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 under section 331 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal No:

CA/HCC/0398/2017

High Court of Gampaha

Case No: 114/2009

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Weerasinghe Mohandiramge Nihal Wickramarathne

ACCUSED

AND NOW BETWEEN

Weerasinghe Mohandiramge Nihal Wickramarathne

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Indica Mallawaratchy for the Accused-Appellant
	: Azard Navavi, S.D.S.G. for the Respondent
Argued on	: 04-12-2023
Written Submissions	: 12-01-2022 (By the Respondent)
	: 31-08-2018 (By the Accused-Appellant)
Decided on	: 29-04-2024

Sampath B. Abayakoon, J.

This is an appeal preferred 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 Nadeeka Dilrukshi on or about 23-12-2007, at a place called Makawita 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.

After trial without a jury, the learned High Court Judge of Gampaha found the appellant guilty as charged of his judgment dated 31-10-2017, and accordingly he was sentenced to death.

The facts as narrated in evidence at the trial can be briefly summarized in the following manner.

Facts in Brief

According to the evidence of PW-02 Lakmal Jayarathne, who was the appellant's mother's younger brother, he has received a telephone call from the appellant stating that the woman he was married to from the area he was living at that time is dead. The witness knew that the appellant was living in Gampaha area at that time. After the telephone conversation, the witness has advised the appellant to surrender to the police.

He has been unaware of any details of the marriage of the appellant to the mentioned female or has not seen her before. However, in his evidence he has stated that he knew that the appellant was already married to a woman from a neighbouring village and they were living at their house in the area, where he also lived. Both the appellant and the PW-02 are from a village called Gonamulla.

The evidence of the father of the victim was to the effect that her daughter was working at a garment factory in Biyagama and she was 26 years old at the time of her death. About six months prior to her death, she has got married to the appellant after a love affair, and they have been living in Makawita, Gampaha after the marriage.

His daughter has come home on 19-12-2007 and had informed him that she had a dispute with her husband and the husband wanted her to bring Rs.50,000/-. However, since they do not have such amount of money, he had been unable to give it to her and she has left the house on the following day around 8.00 p.m. in the night. Subsequently, his elder daughter who had been living close by has received a telephone call by the police informing of her death.

It appears that the father of the deceased knew little about the married life and the relationship his daughter had with the appellant and had never visited her while she was living in Gampaha.

When he was giving evidence, the defence has marked two contradictions in relation to his evidence. The first contradiction being of him saying in the

statement to the police that, it was the owner of the boarding where her daughter lived informed him about her death. The second contradiction had been to the effect that in the police statement, the witness has stated that it was on the 21st morning that her daughter left his house to go to her boarding, whereas in his evidence, he has conceded that if he has stated so in his police statement, that may be the truth.

The prosecution has called the sister of the deceased (PW-09) to give evidence. Being the elder sister of the deceased, she had known about her sister much more than the parents. She has attended the marriage registration between the deceased and the appellant and it had been her evidence that although both of them worked at different places, they got married due to a love affair. Her sister has died about 8 or 10 months after the marriage, and at that time, she had been living with the appellant in a boarding house in the Gampaha area. She too has visited the boarding, and the sister had been in the habit of talking to her over the phone very frequently. Although her sister used to come home from her workplace previously, she has not come home regularly after the marriage.

On one occasion, she has received a call from the boarding house that her sister and the husband are quarrelling, which has resulted in her visiting the boarding. When questioned about the reasons for the disputes, although the sister has not given details, she has been informed that her sister came to know that the appellant was a previously married person with a child, and his wife and the child had visited the boarding which has ensured in a quarrel. Although she has attempted to convince her sister to come back home, she had refused. On another occasion, she has come to know that her sister has been assaulted and hospitalized. She has visited her at the Gampaha hospital. There too she has refused to come home saying that it was the appellant who put her in this situation.

It had been her evidence that the deceased visited her home on 19-12-2007 and left on 21-12-2007 by bus from Balangoda at around 9.30 in the morning.

Around 2.00 p.m., the appellant had called her and has informed that her sister reached the boarding. On 23-12-2017 around 8.30 - 9.00 p.m., she has received an information from the police that her sister has been killed.

Accordingly, she has come to Gampaha and had identified her sister's body at the post-mortem. It was apparent from her evidence that she was aware about the marital disputes her sister had with the appellant due to the fact of discovering that the appellant was a previously married person with a child. She has also been aware of the fact that when her sister came home for the last time, she has informed her father that the appellant was demanding Rs.50,000/-. It has been her evidence that on the 19th of December, the appellant too gave a call to her parents' house and informed not to come without Rs.50,000/-. At that time, she too has spoken to the appellant over the phone and had informed that since they are poor, they cannot give him Rs.50,000/-.

The Judicial Medical Officer (JMO) who conducted the post-mortem, has observed a tightly knotted wire around the neck of the deceased. He has observed three cut injuries on the stomach, but has opined that the said injuries have not contributed to her death. He has opined that the deceased has died due to strangulation of her neck.

The police officers who conducted the investigations as to the incident has given evidence, and the prosecution has marked a knife found at the scene of the crime allegedly recovered in terms of the statement made by the appellant under section 27 of Evidence Ordinance, to establish that it was the knife used by the appellant to commit the crime.

The prosecution has called PW-10, who was the owner of the boarding where the appellant and the deceased lived before her death. According to him, they had been living there as the husband and wife and he had been unaware of the fact that they had frequent disputes among them. However, he has stated that on one day, he heard a quarrel between the appellant and the deceased informed them not to quarrel, and if they cannot live peacefully, to leave the place.

This incident has occurred two weeks prior to her death. Under cross-examination, the witness has stated that he saw the deceased near the road a day prior to her death, but did not see her husband at that time.

Once the prosecution closed its case after leading the evidence relied on by the prosecution, the learned trial Judge has decided to call for a defence.

The appellant has made a dock statement and has claimed that he knows nothing about the death. He has claimed that when he came to the boarding after finishing his day's work, he saw the door of the room partly opened and when he went inside, he saw something on the bed covered with a bedsheet. He has claimed that when he removed the cover, he saw the woman he married lying dead on the bed with a wire around her neck. After covering the body, he had thought about what to do and gone to the police and informed about the finding. It had been his position that after he informed the incident, he was detained by the police, and later the police took down a statement from him leaving a large part of the statement blank.

The Grounds of Appeal

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

1. The items of circumstantial evidence are wholly inadequate to support the conviction.
2. The prosecution has failed to eliminate the possibility of a 3rd party being the perpetrator of the crime.
3. There is a total failure on the part of the learned High Court Judge to judicially evaluate the items of circumstantial evidence in its correct perspective.
4. The learned High Court Judge has drawn adverse inferences against the appellant totally unsupported by evidence and thereby causing serious prejudice to the appellant.

Consideration of the Grounds of Appeal

As the grounds of appeal urged are interrelated, I will now proceed to consider them collectively.

The learned Counsel for the appellant contended that the learned High Court Judge has raised doubt about the alleged recovery of the knife based on a statement made by the appellant and contended further that the circumstantial evidence does not point towards the accused on the basis that it was only the accused committed the offence.

It was the position of the learned Counsel that the judgment does not say that the conviction was based on the principles of circumstantial evidence. It was argued that the fact of both the appellant and the deceased living in the room where the body was found, and the fact of the appellant giving a call to his uncle are not incriminating evidence against the appellant which would constitute circumstantial evidence against him. It was submitted that the learned High Court Judge has failed to evaluate the evidence on the basis of circumstantial evidence and had not adequately discussed the circumstantial evidence upon which the conviction was based on.

Referring to the ground of appeal where it was contended that an involvement of a third party cannot be overruled, it was the position of the learned Counsel that there had been several other boarding rooms around the room where the body was discovered and the prosecution has failed to call PW-04 and 05 listed in the indictment to eliminate any such possibility.

Countering the submissions made on behalf of the appellant, the learned Senior Deputy Solicitor General (SDSG) was of the view that the learned High Court Judge has considered the evidence on the basis of circumstantial evidence by being very mindful of the principles and the necessary ingredients that should be established in a matter based on circumstantial evidence.

He was also of the view that by deciding not to rely on the alleged section 27 statement, the learned High Court Judge has well considered the validity of the evidence and the necessary ingredients of proof in relation to a discovery made in terms of section 27(1) of the Evidence Ordinance, when it was decided to disregard the evidence in that regard. It was the position of the learned SDSG that the learned High Court Judge has considered all available pieces of circumstantial evidence in its correct perspective to come to his finding of guilt of the appellant. He was of the view that there are no reasons to interfere with the conviction and the sentence, and moved for the dismissal of the appeal.

It appears from the judgment that the learned High Court Judge had not specifically stated in the judgment that the evidence is being considered on the basis of circumstantial evidence. The learned High Court Judge has also not discussed the basic ingredients that have to be established when considering evidence in terms of the requirements of circumstantial evidence, and has not cited any of the judgments he would take guidance for his judgment.

However, it is my considered view that, in itself, does not mean the learned High Court Judge has failed to consider the evidence on the basis of circumstantial evidence in its correct perspective. What matters is whether the judgment demonstrates that the evidence has been considered on the basis of circumstantial evidence and whether there can be a justification in the conclusions reached by the learned trial Judge.

The learned Counsel for the appellant, in her written submissions filed before this Court has cited the judgment pronounced by the Supreme Court of Canada in the case of **The Queen Vs. R.E.M. and Attorney General of Ontario and Attorney General of Alberta (2008) 3 SCR 3, 2008 SCC 51** to substantiate her argument that the impugned judgment was not up to the required standard.

> *It was observed by their Lordships that the authorities establish the reasons for a judgment in a criminal trial served three main functions.*

1. *Reasons tell the parties affected by the decision why the decision was made.*
2. *Reasons provide public accountability of the judicial decision.*
3. *Reasons permit effective appellate review.*

In addition, reasons help ensure fair and accurate decision-making.

It was also observed that Court of Appeal considering the sufficiency of reason should read them as a whole, in the context of evidence, the arguments and the trial, with an appreciation of the purpose or functions for which they are delivered (see Sheppard, at paras. 46 and 50; ***R Vs. Morrissey (1955), 22 O.R. (3d) 514 (C.A.)****, at p.524).*

These purposes are fulfilled if the reason, read in context show why the Judge decided as he or she did. The object is not to show how the Judge arrived at his or her conclusion in a "watch me think" fashion. It is rather to show why the Judge made that decision. The decision of Ontario Court of Appeal in ***Morrissey*** *predated the decision of this Court establishing a duty to give reasons in Sheppard but the description in* ***Morrissey*** *of the object of a trial Judge's reasons is apt. Doherthy J. A. in* ***Morrissey*** *at p.525, puts it this way:*

"In giving reason for judgment, the trial Judge is attempting to tell the parties what he or she has decided and why he or she made that decision."

What is required is a logical connection between the "what" – the verdict - and the "why"- the basis for the verdict. The foundations of the Judge's decision must be discernable, when looked at in the context of the evidence, the submissions of the Counsel and the history of how the trial unfolded.

As I have stated before, even though the learned trial Judge has not discussed the principles of circumstantial evidence in his determinations, if the judgment establishes that in fact the evidence has been considered in the manner under which circumstantial evidence should be considered, and has given reasons to

his findings which are in accordance with the required standards, I find no basis to agree with the contention of the learned Counsel for the appellant that the evidence has not been considered in its correct perspective.

The manner under which the circumstantial evidence must be looked at in a criminal trial is well settled in our country. 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 is consistent with their guilt and inconsistent with their innocence.*

However, when 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."*

The evidence led in the trial has been undisputed in relation to the fact that the appellant and the deceased were married and were living in the boarding room where the body of the deceased was found. The evidence establishes that they have got married as a result of a love affair and the parents of the deceased knew very little about the appellant and his family background. The deceased has had little contact with the parents after she left for work in Biyagama area and her father had known no details even about where she lived during her stay in Biyagama area.

However, on 19-12-2007, the deceased has come home and informed her parents that her husband wanted her to bring Rs.50,000/-, a demand which he could not fulfill. On that day, his daughter has informed him that she came home after a quarrel with the appellant. Although he has given evidence in Court saying that his daughter left the house on the 19th, whereas he has stated that she left on the 21st in his statement to the police, the fact that she left her home on the 21st has been established without doubt, as the sister of the victim has given clear evidence in that regard.

The sister (PW-09) of the deceased, being the elder sister, has had much better contact with her sister and her husband, the appellant. The appellant has visited her house along with the deceased after their marriage. She has visited the boarding several times because of the disputes the deceased and the appellant had in their married life, and she had even visited the deceased at the hospital when she was undergoing treatment as a result of an assault by the appellant.

She has come to know that the appellant was a married person with a child, and as a result of that, there had been quarrels between the appellant and the deceased. She has met her sister for the last time when she came home on 19-12-2007. She has even spoken to the appellant over the phone informing that due to their poverty, they cannot afford to give Rs.50,000/- to the deceased.

According to her evidence, after the deceased left the house on the 21st, the appellant has given a call to her informing that she reached the boarding. The evidence of the sister of the deceased clearly establishes the fact that although she and her other family members wanted her to abandon the appellant and come home, the deceased has refused, stating that she wanted to be with the appellant as he was the one who put her in this situation.

The evidence taken as a whole clearly establishes the fact that the deceased has become a nuisance to the appellant because of the strained relationship which has developed between them, and there had been constant quarrels between them.

The owner of the boarding where the two of them lived has seen the deceased near the place where both the appellant and the deceased lived a day prior to when her body was discovered. The house owner's evidence establishes the fact that there had been issues in their life as a married couple, and at one time, he was forced to advise them not to quarrel and leave the place, if they cannot live peacefully.

It is clear from the judgment of the learned High Court Judge that since there was no eyewitness account of the incident which led to the death of the deceased, it is only on the basis of circumstantial evidence that the evidence has been considered.

In that process, the learned High Court Judge has decided to disregard the alleged statement made by the appellant in terms of section 27(1) of the Evidence Ordinance, as the evidence which led to the discovery of the knife was sketchy, which has led to an uncertainty. I find that this determination has been reached by the learned High Court Judge being very well mindful of the relevant considerations that should be given to such a finding. It is clear that the learned High Court Judge has taken all the pieces of circumstantial evidence in its totality.

In the said process, the learned High Court Judge has taken the evidence of the uncle of the appellant to whom the appellant has given a call informing that the woman he is married to and lived with him, was dead. The response by the uncle of the appellant had been to go and surrender to the police. As rightly considered by the learned High Court Judge, there cannot be any reason for the uncle of the appellant to inform him to surrender to police other than make a complaint to the police, if the appellant had not informed more than what the witness has stated in the Court. This was an inference that can be safely drawn from the evidence of the uncle of the appellant as a piece of circumstantial evidence that can be considered against him. The learned High Court Judge has well considered the defence taken up by the appellant and has correctly determined

that he was not telling the truth, but creating a story in order to escape from the situation he was entangled.

I find that the learned High Court Judge, after analyzing the evidence on the basis of circumstantial evidence has come to a correct finding that the only inference that can be reached from the evidence is that, it was the appellant who has committed this murder and no one else.

For matters of clarity, I would like to reproduce the last paragraph of the judgment, which reads as follows:

> මෙම නඩුවේ ඉදිරිපත් වී ඇති සාක්ෂි අනුව මෙම මරණකාරියගේ මරණය සිදු කරන ලද්දේ මෙම විත්තිකරු විසින් මිස වෙනත් අන් කිසිවෙකු විසින් නොවන බව පැමිණිල්ල සාධාරණ සැකයෙන් තොරව ඔප්පු කර ඇති බවට මම සෑහීමට පත් වෙමි. පැමිණිල්ල විසින් ඉදිරිපත් කරන ලද සාක්ෂි අනුව එකම හා මගහල නොහැකි අනුමිතිය වන්නේ මෙම මරණකාරියගේ මරණය සිදු කරන ලද්දේ මෙම විත්තිකරු විසින්ම මිස අන් කිසිවෙකු විසින් නොවන බවයි. ඒ අනුව පැමිණිල්ල විසින් විත්තිකරුට විරුද්ධව මරණකාරියගේ මරණය සිදු කිරීමෙන් මිනි මැරීමේ වරද සිදු කළ බවට ඉදිරිපත් කර ඇති අධි චෝදනාව පැමිණිල්ල සාධාරණ සැකයෙන් තොරව ඔප්පු කර ඇති බවට නීරණය කරමි. අධි චෝදනාවට චුදිත වරදකරු කරමි.

For the reasons considered as above, I find no basis to agree with the submissions of the learned Counsel for the appellant that the learned High Court Judge has failed to consider circumstantial evidence in its correct perspective, and has failed to judicially evaluate the evidence.

Another point taken up the learned Counsel for the appellant was that the prosecution has failed to eliminate the possibility of a 3rd party being the perpetrator of the crime.

This submission was based on the premise that there were other persons living in similar housing conditions near the boarding room where the deceased was found, and in view of the fact that there were no eye witnesses for the incident, even a 3rd party could have committed the offence.

I am in no position to agree with such a contention, as the evidence led in the case completely removes the possibility of a 3rd party being involved in the crime. The evidence clearly shows that there had been no possibility for an intruder to get into the boarding room and commit such a gruesome act. The only inference that can be reached based on the circumstantial evidence available against the appellant is that, it was he who committed the crime and no one else.

For the reasons as considered above, I am of the view that the grounds of appeal urged by the appellant have no merit.

Accordingly, the appeal is dismissed.

The conviction and the sentence of the appellant is affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal