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

In the matter of an appeal in terms of Article 138 (1) of the Constitution read together with section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka

Complainant

Gunapolasingam Benet Jerome

Accused

CA Case No:

CA/HCC/255/17

HC of Jaffna Case No:

HC/1974/2016

AND NOW BETWEEN

Gunapolasingam Benet Jerome

Accused-Appellant

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

Before: **Menaka Wijesundera, J.**

B. Sasi Mahendran, J.

Counsel: N. Srikanthan with S. Panchadsaran for the Accused-Appellant

Shaminda Wickrama, SSC for the Respondent

Written Submissions On: 26.08.2020 (by the Accused-Appellant)

04.05.2022 (by the Respondent)

Argued On: 13.06.2023

Decided On: 03.08.2023

Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as "the Accused") was indicted in the High Court of Jaffna under Section 296 of the Penal Code for committing the murder of Vetharasa Lily Mary (hereinafter referred to as "the Deceased") on the 29th of December 2008.

The Prosecution led evidence from eleven witnesses, with marked productions from P1 to P4, and closed its case. The Accused also gave evidence from the witness box. At the conclusion of the trial, the Learned High Court Judge found the Accused guilty and imposed the death sentence.

The following grounds for appeal were set out in the written submission.

1. There is no substantial evidence either direct or circumstantial led by the prosecution incriminating the Accused-Appellant.
2. In the absence of any eyewitness, the evidence submitted by the prosecution went only to the extent of establishing
    a. The death of the deceased
    b. The exhumation of her decomposed body on judicial order following information and
    c. The fact that the death was caused by violence. Thus, the case of the prosecution was bound to fail.

3. The fact that, in addition to the absence of either direct or circumstantial evidence, there was no cogent evidence incriminating the applicant-petitioner, in the form of (1) Any recovery in consequence of his own statement permissible under section 27 (1) of the Evidence Ordinance connecting him with the death of the deceased, or (2) his own confession to a Learned Magistrate, and thus the conviction cannot be sustained.

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.

In the case of ***State of U.P. vs Dr. Ravindra Prakash Mittal*** **1992, 2 S.C.J, 549** it was held that the essential ingredients to prove guilt of an accused person by circumstantial evidence are :-

1) The circumstances from which the conclusion was drawn should be fully proved:

2) The circumstances should be conclusive in nature;

3) All the facts so established should be consistent with the hypothesis of guilt and inconsistent with innocence;

4) The circumstance should; to a moral certainty, exclude the possibility of guilt of any person other than the accused.

This judgement was referred by **Balapatabendi, J** in the case of **Karunasena v. Attorney General,2005 (2) SLR 233.**

Before we scrutinize the evidence led before the Learned High Court Judge, it is pertinent to consider the reasons found in his judgment that led him to form the opinion with regard to the guilt of the Accused.

On Page 153 of the translated brief;

Analysis of evidence by Court that it was the accused who had committed the murder

1. The person who was murdered in this case had been living at No.18 Martin Lane Jaffna.

2. The accused and his wife too had been living in that house on rent.

3. The first information with regard to murder of Lily Mary and her body was buried at No. 14 Martin Lane was informed to the police by the accused's wife Roxy.

4. The wife of the accused Roxy is dead now.

5. A complainant was made to the police with regard to Lily Mary going missing, in December 2008.

6. Accused Jerome had sold a gold chain in December 2008 the 5th witness. Joseph Welington who was a jewelry shop owner. That chain had been melted by the witness. The witness said that as per the police, that chain was of Lily Mary.

7. This sale of the chain had taken place in December 2008 by the accused Jerome.

8. It has been proved that Lily Mary had gone missing during 2008 December.

9. Accused in his evidence had said that he was arrested by the Army Intelligence in December 2009.

10. The accused did not put forward any witnesses documents with regard to his arrest.

11. It has been proved that the chain of Lily Mary was sold by accused Jerome to the jewelry shop of the 5th witness (But the chain had been melted)

12. Similarly a pair of ear studs was sold at the jewelry shop of witness No. 3 in December 2008.That too had been melted.

13. The spot where the corpse was buried was shown to the Magistrate by wife of the accused, Roxy.

14. It is proved that the accused, his wife and the deceased Lily Mary had been living in that house.
15. Almost after period of 2 ½ months information regarding the murder of Lily Mary and the place where the corpse was buried were given to the police by the wife of the accused and corpse was exhumed at No. 18 Martin Lane Jaffna.

16. Lily Mary who lived at the address is dead. The wife of the accused Roxy too has died now. Only the accused Jerome who lived in that house is alive.

17. Evidence Ordinance states that the wife who gave information with regard to the murder and the place of the corpse where it was buried, cannot give evidence against the husband.

18. The case commenced based on the complainant and information given by the wife of the accused under section 109 and 110 of the Criminal Procedure Code.

19. The corpse was exhumed on 11/03/2009 before the Magistrate.

20. The spot where the corps was, had been identified by the wife of the accused.

21. In the evidence of the accused, he said that he was arrested by the Intelligence officer during December 2008 and that he was not at Martin Lane.

22. According to Section 103 of the Evidence Ordinance the onus of proving the particular information lies with the accused. The matter that the accused was arrested by the Army Intelligence was not proved by the accused in Court. On the contrary, the matter of the accused being at No.18 Martin Lane during December 2008, and the matter of Lily Mary going missing in that month, the sale of Lily Mary Jewellery that were sold to a Jewellery shop in 2008 December and the matter of the accused selling that gold chain directly to the jewellery shop that was said in the evidence of witness Joseph Wellington have been proved.

23. Therefore it is proved that when Lily Mary went missing in 2008 December, the presence of accused, Jerome being in that house has been proved.

24. It is proved that it was the wife of the accused, Roxy who had given all the information with regard to the murder to the police and had assist the police to recover the corpse. She is now dead.

25. As such, the Court pronounce the Judgment in this case that it has been proved beyond reasonable doubt through circumstantial evidence that it was accused Jerome who had committed the murder of Lily Mary.

The question before us is whether the prosecution has established sufficient evidence for the court to form an inference that the one and only irresistible and inescapable conclusion is that the Accused himself committed this crime.

To answer this question, we focus on the evidence led by the prosecution before the trial:

According to PW1 Jayakumaran Rajkumaran, a relative (great-grandson) of the deceased, he was informed by the Accused's wife, Jerome Roxy, and his mother-in-law, Anthony Ritamalar (PW2), about the killing and burying of his relative, the Deceased. According to PW1, it was an assumption that the Deceased's body could be at the house. During this time, the Accused's wife and PW2, after quarreling with the Accused, were residing close to PW1's house. This is when they decided to tell PW1 that the Deceased's body was at their house (the Accused's house). PW1 had already lodged a complaint three days after her disappearance and was later notified by the Accused's wife and PW2 about the Deceased's demise. PW1 and his brother-in-law then lodged a complaint with the Police, who conducted the investigation and recovery of the Deceased's body from the Accused's house. The place was pointed out by the Accused's wife and PW2, and they dug up and recovered the decayed body. PW1 identified the decayed body as that of his relative.

In his cross-examination, it was put forward that the Accused's wife had made the complaint to the police station two months after the killing of the Deceased, and that the particular place where the body was buried was exactly pointed out by the Accused's wife,

stating that this was where the body was buried. This piece of evidence was challenged by the Accused.

It must be noted that his statement was recorded 2½ months after the incident. No reason was given for this delay. We are mindful of the Accused's allegation in their grounds of appeal.

We are mindful that PW8 IP Rukmal, who conducted the investigation, was not called to give evidence at the trial. The Learned High Court Judge only relied on the premise of the evidence postulated by the 10 witnesses that were summoned, as the prosecution had not elicited the reason as to why the Accused had committed the murder of the Deceased, as there had been no evidence postulated by the witnesses regarding this issue. This raises the question as to whether the evidence relied upon by the Learned High Court Judge is enough to convict the Accused of the Murder of the Deceased.

The Accused's version:

The Accused testified under oath that he used to live at the house at No. 18 Matin Lane, which was given by his grandfather, as it was owned by his relatives. The Accused and his wife moved into that house during that time, and the old lady had been residing there for seven years. It was pointed out that she was not the owner of that house. The Accused, his wife, and their child (who was born later) resided there along with the Deceased, as she was asked to stay behind instead of going to an elder's home. After finding out about his wife's previous marriage, which was not disclosed to him, he engaged in a physical altercation with his wife. Later on, after his father-in-law committed suicide, his brother-in-law and his wife assaulted him. Afterward, he lived at his friend's house, which was on the same road in front of his house. Due to a dispute with Chooti, he reported the Accused to the Army intelligence unit due to his affiliation with the LTTE, where he was later apprehended towards the end of November 2008. He was assaulted and confined for 26 days. In his re-examination, he was released on the 26th of January 2009. After that, when he returned home, his wife, child, and the old lady were not at home. Upon further inspection, PW2 told him that his wife and child were not there anymore, and he later learned that his wife had left with Chooti. He then reported this to the police, who merely overlooked his complaint. One night, when he was alone, the roof of his house was set on fire, and succumbing to fear, he lived with his grandfather. When he was at a church, he was put into a police jeep, and upon being arrested, he was inquired about the whereabouts of the old lady, of whom he had no knowledge of her disappearance.

Thereafter, he learned that his wife had reported to the police that he had killed and buried the body of the Deceased. He was assaulted while under custody. Prior to these events, he stated that the Deceased had informed him that Chooti used to visit their house and give money to his wife from the Accused's bank account. Eight people were arrested alongside him on that day.

In his cross-examination, he stated that he did not know where his family had gone to, and he did not take any action to find them as he feared that he would be taken by the Army and assaulted again.

We must note that in the evidence given by the Accused from the evidence box, he was not questioned about the gold jewelry that was sold off to the goldsmiths by the prosecution. Neither was he questioned about the reason for the killing of the old lady who resided in his house.

It is pertinent to note that according to the evidence statement given by PW11, it was the Accused's wife who pointed out the location of where the body was buried. This gives rise to the question as to how she knew precisely where the exact spot was, and how it had created credibility to believe the statement given by her to the police about this incident. We are mindful of **Section 120 (2) of the Evidence Ordinance**, which reads as follows: "In criminal proceedings against any person the husband or wife of such person respectively shall be a competent witness if called by the accused, but in that case, all communications between them shall cease to be privileged."

The Learned High Court Judge has considered this evidence against the Accused. **As per page 153 of the translated brief**:

20. The spot where the corps was, had been identified by the wife of the accused.

24. It is proved that it was the wife of the accused, Roxy who had given all the information with regard to the murder to the police and had assist the police to recover the corpse. She is now dead.

On the other hand, the Learned High Court judge has failed to consider the following evidence;

1. Apart from the Accused there were other people including his wife living in that house at the time of the incident.

2. Evidence given by the Accused stated that there was animosity between the Accused himself and his wife which existed prior to this incident.

We are mindful of the following Indian judgement that was considered by our judges when dealing with circumstantial evidence:

In the case of **Hanumant Govind Nargundkar and another v. State of Madhya Pradesh, AIR 1952 SC 343 at Page 345, Mahajan, J** held that **,**

"In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore, it is right to recall the warning addressed by Baron Alderson, to the jury in Reg v. Hodge ((1838) 2 Lew. 227), where he said :-

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to from parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

For this, we shall follow the judgements passed in the cases of;

In the case of **Sudu Hakuruge Jamis and 1 Other v. The Attorney General, CA 204/2010, decided on 13.11.2013, Sisira De Abrew, J** held;

"Applying the principles laid down in the above judicial decisions, I hold that in a case of circumstantial evidence if the Court is going to arrive at a conclusion that the accused is guilty of the offence, such an inference must be the one and only irresistible and inescapable conclusion that the accused himself committed the crime. Further I hold

that if the proved facts are not consistent with the guilt of the accused, he must be acquitted."

This was further analysed in the case of **H.K.K.Habakkala v. Attorney General CA Appeal 107/2005,** his Lordship **Sisira De Abrew, J** held that:

"The case against the appellant entirely depended on circumstantial evidence. Therefore it is necessary to consider the principles governing cases of circumstantial evidence." In his judgement he had referred the following case of *Don Sunny v. AG 1998 2 SLR Page 1 Gunasekara J held that*

1. when a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence. On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.
2. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.
3. If upon a consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence then they can be found guilty."

Therefore, we hold that the prosecution has failed to draw inference between the deceased body found at the accused's property and the accused himself.

The next point we need to consider is the items of gold jewelry that were sold and exchanged by the Accused with the witnesses PW3 and PW5. They claim that the Accused had visited their respective shops to exchange items of gold jewelry, which were later melted after the transaction was completed. It is evident that these items of jewelry were not identified by anyone as they were melted. We observe that the learned High Court judge had come to the conclusion that these items were identified by the police but had been melted before the recovery was made. So, the issue raised here is how a connection was made between the said melted jewelry and the deceased.

In the case of **RANASINGHE v. ATTORNEY-GENERAL 2007/ 1 S L.R 218, at page 223, his Lordship Sisira De Abrew, J** held that;

"The learned Counsel for the appellant was that the erroneous approach of the learned trial Judge with regard to section 27 (Evidence Ordinance) statement of the appellant (hereinafter referred to as section 27 statement). Learned trial Judge, referring to recovery of iron club recovered from a well, observed as follows: "This iron club was recovered from a well in consequence of the accused's statement. This shows that the accused tried to hide the weapon which was used to commit the crime." In my view the above conclusion of the learned trial Judge is erroneous since discovery in consequence of a section 27 statement only leads to the conclusion that the accused had the knowledge as to the weapon being kept at the place from which it was detected. This view is supported by the judgment of His Lordship Justice Sirimane (with whom Samarawickrama, J. and Weeramantry, J. agreed) in the case of Heenbanda v Queers7) which states as follows: "Where part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance, it is the duty of the trial Judge to explain to the Jury that such a statement is only evidence of the fact that the accused knew where the article discovered could be found, and nothing more."

It is not sufficient to convict the Accused based on the witness statements given by PW3 and PW5 about the gold jewelry, which was sold and exchanged by the Accused, and which was not identified by anyone as belonging to the Deceased.

After considering the above-said facts and the judgments, it is my considered opinion that the circumstantial evidence led by the prosecution against this accused was not sufficient to prove his guilt with regard to the murder of Vetharasa Lily Mary (the Deceased). Therefore, we set aside the findings, conviction, and sentence imposed on the Accused, and acquit him. This Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL