

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

In the matter of an appeal under Section 331 of
the Code of Criminal Procedure Act No. 15 of
1979.

The Hon. Attorney General

**Court of Appeal
Case No. 280-281/2008**

Complainant

**High Court of Colombo
Case No. HC 609/2001**

-Vs-

1. Moragodage Sydney Rohitha Priyantha
Pinto alias Kahandawita Gamage Jude
Prasanna
2. Samanthi Athukorale alias Isuri
Priyadarshani Perera alias Mali

Accused

-Now Between-

1. Moragodage Sydney Rohitha Priyantha
Pinto alias Kahandawita Gamage Jude
Prasanna
2. Samanthi Athukorale alias Isuri
Priyadarshani Perera alias Mali

Accused-Appellants

-Vs-

The Hon. Attorney General

Complainant-Respondent

Before : S. Thurairaja PC, J

&

A.L. Shiran Gooneratne J.

Counsel : Rienze Arseculeratne, PC with Chamindri Arseculeratne for the 1st
Accused-Appellant

Dale Gooneratne for the 2nd Accused-Appellant

M. Thennakoon, SSC for the Respondent

Written Submissions of the 1st Accused Appellant filed on:

03/10/2017, 07/09/2018

Written Submissions of the 2nd Accused-Appellant filed on:

25/09/2017, 05/09/2018

Written Submissions of the Respondent filed on: 21/02/2018

Argument on: 07/08/2018, 29/08/2018

Judgment on : 02/10/2018

A.L. Shiran Gooneratne J.

The 1st and 2nd Accused-Appellants were indicted in the High Court of Colombo, under Section 296 of the Penal Code read with Section 32 of the Penal Code for committing the murder of Aleethiya Margarita Ewlin Nancy Fernando, and under Section 380 of the Penal Code for robbery of a vehicle and home appliances. At the conclusion of the trial, the learned trial judge sitting without a

jury found the Appellants guilty as charged on both counts and sentenced the Appellants to death on the first count and imposed a 10 years Rigorous Imprisonment on each of the Appellants on the second count.

The facts of this case briefly are as follows,

The deceased was the sole occupant of house bearing number 58/1, Rosmad Place, Colombo 7. Tamara Muileen Dharmaraja, (PW1) the daughter of the deceased, who lives in America had spoken to the deceased on 12/07/1998, and was informed by the deceased that she was unable to manage house by herself due to her servant leaving the house and her pet dog falling ill. On hearing her predicament, she had decided to come down to Sri Lanka. She arrived at around 2.00 PM, on 15/07/1998, and found the gate and the door to the house locked and therefore had decided to come back later. On arriving thereafter, she found the house in the same condition. With the help of her driver she had entered the house forcibly, and had found the naked body of the deceased in the bathtub. According to the Judicial Medical Officer the cause of death was strangulation. PW1 in her evidence stated that when entering the house she observed that the nails on the wooden planks of the door to the stair case leading to the room of the deceased in the 2nd floor, had been removed.

Tamara Dharmaraja, and David Perera, the daughter and the son of the deceased, identified 49 household items which were in the possession of the deceased, missing from the house. The said items included a Siedles Television

set, a Phillips Cassette Recorder, a gas cooker and a gas cylinder, electric fan, electric kettle, a wrist watch, a Samsung DVD, a Singer sewing machine, two cameras, ladies garments, bed linen, a box containing plastic and glass items, a microwave cooker and electrical equipment. The said items were marked as P1 to P23.

IP Jayantha Wedisinghe, arrested the 1st Appellant on 02/08/1998, and recovered the said items, placed under a bed in the room of the house where the 1st Appellant was living. On a statement given, by the 1st Appellant on 12/08/1998, the police also recovered a key which fitted the lock to the rear door of the house and a knife which was buried in the backyard of the house. The said items of evidence are marked as P56 and P57 respectively.

According to the evidence of IP Henry Karunaratne, the vehicle bearing number 13 Sri 7410 belonging to the deceased was found abundant near the private bus stand in Ratnapura. The police had recovered an international driving license belonging to the deceased and her passport from the said vehicle.

According to the evidence of IP Jayantha Wedisinghe, the 1st and 2nd Appellants were arrested at a house in Kandana. The 1st Appellant had been hiding under a bed at the time of arrest. The witness had recovered a driving license and identity cards bearing names, Jude Prasanna, Moragodage Sidney Priyantha Rohitha Pinto and Samantha Athukorala from the possession of the 1st Appellant.

The 1st Appellant in his evidence took up the position that the household items recovered from the house were items given to him by the deceased. The 2nd Appellant also took up the same position in her dock statement. She also stated that, she left the deceased house due to ill health and came to know about the death of the deceased through the newspaper. It is to be noted that both the Appellants had unrestricted access to the house of the deceased at the time of this incident.

The Appellants have raised the following grounds of appeal.

1. Whether the presumption under Section 114(a) of the Evidence Ordinance can be applied in this case.
2. Even if the presumption contained in Section 114(a) of the Evidence Ordinance is applied, whether the presumption can be extended to Robbery and Murder.
3. The learned trial judge permitted the prosecution to lead evidence pertaining to bad character of 1st Appellant, apparently in the guise of leading system evidence when the evidence thus led did not constitute system evidence.

Section 114 of the Evidence Ordinance states;

“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.”

IP Wedisinghe, in his evidence stated that the household items inclusive of electrical items which belonged to the deceased was found in the room where the Appellants were arrested. Consequent to a statement given by the 1st Appellant, the key to the rear door of the house (P56) and a knife (P57) were recovered buried in the backyard of the house. The relevant part of the information which led to the discovery of the said items is marked as P52.

According to the impugned judgment, the main facts that incriminate the Appellants can be set out as follows;

- the household items listed above belonging to the deceased recovered from the exclusive possession of the Appellants, soon after the robbery
- the recovery of a key which fitted the lock to the rear door of the deceased house
- evidence relating to previous convictions to show that such an act was done with a particular knowledge or intention in terms of Section 15 of the Evidence Ordinance.

Taking into consideration the facts of this case, the trial judge has contemplated whether the use of the presumption under Section 114 of the Evidence Ordinance was justified on the basis that the articles were stolen property which were recovered from the possession of the Appellants soon after the robbery. The incriminating evidence against the Appellants are based on circumstantial evidence. When dealing with such issues, it is important to consider

whether, the explanation given by the appellants were reasonably true when imputing culpability. The case for the prosecution is that the Appellants alone were responsible for the Robbery and the murder of the deceased.

In the case of *Somaratne Rajapakse others Vs. Attorney General (2010) 2SLR 115* the court held that;

“Although there cannot be a direction that the accused person must explain each and every circumstances relied on by the prosecution and the fundamental principal being that no person accused of a crime is bound to offer any explanation of his conduct, there are permissible limitations in which it would be necessary for a suspect to explain the circumstances of suspicion which are attached to him.”

The 1st Appellant in his evidence stated that, he was a frequent visitor to the house where the deceased lived and was well known to the deceased. He had been asked to drive the car when the deceased didn't have a driver. He also states that, he had an extramarital affair with the 2nd Appellant. The 1st Appellant further states that the electrical and household items found in the house were items that were given to the 2nd Appellant by the deceased. In cross examination he has admitted that the identity card bearing name Kahadawita Gamage Jude Prasanna marked P47, was made by him in order to assume a false name. It is observed that, the 2nd Appellant too carried a fraudulent identity card assuming a false name, which is marked P49. The explanation given by the 1st Appellant for possessing a

fraudulent identity card was that he had death threats on account of a previous case of robbery of a motor vehicle.

Items marked P56 and P57, have been recovered on information given by the 1st Appellant. Regarding the discovery of the said items, a solitary question has been put to the police officer in cross examination suggesting that after the recovery of the items, the investigator forced the 1st Appellant to place his signature on a prepared statement, the witness has denied this suggestion. It is observed that the productions relating to this incident have been recovered in two stages. One at the time of the arrest of the accused and the other on a Section 27 statement given by the 1st Accused. Therefore, there are two distinct occurrences of recovery of productions which draws considerable inference to the possession of stolen articles and the suspicious conduct of the accused. Not a single question has been put to this witness denying that the said items were recovered by this witness or at the place where it was recovered. The Appellants have also not challenged the date of arrest or the time and place of recovery of such items. There is evidence in this case that the stolen property was in the possession of the Appellants, and that a very close association existed between the 1st Appellant and the 2nd Appellant. Except denying the fact that the key to the rear door of the deceased house was recovered from the backyard of the 1st Appellants house, the said Appellants failed to offer any reasonable explanation leading to the said vital recovery.

The 2nd Appellant takes up the position that the house where she was arrested was not her permanent residence. However, she has failed to offer a satisfactory account of the stolen articles found in her possession at the time of arrest. The 2nd Appellant does not deny that she was arrested at mid night while in the company of the 1st Appellant. It is also observed that in her dock statement, the 2nd Appellant denies that, the 1st Appellant was employed by the deceased. This position has been contradicted by the 1st Appellant.

The learned trial judge having taken into consideration the facts of the case, and exercising her powers of inference to the said facts has drawn the presumption under Section 114 of the evidence Ordinance and convicted the Appellants not only on the charge of Robbery but also on the charge of murder.

In *Abeysekara Vs. Attorney - General (1981) 1 SLR 376*, Court observed that,

“On the question whether recent possession of stolen property raises a presumption not merely of theft or dacoity but also of some graver offence committed in the same transaction, the decisions of the Indian Courts appear to be conflicting. In some cases — Eg. Sunderlal v. State of Madhya Pradesh — (1954) 55 Cr. LJ (S.C.) 257 — it has been held that in cases in which murder and robbery are shown to form part of one transaction, recent and unexplained possession of stolen property, in the absence of circumstances tending to show that the accused was only the receiver of the property, would not only be

presumptive evidence against the prisoner on the charge of robbery but also on the charge of murder. There was evidence in that case that the stolen property sold by the accused was jewellery habitually worn by the deceased, and also evidence that the accused and the deceased were seen together immediately before the murder.

*In other cases, Eg. **Fakirchand v. The State (1950) 51 Cr. L.J. 1265**, a Full Bench of the Madhya Bharat High Court has expressed the view that mere possession of property stolen from the deceased is not enough for convicting the prisoner for murder. The possession by the accused of all the property which was the result of robbery justifies only an inference that they took part in the robbery."*

On this question Wills in his work on Circumstantial Evidence (7th Ed.) page 104 says;

*"The possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft." He then refers in footnote (2) to the case of **Chiraveddi Munayya v. Emperor (21 MLJ) (1071)** " if it is proved that a person was found, soon after the murder of another person, in possession of property which was on the person of the latter when last seen alive, an inference might be drawn that he obtained possession of the property by the murder of the deceased; but to justify the inference, there must be satisfactory proof that the deceased had them on his*

person at the time of the murder and the accused cannot explain his possession. In India, therefore, no certain rule of universal application appears to have been laid down. The cumulative effect of all the circumstances, established by evidence and the nature of these circumstances have to be taken into consideration, and then it has to be judged whether, having regard to the ordinary course of human conduct, it is safe to presume that the offence was committed by the accused.”

In the case of *Attorney General Vs Seneviratne (1982) 1 SLR 302*, the court held that,

“a trier of facts is entitled to conclude that where murder and robbery form part of the same transaction the person who committed the robbery committed the murder also. The validity of such a conclusion depends on the facts of the transaction.”

The prosecution led evidence that prior to this incident both Appellants were convicted by the Magistrate’s Court of Gangodawila, on a charge of Robbery of jewellery and also where the 1st Appellant had been convicted in the Magistrate’s Court of Negambo, on a charge of Robbery of a van and property valued at Rupees 20,700/-. Based on the said convictions the prosecution has moved the trial Court to apply Section 15 of the Evidence Ordinance. Section 15 states,

“when there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.”

It is observed that, the law provides to lead evidence which constitute a system of similar occurrence to prove particular knowledge or intention of the accused. Referring to system evidence led in this case the 1st Appellant submits that evidence containing bad character was led when such evidence did not constitute system evidence. On this issue the Appellants have failed to support its stand in order to distinguish bad character which is alleged to have been implied in evidence from that of system evidence in the submissions to Court or in the written submissions filed of record. However, we do not see any inference to bad character of the Appellants imputed by the trial judge with reference to similar facts or system evidence in the impugned judgment.

The trial Court was invited to draw a presumption and apply its operation and the principles of law applicable to Section 15 and Section 114 of the Evidence Ordinance. Even though the burden of proof in no circumstance shifts to the Appellants, on the evidence led by the prosecution, the Appellants have failed to create a reasonable doubt on conclusions reached by the trial Judge on the basis of evidence and reasoning of the said legal principles. Accordingly, we are of the view that the circumstantial evidence led in this case strongly supports the prosecution case and the Appellants have failed to give a reasonably true

explanation to the incriminating circumstances, which are consistent with their innocence.

Accordingly, we are of the view that the Appellants have failed to satisfy this Court on any of the grounds of appeal to reverse the findings of the learned trial judge. Therefore, we affirm the convictions and the sentences imposed on the accused appellants.

Appeals dismissed.

JUDGE OF THE COURT OF APPEAL

S.Thurairaja PC, J

I agree.

JUDGE OF THE COURT OF APPEAL