

**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 Case No:**  
**CA 162/16**

**HC Anuradhapura**  
**Case No: HC 173/2011**

Wijesinghe Mudiyanse  
Rathnasighe alias Kiri Mahaththaya

**ACCUSED -APPELLANT**

**Vs.**

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

**COMPLAINANT- RESPONDENT**

**Before** : Achala Wengappuli, J.  
Devika Abeyratne, J.

**Counsel** : Nayantha Wijesundara for the Accused-  
Appellant  
Anoop de Silva , SSC for the Respondent

**Argued On** : 30<sup>th</sup> January 2020

**Decided On** : 06<sup>th</sup> march 2020

**DEVIKA ABEYRATNE. J**

The accused-appellant was indicted in the High Court of *Anuradhapura* for having committed the murder of *Seelaratnage Mallika Padmini*, and was convicted and sentenced to death.

Aggrieved by the said conviction and the sentence, the accused appellant appealed, raising several grounds of appeal that the learned High Court judge; had not evaluated the contradictions in the evidence of the prosecution witness; had not considered the submissions made by the Defense; had not considered the weaknesses in the prosecution witnesses and that the judgment is contrary to the evidence placed before court.

However, at the appeal it was contended by the counsel for the appellant that the learned High Court Judge has not considered the defense of cumulative provocation despite the overwhelming evidence that the deceased and the appellant were constantly quarrelling with each other.

The counsel has cited the decisions in *Premal Vs Attorney General [2002] 2 Sri LR 403*, *King Vs Albert Appuhamy 41 NLR 505* and *King Vs Bellana Vidanelage Eddin 41 NLR 345*, to substantiate her

argument that even if there is failure on the part of the defense to take up a certain line of defense, it was the responsibility of the trial judge to consider a factual situation which would result in culpable homicide not amounting to murder in the evidence on record.

I will consider the grounds of appeal adverted to in the petition of appeal as well as the position taken up at the hearing of the appeal.

The cause of death of the deceased *Seelaratnage Mallika Padmini* is burn injuries caused from fire. The case for the prosecution can be summarized as follows; the deceased and the appellant were living together as husband and wife and the deceased had been earlier married to one *Gamini Wickramasinghe*, a step brother of the appellant, from which marriage she has two daughters, PW 2 *Priyanka Nilmini Wickramasinghe* and the other daughter was living abroad at the time of the incident.

Several Prosecution witnesses have testified that the deceased told them that *Kirimahathmaya* the appellant has set fire to her.

*Priyanka* PW 2, was living with the mother and the appellant whom she addressed as *Bappa*. On the day of the incident 25.03.2005, around 8.30 and 9.00 in the morning she has gone to the *Udamaluwa*, with the neighbors, *Nishantha* mama, his wife and child. Later in the morning, through *Nishantha* she was informed that the mother has been brought to the Anuradhapura hospital, where, around noon, she saw her mother on a hospital trolley with burn injuries . Thereafter, she has visited her mother in hospital only on 29.03.2005, the day her mother died, when after the afternoon visiting hour, she was told by the mother, that when she was going through some receipts with the help of a kerosene lamp , the Appellant poured petrol on her and set fire to her.

She has testified that the mother and the appellant used to fight and argue with each other often, mostly when he was under the influence of liquor.

It was also in evidence that when he was not drunk, they still argued about the earlier incidents. It was revealed that there was an

argument on the previous night of the incident over some Paddy and that it subsided after the appellant went to sleep ( Page 97 of the Brief).

She has testified that when she left the house around 8.30 and 9.00 in the morning the mother and the appellant were in the house and there was no fighting at that time, later saw the mother with burn injuries. Thus, it is apparent that within about three hours after PW 2 left the house the incident occurred and her mother was in hospital.

Under the persistent cross examination of the defence counsel the witness has clearly evidenced in page 113 of the brief that the mother stated that it was *Kirimahaththaya* the appellant who threw petrol on her.

ප්‍ර: කවුරු හරි ගිනි තැබීමක් සම්බන්ධයෙන් කොයිම අවස්ථාවකදීවත් තමුන්ට කිවුවේ නැහැනේ?

උ: ගිනි තිබීම කියල නෙවෙයි කිවුවේ. අම්මා ලාමිපුට තියාගෙන හරක්ට බෙහෙත් දෙන කාඩ් හොය හොයා ඉන්න කොට එයාගේ ඇහට සිතලක් දැනුනා කියලා කිවුවා. ඊට පස්සේ ගිනි ගත්ත කියලා කිවුවා.

ප්‍ර: කිසිම පුද්ගලයෙක් ගැන අනාවරණය කිරීමක් කළේ නැහැනේ?

උ: කිරි මහත්තයා කියලා කිවුවා. බාප්පා කියලා කිවුවා.

ප්‍ර: එයා ගැන මොනවද කිවුවේ?

උ: අම්මාට පෙට්ටුල් දාලා තමයි ගිනි ගත්තේ කියලා කිවුවා. පෙට්ටුල් ගෙනත් දැමීමේ කිරි මහත්තයා කියලා කිවුවා.

PW 4 *Leelawathie* who is a neighbor as well as a relative who lives about 15 meters from the house of the deceased has testified that in the morning of the incident she has heard cries of a woman and thinking that it was from her immediate next door neighbor *Indra Kumari*, she has run to the adjoining house, when *Indra Kumari* told her that It was *Mallika* who was shouting saying she has been set fire to. PW 4 has gone to *Mallika's* house with her husband, where she has seen *Mallika* naked with burn injuries and was told that *Kirimahathmaya* ( appellant) threw petrol and burnt her. She has stated that she did not know the motive

for the incident but she often heard the couple constantly fighting and shouting. Her husband has accompanied the injured to hospital.

PW 1, *Dinesh Lakshman Kumara* has taken the injured *Mallika* to the hospital around 11.15 11.30 on the 25<sup>th</sup>. He has testified that he was told by the injured that *Kirimahathmaya* set fire to her.

*H. M. Senarath* PW 14 , a step brother of the appellant has given evidence to the effect that on the day of the incident around 10 and 11 in the morning the appellant came to the paddy field to give him his rice meal and uttered the following (in page 242 of the brief)

ප්‍ර : වෙලට ඇවිත් මොකද කිවුවේ ?

උ : මට ඔත් දිලා උක්කුන් මල්ලි ඕකිව මරනවා කියලා තමයි ගියේ.

ප්‍ර : ඕකි කියලා කිවුවේ කාටද ?

උ : අක්කාට.

ප්‍ර : අක්කා කිවුවේ ?

උ : මල්ලිකා.

The following morning he has been informed that *Mallika* has suffered burn injuries from petrol being thrown on her.

PW 5, *Thushara Nilmini* who with her husband runs a boutique where she sells petrol among other commodities , who knows the appellant as a person from the village as well as one of her customers, has testified that the appellant has purchased petrol from her boutique around 10 and 11 am on the morning of the incident and within about half an hour to an hour, heard that petrol has been thrown on *Mallika* and she has suffered burn injuries.

The mother of the deceased *Somawathie* PW 12 who was living in *Bulathkohupitiya* with her son, after being informed about the daughter getting injured has come on the 25<sup>th</sup> itself and has been with *Mallika*

until the 29<sup>th</sup> also has testified that *Mallika* told her that she was set fire to by the appellant.

PW 7, IP *Thilakaratne* who visited the scene of crime has taken in to custody a portion of a polythene bag tied to a coir and burnt items of clothing.

From the evidence of the prosecution witnesses and the JMO's evidence it is established that although the victim had severe burn injuries, she had the ability to speak. On the 29<sup>th</sup> of March, the day she died, she had even advised PW 2 to keep the small stool under the bed safely, stating if not she will have to stand and wait till morning, which showed her rational thinking.

Some contradictions and omissions have been marked in the evidence of the prosecution witnesses and the counsel for the appellant has submitted that the learned trial judge has failed to evaluate same.

In the evidence of PW 2, the fact that PW 2 has not mentioned that the receipts the deceased was going through were pertaining to 'Cows' was highlighted as an omission (page 109); The witness's failure to state that the mother and the appellant had an argument on the eve of the incident in her statement to the police or at the magisterial inquiry has been highlighted as an omission; the witness's police statement referring that she went to see her mother on the 28<sup>th</sup> when in evidence she has stated it was the 29<sup>th</sup> has been marked as V1 contradiction.

In PW 4 *Leelawathie's* evidence, contradiction V1 is based on her statement that *Indra Kumari's* house is situated on the other side of the road when in evidence, she has stated that *Indra Kumari* lives adjoining her house. Contradiction V2 is on the basis that in the police statement it is recorded that she has stated that she was told by *Mallika* that

kerosene oil was used to set fire, when in evidence she has stated it was petrol.

In re-examination she has explained why she referred to *Mallika* being burnt with petrol and kerosene oil in the following manner.

ප්‍ර: : දැන් ඔය සිද්ධිය සිදුවුණේ කීයට විතරද?

උ : 9.00 න් 10.00න් අතර එයාලගෙ ගෙයි වට්ට ගස් තියනවා. ගෙයි ඇතුළේ කලුවරයි. ඒ නිසා ගෙයි ඇතුළේ ලාම්පුවක් පත්තු කරගෙන ඉඳලා තියනවා. ඒ වෙලාවේ තමයි සීතල වගේ දෙයක් ලාම්පුවට උඩින් වැටෙනවා දැනිලා තියනවා ඊට පස්සේ ලාම්පුව ගිනි ගන්නා කියලා කිව්වා.

I do not see any material contradictions in the testimony of either PW2 or PW 4, as the witnesses have sufficiently explained the basis for the omissions and contradictions. One omission of PW 2 is the failure to state that the deceased and the appellant argued the previous evening. From the evidence it appears the mother and the appellant fighting seem to be an everyday occurrence and she has forgotten whether she informed it or not. Contradiction V 1 is with regard to the date PW 2 visited her mother in hospital. These are omissions and contradictions which are not material which has not affected the root of the case.

The fact that PW 2 not mentioning the receipts regarding the vaccinations for the cows in my opinion is also not a material fact, what is important and relevant is that the kerosene lamp was used to read any document as that particular room was dark and it needed light for anyone to read anything as corroborated by the police witness, PW 7 who has inspected the scene.

Where the evidence of PW 4 is concerned, her reference to kerosene oil is in the context of the lamp that was being used by the deceased, and the pouring of petrol was what ignited the fire that burnt *Mallika*, and likewise in the statement, her describing that *Indra Kumari's* house is on the other side of the road has not affected the



credibility of the witness as these contradictions are not material contradictions.

With regard to the evidence of PW1, an omission was highlighted that in his statement he has not stated that he was told by *Mallika* that the appellant threw petrol on her. An explanation was given that he was only asked to make a statement that he is the one who admitted the patient.

Contradiction V5 was marked from the evidence of PW 14, that in the statement to the police the witness has said that *Kirimahathmaya* was after liquor, which in evidence he denied.

On a perusal of the judgment it is seen that the learned trial judge has considered all the contradictions and omissions that were highlighted and decided that they are minor contradictions that can occur with passing of time and that they have not affected the root of the matter, which sentiments this Court agree.

In his Dock Statement the appellant has stated that he is innocent and that there was an argument the previous evening and as the deceased was saying various things the following day also, and thinking that a fight may ensue if he stays, he has left the house. Usually he goes to the village and returns in the evening, and on this day when he was getting ready to return in the evening, he had heard that the victim had got burned and others have advised him not to go that he may be accused and he sent his mother to the hospital and that as he was threatened, he surrendered himself to the police.

The learned trial judge after considering the dock statement and the relevant authorities on a plea of alibi, has given plausible reasons why he is not accepting the dock statement.

On appeal, it was submitted on behalf of the accused that the dock statement cannot be rejected in toto , as it was corroborated by



the evidence of the prosecution witness that the appellant and deceased were fighting constantly and that the learned trial judge has not given due consideration to that fact.

At the trial it was the position of the accused appellant that he was not present at the scene of the incident. Only at the appeal stage a new argument was brought up on the basis of cumulative provocation.

The learned State Counsel argued that cumulative provocation cannot be considered as per the evidence of the daughter PW 2, as there was a cooling off period after the incident the previous afternoon and when PW 2 left the house in the morning they were not fighting.

The evidence of PW 2 in page 116 of the brief is reproduced to get an understanding how the constant quarrelling was accepted as a way of life by the witness, which fact may be difficult to comprehend for some others.

- ප්‍ර : එහෙම ගහගන්න අවස්තාවක් ගැන තමුන් දන්නේ නැතුව නමයි මූලික සාක්ෂි වලදීත් හරස් ප්‍රශ්නවලදීත් මේ දෙන්නා ගහගන්න බවට සාක්ෂි දන්නේ?
- උ : මම සාමාන්‍යයෙන් දැකලා තියෙනවා අම්මාට ගහනවා අම්මා කියනවා මට, බාප්පා එයාට ගහනවා කියලා මම රට ඉන්නකොට ලියුමක් එවුවත් කියනවා අම්මාට ගහනවා කියලා.
- ප්‍ර : එතකොට බාප්පා අම්මාට ගහනවා කියලා කියනකොට තමුන්ට අම්මා ගැන වේදනාවක් ඇති වෙලා තියෙනවාද?
- උ : තියෙනවා ඇත්තටම අම්මාට ගහනවා කිවුවාම මට වේදනාවක් දැනු නා.
- ප්‍ර : ඒ අවස්තාවේදී තමුන්ට වූදින ගැන මොකද හිතුවේ? ඒ ගැන තමුන්ට ඇති වුන හැඟීම මොකක්ද?
- උ : මගේ හිතේ ටොරයක් නැහැ ඒ දෙන්නා පවුල් ජීවිතය ගෙවියන විදියෙන් මගේ හිතේ ටොරයක් නැහැ.

The evidence of PW 14 the step brother and PW 5 *Thushara Nilmini* is of importance when considering the submission of the counsel for the appellant. According to PW 14 the appellant around 9 and 10 in the morning has made an utterance to the effect he was going to kill her ( *Mallika* ) , and PW 5 has testified that the appellant purchased petrol from her boutique around 9 and 10 in the morning, which evidence remain unchallenged. It is unclear from the dock statement what time the appellant is alleged to have left the village.

The appellant has not offered any explanation with regard to this evidence of the prosecution that he was seen in the morning of the incident although in the dock statement he has stated that he left the village with no specific time frame given.

The testimonies of the prosecution witnesses is that the deceased informed them that it was *Kirimahathmaya* who set fire to her using petrol. The way the pouring of petrol that ignited the kerosene oil lamp that *Mallika* was using to read the receipts have been adequately explained. This has been corroborated by the evidence of the JMO, who has testified that the burns would not have been caused by a fire of a kerosene oil lamp falling over the body ,but it was more probable that some fuel was poured on the body whilst in a seating position and getting ignited according to the burn injuries that are present.

The reference in the dying declarations is closely related to the actual occurrence and it is directly related to the death of the deceased. The appellant has not offered any explanation with regard to the strong incriminating evidence led against him.

It is trite law that when a case depends on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused .

There are no eye witnesses to the incident therefore the prosecution relied on the circumstantial evidence to submit evidence before court that the deceased died due to the action of the appellant.

***In Don Sunny vs Attorney General [1998] 2 Sri. L R 1*** it was held *'where a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence. On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.....if upon a 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 totality of the evidence led in this case lead to an inescapable and irresistible inference and conclusion that it was the appellant who has inflicted the injuries on the deceased which caused her death.

The prosecution has proved the case beyond reasonable doubt and we see no reason to interfere with the learned trial judge's conclusion. The conviction and the sentence of the learned High Court Judge is affirmed.

Appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

**HON JUSTICE ACHALA WENGPPULI**

I agree.

**JUDGE OF THE COURT OF APPEAL**