

**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**

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs,

1. Su Ting Rui
2. Song Yang
3. (Ms). Zhang Li
4. Miss. Guan Lu
5. Miss. Li Hui Bo

CA/203-207/2011

ACCUSED

H.C Colombo Case No 3403/06

And,

1. Su Ting Rui
2. Song Yang
3. (Ms). Zhang Li
4. Miss. Guan Lu
5. Miss. Li Hui Bo

ACCUSED-APPELLANT

Vs,

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

COMPLAINANT- RESPONDENT

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

Counsel: Dr. Ranjith Fernando for the Accused- Appellant
Yasantha Kodagoda ASG/ PC for the AG

Argued On: 08.05.2015, 29.06.2015, 29.09.2015

Written Submission On: 29.10.2015, 30.12.2015

Judgment On: 30.03.2016

Order

Vijith K. Malalgoda PC J (P/CA)

The accused-appellants were indicted before the High Court of the Western Province Holden in Colombo on the following counts.

1. For being a member of an unlawful assembly with the common object to hurt Sui Lincoln, an offence punishable under section 140 of the Penal Code
2. Committing the murder of Sui Lincoln being a member of the said unlawful assembly an offence punishable under section 296 read with section 146 of the Penal Code
3. Committing the murder of Sui Lincoln with the Common Intention an offence punishable under section 296 read with section 32 of the Penal Code.

After trial before the High Court Judge without a jury, all five accused-appellants including the 4th and 5th accused-appellants who were tried in absentia were convicted of all the counts against them and were sentenced to death by the Learned High Court Judge.

Being dissatisfied with the said conviction and sentence, all five accused including the two absconding accused have preferred this appeal before us.

All five accused-appellants and the deceased in this case are Chinese National living in Sri Lanka on Visa at the time the alleged offence took place on or around 23rd January 2003.

The entire case for the prosecution was based on circumstantial evidence and the prosecution in addition to the said evidence, relied on a confessionary statement made by the 1st accused-appellant before the Hon. Magistrate.

According to the prosecution version, the investigation into the death of a Foreign Nation was commenced by the Officers of Peradeniya Police subsequent to the recovery of dead body packed inside two travelling bags by the residents in Hendeniya area on 24th evening.

According to the evidence of one K.K. Indrarathne, a resident of Hendeniya – Peradeniya, he lives in a house which is situated below the Peradeniya- Daulagala Road. On 25th evening while he was in his garden he had observed two foreigners getting down from a three-wheeler with two large bags on the Daulgala Road. After the three-wheeler left they walked few distance pulling the two bags towards the temple and suddenly they pushed the two bags to the precipice above his house and started walking away. The said two bags had fallen to his garden with a large noise, and when he rushed to see what it was with his son, he saw some parts of a human body have come out from a bag which was partly opened. He along with his son immediately went to the road and chased behind the two foreigners. Since it was a deserted area they had to chase behind them up to a muslim village close by and with the help of the villagers the two suspects were apprehended and tied them to some lamp posts until the police arrived.

Inspector Bowala of Peradeniya Police Station had first visited the muslim village and taken charge of the two foreign national who look like chinese but they could not speak English in order to identify their nationality. When he visited the garden of witness Indrarathne, he observed the body parts of a human in both those bags. When the two chinese looking people were searched, he recovered a visiting card of a guest house in Kandy and he decided to visit the said guest house with the two

suspects. At the guest house he recovered the passports belonging to the suspects and identified them as Chinese National and also arrested three other Chinese ladies who said to have travelled along with them on that day. When searched the van in which the said suspects have travelled, he observed blood in some of the carpets of the van and the said carpets too were taken into custody with the van and its driver. Even though the three-wheeler driver was not immediately arrested, the said driver too had surrendered to the police thereafter.

The post mortem was conducted by the Consultant Judicial Medical Officer Kandy Dr. A. B. Senevirathne and the subsequent investigation was handed over to Dehiwala Police since it was transpired that the offence had committed at a Chinese Restaurant in Dehiwala.

According to the investigations carried out by the officers of Dehiwala Police, they managed to open the gate with the help of the keys they recovered from the suspects but could not open the main door with the keys and therefore they had to break open the main door.

When the officers searched the house they observed some patches of blood covered with carpets in the ground floor and some patches of blood inside the bathroom of the same floor. Two knives were also recovered with blood and the Chinese National Identity Card of the deceased person too was recovered from the said premises.

A neighbor of the Chinese Restaurant one Cicil Fernando had identified the deceased as a person whom he had seen at the restaurant and he referred to an incident took place few days prior, where they rushed the deceased to Delmon hospital with some injuries for treatment.

During the investigations it was further revealed that the 1st and the 2nd male suspects and the 4th and the 5th female suspects are employees of the Chinese Restaurant where as the 3rd is the owner of the Restaurant.

The 1st suspect Su Ting Rui had made a confessionary statement before the Magistrate. In the said confessionary statement 1st suspect admitted attacking the deceased with a hammer who jumped in to the premises of the restaurant, in the absence of the others at the restaurant and when he realized that he is dead, pulled him inside the bath room and cut him and packed into two travelling bags. According to his confession none of the other suspects were present at the restaurant at that time and after packing the dead body into the two bags, he cooked the dinner for the others, who had gone out with the owner of the restaurant.

In the absence of eye witness's testimony in this case prosecution had mainly depended on the said confessionary statement made by the 1st accused-appellant.

During the argument before us, the Learned Additional Solicitor General who represented the Attorney General submitted that the said confessionary statement made by the 1st accused-appellant contains both inculpatory and exculpatory material. The fact that the 1st accused-appellant admitted the killing of the deceased could be considered as inculpatory material but, the position he took up that he attacked the deceased in exercising his right to private defence could be exculpatory material.

Whilst referring to the inculpatory and exculpatory parts in the said confessionary statement made by the 1st accused-appellant, the Learned Additional Solicitor General argued that in terms of section 21 of the Evidence Ordinance admissions are relevant and can be proved against the maker only within the limited instances specified in section 21 the Evidence Ordinance. He further argued that it is only the inculpatory parts of the said statement could be admissible against the 1st accused-appellant.

When considering the provision in the section 17 (2) of the Evidence Ordinance with 26 (1) I see no reason to reject the argument raised by the Learned Additional Solicitor General.

The two drivers initially arrested as suspects were made witnesses since the investigation revealed that they have no connection to the killing. According to the evidence of Gamini Abeykoon a three-wheeler driver from Kandy town, his three-wheeler was hired by two foreigners to go to Daulagala on

the day in question. He identified the 1st and the 2nd accused-appellants as the persons who hired the three-wheeler on that day and went up to Hendeniya Temple on the Daulagal road. According to him the two passengers carried two large bags with them and he had charged Rs.450 for the said hire.

Prosecution has further relied on the evidence of the van driver Lal Chandrasiri during the High Court Trial. According to his evidence he was working for Uni Cab Services on the day in question and the said company has entrusted a hire to take few foreigners to Kandy. Five Chinese Nationals including two males and three females, had got into the vehicle at a Chinese Restaurant in Hill Street Dehiwala around 8.30 A.M on that day. They were having two large bags with them and 1st, 2nd and 3rd accused had got involved in loading the said bags in to the van.

The two bags were kept behind the driving seat of the van and the 1st and the 2nd accused were seated just behind the two bags. The 3rd accused was seated in the front seat and the 4th and 5th accused who were not present at the High Court Trial were seated in the back seats of the van.

They first went to the Botanical Garden in Peradeniya and thereafter gone to a restaurant for lunch. After having lunch, they went to a Hotel in Rajapihilla Mawatha Kandy and around 4.30 P.M all five passengers came back to the town. All these time the two bags were inside the van and when they came to the town in the evening the 1st and the 2nd suspects took the two bags and went away in a three-wheeler. He had come back to the Hotel with 3 ladies around 6.30 P.M.

Whilst referring to the evidence led at the trial the Learned Additional Solicitor General had placed the following circumstantial evidence against the 1st to 5th suspects.

- a) 1st to 5th accused were occupants of the place where the crime took place and they were jointly carrying out the business of running a Chinese Restaurant.
- b) According to the evidence of Lal Chandrasiri the two bags were loaded to the van at the said restaurant by the 1st, 2nd and the 3rd accused-appellants.

- c) Police had confirmed that they found patches like blood inside the restaurant and the bath room, which confirms the confessionary statement made by the accused-appellant.
- d) On the early hours of 24th, all of them set off in a van to Kandy. They took with them the two bags contain the body of the deceased. The two bags were not taken canceled in the van and kept behind the driving seat.
- e) The primary objective of the said trip to Kandy was to dispose the body.
- f) All five suspects jointly possessed the afore stated two bags from the time the bags were loaded to the van at Dehiwala until they were unloaded in Kandy.
- g) Few days prior to the incident the deceased had a fight with the inmates of the restaurant and the deceased was rushed to Delmon hospital with injuries by the neighbors.

In addition to the above evidence, the 1st accused-appellant admitted the killing of the deceased in his confessionary statement made before the Magistrate.

When considered the case against the suspects other than the 1st accused-appellant the prosecution was entirely depend on the circumstantial evidence referred to above. In a case the prosecution is solely relied on circumstantial evidence, it is necessary to consider the items of evidence relied upon by the prosecution to conclude that the prosecution has established its case beyond reasonable doubt. The said material the prosecution has relied upon should be consistent only with the hypothesis of the guilt of the accused that is to say; they should not be explainable on any other hypothesis except that the guilt of the accused.

In the case of *Don Sunny V. Attorney General 1998 (2) Sri LR 1* the principles that should be applied by court in analyzing circumstantial evidence was identified as follows;

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.
4. The prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

When applying the above principles to the case in hand this court observes that case against the 2nd to 5th accused-appellants do not fulfill the principles identified in the above case.

The Learned Additional Solicitor General maintaining the best traditions of the Attorney General's Department had conceded this fact and informed court that he would not be supporting the conviction imposed on the 2nd to 5th suspects for the murder of the deceased Sui Lincon.

However as against the 1st accused-appellant the Learned Additional Solicitor General had relied on the evidence of the Consultant Judicial Medical Officer and submitted that the confession made by the accused-appellant was not compatible with the evidence of the Medical Expert.

According to the Consultant Judicial Medical Officer the attack on the deceased was aimed from his behind and if this independent opinion based on his observation is admitted, the exculpatory statement made by the 1st accused-appellant to the effect that he attacked the deceased when he was lawfully exercising the right to private defence should be rejected.

However when considering the material already discussed in this Judgment it is our considered view that the only irresistible inference that can be arrived by this court is that the murder of Sui Lincoln was committed by the 1st accused-appellant and not by any other person.

However as discussed above there is ample evidence against the 2nd and the 3rd accused to establish that they knowingly helped the 1st accused to disposed the body of Sui Lincon. The 2nd accused-appellant had accompanied the 1st accused-appellant until the two bags were disposed by them.

According to the evidence of the van driver Lal Chandrasiri both the 2nd and the 3rd accused had helped the 1st accused-appellant to load the two large bags in to the van. The two bags were loaded to the van from the restaurant belonging to the 3rd accused-appellant. The above material will clearly establish the fact that the 2nd and the 3rd accused-appellants had knowing helped the 1st accused-appellant to dispose the body of the deceased. However as against the 4th and the 5th accused-appellants this court is not inclined to accept the argument raised by the Learned Additional Solicitor General. Except for their mere presence, the prosecution has failed to establish the connection between the 4th and the 5th accused-appellants for the disposal of the body of Sui Lincoln.

Section 335 (2) (b) of the Code of Criminal Procedure Act No. 15 of 1979 reads thus;

“Alter the verdict maintaining the sentence or without altering the verdict increase or reduce the amount of the sentence or the nature thereof or **substitute a conviction for a different offence of which the accused person could have been found guilty on the indictment** and pass such sentence as may be warranted by law in substitution for the sentence passed.”
(emphasis added)

Section 198 of the Penal Code reads thus;

“Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the

offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false,

- i) Shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

When considering the material already discussed against the 1st, 2nd and the 3rd accused-appellants along with the foregoing sections of the Code of Criminal Procedure Act No. 15 of 1979 and the Penal Code this court is of the view that no prejudice will cause to the said accused-appellant's by convicting them for causing disappearance of evidence, an offence punishable under section 198 of the Penal Code, since the prosecution has led clear evidence to establish the said fact before the High Court.

Therefore this court concludes as follows;

We set aside the conviction and sentence imposed on the 4th and the 5th accused-appellants and acquit and discharge them from this case.

We set aside the conviction and sentence imposed on the 2nd and the 3rd accused-appellant and replace with a conviction for causing disappearance of evidence under section 198 of the Penal Code and impose a sentence of 5 years Rigorous Imprisonment with a fine of Rupees 10,000/-. In default six months simple imprisonment.

We set aside the conviction and sentence imposed on counts 1 and 2 of the indictment on the 1st accused-appellant.

We affirm the conviction and sentence imposed on count 3 of the Indictment on the 1st accused-appellant.

In addition to the above conviction we impose a conviction for causing disappearance of evidence on the 1st accused-appellant and impose a sentence of 5 years Rigorous Imprisonment with a fine of Rupees 10,000/-. In default six months simple imprisonment.

The sentences imposed are effective from the date of this order i.e. from today

Appeal is partly allowed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL