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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal No:
CA/HCC/0020/2021

Medawatte Hewayalage Kosala Sisila Kumara

High Court of Ratnapura
Case No: HC/13/2008

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Indika Mallawarachchi for the Appellant.**
Anoopa de Silva, DSG for the Respondent.

ARGUED ON : **20/06/2023.**

DECIDED ON : **15/09/2023.**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Ratnapura on the following charges:

1. That on or about the 3rd September 2005, the accused committed the offence of murder by causing the death of Hewayalage Manel Chitralatha which is an offence punishable under Section 296 of the Penal Code.
2. That at the same time and place and in the course of same transaction the accused committed the offence of robbery of a gold chain valued at Rs.11000/- from the possession of the above-named victim which is an offence punishable under Section 380 of the Penal Code.
3. That on or about 06.09.2005 in the course of same transaction the accused disposed of the gold chain valued at Rs.11000/- by pawning the same to the People's Bank which is an offence punishable under Section 396 of the Penal Code.

The trial commenced before the High Court Judge as the Appellant had opted for a non-jury trial. 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 the case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant as follows:

1. For the 1st count he was sentenced to death.
2. For the 2nd count he was sentenced to 8 years rigorous imprisonment with a fine of Rs.15,000/-. In default a term of 1-year simple imprisonment imposed.
3. For the 3rd count he was acquitted from the charge.

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 platform from prison.

Counsel appearing for the Appellant has submitted the following grounds of appeal.

1. The prosecution has failed to establish the *corpus delicti* beyond reasonable doubt.
2. The Learned High Court Judge erred by relying upon the last seen theory.
3. The ingredients of the charges are not proved beyond reasonable doubt.

Background of the Case *albeit* **briefly is as follows**

According to PW1 Damayanthi, the Appellant is her brother-in-law. The deceased is her sister who was married to Susantha Deepal, who is the 16th witness in this case. Her mother, PW2, had a plot of land grown with tea.

She had divided the same among her children keeping a portion for herself too. All recipients of the land used to work in their respective portions of land. On 03.09.2005, although it was a rainy day, the deceased had gone to her land for work but had not returned. The deceased had gone to her land despite the advice not to go, given by PW1 and PW2.The deceased was last seen with a black pleated skirt and a black sleeveless T shirt. Further, she had worn a pair of tussle earrings and a gold chain with a flower shaped pendant. The deceased had left home between 7 to 7.30 am on that day. The distance between her home and the land is approximately about 2 km. At the relevant time, the deceased's husband was in remand. Usually, the deceased returns home at about 4.00 pm, after work. However, on that day she had not returned home by that time. A search was carried out to find out the deceased was not to be found. Hence, the witness's elder sister's husband PW7 had lodged a complaint at the Nivithigala Police Station on the following day. The witness had looked for her sister for about one year but she couldn't find her sister.

In the meantime, on 02.09.2006, two police officers from Nivithigala Police Station had come to her house. At that time, the Appellant was in her house. Although the police officers insisted the Appellant to come to the police station to record a statement, the Appellant had surreptitiously evaded them. The two police officers and PW1 had looked for the Appellant till in the evening but the Appellant was not to be found.

On 05.09.2006, PW1 had received a call from the Appellant and he informed PW1 that he knows where the "Appo" was Appo is the nick name of the deceased. When she confronted with the Appellant about this information, he said nothing. Thereafter, she had requested the Appellant to pass this information to the police but he had done nothing.

On 07.09.2006, while PW1 was attending work at her plot of land, a woman namely, Sumanawathi had told her that the Appellant had come to her house. When she rushed to her house, she found the Appellant was inside

and some people gathered outside.PW7 and a person called Rathasena had taken the Appellant to the police. On 08.09.2006, PW1 had received a call from the police. As per the request of police PW1 and her mother PW2 had gone to a cave located within the close proximity of her house. As per the request, when she and her mother looked into the cave, they had seen bones. Thereafter the police had produced an earring worn by the deceased allegedly to have been discovered from the place where the bones were scattered.

At the trial, PW1 had identified the earrings, a gold chain with a pendant and the clothes worn by the deceased on the last date the deceased was seen alive.

PW2, Agnes Nona had corroborated the evidence given by PW1.

According to PW3, Piyasena, he too had a plot of land close to the land belonging to PW2. On the date of incident, he too had gone to his land to cut a Kittul flower. As his Wadiya was situated close to the Kittul tree, he had gone there to pluck some beetle. When he was in his Wadiya, the Appellant had come there between 8.00-9.00 am, and asked for a bottle of Arrack. As he was not in possessed immediately, he promised that he could arrange it in the evening. Thereafter, both had gone to another Wadiya owned by PW5, Peiris. He has seen the deceased also there. All had consumed tea and he left the place leaving PW5 and the deceased. At that time PW4, Mallika also had come there. After leaving the Wadiya of Peiris, he had not seen the deceased alive after that.

PW4 Mallika also had corroborated the evidence of PW3. Further, she had seen the deceased working in her plot of land in the morning.

According to PW16, Susantha Deepal, husband of the deceased, during the relevant time was in the Kuruwita Prison and the deceased visited him and advised him not to smoke cigarette, and not to have bad friendship. The deceased last visited him on 25.08.2005. He had identified the gold chain of the deceased.

The Appellant had also visited PW16 and told him that there is a rumour that the deceased had been concealed among rocks.

PW10, Ajith Tennakoon, the Consultant JMO carried out the post mortem on the remains submitted to him by the police.

The clothes last worn by the deceased had been identified by her sisters. The JMO had noticed a noose amongst the skeletal remains. According to the JMO, the skull of the skeletal remains is belonged to a female. The said opinion was arrived based on the smoothness of the skull and the fact that it was small in size. The said conclusion was based on the premise that the area of the skull bone which touches and flesh to not to have been formed properly. Further, the front portion of the skull the forehead area of the skull to be jutting out. The mastoid bone of the skull had been small in size and naso frontal angle which is triangular in shape had also been observed to be wide. The eye holes of the skull had also been circular in shape. According to the JMO all these features were identified to be characteristic of a female skull.

Further, the examination revealed basisphenoids suture to be fully closed. This feature, according to the JMO, appear on a person who is more than 20 years. The JMO opined that the skull sutures get closed completely when one is over 30 years of age. The JMO having examined the placing of the basisphenoids suture and the skull suture arrived at the conclusion that the skeleton remains belonged to a female between the age of 21 and 30 years.

According to the JMO, the lower jaw and the hip bone of the skeleton remains had also comprised of a female characteristic. The front aspect of the hip bone referred to as the symphysis comprises of gutters and protrusions when the person is young. This too had been considered to be an age indicator. As the person gets older these gutters and protrusions will disappear.

Furthermore, examination revealed that the sacrum to be wide and circular in shape. According to the JMO, this is an indicator that the bones belong to a female.

The JMO had observed one of the ribs on the left side frontal aspect of the body being subjected to an ante-mortem fracture. Further, the hyoid bone had gone missing.

Following comments were made by the JMO in his Post Mortem Report.

1. The examination of the skeleton remains revealed that those bones were of human origin and belongings to a female of 25-30 years of age.
2. The deceased was identified by the relatives by the clothing found with the remains.
3. There was a single ante-mortem rib fracture which may have been caused by the blunt force. (This could have been caused by blow from a fist)
4. There was no evidence of fatal injuries in bones to establish the cause of death.
5. Presence of a ligature made from a meshy gunny bag with a running knot may suggest strangulation.

The JMO opined that the fracture on the left rib could have been caused by a person sitting on the body of the deceased for the purpose of fixing the noose on the neck of the deceased. Further, the JMO had identified the fracture to be ante-mortem injury based on the following:

- The fact that there was evidence that there had been a flowing of blood on the bone,
- As the bone had got discoloured by the blood.

The JMO had categorically ruled out the impossibility of suicide based on the premise that the material used to make the noose had not been strong enough and there cannot be a rib fracture in the event a suicide had taken place.

The remains were not sent for DNA test as there was no facility available at that time.

PW11 IP/Malawiarachchi was the Officer-in-Charge of the Crime Unit of the Nivithigala Police Station in the year 2005. After receiving the complaint with regard to the disappearance of the deceased, he had commenced proper investigation in to the disappearance of the deceased upon receiving a letter from the PW16, the husband of the deceased. He had sent the letter while he was in the Kuruvita Prison. PW11 had commenced his investigation on 08.09.2006.

Firstly, the Appellant was taken into custody at his wife's residence. At the time of arrest, the Appellant had tried to escape from the police custody. A statement was recorded in the police jeep itself. The Appellant made a statement under section 27(1) of the Evidence Ordinance and revealed where the deceased's body was and pawning receipt of deceased's gold chain.

As per the information, the police team had gone in the jeep up to a place called '26 Kella' with the Appellant. Thereafter the team had gone into forest reserve with much difficulty. From there the team had gone to a place called '26 Dola'. The Appellant had then pointed a rocky cave like structure which had comprised of two rocks covered by another rock hidden under a mass of thorny bushes and reeds. Thereafter, on the pointing of the Appellant, they recovered the skeleton remains of the deceased inside a rocky cave which is about 5 feet in height. The rocky cave only surfaced after the cleaning of the thorn bushes and reeds with much difficulty. As it was dark inside the cave, after flashing a torch PW11 had spotted the skull and a ball of hair lying next to the skull. There had been a piece of black cloth amongst the ball of hair.

Next the witness had spotted a skeleton remain of a foot lying near the mouth of the cave. Upon further search, an earring which glittered under the torch light was found lying inside the cave.

Thereafter, PW11 and several police officers had gone to the Appellant's house and recovered a pawning receipt from a tube used to fix the lamp. The receipt number is 3602819, issued by the Peoples Bank Kahawatta Branch in the name of the Appellant and his identity card number for pawning a gold chain for Rs.11000/-.Upon a Court order the gold chain was taken into police custody.

After the Magisterial inquiry, the skeleton remains were sent for post mortem examination. The prosecution had closed the case after leading prosecution witnesses and marking productions P1-16. When the defence was called the Appellant made a dock statement and closed the case.

In his dock statement the Appellant while denying the charge, admitted the fact that he lived with his wife in his wife's house. In definite terms the Appellant had stated that the deceased had joined him to go to the estate and also that she had left earlier.

In this case, the conviction is solely based on circumstantial evidence. It is well settled law that when the conviction is solely based on circumstantial evidence, the prosecution must prove that no one else but the Appellant had committed the crime. The below cited authorities set out the position succinctly.

In **King v. Abeywickrema Et Al** 44 NLR 254 the court 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 **Tamil Nadu v. Rajendran** Appeal (Cr.L) 917 of 1996 the Indian Supreme Court observed that:

> *"In a case of circumstantial evidence when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete."*

Hence, it is incumbent upon the prosecution that none other than the Appellant had committed the murder of the deceased.

In this appeal as the 1st and 3rd grounds raised are interconnected, those two grounds will be considered jointly hereinafter. In the first ground of appeal, the Appellant contend that the prosecution has failed to establish the *corpus delicti* beyond reasonable doubt. In the third ground of appeal, the Appellant contends that the ingredients of the charges are not proved beyond reasonable doubt.

Corpus delicti literally means "body of the crime" in Latin. In its original sense, the body in question refers not to a corpse but to the body of essential facts that, taken together, prove that a crime has been committed. In popular usage, *corpus delicti* also refers to the actual physical object upon which a crime has been committed. In a case of murder case, the victim's corpse.

E.R.S.R.Coomaraswamy in his book "The Law of Evidence" (Book 2 Vol.page 932) states:

> "The judge must in a case of murder or culpable homicide direct the jury on the necessary ingredients of the relevant offence;
>
> a) The death of the deceased,
> b) That the accused caused the death,

c) That the accused had the murderous intention in a case of murder or the necessary intention or knowledge in a case of culpable homicide not amounting to murder."

When a charge of murder is preferred against an accused, the evidence offered has to connect the accused with the crime.

In this case, the deceased went to her tea plantation on 03.05.2005 in the morning in a rainy weather. But she had not returned. The Appellant admitted in his dock statement that the deceased went with him together but she had returned earlier. The relevant portion is re-produced below:

Page 392 of the brief.

ගරු අධිකරණයෙන් අවසර උතුමාණනි. මගේ බිරිඳගේ අක්කා තමයි මිය ගොස් තියෙන්නේ. මගේ අතින් මෙහෙම දෙයක් සිදු වුනේ නැහැ උතුමාණනි. මම කසාද බැඳලා හිටියේ ඒ ගෙදර. මගෙත් එක්ක ඉඩමට ගියා. ඉඩමෙන් ආපසු ඇවිල්ලා. ඉඩමින් මට කලින් ආවා. මම ඉඩමේ වැඩ කර කර හිටියේ. මෙම තැනැත්තියට මම එහෙම දෙයක් කළේ නැහැ.

While the investigation was going on, according to PW1, on 02.09.2006, two police officers had come to her house. At that time the Appellant had been there. When the police officers asked the Appellant to come to the Nivithigala Police Station to record a statement regarding the disappearance of the deceased, the Appellant had however managed to escape from the police on that day.

Further on 05.09.2006, PW1 had received a call from the Appellant and he informed that he knew where Appo was. Appo is the nick name of the deceased. When she told the Appellant to pass this information to police, he did not do it.

In **RM Malkani v State of Maharashtra**, AIR 1973 SC 157, conversation over telephone for settling details for passing bribe-money was recorded by secret instruments. This was held by Apex Court to be evidence of conduct.

According to PW16, the husband of the deceased, the Appellant had visited him at the Kuruwita Prison and told him that his wife has been concealed among rocks. When he confronted with the Appellant about this story, he just left the place abruptly. As this caused serious doubt on the Appellant, he had told this to the Prison Superintendent who wrote it down and forwarded it to the police.

The relevant portion is re-produced below:

Page 180 of the brief.

උ : එයා ඇවිල්ලා කිව්වා මානෙල් ගල් ගොඩක් අස්සේ හංගා ගෙන ඉන්නවා කියලා ආරංචියක් තියෙනවා. මානෙල් අක්කා අතුරුදහන් වෙලා කියලා කිව්වා. මං කිව්වා මානෙල් අක්කා අතුරුදහන් වෙන්න විදියක් නැහැ. මේ දෙන්නා විරසක වෙලා හිටියේ. ඒ නිසා මං කිව්වා ඔයායි නැන්දායි මේ ගැන දැන ගන්න ඕන කියලා කිව්වා. එයා එහෙම කියන කොට මාත් එක්ක කතා කලෙත් නැහැ. ටක් ගාලා හැරිලා ආවා.

The previous and subsequent conduct of the Appellant also gives rise to a reasonable suspicion about him. Now I consider whether the previous and subsequent conduct of the Appellant are relevant to this case.

Section 8(1) and 8(2) of Evidence Ordinance are read as follows:

> 8 (1) Any fact is relevant which shows or constitute a motive or preparation for any fact in issue or relevant fact.
>
> 8 (2) The conduct of any party, or of any agent to any party, to any suit or proceedings in reference to such suit or proceedings 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, if

> such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

The three incidents mentioned above clearly shows the suspicious conduct of the Appellant.

The court has to take into account, most seriously, both the previous and subsequent conduct of the accused before drawing any conclusion regarding the guilt or innocence of the accused and very rightly so. It is by analysing carefully the conduct of the accused both previous and subsequent that the court draws its own logical inference. Therefore, the role of conduct and importance of its evidentiary value can never be overlooked or underestimated by any court in determining the conviction or acquittal of the accused. 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 innocence or guilt of the accused. So, it is the bounden duty of all the concerned courts to analyse carefully both the previous and subsequent conduct of the accused before drawing any definite conclusions.

The legality of the recovery made under Section 27(1) Evidence Ordinance has been discussed in several cases in our jurisdiction.

According to Section 27(1) of the Evidence Ordinance-

> "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."*

After the arrest of the Appellant, PW11 had recorded his statement and recovered the skeleton remains of the deceased and the gold chain of the deceased under section 27(1) of the Evidence Ordinance.

PW11 in his evidence stated that they reached the place where the skeleton remains were found with much difficulty as the place was under a mass of thorny busses and reeds. The rocky cave had surfaced only after the cleaning of the thorn busses and reeds with the greatest difficulty.

In **De Saram v The Republic of Sri Lanka** [2002] 1 SLR page 288 held that:

> *"for the basis of admissibility of the accused statement was not that the accused confessed to the crime but the fact that he knew where the deceased's body was buried. Evidence of the accused's information was therefore admissible under section 27(1) of the Evidence Ordinance".*

In this case, after the arrest of the Appellant, the investigating officer had properly followed the necessary requirements under section 27(1) of Evidence Ordinance and had recovered the skeleton remains of the deceased

and the gold chain of the deceased and presented it to court properly to establish nexus to the alleged offence by the Appellant. As no improper procedure has been followed to adduce this evidence in the trial, the Learned High Court Judge had very correctly considered this as admissible evidence in his judgment.

PW10, Dr.Ajith Tennakoon, a well experienced Consultant Judicial Medical Officer had conducted the post mortem on the remains recovered under section 27(1) of the Evidence Ordinance. Using his expertise and knowledge in the field of Judicial Medical Science, he had expressed his opinion with credible reasons that the recovered skeleton remains were belonging to a female who was between ages of 21 to 30 years. Further, he had come to logical conclusions correctly by excluding the possibility of suicide. The High Court Judge had correctly accepted his opinion expressed under Section 45 of the Evidence Ordinance.

Considering the evidence that the PW1 had looked for the deceased about one year, the Appellant's evasion from giving statement and evading giving a statement to the two police officers who came to PW1's residence for investigation, the Appellant giving a phone call to PW1 and informed that he knows whereabouts of the deceased also known as 'Appo', the Appellant meeting the deceased's husband at the Kuruwita Prison and informing him that he knew that the deceased was concealed among rocks, the attempt to run away when he was arrested, the recovery of the remains of the deceased upon the statement of the Appellant made under section 27(1) of the Evidence Ordinance, identification of the deceased's earrings and clothes worn at the time of her disappearance, the recovery of the gold chain of the deceased pawned in a bank in the name of the Appellant and his identity card, the conclusion reached by the JMO that the skeleton remains belonged to a human being, between the ages of 21-30 years, the relations identified the remains as to the deceased's by her last worn clothes and the earring, ante-mortem rib fracture caused by a blunt weapon and there is a possibility

that the death would have been caused by a ligature strangulation are indeed a clinching and definitive character unerringly leading to the inference that the victim concerned has met with a homicidal death. It is further established that the evidence led was sufficient to come to the conclusion that within all the probability, the deceased had been murdered by the Appellant. Hence, the 1st and 3rd appeal grounds have no merit at all.

In the 2nd ground of appeal, the Counsel for the Appellant contends that the Learned High Court Judge erred by relying upon the last seen theory.

In this case according to PW3 and PW4, all had tea at a Wadiya owned by Peiris Aiya. But none of the witness said that they had last seen the deceased with the Appellant. Hence, I too agree that the application of last seen theory in to this case is not proper. Hence, I conclude that the 2nd ground of appeal has merit.

It is well settled law that when the conviction is solely based on circumstantial evidence, the prosecution must prove that no one else but the Appellant had committed the crime. In this case, considering all the circumstances, the only cogent inference that can be drawn is that the Appellant had committed the offence.

The Appellant in his dock statement denied the allegation levelled against him. Though he has not been bound by law to offer any explanation, he failed to offer an explanation when strong and incriminating evidence had been led against him.

Having with regard to the nature of the circumstantial evidence led by the prosecution, I am inclined to accept the submissions of the learned Deputy Solicitor General that the strong items of circumstantial evidence unexplained by the Appellant would itself be adequate to establish the charges against the Appellant. Hence, I am of the view that the learned trial Judge has rightly convicted the Appellant for the charges of Murder and

Robbery levelled against him. In the said circumstances I see no reason to interfere with the Judgement of the High Court Judge dated 11.02.2021. Hence, 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 Ratnapura along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL