KARUNARATNE

VS

ATTORNEY-GENERAL

COURT OF APPEAL
BALAPATABENDI, J
SISIRA DE ABREW, J
C.A. 88/2000
H.C. BALAPITIYA HCB 268
MAY 16, 2005
JUNE 29, 2005
JULY 15, 2005
SEPTEMBER 22, 2005
OCTOBER 20, 2005

Penal Code - Section 296 - Murder - Conviction based on circumstantial evidence - Essetial ingredients ? - Evidence reliable - Discrepancies and technical errors - Criminal Procedure Code - Section 279, 283, 436 - Violating the statutory provisions - Procedural irregularity - Could it be cured ?

The accused appellant was convicted after trial for committing murder of one "P" and was sentenced to death. The Prosecution relied solely on circumstantial evidence of three witnesses.

HELD

(i) The primary advantage of circumstantial evidence is that the risk of perjury is minimized since it, unlike direct evidence, does not emanate from the testimony of a single witness. It is therefore more difficult to fabricate circumstantial evidence, than it is to resort to falsehood in the course of giving direct evidence.

(ii) There is no principle of the law of evidence which precludes a conviction in a criminal case based entirely on circumstantial evidence. There are no uniform rules for the purpose of determining the probative value of circumstantial evidence. This depends on the facts of each case.

(iii) Where eveidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors.

(iv) The faliure of the presiding Judge to date the judgment at the time of pronouncing it is only a procedural irregularity curable under section 436 of the Code - it had not occasioned a failure of justice.

APPEAL from the judgment of the High Court of Balapitiya.

Cases referred to :

1. *State of U.P. vs. Dr. Ravindra Prakash Mittal, 1992 2 SCJ 549*
2. *Podi Singho vs. King - 53 NLR 49*
3. *K.vs. Appuhamy 46 NLR 128*
4. *Tamil Nadu vs. Rajendran 1999 Cri J 4552*
5. *State of U.P. vs. M.K. Anthony 1984 2 SC J 236*
6. *King vs Seeder Silva 41 NLR 337*
7. *Iqbal Ismil Sadawala vs. Registrar, High Court, Bombay, AIR 1974 SC 1880*

Ranjith Abeysuriya, PC, with Ms. Thanuja Rodrigo

W.N. Bandara, Deputy Solicitor General for Attorney-General

Cur.adv.vult

January 17, 2006

JAGATH BALAPATABENDI J.

The Accused appellant was indicted for committing murder of one Bolanda Hakuru Dalin *alias* Piyadasa on 24.06.1994. After trial the learned High Court Judge convicted the accused-appellant for murder and sentenced him to death on 16.11.2000.

The prosecution relied solely on circumstantial evidence of the witnesses Alpi Nona, Josalin and Somapala.

The evidence led by the prosecution at the trial briefly as follows :- The witness Alpi Nona had stated that on the day in question around 3.00 p.m. the deceased (her son) was at home, the accused - appellant (Kalu Chutiya)

had come to her house with a bottle in his hand and asked the deceased " අයියා මා එක්ක තරහද ?" " Thereafter, both of them had been in conversation for a long period of time consuming the bottle of liquor (එයින්) and eating " Kurumba". After sometime the witness (mother) had given the deceased two bottles to bring kerosene oil and coconut oil. When (her son) the deceased left her house on his bicycle to bring oil, the accused-appellant had also joined the deceased and sat on the luggage carrier of the bicycle both of them had left home. Thereafter on hearing the people talking that a man had been killed on the road, she had gone to the place of incident and seen her son (the deceased) killed, lying on the road with the bicycle placed on his body.

The witness Josalin had stated that when she was at home around 5 p.m. she had seen two persons fallen on the road near Somapala's house and she could not identify them at a distance of about 20 ft. away, one person dressed in white shirt and a sarong in a seated position moving his hand upward and downward in a stabbing motion, the other person lying flat on the road, little later she had seen the accused-appellant running past her house wearing only a red colour under wear. (at page 91 of the brief) - The witness has stated as follows :-

ප්‍ර තමන් ඒ ආදු කෙනා අඳුනා ගත්තද ?

උ ඔව් එයාගේ නම සෝමරත්න ගෙදරට කියන්නේ චූටි. විත්තිකරු හඳුනාගනි.

ප්‍ර තමන් ඊට කලින් චූටිව දැකලා තියෙනවද ?

උ එයාත් ගමේනේ නෑයොත් වෙනවා අපේ ගෙවල්වලට පස්ස පැත්තේ පාරේ නමයි ඉත්තේ

Thereafter the witness had gone to the scene after arrival of the police and seen the deceased killed lying dead on the road at the place where she saw the incident.

The witness Somapala had stated, on the day in question around 5 p.m. when he was near the well of his house, he had seen the deceased riding a bicycle and the accused - appellant seated on the luggage - carrier; when he came out of the house about 15 to 30 minutes later he had seen the deceased fallen on the road and the accussed-appellant running away

from the scene of crime towards Elpitiya wearing a red colour underwear at page 132 of the brief the witness has stated as follows :-

ප්‍ර ඒ වෙලාවේ සිද්ධිය දැක්කා ද?
උ බයිසිකලය වැටිලා තිබෙනවා දැක්කා

ප්‍ර ඊට අමතර මොනවාද දැක්කේ ?
උ කලු චූටි රතු ලන්කට් එකක් ඇඳගෙන ඇල්පිටිය පැත්තට දිව්වා.

ප්‍ර එතකොට ඩාලිං වැටිලා හිටියේ කොහේද ?
උ අපේ ගේ ඉස්සරහා
ප්‍ර ජොසලින් ගේ ගෙදර තිබෙන්නේ කොයි පැත්තෙ ද?
උ ඇල්පිටිය පැත්තේ

ප්‍ර ජොසලින්ගේ ගෙදර පැත්තට කරුණාරත්න දිව්වේ ?
උ ඔව් පාර දිගේ ගියා. අපේ ගෙදර ලඟ ඉඳලා දිව්වේ.

(at page 134)

ප්‍ර තමන් කිව්වා තමන් ගෙයින් එලියට ආවා ඒ අවස්ථාවේ කලු චූටි දුවනවා දැක්කා
උ ඩාලිං මරපු තැන ඉඳලා දුවනවා දැක්කේ.

The witness Jayasuriya had stated he saw the accused - appellant running towards Elpitiya wearing only a red colour underwear, abusing in foul language. The accused-appellant in his dock statement had admited that he went to the deceased house on the day in question and both of them consumed a bottle of liquor, thereafter he left the house of the deceased with the deceased, and went home in a different direction.

The wife of the accused - appellant Suneetha (called by the defence) in giving evidence had stated, that on the day in question the accused-appellant left home around 2 p.m. dressed in a white shirt and a sarong and came back home around 4.30 p.m. When they were at home around 7p.m. they heard that the deceased had been killed; but did not go out to see the deceased. She knew that there existed an animosity between the accused-appellant and the deceased, prior to this incident the accused-appellant had neither visited the house of the deceased, nor had consumed liquor with the deceased.

At the hearing of the appeal the following grounds were urged by the counsel for the accused - appellant.

1) Whether one person could have possibly caused all the injuries (24 injuries) single handed.

2) Evidence of the witnesses Josalin and Somapala as to the place where they made the statements to the police, contradict the police officer's evidence who recorded their statements, and also belatedess of their statements to the Police.

3) Arrest of another suspect named Gunaratne by the Police and remanded in connection with the case.

4) There was no record made, that the Judgement was pronounced on 16.11.2000, by the trial judge, thus violating the provisions of the sections 279 and 283 of the criminal procedure Code.

Now I would like to deal with the principles governing the evidence of circumstantial nature. Circumstantial evidence may be used to establish the facts in issue in the absence of direct evidence or to supplement and corroborate direct evidence when doubt is cast on it or when the effect of direct evidence, standing by itself is too slender to enable proof of the fact in issue (*Vide*, Law of evidence by Coomaraswamy)

The primary advantage of circumstantial evidence, is that the risk of perjury is minimized since it is unlike direct evidenced, does not emanate from the testimony of a single witness. It is therefore more difficult to fabricate circumstantial evidence, than it is to resort to falsehood in the course of giving direct evidence.

Thus, there is no principle of the law of evidence which precludes a conviction in a criminal case based entirely on circumstantial evidence.
There are no uniform rules for the purposes of determining the probative value of circumstantial evidence. This depends on the facts of each case.

In the case of ***State of U.P. vs Dr. Ravindra Prakash Mittal*** [1] it was held that the essential ingredients to prove guilt of an accused person by circumstantial evidence are :-

1) The circumstances from which the conclusion was drawn should be fully proved :

2) The circumstances should be conclusive in nature;

3) All the facts so established should be consistent with the hypothesis of guilt and inconsistent with innocence;

4) The circumstance should; to a moral certainty, exclude the possibility of guilt of any person other than the accused.

In the case of ***Podi Singho vs. King*** [2] it held that "in a case of circumstantial evidence it is the duty of the 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 guilty. In the case of ***King Vs. Appuhamy*** [3] *Keuneman* J. held that in order to justify the inference of guilt purely on circumstantial evidecnce, the inculpatory facts must be incompatable with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"In the case of State of ***Tamil Nadu vs Rajendran*** (4) justice Pittanaik observed that " In a case of circumstantial evidence when an incriminating circumstances is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstance to make it complete"

It is to be noted that the following items of circumstantial evidence available in this case.

The Accused - Appellant having a animosity with the deceased, visited the deceased on the day in question with a bottle of liquor and consumed it with the deceased. Thereafter Accused- Appellant left the house of the deceased with the deceased on a bicycle.

The Witness Josalin :- Saw two people fallen on the road, one person dressed in a white shirt and a sarong in a seated position moving his hand up and down in a stabbing motion, thereafter she saw the accused - appellant clad in a red colour under wear running towards Elpitiya-passing her house.

The witness Somapala saw the deceased going with the accused - Appellant on a bicycle when he was near the well of his house. and about 15 to 30 minutes later accused-appellant running away clad in a red colour underwear from the place of incident where the deceased was fallen dead.

The witness Jayasuriya has also seen the Accused-Appellant running towards Elpitiya clad in red colour underwear, abusing in foul language. The evidence of the wife of the accused-appellant as to the existed animosity between them, and for the first time the accused-appellant visiting the house of the deceased on the day in question and had consumed liquor with the deceased.

The medical evidence revealed that the deceased had twenty four (24) stab injuries on the body, and the injuries 8,9 and 10 were necessarily fatal injuries (at page 43 of the Brief).

The Doctor in his evidence had stated as follows :

ආයුධ දෙකක් භාවිතා කිරීම මට එකඟ වන්න හෝ එකඟ නොවීම කර ගන්න අමාරුයි. නමුත් තුවාලවල ගැඹුර අනුව එකම ආයුධයෙනුත් ඒ පිළිබඳව යොදන බලය අනුව කරන්නපුලුවන්. නමුත් ආයුධ දෙකක් භාවිතා කරනවා ද යන්න මට එය පැහැර හරින්න බැහැ.

It had been revealed that the injuries on the deceased could be caused either with one weapon or with two weapons. at page 57 doctor had stated as follows : -

ප්‍ර මෙම තුවාල සමස්ථයක් විශයෙන් නිරීක්ෂණ කරන විට මෙම තුවාල සිදු කළ ආයුධය ගැන මතයක් ප්‍රකාශ කළා. හරස් ප්‍රශ්ණ අහන කොට මෙම තුවාල සියල්ලම එකම ආයුධයකින් වෙනස් බලයක් යෙදීමෙන් සිදුවෙන්න පුලුවන් ද?

උ සිදුවන්න පුළුවන්.

The contention of the Deputy Solicitor General was that, the accused - appellant may have got the deceased drunk, and could have caused few injuries to incapacitate the deceased, thereafter when the deceased fell down caused the other injuries. Further, the evidence in the case revealed that though there were twenty four (24) stab injures, there was no evidence to connect an involvement of another person other than the accused - appellant to the incident. Also, there had been no doubt created that one person could have inflicted 24 stab injuries.

For the reasons mentioned above I disagree with the contention of the counsel for the accused - appellant that one person could not have possibly caused all the injuries single handed.

The evidence revealed that the witness Alpi Nona had made a statement to the Police on the 25th at 2 p.m. (the following day of the incident) and the witness Somapala had made a statement to the Police on the 26th at 10.30. a.m.

The witness Alpi Nona had stated in evidence that she did not come forward to give evidence at the inquest held by the Acting Magistrate near the scene of crime as the Acting Magistrate was her lawyer who appeared for her in Court when she was charged for possession of illicit liquor and further she had stated she did not make a prompt statement on the same day of the incident, as no one came forward to give evidence when her husband was killed, thus the explanation given by her, why she did not make a statement to the police on the same day in the evening could be accepted as a reasonable explantion.

The second ground of appeal urged by the counsel was that, the witnesses Josalin and Somapala had stated that they made the statements at the Police Station, where as Inspector Silva had stated statements of these two witnesses were recorded at their residences. Thus, the evidence of these two witnesses is open to suspension and unworthy of being acted upon.

I do not agree with his cotention, as it was not an important factor to disbelieve the evidence of these two witnesses completely; with the lapse of time. (over 6 years) may affect the memory of the witnesses, as to the place where they made the statements to the Police.

In the *case of state of U.P. Vs M. K. Anthony*[5] it was held that "Where evidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors."

The third ground of appeal urged by the counsel for the accused-appellant was that, an another suspect by the name Gunaratne had been arrested and remanded in connection with this case, and the prosecuting counsel or the learned High Court Judge not elicited an explanation from the police witness as to why an additional suspect had been arrested, this factor had created a doubt and mystery in the prosecution version.

It behove this Court in the interest of justice to ascertain the circumstances that led to the arrest and remand of an another suspect namely one Gunaratne, only on perusal of "B" reports filed in the Magistrate's Court. The "B' reports dated 27.6.94 and 08.08.94 indicate that, investigations had revealed, that the suspect Gunaratne being the brother of the accused-appellant had met the accused-appellant on the way and taken him home after the incident, he was never charged at any stage of the proceedings in this case, as there was no evidence against him in connection with the incident. Hence the above contention of the counsel for the accused-appellant should fail.

In the case of King Vs Seeder Silva Howard CJ observed that "A" strong prima facie case was made against the appellant on evidence which was suffieient to exclude the reasonable possibility of someone else having committed the crime, without an explanation from the appellant the jury was justified in coming to the conclusion that he was guilty"

Thus, in my opinion, the circumstantial evidence available against this accused - appellant were so strong and incriminating; incompatible and inconsistent with the innocence of the accused-appellant and consistent with his guilt, the only conclusion that could be arrived at on such evidence is that the accused-appellant is guilty of the offence charged.

The fourth ground urged by the counsel was that, there was no record made, that the judgment was pronounced on 16.11.2000, by the trial judge, thus violating the statutory provisions of the sections 279, 283 of the Criminal Procedure Code.

It is apparent from the proceedings on 16.11.2000 after the conclusion of the address by both counsel the allocutus had been recorded, thereafter the verdict and the sentence was passed on the accused-appellant. The learned High Court Judge on the same day (16.11.2000) has recorded as follows :-

මෙම නීන්දුවේ පිටපත් සහ විනිසුරුවරයාගේ නිරීක්ෂණ අතිගරු ජනාධිපති තුමිය වෙත යැවීමට නියෝග කරමි. බන්ධනාගාර අධිකාරි අමතන වරෙන්තුව අත්සන් තබමි. මරණීය දන්ඩනය ප්‍රදානය කිරීමේ ප්‍රකාශය විවෘත අධිකරණයේ කියවා ගොනු කරමි. අත්සන් තබමි.

Further the journel entry on 16.11.2000 written by the learned High Court Judge himself states as follows පවහන් බලන්න. 280 යටතේ කටයුතු කරමි. මරණ දඬුවම් නියම කරමි. ලේඛන ගොනු කරමි. නිත්දුව හා නිර්දේශ ජනාධිපති තුමියට යවමි.

The contention of the Deputy Solicitor General was that, the above factors indicate that the learned High court judge on the 16.11.2000 may have dictated the judgment in Open Court to the stenographer, and the stenographer had typed it later, eventhough the date of the judgement appears as 2000.11 ..... the judgment had been signed by the Leaned High Court Judge.

In support of his contention he has cited the decision in the case of ***Iqbal Ismail Sadawala vs Registrar High Court Bombay*** [6] It has been held that failure of presiding Judge to date and sign the judgement at the time of pronouncing it is only procedural irregularity curable under section 436 of the Criminal Procedure Code.

Hence, the Deputy Solicitor General submitted that, in the instant case failure to date the Judgement is only a procedural irregularity curable under section 436 of the Criminal Procedure Code.

I agree with the contention of the Deputy Solicitor General, that it was an irregularity curable under section 436 of the criminal Procedure Code, which had not occasioned a failure of justice.

At the outset the counsel for the accused-appellant conceded the fact that who ever who killed deceased has rendered himself to be found guilty of the offense of murder and nothing less, as the deceased had 24 stab injuries caused by a knife of which 8th, 9th and 10th injuries were necessarily fatal.

For the reasons aforesaid, the grounds of appeal urged by the counsel for the accused-appellant are of no merit. I am of the view that the leaned trial judge has rightly found the accused-appellant guilty of the offence charged. Appeal is dismissed.

Sisira de Abrew, J. I agree,

Appeal dismissed.