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

In the matter of an Appeal under and in terms of Article 138 (1) of the Constitution read with Section 11 (1) of the High Court of the Provinces (Special Provision) Act No. 19 of 1990 with Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

COURT OF APPEAL CASE NO:
CA/HCC/436/2019
HC Kurunegala Case No:
HC 95/17

The Democratic Socialist Republic Of Sri Lanka

Complainant

Vs.

Ayagama Thennegedara Martin Alias Silva

Suspect

AND NOW BETWEEN

Ayagama Thennegedara Martin Alias Silva

Accused-Appellant

Vs.

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

Complainant-Respondent

Before : **B. Sasi Mahendran, J.**
Amal Ranaraja, J.

Counsel: I. B. S. Harshana for the Accused-Appellant
Udara Karunathilake, SC. for the Respondent

Argued On: 25.02.2025

Written Submissions On: 17.05.2022 (by the Accused-Appellant)
04.07.2022 (by the Respondent)

Judgment On: 27.03.2025

JUDGMENT

B. Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as the Accused) was indicted before the High Court of Kurunegala on the charge of committing the offence of murder of one Dissanayaka Arachchige Nilani Dissanayaka on 07.05.2013 punishable under Section 296 of the Penal Code as amended.

The Prosecution led the evidence through twenty-five witnesses and marking productions from P1 to P13 and thereafter closed its case. The Accused in his defence gave evidence under oath. At the conclusion of the trial, the Learned High Court Judge by judgment dated 19.12.2019 found the Accused guilty of murder and imposed the death sentence.

Being aggrieved by the afore-mentioned conviction and the sentence, the Accused has preferred this appeal to this Court.

The following are the grounds of appeal as pleaded by the Accused.

1. Whether the Accused was placed in disadvantageous position by not being tried by a jury?
2. No evidence of eye witness to show that the Accused is the perpetrator of the said crime
3. Trial Judge erred by not considering the contradictions made by the prosecution witnesses
4. The reports produced by the Government Analyst Department has not stated that the fingerprints found in the productions are that of the said Accused.

When this matter was argued on 25.03.2025, the Counsel for the Accused informed the Court that they were not challenging the conviction and the sentence imposed. However, there is a duty cast on this Court to consider whether the Prosecution has proved the case beyond reasonable doubt as the Accused is facing a death sentence.

Since the case of the prosecution is based entirely on circumstantial evidence, it is pertinent to consider the rules governing the cases of circumstantial evidence.

E.R.S.R. Coomaraswamy, *The Law of Evidence*, Page 25:

> "In Sri Lanka, the rule that in order to justify the inference of guilt from purely circumstantial evidence, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation

on any other reasonable hypothesis than that of his guilt, has been repeatedly emphasized and applied by our courts. Thus, in a case based entirely on circumstantial evidence, the fact that the deceased was last seen alive in the company of the deceased would not of itself justify a conviction, where the exact time of death is not established, nor would the fact that the accused subsequently attempted to dispose of a weapon which might have caused the injuries on the deceased. Again, where the only evidence against two accused, indicted for murder, was that they had the opportunity of committing the offence either jointly or individually and that after the discovery of the body, they absconded and were not apprehended for three years, the verdict of guilty was held to be unreasonable."

In B.R.R.A. Jagath Pramawansha v. The Attorney General, CA Appeal No. 173/2005, decided on 19.03.2009, His Lordship Justice Sisira de Abrew held that;

"The case for the prosecution depended on circumstantial evidence. Therefore it is necessary to consider the principles governing cases of circumstantial evidence. In King v. Abeywicrama 44 NLR 254 Soertsz J remarked thus: "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 this innocence."

In King v. Appuhamy 46 NLR 128 Kueneman J held thus: " 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 the that of his guilt."

In Podisingho v. King 53 NLR 49 Dias J remarked thus: "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."

Having regard to the principles laid down in the above judicial decisions, I hold that in a case of circumstantial evidence, if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapably conclusion that the accused committed the offence. When the evidence adduced at the trial is considered, the one and only irresistible and inescapable conclusion that can be arrived at is that the accused committed the murder of Prema Jayawardwene."

His Lordship Justice Aluwihare, PC, in Junaideen Mohamed Haaris v. Attorney General, SC Appeal 118/17, Decided on 09.11.2018 held that:

"Before I consider the facts of the case and the legal issues raised in this appeal, it should be borne in mind 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.

Regard should be had 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 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)"

At this juncture, it should be noted that the Learned High Court Judge had considered the following items of evidence as incriminating evidence against the Accused where she had come to the conclusion that from that evidence, the one and only inextricable and irresistible inference is that the Accused is guilty of the said offence.

- "මෙම වත්තේ මුරකරු හැටියට මෙම නඩුවේ විත්තිකරු සේවය කර ඇත.
- මෙම තැනැත්තියක් එම නිවසින් 2013.07 වැනි දිනය උදේ 6.20 ට පමණ පිටත්ව ගොස් ඇත.
- ඒ බවට එම බුද්ධික සහ ඔහුගේ මව සාක්ෂි දී ඇත.
- ඇගේ ස්වාමිපුරුෂයා එම වත්තට යන ගමන් ඇය සමඟ දුරකථනයෙන් කතාකර ඇත.
- ඉන්පසු එදින ඇය සුපුරුදු පරිදි නැවත වරක් මෙම නවාතැන්පලට පැමිණ නැත.
- ඇය සාමාන්‍යයෙන් එසේ සවස 5.30 ට පමණ පැමිණෙන බව දක්වා ඇත.
- ඒ අනුව එම නිවසේ පුද්ගලයින් විසින් ඇගේ නැගණිය අමතා ඇත.

- නැගණිය සහ මෙම මරණ කාරියට හිතවත්ව සිටි සම්පත් යන එම වත්තේ වැඩ කළ තැනැත්තා සහ මෙම නවාතැන්පලේ බුද්ධික යන අය ඇතුළු දෙතුන් දෙනෙක් හත් වැනිදා රෑම මෙම වත්තතුළින් මරණකාරියව සොයා ඇත.
- එම අවස්ථාවේදී මුරකරුවන විත්තිකරු මුර කුටියේ සිට ඇත.
- ඔහු මරණකාරී සෙවීමට සහභාගී වී නැත.
- ඔහු සඳහන් කර ඇත්තේ මරණකාරිය එදින උදේ වරුවේ වත්තට පැමිණි බවය.
- පැමිණ ඉන්පසු එම ස්ථානයෙන් පැළ පැළ ගෙන ඒමට තිබෙන බව පවසා නික්මගිය බවය.
- පිරිස මුරකුටිය බලන විට එහි මරණකාරියගේ පර්ස් එක සහ කුඩය සොයාගෙන ඇත.
- 2013.05.07 මරණකාරියව හමුවුණේ නැති නිසා පසුදින සම්පත් යන පුද්ගලයා එනම් 2013.08 වැනි දින උදේ පාන්දර වත්තට ගිය විට මුරකුටිය අවට සොයන විට මුරකුටියට අඩි 64ක පමණ දුරින් පොල් වලක මරණකාරියගේ දේහය හමුවී ඇත. මෙයට සාක්ෂි වශයෙන් මෙම සම්පත් සහ එම වත්තේ වැඩ කළ තවත් පුද්ගලයෙකු වන නන්දසේන සාක්ෂි දී ඇත.
- මෘත ශරීරයේ බාගෙට නිරුවත්ව තිබී ඇත.
- ඔරලෝසුවක් අතේ තිබී ඇත.
- ඉන්පසු ඔවුන් 119 මාර්ගයෙන් දුරකථන ඇමතුමක් ලබා දී ඇත.
- පොලිසිය විමර්ශන ආරම්භ කර ඇත. පොලිස් විමර්ශන වලදී මුරකුටියේ සිට මීටර් 27 ක් පමණ දුරින් ලේ වැනි විශාල පැල්ලමක් හමුවී ඇත. ඒ අවට එතන පිහියක් සහ සඟවා තිබූ මරණකාරියගේ බවට හඳුනාගන්නා ලද ඉරණ ලද ඇඳුම් කිහිපයක් හමුවී ඇත.
- 2013.05.08 වෙනි දිනකරු මුරකුටියේ සිට නැත.
- නමුත් මුරකුටිය පිටින් අගුල් දමා තිබී ඇත.
- පොලිස් සුනකයකු මෙම ස්ථානයට රැගෙන විත් විශාල ලේ වැනි පැල්ලම තිබූ ස්ථානයෙන් සොයාගන්නා ලද පිහිය ඔහුගේ ඉවට ලක් කළ විට පොලිස් සුනකයා විසින් මුරකුටි අසලින් පාරට ගොස් පාරේ තිබූ බස් හෝල්ට් එකට ගොස් ඇත.

- ❖ අසල්වාසියෙකුට අනුව මෙම මෘත ශරීරය සොයා ගන්නා දින උදේ පාන්දර 04.15 පමණ විත්තිකරු උදේ පාන්දර බස් එකේ නැග වත්තෙන් පිටත ගොස් ඇත.
- ❖ පසුව දින පසුව දින දෙකකට පසුව විත්තිකරු මාවනැල්ල ප්‍රදේශයේදී අත්අඩංගුවට ගෙන ඇත. ඔහුගේ ප්‍රකාශය මත මරණකාරියගේ ජංගම දුරකථනය, ඇඳුම් කිහිපයක් සහ විශාල පිහියක් සැකකරු රැඳී සිටි කුටියේ තිබී පිහියක් සහ සරමක්ද සොයාගෙන ඇත. මරණකාරියගේ චේන් පටක්, මුද්දක් සහ කරාබුවක්ද,පෙන්ඩන් එකක්ද සොයාගෙන ඇත.
- ❖ මරණකාරියගේ සහෝදරිය විසින් මරණකාරියගේ කරාබුව, කුඩය හඳුනාගෙන ඇත.
- ❖ මරණකාරියගේ ස්වාමිපුරුෂයා විසින් මරණකාරියගේ කරාබුවද, ද මුද්ද, මාලය, මුදල් පසුම්බිය, ජංගම දුරකථනය හඳුනාගෙන ඇත"

The Learned High Court Judge also has considered the statement made by the Accused from the dock and the recovery under Section 27 of the Evidence Ordinance.

When we peruse the evidence placed by the prosecution, the following items of circumstantial evidence are available in this case.

A. PW3, the husband of the deceased revealed that the Accused had an animosity with the deceased which was not disputed by the defence.
B. The deceased had come to the watchman's post in the estate around 7 AM to 7.30 AM on the day of the incident. It was seen by one of the workers.
C. When PW1 questioned the Accused regarding the deceased, he stated that she had gone out to buy some crops.
D. According to PW2 namely Dilanga Sampath, he had seen the umbrella and the purse which belonged to the deceased at the watchman's post where the Accused stayed.

E. According to PW9 and PW26, they saw the Accused at the bus halt in the early morning of the following day i.e. 08th of May 2013.

F. According to PW10, the deceased had left the house around 6.20 AM to go to the estate on the 7th of May 2013 after having tea.

G. According to PW11, the Judicial Medical Officer, Senanayake Mudiyanselage Harshana Mahendra Kumara Senanayaka, has observed a number of cut injuries in the deceased's body. All the injuries are deep-cut injuries. Further, he had identified that the incident had taken place between the evening of the 6th of May and the evening of the 7th of May. He further observed, there was a milky liquid in the stomach of the deceased indicating that she had not taken anything after she left the house of PW1. When the knife was shown to him, he identified that the injuries would have been caused by a similar weapon. It should be noted that the particular weapon was found at the place of the incident.

H. According to PW13 namely Dasanayake, the Police Officer, they were able to arrest the Accused only on 13th May 2013. Through the statement of the Accused, a number of items were recovered which were identified by the witnesses. It should be noted that the accused was arrested after 4 days of the incident.

I. The Police got the service of the Police Kennels Division and the sniffer dog used for the investigation had gone from the scene of the crime to the bus halt where the other witnesses had seen the Accused in the early morning of the 8th May.

This Court is mindful of the canine evidence available in this case. The sniffer dog of the Police Kennel Division sniffed the knife and had gone to the bus halt where the other witnesses had seen the Accused in the early morning of the 8th May. This evidence corroborates the evidence given by PW9 and PW26.

The value of such canine evidence is discussed by His Lordship Justice Colin Thome in Gunawardena vs. The Republic of Sri Lanka (1981) 2 SLR 315 at 326;

> "In *Kanapathipillai v The Queen* (supra) it was held that very convincing expert evidence should be placed before the Court which is invited to conclude that the mere behaviour of a police dog by itself renders the existence of any relevant fact in a criminal trial so "highly probable or improbable" as to justify the application of section 11 (b) of the Evidence Ordinance.
>
> It is common knowledge today that dogs can be specially trained to assist in the detection of crime and that for a long time have been one of the best known instruments of crime detection. As Gratiaen J., stated in the above case:-
>
> > "An important clue may be discovered by an animal which would point to the identity of the offender; but in such a case, it is the positive evidence brought to light rather than the manner of its discovery that constitutes relevant and admissible evidence of the offender's guilt.'"

This was followed by His Lordship Justice W.L. Ranjith Silva in CA 306/2006 decided on 03.08.2011,

> "In my opinion just like the evidence of an expert, if the skill and expertise the training and experience of the tracker dog could be considered as reliable and if the expertise and the training of the tracker himself is also reliable then and only then the evidence of the tracker with regard to the behaviour of the dog could be accepted as a vital piece of circumstantial evidence against the accused."

In the instant case, the defence has not challenged the skill and training of the tracker dog and the experience and the qualification of the dog handler. We take notice that evidence of the witnesses who saw the Accused in the early morning is corroborated by this piece of canine evidence. Through this evidence, the Prosecution has proved that the Accused was last seen at the bus halt.

The fact remains that the particular watchman's hut was only used by the Accused and it was identified by the witnesses that the particular knife was used in the estate and was kept at the Accused's place.

According to the evidence, the Accused did not participate in looking for the deceased on the night of the 7th of May, and on the very next day, he escaped from the estate.

In this instant, his subsequent conduct is a matter for us to consider.

According to Section 8 (2) of the Evidence Ordinance;

> "The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct

influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."

Knowing the fact that the deceased was missing and people were searching for her, leaving the estate at 4.15 in the morning without informing anyone and staying at an unknown place is a matter to be considered.

According to E.R.S.R. Coomaraswamy, *The Law of Evidence*, Volume I, on page 233;

Absconding or flight

"By the English common law, flight was considered so strong a presumption of guilt that in cases of treason or felony, it carried the forfeiture of the party's goods, whether he was found guilty or acquitted. But now the position is quite different: although the conduct of a person in absconding after the commission of an offence is evidence to show that he was concerned in the offence it is usually a small item in the evidence on which a conviction can be based.

Mere absence does not amount to absconding. It implies a departure with intent to defeat or delay the arrest. It is to go out of the jurisdiction of the court or to conceal oneself to avoid legal process. The court must be satisfied that the accused is missing from his usual haunts under circumstances which lead the court to infer that he is hiding in order to avoid arrest. It is well known that some accused persons, though innocent, deliberately run away rather than face the ordeal of a criminal trial. Evidence of alleged

absconding is of no value when it can be otherwise explained or accounted for.

But if it is established that the accused had absconded immediately after the commission of the alleged offence and that the police could not trace him for several days thereafter in spite of all efforts at his normal place of residence or at any other place where he could normally be expected to be, that is an important circumstance pointing to his culpability, unless he can offer a reasonable explanation for his absence. A classic case of absconding in a case based on circumstantial evidence in which the evidence of absconding may have clinched the verdict of the jury against the accused was the Mangala Eliya case. The accused was charged with the murder of his mistress, whose throat was slashed and who had been tied to rocks and whose body was immersed in a lake. On the day that the body floated up, the accused, who was a teacher disappeared without any intimation to his superiors. He was arrested about six months later in a distant village in the jungle about one hundred miles away, where he had been teaching in a remote village school, having changed his appearance by growing a beard."

In the instant case, there is evidence to show that the Accused was absconding. Soon after the people started searching for the deceased, he vanished in the early morning of the next day. This was not challenged by the defence and the Accused had not provided an explanation. This Court observes that in view of the fact that the Accused was employed by the deceased, the normal acceptable conduct of a lay person would have been to assist the other people in finding the deceased and wait until she is found. The conduct of the Accused and the improbability of the

Accused's conduct draw certain adverse inferences that point in the direction of his guilt. We are mindful that the Accused has failed to give a plausible explanation before the Trial Judge enabling the Judge to give his mind towards the innocence of the Accused.

We further observe that the Police had found blood stains near the place where the Accused stayed in the estate. We are also mindful of the impact of the recovery under Section 27 (1) of the Evidence Ordinance. From his statement, the Police had recovered items belonging to the deceased which was identified by the witnesses. This was not controverted by the Accused.

The question before us is what is the evidential value of the discovery in consequence of a statement made under Section 27(1) of the Evidence Ordinance.

In B.R.R.A. Jagath Premawansha v. Attorney General (Supra), His Lordship Justice Sisira de Abrew held that;

> "The investigating officer recovered an ear stud, a broken chain and a ladies' watch near a rubber tree in a rubber estate. These were recovered in consequence of a statement made by the accused who at 1. 05 am pointed out these items to the investigating officer. In Ariyasinghe v. AG (2004) 2 SLR 357 at page 386 court considered three ways in which an accused person could gain knowledge of a thing recovered in consequence of a statement made by him. They are as follows:
>
> 1. The accused himself hid the item
> 2. The Accused saw another person concealing the item

3. A person who had seen another person concealing the item in a certain place has told the accused about it."

In the instant case, the Accused had failed to explain how he got to know of such items that were hidden and were later discovered based on his statement. This Court notes that the inference can be drawn that the Accused was the person who hid the said belongings of the deceased which were recovered from the vicinity of the scene of the crime. This was further corroborated by the fact that the Accused was unable to provide the Court with an explanation.

When we consider the evidence placed by the prosecution, we hold that the prosecution had put forward a strong prima facie case.

When cogent evidence is placed against the Accused, our Courts expect the Accused to give the Court an explanation. The question then arises as to what the explanation given by the accused is against the said incriminating evidence. We note that he merely denied the charge and stated as follows from the dock:

> "ගරු මැතිනියනි මම මෙම ඉඩමේ මම මුරකරුවෙක් වශයෙන් රාජකාරිය කරමින් සිටියා. මෙම සිද්ධිය ගැන මට කියන්න දෙයක් නෑ ස්වාමිනී. ඒ සම්බන්ධයෙන් මම නිර් දෝෂ බව ප්‍රකාශ කරන්න පුළුවන්, මට කියන්න තියෙන්නේ එච්චරයි."

At this stage, it is pertinent to reproduce the dictum of Lord Ellenborough in R Vs. Lord Cochrane and others (1814 Gurney's Report 479):

> "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of

such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

The above dictum was followed by our Courts in the following judgments.

In Sumanasena vs. Attorney General (1999) 3 SLR 137, His Lordship Justice Jayasuriya held thus;

> "When the prosecution establishes a strong and incriminating evidence against the accused, the accused in those circumstances was required in law to offer an explanation of the highly incriminating circumstances established against him."

In Baddewithana vs. The Attorney General (1990) 1 SLR 275, His Lordship Justice P.R.P. Perera held thus;

> "From the failure of an accused to offer evidence when a prima facie case has been made out by the prosecution and the accused is in a position to offer an explanation, an adverse inference may be drawn under S. 114 (f) of the Evidence Ordinance."

In Aruna Alias Podi Raja v. Attorney General, 2011 2 SLR 44, His Lordship Justice Sisira De Abrew held that:

> "When prosecution established a strong incriminating evidence against an accused in a criminal case the accused in those circumstances is required

to offer an explanation of the highly incriminating evidence established against him and the failure to offer such explanation suggests that he has no explanation to offer."

Considering the above judicial decisions, we hold that the Accused failed to offer an explanation against the evidence placed against him. The Accused is the person who was employed by the deceased. He simply says that he does not know anything. Nevertheless, he had not denied that he met the deceased in the morning on the day of the incident. But he stated to the witnesses that the deceased had gone to Polgahawela to buy some crops. However, the witnesses had found the handbag and other belongings at the watchman's post where only the Accused resided. Later, some items were also recovered based on the Accused's statement which belonged to the deceased. Subsequently, the Accused left the place without informing anyone. When one considers the location and the time such were recovered, the only inference this Court can draw is that it was the Accused who concealed these items at those places which belonged to the deceased.

Considering the above evidence and the judicial decisions, we hold that the one and only irresistible and inescapable inference that this Court can arrive at is that the Accused committed the murder of Dissanayaka Arachchige Nilani Dissanayaka and there is no room for doubt that someone other than the Accused committed the said murder. We therefore hold that the Learned High Court Judge has correctly applied the principles governing the circumstantial evidence.

For the above-said reasons, we affirm the conviction and the sentence and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE

JUDGE OF THE COURT OF APPEAL