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

In the matter of an application for Special Leave to Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka.

Complainant

SC Appeal No: 184/2019
SC (SPL) LA Application No: 210/2018
CA Appeal No: CA 122-123/2007
High Court: Kandy 161/1995

Vs.

Kotuwe Gedara Sriyantha Dharmasena

Accused

And Now

Kotuwe Gedara Sriyantha Dharmasena

Accused-Appellant

Vs.

The Hon. Attorney General,
Attorney General's Department,
Colombo.

Respondent

And Now Between

Kotuwe Gedara Sriyantha Dharmasena

Accused-Appellant-Petitioner

(Presently incarcerated in Welikada Prison)

Vs.

The Hon. Attorney General,
Attorney General's Department,
Colombo.

Complainant-Respondent-Respondent

Before: **Justice E.A.G.R. Amarasekara**
Justice A.L. Shiran Gooneratne
Justice Janak De Silva

Counsel: Indica Mallawartchy for the **Accused-Appellant-Petitioner.**

Dilan Ratnayake, SDSG with Sajith Bandara, SC for the **Complainant-Respondent-Respondent**.

Argued on: 27/09/2022

Decided on: **04/11/2022**

A.L. Shiran Gooneratne J.

The Accused-Appellant-Petitioner (hereinafter referred to as the Appellant) along with two others (the 2nd and 3rd Accused) were indicted before the High Court of Kandy for committing an offence punishable under Section 296 of the Penal Code. At the conclusion of the trial, the learned trial judge convicted the Appellant on the said count and was sentenced to death. Being aggrieved by the said Judgment, the Appellant preferred an appeal to the Court of Appeal. By Judgment dated 06/06/2018, the said appeal was dismissed and the death sentence was affirmed. The 2nd and the 3rd Accused whose convictions were affirmed by the Court of Appeal have not canvassed their convictions or the sentence imposed before the Supreme Court. This Court is called upon to decide the legality of the Judgment of the Court of Appeal in relation to the Appellant who stood as the 1st Accused before the High Court.

This Court by its order dated 03/12/2019, granted Special Leave to Appeal to the question of law in paragraph 10(e) of the petition of appeal dated 16/07/2018, as well as another question of law suggested by the learned Counsel for the Appellant and permitted by this Court, set out below as;

1. Have the judges of the Court of Appeal failed to consider that, the learned trial judge had totally failed to apply the principles governing circumstantial evidence when evaluating the evidence against the 1st Accused.
2. Has the prosecution proved the case against the 1st Accused-Appellant beyond reasonable doubt based on the circumstantial evidence.

According to the evidence led by the prosecution, the Deceased was 23 years of age at the time of the incident and was a new entrant to the Peradeniya Medical Faculty. It was revealed in evidence that on 04/01/1994, in anticipation of attending the faculty on the following day, the Deceased had gone to sleep in the front room of his abode. In the morning of 05/01/1994, the Deceased was not found in his room and later in the day

the body was discovered in an abandoned well in the vicinity. The 1st post mortem examination revealed that death was caused due to insecticide poisoning and possible drowning. The body was exhumed after several days and the 2nd post mortem examination held, revealed, that death was due to forcible introduction of an organo-phosphate containing pesticide into the body through the mouth.

The conviction and sentence against the 2nd and 3rd Accused was primarily based on the confessions made before the learned Magistrate of Kandy under Section 127 of the Code of Criminal Procedure Act. The prosecution tendered in evidence the said confessions against the Accused.

At the commencement of evaluation of evidence, the learned trial judge has arrived at a precise conclusion that this case rests on the confessions made by the 2nd and 3rd Accused and the circumstantial evidence available. The Court noted that inducement, threat, or promise was not present and having regard to all the circumstances which the evidence was obtained held, that the confessions were made voluntarily and admitted it as evidence against the 2nd and 3rd Accused.

Evaluation of evidence against the Appellant (1st Accused) -

The prosecution case was entirely based on circumstantial evidence and accordingly the Court must be satisfied that the chain of circumstances is complete and unbroken.

When evaluating the confessions made by the 2nd and 3rd Accused, the learned trial judge was mindful of the statutory compass of Section 30 of the Evidence Ordinance, as to the use of a confession against a co-accused, when he observed that the confessions made by the 2nd and 3rd Accused cannot be used against the 1st Accused (page 399). Same was reckoned later in the Judgment at page 402. However, it is noted that in contrast to the said observation, the learned trial judge made use of the said confessions as evidence against the Appellant. (Page 391-396, page 398, 400-403).

The principle embodied in Section 30 of the Evidence Ordinance was indicated in a Full Bench of the Supreme Court in **Rex vs. Ukku Banda, (1923) 24 NLR 327**, where Bertram C J. stated that;

"Section 30 relates solely to confessions made before the actual trial and tendered in evidence at the trial by the crown against the prisoner. It relates to confessions which are "proved" in the case. The word 'proved' in Section 30 must refer to a confession made beforehand."

A clear distinction was made to the above-stated principle in **King vs. Ferdinands et al. (1944) 45 NLR 450 at p. 451**, where Wijeyewardene J. observed that;

"Under our law a confession made by an accused in the ***witness box*** *affecting himself and his co-accused is not shut out by Section 30 of the Evidence Ordinance".* (Emphasis is mine)

It is in this context that the learned Counsel for the Appellant submitted that both the trial court and the Court of Appel fixed culpability upon the Appellant without a shred of evidence which now stands for scrutiny before this Court. It was further submitted that the circumstantial evidence available in this case, would raise a mere suspicion at its best and not establish the guilt of the Appellant.

In the light of the afore-stated findings of the trial judge, I will initially deal with the circumstantial evidence held against the Appellant and thereafter with the Appellants evidence in defence.

The circumstantial evidence relied upon by the learned trial judge -

The learned trial judge in his deliberations did not compartmentalize the evidence led against each Accused. The learned Judge considered the available circumstantial evidence in totality and came to a finding that on the date prior to the incident, all three Accused had been seen at a boutique making purchases, had spent the afternoon consuming liquor, and therefore concluded that there exists a probability that the

Appellant had spent the night prior to the incident together with the 2nd and 3rd Accused. In order to establish the said probability, the learned trial judge read in conjuncture the confessions made by the 2nd and 3rd Accused and the dock statements, to incriminate liability on the Appellant.

The prosecution has relied on the Appellant's subsequent conduct by drawing inference to his unusual expression of grief at the funeral house of the Deceased. It is revealed that the prosecution witness, Kodithuwakkuge Dickson who testified to such behaviour of the Appellant is an accused in the murder trial of the Appellant's brother, which took place prior to this incident. In the circumstances, the learned Counsel for the Appellant submitted that Dickson may have had an agenda to implicate the Appellant.

There is no evidence that the Appellant had entertained any animosity towards the Deceased nor towards the deceased family. To the contrary, the family members of the Deceased speak of the cordial relationship the Appellant had with the deceased family and the Appellants assistance to them at the funeral house with the funeral arrangements.

Placing the Appellant at the scene of the crime.

The Deceased was last seen alive on 04/01/1994, around 9.00 PM. The following morning the body was discovered in an abandoned well. According to the evidence of the mother of the Deceased, the Deceased accompanied by his family members had met the Appellant on the road around 3.00 PM on 03/01/1994. Considering the time gap when the Appellant parted company with the Deceased last seen alive, and the recovery of the body of the Deceased, a strong inference could be drawn of the possibility of any other person being responsible for the crime and that possibility was not totally excluded. There is no other evidence to connect the Appellant from there onwards to the place of occurrence. The learned trial judge noted that the Appellant was at the house of the 2nd Accused in the company of the 2nd and 3rd Accused on 04/01/1994, to incriminate liability on the Appellant.

"In order to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt" (The Principles of Circumstantial Evidence, by William Wills - 3rd Ed. page 149 - Rule No. 4, Applicable to Circumstantial Evidence.)

In other words, all facts or circumstances proved by the prosecution must inevitably and exclusively point to the guilt of the Accused and there should be no circumstances, which may reasonably be considered consistent with the innocence of the Accused.

In **Junaiden Mohamed Haaris, vs. Hon. Attorney General, SC Appeal 118/17 SC** (SC minutes 09/11/2018), the Supreme Court observed that;

"the prosecution relied entirely on circumstantial evidence to establish the charges, for the reason that there were no eyewitnesses to substantiate any of the charges against the Accused-Appellant. Thus, 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."

In the afore-stated Judgment Aluwihare, PC. J., referred to *"a set of principles and rules of prudence, developed in a series of English decisions, which are now regarded as settled law by our courts."*

The two basic principles referred to 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**)

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 absence of any incriminating evidence stemming from the dock statements made by the 2nd and 3rd Accused against the Appellant, the learned trial judge made use of the said unsworn statements to compare, and contradict the evidence given by the Appellant to fix culpability. The learned trial judge also made use of the unsworn statements made by the said Accused to fill in the gaps to strengthen the prosecution case.

Even if there was evidence which implicated the Appellant, *"a statement made by an accused person from the dock implicating a co-accused is not admissible in evidence against the latter."* **[Rex vs. Ukku Banda (Supra)].**

A similar decision was taken in **Monis Appu vs. Heen Hamy et al. (1924) 26 NLR 303**, in a situation where an unsworn statement made by a co-accused from the dock implicating another, Bertram C. J. declared;

"If one prisoner makes a statement implicating himself, this is an admission which may be taken into account. But if one prisoner standing in the dock makes an unsworn statement implicating the other, this is not evidence. It has no more effect than an ejaculation uttered by an auditor in Court."

The 2nd and 3rd Accused opted to make dock statements. Though the Appellant testified in Court, he was not bound to offer an explanation. In his testimony the Appellant having denied any involvement with the death of the Deceased was consistent in his stand when he stated that he was in the company of the 2nd and 3rd Accused at the house of the 2nd Accused around 4.00 PM on 04/01/1994, had consumed liquor and thereafter proceeded to his house around 6.00 PM. The trial judge did not make any pronouncement on the strength or on the infirmities of the Appellants evidence or of the dock statements made by the 2nd and 3rd Accused.

Considering the question of evaluation of a dock statement made by an Accused, Sisira De Abrew, J. in **Priyantha Lal Ramanayake vs. Hon. Attorney General [SC Appeal No. 31/211]**, (SC Minutes dated 27/01/2020), cited with approval the case of **Queen vs. Kularatne (1968) 71 NLR 529**, where it was held;

1. If they believe the unsworn statement, it must be acted upon.
2. If it raises a reasonable doubt in their minds about the case for the prosecution the defence must succeed.

In the afore-stated case, His Lordship made the following guidelines as to how the evidence given by an Accused person should be evaluated;

1. If the evidence of the Accused is believed by court it must be acted upon.
2. If the evidence of the Accused raises a reasonable doubt in the prosecution case, the defence of the Accused must succeed.
3. **If the Court neither rejects nor accepts the evidence of the Accused, the defence of the Accused must succeed.**
   (Emphasis is mine)

It is observed that the trial court or the Court of Appeal did not appear to have evaluated the evidence of the Appellant or the dock statements made by the 2nd and 3rd Accused with due judicial caution on credibility, admissibility, or relevancy of the evidence.

Having being mindful that making use of the confession made by the 2nd and 3rd Accused against the Appellant is obnoxious to Section 30 of the Evidence Ordinance, the learned trial judge has clearly made inroads to consider the facts and circumstances of the confession, to arrive at an irresistible conclusion that the Appellant committed the offence in question. To make use of the said item of circumstantial evidence to base the said conviction, does not in any manner conform to the settled principles of law applicable to the evaluation of circumstantial evidence.

At the commencement of the oral submissions, the learned Deputy Solicitor General upholding the highest traditions of the Attorney General's Department submitted that in the interest of justice he concedes to the issues of law raised by the learned Counsel for the Appellant and as such contended that the conviction and sentence against the Appellant should be set aside.

In view of the above finding, I am of the view that the conviction and sentence imposed on the Appellant cannot be permitted to stand and accordingly, the questions of law No. 1 and No. 2 are answered in favour of the Appellant.

Therefore, the Judgment of the High Court of Kandy dated 27/08/2007 and the Judgment of the Court of Appeal dated 06/06/2018 are set aside. The appeal of the 1st Accused-Appellant is allowed.

Appeal allowed.

Judge of the Supreme Court

E.A.G.R. Amarasekara J.
I agree

Judge of the Supreme Court

Janak De Silva J.
I agree

Judge of the Supreme Court