

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal under and in terms of section 331 of the code of Criminal Procedure Act No. 15 of 1979 (as amended) read with Article 138 of the constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:
CA / HCC / 0109 / 2018

The Democratic Socialist Republic of Sri Lanka.

Complainant

High Court of Gampaha Case No:
HC 166 / 2013

Vs.

Liyanage Nimal Jayathilake alias Podimahattaya.

Accused

AND NOW BETWEEN

Liyanage Nimal Jayathilake alias Podimahattaya.

Accused – Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondent

Before: Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel: Chathura Amarathunga (Assigned Counsel) for the Accused –

Appellant.

Suharshi Herath, D.S.G. for the State.

Argued on: 22.05.2023

Decided on: 22.06.2023

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 19.3.2028 of the High Court of Gampaha.

The accused appellant in the instant matter had been indicted for three counts of murder. The deceased had been the mother and her two children.

The story of the prosecution is that the entire case has been based on circumstantial evidence. The police in 2006 September had received an anonymous petition with regard to this incident and they had recorded the statements of the mother and the husband of the deceased Chamila whose children also are alleged to have been killed in the incident.

According to the mother of the deceased Chamila, she had last seen the daughter in 2000 and she had been married to Ajith and has had two children and both of them had been working in the quarry belonging to the accused who had been known as Podimahattaya in the area, and the deceased Chamila had complained that the accused had been in the habit of coming to her house when the husband was not around. Later on, 16.12.2000 she had got to know that the deceased

Chamila and her two children had gone missing. The elder child had been 6 years old and the daughter had been an infant.

The husband of the deceased Chamila had corroborated the mother of the deceased and had said further that the accused had been in the habit of having a drink with him and on such a day the deceased Chamila had complained that the accused had forced himself on her, and he had confronted the accused and the accused had tried to stab himself.

The police had recorded statement from one Rupavati who had received a letter on the post which was supposed to have been written by the deceased Chamila which had stated that she was going away and not to look for her and this letter had been shown to the mother and the husband of the deceased Chamila and they have all said that it is not the hand writing of the deceased Chamila.

When the disappearance took place in the year 2000 the husband and the mother of the deceased Chamila had gone to the police and had tried to complain but the police had not investigated the matter. The letter which is supposed to have been written by the deceased Chamila had been sent to the Examiner for Questioned Documents with the specimen signature of the accused and he had said that the hand writing on the letter tallies with the hand writing of the accused.

The police had also recorded statements from some persons who had lived near the house of the accused and the deceased and one such person had seen the accused closer to the date of the disappearance of the deceased Chamila and her children with blood on his body and looking agitated but on questioning he had said that he had injured himself from some barbed wire.

When the police had arrested the accused, he had made a statement and on his statement the police had unearthed some skeletal remains of human bodies and

it had been examined by the judicial medical officer and he had been able to say that the skeletal bones were of persons of about 25 years and of two very young children but he had not been able to identify the gender and no DNA testing has been done. Therefore, there is no evidence to say that the skeletal remains unearthed were that of the deceased persons.

There had been statements from villagers to say that the accused was in the habit of always setting fire to the jungle in the area from which the skeletal remains were recovered, and it had been recovered from the vicinity of the accused persons property.

The accused had made a dock statement and had said that in the year 2006 he had been clearing the bush jungle from his property when he had discovered that there were pieces of human bones being dugged out by wild animals in the night and he had recovered a riffle also from his property and when the police came to record statements form the neighbors he too had gone and complained about what he had seen in his property and he had been arrested and he had said that thereafter his signature had been forcibly obtained by the police. He had further said that he had known deceased Chamila and suddenly she had disappeared in the year 2000 with her children and one fine day he had seen the husband of the deceased washing and cleaning his house and the mother of the deceased Chamila had been crying inside the compound.

The learned trial judge had analyzed the evidence stated above and had concluded that the accused had been guilty for the three murders he had been indicted for and had passed the capital punishment on him.

The main ground of appeal had been that the prosecution had not proved the death of the three deceased persons.

The entire case mentioned above is based on circumstantial evidence and it had been held in many a cases that if a matter is to be decided purely on circumstances, the said circumstances have to draw the irresistible conclusion and nothing less, other than the guilt of the accused. It has been compared to the strands in a rope and all strands together must only infer the guilt of the accused.

It has been held that in the cases of **Queen vs Kularatne 71 NLR 529** and **Karuppaiya Servie vs The King 52 NLR 227** that **“in a case of circumstantial evidence, the prosecution evidence lends itself to a reasonable inference that either the accused or another could have committed the act, the prosecution must exclude the other effectively in order to attach responsibility to the accused for that act”**.

Wills on Circumstantial Evidence 7th edition at page 296 had said that **“every fact and circumstance on which the prosecution relies as the basis for the inference of guilt must be clearly proved and connected with the fact to be proved beyond reasonable doubt and must be such as to lead to reasonable inference as to the guilt of the accused”**.

As such in the instant matter the circumstances against the accused are that,

- 1) He had been showing an interest in the deceased Chamila ,
- 2) The said deceased had complained to the husband, about the accused.
- 3) The letter received by the mother and the husband of the deceased Chamila carries the hand writing of the accused,
- 4) Human skeletal bones had been recovered subsequent to the statement of the accused.

But none of the above circumstances prove the fact beyond reasonable doubt that the skeletal bones recovered were of the three deceased persons and that the accused committed the death of the said deceased. Anyhow we are also mindful of the fact that the investigations have commenced six years after the

incident and the accused in his dock statement had in fact cast a doubt in the husband of the deceased but the prosecution had not been able to eliminate the fact that it was the accused and no other person committed the deaths of the deceased which is a fundamental principle when considering circumstantial evidence. Upon considering the evidence we find the behavior of the deceased Chamila's husband to be extra ordinary for not being concerned for the disappeared children leave alone the wife, he had complained to the police and thereafter when the police had not shown any interest in investigating the matter, he had given up all efforts which in fact throws doubt in the behavior of his and makes a prudent mind wonder whether what had been mentioned by the accused in the dock statement is true. Therefore, we are of the opinion that the prosecution had not been able to eliminate beyond a reasonable doubt that it could have been another person who committed the deaths and not the accused.

Hence, we find a lot of merit in the ground of appeal of the accused and we are unable to agree with the submissions of the Counsel for the respondents who strenuously argued that all the circumstances put together only draws the inference that the accused was guilty of the charges.

As such we are unable agree with the learned trial judge who also had concluded that the circumstances of the prosecution evidence only draw the inference that accused was guilty of the offences in the indictment.

As such the conviction and the sentence of the trial judge is hereby set aside and the instant appeal is allowed.

Judge of the Court of Appeal.

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal.