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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979, read with Article 138 of The Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0244/16

High Court of Panadura

Case No: HC/2269/2006

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1.Kulathunga Aarachchige Pushpakumara Perera

2.Bomiriyage Lakshman Ranganath Gomez

ACCUSED

AND NOW BETWEEN

2. Bomiriyage Lakshman Ranganath Gomez

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Tenny Fernando with Terin Marasinghe for the Accused-Appellant
	: Dileepa Pieris, S.D.S.G. for the Respondent
Argued on	: 12-06-2024
Written Submissions	: 29-09-2017 (By the Accused-Appellants)
	: 17-10-2018 (By the Respondent)
Decided on	: 30-08-2024

Sampath B. Abayakoon, J.

This is an appeal by the 2nd accused-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved of his conviction and sentence by the learned High Court Judge of Panadura.

The appellant along with the 1st accused was indicted before the High Court of Panadura for committing the following offences.

1. That they caused the death of one Pullikutty Arachichige Punchinona on 19-02-2002, at a place called Halthotiyawaththa in Horana within the jurisdiction of the High Court of Panadura, and thereby committed

the offence of murder, punishable in terms of section 296 read with section 32 of the Penal Code.

2. At the same time and at the same transaction, they committed the offence of robbery of jewellery and other property valued at Rs. 62,000/- belonging to one Lokupathirage Mallika Indrani, and thereby committed an offence punishable in terms of section 380 of the Penal Code.
3. Alternative to the 2nd count as above, the 1st accused at the same time and at the same transaction had in his possession stolen property mentioned in count 2, and thereby committed an offence punishable in terms of section 394 of the Penal Code.
4. Alternative to the 2nd count as above, the 2nd accused, namely the appellant, at the same time and at the same transaction had in his possession stolen property mentioned in count 2, and thereby committed an offence punishable in terms of section 394 of the Penal Code.

After trial without a jury, the learned High Court Judge of Panadura of his judgment dated 13-10-2016 found both the accused including the appellant who was the 2nd accused guilty for the 1st and the 2nd count preferred against them, and accordingly, they were acquitted of the 3rd and the 4th count preferred on the basis that they were alternative counts to count 2.

The 1st accused indicted had absconded the Court throughout the trial, and the trial has been proceeded against the 1st accused in terms of section 241 of the Code of Criminal Procedure Act.

After the 1st accused was found guilty, the learned High Court Judge has sentenced him for death on the 1st count and for a period of 10 years rigorous imprisonment on count 2. He has also been fined Rs. 20,000/- with a default sentence of 2 years simple imprisonment.

Having considered the allocutus of the appellant, where he has said that he was a 16-year-old schoolboy at the time of the commission of this offence, the learned High Court Judge has imposed life imprisonment in lieu of death sentence in relation to the 1st count. He has also been sentenced to a period of 10 years rigorous imprisonment on count 2. In addition, he has been ordered to pay a fine of Rs. 20,000/- with a default sentence of 2 years simple imprisonment.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal to be considered by the Court.

1. The learned High Court Judge misdirected himself by failing to properly evaluate the evidence against the 2nd accused and therefore, the judgment was bad in law.
2. The learned High Court Judge misdirected himself by applying the Ellenborough Dictum in this case when the prosecution failed to establish a *prima facie* case.
3. The learned High Court Judge misdirected himself by shifting the burden of proof to the accused by expecting an explanation for certain evidence which are not conclusive against the appellant and therefore the judgment was bad in law.

Before considering the grounds of appeal and the argument presented by the learned Counsel for the appellant and also by the learned Senior Deputy Solicitor General (SDSG) in that regard, I find it appropriate to summarily narrate the evidence led before the trial Court.

The Facts in Brief

This is a matter where the deceased, who was an old woman, was found killed inside the house where she lived with her family members. At the time of the incident, she has been alone at the house. Her death has been discovered only after the inmates of the house returned home after day's work,. It has been found

that the house has been robbed, and several items of jewellery and some of the valuables that were inside the house had been taken away. At the trial, PW-01 who was the wife of the deceased's son, who lived in the house along with the deceased has identified several items of jewellery and belongings that had been robbed from the house.

It has to be noted that there are no eyewitnesses to this incident and this is a matter that needs to be determined entirely based on circumstantial evidence.

The police officers who conducted the investigations had recorded the statements of the 1st accused and the appellant after their arrest. As a result of the statement made by the appellant, a purse, a pendant and a gold ring have been recovered from a house. The relevant portion of the statement which led to the recovery had been marked as P-14 at the trial in terms of section 27 of the Evidence Ordinance.

The relevant portion of the statement made by the 1st accused which led to the recovery of several other items had also been marked under the same provision.

The witness PW-01 has identified the ring and the pendant as items belonging to her and her husband.

The other witness of importance when it comes to the circumstantial evidence against the appellant had been PW-03 Sumudu Priyangika Perera. She has been a neighbour of the 1st accused. She has known him as well as his mother well. On 19-02-2002, namely on the date of the incident, around 8.00 – 8.30 in the morning, the 1st accused has visited her house and had stated that he has some jewellery belonging to his mother and although she needs to pawn them she cannot do so as she is not in possession of an identity card, and has requested her to help him out to get the jewellery pawned.

According to her evidence, the appellant has accompanied the 1st accused when he visited the house. He was unknown to her, and had met him only on that occasion. Agreeing to the request of the 1st accused, she has accompanied him

and the appellant to Bandaragama Rural Bank and has pawned two gold chains given by the 1st accused to her and had obtained Rs. 13,000/-, which she has then given to the 1st accused. She has also gone to the Piliyandala Dedigama Pawning Centre along with them and pawned another gold chain given by the 1st accused at that centre and had obtained Rs. 10,000/-, which she has again given to the 1st accused. On their way back, the 1st accused has purchased a ring and some clothes from Piliyandala town and has told PW-03 to hand over them to his mother, which she has done on her return. On the same day, she has come to know that a grandmother has been killed. Fearful that the gold jewellery pawned by her may have been taken from the person who was killed, she has destroyed the pawning receipts she had with her. She has been arrested by the police on 22-02-2002. She has identified the ring purchased by the 1st accused when giving evidence in Court. PW-03 has spent some time in remand custody as a suspect of this crime, but had been released later and made a witness.

When the learned High Court Judge called upon the appellant for his defence at the conclusion of the prosecution case, he has made a statement from the dock. He has denied any connection to the offence and had stated that he was a 16-year-old schoolboy when he was arrested. He had stated that the 1st accused was his mother's elder sister's son, and the mother's elder sister and the 1st accused visited their home, and while they were there, the 1st accused was arrested by the police. He has claimed that subsequently he was also taken to the police station and made to sign documents. He has claimed that PW-03 was unknown to him, and he saw her for the 1st time when he was arrested and taken to the police station.

Consideration of the Grounds of Appeal

Since the grounds of appeal urged are interrelated, I will now proceed to consider the said grounds of appeal together. Since this is a matter that should be considered entirely based on circumstantial evidence, I find it appropriate to

discuss the basic ingredients that should be proved in a case where circumstantial evidence needs to be considered.

In the case of **The King Vs. Abeywickrama 44 NLR 254** it was held:

> Per **Soertsz, J.**,
>
> *"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 hypotheses of his innocence."*

In the case of **Don Sunny Vs. The Attorney General (1998) 2 SLR 01**, it was held:

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 only inference that the accused committed the offence. On 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 consideration of the proved items of circumstantial evidence the only inference that can be drawn is that the accused committed the offence, then they can be found guilty. 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 if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.*

However, when considering the circumstantial evidence, what has to be considered is the totality of the circumstantial evidence before coming to a firm

finding as to the guilt of an accused, although each piece of circumstantial evidence when taken separately, may only be suspicious in nature.

In the case of **King Vs. Gunaratne 47 NLR 145**, it was held:

> *"In a case of circumstantial evidence, the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion.*
>
> *The jury is entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt."*

In the case of **Regina Vs. Exall (176 English Reports, Nisi Prius at page 853)**, **Pollock, C.B.** considering the aspect of circumstantial evidence remarked;

> *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in a chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like of a rope composed of several codes. One strand of the rope might be insufficient to sustain the weight, but stranded together may be quite of sufficient strength."*

It was observed in the case of **Karunaratne Vs. Attorney-General (2005) 2 SLR 233,**

> Per **Jagath Balapatabendi, J.,**
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> "*The primary advantage of circumstantial evidence is that the risk of perjury is minimized since it, unlike direct evidence, does not emanate from the testimony of a single witness. It is therefore more difficult to fabricate circumstantial evidence, than it is to resort to falsehood in the course of giving direct evidence.*
>
> *There is no principle of the law of evidence which precludes a conviction in a criminal case based entirely on circumstantial evidence. There are no*

uniform rules for the purpose of determining the probative value of circumstantial evidence. This depends on the facts of each case."

In the case of **Krishantha de Silva Vs. The Attorney General (2003) 1 SLR 162**:

Per **Edirisuriya, J.,**

"It is admitted that this is a case of circumstantial evidence. In such a case, circumstances relied upon should be consistent with the guilt of the accused and inconsistent with his innocence. If the circumstantial evidence relied upon can be accounted for on the supposition of innocence then the circumstantial evidence fails. Circumstantial evidence can be acted upon only if, from the circumstances relied upon the only reasonable inference to be drawn is the inference of guilt. If the circumstances are consistent both with guilt and with innocence then the case is not proved on circumstantial evidence. The hypothesis of innocence must be excluded by the circumstances relied upon and the circumstances must point to one conclusion alone, i.e. the guilt of the accused. The learned trial Judge has in detail, discussed these principles to be followed in appreciating circumstantial evidence in the instant case."

There are two main pieces of circumstantial evidence that have been led against the appellant. The 1st one being the evidence of PW-03 who says that the appellant accompanied the 1st accused when he came and met her and wanted her to pawn some jewellery for him.

The 2nd piece of circumstantial evidence is the discovery of items that were in the house where the deceased was killed, as a result of the statement made by the appellant to police in terms of section 27 of the Evidence Ordinance.

It is settled law that evidence in a case has to be considered in its totality, be it the evidence of prosecution witnesses or that of the defence, without compartmentalizing it. It is also well settled law that if a a fact discovered as a

result of evidence can be interpreted in favour of the prosecution case or the same fact can be considered in favour of the defence, in such a scenario, the version which favours the defence has to be considered.

In the case of **Alim Vs. Wijesinghe (S.I. Police, Batticaloa) 38 CLW 95**, it was held that,

> *"Where the same facts are capable of an inference in favour of the accused and also an inference against him, the inference consistent with the accused's innocence should be preferred."*

When the evidence of PW-03 is considered having in mind the above legal principles, what has to be determined is whether her evidence was cogent enough to accept as it is. I am of the view that in that regard, the dock statement made by the appellant and the stand taken up by him at the trial should also be considered along with the evidence of PW-03. Although a dock statement made by an accused person has less value compared to evidence given under oath, it is settled law of this country that even a dock statement has some evidential value which needs to be considered.

The evidence of PW-03 had been to the effect that the appellant was unknown to her and she saw him for the 1st time when he accompanied the 1st accused to her house. If that was the case, the best evidence to establish that it was the appellant who came along with the 1st accused would have been to hold an identification parade in that regard, which has not happened as part of the investigation of this case.

The stand taken up by the appellant in his dock statement had been that he did not go with the 1st accused to meet PW-03 and he has never seen her until she was arrested and produced before the police station.

It is an undisputed fact that the PW-03 was also under remand custody as a suspect in this matter. She has later been released and made a witness for the prosecution. According to her evidence, she was the one who took the jewellery

and pawned them and obtained money, which, according to her, has been given to the 1st accused.

Under the circumstances, since the identification of the appellant by PW-03 amounts to a dock identification, it needs to be considered whether such an identification can be considered as a safe identification of the appellant. It may be quite possible for PW-03 to conclude that the person in the dock is the one who came with the 1st accused even though it is also possible that the PW-03 has identified the appellant correctly. I am of the view that under the circumstances, and in view of the defence taken up by the appellant, this uncertainty as to the identity of the appellant needs to be considered in favour of him.

The other piece of evidence against the appellant is the discovery of a purse, a gold ring and a pendant as a result of his alleged statement to the police.

It is settled law that the value that can be attached to a recovery made based on a section 27 statement is to impart the knowledge of the fact discovered to the person who made the statement.

The Indian Supreme Court held in the case of **Kottaya Vs. Emperor 1947 AIR PC at Page 70**;

> *"In Their Lordships' view it is fallacious to treat the' fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission*

of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

The evidence led at the trial shows that the things discovered as a result of the section 27 statement made by the appellant were things taken from the house of the deceased, which shows that the appellant had the knowledge as to where he kept the things found. However, there must be evidence to show which connects the appellant to the crime in order to make use of the section 27 statement against him.

It is undisputed that the appellant as well as the 1st accused are close relatives. The evidence led at the trial shows that the 1st accused had been arrested while he was at the house of the appellant. The appellant, in his dock statement has explained the presence of the 1st accused in his house saying that he visited their house along with his mother and was arrested while they were in their house. This cannot be considered as an unusual event since they were close relatives. When considering this fact in relation to the evidence of PW-03, which says that it was the 1st accused who brought her the jewellery and did the entire transaction with her, I am of the view that the discovery cannot be concluded as a fact that connects the appellant directly to the killing of the deceased.

I find that the attention of the learned High Court Judge has not been drawn to the above legal matters that should have been considered in favour of the appellant when the learned High Court Judge analyzed the evidence against him. I am also of the view that the learned High Court Judge has failed to analyze the defence taken by the appellant in its correct perspective.

Under the circumstances, I am of the view that although there are suspicious circumstances which may connect the appellant to the crime, those suspicious circumstances taken as a whole, are not sufficient enough to conclude that the

charges against the appellant had been proved beyond reasonable doubt. I am of the view that it is not safe to convict the appellant on such evidence.

Therefore, it is my considered view that the conviction of the appellant based on the circumstantial evidence available against him cannot be allowed to stand and the grounds of appeal urged by the learned Counsel for the appellant has merit.

Accordingly, I set aside the conviction and the sentence of the appellant by the learned High Court Judge of Panadura and acquit him from the 1st and the 2nd counts for which he was found guilty.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal