

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

In the matter of a Petition of Appeal in
terms of Section 33(1) of the Code of
Criminal Procedure Act No. 15 of 1979 of
the Democratic Socialist Republic of Sri
Lanka.

Court of Appeal No:
CA/HCC/73/2018
High Court of Panadura
Case No: HC/2730/2010

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

Complainant

Vs.

Ilanganthilake Bandara Mudiyanse
Bandara Menike

Accused

AND NOW BETWEEN

Ilanganthilake Bandara Mudiyanse
Bandara Menike

Accused – Appellant

Vs.

Hon. Attorney General

Complainant- Respondent

Before : Menaka Wijesundera J.
Wickum A. Kaluarachchi J.

Counsel : Gayan Perera with Ms. P.H. Perera for the Accused-
Appellant.
Ms. Damithini de Silva, SSC for the Respondent.

Argued on : 03.04.2024

Decided on : 08.05.2024

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 14.03.2018 of the High Court of Panadura.

The accused appellant (hereinafter referred to as the appellant) has been indicted for committing the murder of her husband on or about 10.04.2009.

The main grounds of appeal raised by the appellant were as below,

- 1) Whether the trial judge had impartially evaluated the evidence of Jagath Sameera,
- 2) Has the trial judge evaluated the circumstantial evidence appropriately,
- 3) Has the dying declaration been considered in its proper perspective,
- 4) Has the trial judge properly evaluated the evidence of the prosecution.

The appellant having pleaded not guilty to the indictment, the trial judge had heard the evidence of both sides and had found the appellant guilty for the charge in the indictment and had proceeded to convict the appellant with the sentence of death.

According to the submissions of both sides the prosecution has rested its case entirely on circumstantial evidence.

The evidence of the prosecution unravels with the police receiving a 119 message on the day of the incident at midnight from the caretaker of the house in which the deceased and the appellant has been living.

The said house in which the incident had taken place has been situated at Angulana Panadura and according to the evidence of the care taker it has three

parallelly placed rooms which each room opening up to the main hall of the house and the said main hall has opened up to the garden and there had been another back door which had led to the toilets.

Each room has consisted of one door and a window from which no person could creep out.

In the said one of the rooms, the deceased and the appellant has lived on rent and in another, an old couple and in the third, a grandmother and the grand daughter had been living on rent.

The care taker and the wife had occupied a separate compound which had been nearby.

On the day of the incident, the care taker had returned home after work in the evening and he and his wife had gone to sleep around 10 or 10.30 pm the appellant had been knocking on their door and had said that the deceased had locked himself up in the room and he had set fire to some clothes and he had said that he was going to do something to himself. She had sounded worried and agitated.

The care taker and his wife accompanied by the appellant had gone to see and they had pushed opened the door to the room of the deceased and it had opened and he had seen the deceased dead with blood splattered all over the room.

The care -taker had taken steps to inform the police to which the police had responded and the appellant and the nephew of the deceased had been taken in to custody by the police but the nephew of the deceased namely Jagath Sameera had been later released by the police.

The care taker had been cross-examined and he had been asked as to the location of doors in the house. The defense had taken this line of defense to establish the fact that a third person could have entered the house.

But the prosecution whose responsibility is to prove its case against the appellant beyond reasonable doubt and has failed to at least question this witness as to whether the other occupants of the other two rooms were anywhere to be seen.

The police also have failed to record a statement from those occupants.

Hence, it is the opinion of this Court that the prosecution and the police have both failed in their respective duties and the possibility for a third person to involve in the crime has not been excluded by the prosecution.

Next the prosecution had led the evidence of the doctor who had ruled out suicide and had said that the deceased has had three serious injuries and two other defensive injuries and that the serious injury on the a back of the shoulder had penetrated inside and the death had been instantaneous.

Although the police had recovered a knife from the scene of crime the doctor had not been shown with the said weapon which again this Court is surprised to observe.

The evidence of Jagath Sameera had revealed that he had been boarded near the house of the deceased and he had come to the appellants place for meals and he had said that the deceased has had another family at Mathugama and he had been in the habit of visiting them and whenever he does so, there had been major disputes between the deceased and the appellant.

He had said on one such occasion the appellant had said that she would cut and kill the deceased.

On the day of the incident, he had seen his uncle going towards his place of boarding with a bag of clothes in the afternoon and he had assumed that it was clothes for his children from the other family.

As usual, in the evening he had gone to have dinner and nobody had opened the door for him, he had just walked in and he had seen the clothes splattered all over the room and the appellant has given him food to eat and the deceased had come home drunk and there had been an exchange of words between the deceased and the appellant and he had been told to leave by the appellant.

Then he had seen himself out and thereafter when he had gone to sleep, in the midnight, the appellant had called him and had asked him to come saying that the deceased had cut himself.

He had immediately gone and the police had been at the scene of crime and he had seen the appellant crying and the police had taken him to custody.

This witness also had been cross-examined and he also had not been asked whether there was anybody else at the scene of crime apart from the appellant and the deceased and the caretaker.

The police had observed the body in the room cut and murdered and they had observe blood splashed all over the room and they had taken a knife in to custody which had been later shown and identified in Court. But it had not been shown to the doctor.

The police also had observed that something burning at the back of the house and they had observed it to be some clothes but they had failed to take any specimen in to custody which is very disappointing to note.

The investigative officers also have not been questioned by the prosecution as to whether the other occupants of the rooms were there at the time they went to the scene and as to why their statements were not recorded.

The parents of the deceased who had made statements to the police after eight months had said that when the deceased and the appellant had visited them the appellant had threatened the deceased that she would cut and kill him if he visits the family at Mathugama.

But the prosecution had failed to explain as to why the delay in recording their statements.

With that the prosecution had closed its case and when the defense had been called the appellant has made a statement from the dock.

According to the said dock statement she had said that she and the deceased had been living at the place of incident and the deceased had been having another family and she had helped the deceased to buy them the necessary items of food and clothing but she had also said that the deceased on numerous occasions had been arguing with the said lady and on such occasions the deceased had argued with her also and had been in the habit of threatening her that he will kill the appellant and she also had said the same thing to him.

On the day of the incident, the deceased had bought some clothes for the children and had been preparing to go and see them and at that point the other lady had called him and had asked for money and he had got angry and had burned the clothes he had bought for the children and had shouted at the appellant also and had locked himself up leaving the appellant outside the room threatening to kill himself

Thereafter the appellant has heard noises from inside and the appellant had been worried and she had called for help from the caretaker.

The appellant has further said that the deceased had been in the habit of drinking and had been in the habit of consuming narcotics and he has had asked for money from several outsiders and she had inferred that it could be one of them who had been the assailant.

The trial judge in evaluating the evidence had said that at the time of the incident the prosecution had not ruled out the possibility that a total outsider may have done the murder but he had instead relied on the dock statement and had arrived at the conclusion that at the time of the murder that only the deceased and the appellant were present and that as said in the dock statement that any outsider could not have entered because the door had been closed and the appellant had been outside and she had only gone out to call

the caretaker by which time anybody else could not have come inside and have committed such an act.

But this we observe to be entirely erroneous because it is the duty of the prosecution to prove its case and the learned trial judge cannot elicit matters from the dock statement and then decide the case of the prosecution.

On perusing the evidence of both parties this is a case based on circumstantial evidence and in such a case it is a well-established principle that all circumstances adduced by evidence shall only point at the guilt of the accused and nothing else.

In the case of The Queen vs Kulararne 71 NLR 529 and Karrupai Servai vs The King 52NLR 227 had said that “In a case of circumstantial evidence the prosecution evidence lends itself to a reasonable inference that either the accused or another could have committed the offence, the prosecution must exclude the other effectively in order to attach responsibility to the accused”.

The Bench Book on Law of Evidence has cited ,Wills on Circumstantial evidence 7th edition at pages 296-336 which had laid down four principles in evaluating circumstantial evidence which reads as follows,

1. Every fact and circumstances on which the prosecution relies as the basis for the inference of guilt must be clearly proved and connected with the fact to be proved beyond reasonable doubt and must be such as to lead to a reasonable inference as to the guilt of the accused.
2. Particularly when circumstantial evidence is relied on, the best evidence must be adduced. The suppression or non-production of pertinent and cogent evidence necessarily raises a strong presumption against the party who withholds the evidence.
3. The chain or strand of proved fact and circumstances must be so complete that no vital link in it is missing. **A vital link should never be inferred. Mishra vs. State of Bihar A.I.R. (1955) S.C. 801.**
4. In order to justify the inference of guilt, the inculpatory fact must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Any reasonable probability of innocence must ensure to the benefit of the accused.

Hence, in the instant matter we observe that the prosecution has failed to establish that it was the appellant and no one else who committed the act of murder beyond a reasonable doubt and the trial judge has erroneously has used the dock statement to fill in the lapses of the prosecution.

As such, we are of the opinion that the prosecution has failed to prove its case beyond a reasonable doubt.

As such we are of the opinion that the conviction is bad in law and is without merit hence, we set aside the conviction and the sentence imposed by the trial judge and acquit the appellant and allow the instant appeal.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal