

NANDASENA
v.
THE REPUBLIC OF SRI LANKA

COURT OF APPEAL.

DR. A. DE Z. GUNAWARDENA, J. &
ISMAIL, J.

C.A. NO. 41/92

H.C. ANURADHAPURA NO. 62/92

FEBRUARY 23 AND 24, 1993.

Criminal Law – Circumstantial evidence – Direction to the jury.

Held:

In a case which turns on circumstantial evidence it is essential that the trial judge should explain clearly to the jury that circumstantial evidence, if it is to support a conviction, must be altogether inconsistent with the accused's innocence and explicable solely on the hypothesis of his guilt.

It is a sufficient direction where the trial judge directed the jury that they should find the accused guilty of the charge of murder only if they were satisfied beyond reasonable doubt that the fatal injuries were caused by the accused having regard to the circumstantial evidence in the case. The jury had been sufficiently directed where they were told that the circumstantial evidence should unmistakably point to the conclusion that the accused and no other, inflicted the fatal stab injuries.

Cases referred to:

1. *Wimalasena v. The Queen* 77 C.L.W. 1.
2. *Podisingho v. The King* (1951) 53 N.L.R. 49.
3. *McGrævy v. D. P. P.* (1973) 57 Cr. Ap. Rep. 424, 437.
4. *Gunawardena v. The Republic of Sri Lanka* (1981) 2 Sri L.R. 315, 330.

APPEAL from conviction by the High Court of Anuradhapura.

Dr. Ranjith Fernando for appellant.

R. Arasakularatne, Senior State Counsel for Attorney-General.

March 16, 1993.

ISMAIL, J.

The accused-appellant was indicted on the charge of having committed the murder of Dawulkara Gedera Sumanapala on 26.01.85 at Thelhiriyawewa. He was found guilty of the charge by an unanimous verdict of the jury.

The witness Nandawathie in her evidence stated that the accused who had come with his elder brother Piyasena on a bicycle at about 2.30 or 3 p.m. on 26.01.85 had inquired from her mother whether the deceased was at home. When she replied in the affirmative the accused had gone inside the house, and having spoken to the deceased had left with his brother immediately. The deceased then followed them on his bicycle.

Nandawathie's mother had asked her to ascertain why the deceased was being taken away by them. Piyasena lived in a house in the compound past a bend on the road about five half-acre blocks of land away. Nandawathie, the elder sister of the deceased who was then seventeen years of age went towards the house of Piyasena. While proceeding in that direction she heard the deceased crying out "apoy appappo". When she was about 20 yards away from the house of Piyasena she saw the deceased outside the front door bleeding and struggling to escape from the accused and Piyasena who was holding him. The deceased managed to free himself and as he rushed towards the road the accused held him again and had stabbed him once on the shoulder with a knife. The deceased then fell down on the road crying out "Budu Ammo". Nandawathie ran up to him and held him. The accused then abused her and had threatened to stab her. She raised cries and while she was attempting to speak to the deceased, the accused inquiring whether he was still not dead had trampled the mouth of the deceased. Piyasena was at this stage in his compound. The accused threatened the several persons who had by then collected at the scene and prevented them from getting close to the deceased.

The next witness Saima who came to the scene about 10-15 minutes later said that the accused was waving a knife, and threatening the persons who had collected there that he would stab them if they came near. The accused had then said that he was

going to the police station and invited the others also to come there. Later Saima assisted Nandawathie and her father to take the deceased to the hospital in a car. They had first gone to the Thambettuwegama police station and had seen the accused there. They were instructed by the police to take the deceased to the hospital. The deceased had died before admission to the hospital. The cause of death was shock and haemorrhage following multiple injuries. There was a 1" stab injury on the left side of the neck 3" from the left shoulder on the body of the deceased and in addition, there were also a 1/4" abrasion on the left shoulder and three separate 1" stab injuries on the back of the chest to the left of the midline.

SI Nandasiri Fernando stated that the accused surrendered at the police station at 4 pm the same day and handed over a knife the blade of which was 7" long. In the course of his investigations he observed dried blood stains leading from the hall of Piyasena's house to the front door. He also found dried blood stains on a bench and on the wall inside the house. The furniture too was found to have been disarranged.

Thus as Nandawathie was an eye witness only to the stab injury inflicted by the accused on the shoulder of the deceased on the road, the burden lay on the prosecution relying on circumstantial evidence to prove beyond reasonable doubt that the three stab injuries sustained by the deceased on the back of his chest before Nandawathie arrived at the scene were also inflicted by the accused.

Learned Counsel for the appellant submitted that the trial Judge erred in law in failing to direct the jury that in a case of circumstantial evidence, such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt. He relied on the judgments in *Wimalasena v. The Queen* ⁽¹⁾ and in *Podisingho v. The King* ⁽²⁾.

In **Wimalasena's case** four accused appellants were indicted on a charge of murder. Specific acts of shooting at the deceased were attributed to the 1st and 2nd accused. The 3rd and 4th accused were indicted on the basis of a common intention to be inferred purely from circumstantial evidence. It was held that although the proved circumstances in this case were consistent with the presence of a common intention, in a case based on circumstantial evidence, the

jury should also be directed that before returning a verdict of guilty they should be satisfied that "the proved circumstances should, not only be consistent with guilt but inconsistent with any reasonable hypothesis other than the guilt of the accused".

In *Podisingho's case*, the prosecution was driven to the necessity of proving an alleged conspiracy by circumstantial evidence but that evidence was given by an accomplice who was a tainted witness. Having observed that it was the duty of the trial Judge to explain the law relating to criminal conspiracy without merely reading out its definition in the Penal Code, it was held that "in a case of circumstantial evidence it is the duty of a 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".

Learned Senior State Counsel relying on the decision of the House of Lords in the case of *McGreevy v. D. P. P.*⁽³⁾, submitted that such a direction as referred to above was redundant in cases of wholly circumstantial evidence. In *McGreevy's case* the House of Lords considered the *dictum* which was originally applied in *Hodge's case*,⁽⁴⁾ where Alderson, B. said in summing up to the jury, that the case was "made up of circumstance entirely" and that before they could find the prisoner guilty, they must be satisfied "not only that those circumstances were consistent with his having committed the act, but that they must be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person".

The House of Lords observed in the case of *McGreevy v. D. P. P.* at page 437; "There should be no set formulae which must be used by a learned Judge. In certain types of cases there are rules of law and practice which require a judge to give certain warnings though not in any compulsory wording to the jury". Their Lordships proceeded to hold thus; "In a trial in which the case for the prosecution, or any essential ingredient thereof, depends as to the commission of the act wholly on circumstantial evidence, no duty rests upon the Judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to give further direction in express terms that this means that they must not convict on circumstantial evidence unless they are satisfied that the proved facts are a) consistent with the guilt of the defendant and b) exclude every other possible explanation other than the guilt of the defendant".

The Court of Appeal in *Gunawardena v. The Republic of Sri Lanka*⁽⁶⁾ referring to this decision expressed the view that; "This authority merely states that a judge who in addition to the usual direction about proof beyond reasonable doubt gives a further direction to the jury as in **Hodge's** case errs in redundancy, as the particular direction stems from the general requirement and basic necessity that proof must be established beyond reasonable doubt".

Despite the view of the House of Lords that it is unnecessary to give any special direction in cases which turn entirely on circumstantial evidence, a stricter view has prevailed in our law that it is essential in such a case that the trial Judge should explain clearly to the jury that circumstantial evidence, if it is to support a conviction, must be altogether inconsistent with the accused's innocence and explicable solely on the hypothesis of his guilt.

In the present case which is not wholly based on circumstantial evidence directions to the jury in words similar to those used in **Hodge's** case would not have been quite appropriate. However, we find that the learned trial Judge has directed the jury appropriately in several passages in his summing up that they should find the accused guilty of the charge of murder only if they were satisfied beyond reasonable doubt that the stab injuries on the back of the chest of the deceased were caused by this accused having regard to the circumstantial evidence in the case. The jury has been sufficiently directed that the circumstantial evidence should unmistakably point to the conclusion that this accused and no other inflicted those stab injuries. They were further directed that if they had a doubt in this regard that they should find the accused guilty of causing hurt only. We are therefore unable to accept the submission that the trial Judge had erred in law in this regard. Having carefully considered the direction to the jury, we are also unable to accept the submission that the trial Judge had failed to give directions on items of evidence that tended to favour the accused.

We are of the view that the verdict of the jury is not unreasonable and can be supported on the evidence led at the trial. We therefore affirm the conviction and the sentence. The appeal is dismissed.

DR. A. DE Z. GUNAWARDENA, J. – I agree.

Appeal dismissed.