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

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

Court of Appeal No:
CA/HCC/ 246-247//2019
High Court of Negombo
Case No. HC/ 326/2003

The Attorney General
Attorney General's Department
Colombo-12.

COMPLIANANT

Vs.

1. Makawitage Suresh Gunasena
2. Jayasinghe Arachchige Nalin Chandimal Jayasinghe
3. Herath Adikaralage Prasad Dilhara Perera
4. Herath Mudiyanselage Asela Kumara Herath

ACCUSED

AND NOW BETWEEN

1. Makawitage Suresh Gunasena
2. Jayasinghe Arachchige Nalin Chandimal Jayasinghe

ACCUSED-APPELLANTS

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE	:	**Sampath B. Abayakoon, J.** **P.Kumararatnam,J.**
COUNSEL	:	**Shanaka Ranasinghe, PC., Niroshan with Niroshan Mihindukulasuriya of the Appellants.** **N.R. Abeysuriya, PC., ASG for the Respondent.**
ARGUED ON	:	**02.05.2024, 16.05.2024 and 22.05.2024**
DECIDED ON	:	**30.08.2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted along with the 3rd and 4th Accused by the Attorney General for committing an offence as detailed below:

> That on or about the 03rd of June 2003 with others unknown to the prosecution, the Accused above named, subjected one Waragoda Mudalige Gerard Perera to torture, in order to extract information or a confession from him and that they have thereby committed an offence punishable in terms of Section 2(4) of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Act No.22 of 1994 read along with Section 32 of the Penal Code.

The trial commenced before the High Court Judge of Negombo and the prosecution had called 11 witnesses. As the 3rd Accused passed away pending trial, the indictment was amended accordingly by the prosecution. The learned High Court Judge being satisfied that evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the accused. Having selected the right to make a statement from the dock, the Appellants and the 4th Accused had proceeded to deny the charges and called witnesses on behalf of them.

After considering the evidence presented by both the prosecution and the defence, the learned High Court Judge had convicted the Appellants as charged and sentenced them to 10 years of rigorous imprisonment and a fine

of Rs.50,000/- each with a default sentence of 3 years simple imprisonment on 28.06.2019. The 4th Accused was acquitted from the charge.

Being aggrieved by the aforesaid conviction and sentence the Appellants preferred this appeal to this court.

The learned Counsel for the Appellants informed this court that the 1st Appellant has given consent to argue this matter in his absence. The 2nd Appellant was present in person as he is on bail pending appeal. At the hearing the 1st Appellant was connected via Zoom platform from prison.

History of the case

Originally the Hon. Attorney General preferred an indictment against 7 Accused including the Accused named above on counts of Torture and Degrading Human Treatment along with aiding and abetting to commit Torture and Degrading Human Treatment. Before the commencement of the trial, the indictment against the 7th Accused - the Officer-in-Charge of the Wattala Police Station IP/Suraweera was withdrawn by the Hon. Attorney General and the trial was proceeded against 1st to 6th Accused. At the conclusion of the trial, the learned High Court Judge who heard the trial had acquitted all 6 Accused from the case.

As the Hon. Attorney General did not prefer an appealed against the acquittal, an aggrieved party preferred an appeal against the acquittal in the Court of Appeal. At the conclusion of the appeal, his Lordship while conforming the acquittal of 5th and 6th Accused, set aside the acquittal against 1st to 4th Accused and directed a re-trial against the above-named 1st to 4th accused.

The Accused above named made a Special Leave to Appeal to the Supreme Court under case No. **SC.SPL.LA 259/2021** against the re-trial decision. On

2nd June 2014, His Lordship Mohan Peiris, PC., CJ affirming the Court of Appeal decision held further,

> *"We have taken into consideration the evidence of the brother, Ranjith who implicates Renuka as a person who was concerned with the transaction. We are also dissatisfied with the manner in which the O.I.C. (7th Accused Suraweera) has given evidence. This Court therefore sees no reason to interfere with the Judgment of the Court of Appeal in ordering a re-trial in respect of 1st ,2nd ,3rd and 4th Petitioners. We are however of the view that the Court of Appeal should have gone further in this matter. The evidence in this case materially touches the conduct of the O.I.C of Wattala Police Station and Renuka. We are therefore of the view that in the presentation of the new indictment at the re-trial, consideration must be given by the Hon. Attorney General as to whether the O.I.C. of Wattala Police Station Suraweera and the officer named Renuka ought to have made accused or cited as witnesses, so as to ensure an effective prosecution."*

The background of the case

Re-trial commenced and the prosecution called 11 witnesses. Notwithstanding the directions given by the Apex Court of the country, the Hon. Attorney General did not make the Officer-in-Charge of the Wattala Police Station, IP/Suraweera and officer Renuka at least as a witness to ensure an effective prosecution.

According to PW2 Pathma, the wife of the victim, on 03.06.2002 at about 11.45 a.m. a police party led by the 1st Appellant had come in search of her husband to proceed with an investigation with regards to the murder of three persons in the Hendala area. As the victim was not at home at that time, the Police had subjected PW2 to a lengthy enquiry about the victim. At about 12.45 p.m. when the victim got off from the bus, he was dragged into the jeep and PW2 and her son were dropped near a boutique namely 'Countasge

Kade'. PW2 along with PW3, the brother of the victim had gone to Gampaha Police Station to lodge a complaint but was not entertained.

In the evening on the same day, PW3 had gone to the Wattala Pollice Station but his brother was not to be seen. When he was seated near the reserve duty officer's table in the police station, he had seen his brother walking to the Officer-in Charge IP/Suraweera's room with the assistance of SI/Renuka and another police officer. When PW3 went to the Wattala Police Station again at about 9.00 p.m., he had seen some police officers applying some pain reliving balm on the victim's body. Their identity had not been established by the prosecution.

According to PW5, the victim was released on police bail on the direction of the OIC of Wattala Police Station on the following day by the OIC of the Crime Division, IP/Nawaratna.

In this case the Appellants admitted that they arrested the victim on 03.06.2002 and that he was handed over to PC 29245 Ratnayake who was on reserve duty on that day. Although PC Ratnayake was named as witness number 32 the prosecution had not taken any endeavour to call him as a prosecution witness. But he was called as a defence witness in this case.

Grounds of appeal advanced by the Appellants

1. The learned High Court Judge failed and neglected to appraise the circumstantial evidence as required by law.
2. The learned High Court Judge failed to evaluate the evidence of PW3 Francis Ranjith Perera the brother of the victim as required by the law.
3. The learned High Court Judge failed to direct himself appropriately with regard to the failure of the prosecution to follow the direction of their Lordship of the Supreme Court.

4. The learned High Court Judge failed to direct himself appropriately with regard to the evidence relating to the arrest and handing over the victim to the police.
5. The learned High Court Judge erred in law by deciding to only acquit the 4th Accused on the basis that the prosecution failed to prove the case against the 4th Accused beyond reasonable doubt and failing to consider appealing against the acquittal of 4th Accused.

As the appeal grounds advanced by the Appellant are interconnected, all grounds will be considered together hereinafter.

The Appellants contended that the learned High Court Judge erred in law by his failure to follow the settled law and relevant legal principles relating to a case entirely based on circumstantial evidence.

Circumstantial evidence gives rise to a logical inference that facts exist. It is indirect evidence that does not, prima facie prove a fact in issue. Therefore, such evidence requires the court to draw additional reasonable inferences to support a given claim.

While in general this type of evidence is admissible in courts, the courts are rather wary and cautious of cases in which the sole type of evidence available is circumstantial evidence.

Circumstantial evidence must be treated with caution – that is, they should be closely examined and looked at in connection with other evidence. While a court would be very hesitant to convict a defendant based on a single piece of circumstantial evidence. However, where there are more pieces of cohesive circumstantial evidence, they will bear more weight when considered together.

In order to convict an Accused person on the basis of circumstantial evidence it is the duty of the trial judge to be satisfied that that the facts proved are

only consistent with the guilt of the Accused and the facts proved exclude every other possibility other than the guilt of the Accused.

In **King v Abeywickrama** [1943] 44 NLR 254 the Court held that:

> *"In order to base a conviction on circumstantial evidence the Jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence".*

In **Gunawardena v the Republic** [1981] 2 SLR 315 the Court held that

> *"Each piece of circumstantial evidence is not a link in a chain for if one link breaks the chain would fail. Circumstantial evidence is more like a rope composed of several cords. One strand of rope may be insufficient to sustain the weight but three stranded together may be quite sufficient."*

In **Hanumant v State of M.P** [1952] AIR SC 343; 1953 Cri LJ 129 the Court laid down following guide lines to be used when a case is found to solely rest on circumstantial evidence.

> *"(i) 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;*
>
> *(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, that should not be explainable on any other hypothesis except that the accused is guilty;*
>
> *(iii) The circumstances should be conclusive;*

(iv) They should exclude every possible hypothesis except the one to be proved.

(v) 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 this case the Appellants admitted the arrest and handing over of the victim to the reserve police officer PC 29245 Ratnayake of Wattala Police Station on 02nd June 2002 at 13:10 hours. PW28, CI/Eric Perera who was the Officer-in-Charge of the Wattala Police Station during the trial, produced the police books relevant to this case. According to him the Appellants had departed the Wattala Police Station on 03rd June 2002 at 12:30 hours for crime prevention duty headed by the 1st Appellant. The relevant entry entered by the 1st Appellant was marked as P3. The Appellants and the team had returned to the Wattala Police Station at 13:10 hours and the 1st Appellant had inserted a detailed entry regarding the arrest of the victim. After the return entry, the victim was handed over to the reserve police officer PC 29245 Ratnayake. The said entry was marked as P4. In the same book at page 40, the victim was released on police bail on 04th June 2002. The reserve police officer who released the victim on bail was not established. According to PW28, no alteration had been made to the entries entered by the 1st Appellant. The relevant portion of the proceedings is re-produced below:

<u>Pages 734-735 of the second brief.</u>

ප්‍ර : එම සටහන යොදා තිබෙන්නේ කවුරුන් විසින් ද ?

උ : උප පොලිස් පරීක්ෂක සුරේෂ් විසින්.

ප්‍ර : එම සටහනේ මුල් තොරතුරු පොත ඔබ ඉදිරියේ දැන් තිබෙනවා ?

උ : එහෙමයි.

ප්‍ර : එම සටහන එම නිලධාරියා විසින් අත්සන් කර තිබෙනවාද ?

උ : විශේෂ වෙනසක් කිරීමක් දක්නට ලැබෙන්නේ නැහැ.

ප්‍ර : අත්සන් කර තිබෙනවා ද ?

උ : සටහන අවසානයේ අත්සන් කර තිබෙනවා.

එම සටහන මේ අවස්ථාවේදී **පැ.3** වශයෙන් ලකුණු කර සිටිනවා.

According to PW3, the brother of the victim, had seen the victim walking to the room of OIC of Wattala Police Station assisted by SI/Renuka and another officer whose identity was not established, when he went to the Wattala Police Station at 5.00 p.m. on the date of arrest. On the following day he had gone to meet the OIC of Wattala with PW5, Thiagiratna and had gotten the victim released on police bail on the instructions of the OIC. At that time the OIC had told them that the arrest of the victim was a mistake.

According to PW28, the victim was received by reserve police officer PC 29245 Ratnayake. Though he was named as witness number 32, he was not called by the prosecution to give evidence. But he was called as a defence witness by the Appellant. In his evidence PC 29245 Ratnayake admitted that he was the reserve police officer when the victim was produced to the Wattala Police Station by the 1st Appellant on 03rd June 2002. He had put the relevant entry in the MOIB at 13:25 hours and accepted the victim. He had not noted any abnormality or received any complaint from the victim at that time. Thereafter he had handed over his reserve duty to PC 26320 Boradeniya entering an entry in the RIB. The relevant entries had been examined by the OIC of the station and he was not questioned about the entries by the OIC.

Hence, it is quite clear that the victim was handed over to the reserve police officer of Wattala police Station on 03rd June 2002 at 13:25 hours. From that time onwards the victim was no longer in the custody of the Appellants. According to PW3 he had seen the victim being assisted by SI/Renuka and

another police officer at 5.00 p. m. on 03rd June 2002 and he was released on police bail by the OIC of the station on the following day. PW3 had not seen the Appellants at the police station. Hence, the prosecution should have called PC 29245 Ratnayake, PC 26320 Boradeniya, SI/Renuka and the OIC of the Wattala Police Station IP/Suraweera as prosecution witnesses as they are essential witnesses this case. His Lordship of the Supreme Court had considered the importance of calling or making SI/Renuka and the OIC of the Wattala Police Station as prosecution witnesses or Accused in this case, as there is a break in the evidence pertaining to the involvement of the Appellants torturing the victim in the police station.

An essential witness, is one who's testimony is necessary to unfold the truth. Their testimony is so vital, that without it, there really a no case or evidence to get a conviction in a case.

In **Stephen Seneviratne v The King** [1936] 3 All ER 36 at 46 where Lord Roche said:

> *"Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution."*

Considering the above cited judgment, PC Ratnayake, PC Boradeniya, SI/Renuka and CI/Suraweera are of course, essential witnesses and the prosecution should have called them to give evidence. Not calling the said witnesses has caused great prejudice to the Appellants. Further, the prosecution had failed to explain how the victim who was in the custody of PC Boradeniya ended up with SI/Renuka and another officer unknown to the prosecution in a severely injured state which create a serious doubt on the prosecution case.

In **Kumara De Silva v The Attorney General** [2010] 2 SLR 169 the Court held that:

> *"Question of an adverse presumption under Section 114 (f) arises only where a witness whose evidence is necessary to unfold the narrative is wilfully withheld by the prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case."*

The learned High Court Judge heavily relying on the affidavits filed by the Appellants in the FR Application No 328/2002 had arrived at the conclusion that the Appellants had conducted the investigation about the victim until he was released on police bail. The learned High Court Judge had failed to consider the break of events from 13:25 hours on 03rd June 2002 to 11:30 hours on 04th June 2002. Had the learned High Court Judge considered the Supreme Court's direction with regard to SI/Renuka and OIC CI/Suraweera and the failure to call them as witnesses along with PC Ratnayake and PC Boradeniya by the prosecution, he wouldn't have come to the conclusion that the prosecution had proved the guilt of the appellants beyond a reasonable doubt. This failure had caused great prejudice to the Appellants rights to a fair trial.

The prosecution had not made SI/Renuka and the OIC CI/ Suraweera either Accused or witnesses in this case. But the learned High Court Judge had considered that the OIC had given evidence in this case. The relevant portion of the judgment is re-produced below:

Page 1215 of the brief.

ස්ථානාධිපති පිළිතුරු දෙමින් ඒ සම්බන්ධයෙන් අපරාධ අංශයේ ස්ථානාධිපතිට පරීක්ෂණයක් පැවැත්වීමට උපදෙස් ලබා දී ඇති බවට 01 චූදිතව දැනුවත් කල බවක් දන්වා ඇත.

This is a clear misdirection which certainly affected the Appellant's right to a fair trial.

The learned High Court Judge had not considered the evidence favourable to the Appellants. Evidence transpired that the 1st Appellant was exonerated by a Deputy Inspector General of Police who held an inquiry regarding the alteration and entries made in the MOIB. The learned High Court Judge had not considered this evidence in favour of the Appellant. The relevant portion of the judgment is re-produced below:

අදාල සටහන් යෙදූ වේලාව වෙනස් කර තිබීම, දෝෂ සහිත ලෙසට සුළු අපරාධ පොතේ සටහන් ඇතුලත් කර තිබීම යන කාරණාවන් සම්බන්ධයෙන් නියෝජ්‍ය පොලිස්පතිවරයකු පරීක්ෂණයක් පවත්වා 01 වූදිත නිර්දෝශී බවට තීරණය කළ බවට කරුණු දන්වා ඇතත්, එම කරුණු දැක්වීම නුදු ප්‍රකාශයක් මත පමණක් පිහිටා සිදු කර ඇත.

In **Hattuwan Pedige Sugath Karunaratne v. The Attorney General** SC Appeal 32 of 2020 Aluwihare PC J., held that:

> *"No doubt the duty of a State Counsel is to present the Prosecution in an effective manner to the best of their ability in furtherance of securing a conviction, if the evidence can support the charge. The Prosecutor, however, is an officer of the court and their role is to assist the court to dispense justice. Thus, it is not for a Prosecutor to ensure a conviction at any cost, but to see that the truth is elicited, and justice is meted out. A Prosecutor is not expected to keep out relevant facts either from the court or from the accused. It the investigation has revealed matters which are favourable to the Accused and the accused is unaware of the existence of such facts, it is the bounden duty of the Prosecutor to make those facts available to the court and to the defence".*

Defence witness PC Ratnayake had not noted any abnormalities or received any complaint from the victim when he was handed over to him by the Appellants. The learned High Court Judge considering an opinion expressed by CI/Eric Perera regarding police reserve duty, utilized the same adversely against the Appellants. This too has caused great prejudice to the Appellants. The relevant portion of the judgment is re-produced below:

Page 1217 of the brief.

ප්‍රධාන පොලිස් පරීක්ෂක එරික් පෙරේරා නිලධාරී මහතා සාක්ෂි ලබා දෙමින් සැකකරුවකු උප සේවයට සටහන් යොදා භාරදෙනු ලැබුවත්, එවැනි සැකකරුවකු වැඩිදුර පරීක්ෂණ පැවැත්වීමට උපසේවයෙන් පරීක්ෂණ පවත්ව නිලධාරී මහතාගේ භාරයට නැවත ගන්නා අවස්ථා ඇති බවට දන්වා ඇත. එවැනි අවස්ථාවන්හිදී ඒ බවට සටහන් යෙදීමක් සිදු නොවන අවස්ථාවන් ද ඇති බවට දන්වා ඇත. ඒ කෙරෙහි අධිකරණයේ අවධානය යොමු වී තිබීම මෙසේ වාර්ථා කර තබනු ලැබේ.

Further the learned High Court Judge had come to his own conclusion regarding the function of the Wattala Police Station and utilized the said conclusion adversely against the 1st Appellant without any evidence led either by the prosecution or the defence. This has caused great prejudice to the 1st Appellant. The relevant portion of the proceeding is re-produced below:

Page 1217 of the brief.

හැරත් වත්තල පොලිස් ස්ථානයේ එම වකවානුවේදී පවත්වා ගෙන ගිය සුළු අපරාධ සටහන් පොතේ 2002.06.03 දින පැය 13.50 ට 01 වූදිත වෙනත් අපරාධයන් පරීක්ෂා කිරීමට නැවත වත්තල පොලිස් ස්ථානයෙන් පිටව යන බවට පිටවීමේ සටහන යෙදීමෙන් අනතුරුව එම සටහන් පොතේ 01 වූදිත නැවත එදිනම පැය 22.30 ට පොලිස් ස්ථානයට පැමිණ පැය 22.30 ට පැමිණීමේ සටහන යොදන තෙක් වෙනත් සටහනක් යොදා නැත. වත්තල පොලිස් ස්ථානය වැනි කාර්යය බහුල පොලිස් ස්ථානයක එම තත්ත්වය “අස්වාභාවික” තත්ත්වයකි. ඒ හරහා ද 01

චූදිත අසත්‍යය සටහන් අදාල සටහන් පොතට ඇතුලත් කිරීමක් සිදු කර ඇති බවට අනුමැතියකට එළඹිය හැක.

Although the prosecution had placed evidence before the court that it was the 4th Accused who recorded the statement of the victim at late hours and in fact the victim was in the custody of the 4th accused during the period the victim was in police custody. The prosecution led evidence commonly against all the Accused. But the 4th Accused was acquitted simply stating the case against the 4th Accused was not proved beyond reasonable doubt. But the learned High Court Judge had failed to consider the evidence presented by the prosecution equally against the Appellant and the 4th Accused. This has not only caused great prejudice to the Appellants but also demonstrated that there is a serious doubt in the prosecution case.

In a criminal trial, it is incumbent on the prosecution to prove the case beyond reasonable doubt. There is no burden on the Appellant to prove his innocence. This is the "Golden Thread" as discussed in **Woolmington v. DPP** [1935] A.C.462. In this case Viscount Sankey J held that:

> *"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt…… If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner…..the prosecution has not made out the case and the prisoner is entitled to an acquittal.*

The well-known and established 'presumption of innocence' stems from the Latin legal principle 'ei incumbit probatio qui dicit, non qui negat' which means that 'the burden of proof rests on who asserts, not on who denies.' As such, it forms the basis of all criminal trials which begins with a presumption of innocence in favour of the accused. Thus, the prosecution, is burdened

with proving the guilt of the accused to record a finding of guilt against him, in order to emerge victorious in the adversarial court of law. This presumption is not limited to the defendant during the criminal trial and applies in relation to the suspect/accused at the pre-trial phase as well.

In order to find the Appellants guilty of the charge in the present case, all the circumstances must show that the Appellants are the ones who committed the offence as charged and not anybody else. It is the incumbent duty of the prosecution to prove the same beyond reasonable doubt.

E.R.S.R.Coomaraswamy in his book titled "Law of Evidence" Vol: 1 at page 20 states:

> "Suspicious circumstances cannot establish guilt. The proof of any number of suspicious circumstances does not relieve the prosecution of the burden of proving the case against the accused beyond reasonable doubt, and compel the accused to give or call evidence."

In this case, after handing over the victim to the reserve officer, there is no evidence to link the Appellant to the crime that had been committed, as a very clear explanation had been given as to the whereabout of the Appellants. The prosecution had failed to bring evidence to rebut the strong position taken by the defence and failed to bring evidence to prove what happened to the victim after he was handed over to the reserve officer up till the time when he was seen by his brother at 5.00 p.m. in the evening. This is due to non-adducing of the evidence of SI/Renuka, OIC CI/Suraweera, PC Ratnayake and PC Boradeniya despite the direction of the Supreme Court. As correctly argued by the Learned President's Counsel who appeared for the Appellant, the selective process in naming the Accused and listing the witnesses by the prosecution has caused grave prejudice to the Appellants paving a way for a miscarriage of justice. As such, all grounds of appeal have merits.

Considering all the evidence presented by both parties, I conclude that the item of circumstantial evidence led in this case is only consistent with the Appellants innocence and inconsistent with their guilt.

Therefore, I set aside the conviction and the sentence imposed against the Appellants and acquit them from the charge.

The Registrar of this Court is directed to send this judgment to the High Court of Negombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL