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

In the matter of an appeal under and in terms of Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution

C.A. Case No: 192/2017

H.C. Anuradhapura Case No: 136/2011

The Democratic Socialist Republic of Sri Lanka

Complainant

-Vs-

Jayasenage Janaka

Accused

-And Now Between-

Jayasenage Janaka

Accused-Appellant

-Vs-

Hon. Attorney General

Respondent

Before : **A.L. Shiran Gooneratne J.**

&

K. Priyantha Fernando J.

Counsel : Indica Mallawarachchi with K. Kugaraja for the Accused-Appellant.

Madhawa Tennakoon, SSC for the Respondent.

Written Submissions of the Accused-Appellant filed on: 29/01/2018

Written Submissions of the Respondent filed on:

Argued on : 30/01/2019

Judgment on : 27/02/2019

A.L. Shiran Gooneratne J.

The Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Anuradhapura for causing the death of Ariyapalage Sujatha Weerasekera, (hereinafter referred to as the deceased) under Section 296 of the Penal Code. Upon conviction, the Appellant was sentenced to death. The said conviction was based entirely on circumstantial evidence.

The case for the prosecution briefly is that the Appellant who was attached to the Army was in a relationship with the deceased, and on 22/10/2007, was seen

together by Weerasekarage Premalal PW2, travelling in motor cycle. PW2 had informed Kusumawathi, (PW1), the mother of the deceased regarding this incident on the same date. PW1 made a statement to the police regarding her disappearance on 25/10/2007. The Appellant surrendered to the police on 30/10/2007, where a statement was recorded and the Appellant was released thereafter. On 04/12/2007, the Army authorities handed over the Appellant from there custody to the police, and on the same date a second statement was recorded. On 05/12/2007, on information provided by the Appellant in his second statement to the police, the body of the deceased was exhumed from a cemetery in close proximity to a property belonging to the father of the Appellant.

In this background, the following grounds of appeal were raised by the Counsel for the Appellant;

1. The prosecution has failed to establish Corpus Delicti
2. Items of circumstantial evidence are wholly inadequate to support the conviction.
3. Total failure on the part of the learned high court judge to apply the principles governing evaluation of circumstantial evidence.

The counsel for the Appellant submits that in a murder charge components of corpus delicti are two fold;

(a) The prosecution must establish the fact of death

(b) That death was brought about by the criminal agency of another

E.R.S.R. Coomaraswamy in his Book "The Law of Evidence" (Book 2 Vol. 2 page 932) states;

"The judge must in a case of murder or culpable homicide direct the jury on the necessary ingredients of the relevant offence;

a) *The death of the deceased,*
b) *That the accused caused the death,*
c) *That the accused had the murderous intention in a case of murder or the necessary intention or knowledge in a case of culpable homicide not amounting to murder."*

When a charge of murder is preferred against an accused the evidence offered has to connect the accused with the crime. The exhumed body was sufficiently identified to be that of the deceased. However, Doctor Ajith Jayasena (Dr. Jayasena) who authored and submitted the Post Mortem Report (PMR), in evidence, opined that the cause of death of the deceased is unascertained. The medical evidence has clearly ruled out strangulation, natural causes, suffocation or poisoning as a cause of death. No external or internal injuries on the body has been observed. The whole body of the deceased was recovered with all internal organs intact. The medical evidence further reveals that;

"the body shows adipocere formation which can be seen when the body is subjected to wet conditions. The body with adipocere formation will preserve its normal appearance to a certain degree".

Dr. Jayasena was consistent in his evidence that the cause of death is unascertained. However, he has also opined *"that sudden pressure on the neck may precipitate reflex cardiac arrest ('vagal inhibition') resulting in sudden death"*.

I will now re-produce the comment made under Section 20 of the PMR for purpose of clarity;

> *"According to the circumstances revealed by the police, the deceased was assaulted by her husband with a blunt edge of a knife upon the neck and she collapsed on the floor, sudden pressure on the neck may precipitate reflex cardiac arrest ('vagal inhibition') resulting in sudden death. This is due to the simulation of the nerve endings in the carotid artery in the neck"*.

In this content, it is important to note that;

Firstly, that there is no evidence that the Appellant had used a knife and inflicted injury in the neck of the deceased.

Secondly, the conclusions made under Section 14 of the PMR and in evidence given by Dr. Jayasena is that, there were "no soft tissue injuries" and the "muscles of the neck are free of injuries. Unremarkable other than the adipocerous changes. Blood vessels and cervical vertebrae are normal".

Therefore, we cannot come to a conclusion that sudden pressure on the neck may have precipitate reflex cardiac arrest resulting in sudden death, a condition which is not supported by medical evidence. We also note that the date of death indicated in the PMR does not correspond with the date given in evidence.

E.R.S.R. Coomaraswamy at page 933 (Supra), states;

a) ……..

b) That the accused caused the death

The cause of death would have been given in the medical evidence. The jury has to consider whether the alleged act of the deceased, with the weapon he is alleged to have used, was the cause of death. The true cause of death must be clearly established. But the prosecution need not prove the manner in which the deceased was killed, provided it is able to prove that he was in fact murdered.

In this case, there is satisfactory proof of death of the deceased. However, it is incumbent on the prosecution to prove that the accused is the author of the crime and establish that the crime charged has been committed by the accused. The medical evidence does not reveal the cause which resulted in the death of the deceased.

In ***R vs. Wijedasa Perera (1950) 52 NLR 20***, the Court observed that;

The burden of proof was on the prosecution to establish beyond reasonable doubt that the deceased man was murdered. There is no burden cast on the prosecution to go further and to establish the manner in which the deceased was killed, provided the prosecution was able to prove that the man was in fact murdered. We are mindful of the words of Scrutton J. in charging the jury in the case of R v. George Josegh Smith [(1915) Notable British Trials, pp. 271-272.].

"I direct you . . . . that it is not necessary that you should be satisfied exactly how the death was caused, if you are satisfied that it was caused by a designed act of the prisoner. I direct you that in my own words and I also direct you in the words of a judgment which I regret has not been more widely circulated in England-the judgment of Mr. Justice Windeyer of the Australian Courts: -" All that the law requires is that the offence charged must be proved. In proving murder, the exact mode of killing becomes immaterial if there is sufficient evidence to satisfy a jury that there was a killing by the prisoner under conditions which make it murder ".

In ***Mafabahi Nagarbhai Raval vs. State of Gujarat, A 1992 SC 2186, 2188,*** the court held that,

"the doctor who has examined the deceased and conducted the post-mortem is the only competent witness to speak about the nature and

injuries and the cause of death. Unless there is something inherently defective the court cannot substitute its opinion to that of the Doctor".

In terms of Section 45 of the Evidence Ordinance, when evaluating medical evidence, the Court should arrive at conclusions based on the opinion of experts having special skill and knowledge of their respective field of expertise. It is in evidence that Dr. Jayasena who held the post mortem examination has considerable experience in dealing with exhumed bodies. He had seen the body of the deceased closely at the medico-legal morgue and also at the place where the body was exhumed. Therefore, in the absence of any convincing evidence that Dr. Jayasena had deliberately given a wrong report, his evidence should be excepted.

To bring home a conviction, the only premise the Learned High Court Judge has acted upon is that the Appellant owed an explanation for the information provided in terms of Section 27 of the Evidence Ordinance, which resulted in the exhumation of the body of the deceased. In the absence of direct, circumstantial or any other form of evidence incriminating the accused to the crime, the learned trial judge has clearly misdirected himself to expand the scope of knowledge attributable to the Appellant on such recovery in terms of Section 27 of the Evidence Ordinance, to that of seeking an explanation from the accused based on the said information. The learned trial judge has failed to independently evaluate the evidential value of the PMR, where the cause of death is given as unascertained. Having noted that the prosecution has not established an exact time

or date of death of the deceased, the learned high court judge has taken into consideration the Appellant been seen in the company of the deceased on 04/10/2007, and adverts to the principle of last seen theory, which cannot be applied in the circumstances.

The Counsel for the Appellant has cited the case of ***The King v. Appuhamy*** **46 NLR 128,** where it was held that;

> *"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 if the prosecutor has failed to fix the exact time of death of the deceased".*

As I noted before the prosecution case rests purely on circumstantial evidence.

In ***King vs. Abeywickrama 44 NLR at page 254 Soertsz, J.*** remarked;

> *"in order to base a conviction on circumstantial evidence the jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence."*

Therefore, mere doubt or suspicious conduct of the accused should not be taken into consideration.

In Jose vs. Joy, 2008 (3) KLT 512 (515), the court held that,

"The probability of the prosecution case does not depend upon the improbability or falsity of the defence case. Irrespective of the falsity of improbability of the defence case, the prosecution has to prove its case beyond reasonable doubt. What the court has to consider is whether the prosecution has proved all the ingredients of the offence or not and not whether the accused has failed to establish his case to come to conclusion whether prosecution has established its case".

Accordingly, for all the above reasons we are of the view that all three grounds of appeal as noted above, should be decided in favour of the Appellant.

Therefore, we set aside the conviction dated 09/08/2017, and the corresponding sentence and acquit the Appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL