CHUIN PONG SHIEK
v.
THE ATTORNEY-GENERAL

SUPREME COURT
FERNANDO, J.,
WADUGODAPITIYA, J. AND
BANDARANAYAKE, J.
S.C. SLA NO. 100/98
C.A. NO. 171–172/95
H.C. COLOMBO NO. 6768/94
AUGUST 20 AND DECEMBER 11, 1998
JANUARY 25 AND MARCH 8, 1999

Criminal Law – Conviction for murder – Common intention – Circumstantial evidence.

Two accused were convicted of the murder of the deceased. The deceased was killed at about 2.30 am on 16.5.86.The entry into the one-bedroom annexe, in which he lived alone, had been effected by removing the screws by which an iron grill had been fixed to a window. A very serious injury had been inflicted on the deceased's head with a hammer. There were eighty-seven other injuries inflicted with sharp cutting and blunt instruments. The evidence against the 1st accused consisted of, *inter alia, a* blood-stained palm print on one of the walls of the annexe; and the expert evidence was that this was the palm print of the 1st accused. The evidence against the petitioner (the 2nd accused) who alone sought special leave to appeal to the Supreme Court was circumstantial.

Held:

1. The circumstantial evidence led irresistibly to the conclusion that the murder was committed by the petitioner and the 1st accused acting in furtherance of a common intention.

Per Fernando, J.

"The medical evidence as to the petitioner's injuries, the blood stains in his car, and his knowledge of the location of the plastic bag in which were found the six screws from the window grill, are consistent only with his

presence and participation in the murder. That conclusion is confirmed by his conduct immediately before the murder (being in the company of the accused just four hours before the murder) and during the ten days thereafter. While further confirmation is hardly necessary, one cannot ignore his deliberate false statement in material respects : as to how he sustained those injuries; and as to who wanted a trip to Kegalle to be arranged."

2. Whatever infirmity there might have been in the admission or assessment of evidence, the substantial rights of the petitioner have not been prejudiced and there has been no failure of justice.

Cases referred to:

1. *Narapane Swami v. King–Emperor* (1939) – 1 AER 396.
2. *Somasiri v. The Queen* (1969) – 75 NLR 172.
3. *Perera v. The Queen* (1970) – 76 NLR 217.
4. *R. v. Marshal Appuhamy* (1950) – 51 NLR 272.
5. *R. v. Krishnapillai* (1968) – 74 NLR 438.
6. *Etin Singho v. The Queen* (1965) – 69 NLR 353.

APPLICATION for Special Leave to Appeal from the judgment of the Court of Appeal.

Ranjith Abeysuriya, PC with *Miss Priyadarshani Dias* for the petitioner.

C. R. de Silva, PC, ASG with *S. Jayamanna*, SC for the respondent.

Cur. adv. vult.

May 28, 1999.

FERNANDO, J.

Two persons were charged with and convicted of the murder of one Tony Martin, by the High Court of the Western Province, sitting without a jury. The Court of Appeal dismissed the appeals of both accused. The 2nd accused-appellant-petitioner (the petitioner) alone seeks special leave to appeal against that order.

At the commencement, Mr. Abeysuriya, on behalf of the petitioner, handed to us a statement of the alleged errors of law on which special leave was sought:

1. Has it been affirmatively established as alleged in the indictment that this murder was committed by these two accused *alone*?

2. Has the prosecution evidence conclusively established in this case, based entirely on circumstantial evidence, that the petitioner had been present at and participated in this killing?

3. Have statements attributed to the deceased well before he was attacked been improperly admitted and acted upon under section 32 (1) Evidence Ordinance, as falling within the meaning of "circumstances of the transaction which resulted in death"?

4. Was it permissible to hold that the presence of relatively trivial injuries on the fingers and arms of the petitioner leads to the inescapable inference that he had participated in the attack on the deceased?

5. Does the alleged discovery of a sarong (P32), cap (P33) and 6 screw nails (P36) said to have been found on the statement of the petitioner implicate him in this killing?

6. Did the failure of the Court of Appeal to examine the sustained attack made on the manner in which the Trial Judge dealt with the testimony of the principal witness, H. Jayasena, deprive the petitioner of a fair hearing and adjudication?

7. Has the Court of Appeal made wrong inferences to the detriment of the petitioner from items of the subsequent conduct of the petitioner?

8. Did the Court of Appeal wrongly fail to take into consideration other relevant evidence relating to these very items which transpired at the trial proceeding?

The facts are stated in detail in the judgment of the Court of Appeal. I set out below the relevant facts – undisputed, except as otherwise indicated – on the basis of which this application for special leave was argued.

Tony Martin, a bachelor, was killed at about 2.30 am on 16.5.86. Entry into the one-bedroom annexe, in which he lived alone, had been effected by removing the screws by which an iron grill had been fixed to a window.

There was a blood-stained palm print on one of the walls of the annexe, and the expert evidence was that this was the palm print of the 1st accused. A very serious injury had been inflicted on the deceased's head with a hammer; the hammer head with part of the handle was found at the scene. Eighty-seven other injuries had been inflicted with sharp cutting instruments and blunt instruments. The JMO was of the opinion that there had been more than one assailant.

In consequence of a statement made by the 1st accused to the Police, after his arrest, a bag was found which contained the remaining part of the handle of the hammer used for the killing.

The evidence thus established that the 1st accused was present at and participated in the killing.

The evidence against the petitioner (the 2nd accused) was circumstantial. The petitioner and the deceased had known each other for a considerable period; they were members of the same sports club; and there had admittedly been some financial transaction between them, although its nature was hotly disputed. The Registration Book relating to the petitioner's car and two cheques drawn by the petitioner for a total of Rs. 125,000 were found in the deceased's safe. In a dock statement the petitioner explained that he had won a million rupees gambling at the casino, and had given a sum of Rs. 450,000 to the deceased (without documentary evidence or security) for investment, yielding a monthly interest income of Rs. 25,000; he also claimed that the deceased was endeavouring

to invest a further sum in the purchase of US$ 10,000 in foreign currency, and that the Registration Book and cheques had been haned over as security for that transaction. The prosecution contended, on the other hand, that if the deceased actually had Rs. 450,000 belonging to the petitioner, there was no need for him to provide any further security for the alleged purchase of foreign exchange; and that in fact the Registration Book and cheques had been given as security for a loan *by* the deceased to the petitioner.

On 14.5.86 the petitioner and the 1st accused came to the deceased's annexe at about 9.30 pm; they came on a motor cycle, which they parked some distance away, on a side road, in such a way that it was not visible from the annexe; and to enter the premises, they jumped over the gate – which was about six feet high. The deceased had a part-time employee named Jayasena. Jayasena had full-time employment elsewhere during the day, and did household chores for the deceased in the evenings; and he then spent the night at another house (owned by the deceased) at Nugegoda, of which he was the caretaker. Jayasena testified to this visit; he said that while the petitioner spoke to the deceased inside the bedroom, the 1st accused remained outside; he did not know what they talked about.

The two visitors left after ten or fifteen minutes. The petitioner neither denied nor explained that visit in his dock statement.

Then, said Jayasena, the deceased made a statement about the petitioner – which Mr. Abeysuriya submitted was improperly admitted under section 32 (1) of the Evidence Ordinance – to the effect that he had lent money to the petitioner, and had scolded the petitioner that evening at the club for failing to repay the loan. Apart from that point of law, Mr. Abeysuriya also argued that Jayasena's evidence was not worthy of credit.

The petitioner and the 1st accused spent the next evening (15.5.86) together, with another friend Imran. Having visited the casino, the petitioner gave his two friends a lift in his car. Imran said the petitioner dropped him at his residence at about 10.30 pm. The killing took place, just four hours thereafter, at 2.30 am on 16.5.86.

On 16.5.86 at about 9.30 am Imran came to the petitioner's house. Imran testified that he noticed that the petitioner had some minor injuries on his hands and wrists. The petitioner explained that these had occurred the previous night when he reached home: as he tried to get out of his car, he said, his pet dog had greeted him, over-eagerly; he got scratched by its nails; and when he was pushing it out of the car, his finger was accidentally bitten. The truth of that version was contested by the prosecution, which contended that those injuries, eleven in all, had been caused in the course of an attack on the deceased. The Police could not trace the petitioner, and he was arrested only on 26.5.86. He was produced before the JMO on 27.5.86, specifically in order to ascertain the circumstances in which he had sustained those injuries. The JMO's evidence was that one of those injuries – an incised wound, 1/2" long and 1/5" deep – on the left index finger had been caused by a sharp cutting instrument; the other ten could have been caused by a sharp cutting instrument or by human fingernails, or in some other way, in the course of a struggle – but it was not suggested to him that a dog was responsible. It was suggested in cross-examination that the first injury might have been caused by a bite, but that was rejected by the JMO. Further, although the JMO testified that the petitioner had given a history – which he said he did not record in his report as it might have been inadmissible, as the petitioner was then in police custody – it was not suggested to him in cross-examination either that the petitioner had attributed any of his injuries to his pet dog, or even that the injuries might have been caused by a dog. Mr. Abeysuriya was not able to suggest any valid reason for not accepting the JMO's evidence.

There was also evidence of blood-stains in a number of places in the car; in particular, *to the left* of the driver's seat (near the hand brake, and on the seat belt clip attachment). These were more consistent with the petitioner having received injuries (particularly the incised wound on his left index finger) *before* getting into the car, rather than with the petitioner's dog injuring him as he was trying to get *out* the car.

On the medical evidence, therefore, the conclusion was that the petitioner had suffered minor injuries after 10.30 pm on 15.5.86 and before 9.30 am on 16.5.86; that one of those was caused by a sharp cutting instrument; and that while the other ten could have been caused by a sharp cutting instrument or human fingernails, or otherwise, the petitioner did not take up the position that the injuries had been caused by his pet dog, either when examined by the JMO, or even in the cross-examination of the JMO.

The prosecution case was that – as a result of the deceased vigorously trying to defend himself – a weapon in the hands of the petitioner would have caused those injuries. Mr. Abeysuriya contended that it was most unlikely that a strong athletic person like the deceased would have caused his assailant only such trivial injuries while defending himself. Mr. de Silva countered that the attack had commenced when the deceased was asleep, and that the hammer blow on the deceased's head would have greatly reduced his capacity to defend himself.

Imran testified that when he met the petitioner at 9.30 am on 16.5.86 the petitioner asked him to arrange a trip to Kegalle to his aunt's place – which he did the next day. However, in his dock statement the petitioner claimed that Imran's aunt had previously extended an invitation: but that position was never put to Imran. The petitioner, his wife and Imran left for Kegalle at 2.30 pm the next day, in the petitioner's car. Before they left, Imran drew the petitioner's attention to a newspper item about the murder, but the petitioner expressed no interest – despite his friendship with the deceased. That lack of interest continued even at Kegalle. Further, he neither visited the funeral house, nor attended the funeral. Apart from friendship, although the petitioner's position was that he had given the deceased Rs. 450,000 for investment, and had kept some security in connection with another transaction, nevertheless he took no steps even to protect his financial interests.

The prosection contended that the petitioner was taking steps to distance himself from the killing. He returned from Kegalle on 18.5.86. For some days, the Police could not find him, although they looked for him (and left messages) at his home as well as the homes of his parents and his in-laws. Ultimately, he was traced and arrested only on 26.5.86.

In consequence of a statement made to the Police by the petitioner to the effect that he could point out the location of a bag containing clothing, a bag was found which contained a jacket, in one of the pockets of which were found six screws. These were identified – by reason of length and circumference, the colour of the paint on the head of the screws and the iron grill, the depth of the cavities in the wooden window frame, etc. – as being those removed from the grill of the window through which access had been gained to the deceased's annexe. Mr. Abeysuriya submitted that the evidence in regard to finding the screws inside the bag was not admissible under section 27 (1) of the Evidence Ordinance.

I must refer first to Mr. Abeysuriya's submissions regarding section 32 (1). He relied on *Narayana Swami v. King-Emperor*[1] *Somasiri v. The Queen*[2] and *Perera v. The Queen*[3]. In the first of these decisions the Privy Council held that the "circumstances of the transaction" which resulted in death are circumstances that have some proximate relation to the death of the declarant. As pointed out in *R v. Marshall Appuhamy*[4], whether there is a proximate relation between the commencement of the transaction and the ending thereof is a matter to be determined *on the facts* of each case. *Somasiri's* case is of little assistance, because evidence of a statement made by the deceased was excluded not on the ground that it did not relate to the "circumstances of the transaction" but because hearsay evidence was tendered. In Perera's case, the statement had been made almost a fortnight before the death of the deceased; further, the State conceded that it had been wrongly admitted. The statement in this case is much closer, in point of time, to the death.

The undisputed evidence in this case is that there was some financial transaction between the petitioner and the deceased. The statement relied on by the prosecution was intended to establish that there was displeasure arising out of that transaction, followed by a visit, somewhat late in the evening on 14.5.86, just 28 hours before the killing. The circumstances thus have some similarity to *Narayana Swami's* case.

However, in view of Mr. Abeysuriya's submission that the infirmities in Jayasena's evidence were not adequately considered, we decided to consider whether it would be safe to allow the conviction to stand if this statement was excluded.

Mr. Abeysuriya's second submission was that leave should be granted on the question whether evidence of the contents of the plastic bag, namely of the discovery of six screws in the pocket of the jacket, had been improperly admitted, contrary to section 27 (1) of the Evidence Ordinance, because that part of the petitioner's statement which led to the discovery of the plastic bag did not refer to the contents of the bag. The Court of Appeal rejected that submission, and I would venture to summarise its reasoning as follows. The bag was the "fact" discovered; it was deposed to as having been discovered in consequence of the petitioner's statement; so much of that statement as related distinctly to the bag – the "fact" discovered – could therefore be proved. The "fact" discovered was the bag *including* its contents – and not just the bag, *without* its contents. Accordingly, as held in *R v. Krishnapillai*[5] and *Etin Singho v. The Queen*[6], the petitioner's statement established that he had knowledge of the place at which was found the bag containing the jacket and the screws. The petitioner failed to explain how he had acquired that knowledge. In my view, no question of law arises in relation to the interpretation or application of section 27 (1).

Even without the statement made under section 32 (1), the circumstantial evidence led irresistibly to the conclusion that the murder was committed by the petitioner and the 1st accused acting in

furtherance of a common intenion. The medical evidence as to the petitioner's injuries, the blood-stains in his car, and his knowledge of the location of the plastic bag in which were found the six screws from the window grill, are consistent only with his presence at and participation in the murder. That conclusion is confirmed by his conduct immediately before the murder (being in the company of the 1st accused just four hours before the murder) and during the ten days thereafter. While further confirmation is hardly necessary, one cannot ignore his deliberate false statements in material respects: as to how he sustained those injuries, and as to who wanted a trip to Kegalle to be arranged.

Whatever infirmity there might have been in the admission or assessment of evidence, the substantial rights of the petitioner have not been prejudiced, and there has been no failure of justice.

Special leave to appeal is therefore refused without costs.

WADUGODAPITIYA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Special leave to appeal refused.