

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of section 331 (3) of the Code of Criminal Procedure Act.15 of 1979 read with Article 139 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:

CA/HCC/0113/2022

High Court Gampaha Case No:

HC/61/2016

Complainant

Vs

Gamlath Disavage Don Thushan Priyankara

Accused

AND NOW BETWEEN

Gamlath Disavage Don Thushan Priyankara

Accused – Appellant

Vs

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

Complainant – Respondent

**Before : P. Kumararathnam, J.
Pradeep Hettiarachchi, J.**

**Counsel : Sarath Jayamanne, PC with Asith Siriwardena, Vineshka Mendis,
Prashan Wickramaratne, Dakshin Abeykoon, Dinindu Rathnayaka and
Chathusgi Vidushika for the Accused – Appellant.
Anupa de Silva DSG for the Complainant-Respondent**

Argued on : 26.06.2025

Decided on : 29.08.2025

Pradeep Hettiarachchi, J

JUDGEMENT

1. The accused–appellant was indicted before the High Court of Gampaha for allegedly committing the murder of Ajith Priyankara, an offence punishable under Section 296 of the Penal Code. The trial was conducted before the learned High Court Judge of Gampaha without a jury. At the conclusion of the trial, the learned Judge found the accused–appellant (hereinafter referred to as the appellant) guilty of the charge of murder, and accordingly convicted him and sentenced him to death.
2. Being aggrieved by the said Conviction and sentence, the appellant has preferred the present appeal. The grounds of appeal advanced by the Appellant are as follows:
 1. The learned trial Judge has failed to appreciate the salient aspects of a case based on circumstantial evidence.
 2. The evidence available is not sufficient and does not give rise to the irrepressible inference that the accused committed the offence’
 3. The learned trial Judge has misinterpreted the evidence of the ballistic expert and used such evidence against the accused;
 4. The learned trial Judge has failed to appreciate the medical evidence with regard to the distance of shooting
 5. The learned trial Judge has failed to understand and appreciate the principles relating to the burden of proof and that the burden of proof is with the prosecution
 6. The learned Judge has failed to realize that mere suspicion of the commission of an offence does not suffice to arrive at a conclusion of Guilt.
3. As directed by the court, both the appellant and respondent submitted their respective written submissions, which I examined carefully.

Background to the appeal:

4. The appellant, PW1, PW2, and the deceased were friends. On the day of the incident, the deceased, together with PW1 and PW2, had been consuming alcohol at a friend's house. Thereafter, they contacted the appellant, and all four met near a church in Makola. PW1, PW2, and the deceased arrived in a three-wheeler, while the appellant came in a car.
5. A heated argument on political matters ensued, which escalated into a scuffle between the appellant and the deceased. During the altercation, the appellant pushed the deceased, at which point a gunshot was heard and the deceased collapsed to the ground. PW2 immediately transported the deceased to Kiribathgoda Hospital, from where he was later transferred to the National Hospital, Colombo, where he succumbed to his injuries.
6. Around midnight on the same day, police arrested the appellant at a roadblock. He was traveling in a black car when officers found a gun inside that smelled of gunpowder. The appellant was then taken into custody.
7. Following the arrest, police returned to the crime scene and recovered an empty cartridge. Another cartridge was subsequently found at the scene by PW 12.
8. For the prosecution, seven witnesses testified. Among them, PW 2 was a lay witness, while PW 5, PW 7, PW 6, and PW 12 were police officers who conducted the investigation. PW 9 was the Judicial Medical Officer who performed the autopsy on the deceased, and PW 10 was the Assistant Government Analyst. For the defense, the appellant made a dock statement, and two other witnesses also testified.
9. The prosecution case rests entirely on circumstantial evidence, as there were no eyewitnesses who saw the appellant shooting the deceased. The paramount question, therefore, is whether the circumstantial evidence adduced by the prosecution is sufficient to establish the guilt of the appellant beyond reasonable doubt.
10. It is well settled that a conviction can lawfully be founded on circumstantial evidence, provided that the circumstances relied upon are cogently and firmly established, are consistent only with the hypothesis of the accused's guilt, and exclude every reasonable

hypothesis of innocence. It is therefore appropriate, at the outset, to consider the principles of law governing circumstantial evidence.

11. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused and should exclude every reasonable hypothesis of innocence.
12. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. In this regard, the following authorities would be of much importance.
13. In ***Hanumant Govind Nargundkar v. State of M.P., AIR (1952) SC 343***, it was observed thus;

"It is well to remember that in case where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

14. In ***State of U.P. v. Ashok Kumar Srivastava, (1992) CrL LJ 1104*** it was pointed out that great care must be taken in evaluating **circumstantial evidence** and if the **evidence** relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.
15. In ***C. Chenga Reddy v. State of A.P., [1996] 10 SCC 193***, wherein it has been observed thus:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

16. **Sir Alfred Wills** in his book '*Wills' Circumstantial Evidence*' (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:

- (1). the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;*
- (2). the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;*
- (3). in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits;*
- (4). in order to justify the inference of guilt, 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; and*
- (5). if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.*

17. In ***Padala Veera Reddy v. State of A.P.***, AIR (1990) SC 79 it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- (1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
- (2) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

18. In ***Don Sunny Vs Attorney General*** [1998] (2) Sri.L.R. 1 it was held that:

- 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.*

2. *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.*
3. *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.*
4. *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.*
5. *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.*

19. In ***Krishantha De Silva vs The Attorney General [2003] (1) Sri.L.R, 162*** it was held inter alia that:

Circumstantial evidence can be acted upon only if from the circumstances relied upon the only reasonable inference to draw 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.

Per Edirisuriya, J.

The hypothesis of innocence must be excluded by the circumstance relied upon and the circumstances must point to one conclusion alone, i.e. the guilt of the accused"

20. It is with these legal principles in mind that I shall proceed to consider the present appeal. PW2 and PW5 were the witnesses who were in the company of the deceased and the appellant on the day of the incident.
21. According to PW2's testimony, PW5, the deceased, and the appellant had met near a church on Makola Road, where a heated argument arose between them over a political issue. The argument escalated into a scuffle between the deceased and the appellant. Suddenly, PW2 heard the sound of a gunshot and saw the deceased fall to the ground.
22. PW2 further stated that the deceased was transported in a van to Kiribathgoda Hospital. From there, he was transferred in an ambulance to the National Hospital, Colombo,

where he subsequently succumbed to his injuries. PW2 also stated that he did not see any firearm in the appellant's possession at the time of the incident.

23. It is in evidence that when they lifted the deceased to take him to the hospital, the appellant's vehicle was present, but the appellant had left thereafter. PW5, a retired Sub-Inspector who was attached to the Kiribathgoda Police Station at the relevant time, recorded statements from the witnesses and also assisted in arresting the appellant and producing him before the Judicial Medical Officer (JMO).
24. PW7 was the Officer-in-Charge of the Kiribathgoda Police during the relevant period. He arrested the appellant at a roadblock and recovered the gun, which had been placed behind the driver's seat of the vehicle in which the appellant was travelling at the time of arrest. Thereafter, he proceeded to the scene of the crime, prepared a sketch, and observed bloodstains. He also recovered an empty cartridge from the scene. Subsequently, the witness took steps to forward those items to the Government Analyst. In open court, the witness identified both the gun and the empty cartridge when they were shown to him.
25. According to PW5, the appellant was arrested around midnight on the same day. At the trial, the recovery of the gun and two cartridges, and their submission to the Government Analyst, was admitted under Section 420 of the Code of Criminal Procedure Act.
26. PW9, the Judicial Medical Officer, testified that one injury was observed on the deceased. According to his opinion, the gunshot had been fired from a distance of approximately three to fifteen feet. Furthermore, the JMO stated that no blackening, tattooing, or burn marks were found on the body of the deceased.
27. In the impugned judgment, it can be observed that the learned High Court Judge inferred the appellant's fleeing away from the scene as an incriminating piece of evidence. Furthermore, the learned High Court Judge concluded that the following items of evidence were sufficient to secure the appellant's conviction.
 1. Soon after the report of gunfire, the appellant fled the scene. The learned High Court Judge concluded that, had the appellant not been involved in the crime, he would have had no reason to leave the scene.

2. The appellant was arrested at a roadblock approximately one hour after the incident, in possession of a gun that still emitted the smell of gunpowder.
 3. Two empty cartridges were recovered from the scene of the crime, and the cause of death was established as injuries to the brain and skull caused by gunshot.
 4. The gun is capable of firing 12-bore cartridges, and, according to the Government Analyst, a shot had been discharged from this firearm.
 5. Despite there being no conclusive proof that the cartridges found at the scene were fired from the gun marked P1, the Judge has noted that it also cannot be ruled out that they were not fired from the gun.
28. The learned High Court Judge has considered the above circumstantial evidence and concluded that it was sufficient to establish the guilt of the appellant and inconsistent with his innocence. However, in a case resting solely on circumstantial evidence, it is incumbent upon the court to determine whether the established facts are not only consistent with the guilt of the accused but also wholly inconsistent with any reasonable hypothesis of innocence.
29. In this case, the prosecution placed much reliance on the testimony of PW2 Sanath Perera. He testified that he did not see a gun in the appellant's hand during the scuffle; he simply heard a gunshot and saw the deceased fall. Furthermore, there was no evidence to suggest the appellant was armed with a gun when he got out of his vehicle. In this regard, the JMO's opinion on the nature of the injuries and the distance from which the shot was fired is particularly crucial.
30. His observations indicate that the person who fired the shot was at a distance of approximately 4 to 10 feet from the deceased. More importantly, he observed no tattooing, blackening, or burn marks on the deceased. This observation further confirmed his opinion on the distance from which the shot was fired, as such marks would have been present if the gun had been close to the deceased.
31. Thus, it is highly improbable that the appellant shot the deceased, as PW2 clearly stated that he heard a gunshot and saw the deceased fall to the ground while the appellant and the deceased were in a scuffle.

32. Another important fact that requires serious consideration is the opinion of the Assistant Government Analyst (PW10) regarding the cartridges recovered at the scene. His evidence does not suggest that they were fired from the gun marked as P1, which was recovered from the vehicle in which the appellant was travelling. He clearly stated that the marks visible on the cartridges were insufficient for microscopic examination and, therefore, he could not express any opinion as to whether they were fired from gun P1. In re-examination, he further clarified that he could not rule out the possibility that they were fired from gun P1. Thus, there is no conclusive opinion establishing that the cartridges found at the scene were discharged from gun P1. This, in turn, severs a major link in the chain of circumstantial evidence relied upon by the prosecution.
33. However, the learned High Court Judge has misdirected himself in the analysis and evaluation of the evidence of PW10 by declining to rely on the expert opinion on the said point, while at the same time attaching undue weight to the negative observation of PW10 that he could not rule out the possibility of the cartridges having been fired from gun P1.
34. More significantly, PW10 in his testimony stated that he was unable to express any opinion as to when the said gun was last fired, notwithstanding his observation of remnants of gunpowder in P1. He further clarified that such remnants may remain traceable even after several years. Accordingly, it would be difficult, if not impossible, to conclude that the cartridges found at the scene had been fired from the gun marked P1.
35. The facts that no evidence was forthcoming to show that the appellant was armed with a gun when alighting from his vehicle at the scene of the shooting, or that he had the gun in his hand during the scuffle with the deceased, together with the JMO's opinion that the shot was fired from a distance of 4 to 10 feet, and the absence of any concrete evidence to establish that the cartridges were fired from gun P1, in my view, prevents the court from forming a basis to arrive at the sole inference of the appellant's guilt.
36. It is also important to highlight that, since PW2's evidence never suggested that the appellant was armed with a gun during the scuffle with the deceased, and given the distance from which the shot was fired, together with the absence of any conclusive link between gun P1 and the cartridges found at the scene, the possibility that an individual other than the appellant fired the gun cannot also be ruled out. Given the

possibility of such an occurrence, it can be reasonably said that a set of circumstances contributing to an inference that is inconsistent with the guilt of the appellant, exists in this situation.

37. When the evidence is suggestive of even a single reasonable inference other than the guilt of the accused, then it is not safe to convict the accused, as the benefit of the doubt must be afforded to the accused. The evidence adduced by the prosecution has failed to exclude such an inference being drawn by an examination of the attendant circumstances.
38. Furthermore, PW2 heard only a single gunshot, and the deceased sustained only one firearm injury, yet the police recovered two empty cartridges at the scene, which again casts doubt on the prosecution's version of events.
39. It was submitted by the learned Deputy Solicitor General that the appellant's failure to mention in his dock statement that he had fired the gun a long time ago amounted to an admission of the prosecution's version, particularly since the Government Analyst had confirmed that the gun had been fired, though he could not specify the time frame. However, it must be emphasized that the appellant bears no burden to offer any explanation unless and until the prosecution has first established its case.
40. This being a case founded on circumstantial evidence, it is incumbent upon the prosecution to present material sufficient to exclude any inference consistent with the innocence of the appellant and to establish facts solely consistent with his guilt. The evidence led by the prosecution does not however, suggest that the cartridges marked as P2 and P3 were fired from the gun marked as P1. The only conclusion that can be drawn from the Government Analyst's testimony is that the gun had at some point been fired, without any certainty as to the time.
41. Moreover, the absence of conclusive proof that the cartridges recovered from the scene were in fact discharged from the gun P1 severs a vital link in the chain of circumstantial evidence relied upon by the prosecution, a matter I have not overlooked. Accordingly, the submissions advanced by the learned Deputy Solicitor General on this point are devoid of merit and cannot be sustained.
42. Moreover, it was submitted on behalf of the respondents that following the shooting, PW2 was emotionally shaken by the incident, his rational faculties were impaired, and

he was under the influence of alcohol. If that were so, it would be unsafe to rely on the remainder of his testimony, as there can be no assurance that PW2 clearly perceived the incident. This further undermines the credibility of the prosecution's evidence.

43. The foregoing facts clearly demonstrate that the evidence led by the prosecution was insufficient for the trial Judge to draw an irresistible inference pointing to the guilt of the appellant. Where the prosecution has failed to discharge its burden of proving the case beyond reasonable doubt, the question of the credibility or sufficiency of the defence does not arise. In view of the above, it is my considered opinion that it would be unsafe to convict the appellant on the charge of murder, given the insufficiency and fragility of the circumstantial evidence relied upon.
44. Therefore, I set aside the conviction and the sentence dated 15.07.2015 of the learned High Court Judge of Gampaha. Accordingly, the appeal is allowed.

Judge of the Court of Appeal

P. Kumararatnam, J

I agree,

Judge of the Court of Appeal