

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

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

The Attorney General of the Democratic
Socialist Republic of Sri Lanka.

Complainant

**Court of Appeal
Case No. 91-92/2015**

Vs,

1. Henakaralge Nimal Karunatileke.
2. Nawagamuwage Jagath Prasanna

Accused

And Now Between

1. Henakaralge Nimal Karunatileke.
2. Nawagamuwage Jagath Prasanna

Accused-Appellant

**High Court of Polonnaruwa
Case No. 115/2006**

Vs,

The Attorney General of the Democratic
Socialist Republic of Sri Lanka

Complainant-Respondent

**Before : S. Thurairaja PC, J &
A.L. Shiran Gooneratne J**

**Counsel : A.M. Nimal Shantha Attorney-at-Law for the 1st Accused-Appellant.
Nihara Randeniya Attorney-at-Law for the 2nd Accused-Appellant
Haripriya Jayasundara, SD SG for the Complainant-Respondent**

**Written Submissions : 1st Accused-Appellant – 8th March 2018
2nd Accused-Appellant-7th March 2018
Complainant-Respondent – 13th March 2018**

Argued on : 9th October 2018

Judgment on : 31st October 2018

Judgment

S. Thurairaja, PC. J

Honourable Attorney General preferred an indictment under Section 296 to be read with Section 32 of the Penal Code against Henakaralge Nimal Karunatileke 1st Accused-Appellant (hereinafter sometimes referred to as the 1st Appellant) and Nawagamuwage Jagath Prasanna 2nd Accused-Appellant (hereinafter sometimes referred to as the 2nd Appellant) for committing the Murder and robbery of Henakaralge Dingiri Appuhamy. For the 1st count appellants were found guilty after the trial and convicted and sentenced to death and for the 2nd count 5 years Rigorous Imprisonment and a fine of Rs. 5000/ each, in default 6 months Simple Imprisonment. Being aggrieved with the said conviction the Appellants have appealed to the Court of Appeal.

The 1st accused appellant filed written submissions and raised the following grounds of appeal,

- 1) The prosecution has not proved the case beyond the reasonable doubt.
- 2) The productions were not properly identified.
- 3) Section 32 cannot be applied in this case.
- 4) Concept of circumstantial evidence was not considered.

The 2nd accused appellant filed written submissions and raised the following grounds of appeal,

- 1) The Learned Trial Judge failed to consider well settled principles of law with regard to with regard to a case based entirely on circumstantial evidence.
- 2) That the Learned Trial Judge failed to consider that the prosecution failed to prove the charges against the 2nd appellant.
- 3) The Learned Trial Judge erred in law that there are sufficient evidence to convict the 2nd Appellant for both counts.

Anyhow, the Learned Counsel for the 2nd Appellant submits that he takes up of a preliminary issue namely that the 2nd Appellant was less than 18 years at the time of the incident.

When the matter was taken up for argument the counsel for the 2nd Appellant informed Court that he is not relying on any of these ground of appeal, but submitted that the 2nd Appellant was less than 18 years of age at the time of the incident. Therefore he commits no offence (sic).

Anyhow considering the grounds of appeal submitted by the 2nd appellant was also overlapping with the grounds of appeal submitted by the 1st appellant.

It will be appropriate to see the facts of the case in brief. 1st accused appellant is a grandson of the deceased. He was working at Colombo. The main two witnesses are son and the granddaughter of the deceased. The 1st appellant and the 2nd appellant were workmates and residing in Colombo. According to evidence of the prosecution it was revealed that both appellants were seen coming in a push bicycle, when they saw a bus, abandoned the bicycle and got into the bus with a parcel in hand. A police officer who was there fell suspicious and stopped the bus, when examining the appellants it was found that they had blood stains in their cloths and they were carrying a parcel wrapped in a pillow cover. On suspicion he took them to the police station.

In the same time the murder was reported to the police and the grand daughter who was at the school was brought to the police station. The son of the deceased who the father of the main witness girl and uncle of the 1st appellant, was at the paddy field was

also came to the police station. When the parcels of the appellants were examined the granddaughter identified her chain, wrist watch and coins collected by her grandfather. After the investigation both were indicted for murder and robbery. After having contested that both were found guilty on both counts.

Considering the 1st ground of appeal that, the prosecution has not proved the case beyond the reasonable doubt. Considering the evidence before the Trial Judge, his scrutinization and the judgement shows that there were ample evidence against these two appellants. The counsel for the appellant could not point out a particular doubt or short fall in the case of the prosecution considering all the evidence we find that the prosecution had sufficient evidence to prove their case. Hence in this ground of appeal fails on its all merits.

The 2nd ground of appeal that The productions were not properly identified.

The main witness, Henaka Ralelage Chandra Manel Kumari who was 14 years at the time of the incident identified many items including chain, wrist watch, purse, coins, pillow case and a milk powder tin. The chain, she identified as that it was given to her by the deceased grandfather when she attended puberty. Since she had only one chain she could clearly identify the same. Further she identified the wrist watch and the milk powder tin (Anchor tin) as a tin on which her grandfather collected coins. She also identified many items which belongs to them.

The father of the main witness who is the son of the deceased and the uncle of the appellant also identifies the production.

Considering all available materials, The Learned Trial Judge had enough evidence to satisfy himself regarding the identification of productions. On perusing all, we are also satisfied that the identification of production were proved beyond reasonable doubt. Hence this ground of appeal also fails on its own merits.

The next ground of appeal that, Section 32 cannot be applied in this case.

Considering the facts of the case, that these two people were initially arrested on a suspicion because they were seen riding a bicycle when they saw a bus and police. They abandoned the bicycle and got in to the bus which conduct needs an explanation which was never offered by the appellants. Further the blood stains were not explained. The arrest was soon after the incident and both were in close movement to each other and had possession of robbed articles. There are further materials that indicates these two were acting in collusion. Therefore we find that there is no merit in this ground of appeal too. Therefore this ground of appeal also fails on its own merits.

The last ground of appeal is that concept of circumstantial evidence was not considered. As we discussed earlier, these two suspects were arrested in a suspicious manner soon after the incident further they were in possession of stolen items. They had blood stains in their cloths.

Supreme Court of India in **Manivel and Others v State of Tamil Nadu in Criminal Appeal No. 473 of 2001 (2008 INDLAW SC 1239)** on 08 Aug 2008 held that while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the *infirmity of lacuna* in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

- (1) *"The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;*
- (2) *the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
- (3) *the circumstances should be of a conclusive nature and tendency;*
- (4) *they should exclude every possible hypothesis except the one to be proved;*

- (5) *There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

In **R v Clarke (1995) 78 A Crim R 226** it was held,

"If evidence raises a reasonable possibility that the circumstances pointed to someone other than the accused being guilty of the offence, then a direction about the need to exclude such a possibility beyond reasonable doubt should usually be given. Such a direction should be given even if the evidence is very slight, if it could be interpreted as raising a reasonable possibility of innocence."

In **Padala Veera Reddy vs. State of AP and others [1989 Ind law SC 31]** it was laid down that when a case rests upon circumstantial evidence such evidence must satisfy the following tests.

- 1. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;*
- 2. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;*
- 3. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and;*
- 4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."*

In **the King V Appuhamy (1945) 46 NLR 128**, Keuneman, J held;

"In order to justify the inference of the guilt from purely circumstantial evidence, the inculpatory facts must be incompitable (sic) with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

In **Samantha vs. Republic of Sri Lanka [2010 SLLR 236]** the Court stated that,

"In a case of Circumstantial Evidence, if an inference of guilt is to be drawn against the accused such inference must be the one and only irresistible and inescapable inference that the accused committed the crime"

The Learned Trial Judge had carefully considered the evidence and all circumstances and came to the conclusion that there are sufficient materials to find the accused appellant guilty. We find that the Learned Trial Judge had addressed his mind sufficiently with the concept of circumstantial evidence. Therefore we find that this ground of appeal also fails on its own merits.

The 2nd accused appellant submits that he was not 18 years at the time of the incident.

We are puzzled with this ground of appeal. If any person wishes to take a defence under General Exceptions of the Penal Code under section 75 or 76 of the Penal Code. Those sections does not extend up to 18 years. Further the General Exceptions under section 75 will be applied to children under 12 years (as amended).

The 2nd accused appellant in his dock statement said he was 18 years and working as a security guard in Colombo. On his own admission it is evidenced before the court that he was at least 18 years at the time of the incident.

In the Supreme Court case of **Alwis Vs. Piyasena Fernando 1993 1 SLR 119 at 122**

G.P.S. De Silva CJ stated as follows,

"It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed in appeal."

Therefore, this ground of appeal also fails on its own merits.

We carefully considered the evidence before the Trial Court that the Learned Trial Judge had sufficient materials to find the accused appellants guilty for the offence stated in the indictment. Accordingly, we dismiss the appeal and affirm the conviction and the sentence.

Sentence to be implemented from today.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL