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

**In the matter of an Appeal against an order of the High Court under section 331 of the Code of Criminal Procedure Act No 15 of 1979.**

Tikiri Bandage Siripala

**ACCUSED-APPELLANT**

**Vs,**

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

**CA/127/2010**
**(H. C. Anuradhapura**
**CA No 107/08)**

**RESPONDENT**

Before : **Vijith K. Malalgoda PC J (P/CA)**
**&**
**H. C. J. Madawala J**

Counsel : **Indika Mallawarachchi for the Accused Appellant**
**Shanaka Wijesinghe DSG for the A.G.**

Argued on : 01 /09 /2015

Judgment Date : 23 /10 /2015

## H. C. J. Madawala J

The Accused Appellant was indicted in the High Court of Anuradhapura in case no. 107/08, that on an about 7th October 2003 the Accused-Appellant caused the death of one Punchi Appuge Dharmasena alias Sena and there by committed an offence punishable under sec.296 of the Penal Code. The Appellant pleaded not guilty to the offence and the case was taken up for trial and at the conclusion of the trial the Appellant was found guilty and was sentenced to death. On being aggrieved by the said Judgment the Appellant has preferred this appeal.

When this matter came up for hearing on 17-07-2015 the case was argued and on conclusion both parties under took to file written submissions if necessary. The matter was fixed for judgment on 23-10-2015. We have considered the oral and written submissions of both parties. The prosecution case rests solely on circumstantial evidence. The prosecution version was that the deceased Sena and the appellant had engaged in an exchange of words near a boutique around 7.30 am on 07-10-2003. Thereafter again the deceased and the appellant had an exchange of words at the house of prosecution witness Piyasena around 10.30 am on 07-10-2003 and thereafter the deceased had left. However thereafter the body of the deceased being recovered from an abandoned house belonging to the accused appellants brother, Siripala made a dock statement denying any involvement complicity in the commission of the crime. The grounds of appeal was that,

1) Learned Trial Judge failed to comply with sec. 196 of the CPC which section is a Mandatory Statutory Provision, non-compliance of which necessarily vitiates the conviction.
2) Prosecution has failed to establish the identity of the Corpus.
3) Items of Circumstantial Evidence are wholly inadequate to support the conviction.
4) LTJ erred by applying the Ellenborough principle to the instant case.

It was the contention of the appellant that the Learned Trial Judge failed to comply with sec, 196 of the Criminal Procedure Code which section is a Mandatory Statutory Provision, non-compliance of which necessarily vitiates the convictions. The learned counsel for the appellant submitted that sec.196 of the Criminal Procedure Code stipulates that when the court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged. It was

submitted that the said Mandatory Statutory Provision has not been complied. The indictment had been handed over to the accused, but however the corresponding journal entry which is at pg 13 of the brief does not indicate that sec.196 of the Criminal Procedure Code has been complied with.

Accused- Appellant further submitted that the prosecution has failed to establish the identity of the corpus. It was submitted by the accused- appellant that the prosecution has not led any evidence with regard to the identification of the body at the post of the mortem examination. The Medical Officer has testified that the body was identified by his wife and the brother-in-law of the deceased. However it was submitted this amounts to hearsay as a prosecution has totally failed to elicit this evidence from the wife of the deceased at the trial. It was further submitted that the defence has not admitted this fact in terms of sec 420 of the Criminal Procedure Code and accordingly that this ground alone warrants an acquitted.

It was also contended that the items of circumstantial evidence are wholly inadequate to support the conviction. The items of circumstantial evidence against the appellant are as follows,

- The fact that the deceased was last seen in the company of the appellant engaging in an exchange of words. The deceased was last seen in the company of the appellant at 7.30 am and 10.00 am on 07-10-2003 having an exchange of word.

It is trite law that where the case is based on circumstantial evidence and the prosecution is relying on the last seen theory, it is incumbent upon the prosecution to fix the exact time of death.

In **The King vs. Appuhamy** it was held thus "in considering the force and effect of circumstantial evidence, in a trial for murder, the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance of the prosecutor has failed to fix the exact time of death of the deceased."

In **State of U.P. vs. Satish** and **Ramreddy Rajeshkarna Reddy vs. State of A.P.**

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

We find that the instance case revolves around the last seen theory, it was incumbent upon the prosecution to the fix the exact time of death so as to narrow the time gap between the time that the deceased was seen with the appellant and the time of death, thereby excluding the possibility of a 3rd party being the perpetrator of the crime. In the instance case the doctor has testified that according to the information he had received the body had been recovered around 11.30 am and that he agrees with such conclusion. It was submitted that this is wholly hearsay and the police evidence is that they received information about the body being found in an abandoned house only at 3.15 pm. Accordingly it was submitted that the prosecution has totally failed to fix the exact time in the instant case. It was also submitted that the afore said evidence of the Medical Officer is not calculated according to any acceptable forensic methods and that the doctor had merely stated that he agrees with the information provided relating to time of death which is wholly unacceptable as the time of death has to be assessed by any of the following methods..

- Progress of changes that occur after death, such as hypostasis, cooling of the body and rigor mortis
- Cessation or stopping or bodily functions after death such as passage of food in the gastrointestinal tract, and,
- Insect found on a putrefied body

It was submitted that the instance case the doctor has failed to calculate the time of death and has therefore not given any media, reasons and grounds for his finding but has merely agreed with the information provided to him which is wholly unacceptable. In the circumstances I conclude that the prosecution has failed to fix the exact time of death and in that backdrop the fact that the deceased was last seen in the company of the appellant cannot be considered as an incriminating item of evidence against the appellant.

The respondent took up the position that the accused appellant was last seen in the company of the deceased and the failure by the accused to offer an explanation establishes his guilt.

The only evidence in the present case is that the accused was last seen with the deceased and that there was a argument between them and thereafter the dead body of the deceased was found from and abandoned house belonging to the accused appellant's brother. As such we hold that there is

no duty cast on the accused appellant to explain as to how the deceased body came to the house. There is no evidence as to who stabbed the deceased to death.

In our view of the evidence in this case is not at all sufficient to warrant the application of Ellenbrough principle. It is not the function of a court to supply what is wanting or deficient in evidence. These principles cannot be called to aid to compensate laxity, negligence, ignorance and lethargy on the part of the investigators.

Accordingly we are of the view that the prosecution has failed to prove charges against the accused appellant beyond reasonable doubt. As such we set aside the conviction and the sentence of the High Court Judge and acquit and discharge the accused. Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Vijith K. Malalgoda PC J (P/CA)

I agree.

PRESIDENT OF THE COURT OF APPEAL