

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.

CA Appeal No.151/09

HC Anuradhapura No. 143/2006

H.G. Upul Senevirathne

Appellant

Vs

The Honorable Attorney General,
Attorney General's Department,
Colombo 12

Respondent

Before: L.T.B. Dehideniya, J

K.K. Wickramasinghe, J

Counsel: Indika Mallawarachchi for the Accused-Appellant.

Shamil Kularatne DSG for the state.

Argued on: 29/05/2017

Written submissions filed on : 14.07.2017 & 17.10.2017

Decided on: 24/11/2017

L.T.B. DEHIDENIYA, J

This is an appeal from the High Court of Anuradhapura. The appellant was indicted before the said High Court on a charge of committing murder of Udahagedara Amarangani on or about 8th September 2001, a charge punishable under Section 296 of the Penal Code. After trial, the appellant was convicted and sentenced with death penalty. Being aggrieved, the appellant presented this appeal to this court. The grounds of appeal, the appellant urged before this court are:

1. Learned Trial Judge (LTJ) has factually misdirected herself on critical issues of facts causing serious prejudice to the appellant.
2. Evidence of the Grama Sewaka is wholly contradicted by other prosecution witnesses which the LTJ has been totally oblivious to.
3. Case being governed by circumstantial evidence, evidence led at the trial is suggestive of a 3rd party (namely the Grama Sewaka) being the perpetrator of the crime.
4. Items of circumstantial evidence are wholly inadequate to support the conviction and the LTJ failed to apply the principles governing the evaluation of circumstantial evidence cases.
5. Application of the Ellenborough principle is wholly inapplicable and unwarranted to the instant case.
6. LTJ has misconstrued the defense of alibi raised by the appellant.

7. LTJ has failed to evaluate the defense evidence in its correct perspective causing prejudice to the appellant.
8. LTJ has erred in law by examining the defense evidence in the light of the prosecution evidence which tantamount to shifting the burden of proof to the appellant.
9. Items of evidence favorable to the appellant have not been considered by the LTJ thereby occasioning in a deprivation of a fair trial.

Seemange Seethadevi (PW2) stated in evidence that the deceased came to her house and informed that there had been an argument with the appellant and the appellant has taken the children and left house. On the advice of the witness the deceased spent the night with them in their house and left in the morning. She further stated that one Azwer, a witness listed but was not called, informed her that the deceased had shown him a threatening letter claimed to have been written by the appellant. The prosecution neither called Azwer as a witness nor produced the letter in evidence. The statement made by Azwer to the witness cannot be derived on but the witness's reaction to the statement can be taken as evidence. On receipt of this information, witness had gone to the deceased's house. She testified that the Grama Sewaka namely, Nilawasam Bopage Keerthisoma was at the compound of the deceased's house all by himself. This witness's stand was that when she went there only the Grama Sewaka was there. She had called out the deceased's name but she was not to be seen. Subsequently the Grama Sewaka has found the deceased's body lying in a toilet pit.

Witness Mapa Mudiyansele Yasawathi testified that upon hearing a commotion from the deceased's house she informed the Grama Sewaka. Thereafter she with the Grama Sewaka and another villager had gone to the deceased's house. At that point she had seen the appellant leaving the place telling them he had forgotten his shoes and had come to collect them. She says that they were unable to trace the deceased and she returned home. Much later heard a commotion from the deceased's house and when she went there the body had been found lying in a toilet pit.

The Grama Sewaka Keerthisoma testified that the witness Yasawathi had informed him that she had heard a commotion from the direction of the deceased's house and he along with the witness Yasawathi and other villagers has gone to the deceased's house. He also stated that they met the appellant leaving the house. He further testified that he discovered the body lying in an open toilet pit and thereafter the police was informed and the police proceeded with.

The other witnesses are official witnesses.

The appellant made a dock statement and stated that he went to Kandy with his children and came back only on the information of the police that they were looking for him. The appellant's daughter gave evidence on behalf of the defense and said that her father took them to Kandy and stayed with them. The father had not come back to the house they were previously living in.

The Learned High Court Judge did not accept the alibi of the defense and convicted the accused appellant.

This case is based on circumstantial evidence. There is no direct evidence to the fact that the appellant has committed this offence. In a case relying on circumstantial evidence, for the accused to be convicted, the only

conclusion that could have been come into has to be that the accused has committed the crime.

The counsel for the Appellant submits that the learned High Court Judge has misdirected on factual matters. Her first argument is on the discovery of the body. The witness Yasawathi has testified that they could not trace the deceased and she left. Witness Seethadevi testified to the fact that when she came in, only the Grama Sewaka was there. The body has been found thereafter. The counsel's contention is that the learned HCJ's finding that the body was found immediately after the appellant's departure was wrong. The accused appellant has left the house informing that he came to collect the shoes that he has left. Both witnesses, i.e. Grama Sewaka and Yasawathi testified to this fact. Thereafter they have called the name of the deceased and searched for her. There is evidence to say that the doors were open too. If the deceased was alive and was inside the house, she would have been answered the call. The only conclusion that the court can come into is that the deceased was among living even at the time when the witnesses called her name. witness Seethadevi seeing the GS alone in the deceased's compound does not create a doubt. The body found immediately means that the body found within the almost at the same time.

The witness Yasawathi has stated that she left the place on the failure of tracing the deceased. Witness Seethadevi had come after Yasawathi left. When Seethadevi came only the GS was present. The presence of GS is explained by this two witnesses' conduct.

The GS testified to that he recovered the body lying in the toilet pit. The learned Counsel submits that there is a contradictory inter se that who were present at the time of the recovery of the body. There is no direct question put

to the GS on this issue. The GS had stated that Yasawathi and other villagers came with him in search of the deceased. But who was present when the body was recovered was not elicited from this witness.

The second factual misdirection that the counsel argued is contradiction on the destruction of house hold furniture. The GS testified that some photographs were damaged and thrown to the compound. Witness Yasawathi was questioned whether the house hold furniture were damaged and destroyed and she had answered negatively. These answers do not create any doubt in the credibility of the witnesses.

As I stated above, in a case relying on the circumstantial evidence the prosecution must be able to present evidence which will lead only to the conclusion that the accused committed the crime. In the case of *Don Sunny v. The Attorney General* [1998] 2 Sri L R 1 it was held that the prosecution must prove that no one else other than the accused had the opportunity of committing the offence. In the present case the witnesses testified to the fact that when they came to the house of the deceased the appellant left from there. The doors were open. The deceased was not to be seen. On further searching, they found that the deceased lying in a toilet pit. There had been a hostility between the deceased and the appellant on the previous day and in the morning again a witness had heard the commotion from the deceased's house. When the witnesses arrived at the deceased' house, the appellant was leaving the house and they found that the deceased was murdered and put into a toilet pit. This evidence directs only to one conclusion that the appellant had committed the murder of the deceased.

The appellant in a dock statement stated that he left the house on the previous day and had not come until the police called him. The appellant's

daughter who was living with him testified that they were living in Kandy on the day in issue. Court has to be mindful of the fact that the whole incident propped up on an information revealed to the appellant by his daughter, i.e., that the deceased is having an illicit affair with the GS. On this information she lost her mother. Only her father was living. Court has to evaluate her evidence with keeping this in mind.

The two witnesses testified to the fact that they met the appellant on the day in issue at the deceased's house. They have spoken to the appellant. There is no doubt on the identity of the appellant. With this evidence, my view is that the appellant had failed to create a doubt in the mind of the learned High Court Judge.

Under these circumstances, I see no reason to interfere with the findings of the learned High Court Judge.

I affirm the conviction and the sentence.

President of the Court of Appeal

K.K.Wickramasinghe J.

I agree.

Judge of the Court of Appeal