

SAMANTHA VS. REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW, J.
ABEYRATNE, J.
CA 138/2005
HC KALUTARA 178/02

Penal Code - Murder - Establishing a case on circumstantial evidence - Duty of Judge - Inference of guilt - Beyond reasonable doubt?

The accused-appellant was convicted of the murder of one W and sentenced to death. It was contended by the accused that the prosecution failed to prove the case beyond reasonable doubt.

Held

- (1) 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.
- (2) 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.

APPEAL from the judgment of the High Court of Kalutara.

Cases referred to:-

- (1) *K vs. Abeywickrema* 44 NLR
- (2) *K vs. Appuhamy* 46 NLR
- (3) *Podi Singho vs. K* - 53 NLR 49

Razick Zarook PC with *Rohana Deshapirya* for accused-appellant.

Jayantha Jayasooriya DSG for respondent.

February 20th 2009

SISIRA DE ABREW, J.

The accused-appellant has not been produced by the Prison Authorities. Mr. Razick Zarook President's Counsel appears for the accused-appellant. Heard both Counsel in support of their respective cases. The accused in this case was convicted for the murder of a man named Nanayakkarage Don Weerasingho and was sentenced to death. This appeal is against the said conviction and the sentence. The prosecution relied upon the following items of evidence to prove the case:

1. A pair of slippers alleged to have been given by one Sujeewa to the accused was found near the dead body.
2. A torch belonging to the deceased and a knife were recovered in-consequence of a statement made by the accused.
3. In the night where the deceased went missing, the accused put his arm round the shoulder of the daughter of the deceased who was going home.
4. In the night where the deceased went missing, the accused - appellant went to one Jayasiri's house and asked a knife to cut a leaf called *Habarala* which is normally used as an umbrella to prevent from being wet in the rain.

According to the prosecution case on 28th June 1992 the accused-appellant took a pair of slippers from one Sujeewa. The prosecution tried to prove that this pair of slippers was found near the dead body of the deceased. At page 97 of the brief Sujeewa could not identify the pair of

slippers produced at the trial as the pair that was removed by the accused-appellant about 6 years ago. We therefore hold the identification of the pair of slippers was not proved beyond reasonable doubt and that the same cannot be considered as an incriminating item of evidence against the accused.

According to the prosecution case the deceased person used to carry a torch and an umbrella when he went to pick up the daughter. This umbrella was never found throughout the investigation at any place relevant to the case. The investigating police officer in his evidence stated that he recovered a torch in consequence of a statement made by the accused-appellant. But this torch was not properly identified by Siriyawathie, the wife of the deceased and Sumitra, the daughter of the deceased. According to Siriyawathie, the colour of the torch is red, vide at page 73 of the brief, but according to Sumitra the colour of the torch is green. Jayasiri in his evidence says that on the fateful night he met the deceased around 7.00 p.m. and he noticed the deceased carrying a torch in red colour. In view of the serious contradiction with regard to the colour of the torch, we are of the opinion that the identification of the torch has not been proved beyond reasonable doubt and therefore the same cannot be considered as an incriminating item of evidence against the accused. According to Kapuge Don Dayasiri around 8.00 p.m. on the fateful day the accused came and asked for a knife to cut a *Habarala* leaf. The prosecution case is that the Police Officer recovered a knife in consequence of a statement made by the accused. Prosecution, by this item of evidence, tried to establish that in the night of 9th of October 1998 the accused-appellant was armed with a knife. If the accused-appellant was armed with a knife why did he ask for a knife from Dayasiri to cut a

Hubarala leaf. This question remains unanswered throughout the trial. This too creates a reasonable doubt in the prosecution case.

According to the investigating Police Officer he observed stains like blood on the blade of the Knife. But he failed to send this knife to the Government Analyst. This knife according to the Police Officer was found on a heap of timber in the accused's house. If there were stains like blood on the blade of the knife would he have kept the same on the said heap of timber to be seen by the others. This too raises a doubt in the prosecution case. In our view the prosecution has failed to prove the case beyond reasonable doubt. The prosecution tried to establish the case on circumstantial evidence. 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. This view is supported by the following judicial decisions. In the case of *King vs. Abeywickrema* ⁽¹⁾ 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 his innocence.”

In *King vs. Appuhamy* ⁽²⁾ Keuneman 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 than that of his guilt.”

In *Podisngho vs. King*⁽³⁾ Dias J. held 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.

From the evidence led at the trial I am unable to conclude that the accused committed the offence of murder. The Learned Deputy Solicitor General who appears for the Attorney General, upholding the best tradition of the Attorney General’s Department, submitted to this Court that he is unable to support the conviction in view of the evidence led at the trial. We are pleased with this submission. For the aforementioned reasons. we are of the opinion that the accused should not have been convicted of the offence of murder. For these reasons we acquit and discharge the accused-appellant of the charge leveled against him.

The Prison Authorities are not entitled to keep the accused in their custody once they receive a copy of the judgment of this Court. We direct the Registrar of this Court to forward a copy of this judgment to the Commissioner General Prisons.

ABEYRATHNE, J. - I agree.

Appeal Allowed.