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

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Court of Appeal Case No. HCC 178/2008

High Court of Ampara Case No. HC 1036/2005

Ranhawadi Gedara Sarath Sandanayaka

Accused

AND NOW

Ranhawadi Gedara Sarath Sandanayaka

Accused Appellant

V.

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

Complainant Respondent

BEFORE : **K.K. WICKREMASINGHE, J**

K. PRIYANTHA FERNANDO, J

COUNSEL : Neranjan Jayasinghe with Anusha Rathnayake for the Accused Appellant.

P. Kumararatnam SDSG for the Respondent.

ARGUED ON : 25.11.2019

WRITTEN SUBMISSIONS

FILED ON : 06.06.2018 by the Accused Appellant.

29.11.2018 by the Respondent.

JUDGMENT ON : 24.01.2020

K. PRIYANTHA FERNANDO, J.

01. The Accused Appellant (Appellant) was indicted in the High Court of Ampara for committing the offence of murder punishable under section 296 of the Penal Code. After trial, the Appellant was convicted as charged and was sentenced to death. This appeal was preferred against the said conviction and sentence.

Grounds of appeal urged by the Appellant are;

1. The learned High Court Judge had believed the evidence of the eye witness (PW1) Nandawathie, although her evidence fails the test of credibility and the test of probability.

2. The learned High Court Judge erred in law by coming to the conclusion that the other items of circumstantial evidence lead to the only inference of guilt of the Accused Appellant.

3. The reason given by the learned High Court Judge to reject the evidence of the Accused is unreasonable.

02. Prosecution mainly relied upon the evidence of the sole eye witness Nandawathie (PW1). Appellant is the son-in-law of the PW1. Deceased is Nandawathie's daughter. According to Nandawathie's testimony, the Appellant and the deceased as husband and wife were living in their own house built by the Appellant, with their child. The deceased was pregnant and was

due to deliver the baby in few days. On the fateful night the Appellant had slept with his daughter in one room and the witness Nandawathie had slept with the deceased in another. Windows of the room was kept open on the request of the Appellant as it was warm. In the night the deceased had shouted, 'බුදු අම්මෝ මාව බේර ගන්න' (page 72). She had seen the Appellant sitting on deceased's stomach covering his eyes with a small band. She had recognized the Appellant from his upper body, face and the voice with aid of the light that was on. When she asked the Appellant, 'පුතේ මොකද කරන්නේ?' (page 73), the Appellant had put a cloth on her face, held her neck with his fingers and had threatened to kill her if she shouted. She had recognized the voice of the Appellant. She further said that the Appellant kept a knife on her neck. Appellant had asked the deceased for money saying, 'සල්ලි දීපිය, සල්ලි දීපිය' (page 73). Deceased had said, 'සල්ලි දෙන්නම් මරන්න එපා' (page 73). Then the deceased had said that her neck was cut. Appellant had gone inside the house.

Ground of Appeal No.1

03. Learned counsel for the Appellant submitted that PW1 Nandawathie is not a credible witness and that her evidence is improbable. Nandawathie had later implicated the Appellant as an afterthought and that she had failed to tell the police initially that she identified the Appellant.

04. Learned DSG for the Respondent mainly depended on the circumstantial evidence. However, counsel conceded that the contradiction marked as '1V1' cannot be explained. It was the contention of the learned DSG that PW1 had lied to police due to fear and that her evidence is reliable.

05. Learned Trial Judge after analyzing the evidence of the PW1 Nandawathie, found her to be a credible witness. Contention of the counsel for the Appellant is that PW1 is not a credible witness and also that her evidence is improbable. At the trial, PW1 said that she recognized the Appellant by the light and it was the Appellant who sat on the stomach of the deceased and cut her neck. Further, to confirm her evidence about the identity of the Appellant, she said that she asked the Appellant, 'පුතේ මොකද කරන්නේ?' (page 73 of the brief). After the incident, she immediately had run to the neighbour called 'Fiscal Mama' (PW3) asking for help. She had told PW3 that thieves had cut the neck of the deceased. According to PW1, the

reason for not telling the PW3 about Appellant cutting the deceased's neck was that she was scared that the Appellant may have been around and that he would harm her.

06. When she went to the hospital, admittedly, she had told the hospital staff that thieves cut the neck of the deceased. According to her testimony, she had not revealed about the Appellant as she was scared again. She said that the cousin brother of the Appellant named Sandanayake was around and that she was scared. The learned Trial Judge has accepted the above reason to be genuine. In coming to that conclusion, the evidence given by the said Sandanayake, has escaped the mind of the learned High Court Judge. Sandanayake (PW2) in his evidence said that he suspected the Appellant and that he shouted that the Appellant may have done it. 'මම ඒ වෙලාවේ කෑ ගහල කිව්ව වෙන කවුරුවත් නෙවෙයි ගාමිණී අයිය තමයි මේක කරේ කියල. මම වාහනේ ගියර් එක දාගෙනම කෑ ගහගෙන ගියා රෝහලට' (page 229). Therefore, it is obvious that PW1 did not have any reason to get scared of Sandanayake and to keep without disclosing the Appellant at the hospital. It is clear that the PW1 was not telling the truth when she said that she was scared because PW2 was around and that she lied to circumvent the situation of not disclosing the Appellant at the earliest.

07. It is also important to note that PW1 had told the police that two persons with their faces covered, asked for money from the deceased and cut her neck. She denied telling that to the police and it was marked as V1. She had no reason to fear in the presence of the police if she really recognized the Appellant as the assailant.

08. She clearly said that the assailant asked for money from the deceased whilst being seated on her stomach. Deceased had told the assailant not to kill her, that she would give him the money. It is highly improbable for the Appellant to ask for money from his wife that way making his identity by voice clear to the PW1 who was sleeping beside the deceased. All these factors make the evidence of PW1 on the identity of the assailant doubtful and improbable.

Hence, I am of the considered view that the Ground of appeal No.1 has merit.

Grounds of Appeal No.2 and 3

09. Counsel for the Appellant submitted that although the learned Trial Judge has said that he takes into account the direct evidence as well as circumstantial evidence, learned High Court Judge has failed to analyze the circumstantial evidence. The circumstances the learned Trial Judge relied upon has not been explained. It was further submitted that it is unsafe to rely upon the dying declaration alleged to have made by the deceased.

10. Learned DSG for the Respondent conceded that the contradiction marked as V4 on the dying declaration is not explained by the prosecution witnesses.

11. In his evidence, PW2 Sandanayake said that the deceased made a gesture from which he understood that the Appellant cut her neck. He said that he asked the deceased, 'අක්කේ මොකද වුනේ?' (page 227). Then the deceased had made the gesture to show that the neck was cut and went off. 'දකුණු අතෙන් දෙපාරක් බෙල්ල හරහ මෙහෙම කරල අත්දෙක ඉස්සරහට මෙහෙම කලා. (මේ අවස්ථාවේදී සාක්ෂිකරු තමාගේ අතින් බෙල්ල හරහා දෙපාරක් ඉරක් ඇඳ තමාගේ අත්දෙකෙන්ම තමාගේ පැත්තේ සිට කවුරුහරි ගිය දෙසට දැන දිගුකර පෙන්වා සිටී)' page 228.

12. Then again, the witness said that in between someone asked, 'ගාමිණී පුතා කෝ?'. That gesture was made in answering to that question. PW2 could not remember as to who posed that question to deceased.

13. The person who posed that question also gave evidence at the trial. That was PW11 Upali Chandra Kumara. In the night PW3 had told him that thieves had cut the neck of the deceased. He then had asked the deceased, 'කෝ ගාමිණී?' (page 201). Then the deceased had made the gesture that he thought that she referred to the Appellant. However, in cross examination it was elicited that in his statement to the police she had asked the deceased, 'නංගියේ මොකක්ද වුනේ? කෝ ගාමිණී?'. Witness denied the 1st part of the question, 'නංගියේ මොකක්ද වුනේ?' Page 208.

14. A dying declaration made on the basis of nods and gestures are not only admissible but possesses evidentiary value. In case of ***The King V. Alisandiri 1 C.L.J 169, 7 C.L.W. 2*** it was held that nod of assent made by the deceased constituted a verbal statement within the meaning of subsection (1) of section 32 of the Ceylon Evidence Ordinance No. 14 of 1895. In '*Alisandiri'*, the nod of assent was to a clear question.

15. However, in the instant case on the evidence of PW2 as well as PW11, it is clear that two questions were asked and that gesture was made by the deceased in reply. Therefore, it is unsafe to conclude that the deceased made that gesture in reply to the question, 'කෝ ගාමිණී?' not to the question 'නංගියේ මොකක්ද වුනේ?'

16. The infirmities of the unavailability of the witness (deceased) to testify and to be cross examined also has to be taken into consideration when acting upon a dying declaration. In case of ***Lallubhai Devchand Shah V. State of Gujarat [1971] 3 SCC 767*, para 8**, it was held;

> *"The law with regard to dying declarations is very clear. A dying declaration must be closely scrutinized as to its truthfulness like any other important piece of evidence in the light of the surrounding facts and circumstances of the case, bearing in mind, on the one hand, that the statement is by a person who has not been examined in Court by oath and, on the other hand, that the dying man is normally not likely to implicate innocent persons falsely."*

17. However, in this instance, the issue is not whether that gesture was made or not by the deceased, but in reply to which question posed to him was the gesture made. In the above premise, it is unsafe to act upon the gesture made by the deceased as it is not clear as to which question, she replied by that gesture.

18. The learned High Court Judge has not specifically mentioned the proved circumstances that led to the conclusion on circumstantial evidence that it was the Appellant who committed the murder and no one else. In his Judgment learned High Court Judge said;

'තුන්වැනි, හතරවැනි සහ පස්වැනි කරුණු නන්දාවනී, සුගතදාස, උපාලි වන්දුකුමාර, කරුණාසේන, කුමාර, ගුණතිලක හා නිමලරාජ් යන නිල නොවන සාක්ෂිකරුවන් හා වෛද්‍ය කෝණාර , පො.ප. ජයසේන හා උ.පො.ප. ජයවීර යන නිල සාක්ෂිකරුවන් මඟින් ඉදිරිපත් කළ සෘජු හා පරිවේශණීය සාක්ෂි මඟින් සාධාරණ සැකයකින් තොරව පැමිණිල්ල විසින් ඔප්පු කර ඇති බව තීරණය කරමි.' (Page 592)

19. In case of ***Samantha V. Republic of Sri Lanka [2010] 2 Sri L.R. page 236***, it was held;

> *"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 evidence on those circumstances should be proved circumstances.

20. In his Judgment, the learned High Court Judge has clearly misdirected himself on the evidence of PW9, Nimalaraj who testified about the inquiry made by the Appellant on the insurance policy of the Appellant and wife. The learned High Court Judge went on the premise that the Appellant had inquired from the witness about the benefits that he would get in the event the death of his wife. His evidence on that, in examination in chief itself was totally different, and that has escaped the mind of the learned Trial Judge. At pages 341 and 342 the witness said;

ප්‍ර: ඔහු කා සම්බන්ධයෙන් ද විමසුවේ?

උ: භාර්යාවට දරුවෙකු ලැබෙන්න තියෙනවා. රක්ෂණයෙන් මුදල් ගන්න පුළුවන්ද කියල.

ප්‍ර: තමා මොනවද දුන්න උත්තර?

උ: ඒකට දෙන්නේ නෑ කියල කිවුව.

ප්‍ර: ඊට පස්සේ?

උ: ඔපරේෂන් එකක් කරන්න තියෙන්නෙ කියල ඒකට ගෙවනවාද කියල ඇහුව. මම ගෙවන්නේ නැහැ කියල කිවුව.

ප්‍ර: ඔහු මොනවද ඊට පස්සේ කිවුවේ?

උ: ටිකක් තද වෙලා වගේ ඇහුව එහෙනම් මොකටද ගෙවන්නේ කියල.මම ඔප්පුවත් අරගෙන මොන මොන ආවරණද තියෙන්නෙ කියල විස්තර කරල කිවුව.

ප්‍ර: ඊට පස්සේ මොකද කිවුවේ?

උ: මරණයකට ගෙවනවාද කියල ඇහුව. මම විස්තර කරල එහෙම වෙන්න නෑ කියල ආශිර්වාද කරල කිවුව.

ප්‍ර: කාගේ මරණය ගැනද කථා කලේ ඔහු?

උ: භාර්යාවගේ. මම තමයි කිවුවෙ ඔප්පුවෙ තියෙන ආවරණ ගැන. එහෙම වෙන්න එපා කියල කිවුව.

ප්‍ර: ආශිර්වාද කරා කියල කිවුව ඒ ඇයි?

උ: රක්ෂණ ඔප්පුවේ ආවරණය ගැන. කථා කලාම මරණය සම්බන්ධයෙන් කියපුවාම.

ප්‍ර : කාගේ මරණය සම්බන්ධයෙන්ද කථා කලේ?

උ: භාර්යාවගේ.

ප්‍ර: මොකක් සම්බන්ධයෙන්ද?

උ: එයා ඇහුව මොකටද ගෙවන්නේ කියල.

ප්‍ර: ඔහුගේ භාර්යාවගේ මරණය සම්බන්ධයෙන් ඇහුවාම තමා කිවුවනේ ආශිර්වාද කරා කියල. ඇහුවෙ මොනව වෙලා මරණයට පත්වුනෝතින්ද කියලද?

උ: එයා මරණය ගැන ඇහුවෙ නෑ. මම තමයි කිවුවෙ.

21. Therefore, it is clear that the Appellant had inquired about the benefits they would receive in the event of a childbirth. When he was informed that they would not get any benefit even for a surgery for childbirth, he has got agitated and had asked the witness for the benefits he is entitled to. On his own the witness had explained to the Appellant about the benefits he would get on a death of the spouse. Witness clearly said that the Appellant did not ask about the benefits he would get in the event of the death of a spouse, but on his own he explained. The learned Trial Judge had gone on the wrong premise that the Appellant had inquired about the benefits in the event of wife's death. Therefore, that piece of evidence of PW9 cannot be taken against the Appellant as circumstantial evidence and the learned High Court Judge erred in doing so.

22. As submitted by the counsel for the Appellant and conceded by the learned DSG for the Respondent, the productions said to have recovered in terms of section 27 of the Evidence Ordinance were not produced in court as they were supposed to have got destroyed at the Government Analyst Department. Therefore, learned Trial Judge did not have the advantage of seeing them, especially to compare the two pieces of the knife, nor the defence had the opportunity to observe them and to cross examine. Therefore, it was unsafe for the Trial Judge to totally depend on the so-called comparison supposed to have made on the two pieces of the knife by the investigators in the absence of a Government Analyst Report.

23. Further, as submitted by the counsel for the defence the piece of cloth was never recovered in terms of section 27. The certified extract of the portion of the statement made by the Accused, submitted by the prosecution as P2 did not mention anything about a piece of cloth, but about a sarong and a knife. Therefore, the piece of cloth said to be the cloth Accused covered his eyes cannot be considered as a production recovered in terms of section 27 of the Evidence Ordinance.

24. Therefore, the above circumstances the learned High Court Judge has taken into consideration as circumstantial evidence cannot be considered as proved circumstances to come to the irresistible and inescapable conclusion that it was the Appellant and no one else who committed the alleged offence.

25. It is the contention of the counsel for the Appellant that the learned Trial Judge has unreasonably rejected the dock statement made by the Appellant. It is submitted that the learned Trial Judge erred when he said in the Judgment that the Appellant did not suggest to the police in cross examination that his statement was recorded under duress. As submitted by the counsel for the Appellant, this position has been clearly suggested to the Investigating Officer by the counsel for the Appellant (page 283 of the brief).

ප්‍ර: සාක්ෂිකරු මෙම විත්තිකරු අත්අඩංගුවට ගත්තේ කොහේදීද?

උ: අම්පාර නගරයේදී.

ප්‍ර: විත්තිකරු අත්අඩංගුවට ගත්තේ මල්ශාලාවක් ලහදීද?

උ :නැහැ. ඉන්ධන පිරවුම්හල අසලදී.

ප්‍ර: විත්තිකරු අත්අඩංගුවට ගත්තාට පස්සේ අඩම්තේට්ටම් කලාද?

උ: නැහැ. චෝදනාව කියවාදී අත්අඩංගුවට ගත්තා.

ප්‍ර: විත්තිකරු විසින් 2 වෙනි ප්‍රකාශය කල පොත තිබෙනවාද?

උ: තිබෙනවා.

ප්‍ර: මම සාක්ෂිකරුට විත්තිය වෙනුවෙන් යෝජනා කරනවා මෙම විත්තිකරු අත්අඩංගුවට ගැනීමෙන් පසු ඔහුට අඩම්තේට්ටම් කර තමන් විසින් ඒ සුජීවා නැමති කාන්තාවගේ මරණය සම්බන්ධයෙන් තමා විසින් ගොතන ලද සටහනට විත්තිකරුගෙන් බලෙන් අත්සන් ලබා ගත්තා කියලා?

උ: ස්වාමීණි, මම ඒක ප්‍රතික්ශේප කරනවා.

ප්‍ර: මම නැවත වරක් යෝජනා කරනවා විත්තිකරුගෙන් බලෙන් ප්‍රකාශයක් සටහන් කර ගත් බව?

උ: නැහැ.

26. The Appellant in his evidence said that 'Rathu Aiya' asked him to go to the police station. He said that, 'යන අතරදී රතු අයියා කියලා එක්කෙනා මට හරියටම මතක නැහැ. මල්ලි අපි පොලීසියට ගිහින් පැමිණිල්ලක් දාලා යමුද කියලා ඇහුවා.' (page 387). However, PW10 had said that it was 'Machine Mudalali' who told that they should go to the police station. The fact remains that the Appellant had wanted to go to the hospital, but someone has said to go to the police station first. The learned Trial Judge has taken this into consideration to find the evidence of the Accused inconsistent. The evidence of an Accused also has to be considered the same way the court considers the evidence for the prosecution. As submitted by the counsel for the Appellant, the learned Trial Judge has taken minor discrepancies in the evidence of the Accused to find him to be incredible and inconsistent.

Hence the Grounds of appeal No. 2 and 3 have merit.

27. In the instant case there are so many suspicious circumstances which led to the death of the deceased. In case of ***Queen V. Sumanasena 66 NLR 350,*** it was held;

"In a criminal case suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence."

28. In the above premise, the sole eye witness Nandawathie is incredible. The other circumstantial evidence the learned Trial Judge has taken into account are not sufficient to come to an irresistible and inescapable inference that it was the Appellant but no one else who caused the death of the deceased.

For the reasons stated above, I find that the prosecution has failed to prove the charge against the Appellant beyond reasonable doubt and therefore, I acquit the Accused of the charge.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL