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.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Court of Appeal No:
CA/HCC/0169/2020
High Court of Kalutara
Case No: HC/872/2007

1. Katuwatha Vithanalage Gamini Silva alias Sudda
2. Kurudukarage Lalitha Padmini

ACCUSED

AND BETWEEN

Kurudukarage Lalitha Padmini

2nd ACCUSED-APPELLANNT

Vs.

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

RESPONDENT

BEFORE : **P. Kumararatnam, J.**
K. M. G. H. Kulatunga, J.

COUNSEL : **Sahan Kulatunga with Thilini Samarasekara for the Appellant.**
Anoopa De Silva, DSG for the Respondent.

ARGUED ON : **05/02/2025**

DECIDED ON : **12/03/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named 2nd Accused-Appellant (hereinafter referred to as the Appellant) along with the 1st Accused were indicted in the High Court of Kalutara as follows:

1. That on or about 28.11.2004 the accused named in the indictment committed an offence punishable under Section 355 of the Penal Code by kidnapping Kandhanamulla Kankanalage Duminda Nalin Kulatilaka.

2. At the same time and place and in the course of the same transaction the accused committed the murder of afore-named Kandhanamulla Kankanalage Duminda Nalin Kulatilaka thereby committing an offence punishable under Section 296 of the Penal Code.
3. At the same time and place and in the course of the same transaction the accused committed an offence punishable under Section 383 of the Penal Code for the robbery of the three-wheeler belonging to the deceased Kandhanamulla Kankanalage Duminda Nalin Kulatilaka.

The trial commenced before the Judge of the High Court of Kalutara as the Appellant and other Accused had opted for a non-jury trial. As 1st Accused had absconded the Court evidence led under 241(1) of the Code of Criminal Procedure Act No.15 of 1979 and fixed the case in absentia of the 1st Accused. After leading 12 witnesses the prosecution had closed the case.

When the defence was called the Appellant had made a dock statement and had denied the charges. After considering the evidence presented by both parties, the learned High Court Judge had convicted the 1st Accused, and the Appellant as follows:

- **For the First Count:** 10 years rigorous imprisonment with a fine of Rs.10,000/-. In default of which 01-year simple imprisonment was imposed.
- **For the Second Count:** death sentence was imposed.
- **For the Third Count:** 10 years rigorous imprisonment with a fine of Rs.10.000/-. In default of which 01-year simple imprisonment was imposed.

Further, the learned High Court Judge had issued an open warrant against the 1st Accused.

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

The learned Counsel for the Appellant informed this court that the Appellant had given consent for this matter to be argued in her absence. Further, at the time of argument the Appellant was connected via Zoom platform from prison.

Background of the Case.

PW4, Nimal Nandana, a three-wheel driver by profession had gone on a hire with the 1st Accused and the Appellant and after travelling to several places, he had dropped the two of them at Matugama around 6.30 p.m. He had further seen the 1st Accused and the Appellant getting into another three-wheeler to proceed to Weliwelketiya.

PW6 Ravindra Kumara had also witnessed the 1st Accused and the Appellant get into the three-wheeler of the deceased around 6.30 p.m. on the date of the incident.

According to PW20, the investigating officer CI/Abeysinghe, he had received a call from a person called Dharmawansa regarding a dead body lying on the ground near the Bogaha Junction in Molkawa. He had received this information at 9.45 a.m. on 29.11.2004 and he arrived at the place at 10.30 a.m. His initial observation revealed that the deceased's body was lying near the house of the 1st Accused and the garden of the house showed signs of a struggle and the dragging of an object across it.

On 02.12.2004 PW23, IP/Samaratunga had arrested the 1st Accused and the Appellant while they were travelling in the three-wheeler belonging to the deceased.

PW22, SI/ Susantha had recorded the statements of the 1st Accused and the Appellant at the Bulathsinghala Police Station. Upon the statement of

the 1st Accused a cup was recovered at his residence on 03.12.2004. Next, a Catty was recovered from the same house upon the statement of the Appellant.

PW11, JMO Sunil Kumara had held the post mortem examination of the deceased and had noted 07 cut injuries on the deceased's body. According to the JMO, the death had been caused by the throat being cut. According to the JMO, the injuries are consistent with having been caused by a heavy sharp cutting weapon. The post mortem had not revealed the time of death.

No identification parade was held in this case.

The Appellant had filed the following grounds of appeal.

1. The learned High Court Judge has erroneously applied the last seen theory to convict the Appellant.
2. The learned High Court Judge has erroneously applied the Ellenborough principle to convict the Appellant.
3. The learned High Court Judge has failed to consider, that the prosecution has not charged the Appellant with having a common intention of being part of a conspiracy and as such each accused person must individually commit the *actus reus* while possessing the *mens rea* in respect of each of the offences in order to be convicted.

As the Appeal grounds 1-3 are interconnected, those grounds will be considered together in this appeal.

To obtain a criminal conviction, the burden lies on the prosecution to demonstrate their case, typically relying on evidence collected by law enforcement. This evidence may encompass diverse types such as eyewitness

accounts, defendant confessions, mobile phone records, medical records, and forensic findings.

It was the contention of the learned Counsel for the Appellant that the prosecution has relied on the last seen theory to fix the Appellant to the crime. In other words, the prosecution has relied on the evidence that the deceased was last seen going away in the company of the appellant and 1st Accused and his dead body was found later near the compound where the Appellant and the 1st Accused lived. It was the argument of the learned Counsel that in order to prove a charge against an accused person based on the last seen theory, it is incumbent upon the prosecution to fix the exact time of death of the deceased.

In the **King Vs. Appuhamy** 46 NLR 128, the Court held that:

> *In considering the force and effect of circumstantial evidence, in a trial of murder, the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance if the prosecution has failed to fix the exact time of the death of the deceased".*

The deceased was last seen with the Appellant when she got into the three-wheeler with the 1st Accused on 28.11.2004 at 6.30 p.m. at Matugama. It is noteworthy to mention that the Appellant was carrying her infant at that time. Subsequently the dead body of the deceased was recovered at 9.45 a.m. on the following day. The time gap between the last seen and the recovery of the dead body about 15 hours. There is no evidence that the Appellant went in to the house with the 1st Accused.

The fact that the accused was last seen with the victim or at the crime scene does not automatically imply that the accused is guilty of committing the

crime. There must be additional evidence that establishes a clear connection between the accused and the crime itself.

In this case, the simple accusation that the deceased was last seen in the company of the Appellant cannot be considered as an incriminating item of evidence against the Appellant, as the prosecution had failed to fix the exact time of death. Therefore, applying the last seen theory to convict the Appellant is a clear misdirection.

Next, the learned Counsel for the Appellant complained that the learned High Court Judge had wrongly applied the inference created by the discovery of the Catty (a cutting instrument) based on the statement made by the Appellant to convict her.

Section 27 of the Ordinance deals with "discovery of a fact consequent to any information received from a person accused of an offence".

Discovery of a fact is admissible under Section 27 if the following requirements are satisfied;

1) The evidence sought to be led under Section 27 must be relevant to the fact in issue,

2) The fact discovered ought to have been discovered consequent to the information received from the accused,

3) At the time of making the information known he must be in the custody of the Police Officer,

4) He must be accused of an offence,

5) Only the portion of his information which led to the discovery of the fact can be proven

T. S. Fernando J, referred to the case of **Kottaya v Emperor** 1947 AIR PC at Page 70 and cited the following passage;

> *" In Their Lordships' view it is fallacious to treat the' fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that ' I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the 13 45 NLR 532 14 69 NLR 353 15 1947 AIR PC fact discovered is very relevant. But if to the statement the words be added ' with which I stabbed A ' these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."*

It is trite law that the only inference that can be made regarding a discovery pursuant to a statement made by an Accused is that the Accused had knowledge of the discovered items and nothing more. In this case the only adverse inference that is created by the portion of evidence is that the Appellant only knew the location of the Catty allegedly used for the murder of the deceased. As such, in this case individual liability cannot be established against the Appellant.

Circumstantial evidence is generally admissible in court, but it's crucial that the evidence is relevant to the case, has probative value and is reliable. As this case is hanging on circumstantial evidence, the prosecution should prove the guilt of the Appellant through circumstantial evidence which must be conclusive in nature.

Ranjith Silva J in **Karunaratne v AG** (2007) CA 162/01 stated:

> *"[The]…"Ellenborough principle" would apply only where there is 'strong prima facie evidence already existing (against) the accused and not to augment or strengthen a weak case and to convert it into a strong prima facie case."*

In **Aruna Alias Podi Raja v. Attorney General** (2009) CA 71/2003, at page 54 of [2011] 2 SRI L.R, Sisira de Abrew J described the Ellenborough principle by referring to several Judicial decisions delivered on the subject:

> *"Applying the principles laid down in the above judicial decisions, I hold that when prosecution establishes strong incriminating evidence against an accused in a criminal case, the accused in those circumstances is required in law to offer an explanation of the highly incriminating evidence established against him and failure to offer such an explanation suggests that he has no explanation to offer."*

In this case, the evidence led against the Appellant is completely inadequate as it does not provide a strong incriminating case against her as required by the Ellenborough principle.

Therefore, the grounds of appeal raised by the Appellant have due merit.

As the prosecution had failed in its duty to prove this case beyond reasonable doubt, I set aside the conviction and sentence imposed by the learned High Court Judge of Kalutara dated 16/07/2020 on the Appellant. Therefore, she is acquitted from this case.

Accordingly, the appeal is allowed.

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

JUDGE OF THE COURT OF APPEAL

K. M. G. H. Kulatunga, J.

I agree.

JUDGE OF THE COURT OF APPEAL