IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of Section 331 of the code of Criminal Procedure Act No. 15 of 1979.

C.A. Case No. 46/2001

H.C. Kandy No. 1703/96

Ravindra Dharmapriya Keerthiratne

Alias "Kalu malli",

Accused-Appellant.

Vs.

Hon. Attorney General

Respondent.

Before : **Rohini Marasinghe, J and**

Sarath De Abrew, J.

Counsel : Ranjith Abeysuriya, P.C., with Thanuja Rodrigo for the Accused-Appellant.

Dappula De Livera, Deputy Solicitor General, for the Respondent.

Argued on : 27.10.2009

Written Submissions

Tendered on : 28.01.2010

Decided on : 30.05.2012.

Sarath De Abrew, J.

The Accused-Appellant was indicted before the High Court of Kandy with committing the offence of murder of one Kudagamage Denzil on 12th October 1989 at Thalawakele punishable

under Section 296 of the Penal Code. After trial without a jury the Accused-Appellant was duly convicted for murder and sentenced to death by the learned trial judge on 18.07.2001. Being aggrieved of the aforesaid conviction and sentence the Accused-Appellant (sometimes hereinafter referred to as the Appellant) has tendered this appeal to this Court.

The case for the prosecution rested mainly on circumstantial evidence and the dying deposition of the deceased N.R. Dayani and K. Kannadasa, neighbours of the deceased had given evidence for the prosecution, followed by the evidence of W. Sellaraj a local barber, and one Premasiri who was employed in boutique of the deceased. Thereafter Dr. Seneviratne, then J.M.O. Kandy, has given evidence with regard to the injuries on the deceased and the appellant based on the PMR and MLR prepared by one Dr. Sunil Fernando who has gone abroad. I.P. Weeraratne, then O.I.C. crimes, Thalawakele had given evidence as to the nature of the investigations conducted by the police. The evidence of P.C. Adam Sadan as to deployment of a police dog in the investigations has been rejected by the learned trial judge on the basis that the

witness had failed to tender evidence as to having the skill and knowledge to handle such police dogs. Finally the brother of the deceased, K. Anura Dewa had given evidence followed by that of the Interpreter Mudliyar with regard to the non-summary proceedings in M.C. Nuwara Eliya.

The Appellant has made a lengthy dock statement denying complicity and attaching culpability on two unidentified assailants who intruded into the house of the deceased that night in darkness as the lights went off when he was watching video films with the deceased. One S.W. Gunasinghe, a clerk at the Thalawakele Urban council, had been called as a defence witness in an unsuccessful attempt to establish that there was a exit door at the back of the house of the deceased other than the front entrance.

The learned trial Judge who gave judgment and passed sentence in this case has not had the benefit of observing the demeanor and deportment of witnesses as the entirety of the evidence in this trial has been led before his predecessors and only the final addresses by the opposing counsel had been conducted

before the learned trial Judge who had adopted the entirety of the evidence as the defence did not object .

The facts briefly are as follows. The deceased was a boutique owner who was living alone in the premises in question where the only ingress and exit was the front door. According to the evidence, the deceased had an affinity to watch video films at night in the house in the company of friends including the appellant. On the day in question, around 8 p.m., the deceased had closed his boutique and come to his house accompanied by his employee Premasiri and joined by the appellant. Premasiri had left later leaving the deceased alone in the house watching films with the appellant. Soon after, the neighbours including Dayani and Kannadasa had heard cries from the deceased's house including sounds of a struggle and sounds of articles been broken followed by the sound of a person vomiting with difficulty. The neighbours, including the above two witnesses had converged on the premises and having vigorously banged on the front door which had been locked from inside, had failed in their attempt to open the door from outside. This attempt and the vigil had continued for about 10 minutes,

when suddenly the front door was unlocked from inside and the stark naked deceased had staggered out with multiple bleeding injuries and had collapsed and fallen on the ground while uttering "Kalu malli mawa kepuwa" (Kalu malli cut me). The accused-appellant was known as Kalu malli in the locality.

The next phase of this drama was enacted when, about 03 minutes later, the appellant himself had alighted from inside the house from the front door and fallen on top of the fallen deceased while uttering " කවුද දෙන්නෙක් ඇවිත් ෆියුස් ගලවලා අපි දෙන්නව කැපුවා ඇතුලට යන්න එපා ඇතුලේ ආපු දෙන්නා ඉන්නවා" The appellant two had suffered certain injuries though not apparently visible at that time. The appellant has been wearing a denim jacket and a sarong. The appellant was later seen seated in front of the house on the verandah abutting the road close to where two blood stained gloves were later found. Thereafter the younger brother of the deceased, Anura Dewa too had come there and inquired from the deceased as to what happened whereupon the deceased has feebly repeated the utterance

that Kalu malli cut him. The neighbours had then fetched a van and taken the deceased to the hospital. The appellant too had gone to the hospital in the same vehicle and obtained treatment for his injuries. A police party had then arrived and commenced investigations. Other than the deceased followed by the appellant, no one had emerged from the front door of the house and on investigation, no other persons were found inside the house. Investigations have confirmed that the only mode of ingress and exist was through the front door of the house and there was no possibility of anyone hiding inside the house escaping through any other exit. At the time of the incident the neighbours had observed candles burning inside the house which has been confirmed by police investigations. Two knives were recovered from inside the house, one on top of a bag of rice and the other in a crevice .in the bathroom. (P1 and P2). A pair of blood stained gloves were found outside in a bush opposite to where the appellant was seated.

The deceased had 31 injuries including 17 cut injuries on his body. The medical evidence supported the position that the deceased could have uttered the dying deposition soon after

the infliction of the above injuries. The accused-appellant had 05 superficial injuries comprising of 02 cut injuries on the hands, one abrasion on the right hand little finger, and two contusions on the right knee and the left side of the head. The medical evidence was quite decisive that the injuries on the appellant could not have been self inflicted. The cause of death of the deceased had been due to excessive bleeding following cut injuries on the neck.

Several grounds of appeal based mostly on questions of fact were raised on behalf of the appellant as enumerated in the written submissions tendered to Court.

They may be broadly categorized as follows:

(1) Taking into account the medical evidence as to the number of blows dealt and the nature and number of injuries inflicted on the deceased, (the medical evidence had disclosed 31 injuries out of which 17 were cut injuries, while there were 10 abrasions, 03 contusions and 01 stab injury), it was impossible for a single person to have been

able to cause all such injuries on the deceased who was yet alive to come out of the front door by himself. The medical evidence revealed that the deceased had been struck at least 14 blows.

(2) The evidence as to the dying deposition to the effect that "Kalu malli cut me" given by witnesses Dayani, Kannadasa and Anura Dewa was unreliable for the reason that this dying declaration was not communicated to I.P. Weeraratne by the witnesses when he came to the scene shortly after the deceased and the accused were despatched to the hospital in a vehicle and also for the reason that, if the deceased had in fact made this accusation, the injured accused appellant would not have been permitted to go to the hospital in the same vehicle as the deceased.

(3) The learned trial Judge had failed to consider and attach a proper weightage to the fact that the accused himself had sustained injuries including two cut injuries on the hands which were not self inflicted.

(4) No consideration has been given to the possibility that an unknown assailant could have left the house of the deceased through the front door before witness Kannadasa, who was the first to arrive there, reached the door of the house of the deceased.

(5) The discovery of a pair of blood –stained gloves being found outside the house about 15 feet from the front door lends support to the position that another person participated in the attack. The fact that the accused did not use this pair of gloves is supported by the fact that there was no cut mark on the left glove whereas the appellant had a superficial cut injury on his left palm. There is no evidence to support the inference that the accused could have thrown away the pair of gloves unseen by the witnesses who had gathered there. The fact that another suspect one Lalith too was arrested and produced at the non-summary stage and later discharged is relevant in this context.

(6) The total absence of a motive for the appellant to have committed this offence accrues to his benefit. The fact that Rs. 95,000

cash found secure and undisturbed in a cupboard is suggestive that theft or robbery was not the motive.

(7)As there are no cogent and acceptable evidence that the appellant uttered any deliberate lie, the Lucas principles would not apply.

Having perused the entirety of the proceedings, the judgment of the learned trial Judge and the written submissions tendered to Court, it is now left to evaluate the several grounds of appeal urged on behalf of the appellant in the light of the evidence led at the trial and the findings arrived at by the learned trial Judge in his judgment, mindful of the fact that the learned trial Judge did not have the benefit of questioning witnesses and observing their demeanour and deportment as the totality of the evidence had been led before his predecessors.

The grounds of appeal urged on behalf of the appellant mostly relate to pure questions of fact and questions of mixed fact and law. Where the learned trial Judge has exhaustively analyzed the evidence in detail as in this case and arrived at specific

findings based on evidence led at the trial, the Appellate Court would hesitate to interfere with such findings on arguments based on mere conjecture or surmise, unless it could be conclusively shown that the learned trial Judge has gravely misdirected himself in arriving at improper inferences unsupported by evidence or ignored vital portions of the evidence which would have had a bearing on the entire complexion of the case.

Before focusing on the several arguments propounded by the learned Counsel for the appellant, first and foremost, it is of vital importance to scrutinize the findings of the learned trial Judge as to who participated in the drama enacted in the house of the deceased that fateful night. The accused-appellant, while coming out through the front door and later in his dock-statement had taken up the exculpatory position that two unknown assailants entered the house, put off the lights and attacked the deceased and himself. The appellant had further claimed that the assailants were still inside the house when he come out from front door and was unsuccessful in his attempt to adduce evidence and establish that there was an exit at the rear of the house through which these assailants could have

escaped. The prosecution, on the contrary, had adduced irrefutable evidence that there were no such assailants inside the house of the deceased that night and there was no exit at the rear and the only escape route was through the front door duly guarded by a retinue of neighbours including witnesses Kannadasa and Dayani whose solid evidence was that only the deceased and later the appellant emerged from the house that night through the front door which could only be opened from inside when locked. The learned trial Judge at pages 23- 29 of the Judgment (pages 396 – 402 of the record) has exhaustively dealt with this vital aspect and has arrived at a finding that the only mode of ingress and exit from the house of the deceased was through the front door. In the light of the totality of the evidence led at the trial this Court has no reason to interfere with that finding which would be the apex on which the entire case would revolve.

With the above backdrop and the factual situation in mind, I now proceed to examine the several contentions raised on behalf of the appellant.

The first contention was that is would have been impossible for a single person to have caused all the injuries on the deceased. The deceased had 31 injuries comprising of 17 cut injuries, 10 abrasions, 03 contusions and 01 stab injury resulting from at least 14 blows inflicted on him. The accused-appellant had 05 injuries comprising of 02 cut injuries on the hands, one abrasion and two contusions. Two knives had been recovered (P1 and P2), one on top of a rice bag and the other in a crevice in the bathroom. The cut and stab injuries on the deceased could have been caused by the razor knife P1. There are no eye witnesses as to what happened inside the house of the deceased that night. The neighbours have heard the noise of a continuing struggle, sounds of articles being broken, cries for help and sounds of someone vomiting with difficulty. The evidence conclusively establishes the presence of only the appellant with the deceased inside the house at the time of the offence. In the light of the above, it is only reasonable to infer that there arose a sudden fight between the appellant and the deceased, where the former became the aggressor and inflicted the cut injuries on the deceased during the course of the struggle which would have ensued for a period of time. The learned trial Judge too has arrived at

a conclusion that there a would have been a fight between them (page 403 of the record). As to who put off the lights, the presence of candle lights in the rooms, why the deceased did not open the front door and escape, as to whether the appellant received cut injuries on his hands while averting blows and as to why the deceased was stark naked are questions that remain unanswered. If the appellant was wielding the razor knife (P1) and was the more agile of the two protagonists, if the contusions and abrasions could have been caused in the struggle for a certain duration of time in the dark in a confined area in the house, it was certainly possible for a single person to have inflicted at least 14 blows resulting in the several injuries on the deceased. In view of the above, I am of the view that the first ground of appeal would fail.

The second ground of appeal was the questionable circumstances under which the accused-appellant was allowed to go to the Kotagala hospital in the same vehicle as the deceased after the deceased had accused the appellant by way of his dying deposition which has not been apparently communicated by the neighbours to I.P. Weeraratne and the police party who came to the scene of the crime shortly

thereafter. Even though the deceased came out of the front door and uttered that the accused cut him as testified by witnesses Kananadasa and Dayani, the appellant too had shortly emerged and accused two unknown assailants purportedly still inside the home having attacked them. This certainly would have caused confusion in the minds of those gathered there unable to determine as to who were the real perpetrators . The fact that the appellant too had injuries and feigning serious injury fell on the deceased as he came out, and the fact that the appellant did not attempt to escape but calmly sat by the verandah too would have added to the confusion. Both the deceased and the appellant were well known to the neighbours as friends who used to watch video films together. In this confused state of affairs it is very likely that the dying deposition was not conveyed to the police party who arrived later. The above course of events and human conduct, in my view, would not suffice to assail the evidence with regard to the spontaneous dying declaration pointing a finger of guilt at the accused appellant in view of the firm testimony given at the trial by witnesses Kannadasa and Dayani bereft of material contradictions. For the above reasons, this ground of appeal two should fail.

The fourth contention adduced on behalf of the appellant too should fail due to the following reasons. When witness Kannadasa arrived at the scene and commenced banging on the front door, the commotion or struggle was still going on behind closed doors. The front door had been locked from inside. If an unknown assailant escaped through the front door before Kannadasa or Dayani came, as the door was locked from inside, it would have been possible only if the door was again locked from inside thereafter by the appellant or the deceased after allowing the alleged assailant to escape, which was most unlikely. Further, where the appellant himself had categorically taken up the position as be emerged through the front door that the two assailants were still inside the house, the appellant cannot now effect a complete volte face and claim otherwise.

Dealing with the fifth ground of appeal as to the discovery of a blood stained pair of gloves without any cut marks on the left glove, it must be observed that the learned trial Judge (page 407 of the record) had considered the evidence of witness

Kannadasa that these gloves were found about 08 feet from where the appellant was seated. No one had seen the appellant carrying or throwing away these gloves. However the evidence disclose that he had been wearing a jacket over his sarong as be emerged from the house. Therefore one cannot exclude the possibility that he hid the gloves in his clothing as he came out, and awaiting an opportune moment in the confusion and darkness, threw out the said gloves which were found close to the place he was seated. There is no evidence as to who was wearing and using the gloves if at all. Therefore the lack of cut marks corresponding to those suffered by the appellant would not suffice to create a reasonable doubt in the prosecution case which is bolstered by strong cogent circumstantial evidence and a dying declaration testified to by two witnesses whose evidence has not been challenged. For the foregoing reasons, the fifth ground of appeal too should fail.

As regard the sixth ground of appeal, the prosecution is not required to establish a motive as a necessary ingredient to prove a criminal charge. A cogent and intelligible motive only advances and strenghters the prosecution case as held in Sumanasena

vs. Attorney-General (1999) 3 SLR 137.. Hence this ground of appeal by itself too should fail.

The seventh ground of appeal too should fail for the following reasons. In this case the evidence has established that the appellant had uttered a deliberate untruth as to the presence of two assailants inside the house when he emerged through the front door probably to distract the by standers and neighbours gathered there and formulate a defence. The learned trial Judge has not misdirected himself in invoking the principles enunciated in Regina vs Lucas (1981 2 AER 1008) where it was held that deliberate falsehoods weaken the defence case appreciably and advances in strength the circumstantial evidence elicited from the prosecution witnesses. Where the falsehood uttered is so blatant and goes to the root of the case impacting on its final out come the effect of the application of the principle is also enhanced.

Finally, it is now left to consider the third ground of appeal as to whether the learned trial Judge afforded proper weightage to the fact that the accused himself had sustained injuries

in the incident including two cut injuries on either palm of his hands which could not have been self inflicted giving rise to the possible availability of the mitigatory plea of sudden fight or exceeding the right of private defence.

Before proceeding to examine whether the evidence disclosed at the trial brings this case within the purview of exception 04 to section 294 of the Penal Code, the following legal principles must be borne in mind.

a) The offence must be committed without premeditation upon a sudden quarrel.

b) It is immaterial which party offers the provocation or commits the initial assault.

c) The evidence must disclose, on a balance of probability, that circumstances exist which would bring the case within the ambit of exception 04 to section 294 of the Penal Code. (***King Vs Chandrasekera 44 NLR 97)***

d) Even where an accused person does not put forward a mitigatory plea based on the exceptions to section 294 of the Penal Code but opts for an exculpatory plea, there is a duty cast on a trial Judge to assess the evidence and decided on a balance of probability whether the accused

was entitled to the lesser verdict on the basis of the exceptions to section 294 of the Penal Code (***Chandradasa Vs The Queen 55 NLR 439)***

The learned Trail judge (pages 414-415 of the record) in his judgment has rejected the application of the mitigatory plea on the general basis that it was reasonable to assume that any victim would offer resistance to his assailant during the course of which the assailant too was likely to receive injuries in the struggle. The learned trial Judge has misdirected himself on this aspect as this finding appears to have been arrived at more on conjecture and surmise rather than on the evidence disclosed at the trial. Where the victim armed with a knife retaliates it would still amount to a sudden fight as it is immaterial who commits the initial assault. Irrespective of the failure of an accused person to specifically raise the mitigatory plea in favour of an exculpatory plea and irrespective of the nature of injuries on the victim, where the evidence disclose the probability of a sudden fight or struggle, there is a duty cast on every trail Judge to apply the test of probability and improbability to carefully assess the direct, circumstantial and medial evidence to decide on a balance of probability whether the injuries on the accused were the result

of a protracted sudden struggle or whether injuries were merely the result of unarmed resistance of the victim. The medical evidence support the inference that both the appellant and the deceased used P1 and P2 knives respectively in the struggle.

The learned trial Judge in his judgment has repeatedly concluded that there had been a protracted struggle between the deceased and the accused-appellant (pages 403 and 414 of the record). The medical evidence has categorically stated that there were clear signs of a struggle (page 210 of the record) or fight between the parties as discernible from the injuries on the deceased and the appellant. The two cut injuries on either palm of hands of the appellant could have been caused by the knife marked P2. As these injuries were not self inflicted the irresistible inference would be that the deceased wielded knife P2. The cut injuries on the deceased could have been caused by the razor knife P1. Therefore the medical evidence has supported the view that two knives were used in this struggle by each party and the appellant too had received cut injuries on his palms probably in averting blows. There was a duty cast on the trial judge to question the medical expert on the above aspects and form his own

conclusions as to the probability of injuries being caused to either party during the course of a sudden fight or struggle.

The trial Judge must not permit the medical expert to usurp his functions but must question the expert to elicit answers on disputed points so as to form his own judicial conclusions based on the totality of the evince led at the trial. In this case it is rather unfortunate that neither the doctor who testified had first hand examined the injured parties, nor the learned trial judge who gave judgment had heard the evidence. In such a situation, in examining the several grounds of appeal, there is an onus on the appellate court to delve into the evidence and review the testimony carefully to ensure that there is no miscarriage of justice.

A careful study of the evidence reveal the following circumstances which are suggestive of a sudden fight. The deceased and the appellant were known to be friends who used to watch video films in the night. The total absence of a motive or premeditation are factors that are contributive to the probability that the incident took place due to a sudden

dispute giving rise to a sudden fight. The testimony of the neighbours as to the sounds of articles being broken for a certain duration of time as also suggestive of a continuing struggle. The fact that the appellant joined the deceased and witness Premasiri to go to the residence of the deceased to watch video films as usual suggests that there was no previous enmity or premeditation and the incident in all probability would have been sparked off as a sudden dispute which ignited between the parties behind closed doors that night. The fact that the medical evidence support the proposition that the cut injuries on the appellant could have been due to averting blows dealt with the P2 knife tilt the scales in favour of a sudden fight. Where on a balance of probability all circumstances point to the offence being committed in the heat of passion upon a sudden quarrel the benefit of this exception cannot be denied to the offender.

In view of the aforesaid reasons, I am satisfied that the ends of justice will be met in this case if the appellant is given the benefit of the mitigatory plea of sudden fight under the exception 04 to section 294 of the Penal Code.

In view of the above, I set aside the conviction and sentence for murder under section 296 of the penal Code imposed by the learned High Court Judge of Kandy dated 18.07.2001, and instead convict the accused-appellant under section 297 of the Penal Code for the offence of culpable homicide not amounting to murder on the basis of sudden fight while imposing a sentence of 15 years rigorous imprisonment and a fine of Rs. 10,000/- in default 02 years imprisonment. I further direct that the prison term be operative from the date of conviction, namely 18.07.2001. Registrar is directed to send a copy of this judgment along with the original case record to the High Court of Kandy for compliance. Accordingly, the appeal is partly allowed.

JUDGE OF THE COURT OF APPEAL

Rohini Marasinghe, J

I agree.

JUDGE OF THE COURT OF APPEAL

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