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

*In the matter of an Appeal in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979.*

**Court of Appeal No:**

CA/HCC/0412/2019

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**COMPLAINANT**

**Vs.**

**High Court of Kaluthara**

**Case No:** HC/646/2013

Lesthuruge Janet Rohana Silva

**ACCUSED**

**AND NOW BETWEEN**

Lesthuruge Janet Rohana Silva

**ACCUSED-APPELLANT**

**Vs.**

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**COMPLAINANT-RESPONDENT**

| | |
|---|---|
| Before | : Sampath B. Abayakoon, J. |
| | : P. Kumararatnam, J. |
| Counsel | : Rajinda Kandegedara for the Accused-Appellant |
| | : Dilan Rathnayake, A.S.G. for the Respondent |
| Argued on | : 26-02-2024 |
| Written Submissions | : 22-11-2022 (By the Respondent) |
| | : 06-10-2022 (By the Accused-Appellant) |
| Decided on | : 28-05-2024 |

**Sampath B. Abayakoon, J.**

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Kalutara, for causing the death of one Lesthuruge Uditha Silva on 5th January 2010, at a place called Kamburugoda within the jurisdiction of the High Court of Kalutara, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

After trial without a jury, the appellant was found guilty as charged by the learned High Court Judge of Kalutara of the judgment dated 28-11-2019, and accordingly, he was sentenced to death.

Being aggrieved by the conviction and the sentence, the appellant preferred this appeal.

**The facts in brief**

PW-01, the wife of the deceased, was in the house of a relative who was living about 5-6 feet away from their house when this incident occurred. It was around 5.30 in the evening of 5th January 2010. While in the house of the relative, she has heard her husband screaming “budu ammo” from the direction of their house. When she came out of the house, she has seen her husband screaming in the veranda and the appellant who was the elder

brother of the deceased coming out with a mamoty in his hand. The appellant has gone out through the gate of their property, and when she reached her husband, she has seen him fallen with bleeding head injuries. At that time, the sister-in-law of the PW-01 also has come to the place where the deceased lay fallen. When they were attempting to take the injured to the hospital, the appellant has returned with a mamoty in his hand and has threatened them not to take the injured to the hospital, which has resulted in her sister-in-law running away. The body of the deceased has only been removed after the arrival of the police to the scene of the crime.

PW-02, the sister-in-law of PW-01 has confirmed that when she came to the scene of the crime she was asked by the PW-01 to help her to take the deceased to the hospital, but they were prevented by the appellant who came with a mamoty in his hand and threatened them.

PW-03 is a close relative of both the deceased and the appellant who lived few houses away from the house of the deceased. She had a boutique near the house. While she was in her boutique in the evening of the day of the incident, the appellant has come and wanted water. When she went to get some water to be given to the appellant, he has told her that he consumed poison and show him a place where he can drink water. Thereafter, he has walked towards another house where there was a tap, and had fallen on the ground. After a while, the police officers have come and taken him away. She has not seen the incident where the deceased received injuries, but had heard a screaming from the direction of the house of the deceased a little while before the appellant came to her boutique.

Sub Inspector Anura of Akmeemana police was the officer who has reached the scene of the crime along with a team of police officers after receiving an information with regard to the incident. He has seen the deceased fallen in front of his house with serious cut injuries to his head. He has observed the appellant fallen in front of a nearby house and had been informed that, he has consumed poison. The investigating officer has taken immediate steps to admit both of them to the hospital, where he has come to know that the

injured had passed away. When he arrived at the scene of the crime, he has observed a mamoty with blood like stains about fifteen feet away from the place where he found the appellant. The said mamoty has been marked as P-01 at the trial.

According to the evidence of the Judicial Medical Officer (JMO) who conducted the postmortem of the deceased, he has observed five injuries on his body. The injury number one and two had been cut injuries to the head, out of which, injury number one had been a deep cut injury, which has resulted in the death of the deceased. He has opined that those injuries could be caused by using the mamoty marked as P-01. The other injuries had been lacerations, which has not contributed to the death.

It is noteworthy to observe that the appellant has not taken any line of defence when the witnesses gave evidence in this trial. However, when called for a defence at the conclusion of the prosecution case, he has chosen to give evidence under oath.

He has denied that he caused the death of his brother, and has stated that his brother suffered from a mental ailment and he hit his brother only on one occasion, which happened in the year 2008. He has claimed that the witnesses who gave evidence at the trial were lying in that regard. He has stated that on the day of the incident, he went to his vegetable patch carrying with him a mamoty, a can of water and a can filled with insecticide and saw his brother fallen in front of his house with bleeding head injuries. He has claimed that after seeing his brother in that state, he got stunned and in the ensuring disorientation, he mistakenly drank the insecticide he was carrying.

**The Grounds of Appeal**

At the hearing of this appeal, the learned Counsel for the appellant urged the following grounds of appeal for the consideration of the Court.

(1) The learned High Court Judge has misdirected himself as to the burden of proof and thereby erred in delivering the impugned judgment.

(2) The prosecution has failed to prove the case beyond reasonable doubt against the appellant and the learned High Court Judge has failed to analyze the evidence in the correct perspective.

It was the submission of the learned Counsel for the appellant that since there were no eyewitnesses to the incident where the deceased received injuries, the circumstantial evidence placed before the Court was not sufficient enough to convict the appellant. He submitted that the witnesses PW-01 and PW-02 have stated that the deceased was found injured in the veranda of the house but in fact, the place of the incident had been in front of his house according to the evidence of the police officer who conducted investigations. He submitted further that the mamoty marked as P-01 at the trial, has not been identified as the weapon used in the crime by the relevant witnesses and cannot be used as evidence against the appellant.

The learned Additional Solicitor General (ASG) on behalf of the respondent submitted that, the prosecution has provided ample circumstantial evidence against the appellant and had proved the charge against him beyond reasonable doubt. It was pointed out that there had been no *inter se* or *per se* contradictions in the evidence and the appellant has failed to explain the incriminating evidence against him.

He was of the view that the appeal should be dismissed, as there exists no basis for the appeal.

**Consideration of the Grounds of Appeal**

As the two grounds of appeal are interrelated, I will now consider them together for the purposes of this appeal.

This is a case where there had been no eyewitness to the actual incident where the deceased has received the fatal cut injuries to this head. Hence,

this is a matter where the prosecution has relied on circumstantial evidence against the appellant to prove the case against him.

Before drawing my attention to the evidence placed before the Court in that regard, I find it appropriate to consider the mode of proof in a case where the prosecution relies on circumstantial evidence to prove its case.

In the case of **The King Vs. Abeywickrama 44 NLR 254** it was held:

Per Soertsz J.

> *"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 hypotheses of his innocence."*

In **Don Sunny Vs. The Attorney General (1998) 2 SLR 01** it was held:

1) *When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards only inference that the accused committed the offence. On consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.*

2) *If on a consideration of the items of circumstantial evidence, if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.*

3) *If upon consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence, then they can be found guilty. The prosecution must prove that no one else other than the accused had the opportunity of committing the offence. The accused can be found guilty only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.*

However, in considering the circumstantial evidence, what has to be considered is the totality of the circumstantial evidence before coming to a firm finding as to the guilt of an accused, although each piece of circumstantial evidence when taken separately may only be suspicious in nature.

In the case of The **King Vs. Gunaratne 47 NLR 145** it was held:

> *"In a case of circumstantial evidence, the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion.*
>
> *The jury is entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt."*

In the case of **Regina Vs. Exall (176 English Reports, *Nisi Prius* at page 853)** Pollock, C.B., considering the aspect of circumstantial evidence remarked;

> *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in a chain, but that is not so, for then, if any one link brock, the chain would fall. It is more like of a rope composed of several cords. One strand of the rope might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."*

When considering the circumstantial evidence against the appellant, when the wife of the deceased came out of the house after hearing the screaming of her husband, she has seen the appellant coming out of the veranda of their house having a mamoty in his hand. She has seen her husband fallen on the ground with serious cut injuries to his head. When PW-01 and PW-02, attempted to take the injured to the hospital with the help of others, the appellant had returned with the mamoty and had prevented them from

taking the injured to the hospital by threatening them. It was only after the police arrived, the injured had been taken to the hospital. After the incident, the appellant had consumed poison and the police have recovered the mamoty marked P-01 near the place where the appellant was found fallen.

None of the above-mentioned facts were disputed at the trial. The appellant had not challenged any of the evidence given by the relevant witnesses, which are strong incriminating circumstantial evidence against him.

The circumstantial evidence led in this action has pointed the culpability for the crime directly towards the appellant by way of strong *prima facie* evidence.

It is well settled law that although an accused person has no burden of proof and it was the duty of the prosecution to prove the charge or charges beyond reasonable doubt against an accused person.

However, it is also our law that, when a strong *prima facie* case has been established against an accused, and there is evidence that only he can explain, it is the duty of the accused to provide a reasonable explanation as to the highly incriminating evidence against him.

In the case of **Sumanasena Vs. The Attorney General (1999) 3 SLR 137,** It was held:

> *"When the prosecution establishes a strong and incriminating cogent evidence against the accused, in those circumstances was required in law to offer an explanation of the highly incriminating circumstances established against him."*

Although there is much discussion among legal luminaries that whether such a judgment existed or reported, it is now embedded into our legal principles what the judges often referred to as the Ellenborough dictum.

It is stated that in the case of **Rex Vs. Lord Cochrane and others (1814) Gurneys Reports 479, Lord Ellenborough,** it was held:

*"No person accused of crime is not bound to offer any explanation of his conduct or of circumstances of suspicion which attached to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out and when it is in his own power to offer evidence if such exists, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence it is a reasonable and justifiable conclusion he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."*

**Abott J. in Rex Vs. Burdett (1820) B & Ald 161 at 162 observed that:**

*"No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation to contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to it the prima facie case tends to be true and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends."*

In this action, although the appellant has come up with a story in his evidence when called for a defence, he has not suggested any such position to any of the relevant witnesses when they gave evidence. Other than coming up with a fanciful story, which cannot be considered probable, and admitting that he had with him a mamoty and insecticides at the time of the incident, he has not explained any of the incriminating circumstantial evidence against him.

In the Indian Supreme Court case of **Sarawan Singh Vs. State of Punjab AIR 2002 SC III 3655** it was held:

*"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it*

*must follow that the evidence tendered on that issue ought to be accepted."*

His Lordship **Sisira de Abrew, J.** in the case of **Pilippu Mandige Nalaka Krishantha Thisera Vs. The Attorney General, CA 87/2005 decided on 17-05-2007** held:

*"….I hold whenever evidence is given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."*

The Indian Supreme Court observed in the case of **Motilal Vs. State of Madya Pradesh (1990) (CLJ NOC 125 MP);**

*"Absence of cross-examination of prosecution witnesses of certain facts leads to inference of admission of that fact."*

Under the circumstance, I am of the view that the alleged discrepancy in the evidence as to the place where the deceased fell after the attack provides no material doubt as to the incident.

According to the evidence of PW-01 she has seen her husband fallen in the veranda of the house, but when the police came they have found him fallen in front of the house. The appellant also has claimed in his evidence that when he came, he saw his brother fallen on the ground with cut injuries, which means that this was never a disputed fact that creates any doubt as to the incident.

I am unable to find any basis for the contention of the learned Counsel for the appellant that the learned High Court Judge was misdirected as to the required burden of proof in a criminal case at the 2nd paragraph of page 11 of the judgment (page 206 of the appeal brief). What has been stated was that reasonable doubt cannot be any fanciful doubt that an accused may claim, for which I am in total agreement.

In the case of **Ramakant Rai Vs. Madan Rai AIR 2004 SC at 84**, it was stated,

> *"A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favorite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary trivial or a merely possible doubt: but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. The concepts of probability, and the degree of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and ultimately, on the trained intuitions of the Judge. While the protection given by the criminal proceeds to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice."*

For the reasons considered as above, I find no reasons to accept the argument that the learned High Court Judge was misdirected as to the burden of proof in the judgment.

I am of the view that the learned High Court Judge has well considered the evidence placed before the Court in its totality, and in the correct perspective to determine that the prosecution has proved the case beyond reasonable doubt.

Accordingly, the appeal is dismissed for want of merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal