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

In the matter of an application for Revision in terms of section 331 of the Code of Criminal Procedure Act No.15 of 1979 as amended.

Court of Appeal
Case No: CA(HC)188/2014

Puttlam High Court
Case No: 52/2005

In the Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Joseph Antony Croos Raj,
Panichchawilluwa,
Koththanthiw.

Respondent

And Between

Joseph Antony Croos Raj,
Panichchawilluwa,
Koththanthiw.

Respondent-Appellant

Vs.

Democratic Socialist
Republic of Sri Lanka

Complainant-Respondent

Before	:	**Achala Wengappuli,J** **Devika Abeyratne,J**
Counsel	:	Nayantha Wijesundara for the Accused-Appellant. Thusith Mudalige DSG for the Respondent.
Argument on	:	05th of February 2020.
Decided On	:	01st of July 2020.

Devika Abeyratne,J

The accused appellant *Joseph Anthony Croos Raj* was indicted in the High Court of *Puttalam* for committing the murder of *Emmanuel Anthony Benedict* on 28.10.2000, thereby committing an offence punishable under section 296 of the Penal Code. After trial, the accused was convicted and sentenced to death on 20.11.2014. Being

aggrieved by the said conviction and sentence, the accused appellant has preferred this appeal.

The Prosecution has led evidence of eight witnesses and the accused has given a statement from the Dock. There are no eye witnesses, therefore, the prosecution case rested solely and squarely on circumstantial evidence.

The facts pertaining to this case, briefly are as follows;

According to the prosecution, on the night of 28. 10. 2000, there had been a dinner organized in the house of the deceased for the godfather (PW7) and the godmother of one of the children of the deceased after the Christening service that was held in the afternoon.

After dinner, the deceased carrying a torch and a wooden stick has accompanied PW 7 *Joseph Benedict*, to his home which was more than half a mile away. However, about 30 to 35 feet away from the house of *Benedict*, another christening party was going on and the deceased has gone to that house uninvited after telling PW 7 to go to his home safely.

This fact was corroborated by PW 8, *Manuel Santhiya Pillai* who testified that the deceased came to the christening party that was held in his sister-in-laws house in the night and was singing and enjoying himself and left around 2 am the following morning being the 29th, when the witness and others started to have the meal. It appears from his evidence that he too has been a suspect at one time for this incident. (page143 of the brief).

PW 6, *Mary Matilda* the wife of the deceased has testified that after dinner at their place, the deceased left carrying a torch with PW 7 and never returned. She has specifically stated that there was no animosity between the deceased and the accused. She has stated that the burnt torch which was marked as P 4, looked like the one he was

carrying on the night of the incident, however, it was not established with certainty as the torch that was carried by the deceased that night. The State Counsel has conceded that the torch was not identified.

PW 01, the brother of the deceased when searching for missing *Anthony Benedict* with others, have found the body of the deceased on a *katulahamba* near a barb wired fence of a coconut estate of 8 acres, which is by the side of a road that people use frequently.

The accused is the watcher of that estate and the watchers' hut is situated about 200 meters from where the body was found. PW 1 has also stated there was a mamoty which had stains that appeared like blood in the compound near the hut, but could not establish that it belonged to the accused or that the accused has used it.

PW 2 is a neighbour of the accused who can see the watcher's hut from his home, who testified that the accused came to his compound three times on the night of the incident, at first around 9.30 pm when the accused is alleged to have come carrying an iron rod looking for a box of matches to light the lamp, then at about 12 , 12.30 am with a torch and a bottle of liquor when the accused tried to assault a visitor, who was only identified as 'uncle' who was at the witness's house watching TV, and finally around 2 and 2. 30 in the morning of the 29th calling out to persons named *Quintus* and *Lesli* (who were not there) and was hanging around the garden for about half and hour and then has left. This unusual behavior was attributed by the witness to the accused being under the influence of liquor.

This witness PW 2 when he gave evidence was 25 years old, thus as the incident occurred in the year 2000, he would have been about 19 years of age at that time.

In cross examination in page 91 of the brief, he has stated that around 11 and 12 in the night he has heard someone shouting "මාව මරණවෝ" from the direction of the watcher's hut but did not go to inquire and has gone on to explain as follows;

ප්‍ර :- විත්තිකරු පලමු පාර ඇවිල්ලා ගිහිල්ලා කොපමණ වෙලාවකට පසුද විත්තිකරුගේ වත්තේ ශබ්දේ ඇහුණේ ?

උ :- පැය 1/4 ක් වත් ගියේ නැහැ.

ප්‍ර :- මොනවගේ ශබ්දයක්ද ඇහුණේ?

උ :- මාව මරණවෝ කියලා කෑගහන ශබ්දේ ඇහුණේ. එයා එහෙම තමා කෑ ගහන්නේ එයාගේ නෝනා.

ප්‍ර :- මාව මරණවෝ කියලා කෑ ගහන ශබ්දේ ඇහුණා නේ. ඒ කටහඬ හඳුනා ගත්ත ද?

උ :- නැහැ. ශබ්දේ ගෝෂාවක් වගේ ඇහුනේ.

ප්‍ර :- ඒ වෙලේ කටහඬවල් කීයක් ඇහුනද?

උ :- කටහඬවල් කීපයක් ඇහුණා). පෙ)ඩ් ළමයිගේ කටහඬවල් ඇහුණා.

It appears from this evidence that the watcher and the wife were quarrelling which is corroborated by the evidence of the brother-in-law of the accused PW 3, who testified that his sister-in-law came to his place that night around 2, 2.30 in the morning saying that the accused was assaulting her.

It transpired that at the time PW 2 heard the above shouting, the accused had already come to his compound once and it was before the second visit he has heard this screaming.

The brother- in- law of the accused *Anthony Gnanaprakasam* PW 3 has stated that the wife of the accused came to their house saying that she cannot stay with the accused as he is assaulting her and about half an hour after her arrival, the accused also had come to his house carrying a small stick and the accused and his wife were in his house when he left for work in the morning.

According to the medical evidence, there were cut injuries on the deceased which could have been inflicted with a sharp knife as well as blunt weapon trauma. Answering a direct question, the doctor has testified that some injuries could have been inflicted with a back of a mamoty. But at no point was it established forensically that mamoty marked as P3, was used to inflict injury on he deceased or that the sharp cut injuries were inflicted by the knife marked as P6.

The burnt torch P4 and the burnt knife P6 were stated to have been recovered consequent to a statement based on section 27 of the Evidence Ordinance by the accused. There is no evidence as to where those items were recovered or the proximity to where the body was found. In pg 188 of the brief it merely says

ප්‍ර : ඒ අනුව මහත්තයා එම භාණ්ඩ සොයා ගැනීමට ගත් පියවර මොනවාද?

උ : ඒ අනුව විමර්ශන භාර නිලධාරියා වශයෙන් උප පොලිස් පරීක්ෂක මැනිව් මහතා විසින් අත්අඩංගුවේ සිටි සැකකරු සමඟ ගොස් මෙම සැකකරු පවසන ලද ගින්නට දමා පිලිස්සීමට සලසා තිබූ පිහියක් සහ මෙම කෑලි 03 ටෝච් එක අත්අඩංගුවට ගැනීමක් කළා.

ප්‍ර : එම භාණ්ඩ කොහේ තිබිලද අත්අඩංගුවට ගත්තේ ?

උ : පිළිස්සීමට දමන ලද අළු ගොඩක තිබියදී සොයාගැනීමට හැකි වුනා.

This land is of 8 acres, there is no evidence whatsoever of the location where these productions were found. From the evidence elicited It can be inferred that the deceased would have been inflicted injury at least after 2 am. Therefore, if at all if the items recovered have any connection to the deceased they should have been set fire to thereafter. There is no evidence of the location that the items were recovered, thus, the prosecution has failed to establish a vital piece of evidence.

In his statement from the Dock the appellant has stated that he was locked up and beaten up by the Police and when he could not bear it any more he signed the statement. However, that he cannot remember anything that happened after he got frightened at the cemetery when he was returning home after buying some liquor, '*arrack*', on the fateful night.

There is no specific plea as such in the Dock statement only that the appellant cannot remember anything that happened after he got frightened near the cemetery. The learned trial judge has referred to the Dock statement and concluded that on the evidence of PW 2, the appellant was drunk and as it was voluntary he cannot claim intoxication as a defence. Whether the appellant was drunk on the night of the incident has not been established by cogent evidence. Therefore, this Court hesitate to agree with the conclusion of the learned trial judge.

In the instant case there is no specific plea as stated above. It is also noted that PW 8 also has been a suspect at one stage. It appears from the evidence that the body of the deceased being found close to the appellant' s hut and the bahaviour of the appellant that night, has made him a suspect.

There is an observation of the police officer PW 11 that there were signs of struggle on the compound of the accused appellant, which could be attributed to the fight with the wife. The evidence of PW 3 was that the wife of the accused came to his place because the accused assaulted her.

The evidence is that the deceased had bled a lot of blood, if the struggle was with the deceased, a trail of blood would have been definitely visible from near the hut to where the body was found. There were no drag marks observed. Thus, it is safe to infer that the struggle marks on the compound is not of the deceased.

The Post Mortem report states the time of death is '*29th early morning*'. No other indication. The evidence adduced is that the deceased left the 2nd Christening party he attended around 2 am, which is close to the place where the body was found.

The neighbour PW 2 has stated that the accused was in his compound for about half an hour around 2 am that morning. The brother- in- law of the accused has stated around 2, 2.30 in the morning wife of the accused came and within half an hour the accused was at his place which is about half a mile distance from where the body was found. When the time of death is not established, there is no substantial evidence before Court to place the accused at the scene of crime. The body was found quite close to a road, although it was 200 meters away from the hut.

It is settled law that when the conviction is solely based on circumstantial evidence, prosecution must prove that no one else but the accused committed the offence.

Queen vs Kularatne_71 NLR at page 534 The Court of Criminal appeal quoted with approval what *Whatermeyer J* held in *Rex vs Blom*

Two cardinal rules which govern the case of circumstantial evidence in a criminal trial,

1. *The inference sought to be drawn must be consistent with all the proved facts. If it does not, then the inference cannot be drawn*

2. *The proved facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they had not excluded the other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.*

Don Sunny vs Attorney General 1998 2 SLR 1 it was held that the prosecution must prove that no one else other than the accused had the opportunity of committing the offence. The accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.

The items P 4 and P 6 were said to have been recovered on a section 27 recovery. However, it was not established beyond reasonable doubt that those items belonged to the accused, that he placed them there, or that the knife in fact was used in the assault of the deceased. These items were recovered from an open area where not only the accused but other people also had access to. If at all what can be presumed is he had knowledge of the items being there, which is not sufficient to convict the appellant of having committed the offence he was charged with, in the given circumstances in this case.

It has been held in many decided authorities with regard to circumstantial evidence, that the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence. However, in the instant case the prosecution has failed to prove that no one else other than the accused had the opportunity of committing this offence. When considering the circumstantial evidence, if an inference can be drawn which is consistent with the innocence of the accused, then it can be construed that the case was not proved beyond reasonable doubt.

In ***H.M.Don Somapala v. Republic*** *(78NLR 183, at 188)* it was held

> *"that the evidence of the accused' s statement to the Police was wrongly admitted as the possession of a sword cannot establish that the accused did participate in the criminal act of killing or that he had a common intention to kill,but the possession of*

the weapon which was used for the killing can".

In ***Etin Singho and another v. Queen*** *(69NLR 353, at 356) it was held*

> *"that if the jury believed that the second accused made the statement P17, all that was proved was that he had knowledge of the whereabouts of club P1.The fact discovered as a consequence of P17 (s.27 statement) was confined to that knowledge on the part of the 2nd accused. There was no proof before Court that P1 (club) was in fact used in the assault on the deceased".*

When considering the totality of the evidence led in this case, it does not lead to an inescapable and irresistible inference that it was the accused appellant who inflicted the injuries on the deceased.

In M.M. C. Bandara Deegahawathura vs the Attorney General CA 61 of 2001 decided on 2.8.2005 it was decided

> *"If the prosecution seeks to prove a case purely on circumstantial evidence, the prosecution must exclude the possibility that the proved facts are consistent with the*
>
> *innocence of the accused. If an explanation consistent with the innocence of the accused can be seen from the prosecution case itself, then the accused need not offer any explanation because in such an event the prosecution has not proved its case beyond reasonable doubt."*

In the instant case the prosecution has failed to prove the case beyond reasonable doubt. Therefore, I am of the view that the judgment should not be allowed to stand.

Considering all of the above, I set aside the conviction and the 6sentence of the learned High Court Judge of *Puttalam* dated 20.11.2014 and acquit the accused appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI ,J

I Agree

JUDGE OF THE COURT OF APPEAL