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

In the matter of an Appeal against the order of the High Court under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

C.A.No. HCC No.50/2014
H.C. Kegalle No. 2216/05

Manikpurayalage. Premajayantha alias Jayantha.

Accused-Appellant

Vs.

Hon. Attorney General
Attorney General's Department

Colombo 12 .

Complainant- Respondent

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BEFORE : **ACHALA WENGAPPULI, J.**

DEVIKA ABEYRATNE, J.

COUNSEL : Indica Mallawaratchy for the Accused-Appellant.

A. Navavi D.S.G. for the Respondent

ARGUED ON : 24th February,2020

DECIDED ON : 06th July, 2020

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ACHALA WENGAPPULI, J.

The accused-appellant was convicted for murder of *Liyanapedige Tillakaratna* on 09.04.2000 at *Akbowa* of *Bandarawatta* by the High Court of *Kegalle* with its judgment dated 22.05.2014 and sentenced to death. Being aggrieved by the said conviction and sentence, the accused-appellant preferred the instant appeal seeking intervention of this Court to have them set aside.

The case presented by the prosecution against the accused-appellant is based on circumstantial evidence. The only lay witness who testified for the prosecution as to the conduct of the accused-appellant, prior to the death of the deceased, is one *Dharma Kumara,* who ran a tea boutique in the village. He knew the deceased, as well as the accused-appellant, quite well. Referring to the events that took place prior to his learning of the death of the deceased, the witness said that the accused-appellant, when he saw the deceased walking along the road, muttered that "මම ලහඳීම මූට වැඩක් දෙනවා" and attributed a reason for his intended action by stating that the deceased had "මට පොඩි පාටි එකක් දාම්මා". At that time the accused-appellant was having some hoppers at his boutique.

Thereafter, at about 5.30 in the same evening, the witness again saw the deceased walking along a ridge of the nearby paddy field. He also saw the accused- appellant following the deceased. The accused- appellant carried a *katty* with a long neck, identified as one similar to "P1" at that point of time. The witness had seen the accused thereafter only in Court.

During cross-examination of this witness, a contradiction was sought to be marked off his evidence by the learned Counsel for the accused appellant, upon the witness's evidence before the trial Court that the said utterance was made by the accused appellant in the morning at about 7.30 or 8.00, whereas to the Police, the witness has said that it was in the evening at about 4.00 or 4.30 only the accused-appellant has come to his boutique to have some hoppers. The witness, being reminded of what he said to Police, thereafter corrected himself that is the correct time and this lapse in his testimony was due to his fading memory.

Witness *Jayatillaka* said in evidence that he learnt about his father's death, at about 6.30 a.m., in the following morning, on his way to work.

Post mortem examination of the deceased was conducted by Dr. *Gangodawila,* who testified that the deceased had suffered three cut injuries. The 1st injury was on the right side of his neck, which was 3 inches deep, cutting into cervical vertebra, neck muscles, spinal cord and blood vessels, that supplied blood to the brain. The medical expert was of the opinion that this injury could be termed as necessarily a fatal injury. The said injury may have been caused by a weapon similar to the *katty* marked as P1, by attacking with considerable force, as it is a heavy sharp cutting weapon.

SI *Tibbatumunuwa* of *Alawwa* Police investigated and arrested the accused-appellant at his home town *Giriulla,* some distance away from the scene of the incident at *IlukeWatta* in *Agobowa, Alawwa.* After his arrest, statement of the accused-appellant was recorded by the witness. A *katty* with a long neck (P1) was recovered upon being shown by the accused-appellant, from his temporary

abode at *Agobowa, Alawwa,* close to the place where the deceased suffered his fatal injury.

During cross-examination, it was elicited that the accused-appellant was arrested upon information provided by a private informant of the witness. That informant is identified as "*Nuwan*", who operates a boutique shop. The witness did not record his statement, but only made a note in the pocket note book. He admitted in cross examination that he was unaware as to the contents of the said informant's statement.

During the hearing of the appeal, learned Counsel for the accused-appellant sought to challenge the validity of the conviction on the following grounds of appeal;

a. the prosecution presented its case on the basis of last seen theory but the trial Court failed to consider the failure of the prosecution to establish time of death of the deceased, and relied on hearsay material in determining the said issue,
b. the trial Court erred in applying the legal principles in relation to Section 27 recovery,
c. the trial Court failed to appreciate that the items of circumstantial evidence that had been relied upon by the prosecution are not weighty enough to sustain a conviction for murder,
d. the trial Court erred in shifting burden of proof on the accused-appellant.

In support of her 1st ground of appeal, learned Counsel for the accused-appellant contended that in view of the reasoning of the judgment of ***The King v Appuhamy*** 46 NLR 128, it was incumbent upon the prosecution to *"fix the exact time of death of the deceased"* and in this instance, there was no such evidence led before the trial Court by the prosecution. It was contended that the trial Court had failed to consider the items of circumstantial evidence on this aspect, in the light of the principle enunciated in the said judgment, and therefore the conviction entered against the accused-appellant could not be sustained.

The above reproduced part of the judgment of the Court of Criminal Appeal in ***The King v Appuhamy*** (ibid) that *"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"* was expressed by their Lordships because in said appeal *"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"*.

The underlying principle of the last seen theory referred to by the Court of Criminal Appeal was elaborated by the Supreme Court of India in the judgment of ***State of Uttar Pradesh v Satish*** [2005 (3) SCC 114] as follows;

> *"The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible."*

Their Lordships have further added that;

> *"It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exits. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt on those cases."*

It is in the light of the said principle; this Court must consider the merits of this particular ground of appeal, as contended by the accused-appellant.

The evidence is, by 6.30 a.m. on the following morning, the body of the deceased was already discovered, lying in a ditch with cut injury on his neck. The medical evidence indicate that the deceased's stomach contained some liquid smelling of liquor. It was the opinion of the medical officer that it would take about 2 hours after consuming a liquid for it to empty itself from the stomach. This confirms the fact that the deceased was killed within two hours of him consuming that liquid, smelling of liquor.

The deceased was last seen alive at about 5.30 p.m. on 09.04.2000. His body was discovered lying in close proximity to the place he was last seen walking. The blood marks on the stony path and the nature of injuries indicate that he succumbed to his injuries, where he had sustained them. In considering the relative probabilities of these circumstances, one probability is that the deceased, having walked passed the place where he was attacked, followed by the accused appellant, returned to the same spot once again, after some time and only at that

point of time his assailant had attacked him. The other probability is that the deceased received the injuries, which caused his death, soon after he was spotted by the witness, who saw him being closely followed by the accused appellant who had a katty similar to the one marked as P1. The exact time of the utterance attributed to the accused appellant becomes very relevant in the circumstances. The witness had corrected himself, when confronted with the fact that he told police that it was at about 4.00 or 4.30 in the afternoon. At that time the deceased was walking past his boutique and he continued on his journey. After about one hour since that incident, the witness, whilst on his way to some place on his motor cycle, casually saw the deceased walking along a ridge, followed by the accused-appellant, who was carrying a *katty*.

The deep cut injury on the neck of the deceased could have been caused by such weapon and it appears that the accused appellant had exclusive knowledge of the place where one such weapon could be found, when considered in the light of the fact that he was arrested far away from the place of the incident only on the following day evening, but had knowledge of the place where the weapon was.

The stomach contents, which was still in the stomach of the deceased indicate that he had died within two hours after consuming it. If the deceased had consumed that liquid soon after he had gone past the witness *Dharma Kumara*'s boutique at 4/4.30 p.m., and was killed within a short period of time after 5.30 p.m., then the two-hour period would not render the case for the prosecution an improbable one. This is only in respect of the two-hour period as estimated by the medical witness.

But the prosecution had placed many other items of circumstantial evidence which were referred to in the preceding paragraphs of this judgment.

HQI *Nanayakkara* has visited the scene. According to him the body was lying near a canal, which runs along the boundary of the paddy field. He also noted blood splashes along the stony path. The body was discovered close to the place where the witness *Dharma Kumara* saw the deceased alive for the last time.

Witness *Dharma Kumara* saw the accused-appellant following the deceased with a distance of 50 meters, along the ridge at about 5.30 p.m. carrying a *katty*. Hence, although the time gap that exists between the time the deceased was last seen in the company of the accused-appellant and the time of discovery of his death is about 13 hours, when the other factors are considered in its totality, they would sustain an inference that it was the accused appellant who inflicted the injuries and no other.

Learned Counsel for the accused- appellant complained that the "informant" referred to in the evidence of SI *Tibbatumunuwa* is in fact witness *Dharma Kumara* and his statement was not recorded by the Police. His claim of seeing the accused- appellant following the deceased and the utterances attributed to the accused appellant, becomes unreliable since he acted as an informant.

This contention finds no support from the evidence presented before the trial Court. When the witness was cross-examined as to the time the said utterance was made, learned Counsel for the accused-appellant referred to the

relevant portion from his statement to Police by recitation what he told. This establishes there is in fact a statement made by the witness. In relation to his credibility, witness *Jayatillaka,* in his evidence testified that when he went to Police to inform the death of his father, it was witness *Dharma Kumara* who accompanied him. The fact that the accused-appellant was considered as the suspect for the murder of the deceased, soon after the 1st information is received by Police could be inferred fron the evidence of both official witnesses HQI *Nanayakkara* and SI *Tibbatumunuwa.* This justifies the conclusion drawn by the trial Court that *Dharma Kumara* conveyed what he saw and heard to Police at the first available opportunity.

In its judgment, the trial Court had devoted considerable space in evaluating the evidence in the light of the principle of last seen theory as laid down in judicial precedents.

In these circumstances, the mere failure of the prosecution to lead evidence as to the exact time of death will not accrue to the benefit of the accused-appellant since the direct evidence referred to above indicate that the prosecution has established " ... *that possibility of any person other than the accused being the author of the crime becomes impossible.*" The evidence considered by this Court in the preceding paragraph are undoubtedly direct evidence and not hearsay as the accused-appellant contends. Therefore, this ground of appeal raised by the accused-appellant necessarily fails.

The complaint of misapplication of the principles in relation to discovery of facts under Section 27 of the Evidence Ordinance by the accused-appellant has no

valid basis since the trial Court had correctly attributed only the knowledge of the place, where P1 was found, on him.

This Court, in the judgment of ***Kusumadasa v Attorney General*** (2011) 1 Sri L.R. 240, laid down the applicable principles where the prosecution is seeking to prove the guilt of an accused through items of circumstantial evidence. The trial Court, having identified the several items of circumstantial evidence, has acted on those principles in coming to the conclusion that the prosecution has established its case beyond reasonable doubt since these items only point to his guilt and not his innocence.

The accused-appellant's last ground of appeal that the trial Court has shifted burden of proof on him, should be considered at this stage. It was contended that the trial Court erred when it misapplied the *Ellenborough principle.* The impugned portion of the judgment reads " එමෙන්ම විත්තිකරුගේ වරදකාරිත්වය විය හැකි බව පෙන්වන කරුණු දාමය තහවුරු වන විටක විත්තිකරු විසින් සාධාරණ පැහැදිලි කිරීමක් නොකරන විටක විත්තිකරු වරදකරු බවට ඔප්පු වන බව ඉන් පෙනී යයි".

In ***Kusumadasa v Attorney General***(ibid) it was stated that;

> *"To apply the dictum of Lord Ellenborough it is incumbent on the prosecution to put forward a strong prima facie case against the accused. When the prosecution has not put forward a strong prima facie case the dictum of Lord Ellenborough cannot be applied. Dictum of Lord Ellenborough cannot be used to give life to a weak case put forward by the prosecution. I therefore hold that in the instant case dictum of Lord Ellenborough cannot be applied."*

Thus, it is amply clear that the trial Court, having correctly concluded that the prosecution has established a *prima facie case* against the accused- appellant, commented on his failure to offer an acceptable explanation. This, the trial Court is entitled to do, since the prosecution has established a strong case based on circumstantial evidence against the accused-appellant by proving, his motive, that he had the opportunity and the weapon to inflict the fatal wound, coupled with his subsequent conduct of evading arrest by shifting residence to his village.

This Court is of the considered view that the grounds of appeal that are relied upon by the accused-appellant are without merit. His conviction and sentence is accordingly affirmed.

The appeal of the accused-appellant is therefore dismissed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL