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

In the matter of an appeal against an order of the High Court in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979

The Democratic Socialist Republic of SriLanka.

Complainant

CA/HCC/78/2017 **VS**

High Court of Vavuniya
Case No: HCV/2637/2016 Viswanathan Kanaga Manoharan

Accused

And now between

Viswanathan Kanaga Manoharan

Accused– Appellant

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Gayan Perera, with Ms. P. H. Perera and
Panchali Ekanayake
for the accused-appellant

Maheshika de Silva SSC
for the respondent

ARGUED ON : 07/12/2021

DECIDED ON : 19/01/2022

R. Gurusinghe, J.

The accused-appellant (the appellant) was indicted in the High Court of Vavuniya for two counts, namely,

(1) the appellant having stolen two gold rings and a gold chain from the possession of Sivakumar Indumathi using a dangerous weapon and having caused the death of Indumathi, is an offence punishable under Section 383 of the Penal Code, and

(2) at the same place and time having caused the death of one Indumathi and thereby, committed an offence punishable under Section 296 of the Penal Code.

The appellant was sentenced to 10 years rigorous imprisonment for the first count and a death sentence was imposed for the second count.

The prosecution called PW1,2,3,4,7, 10 and 11 and produced P1,Pa and P2 productions as evidence. The appellant made a dock statement after the prosecution case was called.

As per the evidence of the husband of the deceased, PW2, he left for work in the morning on the date of the murder. The deceased was the only one at home. PW1, a neighbour heard a noise from the deceased house screaming, 'aiyo aiyo'. However, PW1 had not gone to the house of the deceased nor had seen who the assailant was. She informed her uncle Ganesh who is not a witness in this case, about the incident. Later on, when PW1 came to the house of the deceased, the deceased was lying on the floor in the kitchen in a pool of blood in a supine position. The neck of the deceased was severely injured.

According to the evidence of the doctor (PW7), the cause of the death was severe injuries caused to the esophagus and pharynx (throat).

No one has seen the incident.

In the judgment, The Learned High Court Judge stated as follows:

"the only evidence against the accused is, having a receipt of the pawned items of the gold rings that were worn by the deceased and being in his position. Hence, the particular rings were identified as that of the deceased. Further, the particular productions had been recovered based on the statement of the accused."

The above statement is not a completely correct statement.

The evidence of PW4 is that on the statement of the appellant, PW4 had recovered a pawning receipt from the wallet of the appellant. Then the witness

went to the pawning shop with the receipt and obtained the above said two small rings. What was in the wallet of the appellant cannot be considered as a fact discovered, as provided in section 27 of the Evidence Ordinance. The police should have looked into the wallet of the appellant when he was arrested.

Further, PW4 stated that a part of the gold chain was recovered from a hole in the wall of the accused house. However, such an item was not produced in court, as that was not handed over to the court by the police. The evidence of the recovery of a part of a chain has no evidential value.

As per the evidence, the pawning receipt does not bear the name of the accused. The receipt was not available in the original case record. The evidence does not show that the pawning receipt was produced in evidence. It is not a listed item in the list of productions. Part of the statement of the appellant was marked as P2. However, that is also not available for inspection in this court. The two gold rings were marked as P3 and P4. PW2 had given evidence in the High Court twice. When he gave evidence for the first time, he did not speak of rings or a chain worn by the deceased.

On the second occasion, PW2 had said that the deceased usually wears two rings and a chain. When the two rings were shown to him, he said that they were of his deceased wife. However, there was no special or unique characteristic to identify them as belonging to the deceased. PW2 could not even remember correctly the dress worn by his wife at the time of her death. PW2 said that the deceased only wore a Pyjama dress. However, a police witness using notes said that the deceased was wearing a blouse and a skirt. This shows that the recollection of PW2 was poor. He merely said that the two rings shown to him were of his deceased wife.

PW3, a witness from the shop named G. H. A. De Silva,was called by the prosecution. This witness had not seen the appellant before giving evidence in court. He identified the two rings only as 'rings,' and he could not remember

any particular mark or characteristic to identify the two rings. It is evident from the evidence of this witness that the receipt does not bear the date or name of the person who pawned it. This evidence shows only that somebody has pawned two rings; it is insufficient to conclude that the appellant had pawned the two rings or the deceased wore the two rings that were pawned.

When considering the above evidence, the two rings were not identified as of the deceased beyond reasonable doubt. The appellant in his dock statement said that no pawning receipt or jewellery was obtained from him by the police. He said that he was not involved in the murder or plunder of the jewellery.

The Learned High Court Judge says, 'since no evidence was put forward as to how the rings of the deceased were in possession of the accused, he finds him guilty to both counts in terms of section 114 of the Evidence Ordinance.'

Before drawing this presumption,the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established. The prosecution has not produced sufficient evidence for the court to draw this presumption. It is also a settled principle that all the facts so established should be consistent only with the hypothesis of the guilt of the accused.

In *The King vs.Abeywickrema* 44NLR 254, it was held that;

> "in order to base a conviction on circumstantial evidence, they must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence."

The two rings were not in possession of the appellant. The alleged receipt apparently did not bear the name of the appellant. The witness from the pawning shop did not say that the appellant pawned the two rings. A connection between the two rings and the appellant is not established.

In the case of *Abeysekera v Attorney General* [1981] 1SriLR 376, Wimalaratne J, stated as follows;

> "On this question, Wills in his work on Circumstantial Evidence (7th Ed.) page 104 says - "The possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft." He then refers in footnote (2) to the case of Chiraveddi Munayya v. Emperor (21 MLJ) (1071)(3) "If it is proved that a person was found, soon after the murder of another person, in possession of property which was on the person of the latter when last seen alive, an inference might be drawn that he obtained possession of the property by the murder of the deceased; but to justify the inference, there must be satisfactory proof that the deceased had them on his person at the time of the murder and the accused cannot explain his possession." In India, therefore, no certain rule of universal application appears to have been laid down. The cumulative effect of all the circumstances, established by evidence and the nature of these circumstances have to be taken into consideration, and then it has to be judged whether, having regard to the ordinary course of human conduct, it is safe to presume that the offence was committed by the accused."

In the case of *Chenga Reddy and Ors. v. State of A.P.* (1996) 10 SCC 193, the Supreme Court of India held as follows;

> "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....".

In this case there is no direct evidence as to who committed the murder. The only evidence against the appellant is that the two rings which were recovered from the pawning shop by the police, were said to be worn by the deceased.

However, the fact that the covered rings were worn by the deceased and the two rings were pawned by the appellant was not proved beyond reasonable doubt.

The evidence is wholly insufficient to convict the appellant to the two charges leveled against him. I set aside the conviction and acquit the appellant.

The Appeal is allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal