

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

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

C.A. Case No: 60/2016

**H.C. Anuradhapura Case No:
218/2006**

Hon. Attorney General

Complainant

-Vs-

Athauda Ralalage Rukman Jayawardena

Accused

-And Now-

Athauda Ralalage Rukman Jayawardena

Accused-Appellant

-Vs-

Hon. Attorney General

Complainant-Respondent

Before : A.L. Shiran Gooneratne J.

&

K. Priyantha Fernando J.

Counsel : Neranjan Jayasinghe for the Accused-Appellant.

Azard Navavi, SSC for the Respondent.

Written Submissions of the Accused-Appellant filed on: 12/01/2018

Written Submissions of the Complainant-Respondent filed on: 04/05/2018

Argued on : 31/01/2019

Judgment on : 07/03/2019

A.L. Shiran Gooneratne J.

The Accused-Appellant (hereinafter sometimes referred to as the Appellant) was indicted in the High Court of Anuradhapura for causing the death of Chandani Deepika Kumari Ranatunga (hereinafter referred to as the deceased) under Section 296 of the Penal Code in the 1st count, attempt to commit robbery whilst armed with a deadly weapon in the 2nd count and habitually dealing with stolen property in the 3rd count in terms of Section 384 and Section 395 of the Penal Code respectively. Upon conviction on all counts, the Appellant was sentenced to death on the 1st count.

I will now briefly place on record the evidence relied upon by the learned trial judge to convict the Appellant.

Dingiri Bandage Seelawathi, the mother of the deceased (PW1), in her evidence stated that on the date in question, the deceased who lived 1km away from her house had left her infant child in her house and together had proceeded to the village tank “around 11 12”, which was in close proximity to the house of the deceased. On the way she had got into a motor cycle and continued her journey, whereas the deceased had continued her walk. Sometime later, a person had informed her that the deceased was seen lying on the road. When the witness arrived at the place of the incident, she had observed the body of the deceased bloodied, fallen on the ground. The deceased was taken to the Maradankadawala Hospital and on the way the deceased had told PW.1, “take me for the sake of the child”. She described the place where the deceased was fallen as a shrub jungle and in cross-examination she stated that when she was traveling in the motor cycle, she had seen 5 to 6 persons close to the shrub jungle, whom she presumed to be surveyors. She has specifically identified a person called Kapurubanda, a person living close to the house of the deceased, among the unidentified persons. She had also seen a person on a motor cycle, who is identified as working in the Electricity Board.

Hema Ambepitiyage Senaratne (PW2), states that he is an employee of the Electricity Board an on the date in question, he was on his way home on a motor

cycle around 5.30 PM, where he came across the deceased fallen on the side of the road. In cross-examination this witness re-calls seen a few people cutting trees in close proximity to where the deceased was fallen and among them was Kapurubanda, whom he identified as a person known to him. When this witness approached the deceased, she had stated “I was attacked and my earrings were removed”.

Kumara Ranatunga (PW3), a brother of the deceased has stated at page (73), that at the hospital the deceased had told him that *a fair handsome boy had hit her on the spine could be with a club, pulled her hair and removed her chain and the earrings.*

“මලේ, මට පුද්ගාට සේසන කොලෝක් පොල්ලකින් වගේ මගේ කොන්දට ගහල කොණ්ඩින් ඇදලා මගේ මාලයයි කරාපූ දෙකයි කඩා ගත්තා කිවිවා.”

According to the medical evidence, the cause of death is due to “deep cut injuries to blood vessels in the neck caused by a stab with a sharp double edged weapon”.

The chief investigating officer, PS 18189 Amaratunga (PW13), giving evidence, stated that the Appellant was arrested 1 month after the incident. He further stated that based on the statement made by the Appellant, he recovered a knife, a bank receipt and a few clothing from the house of the Appellant in terms of Section 27 of the Evidence Ordinance. The relevant portion of the statement

which led to the discovery of the said items is marked as P7, which states, *I can show the police, what is in the card board box in the room which is behind the cupboard.*

“කාමරයේ කබඩි එක පිටපස කාඩ්බෙර්ස් පෙටරියක දාලා තියෙනවා. ඒක මට පොලීසියට පෙන්වා දෙන්න පුළුවන්.”

Upon the said evidence, the trial judge has permitted the prosecution to mark in evidence a knife as P3, a black denim trouser and a light green coloured t'shirt as P6, and a bank receipt pertaining to a mortgage of a chain as P4.

The conviction of the Appellant was based entirely on circumstantial evidence. Before I evaluate the above noted circumstantial facts in evidence, I wish to dwell upon the guiding principles which are necessarily to be followed when evaluating such evidence.

In a recent judgment, *Aluwihare, PC. J. in case SC Appeal 118/17* observed;

“it was incumbent on the prosecution to establish that the ‘circumstances’ the prosecution relied on, are consistent only with the guilt of the accused- appellant and not with any other hypothesis.

Regard should be had to a set of principles and rules of prudence, developed in a series of English cases, which are now regarded as settled law of our courts.

The two basic principles are-

(i) The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn.

(ii) The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct (per Watermeyer J. in R. vs. Blom 1939 A.D. 188)"

Aluwihare, PC, J. further observed that;

"it so appears that judges tend to gloss over facts and draw inferences whereas close scrutiny of evidence is sine qua non in cases based on circumstantial evidence"

The evidence of PW1 and PW2 are consistent to the extent that both these witnesses re-call having seen Kapurubanda together with few others in the vicinity where the body of the deceased was discovered. According to PW1, the deceased along with this witness was on their way to the village tank between 11 AM and 12 PM. PW 3 discovered the body of the deceased fallen on the side of the road around 5.30 PM. Kapurubanda lived close to the house of the deceased. In spite of Kapurubanda been identified in the midst of the rest of the unidentified persons, the investigators had failed to question him regarding this murder. The prosecution does not provide an answer to the question as to why Kapurubanda was excluded

from the investigation. The above circumstances would necessarily lead to the following inferences;

- (a) has the prosecution excluded the possibility of the involvement of a third party in relation to the death of the deceased
- (b) does the failure to exclude the possibility of involvement of a third party, create a serious doubt arising out of the time the deceased left the house and the time PW3 discovered the body fallen on the side of the road.

In ***Perera Vs. The Queen (1970) 76 NLR 217***, the Privy Council held that;

“the “circumstances of the transaction” which resulted in death are circumstances that have some proximate relation to the death of the declarant”.

As pointed out in ***R. Vs. Marshall Appuhamy (1950) 51NLR 272***,

“whether there is a proximate relation between the commencement of the transaction and the ending thereof is a matter to be determined on the facts of each case”

(cited with approval by Mark Fernando J. in the case of Chuin Pong Shiek v. The Attorney General (1999) 2SLR 277)

The counsel for the Respondent strenuously upholding the conviction argued that the time proximity in relation to the evidence of PW1 and the discovery of the body should be considered in favor of the prosecution. According to the evidence of PW1 and PW2, the body of the deceased was lying on the side

of the road for at least 4 1/2 hrs. to 5 hrs., from the time of the attack. The investigating officer, (PW13) in evidence states that the body was discovered close to a shrub jungle on the Dayagama Mawathagama road in close proximity to the Dayagama junction. There is no other evidence led by the prosecution regarding the place of the crime. The time proximity, as contended by the State Counsel cannot in any way be held in favour of the prosecution;

Firstly, since the duration of the time period cannot exclude the reasonable possibility of the involvement of a third party.

Secondly, the absence of any incriminating evidence regarding the presence of the Accused-Appellant at the scene of the crime.

It is observed that the learned trial judge has failed to address his mind to any of the said issues. The presence of Kiribanda and 5 to 6 other unidentified persons in close proximity to the scene of the crime creates a hypothesis of innocence on the part of the Appellant, which should be taken into consideration before the inference of guilt is to be drawn. In this instance the prosecution has failed to exclude every reasonable doubt arising out of evidence, which should have necessarily been held in favour of the Appellant.

Before I leave this issue, it is pertinent at this stage to discuss the infirmities arising out of the contradictory nature of the dying declaration and the infirmities arising out of the post mortem report which has not received the required attention of the learned trial judge. The narration of evidence of PW1 and PW3 indicates

that the learned trial judge has taken into consideration statements uttered by the deceased which comes within the ambit of Section 32 of the Evidence Ordinance. The post mortem report clearly indicates that the death was caused by a stab located in the neck which was caused by a sharp double-edged weapon. However, as noted earlier the dying deposition does not support the said contention. According to the dying deposition the deceased was attacked with a club like object to the spine. The medical evidence indicates that the deceased was able to talk at the time of making the said dying deposition.

In the case of *Bhagatram v. State of M P, 1990 CrLJ 2407 (Madh.Pra.)* it was held that;

“when there is no trustworthy evidence to show that the deceased was capable of talking or that in fact that he talked, and when there is no injury corresponding to the weapon mentioned in the declaration and when the dying declaration does not recite that the declarant admitted it to be correct ----, such a declaration cannot be acted upon.” (emphasis is mine)

The contention of the counsel for the Respondent is that on the statement of the Appellant, the recovery of a knife in terms of Section 27 of the Evidence Ordinance would be sufficient proof to implicate the Appellant to the injuries sustained by the deceased. He also submits that the recovery made in terms of Section 27, is sufficient proof to establish the identity of the Appellant.

It is observed that the statement given by the Appellant does not make any reference to a particular fact to be discovered. However, the learned trial judge has concluded that the investigating officer to whom the statement was made discovered the said items based on the statement made by the Accused-Appellant.

In *Queen v. Krishna Pillai I (S. C. 19/68), H. N. G. Fernando, C. J.* pointed out the dangers inherent in a statement of this nature, admitted under Section 27 of the Evidence Ordinance when he observed;

"Unless cautioned, juries are prone to attach undue importance to such statements and are too ready to infer that the person on whose statement some fact was discovered, had also in that statement confessed to the commission of the crime".

It was pointed out in that case, that the trial Judge should clearly warn the jury that the law prohibits such an inference.

Section 27 of the Evidence Ordinance provides;

(1) *Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.*

(2) -----

The distinction between the discovery of a fact and the finding of some object is clearly brought out by the Privy Council in the decision in the case of *Pulukuri Kottaya v. Emperor, (1947) AIR PC 67 at 70*, where it was observed that;

"It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact".

This reasoning of the Privy Counsel was followed in the cases of *Piyadasa vs. Queen, 72 NLR 434* and *Etin Singho vs. Queen, 65 NLR 353*.

Sarkar on Evidence, 14th edition 1993 Vol.1 page 476 states;

"S.27 has prescribed two limitations for determining how much of the information received from the accused is provable against him:

(1) the information must be such as has caused discovery of the fact, ie the fact must be the consequence, and the information the cause of its discovery. (2) The information must 'relate distinctly' to the fact discovered. Both conditions must be satisfied."

Therefore, it is very clear that one of the main criteria to bring Section 27 of the Evidence Ordinance into operation is that, there has to be a discovery of a fact

in consequence to information received from a person accused of any offence. It is observed that in this instance the discovery of any of the productions marked in evidence are not in consequence of any information leading to the discovery of a fact. Therefore, such discovery becomes irrelevant under Section 27 of the said Act.

In the instant case the prosecution has also led inconclusive evidence in relation to a gold chain alleged to have been pawned by the Appellant. In spite of the illegality in the discovery of the said item in terms of Section 27 of the Evidence Ordinance, the learned trial judge has applied the presumption in terms of Section 114 (a) of the Evidence Ordinance which calls to account the possession of the gold chain.

Section 114 of the Evidence Ordinance provides that;

"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case."

Illustration (a) of Section 114 provides;

"The Court may presume (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;"

In the case of **Don Somapala v. Republic of Sri Lanka (1975) 78 NLR 183**, the Supreme Court decided that;

"although the presumption arising from recent possession of stolen property is that the person in possession is either the thief or has received them knowing them to be stolen, there is no "similar" presumption that a murder committed in the same transaction was committed by the person who had such possession. The burden still remains on the prosecution to prove that the person who committed the robbery did also either commit the murder or participated in the criminal act of killing sharing a common intention to kill."

Taking into consideration the infirmities as discussed above, we are of the view that there is absolutely no reason that warrants the application of the said presumption in this case.

The prosecution case totally relied on the evidence of a Section 27 recovery, which does not relate to any fact discovered. We also note that the prosecution has failed to exclude the involvement of a third party which has caused a serious doubt in the prosecution case. Therefore, the doubt created as noted, should be necessarily be considered in favor of the Appellant.

"the rule regarding the exclusion of every hypothesis of innocence before drawing the inference of guilt was laid down way back in

1838 in the case of R. vs. Hodges (1838 2 Lew. cc.227). the circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt."

(cited with approval in SC Appeal 118/17, supra)

In the circumstances the following grounds of Appeal submitted by the Appellant, namely;

1. has The learned trial judge based his conviction on unreliable circumstantial evidence
2. has the learned trial judge erred in applying the presumption under Section 114 illustration (a) when evaluating the evidence in this case

Should be decided in favor of the Appellant.

Accordingly, the conviction dated 09/06/2016 and the corresponding sentence is set aside and the Accused-Appellant is acquitted from all charges.
Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL