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

In the matter of an appeal under sec 331 of the Code of Criminal Procedure Act No 15 of 1979 as amended

C A 105/2008

H.C. Matara 47/2007

Yaddehige Shelton,

Accused Appellant.

Vs

Hon. Attorney General

Respondent

Before: Sarath de Abrew, J

H.N.J. Perera, J.

Counsel: Ranjith Meegaswatte for the Appellant.

Haripriya Jayasundara, SSC for the Respondent

Argued 15.05.2012

W/Sub: 25.05.2012

Decided on: 16.07.2012.

H.N.J. Perera, J.

Appellant was indicted before the High Court of Matara with committing the murder of one Koku Hennedige Renuka on 03.12.1999. After trial the accused was convicted and sentenced to death on 21.07.2008. Being aggrieved by the said conviction and sentence the accused appellant has preferred this appeal to this court.

The facts pertaining to this case and the background to the incident may be set out briefly as follows.

The deceased having worked abroad as a domestic has returned to Sri Lanka about six to seven days prior to the date of the incident. On the day in question around 10.30 in the morning the deceased, her husband Sarath Abeysuriya, their daughter Rasika Sanjeewania and the witness Yamuna Rangini have gone to the Bank of Ceylon branch of Dickwella in a three wheeler as the deceased wanted to withdraw some money The deceased and her husband have got down while the others had remained in the three wheeler. According to the evidence led in this case the deceased at the time of the incident had been standing about ten feet away from where the vehicle was. While seated inside the vehicle the witness Yamuna Ranjini has seen the accused attacking the deceased. In fact she has seen the accused stabbing the deceased under the left arm pit. Then the witness has rushed to the deceased and had held her before she has fallen. This witness has said that she did not see where the accused came from and she saw him first when the accused was stabbing the deceased.

The daughter of the deceased too is an eye witness to the incident in question. According to the evidence of the witness Rasika Sanjeewani the daughter of the deceased she too had been inside the three wheeler with the witness Yamuna Ranjini. According to her she had been going through her school books when the witness Yamuna Ranjini had alerted her and had seen the accused stabbing the deceased under her arm pit. She has

further stated that after stabbing the deceased, the accused challenged others to come forward if there are some more whilst brandishing the knife.

The witness Yamuna Ranjini in her evidence has stated that she got to know from her mother, the deceased, that the accused had made improper advances to the deceased and in that connection the deceased had made a complaint to the police against the accused. The witness Yamuna Ranjini too has confirmed that the accused made improper advances to the deceased and that the latter made complaints to the police regarding the same.

The judicial Medical Officer who performed the post mortem examination has said that he observed five injuries on the dead body and two of those were cut injuries whilst three were stab injuries. One of the stab injuries was 12 cm deep and has caused damage to the lung and the artery. The said injury has been categorized as a necessarily fatal injury by the doctor. It is submitted by the counsel for the Respondent that the stab injury observed by the doctor under the left arm pit of the deceased corroborates the two witnesses who in their evidence have stated that they saw the accused stabbing the deceased when the latter raised her arm. S.I Ariya Guneratne who visited the scene of the crime had observed a patch of blood on the edge of the road near the boutique.

The defense version was that he was told by a friend on the day of the incident that the police was looking for him in connection with the murder of deceased and when he told his sister the latter did not allow him to go home. Thereafter he claimed that he went about doing his normal routine work and finally he surrendered to police on the 07.12.1999. The accused has taken up the defense of an alibi in the dock statement.

After oral submissions, counsels on both sides have filed written submissions. The following matters have been raised as grounds of appeal on behalf of the appellant, which are briefly as follows.

(1) Credibility of the witnesses
(2) Evidence given by the witnesses not corroborated by the doctor's evidence
(3) At the time the witness no.4 gave evidence, the witness no. 1 was inside the court listening to her evidence. The Learned Trial Judge has only rejected part of the evidence given by the said witness

(4) Item (weapon) which was used to commit the offence was not identified and has not been produced. Doctor was not questioned as to how these injuries have been caused.

(5) Dock statement of the accused not been properly evaluated.

(6) Failure of the Learned Trial Judge to analyze the evidence led on behalf of the accused appellant

Now I will proceed to deal with the several grounds of appeal urged on behalf of the accused appellant in order to determine whether there arises a substantial miscarriage of justice sufficient to vitiate the conviction.

Witness Rasika Sanjeewani, the daughter of the deceased whilst giving evidence had said that her mother sold an Elmira to her uncle Kokuhennadige Chadrasena to get money to go abroad. However the witness Chandrasena had been summoned by the defense to give evidence and had stated to court that he did not buy an Elmira from the deceased. It was the contention of the counsel for the accused appellant that the evidence given by the witness Rasika Sanjeewani therefore should be disbelieved and rejected. As submitted by the counsel for the Respondent this court too is of the view that the sale of the Elmira has no relevance to the case and this contradiction should be disregarded. We find that no contradictions or omissions have been marked by the defense in cross examination of this witness. The Learned trial Judge had stated in his judgment that the evidence given by the said witness was very consistent and that no suggestions have been

made by the defense to the effect that she did not see the incident or she falsely implicated the accused.

The Learned Trial Judge had held that the both eye witnesses were truthful in narrating the incident as they limited their narration to what they saw. These two witnesses had been only about 10 feet away from the scene of the incident and had seen the accused stabbing the deceased after it has started. Therefore the argument put forward by counsel for the defense that these two witnesses were not credible cannot be accepted. We hold that there was ample material before the Learned Trial Judge to hold that that these two witnesses are trustworthy, reliable and credible witnesses and we find that the Learned Trial Judge cannot be faulted for his conclusions and for his decision to act on that evidence.

Court Of Appeal will not lightly disturb the findings of a Trial Judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong. The Privy Council in Fraad vs Brown & Company Ltd., 20 NLR at page 283, held that:

"It is rare that a decision of a Judge so express, so explicit upon a point of fact purely, is over ruled by a Court Of Appeal, because the Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court Of Appeal, who can only learn from paper or from narrative of those who were

present. It is very rare that, in question of veracity so direct and so specific as these, a Court Of Appeal will over-rule a judge of first instance."

The other argument put forward by the counsel for the accused appellant was that the two eye witnesses evidence were not corroborated by the doctors evidence. The two eye witnesses had categorically stated to court that they saw the accused stabbing the deceased. The doctor who performed the post mortem examination had said that he observed five injuries on the body of the deceased and two of those were cut injuries whilst the other three were stab injuries. The stab injury observed by the doctor under the left arm pit of the deceased corroborates the witness Yamuna Ranjini and Rasika Sanjeewani, who in their evidence have stated to court that they saw the accused stabbing the deceased when the latter raised her arm. Therefore it is inconceivable that one could even argue that these two witnesses are not credible witnesses.

The next argument is about the failure of the prosecution to produce the weapon or the knife which the accused had used to cause fatal injuries on the deceased. The police have failed to recover and produce the weapon which had been used to commit the offence on the deceased. Therefore the prosecution had been unable to show the particular weapon to

the witnesses concerned. But the witnesses had categorically stated to court that they saw the accused stabbing the deceased. And the evidence of the doctor who conducted the post mortem examination had confirmed the fact that the deceased had been stabbed. And in fact the doctor had stated that there were three stab injuries on the dead body and one of the stab injuries has been twelve cm deep and has caused damage to the lung and the artery. The said injury has been categorized as a necessarily fatal injury by the doctor. Therefore I see no merit in the argument put forward by the counsel for the appellant.

It is now settled law that an unsworn statement must be treated as evidence. Queen v Kularatne 71 NLR 529,Queen v Buddarakkitha 63 NLR 443, Gunapala v The Republic of Sri Lanka 1994 (2) SLR 180.It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt. The Learned Trial Judge rejected the dock statement of the accused stating that there was no impossibility for the accused to come to the place of the incident and go from the place of the incident after the commission of the offence, to the place he claimed to have been. According to the evidence of the accused he had not gone to the police although he knew the police was looking for him. The Learned Trial Judge had stated in his Judgment that

the accused had taken seven days to surrender to courts through a lawyer, but the police evidence was to the effect that the accused was not in the area he claimed to have been, and that evidence was not challenged by the defense. The Trial Judge has rejected the evidence of the accused given from the dock and has held that the dock statement has not created any doubt in the prosecution case. It is my view that the Learned Trial Judge has correctly rejected the dock statement of the accused The dock statement is not credible nor does it create any reasonable doubt on the prosecution case.

The witness Sarath Abeysuriya admitted in cross examination that he was inside the court house when the other two witnesses were giving evidence. When one consider the evidence given by this witness it is absolutely clear that this witness had not seen the accused stabbing the deceased. The evidence show that he too accompanied the deceased on this day in a three wheeler and that he was in fact inside the Bank when this incident took place. Although this witness had earlier said that he saw the accused stabbing the deceased but later had admitted the fact that he in fact did not see the stabbing. The Learned Trial Judge has held that it appears that this witness had exaggerated by saying that he saw the incident. The evidence given by this witness that on this day he came to the Bank with the other witnesses can be believed and acted upon. That part of his evidence had been corroborated by the

two eye witnesses. The learned Trial Judge had referred to the judgment reported in 1990 1 SLR 256 Sameraweera v A.G. It is very clear from the judgment of the Learned Trial Judge that he had acted on the evidence of the two eye witnesses who had testified to the effect that they saw the accused stabbing the deceased about ten feet away from the three wheeler.

There is clear direct evidence given by two eye witnesses who testify to the fact that it was the accused appellant who stabbed the deceased. There is no evidence to show that there was an exchange of words or a sudden fight or provocation. The evidence disclosed the fact that the deceased was taken by surprise. The doctor's evidence establish the fact that there were three stab injuries and two cut injuries and one of the stab injuries had been 12 cm deep and has caused damage to the lung and the artery. The said injury has been categorized as a necessarily fatal injury by the doctor. This establishes the fact that the accused entertained a murderous intention. The Learned Trial Judge had very correctly held that the facts of this case do not fall under any of the exceptions recognized in the Penal Code and that the evidence led in this case proves the case against the accused beyond reasonable doubt.

It has been stated that the existence of a motive is not wholly essential in the prosecution case. There is no requirement therefore for the prosecution to prove a motive in order to

prove a charge. In Emperor v Balaram Das, it was held that where there is clear evidence that a person has committed an offence it is immaterial that no motive is proved, or that the evidence of motive is unclear. But in this case there is evidence that the accused had made improper advances to the deceased and in that connection the deceased had made a complaint to the police against the accused. Although the accused had denied the offence in question, he has not denied the allegations made against him by the witnesses regarding his improper conduct towards the deceased. This establishes a motive which advances and strengthens the prosecution case. Sumanasena v AG (1999) 3 SLR 137.

On a perusal of the judgment of the Learned Trial Judge it is very clear that the Learned Trial Judge had considered all the material evidence that had been led before him at the trial by both parties. The evidence given by the accused and the witness called on behalf of the defense had been analyzed and properly considered by the Learned Trial Judge in detail. It is abundantly clear that the Learned Trial Judge had chosen to believe the evidence led on behalf of the prosecution to that of the evidence led by the defense, and further proceeded to give reasons for disbelieving the defense version of the case.

In conclusion, for reasons stated above I hold that the accused appellant had failed to satisfy this court on any ground urged

on his behalf that a miscarriage of justice had occurred. Therefore I dismiss the appeal of the accused appellant and affirm the conviction and the sentence dated 21.07.2008 of the Learned High Court Judge of Matara.

JUDGE OF THE COURT OF APPEAL

I agree.

Sarath De Abrew, J.

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