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

In the matter of an Appeal made under Section 331(1) 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.

The Attorney General

Attorney General's Department

Colombo-12

COMPLAINANT

Court of Appeal No:

CA/HCC/0285-286/2018

High Court of Kurunegala

Case No.HC 107/2016

1. Jayalath Pelige Suresh Priyashantha alias Jayalath Pedige Suresh Priyashantha
2. Subashini De Silva Weerakkodi

ACCUSED

AND NOW BETWEEN

1. Jayalath Pelige Suresh Priyashantha alias Jayalath Pedige Suresh Priyashantha
2. Subashini De Silva Weerakkodi

ACCUSED-APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Nihara Randeniya for the 1st Appellant.**
Sandeepani Wijesooriya for the 2nd Appellant.
Dilan Ratnayake, SDSG for the Respondent.

ARGUED ON : **16/01/2024**

DECIDED ON : **17/05/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted by the Attorney General for committing the offences as mentioned below:

1. On or about 07.06.2009 at Kurunegala by causing death of Violet Mallika Yatawara, thereby committed an offence punishable under Section 296 read with Section 32 of the Penal Code.
2. In the course of the same transaction, committed robbery of jewelleries worth about Rs.250,000/- thereby committed an offence punishable under Section 380 read with 32 of the Penal Code.
3. In the course of the same transaction, you dishonestly received or retained property knowing or having reason to believe the same to be stolen property, own by the deceased thereby committed an offence punishable under section 394 read with Section 32 of the Penal Code.

The trial commenced before the High Court Judge of Kurunegala as the Appellants opted for a non-jury trial. The prosecution had led 22 witnesses and marked production P1-P41 and closed the case.

The Learned High Court Judge having satisfied that evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the accused. The Appellants had made dock statements and closed their case.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants on 1st and 2nd count only. The Learned High Court Judge had neither convicted nor made any order on 3rd count.

After recording *Allocutus,* the Learned High Court Judge sentenced them to death on 30/10/2018 in respect of 1st count and imposed 10 years rigorous imprisonment with a fine of Rs.10,000/- each for 2nd count. In default, 06 months simple imposed on both Appellants.

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

The Learned Counsels for the Appellants informed this court that the Appellants had given their consent to argue this matter in their absence due to the Covid 19 pandemic. At the hearing, the Appellants were connected via Zoom platform from prison.

The background of the case *albeit* **briefly is as follows:**

The deceased Mallika Yatawara, was a famous business woman who owned several drapery shops in Kurunegala. The 1st Appellant had worked as a labourer cum gardener of the deceased's house, while the 2nd Appellant worked in the kitchen of the deceased's house. Although both Appellants lived in a room of the house, were not legally married. This unfortunate incident had happened after 2-3 months of assuming duties by the Appellants.

According to PW2, Upali Madawala, an employee of the deceased, in the morning of date of incident, he had gone to drapery shops with the deceased, collected money and returned to deceased's house. Thereafter both the deceased and PW2 had counted the money, and the deceased kept the money behind the curtain. After counting money, PW2 had left the house at about 8.00 am leaving the deceased and the Appellants who were the only occupants at that time. Further, PW2 had lost his mobile on the very day.

Around 12.00 noon PW2 had received a call from the deceased and the deceased went incommunicado from 12.30 pm onwards. As such, PW2 had gone to the deceased's house around 1-1.30 pm and found the gate was locked and no one was there at the deceased's house. Again, PW2 had visited the deceased's house around 5.30 pm but no one was seemed to be there. As such he had called PW1, Anura Wimalasiri and requested him to come to deceased's house as he was in Wariyapola with his wife. After arrival of PW1, both had entered the house from rear door and found blood stains on the floor. Also seen the deceased was fallen on the floor in a pool of blood. Hence, they had informed the incident to the police and few police officers from Kurunegala Police Station arrived and discovered the deceased's body inside the house.

PW1, Anura Wimalasiri was living in the deceased's house from his childhood. His family too lived in the deceased's house with four other working girls. As the day of incident was a Poya Day, he and his family had gone to Wariyapola and the four girls also left the deceased's house leaving only the deceased and the Appellants in the deceased's house.

According to PW11 CI/Wickramanayake, he had gone to the deceased's house and found the deceased's body lying on the floor with cut injuries on her neck. He also had noticed some footprints on the blood. As such he had instructed the fellow police officers to secure the crime scene. Upon search, a bag with cash amounting to Rs.12,67,500- was recovered from behind the curtain and was the same was handed over to the deceased's daughter.

According to PW13, CI/Piyatilaka who had conducted investigation regarding the Appellants, he had first arrested the 2nd Appellant upon receiving information about her from her mother. She was arrested at Ja-ela after 4 days of the incident and recovered a camera and a mobile phone from her custody. Although she had not given proper information about the 1st Appellant, the police managed to arrest him at Ja-ela and recovered two travelling bags. Inside the same a camera, a DVD player, a Broadband router,

a mobile phone, a lady's hand bag, a gold chain, bunch of keys, a thread, two mobile sim covers, several certificates and several bills were recovered by the police. Further, upon his statement, on 11.06.2009 a pole, a knife, and a wire were recovered from the garage and the rear of the kitchen of the deceased's house. At that time funeral rituals were in progress at the deceased's house.

Thereafter, prosecution had called the Deputy Registrar of Fingerprint SI/Welagedera. He had received 10-foot prints, a fingerprint and a palm print from the scene of crime. The photographs were taken by PS/28463 Ranasinghe. The photographs had been taken on 07.06.2009, i.e. the date of offence. After thorough examination and comparison, this witness had concluded that the footprint recovered on the blood close to the place where the deceased was fallen tallied with the foot print of 1st Appellant. Another footprint recovered on the tile floor of the dining area tallied with the footprint of 2nd Appellant. The report of the Registrar of Finger Print was marked as P37.

SI/Anura Dissanayake and the photographer PS/28463 Nihal Ranasinghe had corroborated the evidence given by Registrar of Fingerprint, and also confirmed that the duo had visited the crime scene on 07/06/2009 and taken photographs which had been used to prepare the finger print report.

JMO/ Dr.Senanayake had conducted the post mortem examination of the deceased and noted five external injuries on the deceased's body. He had come to the conclusion that the death was caused due to ligature strangulation and a cut of the throat.

The prosecution had marked the confession of 2nd Appellant through Hon.Magistrate Ajith Wasantha Kumara as P40. As the defence objected for the marking, a *voire dire* inquiry was commenced. After the cross examination of the prosecution witnesses the defence called 2nd Appellant to witness box to record her evidence. After the cross examination by the prosecution, the defence closed their case pertaining to *voire dire* inquiry.

After considering the evidence presented by both parties, the Learned High Court Judge had allowed the prosecution to mark the confession of the 2nd Appellant as a production.

After closure of the prosecution's case, the defence was called, and both the Appellants made dock statements and closed their case. Both the Appellants denied the charge and blamed the police for fabricating this case against them.

The 1st Appellant had raised following grounds of appeal.

1. That the Learned High Court Judge failed to consider the well-settled principles of law relating to a case entirely based on circumstantial evidence.
2. That the Learned High Court Judge convicted the 1st Appellant based only on suspicious circumstances and speculations.
3. That the Learned High Court Judge failed to exclude the involvement of a third party.
4. That the Learned High Court Judge failed to analyse credibility of the prosecution witnesses and the entirety of the prosecution case.
5. That the Learned High Court Judge failed to consider the important contradictions and omissions of the prosecution witnesses.
6. That the Learned High Court Judge failed to analyse the defence evidence in the correct perspective and rejected the same on wrong premise.

The 2nd Appellant had raised following grounds of appeal.

1. The indictment was not read over to the 2nd Appellant.
2. The dock statement made by 2nd Appellant was not considered and analysed in the judgment.

3. The Learned High Court Judge erred in law by failing to consider the statement under Section 127 of the CPC which is an exculpatory statement and not a confession.
4. The Learned High Court Judge erred in law by failing to consider the items of circumstantial evidence led against the 2nd Appellant is not sufficient to draw an irresistible and inescapable inference the 2nd Appellant entertain common murderous intention with the 1st Appellant.
5. That the Learned High Court Judge failed to consider that the suspicious circumstances do not establish the guilt of 2nd Appellant.
6. That the Learned High Court Judge has not analysed the 2nd charge in the judgment and not given reasons for the conviction against the 2nd Appellant as per Section 283 of the CPC.

As the grounds of appeal urged on behalf of the Appellants are interconnected, all grounds will be considered together hereinafter.

Circumstantial evidence, within legal contexts, doesn't stem directly from observing a fact at hand. It hinges on drawing logical inferences to bolster a claim. Scrutiny of circumstantial evidence is paramount, especially when coupled with other evidence. Relying solely on a single piece of circumstantial evidence for a conviction is typically frowned upon by courts. Yet, when multiple strands of circumstantial evidence intertwine, their collective weight increases significantly.

In **King v Abeywickrama** 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 **Podisingho v King** 53 NLR 49 the court held that:

> *"(ii) that in a case of circumstantial evidence it is the duty of the trial Judge-to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt."*

In this case the Learned High Court Judge had the distinct advantage of hearing all the witnesses and observing their demeanour and deportment. This, no doubt paved the way to the Learned High Court Judge to better comprehend the case. Further, in the course of her Judgment the Learned High Court Judge had very correctly commented on how circumstantial evidence should be approached with decided cases.

In the course of the Judgment, the Learned High Court Judge had correctly analysed the evidence presented to support each of the items established on circumstantial evidence. The Learned High Court Judge finally itemized from point 01-21 the evidence she relied upon to convict the Appellants. Hence, it is incorrect to say that the Learned High Court Judge had failed to consider circumstantial evidence in her judgment.

Next, the Appellants contended that the trial judge convicted the Appellants only based on suspicious circumstances and speculations. Also contended that the prosecution had failed to exclude the involvement of a third party.

In a criminal trial the Accused is presumed innocent until proven guilty beyond reasonable doubt. Suspicious circumstances, even though powerful, do not establish that the prosecution had proved the case beyond reasonable ground.

The Learned High Court Judge had very correctly analysed all evidence placed before her to arrive at her decision. Further, her decision is not based on flimsy or untenable reasoning. She had very correctly itemised the

circumstantial evidence from 1-21 to come to her conclusion that the facts so established were only consistent with the hypothesis of guilt of the Appellants.

The prosecution is bound to exclude the involvement of a third party if there was positive evidence of an identified third party's involvement in crime. In this case the prosecution had very correctly led all evidence pertaining to the crime and there is no doubt caused as to the involvement of the Appellants. The Learned High Court Judge had held the Appellants guilty for the 1st and 2nd charges after giving plausible reasons having examined the evidence presented.

The Learned High Court Judge in her judgment correctly analysed the credibility the witnesses to come to her decision. Further, she had the unique advantage of observing demeanour and deportment of all the witnesses. Therefore, it is incorrect to say that the Learned High Court Judge had failed to analyse credibility of the prosecution witnesses.

In **Attorney General v Sandanam Pitchi Mary Theresa** SC Appeal S.C. Appeal No. 79/2008 decided on 06.05.2010 the Supreme Court held that:

> *"Credibility is a question of fact, not of law. Appellate judges have repeatedly stressed the importance of the trial judges' observations of the demeanor of witnesses in deciding questions of fact (Vide, R. v. Dhlumayo (1948)2 SALR 677 (A); Merchand v. Butler's Furniture Factory (1963)1 SALR 885). No doubt the Court of Appeal has the power to examine the evidence led before the High Court. However, when they go so far as to conduct a demonstration of the evidence, they observe the material afresh and run the risk of stepping into the role of the original court (Vide, King v. Endoris 46 NLR 498; Alwis v. Piyasena Fernando 1993 (1) SLR 119; Fradd v. Brown and Co Ltd; Attorney General v. D. Senevirathne 1982 (1) SLR 302). The trial judge has a unique opportunity to observe evidence in its totality including the demeanour*

of the witness. Demeanour represents the trial judges' opportunity to observe the witness and his deportment and it is traditionally relied on to give the judges findings of fact their rare degree of inviolability (Vide, Bingham, 'The Judge as Juror' 1985 p.67)"

The Counsels further argued that the Learned High Court Judge had failed to consider the important contradictions and omissions in the prosecution's case.

The facts set out by the prosecution may not be accurate or even they can be crooked, in this background the tool of contradiction and omission are very effective to shake or shatter the credibility of prosecution evidence. Proof of contradiction and omissions though is very useful in criminal trials, it has to be used with circumspection and within a legal framework. The credibility of the witness does not stand impeached merely by proving contradictions on record. It is required for the defence side to show that prosecution witnesses may deliberately depose change or improve their original statement in order to cause prejudice to the accused. Similarly, minor omission or discrepancy in evidence is not enough to hold the accused not guilty. Thus, by striking out balance and by evaluating evidence in proper perspective justice can be done. The following cases are very important in this regard.

1. **State Rep. by Inspector of Police v. Saravanan** AIR 2009 SC 152
2. **Acharaparambath Pradeepan & Anr. v. State of Kerala** 2006 13 SCC 643
3. **Kehar Singh & amp; Ors v. State (Delhi Admn.) [3]** AIR 1988 SC 1883

In this case the defence could mark only two contradictions 2V1 and 2V2 from PW1's evidence. On perusal of the said two contradictions, the said contradictions certainly will not be capable to create a doubt in the

prosecution. Therefore, the credibility of PW1's evidence is not affected as correctly decided by the Learned High Court Judge.

Both the Appellants complain that the defence evidence was not considered in the correct perspective and rejected the same on wrong premise.

As correctly pointed out by the Learned Additional Solicitor General, the Learned High Court Judge has in the course of her judgment reproduced the dock statement of both Appellants in verbatim. She has also referred to two authorities on admissibility of dock statement in a criminal trial. At the conclusion of analysis, the Learned High Court Judge had disbelieved the defence and accepted the prosecution's version.

Both the Appellants in their respective arguments have taken up the position that after their arrest they were brought to deceased's house, taken inside and made them walk inside the house. According to PW13, the Appellants were arrested at Ja-Ela after three days of the incident and brought to deceased's house on the day of her funeral to recover certain items under Section 27 of the Evidence Ordinance.

Although the Appellant had taken up the position that they were taken inside the house and made them to walk inside the house after their arrest, the officers from the Fingerprint Department had visited the place of incident on the date of incident at about 10.00pm and photographed the foot prints, palm and finger from the scene of crime. Even they had photographed the deceased who was fallen in a fool of blood. All photographs were marked during the trial and the photographs bear the date as 07.06.2009.

The Counsel for the 2nd Appellant brought to the notice of the Court that the indictment was not read over to her after it was served on her.

According to the journal entry dated 10.10.2017 the indictment was served to the 2nd Appellant on that day. On 09.07.2018 the Counsel for the 2nd

Appellant informed Court that all documents had been given to the 2nd Appellant. On 23.07.2018 the Appellants elected a non-jury trial. Although reading of the indictment was not recorded but all other steps under Section 195 of the Code of Criminal Procedure Act such as granting of bail and obtaining fingerprints of the 2nd Appellant had been done. With the available materials, not recording could have been an oversight as the trial cannot commence without reading out the indictment.

Next, the Counsel for the 2nd Appellant contended that the Learned High Court Judge erred in law by failing to consider the statement under Section 127 of the CPC which is an exculpatory statement and not a confession.

In this case the Learned Magistrate had recorded a statement under Section 127(3) of the CPC.

Section 127(3) of the CPC states:

(3) A Magistrate shall not record any such statement being a confession unless upon questioning the person making it, he has reason to believe that it was made voluntarily, and when he records any such statement, he shall make a memorandum at the foot of such record to the following effect: -

> I believe that this statement was voluntarily made. It was taken I my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him.
>
> (Singed) A.B. Magistrate of the Magistrate's Court.

In this case a *voire dire* inquiry was held before the 127(3) statement was admitted as a confession and made voluntary before the magistrate. All necessary witnesses gave evidence and Learned High Court Judge made her order to allow the prosecution to mark the same as PW40 and portions of the confession relevant to this case were marked in detail by the prosecution.

In **Nuwan de Silva v The Attorney General** [2005] 1 SLR 2004, the accused was arrested and remanded with four others. After about 10 days of remand the accused wished to make a confession to the Magistrate who recorded the confession under section 127 of the Code of Criminal Procedure Act, (the Code) after giving the accused numerous opportunities to consider the matter. The Magistrate satisfied herself that the confession was voluntary and not vitiated by any inducement, threat or promise. At a voir dire inquiry, the High Court was satisfied about the voluntary nature (validity) of the confession and admitted it in evidence.

The accused told the Magistrate that he had a love affair with a girl but as he had no job the marriage was objected to. This was the motive for kidnapping the boy (on his experience of what he had watched on television), to obtain quick money as ransom. He enticed the boy to his grandmother's house by offering birds' feathers and telephoned the boy's father Jayantha de Silva. As the boy was next to the accused at the time, the accused closed his nose and mouth and took him to a room where the boy fainted. Believing that the boy had died, the accused strangled the boy until he really was dead and dumped him in the cess pit having placed the body in a fertilizer bag.

The accused also told the Magistrate that the reason for the confession was his sense of guilt and to free four others, his friends, who were also in remand but not involved in the crime. The accused was convicted of the offences charged despite his denial by evidence at the trial which was rejected. The Court held that:

> *"1. The conviction of the accused was justified on the oral and circumstantial evidence and/ or the confession.*
>
> *2. The confession was voluntarily made in terms of section 127 of the Code read with section 24. Factors such as the accused's knowledge of the strength of the case against him and known to the police or the*

desire to free his friends are irrelevant. Voluntary in ordinary parlance means "of one's own free will."

3. The burden of proving that the confession was not vitiated by section 24 of the Code is on the prosecution.

4. Having regard to all the factors including the strangulation of the boy and the concealment of the body of the boy in a cess pit, there is no doubt as to the murderous intention. Hence the offence of causing the boy's death amounted to murder and not culpable homicide not amounting to murder."

In this case, although 2nd Appellant denied any involvement in the case during the trial, the confession of the 2nd Appellant cannot be considered as an exculpatory statement as argued by the Counsel for the 2nd Appellant.

The Counsel for the 2nd Appellant advanced another argument that the Learned High Court Judge had failed to properly evaluate the evidence relating to Common Intention and also failed to analyse the 2nd charge in the judgment and failed to give reasons for the conviction against the 2nd Appellant as per Section 283 of the CPC.

As per the evidence presented in this case, the items of circumstantial evidence clearly establishes that both Appellants were acting together with common intention. The Learned High Court Judge in her judgment considered each Appellant's culpability individually to come to her conclusion. This clearly demonstrates that they were acting in furtherance of a Common Intention.

The Learned High Court Judge had summarized the items of evidence to show Common Intention on the part of both Appellants and come to necessary and only conclusion that both Appellants were acting on a

Common Intention to commit murder and Robbery. The relevant pages are re-produced below:

Page 841-842 of the brief.

එනම්, මෙම 2 වෙනි විත්තිකාරියගේ පාපොච්චාරණය සහ මරණකාරිය අසල වැටී තිබූ 1 වෙනි විත්තිකරුගේ පා සටහන්, ඉන්පසු 1 වෙනි විත්තිකරුගේ භාරයේ තිබී මරණකාරියගේ රත්තරන් භාණ්ඩ, සහ 2 වෙනි විත්තිකාරියගේ භාරයේ තිබී ඇගේ වීඩියෝ කැමරාව සහ ජංගම දුරකථනය අත්අඩංගුවට ගෙන ඇත. ඒ අනුව මෙහිදී ඉහත සඳහන් පරීවේෂණීයන්ට අනුව මෙම අධිකරණයට එළඹිය හැකි එකම අනුමැතිය වන්නේ මෙම මරණකාරියගේ මරණය මෙම 1, 2 විත්තිකරුවන් පොදු චේතනාව මත ක්‍රියාත්මක වී සිදු කරන ලද බවත් එය සිදු කිරීමෙන් පසුව ඇගේ භාරයේ තිබූ භාණ්ඩ වන රත්තරන් බඩු සහ මුදල් කොල්ලකන ලද බවය.

In the Code of Criminal Procedure Act No. 15 of 1979 and the Constitution of our country provide 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]

In this case the learned High Court Judge had considered the evidence presented by both parties to arrive at her decision. She had properly analyzed the evidence given by both sides in his judgment. As the evidence adduced by the Appellants failed to create a doubt over the prosecution case, the conclusion reached by the Learned High Court Judge in this case cannot be faulted.

As discussed under the appeal grounds advanced by the Appellants, the prosecution had adduced strong and incriminating circumstantial evidence against the Appellants. The Learned High Court Judge had very correctly analyzed all the evidence presented by all the parties and come to a correct finding that the Appellants were guilty of committing the murder and

robbery. Therefore, I dismiss the Appeal and affirm the conviction and the sentence imposed on them on 30.10.2018 by the Learned High Court Judge of Kurunegala.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL