

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

In the matter of an application under Section
331(1) of the Code of Criminal Procedure Act
No 15 of 1979.

The Democratic Socialist Republic of Sri
Lanka

Complainant

CA Case No: HCC/73/2019

HC of Anuradhapura HC 114/2011

Vs.

Heenage Gunathilake

Accused

AND NOW BETWEEN

Heenage Gunathilake

Accused-Appellant

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

Before: Menaka Wijesundera, J.
B. Sasi Mahendran, J.

Counsel: Tenny Fernando for the Accused-Appellant
Janaka Bandara, DSG for the Respondent

Written

Submissions: Not filed by both parties

Argued On : 06.06.2023

Decided On : 02.08.2023

Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as “the Accused”) was indicted in the High Court of Anuradhapura under Section 296 of the Penal Code for committing the murder of one *Yapa Mudiyansele Podi Menike Yapa* (hereinafter referred to as “the deceased”) between the 28th of February and the 19th of April 2005.

Prosecution led evidence of fifteen witnesses PW1 to PW15 and closed its case wherein marked productions from P1 to P18. At the conclusion of the trial, The Learned High Court Judge convicted the Accused guilty, and the death sentence was imposed.

We must be mindful that this case is based on circumstantial evidence. Therefore, we are guided by the well-established principles of law on circumstantial evidence.

The facts and circumstances giving rise to this appeal are that:

According to PW1, *Neelaka Hemantha Kumara*, the accused is the younger brother of PW1’s mother and lived 150 meters away from PW1’s residence. At the time, PW1 was an army deserter hiding at night in the forest for fear of army capture. PW1 visited the accused’s house for a drink, during which the accused confessed to killing a

woman but did not disclose where he had buried her. Later the accused showed PW1 where he had buried the body. However, the accused did not mention who the woman was, and PW1 had no knowledge of her identity. Interestingly, before the accused showed him the burial site, PW1 had already ventured into the forest with a 3-foot stick and poked the ground.

Later, PW1's grandmother informed him that the accused was looking for him. The accused subsequently took PW1, between 9:30 pm and 10:00 pm, to the burial site. There, the accused shone a light and stabbed a knife into the ground, marking the spot where he had buried the body. He then told PW1 not to disclose this to anyone. However, PW1 later informed the *Grama Niladari* (PW14) about the confession made by the Accused, who advised him to report it to the police and meet them at the temple. Four or five days later, PW1 met with the police officers, who told him that since four days had passed, they could not take action on the matter and instructed him to return home. On Page 81 of the brief:

ප්‍ර : මෙම සියලු කරුණු පොලිසියට කීවාද?

උ : කීවා.

ප්‍ර : ඊට පසුව මොකද වුණේ?

උ : දින 04ක් ගිහින් නිසා මේ ගැන ක්‍රියාමාර්ගයක් ගන්න බැහැ මොනවත් කරන්න බැහැ කියලා කාටවත්

කියන්නැතිව ගෙදර ගිහින් ඉන්න කියලා කීවා.

The accused reportedly went to PW1's house looking for him, during which he assaulted PW1's father and threatened him with a knife while inquiring about PW1's location. Thereafter PW1 had gone to the police station and lodged a complaint against the Accused regarding the murder on the 19th of April at which point the Accused was remanded under police custody, Later PW1 accompanied police officers to show them the burial site without the Accused. The body was exhumed in the presence of the Judicial Medical Officer and the Magistrate. PW1 identified the corpse as a female based on the dress she was wearing, although the body was in a state of decay and her face was covered with an object.

PW1 mentioned that no evidence was collected at that time, but a statement was recorded by the Magistrate. Furthermore, PW1 disclosed that he had visited the location

three times - once before the accused led him there and once after the accused showed him the spot however the third time was not stated by him.

In his cross-examination, he revealed that he had visited the site covertly without the accused's knowledge. He informed the *Grama Niladari* and the police out of fear for his own life. He also acknowledged having memory deficiencies and stated that he suffered from mental impairment. It is to be noted that PW1 started to give evidence in contradiction to what he had said earlier.

On page 99 of the brief;

ප්‍ර: එය නිවැරදි නොවන කට උත්තරයක් දුන්නේ?

උ : මම තුවාල වූ අවස්ථාවේදී යම් යම් හේතු නිසා මානසික සහ මනෝවෛද්‍ය සායන වලට ගියා. යම් යම් අවස්ථාවල යම් යම් සිද්ධීන් සම්බන්ධයෙන් මතක ශක්තිය අඩුවෙනවා.

ප්‍ර : අලුත් දෙයක් සම්බන්ධයෙන් මතකය ඇවිත් අලුත් දෙයක් කොහොමද පොලිසියට ප්‍රකාශ කලේ මාමා ගැහැණු කෙනෙක් සමග සිටියා කියලා?

උ : පිළිතුරු නැත.

Before we analyse his evidence with regard to his trustworthiness it is pertinent to refer to the evidence led by PW14 who stated that he was informed about a murder by PW1 but he had not mentioned about a confession made to PW1 by the Accused. The Learned High Court Judge has heavily relied on the circumstantial confession made to this witness,

From assessing the following excerpt from his judgement.

On Page 278 of the brief;

“මෙම නඩුවේ මූලිකම පැමිණිල්ල වෙනුවෙන් කැඳවන ලද පැ .සා.01 වූදිනගේ ඥාතියකු මෙන්ම අසල්වසියෙකුද වේ. ඔහුගේ සාක්ෂිය මගින් වූදින අදාළ අවස්ථාවේදී අදාළ වරද ඔහු විසින් සිදුකල බවට පාපොච්චාරණයක් කල බවට වූ සාක්ෂි අන්තගර්ථවේ.

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මෙම නඩුවට අදාළ කරුණු පරීක්ෂා කර බැලීමේදී වූදින විසින් පැ.සා 1 වෙත කරනු ලැබූ කියන පාපොච්චාරණයේදී කිසිදු බලපෑමක් හෝ තජර්නයකින් තොරව ස්වේච්චාවෙන් කරන ලද එකක් බවට ඉදිරිපත් වී ඇති සාක්ෂි අනුව තීරණය කල යුතු වේ. එම පාපොච්චාරණය එසේ කිසිදු බලපෑමකින් හෝ තජර්නයකින් අනතුරුව කල බවත් විත්තිය විසින් කිසිදු අයුරකින් පැ.සා 1 ගේ සාක්ෂි මෙහෙයවීමේදී යෝජනා කර නොමැත.

එම කරුණු හරස් ප්‍රශ්න මගින් හෝ තහවුරු වී නොමැත. එසේ කල බවට කිසිදු යෝජනාවක් හෝ විත්තිය වෙනුවෙන් කර නොමැත, ඒ හැරුණු විටත් චූදිතයාගේ එකී පාපොච්චාරණය කරන ලද පැ. සා 1 ගේ මගපෙන්වීම මත අනුව පොලිසිය විසින් මිය ගිය අයගේ මෘත ශරීරයද අදාළ චූදිතයා විසින් පැ. සා. 1 ට කලින් පෙන්වා දී තිබූ එම මෘත ශරීරය වල දැමූ ස්ථානයේ තිබී සොයා ගැනීමක්ද කරනු ලැබ ඇත. ඒ පිලිබඳ ප්‍රධාන විමර්ශන නිලධාරී ගේ සාක්ෂිය මෙහෙයවා ඇති අතර විත්තිය පිලිබඳව කිසිදු වාදයක් කර නොමැත. එම සාක්ෂි හරස් ප්‍රශ්න වලදී බිඳ වැටීද නොමැත.”

The Learned High Court Judge has simply accepted the said confession on the basis that it was given voluntarily to this witness by the Accused, he has failed to analyse whether such a confession was actually made by the Accused to PW1.

We find it noteworthy that PW1 visited the burial site prior to the alleged confession from the accused. This raises questions about why he did so and how he was able to identify the location of the body before the accused supposedly revealed it. Furthermore, he admitted to habitually spending nights in the forest, which is also where the accused showed him the burial site.

Another troubling piece of evidence is that PW1 reported the situation to the police only after the accused assaulted his father. Given the entirety of his testimony and his acknowledged difficulties with memory recall, we are inclined to view his evidence as unreliable.

Thus, serious doubt remains as to whether a confession was indeed made by the accused to PW1.

In the case of **King v. Abeywickrema 44 NLR 254** his Lordship Soertsz S.P.J. held that:

“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 the case of **B.R.R.A. Jagath Pramawansha v. The Attorney General CA Appeal No. 173/2005**, decided on 19.03.2009, his Lordship Sisira de Abrew J. analysed a few of the leading authorities on this point thus:

"Having regard to the principles laid down in the above judicial decisions, I hold 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 inescapably conclusion that the accused committed the offence. When the evidence adduced at the trial is considered, the one and only irresistible and inescapable conclusion that can be arrived at is that the accused committed the murder..."

Therefore we reject PW1's evidence.

Two other elements of the evidence that warrant consideration are the necklace reportedly worn by the deceased, which was recovered later, and the phone calls made to the number '0777771986'. Firstly, the necklace (presented as Exhibit P3) was not definitively identified by PW2 (the daughter-in-law of the deceased). Secondly, the nature of the phone calls made to PW5, requesting to speak to the deceased, remains an open question. This ambiguity creates doubt as to whether these phone calls can be directly linked to the guilt in this case.

The prosecution has failed to establish the guilt of the Accused beyond reasonable doubt, the production discovered only embraces the knowledge of the Accused to these items being recovered from the places which they were detected however there is no evidence connecting him with the murder of *Podi Menike Yapa*.

We are of the firm opinion that the circumstantial evidence used against the Accused does not indicate his guilt. Therefore, we overturn the findings, conviction, and sentence imposed on the Accused, thereby acquitting him. Consequently, this Appeal is granted.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL