

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

In the matter of an Appeal made under
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.

The Democratic Socialist Republic of
Sri Lanka

COMPLAINANT

Vs.

Court of Appeal No:

CA/HCC/0226-228/2019

High Court of Chilaw

Case No: HC/27/2009

1. Samarakkody Arachchilage Gamini
Weerasinghe alias Yakada Gamini
2. Arachchi Appuhamilage Sunil Peiris
alias Kumarage Malli
3. Dissanayake Mudiyanseelage Nimal
Samarasinghe alias Pachcha Nimal

ACCUSED

AND NOW BETWEEN

1. Samarakkody Arachchilage Gamini
Weerasinghe alias Yakada Gamini
2. Arachchi Appuhamilage Sunil Peiris
alias Kumarage Malli
3. Dissanayake Mudiyanseelage Nimal
Samarasinghe alias Pachcha Nimal

ACCUSED-APPELLANTS

Vs.

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

RESPONDENT

BEFORE : **P. Kumararatnam, J.**
R. P. Hettiarachchi, J.

COUNSEL : **Jagath Nanayakkara for the 1st Appellant.**
Nihara Randeniya for the 2nd Appellant.
K.A. Upul Anuradha Wickramaratne for the
3rd Appellant.
Maheshika Silva, DSG for the Respondent.

ARGUED ON : **15/07/2025, and 17/07/2025**

DECIDED ON : **02/09/2025**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted in the High Court of Chilaw for committing murder

of Warnakulasuriya Antony Nevil Orbis on 23.04.1998 an offence punishable under Section 296 read with Section 32 of the Penal Code.

The trial commenced before the Judge of the High Court of Chilaw as the Appellants had opted for a non-jury trial. After the closure of the prosecution case, the learned High Court Judge being satisfied that there is a case to be answered by the Appellants, called for the defence and explained their rights. The Appellants made dock statements and closed their case.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants as charged and sentenced them to death on 05.04.2019. Being aggrieved by the aforesaid conviction and sentence the Appellants preferred this appeal to this court.

The learned Counsels for the Appellants informed this court that the Appellants had given consent for this matter to be argued in their absence. During the argument, the Appellants were produced via zoom platform from prison.

The First Appellant had filed the following grounds of appeal

1. Whether the prosecution has failed to establish the ingredients of the charge of murder in the indictment beyond reasonable doubt.
2. Whether the learned High Court Judge has erred in law by concluding that the prosecution witnesses are trustworthy witnesses.
3. Whether the learned High Court Judge has erred in law by concluding that the deceased has made a dying declaration in terms of Section 32 of the Evidence Ordinance basing the judgment on it.
4. Whether the learned High Court Judge has failed to consider some material contradictions in the evidence of the prosecution witnesses.

The 2nd Appellant had filed the following grounds of appeal.

1. That the learned High Court Judge failed to consider the well settled principles of law relating to a case entirely based on circumstantial evidence.
2. That the learned High Court Judge has failed to appreciate the probability factors of the prosecution witnesses.
3. That the learned High Court Judge failed to consider that the prosecution witnesses contradict each other.

The 3rd Appellant had filed following grounds of appeal.

1. The prosecution has failed to prove the ingredients of the charge in the indictment beyond a reasonable doubt.
2. The learned High Court Judge has erred in law by concluding that the prosecution witnesses are trustworthy witnesses.

As the appeal grounds raised by the Appellants are interconnected, all grounds will be considered together hereinafter.

According to the **Wex Legal Lexicon (Cornell Law School)**, circumstantial evidence is "indirect evidence that does not, on its face, prove a fact in issue but gives rise to a logical inference that the fact exists"—i.e., it needs that extra step of reasoning to fill in the gap.

It is not in every circumstantial case that particular items of evidence need to be proved by the prosecution beyond a reasonable doubt.

Dalton JA in **R v Waters** [2023] QCA 243, at [139] (quoting **Shepherd v The Queen** (1990) 170 CLR 573, [592-593]) held:

"If an inference of guilt is open on the evidence, the question for the jury is whether the inference has been proved beyond reasonable doubt – not whether any particular fact has been proved beyond reasonable doubt. ... Ordinarily, in a circumstantial evidence case, guilt is inferred

from a number of circumstances – often numerous – which taken as a whole eliminate the hypothesis of innocence. The cogency of the inference of guilt is derived from the cumulative weight of circumstances, not the quality of proof of each circumstance”.

This case entirely rests on the circumstantial evidence adduced by the prosecution. The starting point of the incident happened at the house of PW4 Piyadasa who sold liquor from his house. On the day of the incident at about 5.00 p.m., all three Appellants had come to PW4's house to consume liquor. While they were consuming liquor at the back of PW4's house, the deceased too had arrived and joined them. At this point, the 1st Appellant had tried to take something from the bag the deceased hung on his bicycle. When the deceased resisted, the 1st Appellant had hit the deceased once and the deceased had fallen on top of his bicycle. At that time deceased had scolded the 1st Appellant as he was carrying eggs in the said bag and they had been broken. The assault was witnessed by PW6, Gunapala who too was there at that time.

When PW4 came to the spot to inquire as to what happened, the deceased had told him that the 1st Appellant had hit him once. Thereafter, the deceased had left the place at about 5.30 p.m. with PW9, Jayakody who dropped the deceased at his home and borrowed his bicycle and left the deceased's house. At about 7.30 p.m., when PW9 went back to the deceased's house to return the bicycle, there had been no signs of the presence of anybody in the deceased's house. As such, he had returned home and, on the way, he had seen the Appellants near PW8, Ramyawathi's house. Though PW8 told him that the 1st Appellant had assaulted her husband PW7, Wipularatne, PW9 had not witnessed the assault.

Once PW9 was back home, the 1st and 2nd Appellants had gone there and the 1st Appellant had told him that he had killed his friend and had threatened to kill PW9 if he was to give evidence in this regard. At that time,

the 1st Appellant was in possession of a knife. As PW9 passed away before the trial, his evidence was adopted under Section 33 of the Evidence Ordinance.

According to PW10, Sriyalatha when the 1st and 2nd Appellants came to her house and the 1st Appellant confessed about killing the deceased, the 1st Appellant had showed blood on his hands to prove the crime. Her family had to go elsewhere due to the death threats extended by the 1st Appellant to prevent them from giving evidence in this case.

According to PW7, on the day of the incident, around 7.00 p.m. when he was busy searching for some money he had accidentally dropped near his house, he had seen all the Appellants coming from the direction of deceased's house and they had passed him riding bicycles. Before they could pass him, the 1st Appellant uttering foul language, had cut the witness's ear with a knife. However, an omission was highlighted here as he had failed to mention the presence of the 3rd Appellant in his police statement.

PW8, Ramyalatha, wife of PW7 had seen the 1st Appellant armed with a club along with another person armed with a knife walking along the road. When she had asked who assaulted her husband, the 1st Appellant had replied that he assaulted PW7.

According to PW5, Asanka the 1st Appellant along with another person had asked him to cut a club from a cotton tree and had handed him a knife. Obliging to the request, he had cut a club from the cotton tree and handed it over to the 1st Appellant. At the trial he identified the cotton club which was marked as P3 by the prosecution.

The investigating officers had recovered 3 clubs made from cotton tree wood, a Katty and two other clubs. Upon information provided by the 1st and 2nd Appellants, they have also found the cotton tree from which the clubs had been cut. The Government Analyst confirmed that P1, P2 and P3 could be

joint physically as part of the same branch cut off from the cotton tree marked P4.

According to the JMO who gave evidence of the post mortem examination, it was confirmed that the death of the deceased had resulted from a hard blow to the right side of the head which had caused severe brain damage.

As stated above at the very outset, the 1st Appellant had hit the deceased when the deceased resisted the 1st Appellant when he tried to put his hand into the bag brought by the deceased. After the incident, the deceased had told PW4 that the 1st Appellant had hit him once. As the deceased was not seen alive after the assault, the learned High Court Judge had considered the utterance made by the deceased as a dying declaration, and had considered the said evidence against the Appellants.

It is very important to discuss the relevant laws pertaining to the acceptance of a dying declaration as evidence in criminal trials under our law.

According to Section 32(1) of Evidence Ordinance,

Statements, written, or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases: -

- (1) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question.

The following requirements must necessarily be established before any evidence is led under section 32(1) of the Evidence Ordinance.

1. That the maker of the statement is dead.
2. That the statement made by the deceased refers to his/her cause of death or to the circumstances of the transaction which resulted in his/her death.

Hence such evidence would become admissible only where the cause of death of the person making the statement is in issue in the particular judicial proceedings. Admissibility of such evidence would ultimately be decided by the trial judge as per Section 136 of Evidence Ordinance.

In **Dharmawansa Silva and Another v. The Republic of Sri Lanka** [1981] 2 Sri.L.R.439 it was held:

“When a dying statement is produced, three questions arise for the Court. Firstly, whether it is authentic. Secondly if it is authentic whether it is admissible in whole or part. Thirdly, the value of the whole or part that is admitted. A dying deposition is not inferior evidence but it is wrong to give it added sanctity”

In this case when PW4 gave evidence pertaining to the dying declaration of the deceased, the Appellant did not refute the same under cross examination. Hence, the learned High Court Judge had correctly considered the said evidence under Section 32(1) of the Evidence Ordinance.

Considering the next ground of appeal, the importance of an omission in criminal trials has been discussed in several judicial decisions by the Appellate Courts of our country. It is pertinent to discuss whether the omission highlighted on behalf of the 3rd Appellant has any adverse effect on the evidence given by PW7 in this case.

In the case of **The Attorney General v. Sandanam Pitchi Mary Theresa** (2011) 2 Sri L.R. 292 held that,

“Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgement on the nature of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance.

Witnesses should not be disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter.”

Now I consider whether the aforementioned omissions are material and affect the trustworthiness and creditworthiness of the evidence of PW9.

PW7, in his statement to the police had omitted to mention that he saw the 3rd Appellant along with the 1st and 2nd Appellants coming from the direction of the deceased’s house. The learned High Court Judge had disregarded this omission merely because it was not proved during the trial. Although other witnesses who gave evidence mentioned about the movement of the three persons during the relevant time, they had only confirmed the identity of 1st and 2nd Appellants. The 3rd Appellant was not positively identified by the witnesses who saw the Appellants in the close proximity of the deceased’s house. Further, according to PW9 and PW10, only the 1st and 2nd Appellants had come to their houses to threaten them into not giving evidence.

Considering the totality of evidence led by the prosecution, the omission highlighted by the 3rd Appellant certainly will go to the root of the prosecution’s case. As such, the learned High Court Judge should have considered the said omission in favour of the 3rd Appellant.

Considering the appeal grounds advanced by the Appellants which were jointly discussed, the prosecution had adduced strong and incriminating circumstantial evidence against the 1st and 2nd Appellants. The learned High Court Judge had accurately analyzed all the circumstantial evidence presented by all the parties to arrive at the finding that the 1st and 2nd Appellants were guilty of the charges levelled against them.

As the evidence led against the 3rd Appellant is not convincing and create a reasonable doubt, he is acquitted from the charge.

Therefore, I dismiss the Appeal and affirm the conviction and sentence imposed on the 1st and 2nd Appellants on 05.04.2019 by the Learned High Court Judge of Chilaw.

The Registrar of this Court is directed to send this judgement to the High Court of Chilaw along with the original case record.

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL