirely on circumstantial evidence. His consideration very clearly in keeping with the guidance that have been decided in several judgments which were entirely rested on circumstances evidence. He has analyzed the evidence and given reasons why he accepts the prosecution case.

Further he had considered the dock statement of the Appellant and had given plausible reasons as to why he rejects the same. Also had given equal and due consideration to the defence evidence in his judgement.

As discussed under the solitary 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 come to the conclusion that the all the circumstances are consistent only with the hypothesis of the guilt of the Appellant and totally inconsistent with his innocence.

It would also be relevant to mention that in the case of **Kahadagamage Dharmasiri Bogahahena v. The republic of Sri Lanka SC Appeal 04/2009** decided on 03/02/2012.Her ladyship Justice Thilakawardena held that:

> *"A criminal trial is meant for doing justice to the accused, victim and the society so that law and order is maintained. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presided to see that a*

guilty man does not escape.one is as important as the other. Both are public duties".

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 Kegalle along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL