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

The Democratic Socialist Republic of Sri Lanka

Complainant

CA - 143/2014

Vs.

H.C. Chilaw – HC:05/2006

Ulapanelage Ginadasa

1st Accused

AND NOW BETWEEN

Ulapanelage Ginadasa

1st Accused – Appellant

Vs.

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

Complainant – Respondent

BEFORE: S. DEVIKA DE LIVERA TENNEKOON J

S. THURAIRAJA, PC, J

COUNSEL:	**Accused – Appellant – Rasika Lasantha Samarawickrama (Assigned Counsel)** **Complainant – Respondent – D.S.G. Dileepa Peiris**
ARGUED ON	**19.09.2017**
WRITTEN SUBMISSIONS –	**Defendant – Appellant – 15.11.2017** **Complainant–Respondent – 19.10.2017**
DECIDED ON:	**26.01.2018**

S. DEVIKA DE LIVERA TENNEKOON J.

The Accused Appellant (hereinafter sometimes referred to as the Appellant) in the instant case was indicted in the High Court of Chilaw on 24.11.2005 for the following offence;

1) That on or about 17.11.1998 the Accused-Appellant caused the death of one Walivitage Milton Hettiarachchi and thereby committing an offence punishable under Section 296 of the Penal Code.

The Appellant pleaded not guilty to the said charge and the Prosecution commenced trial. The case for the prosecution was based on circumstantial evidence along with a Section 27 recovery. The prosecution alleged that there was an animosity between the deceased and the Appellant. There were no eye witnesses to the alleged incident but the body of the deceased was found 300metres away from the Appellant's hut and blood spots patches were found

inter alia on the ground adjacent to the watch hut of the Appellant. PW3 JMO who conducted the post-mortem testified that there were two stab injuries near the left shoulder of the deceased and that there had been internal bleeding and also that the heart and lungs were damaged.

In defence the Appellant opted to remain silent.

The learned High Court Judge pronounced judgment on 17.09.2014 and found the Appellant guilty as charged and convicted and sentenced the Appellant to death.

Being aggrieved by the said conviction and sentence the Appellant preferred the instant Appeal to set-aside the said conviction and sentence on the grounds that the;

a) Items of circumstantial evidence are wholly inadequate to support the conviction,
b) Prosecution has failed to establish the identity of the corpus,
c) Learned High Court Judge has erred by applying the Ellenborough Principle to the instant case,
d) The Judgement does not accord with the provisions of Section 283 of the Code of Criminal Procedure Act.

Having perused the Judgment of the learned High Court Judge dated 17.09.2014 it is pertinent to consider Primonly whether the said judgment does accord with the provisions of Section 283 of the Code of Criminal Procedure as submitted by the learned Counsel for the Appellant and whether the learned Trial Judge has discharged his judicial duties accordingly.

Section 283 states *inter alia*;

> "The following provisions shall apply to the judgments of courts other than the Supreme Court or Court of Appeal: -
>
> (1) The judgment shall be written by the Judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision
>
> (2) It shall specify the offence if any of which and the section of law under which the accused is convicted and the punishment to which he is sentenced.

The learned Counsel for the Appellant submits that no evidence has been led before the learned High Court Judge who delivered the judgment and further that the evidence has not been formally adopted before him. The learned Counsel for the Appellant further submits that the impugned judgment is only a mere repetition of the evidence.

The learned Counsel for the Appellant relies on the Case no: 62-64/2005 decided on 07.06.2011 (2011 ACJ 54) in which Ranjith Silva J. held *inter alia;*

> "that a judgment which is only a repetition of evidence does not amount to a judgment in terms of Section 283 of the Code of Criminal Procedure."

In this light it is prudent to note the dicta in the following case;

Chandrasena and others V. Munaweera 1988(3) SLR 94 which held that;

> "The mere outline of the prosecution and defence without reasons being given for the decision is an insufficient discharge of duty cast upon a judge by the provisions of S.306(1).
>
> The weight of authority is to the effect that the failure to observe the imperative provisions of S.306 is a fatal irregularity."

In the case of **Moses Vs. State** 1993 (3) SLR 401 it was held that;

> "(1) S. 203, s. 283 (1) - Make provision that the judgment shall be written by the Judge who heard the case and shall be dated and signed by him. It is a mandatory requirement - A duty is cast on the Judges to give reasons for their decisions, as their decisions are subject to review by superior courts."

In the case of **Ibrahim Vs. Inspector of Police Ratnapura** 59 NLR 235 it was held that;

> "Nowhere has the Magistrate given any reasons for his conclusions, nor does he appear to have considered the evidence given by the appellant and his witnesses. The learned Magistrate's omission to state the reasons for his decision has deprived the appellant of his fundamental right to have his-conviction reviewed by this Court and has thus occasioned a failure of justice. Without such reasons, it is impossible for this Court to

judge whether the finding is right or wrong. I therefore set aside the convictions and sentences and order a new trial."

In the case of C.A. Appeal No. 34-35/2005 decided on 03.04.2007 Sisira de Abrew J held that;

"In this case the learned Trial Judge has merely narrated the evidence of the prosecution witnesses without giving adequate reasons for his conclusion and for the acceptance of the evidence of the prosecution. In our view a judgment devoid of adequate reasons for the conclusion reached and a mere reproduction of evidence of witnesses is not a judgment in the eyes of the law. We find that the judgment of the learned trial judge in this case is no judgment and would amount to a nullity."

In the same case W.L.R. Silva J held that;

"I find that under the circumstances provision to Section 334 of the Criminal Procedure Code and Article 138 of the Constitution cannot be availed of, for the simple reason to affirm a judgment there must be a proper judgment on existence, when there is no judgment and the supposed judgment is a nullity in the face of law such a judgment cannot affirmed. One cannot expect the Court of Appeal to rewrite the judgments when the judgment pronounced by the learned High Court Judge is a nullity.

The Judges of the Court of Appeal do not have the privilege of observing the deportment and the demeanour of witnesses. Therefore, one cannot expect the Court of Appeal to evaluate the evidence of the witnesses in

the proper sense. Therefore for the reasons I have stated above and by my brother Judge Justice Sisira de Abrew. I am of the view that the conviction cannot be allowed to stand and the judgment should be set aside. We make order that this case be sent back for re-trial."

The instant appeal is based on circumstantial evidence. In the case of **The Queen Vs. K. A. Santin Singho** 65 NLR 445 it was held that;

"In a case of circumstantial evidence, a direction given by the trial Judge, in his summing-up, that the accused person must explain each and every circumstance established by the prosecution is wrong and would completely negative a direction given earlier by him that the circumstances must not only be consistent with the accused person's guilt but should also be inconsistent with his innocence.

The direction that if a prima facie case is made out the accused is bound to explain is wrong and misleading."

In the instant appeal the impugned judgment of the learned Trial Judge dated 17.09.2014 is one which merely narrates the evidence elucidated before the trial and a final paragraph merely states that the evidence against the Appellant and therefore finds the Appellant guilty as charged.

The learned DSG submits that the learned High Court Judge has clearly evaluated the evidence led before him and had decided to convict the Accused. However, I cannot accept this contention. In light of the above dicta I am of the view that the impugned judgment is bad in law.

When evaluating circumstantial evidence it is a well-established principle that if an inference of guilt is to be drawn from circumstantial evidence it must be the one and only irresistible and inescapable conclusion that the accused committed the offence. This was discussed in the following cases;

In the case of AG Vs. Potta Naufer & others 2007(2) SLR 144 Thilakawardena J held that;

> 'When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.'

In the case of Kusumadasa Vs. State 2011(1) SLR 240 Sisira de Abrew J has held that;

> '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.'

Also in the case of Sarath Fernando Vs. Attorney General 2014 (1) SLR 16 it was held that;

> 'In order to justify the inference of guilt from purely circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.'

In Premawansha V. Attorney General 2009 (2) SLR 205 relied by the learned SSC for the Respondent Sisira de Abrew J has held that;

> 'In a case of circumstantial evidence if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapable conclusion that the accused committed the offence'

Therefore, in the instant appeal if the Appellant is to be found guilty it had to be the one and only inference that could have been drawn from the circumstantial evidence against the Appellant. As correctly submitted by the learned Counsel for the Appellant no evidence has been led by the prosecution to the effect that the deceased was seen in the company of the Appellant on or about the day on which the alleged murder took place.

It is trite law that the burden of proof is on the prosecution. As discussed in the case of **The Queen Vs. K. A. Santin Singho** 65 NLR 447;

> "It is fundamental that the burden of proof is on the prosecution. Whether the evidence the prosecution relies on is direct or circumstantial, the burden is the same. This burden is not altered by the failure of the appellant to give evidence and explain the circumstances."

It is prudent to note that in the case of **Queen Vs. Sumanasena** 66 NLR 351 it was opined that;

> "Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its

burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence... The burden of establishing circumstances which not only establish the accused's guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial"

In the instant Appeal the learned Trial Judge has not come to the finding that the prosecution has proved the case beyond reasonable doubt. The learned Trial Judge has simply narrated the evidence and states that;

" මරණකරුගේ මෘත ශරීරය චූදිත මුරකරුවකු ලෙස සේවය කළ පොල් වත්තේ චූදිත වාසය කළ මුරමඩුව / නිවසට ආසන්නයේ තිබී සොයා ගැනීම. චූදිතගේ නිවස තුළ හා නිවස ආසන්නයේ ලේ පැල්ලම් තිබීම. චූදිත වාසය කළ මුර මඩුව / නිවස පිටුපස වූ ගරාජයේ තිබූ ලේ තැවරුණු විල්බැරෝවක්, විසි කැති දෙකත් පරීක්ෂණ නිලධාරී සොයා ගැනීම. චූදිතගේ පැ. 02 දරණ පිහිය තිබූ ස්ථානය දැන සිටීම හා ඒ හා සමාන තියුණු ආයුධයක් උපයෝගී කර ගෙන මරණකරුට මාරාන්තික තුවාල සිදු කර තිබීම. පරීක්ෂණ නිලධාරී අපරාධ ස්ථානයට යන විට එම ස්ථානයේ චූදිත හැර වෙනත් අයෙකු නොසිටීම. වෙනත් අයෙකු සිටි බවට තොරතුරු හෙළි නොවීම යන කාරණා සැලකිල්ලට ගනු ලැබේ. අමතරව මරණකරුට උල් තියුණු ආයුධයකින් ඔහුගේ ශරීරයේ සංවේදී ඉන්ද්‍රියන් තිබෙන උරස් ප්‍රදේශයට ගැඹුරු ඇනුම් තුවාල දෙකක් සිදු කර තිබීම ද සැලකිල්ලට ගනු ලැබේ. එවිට චූදිත අධිචෝදනාවේ සඳහන් පරිදි වරදක් කළ බවට අපරාධාරෝපනය කරන සාක්ෂි ඉදිරිපත් වී ඇත."

It is apparent therefore that the learned Trial Judge has arrived at the conclusion of guilt of the Appellant on the basis that there is evidence to that effect and not on the basis that and not the prosecution has proved the case beyond reasonable doubt. This Court is of the view that impugned judgment is bad in law.

The next question this Court has to determine is whether this matter should be ordered for a re-trial. The learned Counsel for the Appellant relies on the following case;

W.N. Ratnasuriya Vs. The Hon. Attorney General (C.A. 58/2005 deceided on 19.12.2008) in which the Court of Appeal refused to order a re-trial on the grounds that 10 years have lapsed since the commission of the offence.

The case of **Ahamad Lebbe Noor Mahamed and others Vs. Republic of Sri Lanka** (C.A. No. 158 – 159 / 2002 deceided on 16.06.2006) in which it was held that;

> "the alleged incident has taken place more than 17 years ago. In the interest of justice, I agree with the counsel for the accused –appellant that the case should not be sent for re-trial. Thus, I set aside the conviction and acquit all the accused – appellants."

The case of Jagath Chandana Weerasinghe Vs. The Commision to Investigate Allegations of Bribery and Corrupotion (C.A. No. 316/2007) which held that;

> "The reasons why a re-trial is not orders; firstly, the offence was committed about 10 years ago and the convition is in 2007, now four years. Secondly this Court will not provide an opportunity to the prosecution to cover their gaps."

In the instant case it is clear that the offence alleged to have been committed by the Appellant had been committed in 1998 which is almost 20 years ago and the conviction on 17.09.2014 was entered more than 3 years ago.

When perusing the original case record it appears that the Appellant has been in remand custody for more than 10 years. Under these circumstances we are not inclined to send this case for re – trial in the interests of justice.

Therefore, in the circumstances as morefully discussed above this appeal is allowed and the judgment of the learned Trial Judge dated 17.09.2014 is set aside and the Accused – Appellant is hereby acquitted.

We wish to place on record that we appreciate the well – researched written submissions of Rasika Lasantha Samarawickrama the learned Counsel assigned for the Appellant.

Appeal Allowed.

Judge of the Court of Appeal

S. THURAIRAJA, PC, J

I Agree.

Judge of the Court of Appeal