IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

SC/APPEAL/118/2022

SC/SPL/LA/52/2020

Jayaratne Bandage Senaka Kumara Herath

Accused

Court of Appeal No:

CA/109/14

AND

Jayaratne Bandage Senaka Kumara Herath

High Court of Anuradhapura:

HC/170/2011

Accused- Appellant

Vs.

The Hon. Attorney General

Attorney General's Department

Colombo 12

Complainant-Respondent

AND NOW BETWEEN

Jayaratne Bandage Senaka Kumara Herath

Accused - Appellant - Appellant

Vs.

The Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant - Respondent - Respondent

Before : P. Padman Surasena J.

Arjuna Obeyesekere J.

Menaka Wijesundera J.

Counsel : Asela Seresinghe instructed by Denuwan Perera for the Accused-Appellant-Appellant.

Shanil Kularatne, ASG, instructed by Ms. Rizni Firduos, SSA, for the Complainant-Respondent-

-Respondent.

Written Submissions : Written submissions on behalf of the Accused - Appellant – Appellant on 11th January, 2023.

Written submissions on behalf of the Complainant – Respondent -Respondent on 21st November, 2022.

Argued on : 07.03.2025

Decided on : 16.05.2025

Menaka Wijesundera, J.

The instant appeal has been filed to set aside the judgment dated 28.01.2020 by the Court of Appeal.

Upon considering the submissions of the Counsel for the petitioner this Court has granted special leave on the following questions of law:

a) Whether the learned High Court Judge and their Lordships' of the Court of Appeal have failed to consider that the circumstantial evidence led in the trial do not establish the irresistible inference of guilt of the Petitioner?

b) Whether the learned High Court Judge and their Lordships' of the Court of Appeal have failed to consider that the prosecution has failed to prove their case beyond reasonable doubt?

c) Whether the learned High Court Judge and their Lordships' of the Court of Appeal have failed to consider that the identification of the accused has not been established by the prosecution beyond reasonable doubt?

The appellant has been indicted under sections 296 and 380 of the Penal Code and had been found guilty for both the charges in the indictment and sentenced accordingly by the trial Court, which had been upheld by the Court of Appeal.

The instant case has been proved by the prosecution entirely on circumstantial evidence and the learned Counsel appearing for the appellant also challenged

the said circumstantial evidence and the identification of the appellant by a birth mark by the prosecution witnesses.

When considering a case on circumstantial evidence, Court has to bear in mind that the prosecution must prove beyond reasonable doubt that the circumstantial evidence led at the trial must only be consistent with the guilt of the appellant and not with any other hypothesis.

At this point, I wish to set out a set of rules out lined in the case of **Junaiden Mohamed Haaris v Hon. Attorney General (*SC Appeal 118-2017)*** decided on 9.11.2018 by **Justice Aluwihare**, which are as follows,

> *"1) The inference sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn.*
>
> *2) 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 v Blom 1939 A.D.188)*
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> *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."*

In the same judgment further reference has been made to the definition of circumstantial evidence in the book by E. R. S. R. Coomarswamy "The Law of Evidence" where it has stated as follows,

> *"The chain or strand of proved facts and circumstances must be so complete that no link in it is missing. If any vital factor which is necessary to make the chain or strand complete is missing or has remained unproved, it must be held that the prosecution has failed to establish its case. A vital link should never be inferred."*

Having regard to the above mentioned principles of law, now I shall venture to consider the items of circumstantial evidence adduced at the trial against the appellant by the prosecution,

1) A lorry driver who was going towards Nochchiyagama town in the evening of 28.12.2008 had seen a three-wheeler parked by the side of the road with a person lying near the said three-wheeler, and when carefully looked further he

had also seen blood around him and he had stopped and had asked whether he needs help, but he had refused.

Thereafter, he has gone towards the nearest junction and had informed the police constable on duty. Thereafter, he had also informed the police as well. He had seen all these with the light of his vehicle (pages 34, 35 of the brief)

2) A friend of the deceased had met him in his three-wheeler on 28/12/2008 around 6.45 pm, he had seen a person at the back being seated whom he remembers as a person with a prominent birthmark on the face. This particular person he had identified while in police custody on the next date (page 42) as being the appellant. He had also identified him in the dock.

3) A sales girl by the name of Iroshini had identified the knife, which had been recovered on the statement of the appellant by the police, which had been marked as P1, as the knife which had been bought by a person with a birthmark on 28/12/2008, around 5pm, from the shop she had been working in.

4) The police had received the first information on 28·12.2008 and thereafter, they had recovered the body on the same day near the three-wheeler at 2230 hours and near the body they had taken into custody part of a gold chain and a pendent which had been identified by the wife of the deceased as belonging to the deceased.

Thereafter, on 29/12/2008 the appellant had been arrested at 5.45 am, one and a half km away from the scene of crime and his clothes had been blood stained and from his custody part of a gold chain had been taken into custody. These items of jewellery had been identified by the wife of the deceased as belongings of the deceased.

5) The Government Analyst had identified human blood on the jewellery taken into custody, the knife and the clothes.

Upon considering the circumstances taken above, it is quite clear that the deceased was last seen in the company of the man on whom a birthmark had been identified and thereafter, the deceased had been found dead.

The appellant was arrested few hours later and from his possession, a piece of jewellery, which was blood stained, was taken into custody. His clothes had been blood stained as well.

The police had also taken into custody part of a broken chain and a pendant near the body. These items of jewellery had been identified by the wife of the

deceased. A blood stained knife had been recovered on the appellant's statement and the Government Analyst had analyzed human blood on all these items.

The doctor, who conducted the postmortem, had identified P1 as being a possible weapon, which could have caused the fatal injuries.

As such, all the above mentioned circumstances draw the irresistible inference that the appellant was with the deceased just before his death. Thereafter, after the body of the deceased was discovered by the police, the appellant was in possession of some personal items of the deceased which had been blood stained and his clothes were also blood stained. His arrest was made few hours after the recovery of the body of the deceased and one and a half km from the scene of the crime.

Illustration (a) of section 114 of the Evidence Ordinance provides that,

> *"It can be presumed that when a man 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 ***The King v William Perera (1944)*** 45 NLR 433 at 438, Chief Justice Howard stated that,

> *"The law is, that if, recently after the commission of the crime, a person is found in possession of the stolen goods, that person is called up to account for the possession, that is, to give an explanation of it, which is not unreasonable or improbable. The strength of the presumption, which arises from such possession, is in proportion to the shortness of the interval which has elapsed. If the interval has been only an hour or two, not half a day, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is, that the person must have stolen the property. In the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. And juries can, only judge of matters, with reference to their knowledge and experience of the ordinary affairs of life."*

In the case **Kalanchidewage Suresh Nandana v Hon. Attorney General (S.C Appeal No.14/2019)** decided on 09th of February, 2024, Justice Achala Wengappulli further elaborated that,

> *"It is important to note that the scope of presumptions of fact that could be drawn under Section 114 were not confined only to the cases of theft or of retention of stolen property. This statement is in accord with the view*

expressed by the author of the Indian Evidence Act as well as the Ceylon Evidence Ordinance No. 12 of 1864, Sir James Fitz-James Stephen. In his book titled 'An introduction to the Indian Evidence Act, (2nd Impression)', after dealing with the topic of conclusive presumptions, learned author then makes the following statement in relation to Section 114, (at p. 181), that "… the Court may ***in all cases whatever*** *draw from the facts before it* ***whatever inferences it thinks just****" (emphasis added). On a similar note, Wijewardene J (as he then was), in* ***Cassim v Udaya Manaar (1943)*** *45 NLR 519, quoted Tayler on Evidence 12th Ed, para 142, where it is noted that the "… presumption is not confined to cases of theft but applies to all crimes even the most penal. Thus, on an indictment for arson proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner has been held to raise a probable presumption that he was present and concerned in the offence. A like inference has been raised in the case of murder accompanied by robbery, in the case of burglary and in the case of the possession of a quantity of counterfeit money". His Lordship then added a caution in drawing such presumptions of fact by laying emphasis on the aspect that (at p. 520), "… the Court has to consider carefully whether the maxim applies to the facts of the case before it" because a presumption under Section 114 is not a presumption of law but only a presumption of fact."*

Since the appellant was found in the span of a few hours after the body of the deceased was recovered, along with certain articles belonging to the deceased, a reasonable inference can be drawn that the appellant was responsible for the death of the deceased. These items of circumstantial evidence had been placed before the trial court witnesses, who had been lengthily cross-examined but they had stood the test of cross examination very satisfactorily.

Although it is a well-established principle that the prosecution has to prove its case beyond a reasonable doubt, the defense is always at liberty to create a reasonable doubt in the case of the prosecution. In the instant case, the witnesses of the prosecution case had been consistent and truthful and had stood the test of cross-examination very well.

When the defense was called, the appellant had made a dock statement and had said that the police had arrested him and had assaulted him till he was bleeding.

It is a cardinal rule in our criminal law that the accused is presumed to be innocent until he is proven otherwise by cogent and truthful evidence by the

prosecution. However, once the prosecution has discharged their duty, if the defense has not challenged that evidence by way of cross-examination of the prosecution witnesses or by way of any kind of evidence placed before the trial Court by the appellant, the trial Court is compelled to decide on the guilt of the accused on evidence placed by the prosecution if it is truthful and consistent.

At this point, I draw my attention to the case of **Pantis vs The Attorney General** 2 SLR 148, where Justice Wijeyaratne held that,

> *"the burden of proof is always on the prosecution to prove all ingredients of the charge beyond a reasonable doubt and there is no burden on the accused to give an explanation which satisfies Court or at least is sufficient to create a reasonable doubt as to his guilt."*

In my view, it is sufficient if the accused gives an explanation which satisfies the Court or at least creates a reasonable doubt as to his guilt.

But in the instant case, I find that the statement from the dock has not challenged the incriminating evidence against the appellant placed by the prosecution at all.

Therefore, having considered the above-mentioned facts of the case and the law pertaining to the same, it is the opinion of this Court that the Trial Judge and the learned judges of the Court of Appeal are justifiable in finding the appellant guilty for the offences in the indictment.

As such, I answer the question of law raised by the appellant as follows,

a) The prosecution has established the irresistible inference of guilt of the appellant by circumstantial evidence and the trial judge and the judges of the Court of Appeal has been correct in holding so,

b) The prosecution has proved their case beyond a reasonable doubt and the trial judge and the judges of the Court of Appeal have been correct in holding so,

c) The prosecution has proved by identity of the appellant beyond a reasonable doubt and the trial judge and the judges of the Court of Appeal have been correct in holding so.

As such, the instant appeal is dismissed and the judgment of the Court of -

-Appeal is hereby affirmed.

JUDGE OF THE SUPREME COURT

P. Padman Surasena, J.
I agree.

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere J.

I agree.

JUDGE OF THE SUPREME COURT