

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

*In the matter of an application under section
331 of the Code of Criminal Procedure Act
No.15 of 1979*

Court of Appeal No:

CA/HCC/0074/2017

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Gampaha

Case No: HC/170/2007

Mallawa Arachchige Sumith Nishantha
alias Shantha, Welikada Prison, Colombo.

ACCUSED

AND NOW BETWEEN

Mallawa Arachchige Sumith Nishantha
alias Shantha, Welikada Prison, Colombo.

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Ranil Samarasekera for the Accused-Appellant
: Madhawa Tennakoon, D.S.G for the Complainant-
Respondent
Argued on : 11-12-2023
Written Submissions : 28-09-2018 (By the Complainant-Respondent)
: 14-03-2018 (By the Accused-Appellant)
Decided on : 03-05-2024

Sampath B. Abayakoon, J.

This is an appeal by the accused-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved of his conviction and the sentence by the learned High Court Judge of Gampaha.

The appellant was indicted before the High Court of Gampaha for causing the death of one Jayaweera Arachchige Don Amila Sampath Ranasinghe on 30-10-2003, at a place called Kossinna, within the jurisdiction of the High Court of Gampaha, and thereby committing the offence of murder punishable in terms of section 296 of the Penal Code.

He was also indicted for committing the offence of attempted robbery of a three-wheeler from the deceased, at the same time and at the same transaction, and thereby committing an offence punishable in terms of section 382 of the Penal Code.

After trial without a jury, the learned High Court Judge of Gampaha found the appellant guilty of the 1st count preferred against him, and he was acquitted on the 2nd count by the judgment dated 14-02-2017.

Accordingly, the appellant was sentenced to death.

Facts in Brief

According to the evidence of the owner of the three-wheeler numbered HL-2611, he has handed over the newly purchased three-wheeler to the deceased three days prior to this incident, which occurred on 30-10-2003. It has been handed over to the deceased to use for hiring purposes and pay to him Rs.250/- on a daily basis. Since the three-wheeler and the driver did not return to his house as usual, the owner had gone looking for the three-wheeler and had come to know that a boy has been murdered. He had later identified the dead person as his driver and the three-wheeler as the one he gave him for the hiring purposes.

PW-10 Dhanapala was a villager who lived in the area and had a small vegetable plot near the cemetery of the village. While working in his field, he has come to know that three children have seen a dead body in the cemetery and had come to know that a person has attempted to attack one Seelawansha as well. When he went near the cemetery, he has seen a three-wheeler parked in front of an abandoned house situated near the cemetery, and has seen a dead body about 15 meters away from the three-wheeler. He has also observed a trail of blood from the nearby paddy field towards the place where the body was found.

PW-06 Nimal's evidence has been that, the appellant who is well known to him, came to his house on the day of the incident and borrowed a Manna Knife from him promising to return it around 3.00 p.m. of the same day. However, he has

failed to return the knife and the witness has come to know around 8.00 p.m. that a boy has been killed near the cemetery. However, the witness has failed to identify his knife among the knives produced before him at the trial.

Sisira Kumara (PW-08), who is a three-wheeler driver had been waiting in the three-wheeler park situated about 500 meters away from the temple near a place called Nadun Uyana, expecting a hire. He has seen a butter-coloured new three-wheeler driven by a young person travelling towards the cemetery in the area which was situated about 200 meters before one reaches the earlier mentioned temple. The three-wheeler has drawn his attention because it was a new one, and it only had a number written on a cardboard attached to it. He has seen the appellant who is well-known to him traveling in the back seat of the three-wheeler. This was around 4.00 p.m. in the afternoon of 30-10-2003.

Little after 6.00 p.m. of the same day, the appellant has come to the three-wheeler park and has inquired from him whether it is possible to hire an aluminum full body lorry, for which he has replied negatively. The appellant has told him that he needs to transport some goods in a lorry. He has been certain about the time he met the appellant because of the fact that it was just before the time the regular 6.15 p.m. bus, which passes the place where he was staying.

Around 7.00 p.m., when he returned from a hire, he has come to know that a boy has been killed at the cemetery.

The other witness of relevance to the incident is PW-09, Kahanalwita Liyanage Sumith. He has been arrested on the night of 30-10-2003 as a suspect for the murder of the deceased. According to his evidence, he was in the habit of consuming liquor and while walking to the place where he can buy liquor around 12.30 in the afternoon of 30-10-2003, he has met the appellant who is also named Sumith and an acquaintance. He had been travelling in a three-wheeler. When he met him near a place called Ranmuthu Uyana ground and has offered him a lift as he was also going to consume liquor. The three-wheeler had been driven by a boy of about 20 years of age.

When he got into the three-wheeler, he has seen something similar to a knife, wrapped in a newspaper, placed on the seat near the appellant. Afterward, both he and the appellant have gone to the place where the liquor was sold and had consumed liquor.

Subsequently, the appellant has left in the same three-wheeler, while the witness has left the place around 4.00 p.m. and has gone home and slept.

Around 6.00 p.m., he has heard about a murder and had gone to the place where it has happened. He has seen the boy who drove the three-wheeler dead and the three-wheeler nearby. According to his evidence, he was arrested because he too had gone in the three-wheeler, but was released later.

PW-02 Mallawa Arachchige Seelawansha was dead at the time when this matter was taken up for trial, and the prosecution has marked his deposition before the Magistrate's Court at the non-summary inquiry held in this regard in terms of section 33 of the Evidence Ordinance.

The said deposition has been marked as P-05. According to his evidence, on 30-10-2003 afternoon, he has gone to the paddy field to bring his cattle and has seen the appellant, who is well known to him in the said paddy field called Boomithel Kumbura.

When he met the appellant, he has told him that he came with a friend and drank liquor, and the friend is vomiting blood. The witness has seen a person collapsed on the paddy field. Although the witness has attempted to reach the person he saw who was about 25 feet away from where they were, the appellant has prevented him from going near the person. The witness has instructed the appellant to take the person to the hospital. Thereafter, the appellant has gone near the person and had lifted him from his armpits and had taken him towards the cemetery. The witness has not seen any blood on the body of the person, but had informed a fellow villager named Dhanapala (PW-10) whom he met later about what he saw. On his way back, he has seen a cream-coloured three-wheeler parked in front of the abandoned house situated near the cemetery.

During the night of the same day, he has come to know that a person has been killed. On the following day morning when he went to look as to who the deceased was, he has identified the dead person as the person whom he saw collapsed in the paddy field on the previous day. He has been able to identify the deceased person because of the shirt and the trouser he saw him wearing when he saw him in the afternoon.

According to the evidence of the Judicial Medical Officer (JMO) who conducted the post-mortem of the deceased, he has observed 13 injuries on the body, several of them being grievous cut injuries. He has opined that the death has been caused due to the grievous cut injuries caused to the neck of the deceased, which was an essentially fatal injury. He has also opined that the death could have been caused within a short period of time due to the seriousness of injuries that had been caused to the deceased.

It has also been revealed from the investigating police officers that the appellant was arrested more than a month after the incident, at a temple in Beliatta area.

Once the prosecution case was closed and the appellant was called for his defence, he has made a dock statement. He has claimed that he was unaware of anything about the death of the deceased, and has claimed that he was arrested by the police when he was working in the Parakandeniya area and assaulted.

However, he has admitted that he had been travelling in a three-wheeler, and on his way, he met PW-09 Sumith and offered a lift to him. He has stated that both of them went to have liquor to a house belonging to one Rani Akka, and after having liquor, he left in the same three-wheeler while the earlier mentioned Sumith stayed back. He has claimed that he paid Rs. 250/- as the hire to the driver. He has claimed that the driver had asked him whether he could pluck some Kurumba from a nearby coconut tree, for which he has given permission. It has been claimed by him that thereafter, he went to a nearby house and when he returned, the driver was looking for something in the paddy field. The driver had told him that he plucked three Kurumba nuts and was looking for those.

He has admitted that at that time, the earlier mentioned Seelawansha came to the paddy field and met him, and he informed Seelawansha that he as well as the driver was drunk, and had admitted that Seelawansha told him to take the driver to the hospital.

He has also admitted that he took hold of the driver by his armpits and left the paddy field with him. Further to that, he has admitted that he went and talked to the three-wheeler driver Sisira, namely PW-08, and asked him about hiring a lorry with an aluminum body.

He has claimed that thereafter, he went to Ratmalana and from there, went to the temple in Beliatta where he was working previously. He has admitted that he was arrested at the temple and has claimed innocence of the crime.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant urged the following solitary ground of appeal for the consideration of the Court.

1. The prosecution failed to prove the charges through circumstantial evidence beyond reasonable doubt.

It was the submission of the learned Counsel for the appellant that since this was a case where the prosecution has relied on circumstantial evidence against the appellant, the evidence placed before the trial Court is wholly inadequate to prove the charge of murder against the appellant. Commenting on the fact that the deceased was last seen with the appellant, it was his submission, that fact in itself was insufficient to convict the appellant and according to the evidence, there is a possibility that someone else could also have committed this crime.

It was the submission of the learned Deputy Solicitor General (DSG) on behalf of the respondent that, the circumstantial evidence placed before the trial Court against the appellant has proved the case beyond reasonable doubt against him. He submitted to the Court that the dock statement made by the appellant tallies with the evidence of the relevant witnesses and the circumstantial evidence

placed before the Court, and the only inference that can be drawn from the evidence is that it was the appellant and no one else that had committed the crime.

The learned DSG moved for the dismissal of the appeal on the basis that the ground of appeal urged has no merit.

Consideration of the Grounds of Appeal

This is a case where the conviction has been entirely based on circumstantial evidence as no one has seen the actual attack on the deceased by the appellant.

Therefore, I find it necessary to consider the relevant law that should be taken into consideration in relation to proving a case based on circumstantial evidence in order to consider whether the learned trial Judge has considered the evidence placed before the Court in its correct perspective.

In the case of **The King Vs. Abeywickrama 44 NLR 254**, it was held:

Per Soertsz, J. :

“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 hypotheses of his innocence.”

In **Don Sunny Vs. The Attorney General (1998) 2 SLR 01**, it was held:

- 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 only inference that the accused committed the offence. On consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.*
- 2) 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.

- 3) *If upon 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. 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 if the proved items of circumstantial evidence are consistent with their guilt and inconsistent with their innocence.*

However, in considering the circumstantial evidence, what has to be considered is the totality of the circumstantial evidence before coming to a firm finding as to the guilt of an accused, although each piece of circumstantial evidence when taken separately may only be suspicious in nature.

In the case of **The King Vs. Gunaratne 47 NLR 145**, it was held:

“In a case of circumstantial evidence, the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion.

The jury is entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt.”

In the case of **Regina Vs. Exall (176 English Reports, Nisi Prius at page 853) Pollock, C.B.**, considering the aspect of circumstantial evidence remarked;

“It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in a chain, but that is not so, for then, if any one link broke the chain would fall. It is more like that of a rope composed of several cords. One strand of the rope might be insufficient to sustain the weight, but several strands together may be quite of sufficient strength.”

Since the conviction was also being based on the legal principle of last seen theory, it also becomes necessary to consider the relevant legal principles in that regard as well, in order to come to a finding whether the circumstantial evidence placed before the Court supports the conviction against the appellant.

In the Indian Supreme Court case of **Surajdeo Mahto Vs. The State of Bihar (Cr A 1677 of 2011 decided on 4th August 2021 – Indian SC)** it was observed that:

“Briefly put, the last seen theory is applied where the time interval between the point of when the accused and the deceased were last seen together, and when the victim is found dead, is so small that the possibility of any other person other than the accused being the perpetrator of the crime becomes impossible.”

It is also necessary to bear in mind, what **Keunemen, J.** observed in the Court of Criminal Appeal case of **The King Vs. Appuhami 46 NLR 128** where it was stated:

“In considering the force and the effect of circumstantial evidence in a trial for murder the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance if the prosecution has failed to fix an exact time of the death of the deceased.”

It must be emphasized that, last seen with the accused is not sufficient by itself to sustain a charge of murder. More evidence is required to link the accused with the murder.

E.R.S.R. Coomaraswamy in his Book ***The Law of Evidence, Volume I*** at page **23** discusses the rules of evaluation of circumstantial evidence in the following manner;

Rule 1: Every fact and circumstance on which the prosecution relies as the basis for the inference of guilt must be clearly proved and connected

with the *factum probandum* beyond reasonable doubt, and must be such as to lead to a reasonable inference as to the guilt of the accused.

Rule 2: The party who asserts the existence of any fact from which legal responsibility is to be drawn must prove that fact, but sometimes the circumstances may create a counter-obligation to disprove what is proved.

Rule 3: In all cases, whether of direct or circumstantial evidence, the best evidence must be adduced. The suppression or non-production of pertinent or cogent evidence necessarily raises a strong presumption against the party who withholds such evidence. This rule applies a *fortiori* to circumstantial evidence which has its own inherent defects.

Rule 4: The chain or strand of proved facts and circumstances must be complete that no link in it is missing. If any vital factor which is necessary to make the chain or strand is missing, or has remained unproved, it must be held that the prosecution has failed to establish the case. A vital link should never be inferred.

Rule 5: In order to satisfy the inference of guilt, the inculpatory factors must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt. In other words, the proved facts and the circumstances of the case must in cumulative and total effect, lead irresistibly and unmistakably to the only conclusion that the accused is guilty of the offence of which he is accused.

This is a matter where the appellant has in fact admitted most of the circumstantial evidence led against him at the trial.

He has admitted what PW-08 says about him, that he travelled with the deceased towards the place where his body was found at the time where PW-08 has seen him going. He has also admitted the evidence of PW-09 Sumith in that regard, and also the evidence given by PW-02 at the non-summary inquiry before the Magistrate's Court. These pieces of evidence clearly establish the fact that it was

the appellant who was with the deceased around an hour before his body was found.

In fact, the evidence of PW-02 which has been admitted by the appellant shows that when PW-02 saw the deceased, he had been collapsed on the paddy field a little distance away from where PW-02 was. The appellant has told him that he and the deceased had liquor together and the deceased was vomiting blood, for which the advice of PW-02 had been to take him to the hospital. The evidence shows that it was the appellant who lifted the deceased from his armpits and took him away to the place where the deceased's body was found dead later.

According to the evidence of PW-09 Sumith, when he got into the three-wheeler, the appellant had something similar to a knife wrapped in a newspaper. Most of the injuries observed by the JMO on the body of the deceased had been grievous cut injuries. Although the witness from whom the appellant has borrowed a manna knife on the same day promising him that he would return it in the afternoon, has failed to identify the knife at the trial, that does not mean the relevant circumstantial evidence cannot be accepted against the appellant.

The evidence placed before the trial Court has established that the appellant had left his native village soon after the incident and he has been arrested one and a half months later. The appellant has admitted that he left the village and stayed in a temple in Beliatta area in the Southern Province, which was a place far away from his usual residence.

Having considered the circumstantial evidence placed before the trial Court against the appellant, I find that the only inference that can be drawn from the evidence would be that it was the appellant who committed the murder and no one else.

I find no basis for the argument of the learned Counsel for the appellant that there was a possibility of a 3rd party being involved in the crime, given the fact that there was no such possibility. According to the deposition of PW-02, the deceased has been seen on a possible unconscious state and it was the appellant

who had almost dragged the deceased to the place where he was found dead a little time afterwards.

The learned High Court Judge has well considered the circumstantial evidence against the appellant, having in his mind the necessary ingredients that should be established by the prosecution in order to find an accused person guilty based on this circumstantial evidence.

I am in no position to agree with the ground of appeal as there had been overwhelming circumstantial evidence placed before the trial Court, and the conviction has been reached after having considered the relevant circumstantial evidence in its correct perspective.

I find that the learned High Court Judge has acquitted the appellant from the 2nd count preferred against him, as it had been clear that the intention of the appellant had been not to rob the three-wheeler driven by the deceased.

Accordingly, the appeal is dismissed for want of any merit.

The conviction and the sentence of the appellant by the learned High Court Judge of Gampaha is affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I Agree.

Judge of the Court of Appeal