

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

In the matter of an Appeal under Article 154(P) of the Constitution read with Section 331 of the Code of Criminal Procedure Act No.15/1979.

C.A.No.355-357/2017

H.C. Kandy No.206/2004

1. Pahala Polgasdeniya Mudiyanselage Ajith Karunaratne
2. Attanayake Mudiyanselage Sumudu Gayan Attanayake
5. Munasinghe Nihal Silva

Accused-Appellants

Vs.

The Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant-Respondent

BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULI J.

COUNSEL : Kalinga Indatissa P.C. with Kinkini Nelson and Sandeepani Wijesooriya for the 1st Accused-Appellant.

Neranjan Jayasinghe for the 2nd Accused-Appellant.

P.K. Prince Perera for the 5th Accused-Appellant
A. Navavi S.S.C. for the respondent

ARGUED ON : 11th October 2018

DECIDED ON : 11th January, 2019

ACHALA WENGAPPULI J.

The 1st, 2nd and 5th Accused-Appellants (hereinafter referred to as the 1st, 2nd and 5th Appellants respectively), in their separate petitions of appeal addressed to this Court, seek to set aside their convictions and sentences imposed by the High Court of Kandy in case No. 206/2004.

The 1st, 2nd and 5th Appellants were indicted along with three other accused before the High Court under following Sections of the Penal Code

in relation to causing death of *Herath Mudiyanselage Somaratne* on 9th May 1998;

1. Sections 113, 102 read with 296
2. Section 140
3. Section 146 read with 296
4. Section 32 read with 296.

After trial without a jury, the 1st, 2nd and 5th Appellants were convicted in relation to the 2nd and 3rd charges that were levelled against them. Other accused were acquitted of all the counts. They were accordingly sentenced to death in relation to the murder of the deceased.

Being aggrieved by the said conviction and sentence of death, the 1st Appellant seeks to challenge the validity of his conviction of the following grounds of appeal;

- a. the trial Court failed to appreciate the burden cast on the prosecution in establishing a case based on circumstantial evidence,
- b. the trial Court failed to appreciate the relevant considerations to be taken into account in analysing circumstantial evidence,
- c. the trial Court failed to appreciate that the evidence led at the trial was insufficient to rebut the presumption of innocence,
- d. the trial Court failed to appreciate the many inconsistencies between the evidence of the prosecution witnesses,

- e. the trial Court failed to appreciate the applicability of Section 146 of the Penal Code,
- f. the trial Court failed to appreciate the relevant considerations relating to the applicability of Section 27 of the Evidence Ordinance,
- g. the trial Court failed to consider the well-established principle "suspicious circumstances do not establish guilt",
- h. the Judgment cannot be supported having regard to the evidence led at the trial,
- i. the trial Court came to an erroneous finding based on speculations and surmises,
- j. the learned trial Judge did not have the benefit of the opportunity of observing the demeanour and deportment of the prosecution witnesses other than the evidence of the Judicial Medical Officer.

The 2nd Appellant's ground of appeal is as follows;

- a. the trial Court has erroneously convicted him on a presumption on his identity.

The 5th Appellant's ground of appeal is as follows;

- a. the prosecution has not proved the counts on which he was convicted beyond a reasonable doubt.

The case against the Appellants that had been presented by the prosecution before the trial Court is essentially a case based on items of circumstantial evidence. There are no witnesses as to the person who

inflicted the deep cut injury which resulted in the almost instantaneous death of the deceased or the person or persons who inflicted other cut injuries on his body.

Witness *Nilantha* is the driver of the three-wheeler in which the deceased has travelled in the company of "*Janthu*" and "*Babu*" when he was being chased by a group of persons in another three-wheeler driven by witness *Udaya Kumara*.

The deceased and the other two had got into the three-wheeler of the witness *Nilantha* at the *Dambulla* junction. They were armed with two knives. The witness had to take his passengers to their desired destination for the fear of being cut. The deceased was armed with a big knife while his fellow passenger "*Janthu*" was in possession of a smaller one. The witness drove his vehicle towards *Inamaluwa* on the instructions of the deceased. As they proceeded along the main road, after about $1 \frac{1}{2}$ kilometres away from Dambulla town, the engine of the three-wheeler was stalled on the middle of the road as it ran out of fuel.

The deceased was alarmed with this unexpected turn of events and having jumped off the vehicle started to run towards a *kiri Kade*. *Janthu* also ran after the deceased while *Babu* remained with the witness. After about two minutes, another three-wheeler had stopped in front of the stalled vehicle, after passing it in about 25 feet away. *Nilantha* saw the 1st and 5th Appellants getting off from the 2nd three-wheeler. He could not recollect as to whether they were armed or not. These two also ran towards the *kiri Kade*. According to *Nilantha* that was the last time he was seen the deceased alive.

Udaya Kumara stated in evidence that the 1st Appellant, a person called "Ranga" and seven other unknown persons have got into his three-wheeler forcibly and ordered him to follow another three-wheeler travelling ahead of them along the *Dambulla* main road towards *Polonnaruwa*. None of the nine passengers were armed. He followed it for about 2 kilometres. He learnt from his passengers that they wanted to get hold of the deceased. As they travelled along the main road, they saw the other three-wheeler had ran out of fuel and sitting on the middle of the road. They had then stopped their vehicle in front of the already stationary vehicle after passing it. No sooner he stopped the vehicle, his passengers got off it and ran along the road. He did not see anyone in the stalled vehicle except for its driver who was inspecting its engine.

The stalled three-wheeler driver is a known person and then he offered him a lift to the petrol shed and thereafter dropped him off near the stalled vehicle.

This incident has happened at about 7.00 in the evening of 9th May 1998.

Grama Niladhari of the area found the body of the deceased on the following morning lying near a banana plantation located at the edge of a large paddy field.

Investigating officers have recovered a screw driver/tester, a knife and a blade of a *kattay* lying beneath the body of the deceased which had suffered several cut injuries and was lying 800 yards away from the farm shop.

Medical officer who performed the post mortem examination on the body of the deceased has observed 14 cut injuries and abrasions. His death was due to a deep cut injury to head, damaging brain matter which, in the opinion of the expert, may have caused an instantaneous death.

Learned President's Counsel for the 1st Appellant, in support of his multiple grounds of appeal, contended that the items of circumstantial evidence presented by the prosecution does not satisfy the considerations that are applicable to such cases and the trial Court has failed to appreciate them in the light of those considerations. He relied on a series of authorities which dealt with the considerations that a trial Court should employ in determining the guilt of the accused in a circumstantial evidence case.

Learned President's Counsel invited our attention to the evidence is that the Appellants and others were unarmed when they got off the three-wheeler before they chased after the deceased. Only the deceased and his companion had cutting weapons with them. The Body of the deceased was recovered lying at a considerable distance of 800 yards away from the point they were last seen by the witnesses. The body of the deceased was discovered only on the following morning. Therefore, it was contended that the prosecution had no evidence to prove;

- a. whether there were five or more persons at the time of the attack which had resulted in the death of the deceased,

- b. the exclusion of the involvement of a 3rd party in the attack in the absence of the evidence of *Janthu* who was with the deceased with a cutting weapon,
- c. that the Appellants have participated in the said attack.

Learned Counsel for the 2nd Appellant submitted that there was no positive identification of the 2nd Appellant by any of the witnesses and the trial Court inferred that the reference to *Ranga* was made in relation to him since he was tried in absentia. Learned Counsel further contended that the indictment does not refer to any aliases of the 2nd Appellant and therefore the conclusion reached by the trial Court as to his guilt is clearly erroneous.

In relation to the 5th Appellant, learned Counsel who appeared for him also relied on the ground of appeal that the items of circumstantial evidence presented by the prosecution does not justify an inference of guilt against the 5th Appellant.

Learned Senior State Counsel in his reply submitted that the deceased's companion was dead at the time of the trial and therefore prosecution was not able to place his evidence before the trial Court. He submitted that the trial Court was alive to and had in fact applied the principles, that are applicable in relation to cases of circumstantial evidence, correctly on the facts of the case in convicting the Appellants.

In *Don Sunny v Attorney General* (1998) 2 Sri L.R. 1, this Court has held that the following principles should apply in considering a case presented on circumstantial evidence;

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 the only inference that the accused committed the offence.
On a 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 a consideration of the proved items of circumstantial evidence, the only inference that can be drawn is that the accused committed the offence then they can be found guilty.
4. 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 and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

Upon consideration of the impugned judgment of the trial Court it is observed by this Court that the trial Court has identified the several items of circumstantial evidence that had been placed before it by the prosecution to substantiate the charges contained in the indictment.

Primarily the trial Court found the Appellants guilty of murder on two considerations;

1. the Appellants with several others unknown to the prosecution have chased after the deceased with the intention of "attacking" him (පහර දීමේ වෙතනාව / paharadeeme chetanawa),
2. the deceased was last seen alive at the time of the Appellants chasing after him and therefore they owe an explanation.

The conclusion reached by the trial Court that the Appellants have chased after the deceased with the intention of attacking him does not justify an inference of guilt against them of murder in the light of the available evidence in the instant appeal. As correctly pointed out by the learned President's Counsel that the Appellants had no weapons when they "ran" after the deceased which could have been used to inflict injuries as seen on the deceased's body.

It is noted that the deceased was in fear of being attacked by his pursuers. Whether the deceased knew the identities of all or some of them who travelled in the other three-wheeler which followed theirs is not known. There is no evidence that any of the Appellants have made

utterances indicative of their intentions in relation to the deceased. The death of the deceased was due to a deep cut injury to his head, probably with a weapon similar of an axe as per the medical opinion. There is no evidence led by the prosecution that any of the Appellants had or could obtain such a weapon in that situation.

It could be inferred that the Appellants may have intended to attack the deceased when they chased after him. However, that fact alone does not suffice to justify an inference that they did cause his death since there is no evidence as to the time of death of the deceased. This is a consideration erroneously employed by the trial Court which expected the Appellants to offer an explanation.

In *The King v Appuhamy* 46 N.L.R. 128 the Court of Criminal Appeal has held thus;

"The prosecution failed to fix the exact time of 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."

As noted earlier, the body of the deceased was found only on the next morning more than 12 hours since he was last seen alive. In the absence of other evidence, the prosecution failed to exclude any third-

party intervention during this time given the violent history attached to the deceased.

Learned President's Counsel cited the judgment of *Muniratne v State* (2001) 2 Sri L.R. 382 which in turn cited *Queen v Sumanaena* 66 NLR 350 where it was observed thus;

"Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence..... The burden of establishing circumstances which not only establish the accused's guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial and is the same in a case of circumstantial evidence as in a case of direct evidence."

Having carefully considered the several items of circumstantial evidence presented by the prosecution against the principles enunciated in the judgments of *Don Sunny v Attorney General* and *Queen v Sumanaena* (supra) we are of the considered view that those items of circumstantial evidence does not satisfy such criterion and conclude that the trial Court had erroneously found them guilty to the murder of the deceased.

In view of the above finding the ground of appeal raised by the 2nd Appellant does not arise for consideration.

We therefore set aside the conviction and sentences imposed on the 1st, 2nd and 5th Appellants by allowing their individual appeals.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL