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.

Court of Appeal Case No:
CA/HCC /0190-191/2017
High Court of Chilaw
Case No. HC/158/2006

1. Seetha Mary
2. Kapracharilage Upun Ranjith Kumara alias Niroshan

ACCUSED-APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Tenny Fernando for the 1st Appellant.**
K.A.Upul Anuradha Wickramaratne for 2nd Appellant.
Janaka Bandara, DSG for the Respondent.

ARGUED ON : **26/10/2023**

DECIDED ON : **29/02/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the 1st Appellant and 2nd Appellant) was indicted in the High Court of Chilaw under Section 296 of the Penal Code for committing the murder on Iswaralage Kaushalya a female child on or about 02nd April 2005.

When the indictment was read over to the Appellants, they pleaded guilty for the charge of murder, but the Learned High Court Judge ordered the trial to proceed in usual manner as if the Appellants had not pleaded guilty as per the Section 197(1) of the Code of Criminal Procedure Act No. 15 of 1979.

Thereafter the trial commenced before the High Court Judge of Chilaw as the Appellants had opted for a non-jury trial. After the conclusion of the prosecution's case, the learned High Court Judge had called for the defence and the Appellants had made a dock statement and closed their case. After considering the evidence presented by both parties, the learned High Court

Judge had convicted the Appellants under section 296 of Penal code and sentenced them to death on 31/05/2017.

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

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

Background of the Case

The prosecution had called 9 witnesses and marked productions P1 to P6.

According to PW1, Pushpa Ranjani, she was legally married to 2nd Appellant. This witness and the Appellants were living together at a room in the housing scheme belonging to a tile factory named 'Silusavi'. At that time, all three were employed in the said tile factory situated in Punchi Lida Road, Haldanduwana. The 1st Appellant is the mother of the dead child and the 2nd Appellant had been harassing the child at that time and that he even kicked the child while she was on the floor. The child was about 03 months old at the time of her death.

On 05.04.2005, PW1 had gone for work in the tile factory, but the Appellants have remained in the house with the deceased without going for work. On that day when PW1 came for breakfast at about 9.30 am, she had heard the infant crying and had seen the 2nd Appellant strangling the deceased. After having noticed this, she had gone back to her workplace without having her breakfast. When she returned in the afternoon, she had found the deceased child was missing. When she inquired from the 1st Appellant about the child, she had told her not to ask about the child. When she inquired from 2nd Appellant about the child, he had not uttered a word.

PW1, having felt suspicious about the disappearance of the deceased, had informed this to PW3, Chandrakanthi, who in return conveyed this story to her husband and the manager of the tile factory PW2, namely Mendis Illangaratne. PW2, immediately brought this to the notice of the owner of the tile factory PW7, Leslie Appuhamy. As per the instruction of PW7, PW1 had gone to the Koswatte Police Station on 06.04.2005 and lodged the first complaint. The police had commenced investigation after receiving this information and found the dead body dumped in a plantation cultivation plot adjacent to the land where the tile factory is situated. The corpse was sent to the Chilaw base Hospital to conduct post mortem examination on 07.04.2005.

According to the police, after receiving the complaint they had commenced investigation and looked for the Appellants but could not apprehend them on 06.04.2005. On 07.04.2005, the Appellants were caught by village people while hiding under a bridge and they were handed over to the police.

PW09, JMO Wijewardena had conducted the post mortem examination and come to the conclusion that the death was caused due to difficulty of breathing caused by the pressure applied on the neck and mouth of the infant child.

When the defense was called the Appellants had made a brief dock statement and denied the charge levelled against them.

Both Counsels jointly raised following appeal grounds on behalf of the Appellants.

1. The Learned High Court Judge failed to consider the circumstantial evidence placed before court is not sufficient to arrive at a confirmation that the Appellants committed the offence of murder as per the indictment.

2. The Learned High Court Judge failed to consider that the prosecution has failed to prove the date of offence beyond reasonable doubt.
3. The Learned High Court Judge failed to consider the contradictory and inconsistent version of prosecution witnesses and thereby the conviction is bad in law.

In the first appeal ground the Appellant contends that the Learned High Court Judge has wrongly concluded that the items of circumstantial evidence are sufficient to come to the conclusion that the Appellants only had committed the murder.

In the case of **C.Chenga Reddy and others v. State of A.P**.(1996) 10 SCC 193 the court held that:

> *"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence".*

In the case of **McGreevy v. Director of Public Prosecution** [1973] 1 W.L.R.276the court held that:

> *"There is no requirement, in cases in which the prosecution's case is based on circumstantial evidence that the judge direct the jury to acquit unless they are sure of the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion. The question for the jury is whether the facts as they find them to be_drive them to the conclusion, so that they are sure, that the defendant is guilty".*

In the case of **Attorney General v. Potta Naufer & others** [2007) 2 SLR 144 the court held that:

> *"When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence".*

In the case of **Kusumadasa v. State** [2011] 1 SLR 240 the court held that:

> *"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 and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence".*

In **Premawansha v. Attorney General** [2009] 2 SLR 205 the court held that:

> *"In circumstantial evidence if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapable conclusion that the accused committed the offence".*

In this case in order to find the Appellants guilty of the charge, all the circumstances must point at the Appellants that they are the one who committed the murder of the deceased and not anybody else. It is the incumbent duty of the prosecution to prove the same beyond reasonable doubt.

In this case according to PW01 at the time committing the offence, she and the Appellants were living together in the same line room. The evidence further revealed that even though the 2nd Appellant was legally married to

PW1, he lived with 1st Appellant as well. Hence, the admissibility of the evidence given by PW1 need to be discussed under Section 120(2) of the Evidence Ordinance.

The Section states:

> "In criminal proceedings against any person the husband or wife of such person respectively shall be a competent witness if called by the accused, but in that case all communication between them shall cease to be privileged."

The Learned High Court Judge had failed to resolve this legal position when he accepted the evidence given by PW1, who was the legal wife of the 2nd Appellant.

The Section 81 of the Children and Young Persons Ordinance states:

> "Notwithstanding anything in the Evidence Ordinance contained, the wife or husband of a person charged with an offence specified in the First Schedule shall be a competent witness for the prosecution".

FIRST SCHEDULE

OFFENCES AGAINST CHILDREN AND YOUNG PERSONS IN RESPECT OF WHICH SPECIAL PROVISIONS OF THIS ORDINANCE APPLY.

1. Any offence under Section 308 and 360 of the Penal Code.
2. Any offence against a child or young person under any of the following Sections of the Penal Code;
   Sections 296,297,343,345,357,360A,364,365,365A.

Hence, under Section 81 of the Children and Young Persons Ordinance, PW1 is competent witness for the prosecution.

In this case, PW1 had clearly seen the 2nd Appellant strangling the deceased when she came home for breakfast. Although 1st Appellant was in the house,

she did not take any attempt to prevent the deceased being strangled when PW1 came home after work in the evening and inquired about the deceased, the 1st Appellant had replied to her saying not to ask about the child. Further, when PW1 asked the same from 2nd Appellant, he had not answered her questions.

According to police investigation, when they came to the house where the Appellants and the deceased lived, they were not to be found until 07.04.2005 when the villagers caught hiding under a culvert.
The previous and subsequent conduct of the Appellants also give rise to a reasonable suspicion about them.

Section 8(1) and 8(2) of Evidence Ordinance are read as follows:

> 8 (1) Any fact is relevant which shows or constitute a motive or preparation for any fact in issue or relevant fact.
>
> 8 (2) The conduct of any party, or of any agent to any party, to any suit or proceedings in reference to such suit or proceedings 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, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

The evidence given by PW1 and PW9, JMO and the suspicious conduct of the Appellants it is very reasonable that the trial judge had come to the conclusion that the Appellants are responsible of the death of the deceased. Hence, this ground appeal has no merit.

In the 2nd ground of appeal, the Counsels contend that the Learned High Court Judge had failed to consider that the prosecution has failed to prove the date of offence beyond reasonable doubt.

In the indictment the date of offence has been clearly mentioned. PW1 giving evidence had clearly said that the incident that she saw had taken place on 02.04.2005. Thereafter the deceased was not to be found until in the evening of 07.04.2005.

PW9 had not mentioned the date of death but had mentioned that the decomposed body of the deceased was brought to Chilaw Morgue on 07.04.2005 around 2.00 pm. While giving evidence, the JMO expressed an opinion that the death of the deceased could have occurred 4-5 days prior to the postmortem examination. The date of death mentioned in the indictment clearly establish the date on which PW1 had seen the 2nd Appellant strangling the deceased.

As per the Section 165 of the Code of Criminal Procedure Act No.15 of 1979, the Appellant had been given reasonable notice the time of incident. For clarity the Section 165 of CPC is re-produced below:

165. Particulars as to time, place and person.

(1) The charge shall contain such particulars as to the time and place of the alleged offence and as to the person (if any) against whom and as to the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged and to show that the offence is not prescribed.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of movable property, it shall be sufficient to specify the gross sum or, as the case may be, the gross quantity in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 174:

Provided that the time included between the first and last of such dates shall not exceed one year.

(3) When the nature of the case is such that the particulars mentioned in section 164 and the preceding subsections of this section do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

In **Bhoginbhai Hirjibhai v. State of Gujarat** (supra) the court held further:

"In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters."

"It is unrealistic to expect a witness to be a human tape recorder."

In **R. v. Dossai** 13 Cr.App.R. 158 the court held that:

"A date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided that there is no prejudice below) where it is clear on the evidence that if the offence was committed at all, it was committed on the day other than that specified."

As the Appellants had been given sufficient notice regarding the date of offence under which they had been indicted and led plausible evidence through witnesses regarding the period, I conclude that this has not caused any prejudice or failure of justice. Hence, this ground of appeal has no merit at all.

In the 3rd ground of appeal, the Counsels contended that the Learned High Court Judge had failed to consider the contradictory and inconsistent version of prosecution witnesses and thereby the conviction is bad in law. According to PW1, the incident had taken place on 02.04.2005 and she gave evidence on 13.06.2012, seven years after the incident. Hence, it is not possible to remember everything accurately as stated in the police statement.

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

> *"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.....The court observed further, that human beings are not computers and that it would be dangerous to disbelieve the witness and reject evidence based on small contradictions or discrepancies".*

In this case, no contradiction was marked and no omission was highlighted. The Learned High Court Judge had correctly mentioned in his judgment. Hence, this ground also has no merit.

The Learned Counsels in addition to above considered grounds of appeal, further argued that the judgment pronounced in this case is devoid of proper judicial analysis and evaluation of evidence and total disregard of the Section 283 of Code of Criminal Procedure Act No.15 of 1979.

Accordingly, the Code of Criminal Procedure Act No. 15 of 1979 and the Constitution of our country provides provisions to rectify any error, omission, or irregularity in a judgment where such error, omission or irregularity which has not prejudiced the substantial right of the parties or occasioned a failure of justice.

Section 436 of the Code of Criminal Procedure Act No: 15 of 1979 states as follows:

> "Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-
>
> (a) of any error, omission or irregularity in the complaint, summons, warrants, charge, judgment, summing up or other proceedings before or during trial or in any inquiry or other proceedings under this code; or
>
> (b) of the want of any sanction required by section 135,
>
> **Unless such error, omission, irregularity, or want has occasioned a failure of justice."** [Emphasis added]

Article 138 of The Constitution of Democratic Republic of Sri Lanka states:

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be 111 [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things 112 [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance:
>
> **Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect or irregularity, which has not prejudiced**

the substantial right of the parties or occasioned a failure of justice". [Emphasis added]

Considering the Learned High Cout Judge's judgment, I neither find prejudice occasioned nor the occurrence of a failure of justice in this case.

As discussed under appeal grounds, the prosecution had adduced strong and incriminating circumstantial evidence against the Appellants. The Learned High Court Judge had very correctly considered all the evidence presented by both parties and come to the conclusion that all the circumstances are consistent only with the hypothesis of the guilt of the Appellants and totally inconsistent with their innocence.

As the Learned High Court Judge had rightly convicted the Appellants for the charge of murder, I affirm the conviction and dismiss the Appeal of the Appellants.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL