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

In the matter of an Appeal in terms of Article 331(1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hetti Arachchilage Sanjeewa Kumara

Second Accused-Appellant

Court of Appeal No:

CA/HCC/221/2016

High Court of Chilaw:

HC/200/05

Vs.

The Hon. Attorney General

Attorney General's Department

Colombo 12

Respondent

Before : Menaka Wijesundera J.

K.M.G.H Kulatunga J.

Counsel : Tenny Fernando for the Accused-Appellant.

Dishna Warnakula, DSG for the State.

Argued on : 16.10.2024

Decided on : 28.11.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgement dated, 12.10.2016 of the High Court of Chilaw.

The accused appellant has been indicted under section 383, two charges under section 296, and in the alternative section 394 of the Penal Code.

The accused-appellant hereinafter referred to as the appellant has pleaded not guilty and the trial has proceeded against him. Thereafter, upon the conclusion of the trial the learned High Court Judge has said that it can be **presumed** that the appellant has committed the offences referred to in charges one, two, three and four of the indictment (page 443 of the brief).

Thereafter, he had convicted the appellant for charges number 2, 3 and 4 only and had said that charge number 1 is in the alternative to charge number 2 and charge number 5 is in the alternative to charge number 4. Therefore, he has not pronounced any sentence or conviction on charges 1 and 5.

But this I find to be erroneous because charge number 1 is not the alternative charge of charge number 2 because charge number 2 is actually the aggravated form of charge number 1.

But they both can be in one indictment under section 175 of the Code of Criminal Procedure Act.

At this point I wish to consider as to what the learned trial judge had meant by **presuming** (at page 443 and 439 of the brief) that the appellant has committed the offences under charges 1, 2, 3 and 4. The meaning of the term **"presume",** according to the **Black's Law Dictionary 9th edition page 1304,** is that "to assume beforehand; to suppose to be true in the absence of proof." Therefore, the learned trial judge cannot by all means presume after considering the evidence that the appellant is guilty of any offence but what he is required to do is to decide on his guilt or innocence, because as defined in the Black's Law dictionary, presuming is something before proof or assuming beforehand. But in the instant matter the trial

judge had said so after analyzing the evidence of the prosecution and the defense of the appellant.

Therefore, it is the opinion of this Court that the statement at page 439 and 443 of the brief by the trial judge is erroneous and illegal.

The standard of proof for a criminal case is beyond a reasonable doubt, which is engraved in our law.

In the case of ***SC Appeal 208/2012*** decided on 22nd January 2021 by Yasantha Kodagoda PC, J, in which the effect and the impact of the principle of reasonable doubt , was stated thus:-

> *"The principle that the prosecution must prove its case beyond reasonable doubt and the accused is entitled to an acquittal if there exists a reasonable doubt has been engraved in the criminal justice system of this country and in the rest of the common law world. That is to ensure that only those actually guilty of having committed crimes are convicted and the innocent are acquitted. Thus, the application of this principle should cause the advancement of the primary objective of criminal justice and not frustrate it."*

In the instant matter we find that the trial judge has failed to say the standard of proof he applied in deciding in the instant case. He had merelyreferred to the evidenceof both parties and presumed (in his own words) with regard to the guilt of the appellant.

In the same above mentioned judgement by Justice Yasantha Kodagoda his lordship has referred to ***Marcus Stone in Proof of Fact in Criminal Trials (Published by W. Green & Son, 1984 at page 354)***, has explained what proof beyond reasonable doubt is in the following manner

> *"The tribunal of fact could not convict unless it was actually convinced of guilt to that extent it must believe in the reality of guilt. A mere Mechanical comparison of probabilities, however strong this might point to guilt, would not be enough. The*

criterion is human and not mathematical it is a judgement that the facts are established.

The phrase beyond reasonable doubt is the essential verbal formulation which has been devised by law to express the necessary standard of belief for criminal conviction. Attempts improve on or to elaborate on that formulation are discouraged by appeal courts. The phrase appears to be as precise as any other words which could be substituted for its proof facts in court inevitably falls short of absolute certainty."

Therefore, in the instant matter the trial judge had failed to mention the standard of proof he has applied. Thus the failure on part of the trial judge to do so is a fundamental error, as such, it is fatal to the conviction he has imposed on the appellant.

If that is so, then this Court has to consider whether the instant matter should be sent for a retrial.

Upon the consideration of the submissions of both parties this is a case based on circumstantial evidence.

The counsel appearing for the appellant raised the following grounds of appeal

1. The improbability of the prosecution version not being considered by the High Court Judge.
2. Challenging the section 27(1) recovery made by the police.
3. Evaluation of circumstantial evidence being erroneous.

When a case is based on circumstantial evidence every item of evidence of the prosecution should finally point to the guilt of the accused, like the different strands of a rope finally forming the entire rope. This has been so said in the case of ***King v Appuhamy*** (supra) that,

"… in order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis that of his guilt"

In a more recent judgement of ***Karunaratne v Attorney General (2005) 1 Sri LR 233***, this Court re-emphasized the following principles;

"In the case ***State of V.P. vs Dr. Ravindra Prakash Mittal (1992) 2 SCJ 549****, it was held that the essential ingredients to prove guilt of an accused person by circumstantial evidence are:-*

1. *The circumstances from which the conclusion was drawn should be fully proved:*
2. *The circumstances should be conclusive in nature;*
3. *All the facts so established should be consistent with the hypothesis of guilt and inconsistent with innocence;*
4. *The circumstance should; to a moral certainty, exclude the possibility of guilt of any person other than the accused.*

In the case of ***Podi Singho vs King 53 N.L.R 49,*** *it was held that,"in a case of circumstantial evidence it is the duty of the trial judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt. In the case of* ***King vs Appuhamy 46 N.L.R 128****, Keuneman J held that, in order to justify the inference guilt purely on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused incapable of explanation upon any other reasonable hypothesis than that of guilt. In the case of* ***State of Tamil Nadu vs Rajendran 1999 Cri. L.J. 4552****, Justice Pittanaik observed that 'In a case of circumstantial evidence when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstance to make it complete"*

In the instant matter, the circumstantial evidence led by the prosecution against the appellant is as follows.

1. Evidence of PW–01, says that the two deceased people are the mother and the son and they lived at the place of incident and that he has worked as their driver and he has seen the appellant working in the house of the deceased persons. He had been told by PW-02 to come to the place of incident on the date of incident in the morning stating that there was an emergency. He further says that when he went there, he had not seen the motorcycle of the deceased son which was parked in the car porch the previous day.

2. PW-02, who has been the brother and son of the deceased persons, had lived a few houses away from the place of incident and when he came to his mother's house on 25th of April 2001 at around 7.20 in the morning when informed by the neighbour, Leelawathi, that his mother was sick. He had found the brother dead in the room, mother severely injured and certain items mentioned in the indictment which belong to him, had been lost and later he had identified them when shown in court. He says that the accused had been working for his mother and the items were found in the abandoned bag of the appellant. These had been items which he had brought from abroad and had been kept for safe keeping at the place of incident.

3. PW-03, a public health inspector has had his office in the place of incident and he too had seen the accused working for the deceased persons.

4. The doctor who had conducted the postmortems on the two deceased persons on 25.04.2001 had identified the axe shown by the police as a possible weapon which could have caused the injuries on the deceased.

5. PW-09 Leelawathi, who had been the deceased person's neighbour, had seen the deceased seated on a chair in the morning of the date of offence but had not spoken to her therefore she has suspected the deceased to be sick. As such she had informed PW-02. She says at that time, the dogs of the deceased

person were untied and they were very ferocious animals who did not tolerate any visitors coming into the land.

6. Witness Leelawathi furthersays that she had been prompted to go out because an unknown woman had come to her land asking for the PHI next door, then she had gone out to see and had seen the deceased number 1 seated in an unusual manner which had prompted her to inform PW-02.

7. The evidence of the investigating officers revealed that

- The first complaint has been received on the 25th of April 2001 in the morning at about 8,30 am.
- One deceased person had been in the house, the other in the hospital
- Certain electrical items were noted to be missing by PW-02 from the scene crime.
- On the very same day at around 5.30 am the Kochchikade police, who were at a check point at the Thoppuva bridge, had stopped a motor bicycle to search. At that point the person on the bicycle had run away leaving everything behind on the bicycle there had been a bag which had contained a gramasevaka's certificate on which the appellant's name had been revealed
- The motor bike had been identified by PW-02 as belonging to his deceased brother
- Inside the bag there had been several electrical items, which PW-02 had identified to be his belongings, had gone missing after the date of incident from his mother's place
- On the gramasevaka certificate found in the bag the appellant was arrested on 25th of April 2001 by the Vaikkal police later in the evening.
- On his statement, the mamoty marked in court had been recovered with stains of blood, and the Government Analyst had identified it to be human blood.
- An identification parade has been held and PW-07, who had been on duty at the Thoppuwa check point on the 25th morning, had identified the appellant

and the said notes had been admitted at the trial under section 420 of the CPC.

In the instant there is evidence of the appellant immediately after the murder and the robbery , been found with items which had been identified by the PW-02 as being the belongings of the deceased person's house.

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 instant matter also the trial judge had rightfully had applied the above and had found him guilty for the charges of murder also, but he had failed to state the standard of proof he has applied to come to the said conclusion.

In the book of ***The Law of Evidence in Sri Lanka by G.L. Peiris*** it has been said that *"the above presumption is not confined to cases of theft but applies to all crimes"*. This has been so held in the case of ***Anuruddha Samaranayake and Four Others vs Attorney General CA 36-40/2007*** decided on 25th March 2011 by Salam J,

> *"However, it is not right on the part of the trial court to convict a possessor of such property on the sole ground of recovery of it from him. Though the court can draw a presumption under Section 114 of the Evidence Ordinance, simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. The culpability of the offence will depend on other circumstantial evidence, is any.*
>
> *Further the presumption permitted to be drawn under Section 114 must be read along with the time factor. If the articles recovered are found in possession of a person soon after murder, a presumption of guilt may be rightly permitted. On the other hand, a presumption cannot be permitted after a considerable interval. On this aspect of the matter, one has to be also mindful of the distance between the*

place where the offence in respect of the articles was committed and the place where they were later found."

In the same judgement it has been held that:

"A long line of authorities both in Sri Lanka and in India favour the extension of the application of the presumption to offences other than retention of stolen property, only after exercise of great care, particularly when direct evidence clearly exonerates the possess of stolen articles from having participated in the commotion of the principal offence"

In the instant matter the circumstantial evidence points out to the fact that the day the two deceased persons were found dead the accused appellant was found riding the diseased person's bicycle with household items belonging to the diseased family in his possession. The moment the investigating officers at the checkpoint detected him he has run away leaving the bicycle and his bag of goods behind. Then after, few hours later he had been taken into custody.

Hence, the proximity of time and location from where the accused appellant was found in possession of goods identified by PW-02 can be considered under Section 114 (a) of the Evidence Ordinance and an adverse inference can be drawn against the appellant.

Therefore, upon considering the above mentioned items of evidence, it can be concluded that the prosecution had led very serious items of circumstantial evidence against the appellant, to which the appellant has made a dock statement denying the entire incident.

Hence, although the trial judge had misdirected himself on the burden of proof, the cogency of the said evidence cannot be ignored.

As such, this Court has to seriously consider whether this is a fit case to be sent for a retrial.

This Court is very much aware of the fact that this pertains to an incident which had taken place in 2001 and the trial has been concluded in 2016 but it would be a travesty of justice if the appellant is set free upon only the consideration of the nonapplication of the legal principles by the trial judge.

As such, it is the opinion of this Court that, although much time has passed since the date of offence, it is nothing but just and fair that the instant matter should be sent for a retrial.

As such, we set aside the conviction and the sentence imposed by the trial judge but we order that a retrial be held in the instant and we also order that this be concluded expeditiously without any further delay by the relevant High Court.

Judge of the Court of Appeal

Hon. K.M.G.H Kulatunga

I agree with your conclusion and reasons

Judge of the Court of Appeal