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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979.

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

COMPLAINANT

Vs.

Court of Appeal Case No:
CA/HCC /0310/2017
High Court of Panadura
Case No. HC/3142/2014

Kurudupatabedilage Sudharshana Jayasekera
No.98, Thammannagama,
Horigaswewa, Thambuththegama.

ACCUSED

AND NOW

Kurudupatabedilage Sudharshana Jayasekera
No.98, Thammannagama,
Horigaswewa, Thambuththegama.

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**

P.Kumararatnam,J.

COUNSEL : **Dharshana Kuruppu with Sahan Weerasinghe for the Appellant.**

Janaka Bandara, DSG for the Respondent.

ARGUED ON : **13/11/2023**

DECIDED ON : **26/03/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Panadura under Section 296 of the Penal Code for committing double murder of Wimal Malaviarachchi and Nanda Srimathi and committing robbery of items mentioned in the third count of the indictment punishable under Section 380 of the Penal Code on or about 23.11. 2008.

The trial commenced before the High Court Judge of Panadura as the Appellant had opted for a non-jury trial. The prosecution had called 12 witnesses comprising lay, official, and medical witnesses and marked productions P1-20 to fortify the prosecution version.

After the conclusion of the prosecution's case, the learned High Court Judge had called for the defence and the Appellant had made a dock statement to end the defence case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant and sentenced him to death on the 1st and 2nd counts and imposed 10 years rigorous imprisonment and fine of Rs.2500/- with a default sentence of 03 months simple imprisonment on the 3rd count on 31/08/2017.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19

pandemic. Also, at the time of argument the Appellant was connected via Zoom from prison.

Following appeal grounds were advanced by the Appellant.

1. The Learned High Court Judge has failed to consider the items of circumstantial evidence beyond reasonable doubt as the circumstantial evidence led in the trial is insufficient to convict the Appellant.
2. The Learned High Court Judge has failed to explain and record the rights of the Appellant as per section 200(1) of the Code of Criminal Procedure Act No. 15 of 1979.
3. The Learned High Court Judge erred in law by allowing the prosecution to lead the evidence of PW3 in absence of statement given to police and in absence of his evidence in the NS proceedings.
4. The Learned High Court Judge has not considered the dock statement of the Appellant in its correct perspective.

Background of the case is *albeit* as follows:

According to PW3, Pathum Dharshana the elder son of both deceased persons, on the day of the incident being a Sunday he and his brother had gone to Dhamma School in the morning and returned home after attending the Dhamma class. After lunch, at about 1.00pm, the witness and his brother had gone to attend tuition class. Before he left home, his deceased mother had asked him to deliver the lunch to the Appellant who was engaged in tile work at the upstairs of his house. When he gave the lunch, he could see the face of the Appellant at that time.

Although their Class was finished at 5.30pm his deceased father did not come to pick them until 6.30pm. As such he had borrowed Rs.5/- from a nearby boutique known to his father and went to his aunt's house informed the reason of their coming. She too tried to contact both the deceased over

the mobile phone and land line, but their attempt become futile. Hence, they went to PW3's house with them.

When they reach home, they found the gate and rear door opened and the front door was closed. First, they had gone to one of his neighbor's houses and thereafter came to his house. As the house was in the dark, PW1 with the aid of her mobile phone switched on the light. As they could not find the deceased parents in the ground floor, they all had gone to the upstairs and PW3 had first seen a hand with blood, and at that time his neighbor PW2, Ajith uncle took him downstairs. After that he had come to know that his parents had been killed.

After the incident PW3 had not seen the Appellant who was engaged in tile work in the house, and only saw him at the identification parade. He had identified the Appellant at the parade. After the incident a DVD player, gold jewelries belonging to his deceased mother and a phone used by his deceased father had gone missing. During the trial a gold bangle marked as P1, a gold ring marked as P2, a gold chain marked as P3 and a pair of earrings marked as P4 were shown to the witness and he has identified the same as the gold jewelries belonging to his mother. He identified his deceased father's mobile phone as P7. PW3 had further said that he and his brother had been brought up by his aunt PW1 after this incident.

PW1, Yoga Ramani, sister of the deceased Nanda Srimathi, also corroborated the evidence given by PW3 and she went on to say that when she went the upstairs had seen her sister was fallen on the body of her brother-in-law. As she had seen her sister's jewelries very often, she had identified P1-P4 during the trial.

PW2, Ajith Janaka, a neighbor of the deceased persons had corroborated the evidence given by PW1 and PW3 with regard to the entering of the house with PW1 and PW3. He too was aware that some tile repairs were in progress in the deceased persons' house.

PW6, Dr.Ravi Nanayakkara held the post mortem examination of both the deceased on 25.11.2008.

The JMO had noted 04 lacerations on the head of deceased Wimal Malaviarchchi. According to him, the cause of death is due to cranio cerebral injuries following impact to the head. On deceased Nanda Srimathi, the JMO had also noted 04 injuries on the head of the deceased. According to him the female also died of cranio cerebral injuries following impact to the head.

Police commenced investigation upon receiving information via Police Emergency Unit. Further investigation led to the arrest of the Appellant and recovery of items used by the deceased persons.

As it is important to consider the High Court trial procedure first, I consider it is very much appropriate to consider the 2nd ground of appeal first.

In the 2nd ground of appeal, the Learned Counsel for the Appellant contended that the Learned High Court Judge has failed to explain and record the rights of the Appellant as per section 200(1) of the Code of Criminal Procedure Act No. 15 of 1979.

Section 200(1) states:

> "When the case for the prosecution is closed, if the Judge wholly discredits the evidence on the part of the prosecution or is of opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offence of which he might be convicted on such indictment, he shall record verdict of acquittal; if, however, the Judge considers that there are grounds for proceeding with the trial he shall call upon the accused for his defence."

In Sri Lanka, the right to defence is statutorily protected. Section 200(1) implies that when a prima facie case has been made out by the prosecution, the defence will be called for the accused to defend himself. The defence is only required to be introduced at the defence stage once a prima facie case has been proved. This perception may be supported by the presumption that no one is guilty unless proven otherwise. That is to say, the accused need not prove his innocence.

In this case at page 334 of the brief, the proceedings dated 28.06.2017 indicate that after the prosecution closed their case, the defence moving for a date has informed the court that if defence intends to call witnesses they would do so by filing a motion. But no indication in the proceeding that the Court has complied Section 200(1) of the CPC.

But in the journal entry dated 28.06.2017, the Learned High Court Judge had written that the right of the Appellant was explained.

Further the Learned High Court Judge in her judgment at page 415 stated that the right of the Appellant had been explained through the interpreter of the court.

Hence it is incorrect to say that the Learned High Court Judge had failed to adhere to Section 200(1) of the CPC. Hence, I conclude this ground of appeal has no merit.

In the first ground of appeal the Counsel for the Appellant contended that the Learned High Court Judge has failed to consider the items of circumstantial evidence beyond reasonable doubt as the circumstantial evidence led in the trial is insufficient to convict the Appellant.

In this case in order to find the Appellant guilty of the charges, all the circumstances must point at him that he is the one who committed the murder of the deceased persons and robbery and not anybody else. It is the incumbent duty of the prosecution to prove the same beyond reasonable doubt.

In this case the Learned High Court Judge had adequately dealt and applied the principles governing the evaluation of circumstantial evidence. Further, she had considered all the circumstances to come to her conclusion. The Learned High Court Judge had correctly narrated all the witnesses who gave evidence in the judgment.

In the case of **C.Chenga Reddy and others v. State of A.P.(1996) 10 SCC 193** the court held that:

> *"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 guilt of the accused and totally inconsistent with his innocence".*

In the case of **McGreevy v. Director of Public Prosecution [1973] 1 W.L.R.276** the court held that:

> *"There is no requirement, in cases in which the prosecution's case is based on circumstantial evidence that the judge direct the jury to acquit unless they are sure of the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion. The question for the jury is whether the facts as they find them to be_drive them to the conclusion, so that they are sure, that the defendant is guilty".*

In the case of **Attorney General v. Potta Naufer & others [2007) 2 SLR 144** the court 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 v. State [2011] 1 SLR 240** the court 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 and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence".

In **Premawansha v. Attorney General [2009] 2 SLR 205** the court held that:

"In 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".

The deceased Wimal Malawiarachchi was working at a hardware store at the time of his death. PW22, SI/Hemantha Kumara conducted investigation on the phone details of mobile number 0775759708 used by the deceased Wimal Malawiarachchi. After obtaining the phone details upon a court order further investigation was conducted by PW14, CI/Amarabandu the Officer-in-Charge of Piliyandala Police Station.

According to PW14 the IMEI number of the deceased Wimal Malawiarachchi is 350991209449913. Upon further investigation it was found that a Tigo/Etisalat SIM number 0726343175 registered in the name of Sarath Kumara, a resident of Ragama, had been used in the mobile phone of the deceased Wimal Malawiarachchi after the date of incident. A statement was recorded from Sarath Kumara and it revealed he had given the Tigo/Etisalat SIM to PW7 Nisansala Maduwanthi. Although PW7 could not remember using a Tigo/Etisalat SIM, but confirmed that the phone belonging to the deceased Wimal Malawiarachchi was given to her by the Appellant.

After this revelation, PW14 had arrested the Appellant and recovered the mobile phone under Section 27(1) of the Evidence Ordinance. PW3, Pathum, son of the deceased persons had confirmed that his deceased father used a phone similar to the phone recovered from the Appellant. It is very important to note that PW3 was only 12 years old when his parents died under tragic

circumstances and he had given evidence in the High Court after about 10 years of the incident.

During the argument the Counsel for the Appellant vehemently contended that the prosecution had failed to prove that the mobile phone and the dialog number 0775759708 had been used by the deceased Wimal Malaviarchchi. As such the Counsel argued that there is a missing link between the phone and the deceased Wimal Malaviarachchi.

The recovery of the phone had been done by PW22 SI/Hemantha. He was not cross examined by the defense.

It is submitted that failure to cross-examine a witness on any part of his testimony, where there was an opportunity to cross-examine, is tantamount to an acceptance of that testimony by the party whom the evidence is adduced.

In **Sarwan Singh v State of Punjab** AIR 2002 SC 3652 the Indian Supreme Court held that:

> *"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted"*

This judgment was cited with approval in the case of **Bobby Mathew v State of Karnataka** 2004 3 Cri.L.J. page 3003.

The position taken up by the Counsel for the Appellant is that the prosecution had failed to link the mobile phone with the deceased Wimal Malaviarachchi was never put to the prosecution witness PW22. The failure to suggest the said position to the prosecution witness indicates that the position taken up by the Appellant is untrue.

Next, the Counsel contended that the prosecution has failed to satisfactorily established and prove the recovery of the productions under Section 27(1) of the Evidence Ordinance.

According to PW14, the Appellant was arrested on 14.12.2008, and certain items were recovered upon his statement.

Ordinarily, a statement made by an accused person is inadmissible against him. As exception to this rule is the admissibility of statements under Section 27(1) of the Evidence Ordinance where a portion of a statement made to a police officer and which leads to the discovery of a fact can be led in evidence. The admissibility of the recovery evidence under Section 27(1) of the Evidence Ordinance had been discussed in several cases decided by the Superior Courts of our country.

The Section 27 (1) of the Evidence Ordinance states that,

> "When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

The Supreme Court in the case of **Somaratne Rajapakse Others v. Hon. Attorney General** (2010) 2 Sri L.R. 113 at 115 stated that:

> *"A vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been discovered would be permitted in evidence. 'There should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. A discovery made in terms of Section 27 of the Evidence Ordinance discloses that the information given was true and that the Accused had knowledge of the existence and the whereabouts of the actual discovery."*

PW14 CI/Amarabandu was the main investigating officer in this case. After unearthing information regarding the mobile phone of the deceased Wimal Malaviarachchi, the witness had gone to the Appellant's house with a team

of police officers on14.12.2008, arrested the Appellant at about 05.15 hours and recorded a brief statement and recovered certain productions under Section 27(1) of the Evidence Ordinance. From the house of the Appellant, this witness had recovered a DVD Player, a Television, a mobile phone and a pawning receipt issued by Pradeep Jewelers No.275, Rajanganaya Junction, Thabuttegama upon his statement. The extract of his statement to police was marked as P13.

As per the pawning receipt, a gold bangle and a gold chain were recovered from the jewelry shop. The police team went to the Appellant's house again and recovered a pair of gold ear stud and a female gold ring from the wife of the Appellant.

At the post mortem inquiry revealed that a gold ring was worn by the male deceased and a chain was worn by the female deceased which were intact on their bodies.

According to PW1, at the initial stage of this case, a chain with a pendant, another chain without a pendant, a bangle and a ring had been released to her on a bond by the Court. She had brought all the items to Court when she gave evidence. The bangle was marked as P1, the ring was marked as P2, a chain was marked as P3, a pair of ear stud was marked as P3, and another chain with a pendant was marked as P5. According to PW1, identified that P1, P3, P4 and P5 were used by her deceased sister and the P2 was used by her brother-in-law.

PW3, the son of the deceased person was only 12 years old when his parents died. At the trial he had identified P1 the bangle, P3 the chain and P4 the ear stud. Identifying the above-mentioned items, PW3 had stated that he could identify those items as his mother used to wear the same every day. He also admitted that his deceased mother had some more jewelries as well. PW3 further identified the mobile phone of deceased father as P7, the Satellite TV Deck as P8 and DVD Player as P9.

PW14, the Chief Investigating Officer had recovered certain productions upon the statement of the Appellant. The extract of the Appellant's statement which facilitated the recovery of the items was marked as P13.

PW14 had recovered P7, P8, P9 and a pawning receipt which had been marked as P15 upon the statement of the Appellant.

As per the receipt marked as P15 which had been in the name of the Appellant, PW14 had gone to Pradeep Jewelry and recovered a chain and a bangle. PW14 had identified the same which had been already marked as P1 and P3.

After the recovery of P1 and P3, the police team went to the Appellant's house again and recovered a pair of ear stud and female ring from the wife of the Appellant. PW14 identified the ear stud which had been marked as P4. To identify the female ring, when P2 was shown to the witness, the witness could not identify the said ring as the ring P2 was belonging to the male deceased person which had been recovered at the post mortem examination. PW 14 had correctly identified the productions recovered during his investigations. This clearly shows the accuracy and genuineness of the investigation.

The Counsel for the Appellant further contended that the identification of the Appellant was not established properly as PW3, the son of the deceased persons had not given a statement to the police.

Identification evidence is used by the prosecution in a criminal trial to identify the person who is alleged to have committed a crime. The court must always stress a point about the dangers of accepting visual identification evidence to ensure that they don't incorrectly interpret this evidence. This is because that honest witnesses with an opportunity for good observation have often made incorrect identifications. Further, the Court must carefully examine the identification evidence in light of all the circumstances and must be satisfied beyond all reasonable doubt that the identification was correct.

In **Alexander v. R (1981) 145 CLR 395 at 426, Mason,J** stated that:

> "*Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognising on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation on a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed".*

Guided by the above-mentioned judgment, I now assess whether the prosecution in this instance has proven the Appellant's identification beyond reasonable doubt.

On the day of the incident, being a Sunday, PW3 with his younger brother had returned home after Dhamma School and got ready to for their tuition class after lunch. Before he left the house, his deceased mother had given a served lunch plate to be given to the Appellant who was engaged in tile work in the upstairs of his house. At that time, he had clearly seen the Appellant. This not a fleeting glance. Thereafter, he had identified the Appellant at the identification parade after about three months. The identification parade was admitted under Section 420 of the Code of Criminal Procedure Act No.15 of 1979 by the defence. Accordingly, the said report was marked as P19 in the trial. Therefore, the identity of the Appellant cannot be questioned in the appeal.

In the third ground of appeal, the Appellant contends that the Learned High Court Judge erred in law by allowing the prosecution to lead the evidence of PW3 in absence of statement given to police and in absence of his evidence in the NS proceedings.

In this case the police had not recorded the statement of PW3. But PW3 had given evidence at the inquest. When the witness was cross examined, the

witness was questioned in this regard and the witness admitted that he gave evidence at the inquest.

Inquest proceedings are not judicial proceedings. It is a fact-finding inquiry. Hence, the evidence recorded from a witness can be used as previous statements to contradict him during the main trial. Therefore, it is incorrect to argue that the prosecution has no right to call PW3 as a witness in this case as he had given evidence at the inquest on 03.12.2008 which is 10 days after the incident.

In the final ground of appeal, the counsel for the Appellant argued that the Learned High Court Judge has not considered the dock statement of the Appellant in its correct perspective.

Our Apex Court has given clear guidelines as to the consideration of a dock statement of accused in a criminal trial.

An accused person has a right to make a dock statement from the dock. Although the accused cannot be cross examined, the statement has to be considered as evidence.

The Learned High Court Judge in her judgment had considered the dock statement of the Appellant extensively and given reasons as why she disbelieves the same. Therefore, it is incorrect argue that the Learned High Court Judge had not considered the dock statement of the Appellant in its correct perspective.

Therefore, I conclude that the appeal grounds raised in this appeal are devoid of any merit.

In this case, the items of circumstantial evidence led in the trial are sufficient to reach the conclusion that the Appellant only committed the murder of the deceased persons and robbed the items recovered from the Appellant.

The Learned High Court Judge had considered the dock statement of the Appellant and the defence evidence in her judgment. As the evidence adduced by the prosecution is potent and conclusive, the evidence adduced by the Appellant will not able to create any doubt over the prosecution case.

As discussed under appeal grounds advanced, the prosecution had adduced strong and incriminating circumstantial evidence against the Appellant. The Learned High Court Judge had very correctly analyzed all the evidence presented by both parties and come to the conclusion that the Appellant is guilty to the charges levelled against him.

As the Learned High Court Judge had rightly convicted the Appellant for the charges of murder and robbery, I affirm the conviction and dismiss the Appeal of the Appellant.

The Registrar of this Court is directed to send this judgment to the High Court of Panadura along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL