

DON SUNNY
v.
ATTORNEY-GENERAL
(AMARAPALA MURDER CASE)

COURT OF APPEAL
GUNASEKERA, J. (P/CA)
J. A. N. DE SILVA, J.
CA 129/94
HC COLOMBO 4216/89
MARCH 17, 18, 19, 20 AND 26,
APRIL 29, 30 AND
MAY 6, 7, 8, 9 AND 13, 1997.

Murder – S. 102, 113(P) 296 Penal Code – Conspiracy – Circumstantial Evidence – Irresistible inference consistent only with guilt – Evidence of Co-conspirators.

The accused-appellant and two others were indicted on the first Count with having between 1.9.86 and 27.2.87 committed conspiracy to commit murder by causing the death of Amarapala with one G. and others under s. 113(B) and s. 102 Penal Code and on the second count having committed murder by causing the death of the said Amarapala on 27.2.87 under s. 296 Penal Code.

After trial the accused-appellant and the absent-accused were convicted and sentenced to death; on appeal.

Held:

1. When a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.

2. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.
3. If upon a consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence then they can be found guilty.

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.

APPEAL from the Judgment of the High Court of Colombo.

Dr. Ranjith Fernando with Mrs. Premali de Silva, Ms Keshali Pinto-Jayawardena for accused-appellant.

C. R. de Silva P.C Additional Solicitor-General with *Kapila Waidyaratne* SSC and *S. Samaranayake* SC for Attorney-General.

Cur. adv. vult.

September 01, 1997

GUNASEKERA, J. (P/CA)

The accused-appellant Pulukkuttige Don Sunny alias Sunny De Liyanage alias Sunny Aiya and two others Mohamed Iqbal Ismail and Mohamed Haniff Kitchil were indicted with having between 1.9.1986 and 27.2.1987 at Wellawatta, Grandpass, Dehiwala, Delkanda, Angoda and other places within the jurisdiction of the High Court of Colombo committed conspiracy to commit murder by causing the death of Wickremage Don Amarapala with one Halwatu Aratchige Gamini and others unknown to the prosecution punishable under section 296 read with sections 113 (B) and 102 of the Penal Code.

In the second count the accused-appellant was indicted with having committed murder by causing the death of Wickremage Don Amarapala at the B. R. C. grounds in Havelock Town on 27.2.1987 punishable under section 296 of the Penal Code.

Before the trial since it was reported that Mohamed Iqbal Ismail had been abducted and his whereabouts were unknown the indictment was appropriately amended by deleting his name from the list of accused and incorporating his name in the body of the indictment. As the other accused Mohamed Haniff Kitchil was not traceable the trial against him was held in absentia after recording evidence in terms of section 241 of the Code of Criminal Procedure Act.

After trial before a Judge without a jury the accused-appellant and the absent accused Mohamed Haniff Kitchil were convicted, the appellant on both charges in the indictment and the other accused Kitchil of count No. 1 which was the only charge against him. They were both sentenced to death on 28.3.94 and an open warrant was issued for the arrest of the 2nd accused who was absconding.

The facts relating to this case were as follows:

A customs fraud had been perpetrated by one Srilal Caldera, and the deceased W. D. Amarapala a Senior Officer attached to the Customs Department had pursued the offenders. During the course of the investigations he had taken into custody two ledgers from the house of Iqbal who was the 1st accused at the non summary inquiry who had been abducted since then and whose name has been incorporated in the body of the indictment. Since various entries in the said ledgers had contained foreign currency transactions of Iqbal, Iqbal had made every attempt to have the said ledgers released from the custody of the Customs Department. About 3 to 4 months prior to the 27th of February, 1987, Iqbal had tried to get the ledgers released through the intervention of Abdul Majeed Mansoor Mohamed alias Lord Mowjood who was a businessman, a close friend and an informant of the deceased, Amarapala.

According to the evidence of the prosecution Sunny, the accused-appellant had been a neighbour of Iqbal at Swarna Road, Havelock Town and together with Mohamed Hanif Kitchil had been members of the same cricket team of Iqbal with Kitchil being its captain. 3 to 4 months prior to the death of Amarapala, Iqbal, Sunny and Kitchil had been making inquiries from several persons as to whether they could secure a pistol. One of them Lalith Denzil Jayawardena who was a friend of the 2nd accused testified that Kitchil had told him that the pistol was wanted for the purpose of "giving the works" to a senior Customs Official.

The deposition evidence of Halwatu Arachchige Gamini alias Pistola Gamini revealed that a pistol was sold by him to the appellant Sunny some time in the month of August, September or October, 1986, with Lionel and Ravi acting as brokers and that Gamini had visited the house of Sunny which was adjoining the house of Iqbal who had been introduced as Sunny's boss. During the conversation he had with Sunny, Sunny had told him that the pistol was wanted to execute a job in killing a top Customs Official for which he was to be paid 7 to 8 lakhs. On the following day he had been told by Sunny that the pistol was not in proper working condition and that the boss meaning Iqbal would not be happy about the condition of the weapon.

Afterwards Gamini had repaired the pistol and brought it back to Sunny and suggested that he disposes of it and had arranged for one Chandrakeerthi Perera to buy it, but, however Chandrakeerthi Perera had not been able to take it as Sunny had suspected him

to be an agent of the police and assaulted him as a result of which he had run away from Sunny's house.

On the fateful day 27th of February, 1987, the deceased Amarapala had been doing his constitutional walk in the company of his walking companion Piyal Weeraman about 5.30 a.m. at the B.R.C. grounds in Havelock Town when he had been fatally shot on the head from behind by an assailant dressed in a jacket and a pair of trousers who had run away towards the parapet wall adjoining the Havelock playground. Piyal Weeraman had not been able to identify the assailant.

The police had been informed and investigations had commenced. Dr. M. S. L. Salgado the Judicial Medical Officer, Colombo, who had conducted the post-mortem examination on the body of the deceased Amarapala had testified that death had been caused by a single bullet which had been fired from behind which had entered from the back of the head and exited from the front causing extensive damage to the brain.

According to the evidence of the Additional Government Analyst the shot that killed Amarapala had been fired from a distance of between 4 to 20 feet. A.S.P Wijeratne who was the then O.I.C. of the Narahenpita Police Station had arrived at the scene and cordoned off the scene and examined the scene with sophisticated equipment such as metal detectors for the spent bullet casing but, had not been able to find it. During the course of the investigations Iqbal, Sunny, Kitchil and Halwatu Arachchige Gamini had been arrested as suspects and a non summary inquiry had been initiated against them. Suspect Gamini had been given a conditional pardon to testify against the other suspects.

At the hearing of the appeal learned counsel for the appellant relied on two grounds of appeal.

1. That the learned trial Judge erred in law and in fact by failing to appreciate material items of evidence favourable to the accused which militated against an irresistible inference consistent only with his guilt. He urged that the following matters that transpired in evidence were items that were favourable to the accused-appellant.

- (a) that the evidence disclosed that the deceased had many enemies and that there had been death threats other than from Iqbal.
 - (b) that Iqbal's customs culpability being marginal the motive to have got rid of the deceased was not compelling.
 - (c) the visit of the accused-appellant to B.R.C. grounds on the morning of the 27th of February, 1987, had not been positively established.
 - (d) the dress of the accused vis-a-vis the attire of assassin as spoken to by Mr. Weeraman who was walking along with the deceased at the time the deceased was shot is incompatible.
 - (e) the evidence relating to the search for a gun and for an assassin by the accused negates the prosecution version that it was the accused who shot the deceased.
 - (f) the evidence relating to the fact that the gun which has been secured by the appellant was not in working condition and therefore he had made attempts to dispose of it indicates that he was not instrumental in shooting at the deceased.
 - (g) the Government Analyst's report negatives that there had been target practice at the site as deposed to by the witnesses.
 - (h) that several searches made at the scene on the day of the incident and the following day with highly sophisticated equipment failed to retrieve a spent bullet casing.
2. That the learned trial Judge erred in law in respect of the following matters:
- (a) that there was inadequate appreciation of the legal concepts relating to circumstantial evidence.
 - (b) there had been inadequate appreciation of the legal concepts relating to the conspiracy.

- (c) there had been insufficient consideration by the learned trial Judge of principles relating to the evidence of co-conspirators as provided for in section 10 of the Evidence Ordinance.
- (d) the learned trial Judge had failed to give consideration to the consequential effect of the non-compliance of the provisions of section 116 (2) of the Code of Criminal Procedure Act.

It was submitted by learned counsel that the trial Judge dealing with the law relating to circumstantial evidence at page 1077 onwards in very brief outline of the principles applicable has observed that the relevant circumstances must be consistent with the guilt of the accused and if they are consistent with guilt as well as his innocence the benefit of such doubt should enure to the benefit of the accused and that this approach would be inadequate as the law requires that in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than of his guilt and any reasonable probability must enure to the benefit of the accused and therefore the learned trial Judge's application of the test was far from adequate and it cannot safely be said that even if he applied the correct evaluation a finding of guilt would not have been inevitable.

We have considered the judgment of the learned trial Judge and we find that he had dealt with the principles relating to circumstantial evidence from page 1771 onwards where he had observed thus: "accordingly, the prosecution has relied only on circumstantial evidence to establish the charges of conspiracy to commit murder and murder when a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the two accused and Gamini and Iqbal committed the offences. On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt. Therefore, if upon a consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that accused committed the offence then they can be found guilty. That is not all, the prosecution must prove that no one else other than the accused

had the opportunity of committing the offence. Therefore, 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."

Thus on a consideration of the charge we are unable to agree with the submission of learned counsel for the appellant that the consideration of the principles of circumstantial evidence by the learned trial Judge was inadequate.

Another submission made by learned counsel for the appellant was that notwithstanding the fact that this was a non jury trial it must be apparent on the face of the record that the learned trial Judge was alive to the legal concepts relating to the offence of conspiracy and that it was regrettable to note that the trial Judge had dealt with the law relating to conspiracy inadequately.

The items of circumstantial evidence relied on by the prosecution to establish a charge of conspiracy to commit murder against the appellant and the other accused emanate from the evidence of the following witnesses:

L. Denzil Jayawardena a Cashier of a wine stores at Delkanda in his evidence stated that he used to play cricket under the captaincy of Kitchil in the playground opposite Iqbal's house at Havelock Town and had seen Sunny also there. One day in the month of September, October, 1986, when he was playing cricket at the Wijaya Vidyalaya grounds in Dehiwela Iqbal, Kitchil and Sunny had come to see him in a car and Kitchil had asked him to find him a pistol. He had replied that he did not have one but would make inquiries from a friend who was near the Delkanda wine stores and let him know. Then Iqbal, Kitchil and Sunny had gone away. The next day Kitchil had come with Sunny the Appellant to meet him near the Delkanda wine stores and had inquired from him as to whether he had found a pistol as was requested. At that time one Dammi a friend of his had been there and Dammi had told him that his brother Shantha may have one, thereupon Sunny and Dammi had gone in search of Shantha in the same car in which Sunny and Kitchil had come leaving Kitchil with Denzil and returned in about 5 minutes and said that there was no pistol with Shantha. According to his evidence Kitchil had informed him that the pistol was wanted for Sunny and had gone away. About four days thereafter Kitchil had met him and informed him that they

had found a pistol and stated that it was wanted "to give the works to a top customs official and that it was Iqbal's job" and inquired from him as to whether he could find a man for the job. He further stated that about two weeks after the death of Amarapala that Kitchil had met him at a boutique in Hill Street, Dehiwala and stated that the customs chief had been killed.

Lakshman Dias, who was living near Lumbini Vidyalaya in Havelock Town in his evidence stated that he had known Sunny the appellant for some time and had given him a video deck for sale somewhere in May, 1986. He had received a part payment and one day he had gone to Sunny's house to collect the balance payment that was due and when he went there he had seen Sunny showing a pistol to a dark fat man. On seeing this he had returned home and gone back to see Sunny about two hours later and inquired for the balance money. Sunny had then informed him that he would pawn his chain and give him the money the following day and the next day had given him Rs. 3,000. On his visits to Sunny's house he had seen Sunny going about with Iqbal in Iqbal's car.

According to the evidence of Sisil Rohitha who was living at Havelock Road, near the Wellawatta Spinning and Weaving Mills he had known Sunny from about 1970 and had been visiting him in his house also. He stated that for a period of about 1 1/2 months prior to the date on which Amarapala was killed that he had seen Sunny going towards the B.R.C. grounds at about 5.30 a.m. frequently but had not seen him after Amarapala was killed doing his constitutional walk.

Witness Chandrakeerthi Perera who was running a printing press, in his evidence stated that after he got married he went into residence to his wife's house at Kaduwela. When he was there his brother-in-law had been killed and an attempt had been made to kill his mother-in-law as well. As a result he had wanted to get a weapon for his self protection and informed one Gamini working in Sisira Hotel who was a friend of his to find him one. Gamini his friend had introduced him to Pistola Gamini who had informed him that a pistol was available for sale with Sunny at Wellawatta and that he would get it for him. He had gone and met Sunny with Pistola Gamini in Sunny's house and made inquiries, Sunny had wanted Rs. 30,000 for it and showed him the pistol. He had offered Rs. 23,000 and had

given him an advance of Rs. 18,000. The next day he had gone to Sunny's house with the balance money which was carried in a bag of clothes. Pistola Gamini had already come there. When he went to Sunny's house Sunny and Pistola Gamini had taken him to a big house which was about 100 yards away and there they had consumed liquor from about 9 p.m. till about 4 a.m. During this period a telephone call had come to that house and Sunny had answered. He had overheard Sunny telling the caller that there is a buyer for the pistol and that he would sell it as it is not suitable for our job. When Gamini questioned Sunny as to who the caller was he had replied that it was our boss Iqbal. When he was there Sunny had found a collarless shirt amongst his clothes in the bag and had started assaulting him stating that he (Chandrakeerthi Perera) was an agent of the police. He had managed to run away in the early hours of the morning. The following morning Gamini had brought his motor cycle to his house. He had not been able to get his money or the pistol from Sunny. After Amarapala's killing the police had traced him and questioned him in regard to the transaction that he had with Sunny.

Witness K. S. Wimalaratne testifying at the trial stated in his evidence that he was a pawnbroker carrying on his business at Kirulapona. According to him one P. K. D. Sunny of 120 A, Dharmarama Road, Wellawatta had pawned a gold chain on 30.12.86 and obtained a sum of Rs. 2,000/- and thereafter on 13.1.87 he had redeemed the pawned article. He produced the receipt books containing receipt No. 0318 dated 30.12.86 as P3 and the receipt itself as P3A. He identified the appellant Sunny as the person who had pawned and redeemed the chain referred to by him in his evidence.

Counsel appearing for the accused at the trial had challenged the evidence of the aforesaid witnesses by suggesting that they were from the underworld and had a chequered history and had come to give false evidence at the instance of the police. This suggestion had been denied by them. At the hearing of this appeal Dr. Fernando submitted that no reliance could be placed on their testimony as on their own admission they were from the underworld. We are unable to agree with his contention. It transpires from the evidence led in this case that the conspiracy was hatched secretly by Iqbal, Kitchil, Sunny and Gamini with others unknown to get rid of a customs official by employing a hired assassin and it is incredible to expect that their plan and conversations relating to the conspiracy would take place in public and in the presence of unknown persons.

At the close of the prosecution case Sunny the appellant made a statement from the dock in which he stated thus: "Your Honour, I am innocent of these charges. I have not even seen Mr. Amarapala any day. I do not know I have never conspired to murder him. I have *not spoken to him. Up to date no pistol nor an empty bullet casing* had been taken from my house. All the evidence against me is false. God knows that. I am not involved in this murder that is all I have to say".

We have given our anxious consideration to the submissions made by learned counsel for the appellant and the learned Additional Solicitor-General and having examined the evidence led at the trial we are of the view as rightly conceded by the learned Additional Solicitor-General that the proved items of circumstantial evidence is inadequate to establish the charge of murder framed against the appellant and therefore we set aside the conviction of the accused-appellant of Count No. 2 and the sentence of death imposed on him in respect of that Count and acquit him of that Count.

However, on the evidence led we are satisfied that the learned trial Judge had adequately dealt with the evidence of the witnesses who had testified in regard to the conspiracy by the accused to cause the death of the deceased Don Amarapala and we see no reason to interfere with the conviction and sentence of the accused-appellant and the accused who has been convicted in absentia in respect of Count 1 and therefore we affirm the conviction and sentence in respect of that Count. Subject to the variation in setting aside the conviction and sentence in respect of Count 2 in respect of the appellant we dismiss this appeal.

J. A. N. DE SILVA, J. – I agree.

Conviction and sentence in respect of Count 2 set a side, conviction and sentence in respect of Count 1 affirmed.

Appeal dismissed.