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 against a Judgment of the High Court Gampaha

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Court of Appeal Case No: - CA-HCC-0227-18

High Court of Gampaha Case No: - HC/297/2004

Vs.

01. Liyanage Lalitha Rohan Perera
02. Bope Kankanamalage Shanthi alias Eldeniye Sheela Shanthi

ACCUSED

AND NOW BETWEEN

Bope Kankanamalage Shanthi alias Eldeniye Sheela Shanthi

02nd ACCUSED-APPELLANT

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12

RESPONDENT

Before : - Menaka Wijesundera, J.

B. Sasi Mahendran, J.

Counsel : - Palitha Fernando, P.C. with Neranjan Jayasinghe for the Accused-Appellant.

Dilan Ratnayake, S.D.S.G. for the Respondent.

Written : - 24.06.2019 by the Accused-Appellant.

Submissions on 27.06.2019 by the Respondent.

Argued on : - 07.09.2023

Decided on : - 10.10.2023

Menaka Wijesundera, J.

The instant appeal has been lodged to set aside the judgment dated 17.9.2018 of the High Court of Gampaha.

The accused appellant (hereinafter referred to as the appellant) has been indicted in the High Court of Gampaha along with the 1st accused for,

1) conspiracy to commit murder, against both.

2) murder only against the 1st accused,

3) aiding and abetting to commit murder against the appellant.

The appellant faced the trial but the 1st accused absconded but at the end of the trial the trial judge convicted the appellant for the 1st and the 3rd charges and passed the sentence of death. The trial judge also convicted the 1st accused for the first charge in his absence.

The appellant being aggrieved by the said conviction and the sentence has lodged the instant appeal.

The main ground of appeal raised by the Counsel for the appellant is the involuntariness of the confession made to the Magistrate of Gampaha by the appellant.

According to the evidence of the Magistrate who had given evidence on oath, the date of offence had been on 21st of October 1999 and facts had been reported on the 22nd of October 1999 and the same Magistrate has conducted the inquest and the appellant had made a statement as a witness and the Magistrate has ordered further investigations to be conducted against the appellant, and the police had arrested the appellant and had produced her as a suspect on the 23rd of October.

On this day the appellant had been produced to her quarters and the Magistrate had spoken to her and after she made the request that her confession be recorded the Magistrate had taken her to the shrine room and had told her to engage in religious activities if she wants and then only had she queried her further. The appellant had once more told the Magistrate that she wants to make a confession, but the Magistrate had given her time to think about it and had remanded her till the 29th of October.

But upon a further report facts had been reported again on the 24th of October and on the request of the appellant she had been produced to the Magistrate on the 26th and the appellant had once again said that she had wanted to make a confession. She had been produced around 11.30 in the morning and when the Magistrate had queried as to why she wants to make a **statement she had said that she wants the world to know the truth and that she wants all women not to be deceived by men and fall in** to trouble. Thereafter the Magistrate had told her the implications of a confession and had told her to rethink and had given her time till 3.30 in the afternoon.

At 3.30 when the appellant had been produced before the Magistrate, she had told of the same consequences of making a confession and asked her very specifically whether she had been under any influence or threat from anyone in the prison and she had answered in the negative.

Hence the Magistrate had started to record the confession and the Court stenographer had been present inside the chamber other than the appellant and the Magistrate.

At 6.15 in the evening the recording of the confession has been concluded and the due certification on the confession by the Magistrate had been done. The trial judge had considered all these matters in his judgment.

When the prosecution had moved to mark the confession, the defense had objected and the trial judge had held a Voire Dire inquiry and the Magistrate had been very lengthily cross-examined and it had been suggested to her that she being the Magistrate who was involved at the initial stages of the investigations and in fact she being the person who instructed to commence investigations against the appellant, that the voluntariness of the confession is in doubt. But she had replied saying that she was empowered to do so under the law and it was her duty to do so.

The other officers who were involved in recording the confession had also been led in evidence and had been subjected to very lengthy cross-examination and the police officer who produced

the appellant to the Magistrate for the recording of the confession had admitted that the appellant had been in a poor state of mind at the time they went to arrest her.

The Magistrate also had been questioned as to her mental condition at the time the confession was recorded, she had said that the appellant had been in good condition but she had not been produced before a physiatrist. But we note that the appellant had been hospitalized soon after the incident and the doctors in the hospital had given her medical attention and if the requirement of physiatric treatment was evident the doctors then would have attended to it and there had been no note made to that effect by the doctors who had examined her.

At the end of the inquiry the trial judge had admitted the confession and it had been marked in evidence.

The learned Counsel for the appellant challenged the instant confession which had been marked in evidence on the basis that the Magistrate who recorded the confession had been involved at the investigation stage therefore the appellant was not in a position to make a voluntary confession.

Upon perusal of the evidence of the Magistrate and the evidence of the police officer who produced the appellant to the Magistrate to make the confession we observe that,

1) The very same magistrate who recorded the confession had been involved at the very initial stages of the investigations and it is the evidence given at the inquest which had prompted the Magistrate to direct the police to further investigate in to the behavior of the appellant.
2) The appellant was produced to make the confession while in custody,
3) The police officer who went to arrest the appellant had said in evidence that the appellant was not in a proper frame of mind at the time of the arrest,
4) The Magistrate had failed to produce the appellant to a psychiatrist before the recording of the confession.

Section 127 (3) of the Code of Criminal Procedure (herein after referred to a CPC) states very clearly as to how a Magistrate recording a statement under section 127 (1) should be satisfied that the accused who was to make the statement under the above section made it voluntarily.

In **the case of Rangasamy Kanaganayagum alias Attorney General CA (PHC) APN 13/2019 decided on 16.11.2020 has held in a case where the petitioners have made statements under section 127 of the** Code of Criminal Procedure Code that 'although it is under the purview of the trial Court determine the admissibly of the confession, **the magistrate who recorded the statement too should be mindful ….and should have probed further …. In order to exclude any possibility of any threat, promise or inducement, offered to the petitioner, luring them to make such confession, before proceeding into recording the statement."**

In the case of The Queen vs Ghanaseeha Thero and others 73 NLR 154, it has been held that" when considering a confession made by accused persons to a Magistrate under section 134 of the Criminal Procedure Code, were free and voluntary, not only facts proceeding the confessions but also facts which immediately followed the making of the confession are relevant."

In section 127 (3) it says that if the Magistrate has reason to believe that there was no threat or inducement, only the confession should be recorded and this reason to believe is that the Magistrate need not have positive proof that there was no threat or inducement but whether it appears to be that there was no threat or inducement, hence it is at a lesser degree than having positive proof of an inducement or threat. This has been discussed in the case of S Vivekananda and another vs S Selvaratnam 79 NLR 337 and it has referred to confessions recorded under section 24 of the Evidence Ordinance and discusses at length the need to ascertain that the confession was made without any type of inducement or threat.

Therefore, in the in the instant matter we find that the , Magistrate had conducted the inquest and at that time upon questioning the appellant she had felt suspicious and had ordered further investigations and when the appellant had been produced before her on the 23rd of October the appellant had stated that she wanted to make a confession and when the Magistrate had explained to her the legal implications the appellant had still been on the same footing and she had explained further and had said that the world must know the truth so that women in future will not get caught to men and fall in to trouble. The Magistrate had spoken to her very patiently and had made engage in some religious activities and later only she had spoken to her. Thereafter she had been given time to think till the 29th, but on the request of the appellant she had been produced on the 26th and then too she had been explained and given time to rethink her position but still she had been adamant to make a confession . Therefore, the Magistrate had taken steps to explain all the legal impediments in making a confession and furthermore the trial judge also had very succinctly considered all these aspects in his judgment.

The Magistrate had been cross examined by the defense as to why she was not sent to be examined by physiatrist and she had said that the appellant had looked very normal and had not appeared to be in want of phsyatric treatment.

Therefore, in view of the ingredients in section 127 of the CPC it is the opinion of this Court that it gives the Magistrate the discretion to decide as to whether the accused is fit to make a statement and the significant word is "fit" which gives the discretion for the magistrate to decide and the section nowhere had said that the Magistrate who was involved in the investigations cannot record a statement under section 127 of the CPC.

Whereas under the provisions of the Prevention of Terrorism Act it is very specifically stated that an Assistant Superintendent of Police and above has to record a confession of a suspect taken in to custody under the said act and no one else.

Even the cases discussed above refer to the fact that the Magistrate has to make sure regarding the voluntariness of a confessionary statement and in the instant matter we see ample reason to believe and conclude that it had been done so.

As such we see no merit in the submissions of the learned Presidents Counsel that he doubted the voluntariness of the confession of the appellant.

As the confession of the appellant has been admitted in evidence in the High Court certain portions of the confession has been marked in evidence and those indicate the following,

1) **that the appellant had an illicit affair with the 1st accused,**

2) that the appellant conspired with the 1st accused to kill the deceased,

3) and the appellant aided and abetted the 1st accused.

Hence on the material in the confession we find ample material against the appellant. But as stated by the trial judge we also find the following incriminating circumstantial evidence against the appellant led during the trial.

According to the evidence of the son and the daughter of the appellant the house of the appellant is a very secure house with a parapet wall around and on the day of the incident the son had gone to sleep in his room and so has the daughter of the deceased and when the son had wanted to go to the toilet in the middle of the night he had come out of his room and had seen the father on the floor but he had not taken much notice because on previous occasions also he had seen the deceased sleeping on the floor when there had been arguments between the deceased and the appellant ,hence had proceeded to sleep. But in the morning, he had heard the ringing of the alarm to which he had gone to the parent's room and had seen the mother loosely tied in the room and the mother had told him to call the driver. He had done so and he had called the driver who had given evidence later. The driver had let loose the appellant and thereafter the mother had not gone near the father who had been lying on the floor dead but had gone to the hospital. It is the mother of the deceased who had come and had taken steps to call the police. He had identified the jewelry shown by the prosecution which had belonged to the deceased. He had also said that there were times when the mother the appellant has had fights with the deceased and had left the house for short periods. He had very specifically said that the mother had not told him to look for the father and when the mother had been let loose had not even gone near the body of her husband to see as to what happened which this Court finds to be very unusual behavior for a

married woman and the trial judge also had observed the same. The first thing a normal married woman would have done was to first told the son to call the farther and then she herself would have first gone to see as to what happened to the man who had gone to sleep with her. Hence the behavior of the appellant after the incident is very suspicious and is very much out of the ordinary which only raises a reasonable doubt as to her innocence.

The daughter in her evidence had said that she had met the 1st accused in the company of the mother and the mother who is the appellant had asked her whether they could bring the 1st accused home when the father dies, but the daughter had replied that the deceased is yet to die. But she had not said the same to the police according to the evidence given in cross examination. But considering her age and the agitation she may have been undergoing at that time, one cannot expect perfect revelation of facts at the time she made a statement to the police.

The driver who had untied the appellant had said in evidence that the appellant had been tied very loosely and the piece of rope which had been used for the tying had been identified in Court.

A friend of the appellant who had said in evidence that the appellant has had an illicit affair with a navy officer named Rohana, and that she had warned her to stop it as she was a married woman with children but the appellant had said that she would die without him, and six days later the deceased had died. But she had made the statement to police one month later but she says that the delay was because that she was living away from the scene of crime and that she had told only her husband and it got delayed to be conveyed to the family of the deceased.

The police had received the 1st complaint on the 22nd morning and they had commenced investigations immediately. The police had said in evidence that the house of the deceased and the appellant had no sign of any house break although a robbery had been reported. All windows and doors had been intact. On the arrest of the 1st accused jewelry of the deceased had been recovered and the same had been identified by the son of the deceased.

Upon the conclusion of the prosecution case the appellant had made a statement from the dock. According to which she says that she was misled by the Magistrate and the police to make a statement on the hope of being made a state witness. But we find that the proposition of a state witness is considered much later in investigations of a case hence we see no truth in the statement and we consider the contents in the dock statement to be a mere after thought . As such we are of the opinion that the rejection of the dock statement by the trial judge is very correct.

As such we find ample circumstantial evidence implicating the appellant to find her guilty for the charges 1,3 and the contents of the confessionary statement in fact only facilitates these circumstances and those circumstances are as follows,

1) the evidence of the appellants friend which speaks to the illicit affair between the appellant and the 1st accused,

2) the evidence of the appellants daughter who speaks of a statement made by the appellant to her suggesting that take the 1st accused be taken to their home when the father is dead ,

3) the sons' evidence with regard to the unusual behavior of the appellant after the incident

4) the drivers' evidence which says that the appellant had been tied very loosely,

5) the evidence of the marital disputes between the deceased and the appellant,

6) the medical evidence which says that the deceased had died of manual strangulation by a short rope and the appellants bed smelling of urine and a spot of blood being detected by the police becomes vital because the doctor had said that when a person is strangled there are chances of him or her passing urine which means the strangulation may have taken place on the bed because the appellant had been tied to the bed, and the deceased would have been dragged outside the room and left on the floor to be discovered in the morning for it to look like a house break.

7) although a robbery had been reported there had been no sign of any house breaking and then question arises as to how the 1st accused entered the house when only the adult inmates had been the appellant the deceased, and their small children sleeping inside the house on that night.

Hence all the above circumstantial evidence only draws the irresistible inference that the appellant had aided and abetted the 1st accused and the confession had facilitated the said position and had further substantiated that she aided and abetted and conspired to commit the murder with the 1st accused by,

1) **Letting him in to the house on the fateful day by providing a key,**
2) **Discussions and planning as to how to kill the deceased with the 1st accused,**
3) **Motive**
4) **Finding the rope to strangle the deceased**
5) **Thereafter acting as if robbers entered the house and concealing the truth,**
6) **Not taking steps to inform the police about the murder and the robbery.**

Therefore, all thesis's items of glaring guilty of the appellant, in her statement from the dock she had not challenged any of the. At this point it is a well-founded principle of evidence that if something is within the knowledge of the accused if he or he offers no explanation that can be held against him or her under section 105 of the Evidence Ordinance. This by any means does not mean that an accused has to prove her innocence

but only a reasonable explanation which can be accepted by Court. But in this instance, we see none.

Hence in view of the above sated material we see no merit in the submission of the learned Counsel for appellant, hence we dismiss the instant petition of appeal and affirm the conviction and the sentence of the trial judge.

JUDGE OF THE COURT OF APPEAL

B. Sasi Mahendran, J.

I agree

JUDGE OF THE COURT OF APPEAL