

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

**In the matter of an Appeal in terms of  
Section 331 of the Code of Criminal  
Procedure Act No. 15 of 1979 and in terms of  
Article 138 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka.**

Democratic Socialist Republic of Sri Lanka

**Complainant**

**Court of Appeal Case No.**  
CA HCC 123/2013  
Kegalle High Court No.  
HC 3052/2011

Vs.

Murugaiya Chandramogan,  
Kiragalawatta,  
Pahala Kotasa,  
Kuruvita.

**Accused**

**AND NOW BETWEEN**

Murugaiya Chandramogan,  
Kiragalawatta,  
Pahala Kotasa,  
Kuruvita.

**Accused-Appellant**

Vs.

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

**Complainant-Respondent**

**Before:** Sampath B. Abayakoon, J.  
Amal Ranaraja, J.

**Counsel:** Saliya Pieris, P.C. with Thanuka Nandasiri for the Accused-Appellant.

Shanil Kularatne, A. S. G. for the Complainant-Respondent.

**Argued on:** 23.10.2024

**Decided on:** 12.12.2024

## **JUDGMENT**

**AMAL RANARAJA, J.**

1. The Accused-Appellant (hereinafter referred to as the ‘appellant’) was indicted in the *High Court of Kegalle* on the following counts:

### **Count 1**

That on or about 8<sup>th</sup> of July 2009, the appellant committed the murder of one *Ekanayake Mudiyanseelage Deepika Subhashini Dayarathne* which is an offence punishable under Section 296 of the Penal Code.

### **Count 2**

That in the same transaction the appellant committed the offence of robbery by robbing a mobile phone of the deceased *Ekanayake Mudiyanseelage Deepika Subhashini Dayarathne* which is an offence punishable under Section 380 of the Penal Code.

### **Count 3**

That in the same transaction the appellant committed the offence of robbery by robbing a gold chain of the deceased *Ekanayake Mudiyanseelage Deepika Subhashini Dayarathne* which is an offence punishable under Section 380 of the Penal Code.

2. The appellant has pleaded not guilty to all three counts and the matter has proceeded to trial without a jury.
3. At the conclusion of the trial, the Learned High Court Judge has found the appellant guilty of all three counts, convicted and sentenced the appellant to death in respect of the 1<sup>st</sup> count, sentenced to 10 years' imprisonment each in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> counts, also fined Rs. 10,000 each in respect of the latter counts and imposed default terms of five years each.
4. The appellant aggrieved by the judgment and the sentencing order has preferred the instant appeal to this Court.
5. The Learned President's Counsel for the appellant formulated the following grounds of appeal in open Court when the matter was taken up for argument;
  - i. Is the circumstantial evidence adduced by the prosecution insufficient to establish the guilt of the appellant?

- ii. Was the evidence of '**PW-03**' adduced under section 33 of the Evidence Ordinance not admissible in law?
  - iii. Has the Learned High Court Judge failed to consider the explanation given in the dock statement by the appellant?
6. '**PW-01**' and '**PW-02**' are the parents of the deceased. The deceased has lived with her parents on an estate in '*Galpatha, Ruwanwella*'. The deceased, as a 21-year-old woman, had been employed in a 'garment factory' situated in the '*Yatiyanthota*' area. She has left home on **08.07.2009** to engage in her vocation but has not returned home on that day. On **09.07.2009**, the *Yatiyanthota Police* have received a 119 call and details regarding a body of a female lying in an area allocated for a cemetery close to the house in which the deceased was living, have been disclosed by such telephone call.
7. The body of the female has subsequently been identified to be that of the deceased. The post-mortem examination on the deceased has been conducted by *Dr. H. P. Wijewardena* [**PW-12**] and a post-mortem report issued. *Dr. H. P. Wijewardena* has observed a total of 19 injuries on the body of the deceased. 12 of those injuries had been cut injuries. 3 of those cut injuries have been to the neck of the deceased. The cut injuries to the neck have completely severed the upper cervical spine cord and they have

been necessarily fatal. The post-mortem report has been marked as 'अल-2'.

8. The investigating officers have obtained telephone details of the sim card issued in the name of the deceased. Based on the information, the appellant has been taken in for questioning. Subsequently, have also recorded the statements of 'PW-03', 'PW-04', 'PW-11' and other witnesses. The investigating officers have taken into their custody 'अल-1', 'अल-2', 'अल-3', i.e. items of jewellery and a mobile phone which have been taken from the possession of the deceased at the time the necessarily fatal injuries were caused to her. Those items of evidence have been placed before Court as productions at the trial.
9. The prosecution through the examination of its witnesses has established the following:
  - i. The necessarily fatal injuries to the deceased had been inflicted to her on **08.07.2009**.
  - ii. That the deceased has used a mobile phone and its IMEI number had been **35276101835683** ('अल-3').
  - iii. The sim card number **0723747706** registered in the name of the deceased had been coupled with such mobile phone and that the deceased had used the said sim card number **0723747706** to obtain and receive calls.

- iv. That the deceased had taken a call using the sim card number coupled with the phone bearing IMEI number **35276101835683** on **08.07.2009** at **05.59 hrs.**
- v. That the appellant had bought and registered under his name the sim card bearing number **0728520283** on **08.07.2009** ('**अ७-7**').
- vi. The appellant had coupled such sim card bearing number **0728520283** with the mobile phone bearing IMEI number **35276101835683** and taken a call utilizing such mobile phone, on **08.07.2009** at **10.28 hrs.**
- vii. That the appellant on a subsequent date i.e. a few days before **25.07.2009**, sold the relevant mobile phone to '**PW-11**'.
- viii. The investigating officer who took in the appellant on suspicion had taken into his custody the sim card bearing number **0728520283** and the relevant documents from the possession of the appellant.
- ix. Upon the admission of the statement given by '**PW-03**' in the course of the investigation as per the provisions in section 33 of the Evidence Ordinance, it had transpired that the appellant had handed over to '**PW-03**' a gold chain (**अ७-1**) and requested

from **'PW-03'** that she pawned the gold-chain and hand over the money received to **'PW-03'**.

- x. That the appellant made such a request to **'PW-03'** on **08.07.2009** between **09.00 hrs and 10.00 hrs** at *Avissawella*.

10. The Learned High Court Judge has drawn her attention to the fact that **'පී-1'** and **'පී-3'** were stolen property and such property was in the exclusive and recent possession of the appellant after they have been taken from the possession of the deceased. In those circumstances, she had determined that the appellant being in possession of recently stolen property establish incriminating circumstances which caused the appellant to appear guilty of the crimes and throws on the appellant a duty to show that he got such property innocently, further that the appellant was also duty bound to give an explanation which in the opinion of the Court might reasonably be true and which is consistent with his innocence.

11. The Learned President's Counsel for the appellant contended that when the prosecution made an application before the High Court to admit the contents of the statement read out to **'PW-03'** (*Gangodage Chandrakanthi*), at the non-summary inquiry, the appellant objected to the same as **'PW-03'** has not been subjected to cross-examination at such inquiry. However, the Learned High Court Judge has overruled the objection and permitted the contents of such statement to be admitted as evidence of **'PW-03'** as per the provisions in **Section 33** of the **Evidence Ordinance**

**No. 14 of 1895** on the basis that the appellant has been represented by a Counsel and the Counsel himself had informed Court that he does not wish to cross-examine '**PW-03**' at the non-summary inquiry. It is further contended that, the Learned High Court Judge has misdirected herself in law by permitting the prosecution to admit the contents of the statement made by '**PW-03**' at the time the investigations were conducted.

12. Further, the Learned President's Counsel in support of his contention has drawn the attention of this Court to the provisions in the **Code of Criminal Procedure (Special Provisions) Act No. 42 of 2007** and **Section 33** of the **Evidence Ordinance No. 14 of 1895**.

13. **Section 6** of the **Code of Criminal Procedure (Special Provisions) Act No. 42 of 2007** provides,

*(1) Notwithstanding anything contained in Chapter XV of the Code of Criminal Procedure Act, No.15 of 1979, in the course of holding of an inquiry under the aforesaid Chapter, the following provisions shall apply to the taking of statements of persons who know the facts and circumstances of the case.*

*(2) Subject to the provisions of subsection (11), the Magistrate shall read out, or cause to be read out to every witness produced against the accused, in the presence and hearing of the accused, the statement*



*made by the witness in the course of the investigation conducted in terms of Chapter XI of the Code of Criminal Procedure Act, No.15 of 1979 and shall ask the witness whether the statement is an accurate record of what he had stated to the police.*

*(3) (a) If the witness states, in response to an inquiry made of him under subsection (1), that the statement is an accurate record of what he had stated to the police, the Magistrate shall record that fact. The Magistrate shall permit the witness, if the witness so desires, to make such additions or alterations to his original statement. Every such addition or alternative shall be recorded.*

*(b) The Magistrate shall not permit any cross examination of the witness by the accused or his pleader, but the Magistrate may put to the witness, any clarification required by the accused or his pleader of any matter arising from the statement made by the witness in the course of the investigation, or any additions or alterations to his original statement if any, and may put to the witness any clarification which the Magistrate himself may require of any such manner. Every clarification so made shall be recorded:*

*Provided that having considered the nature of the material contained in the statement of a witness made*

*to the police, the prosecution may tender the witness for cross examination by the accused or his pleader.*

*(4) The Magistrate shall thereafter read out or cause to be read out to the witness, the statement made by the witness to Court affirming the accuracy of the statement made by him in the course of the investigation and the clarifications if any made by him under subsection (2), and additions or alterations to his original statement if any, made by him under subsection (3), and shall require the witness to swear or affirm to the truth of the matters recorded.*

*(5) (a) If on the other hand, the witness states in response to an inquiry made of him under subsection (1), that the statement is not, in its entirety or in part, an accurate record of what he had stated to the police, the Magistrate shall permit the witness to give an account of the circumstance relating to the offence, or as the case may be, to make such additions or alterations to his original statement as the witness may wish to make.*

*(b) The Magistrate shall not permit any cross-examination of the witness by the accused or his pleader but the Magistrate may put to the witness, any clarification required by the accused or his pleader of*

*any matter arising from the account given, or additions or alterations made by the witness or may put to the witness any clarification that the Magistrate himself may require of any such matter:*

*Provided that having considered the nature of the material contained in the statement of a witness made to the police, the prosecution may tender the witness for cross-examination by the accused or his pleader.*

*(c) The Magistrate shall record the account given, or the additions or alterations made by the witness under paragraph (a) and any clarification made by the witness under paragraph (b), and read out the same or cause the same to be read out to the witness and shall require the witness to swear or affirm to the truth of the matters so recorded.*

14. **Section 33** of the **Evidence Ordinance No. 14 of 1895** provides,

*“Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or in a later stage or the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount or*

*delay or expense which, under the circumstances of the case, the court considers unreasonable:*

*Provided –*

*(a) that the proceeding was between the same parties or their representatives in interest;*

*(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine;*

*(c) that the questions in issue were substantially the same in the first as in the second proceeding.*

#### *Explanation*

*A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.*

15. When one construes the sections referred to above, it is clear that when holding a non-summary inquiry, the Magistrate is required to read out to a witness, the statement made by such witness in the course of an investigation conducted in terms of **Chapter XI** of the **Code of Criminal Procedure Act** and ask the particular witness whether such statement is accurate. If the witness responds in the affirmative, the magistrate is required to record such fact. If the particular witness desires to make additions or alterations, such additions or alterations shall be recorded. Further, the Magistrate shall not permit the cross-examination of the witnesses. Further, the Magistrate may put to such witness

any clarification required on behalf of the accused of any matter arising from the statement made by the witness.

16. However, there is also provision for the prosecution to tender for cross-examination a witness whose evidence (statement made in the course of the investigation), in the opinion of the prosecution, is material to its case.

17. At the non-summary inquiry relevant to this case, the statements made by the prosecution witnesses' in the course of the investigation have been read out to them by the Magistrate. If the statements were accurate, the Magistrate has recorded such fact. If alterations or additions were suggested to be made to the original statement, the Magistrate has also recorded the same. The Magistrate has not permitted the appellant or its counsel to cross-examine the prosecution witnesses'. Further, the prosecuting officer/Counsel at the non-summary inquiry has not tendered a single prosecution witness for cross-examination by the appellant or his pleader.

18. **Chapter XV** of the **Code of Criminal Procedure Act No.15 of 1979** as amended by the **Code of Criminal Procedure (Special Provisions) Act No. 42 of 2007** (hereinafter referred to as the '**Act**') has brought about changes to the procedure adopted in conducting a non-summary inquiry. The Act, has not conferred upon the appellant a right to cross-examine the prosecution witnesses. Further, such Act has been in existence when the Learned Magistrate read out to '**PW-03**' her statement at the non-

summary inquiry. The appellant therefore has had no opportunity to cross-examine **'PW-03'** in the non-summary inquiry as required by the provisions in **proviso (b) of Section 33** of the **Evidence Ordinance**.

19. In those circumstances, the Learned High Court Judge has erred in admitting the contents of the statement of **'PW-03'** as evidence in the manner she has done. The admission of the contents of such statement as evidence is illegal.

20. The Learned High Court Judge in her impugned judgment dated **04.07.2013**, at page 18 (page 178 of the brief) has concluded that there is evidence of recent and unexplained possession by the appellant of a stolen property, i.e. the mobile phone owned by the deceased marked **'පැ-3'**. She has also concluded further that there existed telling evidence of eloquent circumstances that pointed to the guilt of the appellant which remained unexplained by the appellant.

I draw my attention to an excerpt from the High Court judgment in pages 19 and 20,

“එම නිසා මෙහිදී පැමිණිල්ලෙන් ඉදිරිපත් වූ සාක්ෂි වලට අනුව මරණකාරීය සතුවූ ජංගම දුරකථනය ඇය අවසන් වරට නිවසෙන් පිටවූ දින විත්තිකරු විසින් භාවිතා කර ඇත. එයට ඔහු අලුතින් සිමි කාඩ් පත්ක යොදා ඇත. පසු අවස්ථාවක් ඔහු එය විකුණා ඇත. ඔහු මරනකාරීයගේ

වේන් පට උගස් තබා ඇත. නමුත් ඔහු ඒ සම්බන්ධව විනිකුදුවේ සිට කර ඇති විත්ති වාචකයේ හෝ කිසිවක් සඳහන් කර නැත. එම කරුණු පිළිබඳව ඔහු මෙම අධිකරණය ඉදිරියේ නිශ්ශබ්දව සිටීම ඉහත කී නීති සිද්ධාන්තයට අනුව ඔහුට විරුද්ධව තීරණය කළ හැකි බවට මෙම අධිකරණයට පෙනී යයි.”

21. The Learned President’s Counsel for the appellant has drawn the attention of the Court to the dock statement and complained that the appellant has explained the recent possession of ‘පැ-3’. The appellant making a dock statement has stated that he has picked up the mobile phone marked ‘පැ-3’ at an undisclosed location, used it for some time and subsequently sold it to a third party (Vide pages 159 and 160 of the Brief).

22. I now consider the principles relevant to the evaluation of a dock statement. When evaluating dock statement, the following guidelines must be considered;

- i. A dock statement should be considered as evidence subject to infirmities that it was not a sworn statement and not tested by cross-examination.
- ii. If the docks statement is believed, it must be acted upon.

- iii. If the dock statement creates a reasonable doubt in the prosecutions' case, the defence of the accused must succeed.
- iv. The dock statement of one accused person should not be considered against the other accused.

23. Accordingly, the Learned High Court Judge has misdirected herself when she concluded that the appellant has not explained the recent possession of the mobile phone marked 'B-3', owned by the deceased and taken from her possession on the day the injuries that were necessarily fatal were inflicted on her.

24. The Learned High Court Judge has also misdirected herself when she concluded that the gold chain marked 'B-1' and taken from the possession of the deceased was in recent possession of the appellant by relying on the evidence of 'PW-03' that has been admitted in an illegal manner.

25. The date of the offence is **08.07.2009**, hence, the concerned offences have been committed over 15 years ago. Further, the appellant has been kept in prison for 11 years as an 'accused who has preferred an appeal' to this Court. Therefore, it does not seem just to call upon the appellant to defend himself after such an unconscionable lapse of time.

In ***The Queen vs. G. K. Jayasinghe*** 69 NLR 314 at page 328, Sansoni J, has stated,

*"...we have considered whether we should order a new trial in this case. We do not take that course, because*



*there has been a lapse of three years since the commission of the offences, and because of our own view of the unreliable nature of the accomplice's evidence on which alone the prosecution case rests.*

*We accordingly direct that the judgment of acquittal be entered”.*

26. Hence, having considered the above matters of fact and law, I am of the view that this is not a fit case to order a re-trial.

I acquit the appellant of the counts in the indictment.

The Registrar of this Court is directed to communicate the judgment to the *High Court of Kegalle* for compliance.

**Judge of the Court of Appeal**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**Judge of the Court of Appeal**