

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

In the matter of an Appeal made under
Section 331 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/0100/2020**

Ekanayaka Mudiyanseelage Gamini
Bandara

**High Court of Kalutara
Case No: HC/914/2014**

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

**BEFORE : Sampath B.Abayakoon, J.
P.Kumararatnam,J.**

COUNSEL : **Naveen Maha Arachchige for the Appellant.**
Sudharshana De Silva, DSG for the Respondent.

ARGUED ON : **19/09/2023**

DECIDED ON : **10/01/2023**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Kalutara under Section 296 of the Penal Code for committing double murder of Enderage Pushpa Priyadharshani and Thihari Udayangani Bandara on or about 24th April 2011.

The trial commenced before the High Court Judge as the Appellant had opted for a non-jury trial. The prosecution had called PW1, PW2, PW3, PW4, PW5, PW6, PW8 and marked Production P1-6. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellant had made a dock statement. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant under section 296 of the Penal code and sentenced him to death on 01/06/2020.

Being aggrieved by the aforesaid conviction and sentence, the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant had given consent to argue this matter in his absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via Zoom from prison.

Both parties jointly made an application at the hearing to dispose this appeal upon their respective written submissions in this case.

Grounds of appeal advanced by the Appellant in his written submissions are as follows:

1. The prosecution has failed to prove that the only inference is that the Appellant committed the offence.
2. The Appellant's right to a fair trial has been infringed by biased investigations.
3. The Learned High Court Judge has erred in law by holding that rules relating to Section 27 inquiry under the Evidence Ordinance has been duly complied.

Background of the Case

According to PW1, Karunaratna, the 1st deceased, Pushpa Priyadharshani is the eldest daughter of his wife's sister. The Appellant got married to the deceased and lived at a place called Neliketiya. The land on which the Appellant and the deceased lived was an isolated place at the time of the incident. The couple had a daughter called Thihari Udayangani, the 2nd deceased in this case. As the family life of the Appellant and the deceased was not stable, the 1st deceased had lodged a complaint against the Appellant at the police. The couple had attended the Mediation Borad inquiry on 23.04.2011 and visited PW1's house and informed that their problem was settled and that they have agreed to continue to live together. After informing the couple had gone to their house.

On the following day, at about 10.00 am, the Appellant had gone to PW1's house and informed that his wife had gone to Embilipitiya to get medicine for his daughter. At that time the Appellant had been wearing a T-shirt and a trouser. PW1 had noticed blood marks on the T-shirt of the Appellant. Further, PW1 had noticed mud patches and grass particles also on his T-shirt. The Appellant had not been able to speak properly and he had been in a disturbed state of mind. As the behavior of the Appellant arose suspicion, PW1 had gone to Makeliella Police Post and had informed PW3, who was the senior police officer of the post about the suspicious behavior of the Appellant and the disappearance of the 1st and 2nd deceased. At the same time, the Appellant also had come to the police post. The T-shirt worn by the Appellant was marked as P1 through this witness.

PW2, Premadasa is the father of the 1st deceased. After marriage, his daughter and the Appellant had put up their house on a land bought by them. On 16.03.2011, when the 1st deceased was plucking tea leaves, the Appellant had come there and assaulted the 1st deceased. A complaint was lodged at the Kalawana Police Station regarding this incident. As the dispute was referred to the Mediation Board, the deceased persons and the Appellant had gone to PW2's house before they proceeded to the Mediation Board. On 24.04.2011, PW1 had informed the witness about the disappearance of his daughter and his granddaughter. He had identified the bodies of his daughter and his granddaughter after exhumation.

PW3 PS 26166 Liyange was the senior police officer attached to Makeliella Police Post manned by the Baduraliya Police Station. On 24.04.2011 at about 10.45 am PW1, Karunaratna had lodged a complaint about the disappearance of the deceased persons and the suspicious behavior of the Appellant. As the place of incident was situated in a very lonely and isolated area, he with another officer had gone to the place immediately. As nobody was found in that area and in the house of the Appellant, they had come back to the police post and passed the message to the Baduraliya Police Station. While returning from the place of incident, on their way they had

met the Appellant and brought him to police post by them. The Appellant had behaved in a suspicious manner at that time. As such the witness arrested the Appellant and handed him over to PW5, IP Anandasiri of the Baduraliya Police Station.

PW5 IP Anandasiri was the investigating officer in this case. After coming to the police post he had recorded the statement of the Appellant and recovered the dead bodies of the deceased, clothes and the knife. Further, he had taken the clothes of the Appellant and produced in this case.

PW8, JMO Silva had given evidence regarding the Post Mortem Reports submitted by him to the Court. According to him, he had noticed 14 cut and stab injuries on the body of the deceased Priyadharshani. Further, he had stated that the cause of death is due to hemorrhage and shock following injury to the abdomen.

On the body of the child Thihari, the JMO had noticed three injuries and the cause of death is due to asphyxia.

The JMO had noticed mud and grass particles on the clothes and the bodies of the deceased.

The Appellant in his dock statement had taken up the position that some unknown persons had entered his house and assaulted him as well as his wife. As he also was stabbed, he ran away from the house and hid in the thicket. Hence, he denied the allegation.

In this case no ocular testimony is available, but the case rests on strong circumstantial evidence.

In comparison with direct evidence, circumstantial evidence is more complexed and utmost judicial caution has to be exercised in evaluating such evidence. There are several factors that the Court must consider regarding admissibility, relevancy and acceptability of such evidence. The Court also must consider whether each item of circumstantial evidence is connected to every other item and whether such evidence establishes a link from the beginning to the end. The question that the Court ought to consider is whether such evidence would become legally admissible. The Court finally

must look at the question as to whether the several items of circumstantial evidence taken together, has the cumulative effect of establishing the charges against the accused.

In **Rex v Exall (1866) 4F Exall 4F and F** pages 922 at 929 the Court held that:

“Circumstantial evidence was initially considered as a chain and each piece of evidence is a link in the chain, but that is not so, for then if only one link breaks, the chain would fall. it is more like the case of a rope, comprised of several cords. One strand of rope might be insufficient to sustain the weight, but 3 strands together may be quite sufficient. Thus, it may be a combination of circumstances, no one of which would raise a reasonable suspicion; but the 3 taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit”.

In **King v. Abeywickrama Et Al** 44 NLR 254, the court held that:

“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 reasonable hypothesis of his innocence.”

In the case of **Tamil Nadu v Rajendran** Appeal (1996) 917(Cr.L) the Indian Supreme Court observed that:

“In a case of circumstantial evidence when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.”

The Counsel for the Appellant submitted that the prosecution's evidence by PW1 and PW2 only provides that the Appellant went home with the deceased on 23.04. 2011. Thereafter, the Appellant according to PW1 was seen again in the morning on the following day. There is a sequence of events that is not produced in between the Appellant going home with the deceased on the previous day and until the Appellant is seen again. The hypothesis of the prosecution based on circumstantial evidence is that the Appellant committed the murder of the deceased in the interim period.

In this case it is not in dispute that both deceased were last seen in the company of the Appellant. This had been witnessed by PW1 and PW2.

Doctrine of last seen, if proved, shifts the burden of proof onto the accused, placing on him the onus to explain how the incident occurred and what happened to the victim who was last seen with him. If there is a failure on part of the accused to furnish any explanation in this regard, as in the case in hand, or furnish false explanation would give rise to a strong presumption against him, and in favour of his guilt, and would provide an additional link in the chain of circumstances.

In this case according to PW1, when he met the Appellant on the following day alone, the Appellant had told him that his wife and had gone to Embilipitiya to buy medicine for his daughter who had fallen sick. But in his dock statement the Appellant had said that some unknown persons had entered his house in the night, assaulted him and his wife. Due to fear he had escaped from their clutches and hid himself in the wood. As the Appellant had taken two different positions reading the status of the deceased persons, this would certainly give rise to a strong presumption in favor of his guilt.

According to PW1, when he saw the Appellant on the following day, he had noticed an unusual behavior of the Appellant. The Appellant was in a state disturbance and he behaved in highly suspicious manner. Hence, he had lodged a complaint at Makeliella Police Post, which prompted the investigation.

Conduct of an accused previous or subsequent is truly relevant in a criminal trial.

Section 8(2) of the Evidence Ordinance states:

“The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto”.

In criminal cases the court must consider both the previous and subsequent conduct of the accused pertaining to the commission of the crime. In certain cases, the previous conduct of the accused throws light on whether the accused is innocent or guilty, whereas in some cases it is the subsequent conduct that becomes very important in determining the innocent or guilty of the accused. So, it is the bounded duty of all the concerned courts to analyse carefully both the previous and subsequent conduct of the accused before drawing any definite conclusions.

In **Basanti v State of UP**, AIR 1987 SC 1572, the conduct of the accused telling the villagers including her brother-in-law that the deceased, whose dead body was recovered from a place of concealment, had left the village and had not returned was held by Supreme Court to be relevant at her trial for murder.

In this case the Learned High Court Judge had very correctly considered the evidence pertaining to the conduct of the Appellant to come to his conclusion.

Further, the Counsel for the Appellant contended that the Learned High Court Judge erred in law by holding that rules relating to Section 27(1) of the Evidence Ordinance has been duly complied with.

Upon the statement of the Appellant the body of the deceased persons were exhumed from a ditch in the presence of the Magistrate. The two bodies were recovered in two different places close to each other. The body of the daughter of the Appellant was wrapped with a bedsheet.

The body of the Appellant's wife was clad with a night dress. Her intestines were seen bulging out from her stomach. A nylon rope was seen wrapped around the deceased body.

The body of the wife of the Appellant was buried about 7 meters away from the kitchen of the house and the body of the child was buried about 150 meters away from the house.

The dead bodies and the knife were recovered in consequent to the statement made by the Appellant to the police under Section 27(1) of the Evidence Ordinance. This evidence against Appellant further strengthened the prosecution case.

According to Section 27(1) of the Evidence Ordinance-

“Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.”

Upon his statement both deceased's body were exhumed by the police. The relevant portions of his statement were properly marked in the trial. The prosecution had led evidence of these recoveries under section 27(1) of the Evidence Ordinance successfully.

The Supreme Court in the case of **Somarathne Rajapakse Others v. Hon. Attorney General** (2010) 2 Sri L.R. 113 at 115 stated that:

“A vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been discovered would be permitted in evidence. There should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. A discovery made in terms of Section 27 of the Evidence Ordinance discloses that the information given was true and that the Accused had knowledge of the existence and the whereabouts of the actual discovery.”

Hence, I hold that the adducing evidence under Section 27(1) of the Evidence Ordinance has not caused any prejudice to the Appellant in this case.

Finally, the Counsel argued that the right to a fair trial has been infringed by biased investigation.

In this case the initial suspicious behaviour had led to the police to conduct investigation to unearth the truth. The police nowhere had conducted biased investigation towards the prosecution. They had adhered to the correct legal principles and procedures to conduct the investigation.

In **Zahira Habibullah Sheikh and Others v. State of Gujarat** [Appeal (crl.) 446-449 of 2004] held that:

“Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involve a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public.”

“...Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial

in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated.”

The Appellant in his dock statement denied the allegation levelled against him and took up the position that some unknown persons had entered his house and assaulted the inmates. The Appellant had failed to put this position to the prosecution witnesses during the cross examination.

In this case, the prosecution had led very strong circumstantial evidence against the Appellant and it is consistent only with the guilt of the Appellant and is totally inconsistent with his innocence. Hence, the grounds raised in the written submission of the Appellant are devoid of any merit.

As the circumstances established were consistent with the Appellant’s guilt and inconsistency with his innocence, I proceed to dismiss his appeal.

The appeal is dismissed.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL