

**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, read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

Court of Appeal No:
CA/HCC/ 0340-341//2018
High Court of Colombo
Case No. HC/ 5382/2010

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

COMPLIANT

Vs.

1. Mallawa Arachchige Jayatissa
2. Jayasinghege Bandula Jayalal
Karunarathne
3. Batuwita Lekamlage Pradeep Kumara

ACCUSED

AND NOW BETWEEN

1. Mallawa Arachchige Jayatissa
2. Batuwita Lekamlage Pradeep Kumara

ACCUSED-APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Nihara Randeniya for the 1st Appellant.**
Sahan Kulatunga with Thilini
Samarasekara for the 2nd Appellant.
Dilan Ratnayake, SDSC for the
Respondent.

ARGUED ON : **22/01/2024**

DECIDED ON : **22/05/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted along with 2nd Accused by the Attorney General for committing the offence as mentioned below:

1. On or around November 17th, 2008, in Rajagiriya within this court's jurisdiction, the accused, named above, either intended to cause the death of Raja Ananda Edirisinghe, or participated in actions supporting a shared intention to cause death, or conspired to cause death. As a result of this conspiracy, the death of Raja Ananda Edirisinghe occurred, constituting an offense punishable under Section 296 read with Sections 113B and 102 of the Penal Code.
2. During the same transaction, on the same date and at the same location, the accused mentioned above caused the death of Raja Ananda Edirisinghe, thereby committing an offense punishable under Section 296 read with Section 32 of the Penal Code.

In this case, the Hon. Attorney General had forwarded a direct indictment against the Appellants and the 2nd Accused under Section 3 of the Code of Criminal Procedure (Special Provisions) Act No. 42 of 2007.

As the Appellants and the 2nd Accused opted for a non-jury trial, the trial commenced before the judge and the prosecution had led twenty witnesses and marked production P1-33 (a) and closed the case. The Learned High Court Judge having satisfied that evidence presented by the prosecution

warranted a case to answer, called for the defence and explained the rights of the accused. Having selected the right to make a statement from the dock, the Appellants and the 2nd Accused had proceeded to deny the charges.

After considering the evidence presented by both the prosecution and the defence, the Learned High Court Judge had convicted the Appellants as charged and sentenced them to death on 17/10/2018.

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

The Learned Counsel for the Appellants informed this court that the Appellants have given consent to argue this matter in their absence due to the Covid 19 pandemic. At the hearing the Appellants were connected via Zoom platform from prison.

As the Counsels appearing for the Appellants had advanced same grounds, all grounds will be considered together hereinafter. Additionally, the Counsel for the 1st Appellant had raised an issue pertaining to identity of the 1st Appellant.

Grounds of Appeal

In the first ground of appeal, the Appellants contended that the Learned High Court Judge erred in law by his failure to follow the settled law and relevant legal principles relating to a case entirely based on circumstantial evidence.

Circumstantial evidence refers to indirect evidence that, while not directly proving a fact in question, prompts a logical inference that the fact exists. Utilizing circumstantial evidence entails drawing further reasonable inferences to substantiate the assertion.

In general, courts allow the admission of circumstantial evidence. Nevertheless, courts exercise caution when circumstantial evidence constitutes the sole evidence in a case, should be assessed alongside other forms of evidence.

Relying solely on a single instance of circumstantial evidence for a conviction is viewed cautiously by the courts, as it may not provide conclusive proof of guilt. However, when multiple independent pieces of circumstantial evidence point towards the same conclusion, their combined strength strengthens the case for conviction. In such instances, the court is more likely to consider the evidence as a cohesive whole, contributing to a more robust assessment of the defendant's culpability.

In order to convict an Accused person on the basis of circumstantial evidence it is the duty of the trial judge to be satisfied that the facts proved are only consistent with the guilt of the Accused and the facts proved to exclude every other possibility other than the guilt of the Accused.

In **King v Abeywickrama** [1943] 44 NLR 254 the Court held that:

“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”.

In **Gunawardena v the Republic** [1981] 2 SLR 315 the Court held that

“Each piece of circumstantial evidence is not a link in a chain for if one link breaks the chain would fail. Circumstantial evidence is more like a rope composed of several cords. One strand of rope may be insufficient to sustain the weight but three stranded together may be quite sufficient.”

In **Hanumant v State of M.P** [1952] AIR SC 343; 1953 Cri LJ 129 the Court laid down following guidelines to follow when a case is solely rests on circumstantial evidence.

“(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, that should not be explainable on any other hypothesis except that the accused is guilty;

(iii) The circumstances should be conclusive;

(iv) They should exclude every possible hypothesis except the one to be proved.

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

Now I consider whether the Learned High Court Judge had deviated from the above guide lines in considering circumstantial evidence as contended by the Appellants.

According to PW1, Podimenike Vidanapathirana, the deceased is her husband and he was engaged several businesses after his retirement from government service. The incident had taken place in their residence situated in Rajagiriya. PW1 had stayed in the ground floor with her domestic maid while the 2nd Appellant who was an employee (Manager) for a long time in the deceased's business had been provided accommodation in the upper floor.

On the day of the incident in the morning, while making coffee in the kitchen PW1 had seen the 2nd Appellant entering their house from the rear side of the kitchen. After having coffee, when the 2nd Appellant left the kitchen PW1 heard shouting of the deceased, “Ammo” “Ammo”. When she came out of the kitchen and told the 2nd Appellant to look into what was it, the 2nd Appellant had told her to not to panic but remained silent. After realising that the deceased was not in his room in the ground floor and when she tried to go upstairs, the 2nd Appellant had purposefully prevented her going upstairs, forced her to sit on the settee. As she felt suspicious about the conduct of the 2nd Appellant, she went to upstairs and knocked the room door very hard. Then, the door was slightly opened about 6 inches. She saw a man inside the room, but could not recognize due to the darkness prevailed in the room. As the door was locked inside, she could not open it. As the key was with the 2nd Appellant, she requested him to open the door but the 2nd Appellant without panicking took about 5 minutes to open the door.

When she entered the room, she had seen the deceased lying on the floor fallen with blood oozing from his head. She also noted blood flashes on the wall. After opening of the door, the 2nd Appellant had left the place. PW1 had come downstairs and wanted to give a call to her brother but she was prevented by the 2nd Appellant saying that he would give him a call. As the 2nd Appellant left the place without calling her brother, PW1 had given a call to her brother. According to PW1, the 2nd Appellant did not attend the funeral of the deceased.

On a previous occasion a hand grenade was lobed into deceased’s room, but was defused by the police. No complaint was lodged.

PW4, Manjula was a police constable, who was on a special duty closer to the deceased’s house on the day of the incident as it was a Parliament functioning day. He reported to duty at about 6.10am. While he was on duty, he had seen a person who came in a Pajaro Jeep speaking to the deceased. At that time the deceased had spoken to PW4 as well. At that time 2nd

Appellant called the deceased inside the house. In a short while, he had seen a person clad in a sarong and a shirt come out of the gate and walking away. After some time, the 2nd Appellant also came out from the house and went towards Battaramulla.

While he was continuing his duty on the road, another police officer came and asked PW4 where the murder had taken place. Until such time he was not aware about the deceased's murder. He identified the 1st Appellant as the person who walked away from the deceased's house on the date of incident. Further, he had also identified the 2nd Appellant as well at the identification parade.

PW5, Gunatilaka a three-wheeler driver confirmed that the 2nd Appellant had hired his vehicle to go to Battaramulla on 17.11.2008 at about 6.30am. He too identified the 2nd Appellant at the identification parade.

PW7 Mohamed Rizan, a three-wheeler driver from Trincomalle testified that the 1st Appellant had hired his vehicle to go to Kantale. As the 1st Appellant also informed that he might extend the hire to Dambulla, his brother-in-law accompanied him as he did not possess a driving licence. At Kantale, the 1st Appellant with 2nd Accused who was introduced him as Bandula had extended the hire to Colombo. They had reached Colombo at about 2.30am on 17.11.2008 and 1st Appellant had paid Rs.10,000/- to this witness as his hire charge. As he was not familiar with Colombo roads, he returned to Trincomalee on the same day itself. Before leaving he had seen the 1st Appellant and the 2nd Accused going in another three-wheeler to Rajagiriya.

PW8, Sujeewa Kumara a friend of the 2nd Appellant on a previous occasion purchased a hand grenade from a person in Trincomalee for the 2nd Appellant. Subsequently he had come to know that although the hand grenade was thrown at the deceased, it did not go off. As such the police had defused the same. After the grenade was given to the 2nd Appellant,

Rs.50,000/- had been deposited to his wife's account. Upon instruction the said money was handed over to 1st Appellant by this witness.

PW11, Prasanna a resident of Trincomalee confirmed that the mobile No. 0713530048 was used by the 1st Appellant.

PW12, Priyantha also a resident of Trincomalee confirmed that the 1st Appellant had given him a cheque valued of Rs.400,000/- for encashment through his bank account. He could not encash the cheque due to insufficient funds. As such the cheque was referred to the drawer.

PW13 Malani the wife of PW12 confirmed that the 2nd Appellant had deposited Rs.80,000/- on three occasions prior to the murder of the deceased. She had withdrawn the said amount and given it to her husband PW12.

PW14, a bank witness confirmed that the cheque in issue was issued from a current account of the 2nd Appellant.

According to PW18 Attanayake, a resident of Wellawaya, in the month of November 2008, the father of the village priest called him and handed over the 2nd Appellant to him requesting him to give accommodation as the 2nd Appellant had come there to commit suicide due to his family problem. He had entrusted the 2nd Appellant to his brother who was engaged in chena cultivation and cattle farming. Before he went with his brother, the 2nd Appellant had given him Rs.30,000/- and mobile phone without a sim. After few days officers from the CID had come there and questioned him about a mobile phone of the 2nd Appellant. Upon receiving the information, the CID officers had gone to the Wadiya (place of staying) and apprehended the 2nd Appellant who ran after seen the CID officers.

Initially, investigation was commenced by the Welika Police Station with use a police cancell who went up to a three-wheeler park. Upon inquiry, PW5 had confirmed that the 2nd Appellant had hired in his three-wheeler to go to

Battaramulla on the date of incident at about 6.30am. PS 10609 Hemapala of Welikada Police confirmed this.

PS 28844 Rajapaksha is the Crime Scene Investigation Officer attached to Nugegoda Division had visited the crime scene on 17.11.2008 and prepared a sketch which had been marked as P26. He had seen pool of blood and blood splash on the wall. A ligature was seen over the neck of the deceased. An iron pipe, a fertilizer bag, few pieces of leather, a plastic chair, and water jar, and a knife were also found in the crime scene. He had noticed a stair case leading to upstairs from the outside of the house. A foot print was seen close to the rear wall of the house.

Finger Print Report and the Identification Reports were admitted by the defence. Hence the prosecution had proved the presence of finger prints of Appellants and the identification of the Appellants by PW4, PW5 and PW7 without any dispute.

PW47, Dr.Amarasinghe had conducted the Post-mortem on the deceased's body. According to him he had observed 12 cut injuries on the dead body. According to him the cause of death is due to ligature strangulation, blunt weapon trauma to the head and stab injury to the abdomen.

In this case, the 3rd Appellant had made a confession under Section 127(3) of the Code of Criminal Procedure Act No. 15 of 1979. The confession was recorded by the Additional Magistrate Colombo which had been marked as P28. After recording evidence of PW45, the Learned Magistrate who recorded the confession, marked it as P28 as the defence did not challenge the same. Hence, no *voire dire* inquiry was held. The contents of the confession of the 3rd Appellant accrued to the proceedings remained unchallenged.

The judgment is a pivotal document for all parties involved, particularly for the Judge, who places utmost importance on the rationale behind the judgment. Clear and concise thinking is fundamental to producing a well-written judgment. An eloquently expressed judgment not only showcases the

Judge's interest in the matter but also illustrates the meticulous legal reasoning underlying the decision.

The reasons articulated by a Judge in a judgment offer insights into their cognitive process, approach, understanding of the factual and legal issues at hand, and the depth of their legal knowledge. Essentially, the judgment serves as a reflection of the Judge's persona. Therefore, it is imperative that it is crafted with precision, after thorough consideration and contemplation.

The Learned High Court Judge in formulating his judgment he had considered all-important aspects in writing of the judgment. He has been mindful of the presumption of innocence burden of proof, evaluation of circumstantial evidence with special consideration to human testimony and the tests that should be applied in a judgment.

The Learned High Court Judge had correctly held that this case totally rests on circumstantial evidence. Hence, he had meticulously considered the evidence of all prosecution witnesses to arrive at his decision. This is clearly reflected in pages 1153 to 1191 of the brief. Thereafter, the defence evidence relating to the Appellants in the form of their Dock Statements had also been duly considered and evaluated in the judgment. After applying the required test to assess circumstantial evidence, it is determined that the only reasonable inference drawn from the established circumstantial evidence implicates the guilt of the Appellants regarding the charges levelled against them. Conversely, the 2nd Accused is rightfully acquitted due to the lack of evidence against them.

In this case, the Learned High Court Judge was mindful and very much alive to the evaluation of circumstantial, even though he had not included any reported authority pertaining to evaluation of circumstantial evidence. Therefore, the 1st ground advanced by the Appellants is devoid of any merit.

In the 2nd ground, the Appellants contend that the Learned High Court Judge convicted the Appellants only on suspicious circumstances.

It is well settled judicial pronouncement that suspicion circumstances, however strong cannot prove a case.

In this case, the Learned High Court Judge in his judgment had considered all evidence presented by both parties before he reached his final decision. This is clearly reflected at pages 1153-1191 and 1214-1222 of the brief. Further, the Learned High Court Judge had only considered evidence which was clear and cogent in his judgment. No ambiguous or conflicting evidence considered to form his decision. All evidence presented is considered at length and given reasons as to why he relied on to come to his decision. As the circumstances considered is devoid of suspicion and ambiguity, the finding that the Appellants are guilty of the charges is quite tenable in this case. Hence, I conclude that this ground of appeal is without any merit.

In the 3rd ground of appeal, the Appellants argue that the Learned High Court Judge had taken an erroneous approach in interpreting conspiracy and common intention.

As submitted by the Learned Senior Deputy Solicitor General, though certain authorities with regard to conspiracy and common intention are referred to in their respective written submissions, the Appellants had failed to highlight how the Court had faulted in appreciating these concepts as complained by them.

In his judgment, at pages 1193-1194 and 1127-1128 of the brief, the Learned High Court Judge had discussed the legal principle relating to conspiracy and common intention although it is not necessary to explain in detail. The judgment does not contain any indication or evidence supporting the assertion that the Learned High Court Judge had been misled in this matter. Therefore, this ground also devoid any merit.

In the final common ground of appeal, the Appellants contended that the Learned High Court Judge had not evaluated the defence evidence from the correct perspective and rejected the same in the wrong premise.

In this case the Appellants and the 2nd Accused had made dock statements to conclude their case. The Learned High Court Judge in his judgment at page 1214 of the brief clearly expressed the admissibility of a dock statement of an accused in a criminal trial and followed several tests to evaluate the dock statements of each of the Appellants and the 2nd Accused.

The Learned High Court Judge had considered and evaluated the Dock Statement of the Appellants separately before he could come to the final decision.

Although the 1st Appellant in his Dock Statement took up the position that he had previously visited the deceased's house, this vital position was not put to PW1 when she was cross examined. Next, the 1st Appellant took up the position that the cheque for Rs. 400,000/- was given to him by 2nd Accused to lease out a shop space in Trincomalee. As this also a vital piece of evidence but the 1st Appellant had failed to put this position to the relevant prosecution witnesses to iron out the issue raised by him.

The 2nd Appellant in his Dock Statement did not deny his presence at the crime scene. Although matters incriminatory against the 2nd Appellant was revealed in his own confession made to the Magistrate, lack of explanation of those matters led to the rejection of his Dock Statement by the Learned High Court Judge.

As the evidence adduced by the prosecution outweighed the defence case, rejection of the defence by the Learned High Court Judge quite justifiable and does not cause any prejudice either legally or circumstantially. Hence, this Court has no option but to accept the prosecution's version. Therefore, this ground also has no merit.

Addition to above discussed appeal grounds jointly raised by the Appellant, the 1st Appellant contended that his identity was not established beyond reasonable doubt.

In this case, the defence had admitted the identification notes which had been marked as P32 under Section 420 of the Code of Criminal Procedure Act No. 15 no 1979. The acceptance of the identification parade notes does not create any doubt in the prosecution case.

PW4 asserted that he observed the 1st Appellant departing from the deceased's residence between 6:30 and 6:45 a.m. on the day of the incident. W7 had brought the 1st Appellant to Colombo in the early hours of the date of incident. According to the Identification Notes the witnesses had no difficulty in identifying the 1st and 2nd Appellants at the identification parade. At the trial, the relevant witnesses had identified the Appellants in open court.

As this is not a case of fleeting glance identification, principles enunciated in **Turnbull case** is not necessary. The Learned High Court Judge had accurately discussed the circumstances upon which the witnesses had identified the Appellants. Therefore, this ground is not forceful enough to create a doubt about the identity of the Appellants. Hence, no substantial miscarriage of justice had occurred to the 1st and 2nd Appellants. When the identification evidence presented against the Appellants is considered, positive evidence had been led to establish the identity of the Appellants.

Therefore, I conclude that the prosecution had succeeded in adducing highly incriminating evidence against the Appellants and thereby established the charges beyond reasonable doubt.

As such, I conclude, that this is not an appropriate case in which to interfere with the findings of the Learned High Court Judge of Colombo dated 17.10.2018. Hence, I dismiss the Appeal.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL