KRISHANTHA DE SILVA
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL
FERNANDO, J., AND
EDIRISURIYA, J.
C.A. 146/99
H.C. AMPARA 284/98
JULY 1 AND 4, 2002

Penal Code – Section 296 of the Code – Murder-Sentence of death – Failure of accused to give an explanation of incriminating circumstance-Circumstantial evidence.

Held:

(i). Even though the accused made a statement from the dock he was silent as to what happened after the deceased was placed on the bed; the statement that he did not know anything about the incident cannot be accepted.

(ii). An accused person is entitled to remain silent but when the prosecution has established strong and incriminating evidence against him he is required to offer an explanation of the highly incriminating evidence.

The accused has failed to bring an explanation of such circumstance established againt him.

(III). Circumstantial evidence can be acted upon only if from the circumstances relied upon the only reasonable inference to draw is the inference of guilt. If the circumstances are consistent both with guilt and with innocence then the case is not proved on circumstantial evidence.

Per Edirisuriya, J.

"The hypothesis of innocence must be excluded by the circumstance relied upon and the circumstances must point to one conclusion alone, i.e. the guilt of the accused"

APPEAL from the judgment of the High Court of Ampara

Cases referred to:

1. *Rex v. Cockrone* – Gurneys Reports pags 479

2. *The King v. Geekiyange John Silva*, - 46 NLR 73

3. *U.G. Seetin and 4 Others v The Queen*, - 68 NLR 316

4. *J.M. Chandradasa v. The Queen*, - 72 NLR 160

5. *Baddewithana v. The Attorney General*, - 1990 1 SLR 275

6. *The King v L Seedin de Silva*, - 41 NLR 337

7. *Illangathilaka and Others v Republic of Sri Lanka*, - 1984 2 NLR 39

Ranjit Abeysuriya, P.C. with *Shamane Gunaratne* for appellant.

P.G. Dep. P.C. Additional Solicitor-General with *H.N. Navavi*, State Counsel for Attorney-General.

Cur.adv.vult.

August 21, 2002

EDIRISURIYA, J.

The accused-appellant in this case was indicted in the High Court of Ampara for having committed an offence punishable under section 296 of the Penal Code.

He was tried by the High Court Judge of Ampara without a jury and a conviction for murder was entered against him. Accordingly the learned High Court Judge imposed a sentence of death on him.

The first witness for the prosecution Dr. Mrs. Wijetunga testified to the fact that she performed a post-mortem examination on the body of Indranie Jayakody, the deceased in this case on 1997-05.26 (i.e. the day following the day of the incident in this case.) According to her there was bleeding from the nose and the ear and also there were two contusions on both sides of the neck.

Immediately beneath these contusions, there was bleeding. Small blood vessels on both sides of the neck had been damaged. Hyoid bone was fractured. She had noticed a large contusion on the front of the left side of the head. Corresponding to this contusion there was a rupture of small blood vessels inside the scalp. She said 11th rib on the left side of the body was fractured. She had seen bleeding between ribs no. 8 and No. 9 on the left side. Also there were small haemorrhages in the peritoneum. There was a small contusion on the right lobe of the liver. There were small haemorrhages in the spleen. There were two contusions on both the kidneys. She said that death was due to an assault with a blunt weapon and the strangulation of the neck.

It appears that in view of this ambiguity regarding the cause of death the prosecution led the evidence of Dr. Bandara. He said that he obtained his MBBS degree in 1992 from the University of Peradeniya. He further said that he has performed about 500 post-mortem examintions and about 500 medico legal examinations. The majority of these examinations were on persons who were victims of assaults. After having obtained his MBBS he said he worked as an analyst for a period of one year in the Forensic

Department of the University of Peradeniya. His duties during that period was to participate in the post-mortem examinations and to conduct lectures for medical students in this regard. It is his evidence that he participated in research work as well. At the time he gave evidence he functioned as the District Medical Officer of the Base Hospital Ampara. According to him he had given evidence on Post-Mortem Reports prepared by Doctors other than himself. It appears that the learned trial Judge has treated him as an expert witness on forensic medicine.

He said he is competent to express an opinion on the contents of the Post-Mortem Report (P3) prepared by Dr. Mrs. M.B Wijetunga. The Post-Mortem Report (P3) states that death was due to an assault with a blunt weapon and strangulation of the neck. According to Dr. Bandara there connot be two causes of death. He was of the view that strangulation of the neck was the immediate cause of death.

He said if medical attention was not given the rest of the injuries other than injuries on the neck taken together would have caused death in the ordinary course of nature. He further said that Dr. M.B. Wijetunga was wrong when she stated in the Post-Mortem Report that there were no external injuries since there were two contusions on either side of the neck. He said hyoid bone was fractured and there was bleeding above the contusions. According to him the above injuries on the neck could have been caused by exerting a heavy pressure on the neck. He said a person could die within fifteen to thirty seconds after receiving such injuries. He was of the view that these injuries are necessarily fatal and fracture of the hyoid bone could be caused by stangulation of the neck.

He said the deceased herself could not have squeezed her own neck and up-to now an incident of that nature has not been recorded.

The main witness Anjana said that on the day prior to the day of the incident there was a quarrel between the father and the mother. She said on that day her mother was assulted and severely scolded by the father. The cause of the quarrel was the lending of a bicycle to one Martin.

According to her on the following day (i.e. 1997.05.25) her mother left the house and went to a neighbour's house. The father came home drunk and slept on a mat. He woke up at about 4.00 p.m. or 5.00 p.m. and went in search of the mother with her younger brother. She said the father brought the mother and pushed her into the house.

The father slapped the mother and thereafter used the handle of the knife (p1) to stirke her on the head and the blunt side of the knife to strike her on the back of the chest.

It is also in her evidence that the father dragged the mother four steps to the compound holding her by her hair.

Again he brought the deceased to the house and put her down on the floor and trampled her stomach.

Thereafter she vomited blood. Stating that the mother had applied kerosene oil on her head the accused-appellant wanted the witness and her younger brother to bring water to bathe the mother.

Subsequently the accused-appellant poured water on the deceased, from the head down wards.

After pouring water the witness and her younger brother were asked to leave the house. They entered the house after about 20 minutes. During this 20 minute period only the father and the mother were inside the house. The witness did not hear her mother speak. When they came into the house the father wanted their help to dress up the mother and keep her on the bed. At the time she was kept on the bed she did not speak and was unconscious. The witness was unable to say whether the mother was alive or dead at this particular time. The witness and her younger brother watched the television and slept in the drawing room. Only the mother was in the room.

Before they went to sleep the father locked the doors and windows of the house. At about 12 p.m. or 1 a.m. she woke up due to the noise of her aunt's (mother's sister) crying. She saw her grand mother and her aunt crying near her mother.

In the early morning she came to know that her mother had died. She also said that after the mother was kept on the bed her

uncle came to the house and removed the bulb which was in the Vesak lantern.

The witness Padminie Malkanthie in her evidence said that on 1997-05-25 both the accused-appellant and the deceased came to her house. It is her evidence that the accused-appellant saying that he would kill the deceased that day and demanded that she should come home. At this stage the deceased pleaded with the mother to be with her at least that night. The deceased had also said that it was likely that she would be killed that night. When the mother tried to go with the deceased the accused-appellant had uttered filthy words. The witness pulled the mother's frock. Thereafter the mother did not go with the deceased. When the accused-appellant pushed the deceased ordering her to come with him the deceased poured kerosene oil on her head saying it is far better to kill herself than die at the hands of another. She could not strike a match stick due to the intervention of the witness and her little son.

Her younger brother and the accused came home in the night.

The accused told the witness that the sister was not dead but her body was cold and wanted the witness to go with him and see the deceased. She went to the sister's house at about 1.00 a.m. and came to know that the sister was dead.

Another prosecution witness Ramanisge Martin said he lived in the house adjoining the house of the accused. His evidence was that on the day of the incident at about 6.30 p.m. the accused held the deceased by her hair and dragged her along the road, beating her. She was dragged to the steps near the door.

She was taken to the verandah and was pushed into the house. When the witness was in his house he heard the deceased plead with the accused not to assault her saying.

"බුදු රත්තරනේ ගහන්න එපා කලන්තෙ හැදෙනවා"

After the prosecution case was closed the learned trial judge called for the defence. The accused made a statement from the dock to the following effect: On the day of the incident a minor dispute arose between the deceased and himself over his uncle's

bicycle being lent to one Martin. He brought his wife from her parental house. At the door steps of his house the deceased abused him. He slapped her and she fell down. The accused held the wife by her hand and took her into the house. Thereafter she sat on the bed. The daugher and the son watched the television.

He went to sleep and at about 2.00 a.m. Since he felt thirsty he went to the kitchen and drank some water. At that stage he went to the room and spoke to the deceased. She appeared to have fainted and did not speak. Thereafter he ran to the main house and told "Mallie" (Probably the younger brother of the deceased) that the deceased appeared to have fainted and some thing should be done.

The accused wanted the "Mallie" to inform the mother-in-law about the matter. Thereafter a crowd of people came from "Mallie's" house with Tilakapala and examined the deceased. The mother-in-law massaged the deceased's legs with khohomba leaves. People from the neighbourhood also came. One Suriyaarachchi after having examined the wife declared that she was unconscious. It was at that stage that the accused realized that his wife was dead. The accused said that he did not know anything about the incident.

The learned High Court Judge after having analyzed the evidence for the prosecution has correctly held that the prosecution has proved the follwing facts beyond reasonable doubt:

(1) Anjana did not strangle the deceased.

(2) Mahesh Chinthake did not strangle the deceased.

(3) On the day of the incident an outsider could not have entered the house.

(4) An outsider did not enter the house and strangle the deceased.

(5) The deceased did not commit suicide.

(6) Hyoid bone of the deceased was fractured and this could have been done by exerting pressure with the hands on either side of the neck.

In the circumstances the learned trial Judge has correctly held that *a prima facie* case was made against the accused. It is noted that even though the accused made a statement from the dock he was silent as to what happened after the deceased was placed on the bed. I am of the view that the statement of the accused that he did not know anything about the incident cannot be accepted. An accused person is entitled to remain silent but when the prosecution has established strong and incriminating evidence against him he is required to offer an explanation of the highly incriminating circumstances established against him. The accused has failed to give an explanation of such circumstances established against him. In the circumstances I hold that the learned trial judge was entitled to draw certain inferences which he deemed proper from the failure of the accused to give an explanation of incriminatory circumstances. I am of the opinion that the principle laid down by Lord Ellenborough in *Rex v. Cockroine*(1) is applicable to the facts of the instant case. This *dictum* has been followed with approval and applied in Sri Lanka.

Vide *The King v Geekiyanage John Silva*(2)

U.G. Seetin and 4 others v The Queen(3)

J.M. Chandradasa v The Queen(4)

Baddewithana v The Attorney General(5)

The King v L Seeder de Silva(6)

Ilangathilaka and others v The Republic of Sri Lanka(7)

It is admitted that this is a case of circumstantial evidence. In such a case circumstances relied upon should be consistent with the guilt of the accused and inconsistent with his innocence. If the circumstantial evidence relied upon can be accounted for on the supposition of innocence then the circumstantial evidence fails. Circumstantial evidence can be acted upon only if from the circumstances relied upon the only reasonable inference to be drawn is the inference of guilt. If the circumstances are consistent both with guilt and with innocence then the case is not proved on circumstantial evidence. The hypothesis of innocence must be excluded

by the circumstances relied upon and the circumstances must point to one conclusion alone. ie. the guilt of the accused. The learned trial Judge has in detail discussed these principles to be followed in appreciating circumstantial evidence in the instant case.

The learned trial Judge has rejected the statement made by the accused from the dock. He has also stated that it does not throw a reasonable doubt on the prosecution case.

In the circumstances I see no reason to interfere with the finding of the learned High Court Judge and accordingly I affirm the conviction and the sentence.

Appeal is dismissed.

FERNANDO, J. I agree.

Appeal dismissed.