

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal made
under Section 331 of the Code of
Criminal Procedure Act No.15 of
1979.

C.A.No. 208/2010

H.C. Ampara No.

HC/AMP/1437/2010

Thuiyalage Nishantha
Pushpakumara

Accused-Appellant

Vs.

Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondent

BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULI J.

COUNSEL : Asthika Devendra with Sanjeewa
Ruwanpathirana for the Accused-Appellant.
Haripriya Jayasundara S.D.S.G for the
respondent

ARGUED ON : 03rd July 2018

DECIDED ON : 04th September, 2018

ACHALA WENGAPPULI J.

The Accused-Appellant (hereinafter referred to as the "Appellant") was indicted by the Hon. Attorney General for committing murder of *Senanayaka Nawalage Dona Joslin Senanayaka* on or about 10th May 2006 before the High Court of Ampara. The Appellant elected to be tried without a jury. At the end of the trial, during which the prosecution and the Appellant presented evidence in support of their respective cases, he was convicted for murder and was sentenced to death.

In challenging the said conviction and sentence, the Appellant relied on several grounds of appeal which could be simplified into two main grounds. Firstly, the Appellant contended that the trial Court had

erroneously found him guilty on unreliable evidence led by the prosecution and secondly it erroneously rejected the evidence presented by the Appellant under oath.

The Appellant strenuously challenged the reliance on the evidence of the prosecution, particularly as to the credibility of witness *Vinitha* who claims that the Appellant has admitted to her of causing death of the deceased. In addition, the Appellant placed reliance of the inconsistencies among the prosecution witnesses; in relation to the time of death, of providing information to Police and the failure to call *de facto* wife of the Appellant, who lived in the adjacent house to that of the deceased at the time of the incident.

In relation to the rejection of his evidence, the Appellant contended that the trial Court was in error when it imposed an evidentiary burden of corroborating his evidence in relation to the defence of *alibi*.

The prosecution primarily relied on a confession made by the Appellant to witness *Vinitha* admitting causing death of the deceased. In addition, it also relied on several items of circumstantial evidence, in support of the case it presented before the trial Court.

It is appropriate at this stage to refer to the case for the prosecution at least in summary form.

The Appellant had a *de facto* relationship with the daughter of the deceased, who lived adjacent to the guest house operated by the deceased called "*Suwa Sevana*". He was initially employed by the deceased to carry out repair work to the roof of the guest house and as his relationship grew with her destitute daughter, he settled with her supporting financially and undertaking various jobs in the construction sites around Ampara town area.

Witness *Vinitha*, came to Ampara town on her own with a troubled past, found shelter in the house of one *Singer Some*. Although pregnant for 5 months, she had to provide services as a sex worker at the insistence of person called *Singer Some*. She then got friendly with the deceased who lived alone, and was a regular visitor to her lodge. At the time of the deceased's death, *Vinitha* has rented out a place and lived with her infant and her own mother. She continued her employment as a sex worker and was known to Sub Inspector *Saliya Gamage* who was attached to intelligence unit of Ampara Police. She was one of his informants.

Vinitha's regular acquaintance with the deceased and her daughter led to a friendly relationship with the Appellant. She treated him as a younger brother and was fond of him in memory of her late brother. She regularly mediated and provided counselling to the Appellant when he had problems in his relationship with *de facto* partner, *Rasika/Ajantha* .

About 2 days prior to the death of the deceased, the Appellant had assaulted his partner. *Vinitha* was informed of this and she had spoken to *Rasika* about it. On the day of the incident, the Appellant arrived at *Vinitha's* place early in the morning. He claimed that he did not feel like going to work and had switched off his mobile phone. He played with *Vinitha's* child for some time and then went away. Towards midday, she heard a screech of the Appellant's blue colour moped cycle. He came in and sat near her. He then wanted to convey her something important. *Vinitha* thought it's about his problematic relationship with his partner *Rasika*.

But the Appellant got the witness to swear on her child to keep it as a secret and revealed that he had killed the deceased by throttling her with his hands. He described how he got hold of the deceased. According to the Appellant, he told the deceased, *Rasika* told him to meet her with regard to the completion of remaining work on toilet and having followed her, he had throttled her in the room near to the toilet. He had the clothing worn by the deceased at the time of her death removed and had it in a parcel. *Vinitha* told him to throw it to the canal. He then went away.

The witness was distressed and was in a dilemma after hearing of the killing. She decided to inform SI *Gamage* about this incident, against advice of her mother. SI *Gamage* received a call from *Vinitha* at 1.00 p.m. and was told that the deceased was killed by the Appellant. He immediately alerted the officers of the crimes branch of Ampara Police and visited the crime scene. He found the back door was unlocked and the

deceased was on the bed wearing a yellow skirt and a night dress. The skirt was raised leaving her body half naked. The cassette radio was on with its sound set in very high volume. The front door of the house remained locked from inside. When he was at the crime scene, the Appellant had arrived there and was arrested for the murder.

One of the neighbours of the deceased, *Kanthilatha*, saw the deceased wearing a black skirt covering her bust at about 11.30 in the morning and at that time she had applied some medication to the upper part of her body. They chatted at the rear of her house and when the bell rang, the deceased went in to check. The witness saw the back door being closed. She heard sound of running water and the radio set switched on. When her son returned at about 1.00 p.m. she learned from him that the deceased was killed. Her son, *Sampath* returned home at about 1.45 p.m. and was approached by a policeman who disclosed information about the death of the deceased. He had seen the Appellant among the police officers who have already arrived at the deceased's house.

The Appellant had injuries on his face and the medical officer who examined him is of the opinion that they were fresh injuries and could have been caused by finger nails.

Medical evidence also revealed that the death of the deceased was due to manual strangulation and the external injuries to her neck and the

corresponding internal injuries, especially to the hyoid cartilage, confirm the fact that pressure was applied to her throat, resulting a necessarily fatal injury. There were several injuries around the neck of the deceased.

In the light of the evidence referred to above it is reasonable to expect the Appellant to challenge the acceptance of most damning item of evidence, his confession, in appeal, seeking to vitiate his conviction. The contention of the Appellant that it is improbable for him to make a confession to *Vinitha*, with whom he had only a limited relationship and known as a person visited the deceased lodging. In addition, the Appellant sought to shake her credibility placing reliance on her troubled past, working as a sex worker and the mental disorder she was treated with.

The troubled history of *Vinitha* which eventually led to her seeking shelter and employment in Ampara is revealed in great detail during her examination in chief itself. She candidly admitted that she was treated for mental ailment suffered due to an abortion. However, this background has little or no relevance as to her credibility when her reasons for such a troubled past are considered. An attempt was made by the Appellant that the learned trial Judge was overtly sympathetic towards the witness by equating her to destitute *Patachara* from Buddhist literature, which in fact only a quotation from the submissions of the learned State Counsel.

It is significant to note that during her lengthy cross examination, only two minor omissions were marked. There was no contradictions marked either from her statement or deposition in relation to the fact that

the Appellant made a confession and on its contents. On the contrary, there is clear evidence that no sooner she heard the confession, she conveyed it to Police through her mobile phone, a fact confirmed by SI *Gamage*, which supports the position that she made a spontaneous and consistent claim of admission of guilt by the Appellant. *Vinitha* did not visit the crime scene. But she gave description of how the death of the deceased was committed by throttling the neck, which in line with the opinion of the medical officer, that the death of the deceased was due to manual strangulation. She described the place where the dead body was, and the Police witnesses have confirmed that it was lying in the room next to the toilet. The only way she could describe these, confirms that she was made aware of them by the Appellant himself when he made the confession. Of course, he took the precaution of getting her to swear on her child wanting her not to reveal it to anyone. She explained her reasons for going back on this promise. She decided to pass that information, to the Police understandably with reluctance by weighing over loyalties. She was so distraught that the Appellant had killed the deceased, she banged his head twice on the handle of his moped. Naturally it was a difficult decision for her and she felt as if she had surrendered her own child to authorities.

The claim that making a confession to *Vinitha* is not probable by the Appellant, is apparently based on the evidence he presented before the trial Court. In his evidence, the Appellant maintained that she was a mere acquaintance and thereby downplayed any significant role attributable to *Vinitha* in the sequence of events. However, this is not a position put to *Vinitha* and throughout her evidence she maintained that she had very

close emotional relationship with him and treated him like her own younger brother. There was no denial that she knew the Appellant's relations with *Rasika* had soured in the last two days. *Vinitha* claimed that she mediated on behalf of the Appellant.

Considering their relationship, it is very probable that the Accused turned to the only woman he could rely on to find solace by confessing to what he did and to seek her support to get away from the inevitable consequences. Hence, the claim by the Appellant that it is an improbability is devoid of any merit.

Another factor that supports the making of confession is, that the Appellant returned to the compound where the dead body was, from *Vinitha's* place, with the belief that he would not be betrayed by her, only to find the Police who had already arrived there upon her information.

The other inconsistency highlighted by the Appellant is the evidence in relation to the colour of clothing worn by the Appellant. Witness *Kantilatha* spoke of a black colour skirt worn by the deceased when she was last seen by her, just before she entered her house. The dead body was clad in a yellow skirt and a night dress, according to the medical and Police witnesses. This contradiction is easy to explain as *Vinitha* says the Appellant admitted that he had removed clothing worn by the deceased

when she died and had them in a parcel with him when he arrived at her place.

These considerations amply demonstrate that the Appellant had in fact made an unqualified admission of committing the death of the deceased to witness *Vinitha*.

Section 24 of the Evidence Ordinance makes such confessionary statements, admissible evidence against its maker, provided that the circumstances under which it was made does not offend its conditions. There is clear evidence before the trial Court that it was voluntarily made by the Appellant, quite spontaneously when he arrived at *Vinitha's* house. Of course, he took the precaution of getting her assurance that she would not reveal it to anyone, which in turn, supportive of the fact that it was made voluntarily. Therefore, the confession of the Appellant has been rightly admitted by the trial Court and considered against him in support of the prosecution case.

In *Nagamani Theivendran v Attorney General* S.C Appeal No. 65/2000 SCM of 16.10.2002, Ismail J, with the agreement of Wigneswaran J, adopted the reasoning of a judgment of the Supreme Court of India (*Shankaria v State of Rajasthan* AIR 1978 SC 1248), where it was held that in placing reliance on a confession the Court must apply following two tests;

- (i) Whether the confession was perfectly voluntary ?

(ii) If so, whether it is true and trustworthy ?

In describing the second test, the Court further expanded its scope as it held that;

“The Court could carefully examine the confession and compare it with the rest of the evidence, in the light of the surrounding circumstances and probabilities of the case. If on such an examination and comparison the confession appears to be a probable catalogue of events and naturally fits in with the rest of the evidence and the surrounding circumstances, it may be taken to have satisfied the second test.”

However, Ismail J also endorsed the view adopted by the Court of Appeal, that in relation to confessions there is a *“presumption that a person would not make an admission against his interests unless it were true.”*

When the contents of the confession and the surrounding circumstances under which it was made are considered against the backdrop of the other items of circumstantial evidence that had been placed before the trial Court by the prosecution, we are of the considered view that the confession of the Appellant has satisfied these two tests beyond a reasonable doubt.

The other basis on which the Appellant sought to challenge the validity of his conviction and sentence was that the trial Court had imposed a burden on him to establish his defence of *alibi*.

It is evident from the journal entries that the indictment was served on the Appellant on 29th September 2010. With the passing of Criminal Procedure Code (Amendment) Act No. 14 of 2005, Section 126 of the Code was amended by insertion of Section 126A, imposing a duty on an accused to notify that he wishes to adduce evidence in support of the defence of *alibi*, after satisfying certain conditions. There is no indication that the Appellant had complied with the provisions of this Section in leading evidence of his *alibi*. However, the Appellant in his evidence stated that the Police had taken him to several shops in Ampara town to check on his claims that he was making certain purchases during the relevant time. Nonetheless, the trial Court has considered his evidence on his defence of *alibi* and rejected the same owing to its inherent inconsistencies and improbabilities. One such improbability the trial Court had emphasised is that the Appellant could have called the shop assistants who he claims to have served him. It is this observation that the Appellant complains as having imposed an evidentiary burden on him.

This statement in the Judgment could not be ripped off from the context in which it was stated by the trial Court. The Appellant, during his cross examination, stated in evidence what the shop assistants said the Police when they took him there to verify his claim. What those shop assistants said the Police was rightly excluded by the trial Court upon the basis of hearsay. To render that evidence admissible, the Appellant needed to rely on the direct evidence of those shop assistants which he failed to

do. It is in this context that the trial Court has commented on his failure to call them. It is very relevant to note in this context that when the Appellant cross-examined investigating officers, he did not suggest to them that he was taken to these shops and that his claim of *alibi* was verified in their presence. Further his claim is that he made certain purchases of some hardware items on the request of his *de facto* partner at these shops and he handed the receipts confirming the purchases over to her.

When the inquiring police officers have questioned the Appellant at the crime scene, *Rasika* was present. If he made a reference to his receipts, the investigators could have easily obtained them and verified. In the light of this, the trial Court justifiably held that the claim of *alibi* was not consistently made and proceeded to reject it.

Similarly, the Appellant sought to explain the injuries that were noted on him by stating that he suffered them when engaged in some repair work. However, this position was never put to the medical officer when he gave evidence that there were fresh injuries noted on the Appellant, which are consistent with finger nail scratches.

The trial Court had rejected the evidence of the Appellant as not credible due to the said infirmities and held that the prosecution has proved its case beyond reasonable doubt. It was mindful of the legal principle that in taking up the defence of *alibi*, the Appellant need not prove anything. Having considered the evidence in its entirety we are in full agreement with the view held by the trial Court that the Appellant is guilty of murder.

Accordingly, the judgment and the sentence imposed on the Appellant is affirmed. The appeal of the Appellant is therefore dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL