

**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 and in
terms of High Court of Provinces
(Special Provisions) Section 19 of 1990.**

Democratic Socialist Republic of
Sri Lanka

Complainant

**Court of Appeal Case No.:
CA HCC 00185/2020**

High Court of Kaluthara
HC 552/2005

Vs.

Vithanage Don Welson,
Presently at Welikada Prison

Accused

AND NOW BETWEEN

Vithanage Don Welson,
Presently at Welikada Prison

Accused-Appellant

Vs.

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

Respondent

Before: **B. Sasi Mahendran. J,**
 Amal Ranaraja. J,

Counsel: Neranjan Jayasinghe with Imangi Senarath for the Appellant
 Disna Warnakula, D.S.G. for the Respondent

Argued on: 20.03.2025

Judgment on: 15.05.2025

JUDGMENT

AMAL RANARAJA, J,

1. The Accused-Appellant (hereinafter referred to as the “Appellant”) has
been indicted in the *High Court of Kaluthara* in HC Case No. 552/2005.

2. The charge in the indictment is as follows;

That on or about 21.04.2003, within the jurisdiction of this
Court, you did commit murder by causing the death of one
Kasthuri Archchige Deepani Managalika, and that you have

thereby committed an offence punishable under section 296
of the Penal Code.

3. At the conclusion of the trial, the appellant has been convicted and sentenced to death.

Case of the prosecution

4. The appellant and the deceased along with a child conceived by the deceased through a third individual have been living in a room in the house of PW02. PW01 has been living in a house situated close to that of PW02 but at a lower elevation. At around 11.30 pm on 21.04.2003, the night before the incident, the deceased and the child have visited PW01 and requested permission to spend the night there to which PW01 has consented to. Between 02.00 am and 3.00 am the next morning, the appellant had arrived at PW01's house inquiring about the deceased. When the deceased confronted the appellant, the latter has assaulted her and subsequently held the deceased by her head. Together with the child and the deceased, the appellant has proceeded towards the house of PW02. Upon entering PW02's house, PW02 has

inquired about the deceased. The appellant has replied that she was near the door. Although PW02 has had called out for the deceased, she has not come into the house. At that moment, the appellant has realised that the deceased was not present. Thereafter, the appellant has fed the child and gone to the police station to lodge a complaint against the deceased. After returning, he has attempted to locate the deceased. PW02 and PW04 have assisted the appellant in that regard. At approximately, 12.00 noon on the same date, PW04 has discovered the body of the deceased in a 'thicket' and informed the appellant of the incident. Subsequently, the appellant has lodged a complaint with the Police. Investigations had been conducted into the death of the deceased and a post-mortem examination performed on 23.04.2003 beginning 11.30 am by *Dr. K. Sunil Kumara* Consultant Judicial Medical Officer at the General Hospital in Kaluthara. The post-mortem report has been marked "X" at the trial.

Case of the accused

5. The appellant has maintained that he has no connection to the alleged circumstances surrounding the death of the deceased.

6. When the matter was taken up for argument, the Learned Counsel for the appellant has urged the following grounds of appeal;

- i. The conclusion reached by the Learned High Court that the items of circumstantial evidence placed before Court are sufficient to arrive at the one and only irresistible and inescapable inference that the appellant committed the murder is wrong in law.
- ii. The Learned High Court Judge had rejected the evidence of the defence on unreasonable grounds.

7. *Dr. K. Sunil Kumara* has observed seven injuries on the body of the deceased. He has described those injuries to be contusions, lacerations and abrasions.

8. Further, expressing his opinion as regards to the cause of death of the deceased. he has stated as follows;

“Due to intracerebral haemorrhage the injuries are consistent with having being caused by a blunt weapon”.

9. The Learned Counsel for the appellant has argued that the prosecution's case relies heavily on circumstantial evidence, suggesting that the inferences drawn could support the appellant's innocence.

10. The Learned Deputy Solicitor General has challenged the argument made by the Learned Counsel for the appellant. The Court has been alerted to the time frame when the appellant had a chance to commit the offence, particularly when he came back to the house of PW02 with the deceased. Further, the attention of this Court was also drawn to the alleged utterance made by the appellant at about 06.00 am or 06.30 am in the morning of the incident, that a third individual was responsible for the deceased's death, claiming to mislead the rest.

“මගේ ගැහැනුව වේස බල්ලන් එකතු වෙලා මරලා දාලා”

[vide page 90 of the Brief]

The Learned Deputy Solicitor General has also pointed out that the appellant was the last person seen with the deceased before her body was discovered and the time gap minimal, enhancing the argument consolidated in the principle, the “last seen theory” against the

appellant. Further, suggested that the likelihood of the appellant's involvement in the offence is significant, outweighing the possibility of a third individual's involvement.

11. Circumstantial evidence refers to evidence that indirectly indicate a fact or event, rather than providing direct proof. Circumstantial evidence relies on inference. The strength of circumstantial evidence often depends on the context and the overall situation surrounding the evidence. Multiple pieces of circumstantial evidence can create a strong case together. Logical inferences must be drawn on the circumstantial evidence available. Those inferences need to be reasonable and based on a fair interpretation of such evidence.

When circumstantial evidence consistently points to the same conclusion, it's more reasonable to draw inferences. Multiple pieces of evidence supporting one narrative strengthens the argument. Further, conclusions must be based on the evidence and not on assumptions or emotional responses.

12. In ***Bandara Deegahawathura vs. Attorney General*** CA No.

61/2001 decided on 02.08.2005, Justice Sisira de Abrew discussing the nature of the inferences that must be drawn from circumstantial evidence and how such inferences could be drawn, has stated as follows;

“The case against the appellant depended entirely on circumstantial evidence. Therefore it is necessary to consider the principles governing the cases of circumstantial evidence.

In the case of King Vs Abeywickrama 44 NLR 254 Soertsz J remarked as follows. “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 reasonably hypothesis of his innocence”.

In King Vs Appuhamy 46 NLR 128 Keuneman J held that “in order to justify the inference of guilty from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt”.

In Podisingho Vs. King 53 NLR 49 Dias J held that “in a case of circumstantial evidence it is the duty of the trial Judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt.”

In Emperor Vs Browning (1917) 18 Cr. L.J.482 court held “the jury must decide whether the facts proved exclude the possibility that the act was done by some other person, and if they have doubts, the prisoner must have the benefits of those doubts.”

Having regard to the principles laid down in the above judicial decisions I hold that in a case of circumstantial evidence in order to base a conviction on circumstantial evidence the jury or the trial judge as the case may be must be satisfied on following grounds. (a) Proved facts must be consistent only with the guilt of the accused (b) Proved facts must point the finger of guilt only to the accused (c) Proved facts must be incompatible and inconsistent with the innocence of the accused. (d) Proved facts must be incapable of any other reasonable explanation than that of his guilt. In a case of circumstantial evidence, if two decisions are possible from the proved facts, then the decision which is

favorable to the accused must be taken. In a case of circumstantial evidence, if the circumstances found to be as consistent with the innocence as with the guilt of the accused; or if an innocent explanation is found from the evidence of the prosecution, no inference of guilt should be drawn. Therefore if the prosecution seeks to prove a case purely on circumstantial evidence, the prosecution must exclude the possibility that the proved facts are consistent with the innocence of the accused”.

13. Although PW01 has stated that she heard the appellant make an utterance suggesting that a third person had killed the deceased, PW02 who was with the appellant at that time had not heard such an utterance. After leaving PW02's house to fetch the deceased in the early hours of the morning, the appellant has returned shortly thereafter. Upon entering the house, carrying the child, he has been asked where the deceased was, to which he has replied that she was at the door. The appellant has realised that the deceased had not followed him when PW02 had called out to her in vain. After feeding the child, the appellant has gone to the *Police Station* to report the deceased, PW02 had corroborated this testimony.

14. After returning from the *Police Station* the appellant has begun searching for the deceased, first with PW02 and later with PW04. Around noon, PW04 has discovered the body of the deceased. Upon hearing about this discovery, the appellant has been saddened about the incident. He has thereafter, promptly gone to the *Police Station* to file a complaint.

15. The narrative of the prosecution being as stated above, the circumstantial evidence presented by it against the appellant is not cogent. The circumstantial evidence appears weak, relying on speculative inferences rather than solid facts. Key elements of the prosecution's argument lack consistency and the alternative explanations for the evidence diminish its reliability. The prosecution has failed to establish a clear and unbroken chain of events leading to the appellant's involvement, eroding the case against him. Importantly, there is a conspicuous absence of motive, which weakens the significance of the circumstantial evidence. Additionally, any inferences drawn seem to lack reasonableness, often leading towards conjecture. Considering the legal standard that guilt must be established beyond a

reasonable doubt, the evidence presented by the prosecution falls short, especially when weighted against the appellant's counter arguments. Thus the evidence adduced by the prosecution, in the opinion of this Court fails to implicate the appellant to the offence.

16. Further, in order to apply the principle of "last seen theory" the prosecution bears the responsibility of proving that the appellant's actions co-related with the timing of the deceased's death. If the evidence regarding the death is ambiguous or inconclusive, it creates a reasonable doubt in the appellant's involvement. In this context, as the prosecution has failed to establish the time of death, the Learned High Court Judge has misapplied such principle to infer the culpability of the appellant. Hence, misdirected himself in that regard.

17. In *The King vs. Appuhamy* 46 NLR 128, Keuneman, J, stated as follows;

"The following points in favour of the accused may be emphasised;

(1) The absence of any motive whatever for the accused to murder the deceased...

(5) The prosecution failed to fix the exact time of the death of the deceased, and the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance. The presence of rice and curry in the stomach of the deceased also indicates a strong possibility that the death took place some hours after the deceased set out with the accused.”

18. This offence has been committed in the year 2003. 22 years have passed since the commission of the offence. Therefore, this Court finds that it does not seem just to call upon the appellant to defend himself again after such an unconscionable lapse of time.

In ***Queen vs. G. K. Jayasinghe*** 69 NLR 314 at page 328, Sansoni, J, has stated,

“...we have considered whether we should order a new trial in this case. We do not take that course, because there has been a lapse of three years since the commission of the offences, and because of our own view of the unreliable nature of the accomplice’s evidence on which alone the prosecution case rests.

We accordingly direct that the judgment of acquittal be entered”.

19. Hence, this is not a fit case to order a re-trial.

20. Due to the factors set out above, I am inclined to interfere with the disputed judgment and hereby set aside the conviction together with the disputed sentencing order. Accordingly, acquit the appellant from the charge in the indictment,

Appeal allowed.

21. The Registrar of this Court is directed to communicate this judgment to the *High Court of Kaluthara* for compliance.

Judge of the Court of Appeal

B. SASI MAHENDRAN, J.

I agree.

Judge of the Court of Appeal