

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

*In the matter of an Appeal in terms of
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/0284/2017

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Kegalle Case No:

HC/2225/2005

(1) Gamage Chandrakumara

(2) Rengam Setti Govindasamy alias Raja

(3) Marimuttu Paramesh Kannah

ACCUSED

AND NOW BETWEEN

Gamage Chandrakumara

1st ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Sharon Seresinhe for Accused Appellant

: Riyaz Bary, D.S.G. for the Respondent

Argued on : 01-04-2022

Written Submissions : 08-05-2018 (By the 1st Accused-Appellant)

: 11-09-2018 (By the Respondent)

Decided on : 30-05-2022

Sampath B Abayakoon, J.

This is an appeal by the 1st accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Kegalle.

The appellant along with the 2nd and the 3rd accused was indicted before the High Court of Kegalle on the following counts;

- (1) For causing the death of Monika Rasika Kumari Gunathilaka on 4th July 1999, an offence punishable in terms of section 296 read with section 32 of the Penal Code.
- (2) At the same time and at the same transaction robbing gold jewellery belonging to the said Gunathilaka, an offence punishable in terms of section 380 read with section 32 of the Penal Code.

At the trial, the 1st and the 2nd accused has absconded the Court and the trial has proceeded against them in absentia after following due procedure in terms of section 241 of the Criminal Procedure Code.

After trial without a jury, the learned High Court Judge of Kegalle by his judgment dated 03-10-2017 found all the accused including the appellant guilty as charged, and they were sentenced to death on the 1st count and for a period of 3 years rigorous imprisonment and for a fine on the 2nd count.

This is a matter where one eyewitness has given evidence as to the actual incident, in addition to the several witnesses who has provided circumstantial evidence. The eyewitness had been an accomplice to the crime, who has been granted a conditional pardon in terms of section 256(1) of the Code of Criminal Procedure Act by the Attorney General.

The relevant facts in brief: -

The deceased was the wife of the appellant who was pregnant at the time of her death.

PW-01 Chandana Wijesuriya was the earlier mentioned accomplice who was living in Deegala at the time relevant to the incident. On 4th July 1999 at about 2 p.m. a friend of him named Raja (2nd accused) has visited him and was asked to accompany him to go to Awissawella. They have reached Awissawella at around 3 p.m. in the motorbike ridden by the 2nd accused and they have been met by a person called Kanna (3rd accused). After chatting for about half an hour, they have gone to a restaurant in the town and had consumed beer and arrack until about 6.30-7.00 in the evening. Thereafter, all three of them had gone near the Daraniyagala bus stop and PW-01 had been instructed to get into a bus plying towards Deraniyagala and was asked by the 2nd accused to get down at the Warakathenna bus stop. The bus has reached the Warakathenna bus stop around 7.45-8.00 in the night. The 2nd and the 3rd accused had followed the bus in the motorbike. In the bus PW-01 has seen the

1st accused, whom he came to know later as Chandrakumara and a pregnant lady travelling with him. They too have alighted from the bus at the same bus stop and he has seen them walking along the Derenaiyagala road.

The 2nd and the 3rd accused who followed the bus has stopped the bike and PW-01 has been asked by the 2nd accused to get into the bike while the 3rd accused started to follow the appellant and the pregnant lady about 10 feet behind. When they reached the bridge on the road, the 2nd accused accompanied by PW-01 has ridden the bike passing the couple and stopped.

Thereafter, the PW-01 has seen the couple followed by the 3rd accused turning towards a by-road of about 5-6 feet wide which was along the waterway called Kahanavita ela. He has also seen the 3rd accused Kanna carrying a black tulip bag with him. At the insistence of the 2nd accused, he too has followed them. He has then seen the 3rd accused taking a rope out of the bag he was carrying and putting that around the neck of the female who was walking in front of him and tightening it using force. Although the female has shouted for help the appellant who was accompanying her has done nothing but just looked on. The 3rd accused has asked PW-01 also to assist him by pulling the rope but he has let go the rope after initially assisting the 3rd accused.

Subsequently, the 3rd accused had stabbed the female using a knife he took from the bag he was having in his possession to the neck of the victim. PW-01 has identified the knife which has been marked as P-01. It was the evidence of the PW-01 that after he let go the rope, it was the appellant who got hold of it and after the victim was stabbed, the appellant and the 3rd accused pushed her to the embankment towards the waterway.

After the act, all four of them have met up near the bridge and Kanna has shown a ring, two ear studs and a wrist watch as things found on the female. The appellant has asked the 2nd accused to take them and the appellant has

left with the 2nd accused in his motorbike as he was asked to be dropped off at Dehiovita.

It was the position of the PW-01 that he was threatened with death if he divulged to anyone the incident, and he made a confession before the Magistrate of Ruwanwella after his arrest revealing what happened. It had been his position that although it was dark, he was able to see what was happening with the aid of moon light.

At the cross examination of the witness, the learned Counsel who represented the appellant at the High Court has marked four contradictions where the witness has admitted in his police statement that it was he who had the gold jewellery of the victim and sold them later, but denied that he made such a statement to the police when giving evidence in the Court. PW-01 has admitted that he received money after the robbery.

At the trial, it had been the stance of the appellant that he was never at the scene of the crime or involved, but it was the PW-01 and the other two accused who misled an innocent woman, killed and robbed her.

PW-02 Jayasinghe was a person who had a boutique in the Awissawella town and knew the appellant and his wife well. He has seen the appellant and his wife at the Daraniyagala Bus stand on his way home around 7.00-7.30 in the night of 4th July 1999, and had waved at them. On his way back to his boutique where he used to spend the night at around 9.30 p.m. on the same day, he has met the appellant again at Awissawella town and had informed that his wife has gone missing. When questioned about seeing him with his wife at the bus stand, he has not replied. Following day morning, the appellant has come to the boutique and had requested the PW-02 to not to divulge to anyone that he saw him with his wife. Although he has not taken much notice of the request, once he came to know that a pregnant female has been found

killed, he has realized the gravity of the request of the appellant and had immediately informed the police what he knew.

Ruwanthi (PW-10) was the younger sister of the deceased who lived nearby to the house of her. She has met the deceased on 4th afternoon and had informed her that she is going to Awissawella to see Pandols that has been erected for the Poson festival with her husband who was the appellant. Later she has come to know of her death.

PW-09 Premakumara who has a tailoring shop in the town was the employer of the appellant. On 5th July 1999 around noon, the appellant who came to the shop has informed him that his wife has gone missing and had requested money for him to conduct a Bhodi Puja. Later in the day he has come to know about the killing of the wife of the appellant.

PW-12 Disna Nilanthi is a person who has developed a romantic relationship with the appellant after meeting him about two months before the killing, without knowing that he was a married man. They have exchanged several love letters and photos among them. The appellant has even given a ring to her for her birthday.

Sarath Jayaratne PW-15 was a bus conductor who used to work in a bus plying from Awissawella to Deraniyagala. It has been his evidence that although he could not remember the exact date, few days before he gave a statement to the police, a pregnant female and another person travelled in his bus and they got off at Warakathenna bus halt. It was his evidence that he could remember this because of the fact that the female was pregnant and he assisted her to get off from the bus. He was unable to remember whether anyone else also got down at that stand as he has not paid any special attention. He has identified a bus ticket shown to him (P-08) as a ticket issued by him.

Inspector of Police Lionel Weerasinghe was the main police investigator to the incident. He has given evidence in detail regarding his investigations and recovery of productions from the scene of the crime as well as based on the statements of the accused persons. Apart from the other productions recovered from the crime scene, he has also recovered two bus tickets issued for the private bus No-61-2532, one of which has been marked as P-08 at the trial. It was he who has recovered the knife used in the crime (P-01), based on the statement made to the police by the 2nd accused in terms of section 27 of the Evidence Ordinance and the gold jewellery belonging to the deceased from the places where they were sold by the accused and the PW-01.

The doctor who conducted the postmortem of the deceased (PW-07) has confirmed that the death of the deceased Monika Rasika Kumari Gunathilaka was due to the shock following strangulation and cut injuries inflicted on her. (Postmortem report marked P-22).

After the closure of the prosecution case leading other relevant additional evidence and when called for a defence, the appellant has made a lengthy statement from the dock. He has claimed that he was unaware of anything about the murder of his wife and has claimed that PW-01's evidence was a total falsehood. It was his position that he came to know that his wife has left home for Awissawella saying that she is going to see Poson Pandols only after coming home in that night. He has stated that he led a very peaceful married life with his wife and had no reason to kill her, pleading that he is innocent.

Ground of Appeal: -

In her submissions before the Court, the learned Counsel for the appellant raised the following ground of appeal for the consideration of the Court.

- (1) When there were doubts in the prosecution evidence, the learned High Court Judge without considering those doubts, has convicted the 1st accused for robbery and murder.

It was the contention of the learned Counsel for the appellant that PW-01 relied on by the prosecution was not a reliable and trustworthy witness as he was an accomplice to the crime. Making submissions that it was on the basis of the evidence of PW-01 the appellant has been found guilty, it was her position such a conviction was not safe given the unreliable nature of the evidence. It was stated that the learned High Court Judge has failed to consider material contradictions marked as relevant and the fact that the appellant had no motive to kill his wife with whom he had a happy married life. Claiming that it was not probable for the appellant to kill his wife and take her jewellery, sell them and share the money with the other accused, it was her contention that the appellant was wrongly convicted and he should stand acquitted of the charges.

It was the position of the learned Deputy solicitor General (DSG) on behalf of the Attorney General that the case has been decided not only on the evidence of the PW-01 who was an accomplice who was later given a conditional pardon by the Attorney General, but on the circumstantial evidence as well. Submitting that the evidence led in the action has clearly established that the deceased was in the company of the appellant before her death, it was the position of the learned DSG that although the appellant has made a lengthy statement from the dock, he has failed to explain the most incriminating evidence against him to the Court.

Contending that the learned High Court Judge has reached his verdict after well considering the relevant legal provisions as to the value that can be attached to the evidence of an accomplice as well as the circumstantial evidence made available to the Court, it was his position that the conviction and the sentence needs no disturbance and the appeal should stand dismissed.

Consideration of the Ground of Appeal

As argued correctly by the learned DSG, this is a matter that had been decided based on the evidence of an accomplice to the crime as well as the available circumstantial evidence and not only on the evidence of the accomplice as claimed by the learned Counsel for the appellant.

I am in full agreement with the argument of the learned DSG that the learned High Court Judge has well considered the relevant law as to the way the evidence of an accomplice needs to be considered by a Court, before deciding to accept the evidence of PW-01 as reliable.

In terms of section 133 of the Evidence Ordinance an accomplice shall be a competent witness. The section 133 of the Evidence Ordinance reads as follows;

133. An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

However, when it comes to the presumptions a Court can reach in relation to existence of certain facts in terms of section 114 of the Evidence Ordinance is concerned, section 114 illustration (b) reads;

(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars.

E.R.S.R. Coomaraswamy in his book The Law of Evidence Volume 11 (Book-I) at 364 states thus;

For the purposes of section 114(b), it may be said that an accomplice is one concern with another or others in the commission of the crime. Wharton on Evidence, at page 12, states that;

“An accomplice is a person who knowingly, voluntarily with the common intent with the principal offender units in the commission of a crime. The term cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or with morally delinquent or who was an admitted participant in a related but distinct offence. To constitute an accomplice, he must perform some act or take some part in the commission of the crime, or owe some duty to the person in danger that makes it incumbent on him to prevent its commission.”

It is very much clear from the evidence adduced before the High Court that PW-01 was an accomplice to the crime and therefore his evidence is subjected to the scrutiny on the basis of that of an accomplice.

In the case of **The Queen Vs. Liyanage (1965) 67 NLR 193 at 213** it was held:

If an accomplice gives evidence under a conditional pardon, the suspicion is aggravated, but it does not mean that his evidence should be forthwith struck out, but that it should be considered carefully, and even cautiously and only accepted when it is corroborated and found to be convincing.

Held further;

“In the case of accomplices, we have borne in mind the establish practice, virtually equivalent to a rule of law. Which requires independent corroboration of their evidence in material particulars, and ‘qua’ each defendant. Independent corroboration need not cover the whole prosecution story, or even all the material particulars. The nature and extent of corroboration required by the rule of prudence must, from the very nature of things, vary with the circumstances of each case. What is required is some additional evidence, direct or circumstantial, rendering it probable that the accomplice’s evidence is true and reasonably safe to act

upon, and connecting or rendering to connect the particular defendant with the offence.”

As considered rightly by the learned High Court Judge in the judgment, in the case of **Illanganthilaka and Others Vs. The Republic of Sri Lanka (1984) 2 SLR 38**, it was held:

- (1) While it is legal to convict upon the uncorroborated evidence of an accomplice, it is a rule of practice which has become virtually equivalent to a rule of law to regard it as dangerous to so convict. What is required is some additional evidence rendering it probable that the story of the accomplice is true and it is reasonably safe to act upon it.
- (2) The corroboration must proceed from an independent source and it must be weighed as to its probative value. It must confirm in some material particular not only that the crime has been committed but also that the accused committed it. The corroboration need not extend to the whole story not need it be by direct evidence that the accused committed the crime; it is sufficient if the evidence is merely circumstantial.

With the above legal principles in mind, the learned High Court Judge has considered whether the evidence of PW-01, who was the accomplice can be considered credible and whether his evidence has been sufficiently corroborated.

PW-01's evidence that he travelled in the bus where the deceased and the appellant also travelled has been well corroborated by the evidence of several witnesses. PW-02 has seen the appellant with his pregnant wife who is the deceased moments before the relevant time where PW-01 says they travelled in the bus. The conductor of the bus which travelled towards Deraniyagala at the time and the day relevant to the incident, (PW-15) has given uncontradicted

evidence that he remembers a pregnant lady and another person travelling in his bus and getting down at the Warakathenna bus halt. The sister of the deceased has given evidence in this action to confirm that her sister left the home saying that she is going to Awissawella to see pandols with the appellant. The evidence confirms that it was with the appellant his wife was last seen alive on that night.

The evidence of the Medical Officer who conducted the postmortem perfectly tallies with the evidence of PW-01 as to the way the deceased was strangled and later stabbed with a knife. I am of the view that these pieces of evidence when taken together corroborates the evidence of PW-01 and establishes that he was speaking the truth as to what happened on that fateful day, although he was an accomplice to the crime. The contradictions marked in relation to the statement he made to the police and the evidence in the Court are not material contradictions in my view. All the contradictions are in relation to how the robbed items were taken over and sold, which does not affect the credibility of the witness as to the actual incident where the deceased was killed. Hence, I am in no position to agree with the contention that PW-01 was not a credible witness and his evidence should be disregarded.

In the case of **P. Sarawanamuththu Vs. R. A. De Mel (1948) 49 NLR 529**, it was stated that;

“The corroboration of the evidence of an accomplice need not extend as regards the whole story told by him. It is suffice if the accomplice is corroborated on one or more material particulars as regards the person lie implicated”.

I find that the learned High Court Judge has well considered his evidence and only after satisfying that there was sufficient corroboration of the evidence of PW-01 has decided to accept his evidence, for which I find no reason to interfere with.

Apart from the evidence of PW-01, I find that several other witnesses have provided circumstantial evidence that points the finger directly at the appellant for the crime. Although he has pleaded that he never met his wife on that day, and only came to know that she left the house when he came home for the night, evidence of the PW-02 Jayasinghe was that he saw and waved at the appellant and his wife who were at the Daraniyagala bus stand on that night. It was also his evidence that around 9.00-9.30 p.m. on the same night he met the appellant again in the town and he informed him that his wife has gone missing, for which the witness has questioned the appellant that wasn't she with you when I saw you earlier in the town. The appellant has failed to provide any answer to that question. On the following day morning the appellant has visited the PW-02 again and had requested him to not to tell anybody that he saw the deceased and himself together.

I find that the appellant has failed to contradict the credibility of the evidence of PW-02 on these material points in any manner. Although a contradiction (V-05) has been marked, I find that it was not a contradiction that can be relevant. It is abundantly clear that the witness has forgotten a minute detail of the events that unfolded on that day due to the passage of time. In his evidence before the Court, he has stated that what was stated by the appellant was that *"Aiye you are the only one who saw yesterday, do not tell anyone"*. In the police statement what has been stated by the witness was that *"Mangala aiye, you are the only one who saw me at the Daraniyagala bus stand"*, which explains itself.

Under our law, an accused person has nothing to prove and it is the responsibility of the prosecution to prove the case beyond doubt. An accused only needs to create a reasonable doubt on evidence against him and offer a reasonable explanation.

In the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148**, it was held;

“As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies the Court or at least is sufficient to create a reasonable doubt as to his guilt.”

However, it is also our law that when a strong prime facie case has been established against an accused and there is evidence that only he can explain, it is the duty of the accused to provide a reasonable explanation as to the highly incriminating evidence against him.

In the case of **Sumanasena Vs. The Attorney General (1999) 3 SLR 137**, It was held:

“When the prosecution establishes a strong and incriminating cogent evidence against the accused, in those circumstances was required in law to offer an explanation of the highly incriminating circumstances established against him.”

Although there is much discussion among legal luminaries that whether such a judgment existed or reported, it is now embedded into our legal principles what the judges often referred to as the Ellenborough dictum.

It is stated that in the case of **Rex Vs. Lord Cochrane and others (1814) Gurneys Reports 479 Lord Ellenborough** held:

“no person accused of crime is not bound to offer any explanation of his conduct or of circumstances of suspicion which attached to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out and when it is in his own power to offer evidence if such exists, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence it is a reasonable and justifiable conclusion he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.”

Abott J. in Rex Vs. Burdett (1820) B & Ald 161 at 162 observed that:

“No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation to contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to it the prima facie case tends to be true and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends.”

Although the appellant has made a lengthy statement from the dock, he has failed to offer any explanation as to the evidence of PW-02 who saw and met him and his wife on the day of the incident. The evidence of PW-02 cut across the stand taken by the appellant in his dock statement that he never knew that his wife left the house in that evening, until he came home at that night. If it was the stand of the appellant he has failed to cross-examine and confront the PW-02 at the trial. Besides that, PW-09 who was the employer of the appellant has given evidence and had stated that the appellant left his tailoring shop at around 5.00-5.30 in the evening of that day, which was contrary to the stand of the appellant that he left the shop at around 7.00 p.m. that day in order to go home. However, the appellant has failed to cross-examine the witness on that fact either.

In the case of **Sarwansingh Vs. State of Punjab (2002) AIR Supreme Court (iii) 3652 at 3655 the Indian supreme court** held thus:

“It is a rule of essential justice whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on this issue ought to be accepted”

In the case of **State of Himachalpradesh Vs. Thakur Dass (1983) 2 Criminal Law Journal 1694 at 1701 V D Visva C.J** held:

“Whenever a statement of fact made by a witness is not challenged in cross examination it must be concluded that the fact in question is not disputed”

When it comes to the question whether the common intention has been established in this matter, the evidence of PW-01 provides clear insight as to the part played by the appellant along with the other perpetrators of the crime. I find that the prosecution has established by way of direct and circumstantial evidence the common intention of each of the accused in pursuance of the crime beyond reasonable doubt.

In the case of **King Vs. Assappu 50 NLR 324** it was held that:

In a case where the question of common intention arises the Jury must be directed that;

- (1) The case of each accused must be considered separately.*
- (2) The accused must have been actuated by a common intention with the doer of the act at the time the offence was committed.*
- (3) Common intention must not be confused with the same or similar intention entertained independently of each other.*
- (4) There must be evidence, either direct or circumstantial, of prearrangement or some other evidence of common intention.*
- (5) The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention.*

In this action, the prosecution has led evidence to establish the possible motive for the crime. According to the evidence of PW-12, Disna Nilanthi, the appellant has developed a love affair with her, pretending that he is unmarried. The evidence led in this action has clearly established that this was the motive for the appellant to brutally kill his pregnant wife and get rid of her with the help of the other accused.

In a criminal case there is no need for the prosecution to establish a particular motive for a crime in order to prove a charge against an accused. However, once the motive is established as in the case under appeal, it strengthens further, the case of the prosecution.

In the case of **Sumanasena Vs. The Attorney General (supra)** it was held:

“Although the prosecution is not bound to establish a motive, once cogent and intelligible motive has been established, that fact considerably advances and strengthens the prosecution case.”

I find that the learned High Court Judge has considered the evidence in its totality, as he should have, in relation to the direct as well as the circumstantial evidence against the appellant and the other accused in this action. In his judgment the learned High Court Judge has well considered the facts as well as the relevant law before finding the appellant guilty as charged, for which I find no reasons to interfere with.

The appeal therefore is dismissed, as I find no merit in the appeal. The conviction and the sentenced affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal