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

In the matter of an appeal in terms of Se.331 (1) of the Code of Criminal Procedure Act. No.15 of 1979.

C.A. 303 / 2006

and

C.A.L.A. 321/ 06

HC. Colombo 2722/ 2005

Don. Shamantha Jude Anthony

Jayamaha.

Accused Appellant

Vs

Hon. Attorney General

Complainant Respondent

Before : W.L.Ranjith Silva, J & Nalin Perera, J.

Counsel : Anil Silva PC for the Appellant

Jayantha Jayasuriya ASG PC for the State

Argued : 16-03-12, 19-03-12, 21-03-12 and 03-05-12

W/Subm : 21-09-2011 an 22-06-2012

Decided : 11-07-2012

W.L.Ranjith Silva, J.

The accused appellant (hereinafter some times referred to as the appellant) was indicted in the High Court of Colombo for committing the murder of Yvonne Johnson at Rajagiriya, on or about first of July 2005, an offence as defined in section 294 of the Penal Code and punishable under section 296 of the Penal Code.

The accused appellant was tried before a Judge sitting without a Jury. On 28 July 2006 the learned High Court Judge found the appellant guilty of culpable homicide not amounting to murder, on the basis of knowledge, convicted the accused and sentenced him to a term of 12 years rigorous imprisonment, imposing in addition, a fine of 300,000 on him.

Being aggrieved by the said conviction and the sentences the appellant has preferred this Appeal to this court. The Attorney General too has preferred an Appeal to this Court by way of Leave to Appeal to have the said Judgment convicting the appellant for culpable homicide not amounting to murder set aside or reversed instead to have the said accused appellant convicted for murder and sentenced to death. Counsel

appearing for both parties agreed and stipulated at the very inception of the arguments that both appeals could be disposed of by way of a single judgment common to both appeals, binding on both parties.

The basis on which the Attorney General appealed was that the conviction of the accused appellant for culpable homicide not amounting to murder on the basis of knowledge and the imposition of a term of 12 years rigorous imprisonment on him was bad in law and that the evidence led at the trial court was sufficient to prove criminal liability and the murderous intention on the part of the accused appellant beyond reasonable doubt.

The Attorney General has a right to appeal against an acquittal. **(Weerappan Vs The Attorney General 72 NLR 361)** A conviction for a lesser offence or an offence different to the one pleaded in the indictment amounts to an acquittal from the initial charge framed against the accused. **(Kishan Singh Vs The Emperor 1928 AIR 254)** When an accused is acquitted of a major charge but convicted under a minor charge it is still an acquittal of the major charge which can be challenged by the state. (**Kishore Singh Vs the State of Madya Pradesh 1977 AIR SC 2269m Gopal Reddy Vs The state of Andra Pradesh, !979 AIR SC 387.)** It was held in **The State Vs**

Santosh Kumar Singh 2007 CRI L.J. Decided on 30-10-2006 that in an appeal, an acquittal could be reversed to one of murder and death Penalty could be imposed.

The case for the prosecution

Common facts

The accused appellant received an invitation to attend a party to be held at the Glow Night Club scheduled to be held on 30th of June 2005 organized by the Colombo Night Life Society. The appellant invited Caroline, the sister of the deceased, to be his guest at the party. The Request made to the appellant, by Caroline to take her sister Yvonne Johnson along with them to the party was readily granted.

The two sisters picked up the accused appellant at about 8:30 p.m at Bagathale Road. The vehicle in which they traveled belonged to the father of Caroline and Yvonne (the deceased) and was driven by the deceased. They spend the night visiting various nightclubs and finally Caroline wanted to get back to her flat.

The diseased decided to stay back and spend more time whilst Caroline who had to sit for an exam the following day decided to return home. When they left the club the deceased sister was in the company of a friend named Khone. The evidence in the case disclosed that the particular car bearing number JU 2257 carrying the accused

appellant and Caroline arrived at Royal Park at 2 a.m. on first of July 2005 and left at 2.02 a.m having dropped both of them.

The deceased, her sister Caroline and their parents lived in an apartment on the 23rd floor of the Royal Park residences. After arriving at the flat, Caroline went up to their parents, room and informed them that they had returned. She had also misinformed them that she returned with her sister. Thereafter Caroline retreated to a room in her apartment with the accused and once inside the room Caroline gave a call to Khone to find out about her sister (the deceased). The accused appellant, whilst remaining inside the room, took a call to get down a taxi and thereafter the accused appellant left the room saying "I love you forever."

The following day Yvonne Johnson's body was discovered on the staircase near the 19th floor.

Apart From this the prosecution led evidence to show that on the request of the accused appellant Shafraz,Rilvan,one of his friends, came to pick him up , in a taxi bearing number K.A. 0750 and that the said vehicle entered the Royal Park compound at 3:25 a.m. and left at about 3:30 a.m. after picking up the accused appellant. Having dropped the accused appellant at the third lane, his friend Rilvan had gone back. The

prosecution maintained the position that when the accused appellant was picked up at Bagathale Road on the 30th he was clad in a white pair of longs and a blue shirt and that strangely when Shafraz Rilvan picked him up at the Royal Park residence he was wearing a pair of boxer shorts and a shirt.

Prosecution lead evidence to show that the vehicle carrying the deceased entered the Royal Park at 2.50 a.m. on first of July 2005. Part of a Palm impression was discovered by the fingerprint experts on a railing on the 19th floor. The palm impression was on blood. Prosecution version was that the palm impression was not one created by placing the palm on blood but by placing a palm with blood on the railing. DNA experts testified that the blood was that of the deceased Yvonne Johnson. The prosecution called a number of witnesses to prove the chain of custody pertaining to the productions and with regard to the comparison and tallying of the part of the palm impression found at the scene of crime with the palm impression of the accused..

The prosecution led further evidence to show that when Caroline found out that her sister had not returned home that night, she had telephoned the accused and the accused had said that the deceased could be with Khone. It also transpired that the accused was with his father at Maravila on the following day. The medical evidence

led at the trial proves that Yvonne Johnson died of Axfixia following Manual strangulation.

The case for the defence

The Counsel for the appellant argued that the relationship between the appellant and the deceased on that evening, just prior to the incident, had been quite cordial. In fact the diseased had come to Sri Lanka on 26th of June 2005 and on 29th of June 2005 the deceased had picked up Caroline from school and had gone to Water's Edge where they gave a call to the appellant and got him down.

Counsel for the appellant argued further that on this particular day or even prior to that there was nothing to indicate or from which it could be inferred that there was any enmity or animosity or any ill will between the accused appellant and the diseased; in fact the Counsel for the appellant argued that even on this particular night just prior to the unfortunate incident when the appellant had an argument with Caroline for talking to one Pavithra the deceased had taken the side of the accused and had advised her sister Caroline.

Counsel for the appellant submitted that even on previous occasions the accused appellant, who was having an intimate relationship with Caroline, used to come to this

apartment secretly and spend the greater part of the night there. The unsuspecting parents of Caroline were blissfully unaware of these happenings that took place during certain nights in their own apartment.

In his dock statement the appellant denied any involvement in the murder. His version was that after he and Caroline returned at 2 00 am to the apartment they entered her bedroom, that Caroline went to the bathroom to take a bath whilst he went to the balcony to have a smoke, that During that time he was in the balcony he had given a call to his friend Rilvan, asking him to come and pick him up at the apartment. Counsel for the appellant took up the position that after Caroline returned from the bath room they went to bed and indulged in sex and thereafter he left Caroline's room in his boxer shorts as he usually did. It is also in evidence that he in order to have a smoke walked down the staircase and that when he was going down the stair case he saw Yvonne Johnson lying in a pool of blood on the stair way. The version of the defence was that when he saw Yvonne Johnson lying in a pool of blood he was terribly shocked and could not remember what he did or happened immediately thereafter. The appellant was silent as to whether he saw anybody, stranger or otherwise at or near the scene of the crime during that time or that he heard any noise or that he observed anything strange at or about the time.

Counsel for the appellant contended further that the prosecution failed to prove beyond reasonable doubt that the portion of the palm print on the stair way at the

scene was not that of the appellant and thus no adverse inference against the accused appellant could be drawn from that fact.

The appellant called a psychiatrist to give evidence on his behalf who in his evidence referred to a condition called "post traumatic stress disorder" which occurs when a person suddenly comes across and become aware of a situation where someone close to him or near and dear to him has suddenly met with some disaster. He took up the position that after seeing this horrible incident he completely lost his memory. The evidence of the psychiatrist, in my view has no bearing on this case and is not relevant to the case for the simple reason that the particular witness (psychiatrist) had not personally interviewed or examined the appellant. He had merely stated about a particular mental condition based on information received from the father of the appellant. Therefore the evidence given by the psychiatrist could be rejected as being irrelevant and immaterial.

The learned Counsel for the appellant responding to certain submissions made on behalf of the State by the Deputy Solicitor General, submitted that the suggestion made by the prosecution that when the deceased came to know that Caroline her sister was having an intimate relationship with the accused appellant she was rather unhappy about it and that the accused appellant was very angry with the deceased because

after the deceased came to Sri Lanka the time the accused appellant could spend in the company of Caroline was restricted and that provided the motive for the accused appellant to get rid of the diseased, was only a figment of his imagination, wholly speculative and conjectural.

Analyses of the Arguments of the Counsel for the appellant

Counsel for the appellant strenuously contended that the prosecution failed to prove beyond reasonable doubt that the portion of the palm print on the stair way at the scene was not that of the appellant and thus no adverse inference against the accused appellant could be drawn from that fact. Counsel for the appellant argued that there was no direct evidence and the entire case depended on circumstantial evidence as such it was essential that the prosecution must eliminate the possibility of some other person committing the offence. He contended that the prosecution recovered several items at the scene but none of them belonged to the accused. In this regard we observe that the items recovered belonged to the deceased and none could be attributed to a stranger. The investigating officers had found some sputum at the scene of the crime and that was sent for a DNA test and the report was that it neither belonged to the deceased nor to the accused. According to the police investigations the sputum sample was found not near the dead body and the two samples were found on the stairway between the 19th and the 18th floor above the 20th floor. Before the sputum samples

were collected the evidence revealed that the first police party and several employees of the Royal Park had already visited the scene of crime. Thus the presence of sputum on the stairway does not affect the culpability or the opportunity of the accused whose presence at the crime scene is established on his own admission and by several items of circumstantial evidence. A pair of shoes, as claimed by the appellant, purported to be the pair of shoes worn by the accused on that day, which was handed over to the police by the appellant and not recovered by the police, was forwarded to the 'Genetech' for examination by the government analyst but the report was negative in that there was no evidence to connect the pair of shoes to the scene of crime.

In this regard it is essential for me to refer to certain photographs showing the place of incident the location and the scene of crime marked by the prosecution produced in evidence as P8. A close scrutiny of those photos clearly and undoubtedly indicate that the third to fourth steps immediately above the place where the diseased body was lying and the step below the dead body up to the landing and on the landing floor was full of blood splattered all over. There was a pool of blood spread all over the landing and if the story of the accused appellant that he passed that place is true then it is seemingly impossible that he had no blood on his body or at least on the shoes he was wearing at the time. In his own admission, the accused appellant had admitted that he may have inadvertently come into contact with some of the blood that was there and

that may be how his palm impression happened to be on the railing. This is how the learned Counsel for the appellant has put this in his written submissions. I quote" even assuming that the palm impression tallied with that of the accused appellant the accused had given an explanation as to how it happened to be there, that is, when he passed that place and if there were blood stains on the railing and if he had to wade through the stairs there was a possibility that his hand may have touched a part of blood and thereafter the palm impression was left on the railing."

I must emphasize here that it was not only a possibility but a probability as the photos indicate that there was no way that one could pass the place without even contacting a drop/stain/peck of blood on his person or at least on the sole of the shoes he was wearing at the time.

Counsel further contended that the officers of the Fingerprint Department took photo graphs of three impressions at the scene of the crime and were forwarded to the officer in charge of the fingerprint Department initially he had observed that one of the prints was not suitable for inspection and finally after the accused Palm print was sent to the department one of the other two Prints was also considered not fit for examination and thus was not compared. Counsel argued, could it be because one palm impression was of some other person; could it be that the third finger print was not that of the accused

appellant but of some other person and that at the behest of the CID it was ruled out as unfit for comparison in order to suppress the truth. His contention was that the officers at the fingerprint Department may have done so at the behest of the CID. The appellant challenged the impartiality of the investigators especially I.P.Shani Abesekara.

This argument is wholly untenable and is pure conjecture and surmise. There is nothing to substantiate this argument the evidence is that there was only the palm impression that was fit for comparison. The mere fact that three possible prints were photographed at the scene of crime does not necessarily mean that all three of them were of the required quality with sufficient number of characteristics for comparison. The Registrar of Fingerprints confirmed that only one of them was suitable for comparison. Therefore it is unfair and unrealistic to contend that the police acted in a partisan manner. The accused failed to explain how his hand contaminated with the deceased's blood came into contact with the railing of the stairway. In this regard it is pertinent to note that the palm print of the accused appellant was found a few steps above the dead body and the expert witness confirmed that in view of the direction the impression it had been placed by a person descending the stars.

On the other hand when the officers of the Fingerprint Department gave evidence they were not challenged that they failed to examine the set of fingerprints or that those fingerprints belonged to some other person and that they suppressed that evidence from courts. Having failed to take advantage of the opportunity to cross-examine the said witnesses on these points it is too late in the day now for the Counsel for the accused appellant to agitate the matters for the first time in the Court of Appeal. If the evidence of this particular witness was challenged in this regard at the appropriate time, perchance and most probably the witness would have explained or could have even refuted the allegation. In this regard I would like to cite the following authorities.

In **Sarwan Singh Vs State of Punjab 2002 AIR Supreme court iii 3652 at 36755,3656** " It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted." This case was cited with approval in the case of Boby Mathew Vs State of Karnataka 2004 3 Cri. L. J.3003

In Himachal Pradesh Vs Thakur Dass(1983) 2 Cri L.J. 1694 at 1983 V.D.Misra CJ held : "Whenever a statement of fact made by a witness is not challenged in cross examination , it has to be concluded that the fact in question is not disputed ."

"Absence of cross examination of prosecution witnesses of certain facts leads to the inference of admission of that fact." Motilal Vs State of Madya Pradesh (1990) Cri.L.J. NOC 125 MP

For a recent case I would like to refer to the Judgment of **His Lordship Sisira de Abrew, J in Pilippu Mandige Nalaka Krishantha Kumara Thisera Vs A.G CA 87/2005 decided on 17-05-2007** I quote "....I hold that whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."

The learned Counsel for the defence responding to certain submissions made by the deputy solicitor general, submitted that the suggestion made by the prosecution as to what provided the motive for the murder was the fact that, when the deceased came to know that Caroline was having an intimate relationship with the accused appellant the deceased was rather unhappy about it and the accused appellant was very angry with the deceased because after the deceased came to Sri Lanka the time the accused appellant could spend with Caroline was restricted, was only a figment of his

imagination, wholly speculative and conjectural. In support of his argument he has cited the dictum in **Queen Vs Sathasivam 55 NLR 255** wherein it was held that evidence with regard to a speculative motive cannot be led under section 8 of the Evidence Ordinance. He also cited **Queen vs Matthew de Zoysa 67NLR page 112 at page 117** that the court held the jury should be directed not to pay any regard to the speculative motive suggested by the Crown counsel which is only a figment of his imagination. I must confess that I agree with this submission of the counsel for the appellant. There is no evidence in this case to substantiate such a motive suggested by the deputy solicitor general and it is only a figment of his imagination wholly untenable and unsupported by the evidence led at the triad in fact the evidence is to the contrary. But here I should emphasize that it is not imperative and is not a must or a prerequisite that the prosecution should prove a motive in every case in order to succeed in proving the case beyond reasonable doubt against the accused. In this regard I would like to refer to the decision in Mohamed **Niyas Naufer and Others Vs Attorney General SC Appeal 01/2006 decided on 08-12-2006** wherein five judges of the Supreme Court held that I quote, "the existence of a motive is not a wholly essential ingredient in the prosecution case. There is no requirement therefore for the prosecution to prove a motive or the adequacy of a motive in order to prove a charge. The motive, which induces a man to do a particular act, is known to him and him alone". It was further held in that case that it is important to distinguish between

motive and intention. Here it would be very much pertinent to note that the medical evidence and the government analyst's evidence and the photos marked in evidence indicating the gruesome nature of the crime were more than sufficient to prove beyond any doubt that the crime was committed with a murderous intention. According to the evidence of the judicial medical officer, the head of the deceased has been bashed on an edge of a step more than once. And the government analysts confirmed the said position by examining the blood patterns at the scene. According to the judicial medical officer the cause of death had been due to strangulation by using her own stretch pants as a ligature after bending her legs back words.

Circumstantial evidence--Whether some other person could have committed this offence?

The evidence led at the trial positively proved that the accused left the apartment of Caroline which is located at 22nd and 23rd floors of the Royal Park premises around 2.20-2.30 am on 151 of July 2005. The vehicle in which the deceased traveled entered the Royal Park premises around 2.50 am the same day. That was about 20 minutes after the accused left the apartment. Rilvan, a friend of the appellant came to pick the appellant from the Royal Park premises around 3.25 and 3.30 am. These items of evidence positively prove that the accused appellant was present at the Royal Park

premises during the time the deceased was subjected to the brutal attack. This position was admitted to by the accused appellant himself, in his dock statement. Further the evidence of witness Amarasinghe and witness Indika confirms that there was a person on duty at the basement car park during the time relevant to this case and that he fell asleep from time to time which explains the absence of certain entries in the vehicle register maintained at the basement car park during the relevant period. Caroline in her evidence had denied that the deceased assaulted one of the security guards a few days prior to her demise and thus ruled out any possibility of any enmity between the deceased and any of the security guards.

The items of circumstantial evidence available against the appellant

The deceased her sister Caroline and the appellant went to a party around 8:30 p.m. on 30th of June 2005.

Although the appellant frequently consumed Alcohol beverages at various places during that night there was no change in his usual behaviour. Rilvan in his evidence has testified that the accused is not a person who would get drunk easily. (vide. volume B2 pages 138, 141, 149 and 196)

The appellant left Caroline's apartment around 2:30 a.m. The deceased entered the Royal Park premises around 2:50 a.m. The murder in question took place in the stairway on the 19th floor of the B tower of the Royal Park complex.

The Impression of a part of a palm on blood, found at the scene of crime, was proved to be that of the appellant.

His friend Rilvan picked up the appellant at the Royal Park premises around 3:30 a.m. At the time the appellant was dressed in his underpants with his pair of trousers folded in his arms.

Subsequent conduct of the appellant and loss of memory

According to the evidence of Rilvan he did not observed any unusual behaviour on the part of the accused. The appellant, in fact, had greeted Rilvan and had had a general conversation with him and had dropped the appellant at a certain point from where the accused appellant found his way home. After going home, the accused had called his friend Rilvan to confirm his safe arrival.

The appellant who was in the habit of calling Caroline several times a day failed to call her for the next 1 1/2 days and did not visit her until the 2nd of July. (Evidence of Caroline)

There was no response to the SMS messages sent to the appellant by Caroline informing the murder of her sister.

In the case of King Vs Abeywickrama 44 NLR 254 it was held that in order to base a conviction on circumstantial evidence the Jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence.

In King Vs Appuhamy 46 NLR 128 it was held that in order to justify the inference of guilt from purely circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

In Podisingho Vs King 53 NLR 49 it was held that in the 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 guilt.

In Emperor Vs Brown 1917 18Cri.L.J. 482 courts held that the jury must decide whether the facts proved exclude the possibility that the act was done by some other person, and if they have doubts the prisoner must have the benefits of those doubts.

In the case of The **Queen Vs Kularatne 71 NLR at page 534** the Court of Criminal Appeal quoted with the approval the dictum of Whitemeyer J. in Rex Vs Blom as follows "two cardinal rules of logic which governs the use of circumstantial evidence in the criminal trial (1) the inference sought to be drawn must be consistent with all the approved facts. If it does not, then the inference cannot be drawn. (2) the proof of facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they had not excluded the other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

In Don Sunny Vs Attorney General 1998 2 SLR page 1, the accused appellant and two others were indicted on the first count with having between first of September 1986 and 27th of February 1987 committed conspiracy to commit murder by causing the death of 'A' and others under section 113 (8) and section 102 of the Penal Code and on the second count for having committed murder by causing the death of 'A' on 27th of February 1987 under section 296 of the Penal Code. After trial the accused

appellant and the absent accused were convicted and sentenced to death. It was held that the charges sought to be proved by circumstantial evidence the items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

Had there been provocation

The Counsel for the accused appellant contended that even if the dock statement is completely rejected or the Court comes to an adverse finding that the dock statement does not create a reasonable doubt, if Caroline's evidence, that she quarreled with the appellant in her bedroom at the Royal Park is accepted in *toto*, the only logical conclusion that could be drawn is that there could have been some provocation offered to the appellant by Caroline and that the appellant was in fact provoked at the time appellant left Caroline's room. This argument is most untenable and hilarious if not ludicrous. Provocation given by Caroline cannot be ventilated on the deceased. Unless the deceased had given the provocation the actions of the appellant cannot be justified as arising out of provocation unless it occurred by accident or mistake. Mere provocation alone is not sufficient; the provocation must be grave and sudden.

It is trite law that even if the accused does not specifically take up the defence of a general or special exception to criminal liability, if the facts and circumstances before the court disclose that there was such material to sustain such a plea then the court must consider whether the accused should be convicted for a lesser offence. In this regard I would like to refer to the decisions in the following cases. **Rex Vs Mohideen Meera Saibo 19 CLW 129, S. Luvis Vs The Queen 56 NLR 442, The King Vs Kirigoris 48 NLR 407 and A. Punchibanda Vs The Queen 74 NLR 494.** There is no such evidence coming forth in this case either from the defence or from the prosecution that the diseased had given any provocation to the accused appellant. Therefore this argument put forward by the Counsel for the appellant has to be rejected.

Could the conviction for culpable homicide be sustained

It is settled law that if a person is intoxicated to an extent not to know what he is doing, even if the act is done without the requisite intention the law imputes the knowledge of a rational person and he could be convicted only for Culpable Homicide not amounting to murder under and in terms section Se.79 of the Penal Code. In this regard I refer to the decision in **Maddumage Indrajith Fernando Vs Hon. Attorney General** C.A. Appeal No. 59/2004 High Court Panadura No.1456/200 which might be

pertinent to the decision on this issue, wherein I held, I quote ".In **Jayathilaka Vs Attorney-General reported in (2003) 1 Sri L.R at page 107** Edirisuriya, J held I quote;

i) Though the accused has not taken up the defence of intoxication if such defence arises on the evidence it is the duty of the jury to consider the same.

ii) In cases of involuntary intoxication the test is the same as that applicable to insanity, namely the degree of intoxication is such that the accused was totally deprived of capacity to apprehend the nature of the act or its wrongful or illegal character. The section dealing with voluntary intoxication is of wider scope in that the effect of the provision is not confined to intoxication in this degree, but applies to all cases of self induced intoxication in any degree so long as the offence specifies some definite knowledge or intent as an essential ingredient.

With respect, I am unable to agree with the learned Judge when he opined that section 79 applies only to cases of voluntary intoxication. This section is not only not confined to the degree of intoxication as mentioned in section 78 of the Penal code but also applies to voluntary intoxication and covers both situations voluntary and involuntary intoxication. In other words even in involuntary intoxication, if it does not

amount to the degree of intoxication contemplated in section 78 of the penal Code, is still covered by section 79. Where the degree of the involuntary intoxication is as stated in section 78 the accused is completely exonerated and is entitled to an acquittal. On the other hand the effect of section 79 would be only to reduce the gravity of the offence."

As the evidence in this case reveals that there is some degree of voluntary intoxication on the part of the accused if at all he could take refuge only in the general exception recognized under section 79 of the Penal Code. Then all that he can expect is a conviction for culpable homicide not amounting to murder. As it was held in ***King Vs Marshal Appuhamy 51 NLR 140 at 142 and 144*** and ***King Vs Rengasami 25 NLR 438 at 444***, The intoxication necessary to reduce an offense from murder to culpable homicide not amounting to murder on the ground of absence of murderous intention need not necessarily be the degree of intoxication referred to in Section 78 of the Penal Code. Especially so in the face of the evidence of the only eye witness who stated that the accused was drunk and the admission made by the accused in the dock statement to the effect that he was drunk at the relevant time. On the other hand it is not correct to say that section 79 applies to all cases of self induced intoxication in any degree as it was observed by Edirisuriya, J in **Jayathilaka Vs Attorney-General (Supra)** . It was held in **A.M.P. Ratnayake Vs The Queen reported in 73 NLR at**

page 481 that; For the purposes of section 79 of the Penal Code the state of intoxication in which a person should be is one in which he is incapable of forming a murderous intention; and whether he has reached that state of intoxication or not is a question of fact that has to be determined depending on the evidence in each case; and it is for the person who raises the plea of drunkenness to establish on a balance of probability that he had reached that state of intoxication in which he could not have formed a murderous intention. **(See also Abey Mudalalie Vs Attorney-General 2005 2 SLR 162)**

Therefore it is my considered view that a plea under section 79 whether raised by the accused or not can be considered in favour of the accused by the trial Judge provided there is evidence in the case to determine on a balance of probability that the accused had reached that degree of intoxication in which he could not have formed a murderous intention, while being mindful of the cardinal principle that in a murder case, the overall burden of proof as to the murderous intention, always lies with the prosecution.

According to the facts and circumstances of the instant case the inhuman and the gruesome manner in which the murder was committed clearly shows the murderous intention the accused appellant entertained when he committed the murder. Even prior

to the incident, it appears that the accused had carefully planned and taken the deceased to the staircase soon after she emerged from the elevator. It appears that there had been a struggle during the cause of which the deceased had dropped some articles belonging to her and that she offered resistance and struggled even while she was being dragged down the staircase. According to the judicial medical officer the head of the deceased had been bashed on the edge of a step more than once and this had been corroborated by the evidence of the government analyst who confirmed the said position by explaining the blood patterns at the scene. According to the medical officer the death had been caused by strangling the deceased using her own stretch pants as a ligature by bending her legs backwards. The subsequent conduct of the accused appellant clearly indicate that he was in full control of himself and that he was capable of carefully planning his actions like a sober man. He had discreetly got rid of the blood he had on his clothes and on his Person including the blood that was on his hands by washing or by some other means. He had also divested himself of the clothes and the shoes he was wearing at the time because the appellant ought to have had blood stains on his clothes and his friend who came to take him back would have seen if there were such blood stains on his person or on his clothes. For the reasons aforesaid the contention that a conviction for culpable homicide on the basis of knowledge could be sustained cannot be accepted and should be totally rejected.

Analyses of the dock statement of the appellant by the Learned Trial Judge

Counsel for the appellant citing the Judgment in **The Queen Vs Kularatne, reported in 71 N.L.R. 529 at page 551** took up yet another ground of appeal in which he protested and attacked the evaluation of the dock statement by the Learned Judge.

In Queen Vs Kularatne 71NLR at page of 528; Their Lordships laid down the following guidelines;

a) If the dock statement is believed it must be acted upon.

b) The dock statement is capable of creating a reasonable doubt in the prosecution case the defence must succeed.

c) A dock statement of one accused should not be used against a co accused

If the dock statement is neither believed nor disbelieved (intermediary position) the accused is entitled to be acquitted.Even if the dock statement is rejected the burden always remains on the prosecution of proving the case against the accused, beyond reasonable doubt.

It is not humanly possible or legally tenable to compartmentalize the evidence for the defence or the dock statement as against the prosecution and then decide whether the

defence evidence or the dock statement is sufficient to create a reasonable doubt in the prosecution case. This cannot be done and should not be done in isolation but should be done only after an in-depth analysis of the totality of the evidence in the case led by both the prosecution and the defence. In this regard I would like to refer to **James Silva Vs Republic of Sri Lanka 1980 2 SLR 167 and 176** his Lordship justice Rodrigo,J. Parinda Ranasinghe, J. agreeing held I quote; ' a satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters adduced before the court by the prosecution and by the defence in its totality without compartmentalizing and asking the question whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty. See also the Privy Council Judgment in **Jayasena Vs The Queen 72 NLR page 313.(PC.)**

Whether the evidence of the defence or the dock statement is sufficient to create a doubt cannot be decided in a vacuum or in isolation because it needs to be considered in the totality of the evidence that is in the light of the evidence for the prosecution as well as the defence. it is wrong to assume that under no circumstances should the evidence of the prosecution be considered but the evidence for the prosecution should not be compared with the dock statement as it is against the fundamental principles of law and will amount to shifting the burden of proof. Yes I do admit that the dock statement should not be compared with the evidence for the prosecution but in

deciding whether the dock statement is sufficient to create a doubt the judge must be mindful of the evidence for the prosecution. Finally having considered the case for the prosecution as well as the dock statement it is only then the learned Judge can decide whether or not the dock statement is sufficient to create a doubt in the case for the prosecution. One cannot isolate or disregard the prosecution case completely and consider only the dock statement in deciding whether the dock statement is sufficient to create a doubt provided it is so obvious that the dock statement is only a bear denial or is irrational or palpably false, in which case it could be rejected without even considering the evidence for the prosecution.

In **Punchi BandaVs The Queen 75 NLR 174** it was held, I quote; "Where at a trial before the Supreme Court, the accused makes a statement from the dock, the Judge would be misdirecting the jury if he tells them that they should consider the statement of the accused but that it is not of much value having regard to the fact that it is not on oath and not subject to cross examination".

In **Kamal Addararachchi Vs The State 2002 1 SLR 312 in C.A. 90/97** it was held that " it was a grave error for the Trial Judge to direct himself that he should examine the tenability and truthfulness of the evidence of the accused in the light of the

evidence led by the prosecution. To examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence."

Failure to evaluate a dock statement in the proper perspective shall not ipso facto vitiate a conviction if the dock statement is

a) A bear denial

b) Palpably falls and unbelievable.

In **Simonge Ekanayake Vs The Attorney GeneralC.A.129/2005 C. Anuradapura 142/200** it was held that even though the Trial Judge has not considered the dock statement, if no miscarriage of justice had taken place due to the lapse of the Trial Judge and there is material to say that the dock statement is palpably falls then the findings of the original court should not be overturned.

in **Dharmadasa Vs Director General, Commission to Investigate Allegations of Bribery or Corruption 2003 1 SLR at page 64** it was held in that case that even though the learned Trial Judge has failed in his duty to consider the dock statement adequately and impartially if no credence can be given to the evidence of the accused then there is no reason for the conviction to be set aside.

The dock statement of the appellant when analyzed in the light of the law and the facts above referred to is unbelievable and certainly not sufficient to create any reasonable doubt in the prosecution case. In the totality of the evidence led in the case by the prosecution as well as the defence the dock statement cannot be acted upon.

For the reasons stated above I am of the view that no credence could be attached to the dock statement of the accused and the learned Trial Judge cannot be faulted for the findings and the conclusions he reached with regard to the dock statement made by the Appellant.

For the reasons adumbrated on the law and the facts I dismiss the appeal taken by the accused appellant and allow the appeal taken by the Attorney General. I set aside the conviction for culpable homicide not amounting to murder entered on the basis of knowledge. I set aside the term of 12 years rigorous imprisonment and the fine of Rs.300, 000 imposed on the accused appellant. I find the accused appellant guilty of murder under section 296 of the Penal Code and convict him for murder.

Having acted in terms of se.280 of the Code of Criminal.Procedure Act (vide.J.E of 11-07-2012)

I sentence the accused appellant to death.

Appeal of the State CALA 321/06 allowed

Appeal of the appellant CA.303/2006 dismissed

JUDGE OF THE COURT OF APPEAL

Nalin Perera, J.
I agree,

JUDGE OF THE COURT OF APPEAL