

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

In the matter of an appeal in terms of
section 331 of the Code of Criminal Procedure
Act No.15 of 1979.

Court of Appeal Case No:

CA/HCC/23-25/2020

HC of Kalutara Case No:

HC 766/06

Democratic Socialist Republic of Sri Lanka

Complainant

v.

1. Wickramaarachchige Gamini Thilakasiri
2. Wickramaarachcige Neel Chandika
Wickramaarachchi
3. Dhammika Nilantha Walakularachchi
4. Madawala Maddumage Surendra

Accused

AND NOW BETWEEN

1. Wickramaarachchige Gamini Thilakasiri
2. Wickramaarachcige Neil Chandika
Wickramaarachchi
3. Dhammika Nilantha Walakularachchi

Accused-Appellant

v.

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

Respondent

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

Counsel: Anil Silva PC with Amaan Bandara for the 1st Accused-Appellant
Faisz Musthapha, PC, with K. Thilakaratne for the 2nd Accused-Appellant
Saliya Peiris PC, with Thanuka Nandasiri for the 3rd Accused-Appellant
Sudarshana De Silva DSG, for the Respondent

Written 22.10.2020(by the 1st Accused-Appellant)
Submissions: 03.10.2022 (by the 2nd Accused-Appellant)
On 19.03.2021 (by the 3rd Accused-Appellant)
13.05.2021, 04.10.2022(by the Respondent)

Argued On: 06.09.2023

Decided On: 01.11.2023

Sasi Mahendran, J.

The Accused-Appellants (hereinafter referred to as Accused) were Indicted before the High Court of *Kalutara* under Section 296 read with Section 32 of the Penal Code for committing the murder of *Sarath Chandrasena* (hereinafter referred to as the Deceased) on the 23rd of September 2001.

The Prosecution led evidence of nine witnesses and marked documents P1 to P7. After the conclusion of the Prosecution case, the Accused made dock statements.

After the trial, the Learned High Court Judge convicted all three Accused for murder and imposed the death sentence.

Being aggrieved by the said conviction the Accused have appealed to this court.

Despite having presented multiple grounds of Appeal in their written submission, learned counsel for the Accused limited their arguments to the following grounds of Appeal.

1. Has there been a proper exercise of discretion when the learned High Court Judge who delivered the Judgement decided to adopt the evidence led before his predecessors?
2. Has the prosecution proved the identity of the Accused beyond reasonable doubt?
3. Whether circumstantial evidence was sufficient to establish the guilt of the Accused?

Following are the facts and circumstances of this case;

The Prosecution's case primarily relies on the "last seen" theory. According to *Kahatapitiya Gamage Subarathne Bandara* (PW01), he visited the *Baduruliya* market in the morning, where he encountered *Chanaka*, who instructed him to inform '*Kade malli*' alias Sarath (the deceased) not to come to the market, as he was to be assaulted.

Since the deceased was not visible, PW01 walked towards *Kalawana* and spotted the deceased on the footboard of a bus heading toward the market. Upon seeing PW01, the deceased disembarked from the bus. Upon hearing the witness's news, both of them boarded a bus bound for Kalawana.

When the bus reached *Athwelthota* Bridge, PW01 observed four individuals boarding the bus. He identified three of them by their names: *Neel*, *Dammika*, and *Gamini*, as they were vendors at the aforementioned market. The deceased had forcibly taken a stall from them and handed it over to PW01. This suggests that these Accused individuals were not strangers to the Witness or the deceased. Subsequently, the 3rd Accused approached Sarath and informed him that there was a matter to discuss, after which he physically pulled him aside.

On page 73 of the Appeal brief:

ප්‍ර : ඊට පස්සේ මොකද වුනේ ?

උ : ... සරත් පොලේ වෙළඳාම් කරන මඩුව ගාව වෙළඳාම් කරන කට්ටියක් ඉන්නවා. ඒ කට්ටියෙන්

මම අදුරන පොලේදී දැකල තියෙන තුන්දෙනෙක්ව දැක්කා බස් එකට ගොඩවෙන කොට. අපි

ලගට එක්කෙනෙක් ඇවිල්ල කඩේ මල්ලි වරෙන් පොඩි කතාවක් තියෙනවා කියලා අතින් ඇදලා ගන්නා.

Meanwhile, the 2nd Accused brandished a manna knife in an attempt to stab the deceased, but another passenger intervened, wresting the knife from the said Accused's grasp. All three Accused then collectively removed the deceased from the bus, placing him inside a nearby parked lorry. It's worth noting that PW01 identified this lorry, as it was frequently used for transporting goods to the aforementioned market.

As they escorted the deceased away from the bus, the Accused informed the passengers that they were taking him to the police due to his alleged involvement in a stabbing incident at the *Baduruliya* Market. Consequently, the passengers refrained from intervening in the abduction.

On Page 79 of the Appeal brief:

ප්‍ර :සරත්ව කොහොමද බස් එකෙන් එලියට ඇදගෙන ගියේ ?

උ : අතින් ඇදගෙන ගියේ. අපි මෙයාව පොලිසියට අරන් යන්නේ මෙයා බදුරුලිය පොලේ කෙනෙක්ට

පිහියෙන් අනලා එයාට ඒ නිසයි අරන් යන්නේ කියලා කිව්වා.

Upon witnessing the deceased being taken away from the bus, PW01 promptly approached the driver and reported the incident. The driver then instructed the witness to disembark near the *Kalawana* Police Station to file a complaint and handed over the knife that had been given to him by one of the passengers. Thereafter, he accompanied the deceased's mother to the Police station to lodge the complaint. It was there that they were informed about a body found in the *Mohomodian* estate, and they proceeded to that location to identify the deceased. According to PW01, the last sighting of the deceased was around 9-11 a.m.

PW03, the bus driver in question, stated that although he had an unclear recollection of the incident, he recalled a passenger informing him about the events inside the bus and advised that passenger to report the matter to the police. Moreover, he mentioned that this passenger alighted near the Kalawana Police station. Based on this testimony, the court can reasonably conclude that PW01's account remained consistent.

According to the JMO, Dr. *Palitha Dharmabandu Kapparage* (PW11), the estimated time of death was approximately 11 a.m.

On page 175 of the Appeal brief:

ප්‍ර :සාක්ෂිකරු ඔබ මෙම පුද්ගලයාගේ මරණය සිදු වූ වේලාව සහ දිනය සම්බන්ධයෙන් සටහන් යොදා තිබෙනවද ?

උ:ඔව්

ප්‍ර:ඒ මොනවද?

උ:2001.09.23 වන දින පෙ .ව 11.00ට පමණ.

The postmortem examination was conducted on September 24, 2001, at 11:30 a.m., during which the JMO identified 8 injuries on the body, with injuries 3 to 7 located in the head and neck region. Notably, the 3rd and 4th injuries to the brain were deemed fatal. The JMO also identified no defensive injuries, and the signs of death aligned with the time recorded in the postmortem report.

Upon reviewing the Judgment, the Learned Trial Judge concluded the guilt of the Accused based on the "last seen" theory. After scrutinizing the evidence presented by PW01, there appears to be no reason to doubt his credibility. From PW01's testimony, it can be inferred that the Accused forcibly took the deceased. According to his account, all three Accused individuals approached him, displayed a knife, issued threats, and subsequently took the deceased with them. Importantly, this incident occurred during daylight and took place on public transport. The discovery of the deceased's body shortly thereafter and the existence of prior enmity between the deceased and the Accused further support this conclusion. Additionally, the JMO's assessment placed the time of death at 11:00 a.m.

The last seen theory was considered in the following Judgements,

In the case of *State of Uttar Pradesh v Satish [AIR 2005 SC 1000]* by *Ajith Pasayat J*,

"The last seen theory comes into play where the time gap between the point of time when the Accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the Accused being the author of the crime becomes impossible."

This proposition was followed by **Justice S.B, Sinha, J in *Remreddy Rajeshkhanna Reddy v State of Andhra Pradesh AIR 2006 SC (2) 1656 held that:***

"The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is

found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case Courts should look for some corroboration”.

Considering the facts presented and the aforementioned judgments, the short time gap between the last known sighting of the Accused and the deceased (between 9-11 a.m.) and the discovery of the deceased's body around 11 a.m. in close proximity leaves little room for doubt. When all these circumstances are taken into account, it becomes highly improbable that anyone other than the Accused could be the perpetrator of this crime.

In light of the incriminating evidence presented by the Prosecution, it begs the question: What explanation, if any, did the Accused offer in response to this incriminating evidence?

All three Accused individuals provided dock statements, as detailed on pages 209 and 210 of the Appeal brief.

01 වන විත්තිකරු : වික්‍රමාරච්චිගේ ගාමිණී තිලකසිරි

ගරු ස්වාමිනි, මා මේ කිසිම දෙයක් දන්නේ නැහැ. මගෙන් කිසිම කටයුත්තක් ගන්නේ නැහැ. මාව හඳුනා ගන්නේ නැහැ පෙරටුවක් තියලා. මා මෙම සියළුම දේවලට නිවැරදිකරු. එපමණයි ස්වාමිණි.

02 වන විත්තිකරු : වික්‍රමාරච්චිගේ නිල් වන්දු

ගරු ස්වාමිණි, මේ නඩුවේ කිසිම තැනක දී පෙරෙටුවක් තියලා මාව හඳුනා ගෙන නැහැ. මම මෙම නඩුවේ නිවැරදිකරු බවයි කියා සිටින්නේ. මට ඊට වඩා කියන්න දෙයක් නැහැ.

03 වන විත්තිකරු : ධම්මික නිලන්ත වලාකුළුආරච්චි

ගරු ස්වාමිණි, මා මෙම නඩුව ගැන කිසිම දෙයක් දන්නේ නැහැ. මා නිර්-දෝෂයි. එපමණයි පවසන්න තියෙන්නේ.

They merely denied the charge.

I would like to refer to the sentiments referred by **Justice F.N.D Jayasuriya along with Justice P.H.K Kulathilaka J** in the case **Thalpe Liyanage Manatunga v. Attorney General, CA No.47/98, decided on 25.08.1999**, held that;

“The question arises on an evaluation and analysis of the dock statement whether the accused has attempted to explain away the incriminating circumstances elicited against him and the prima facie case established by the prosecution by explaining away those circumstances and stating that there was only an insertion of the male organ

into her legs and not into the private part of the virtual complainant. If such, a fact took place and existed, it was within the power of the accused to come out with that explanation and to refute the charge of rape. Though the accused made a dock statement he has failed to explain away the incriminating circumstances and prima facie case established against him by indulging in any such explanation. Then as wise and prudent judges often observe in those circumstances both common sense and logic induce any Court to come to the conclusion that the accused did not come out with such an explanation because such circumstances never existed. The accused in his utterly deficient dock statement has merely stated thus. මම කිසිම වැරද්දක් කළේ නැහැ. පෙමවති තමයි තරහට කියා තිබෙන්නේ. කිත්සිරි සමග මගේ කිසිම වරදක් වී නැහැ. That is the bare and the deficient dock statement made by the accused. In view of the deficiency in the dock statement, this Court is entitled to draw the presumptions and inferences arising from such a deficiency in terms of the speeches of Lord Ellenborough in *Rex v. Cochrane-Gurney's Reports* 479 and of Justice Abbott in *Rex v. Burdet* (1820 4 Band Alderman 95 at 120).”

In the present case, the evidence indicates that all three Accused individuals boarded the bus, brandished a manna knife, issued death threats, and forcibly removed the deceased during broad daylight, within a crowded bus where members of the public were witnesses. Shortly after this incident, the discovery of the deceased's body occurred, and the Accused failed to provide any explanation for the incriminating evidence.

Considering the evidence presented, it becomes evident that the only conclusive and inescapable inference the court can draw is that all three Accused were responsible for the murder of the deceased individual.

The next question that arises is when the proceedings move forward, the Trial Judge should issue a comprehensive judicial order. This question was considered by Justice, S. Thurairaja PC, J in *The Attorney General v. Daradadagamage Chandraratne*, CA/85/2013, Decided on 25.05.2018,

He held that, *“As per the above section the law requires the adoption of proceedings by the Judge who is succeeding the previous. When the Judge takes the decision to adopt the proceedings, that decision need not be explained in detail. We cannot expect the trial Judges to give lengthy reasons and explanations on each and every decision taken in a trial proceeding. practically it is impossible. When he writes a judgment, he is expected to give reasons.”*

Upon reviewing the journal entries and the proceedings, it is evident that both Judges who succeeded have formally adopted the proceedings. The proceedings dated 2018.10.03 and 2019.03.26 are as follows,

මෙම නඩුව අද දින වැඩිදුර විභාගය සඳහා නියමිතව ඇත. මෙම නඩුවේ මෙතෙක් විභාග කරන ලද සාක්ෂි පිළිගෙන නඩුවේ සෙසු කටයුතු මා ඉදිරිපිට දී සිදු කිරීමට දෙපාඨඊවය එකඟ වේ. ඒ අනුව වැඩිදුර විභාගය ආරම්භ කරමි.

It is our considered view that formal adoption suffices, and there is no expectation for the Judge to provide reasons. Consequently, this ground of appeal also lacks merit.

During the argument stage, learned counsel for the 3rd Accused pointed out that the last-seen theory traditionally applies to a single Accused. He further stated that he could not find any authority addressing cases with multiple Accused individuals. In response to this objection, learned Deputy Solicitor General Sudharshan De Silva submitted a Judgment that addresses cases involving several Accused.

Namely **Ambagahawattage Sarath Fernando v. AG, CA 270/2012, Decided on 12.02.2014, Sisira J, (Acting P/CA) De Abrew, J** held,

“According to the prosecution case, the two Accused after discussing a hire to Hakmana went in the three-wheeler driven by the deceased person. The deceased person’s body was later found in highly decomposed position. The deceased person never returned to the three-wheeler park. Later the said three-wheeler was found in Matale and the 1st Accused who went with the 2nd Accused claimed the ownership of the three-wheeler..... What is the explanation given by the Accused-appellant to the above incriminating evidence?

*We observed that the Learned High Court Judge has enumerated various pieces of circumstantial evidence presented before him to reach the verdict. Keeping in mind the observations made by **S. Ratnavil Pandian, J. in Padala Veera Reddy v. State of A.P. and Ors. AIR (1990) SC 79**, it was established that in cases relying on circumstantial evidence, such evidence must meet the following criteria:*

- (1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,*
- (2) Those circumstances. should be of a definite tendency unerringly pointing towards guilt of the Accused.*

(3) The circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the Accused and none else, and

(4) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the Accused and such evidence should not only be consistent with the guilt of the Accused but should be inconsistent with his innocence”

Upon analyzing the evidence presented to the Court, the defense failed to highlight any contradictions or discrepancies, leaving no room for them to challenge or question the veracity of PW01's testimony. The consistency of PW01's account, along with corroboration from the testimonies of other prosecution witnesses, had a significant impact on the Learned High Court Judge's accurate assessment and acceptance of this crucial evidence in this case. In my opinion, the prosecution witnesses have maintained consistency and truthfulness in their testimonies, making this evidence central to the case.

Therefore, I hold that the one and only irresistible and inescapable inference that the court can arrive at is that all three Accused Appellants committed the murder of the deceased *Sarath Chandrasena*.

For the above reasons, we affirm the conviction and the sentence. Therefore, we dismiss the Appeal.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL