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

W.A. Camilus Silva,

Accused -Appellant

C.A. Appeal No. 20/2003

H.C. Chilaw No. 92/2001

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

Before : **SISIRA J. DE ABREW, J. &**

P.W.D.C. JAYATHILAKA, J.

Counsel : Amila Palliyage for Accused-Appellant.

Dappula de Livera D.S.G. for the Attorney General.

Argued &

Decided on : 02.07.2013.

Sisira J. de Abrew, J.

Heard both counsel in support of their respective cases.

The accused-appellant in this case was convicted of the murder of a woman named Warnakulasuriya Rohini Priyanka and the murder of a man named Warnakulasuriya Michael Fernando and was sentenced to death. Being aggrieved by said convictions and the sentence the accused-appellant has appealed to this court.

Facts of this case may be briefly summarized as follows:

The accused-appellant is married to a daughter of Micheal Fernando who was 2nd deceased in this case. Rohini Priyanka was the sister-in-law of the accused-appellant. The accused-appellant was living in separation from his wife after the marriage. His wife was living with her parents. On the day of incident around 9.00 a.m. the accused-appellant came to the house of his mother-in law and demanded the divorce from his wife. This demand was made to his mother- in- law. On being told that he must make a statement in the police station, he

went away after threatening the mother-in-law. Around 4.30 p.m. on the same day, the accused-appellant came back and called his son who was living in this house. When the accused-appellant who came on a bicycle, was talking to his son, he tried to stab his son. On seeing this incident, Rohini Priyanka the aunt of the accused's son came to rescue the small boy. At this time the accused-appellant stabbed Rohini Priyanka. Thereafter he ran in the direction of the kitchen and stabbed his father- in-law. Thereafter he uttered the following words "I will kill another". The incident was witnessed by the accused-appellant's own son Rumesh Chandana, Elisebeth Fernando, the mother-in-law of the accused-appellant and Geetha the sister-in-law of the accused-appellant. All three witnesses gave evidence at the trial. The accused-appellant in his two line dock statement stated that he went home drunk. He further stated that he was unaware of what happened. He did not say anything about the incident that took place in his mother-in-law's house.

Learned Counsel appearing for the accused-appellant submits that the accused-appellant is entitled to the plea under Section 79 of the Penal Code. He submits that at the time the accused-appellant came to the house of his mother-in-law he was drunk. He further submits that at the time that the police arrested him, he was drunk. He also

submits that at the time of the examination by the doctor he was drunk. It has to be noted that at the time of the arrest the incident was over. Section 79 of the Penal Code reads as follows.

> *"In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will. "*

In order to consider the argument of the learned counsel for the accused-appellant it is necessary to consider some judicial decisions. In the case of Ratnayake Vs. The Queen 73 NLR page 481 Sirimana,J held as follows:

> " F*or the purpose 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 for the jury to determine 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 the state of intoxication in which he could not have formed a murderous intention."*

In King vs. Velaiden 48 NLR pg. 409 Howard C.J. held thus:

> *"where in a case of murder the defence of drunkenness is put forward, the burden is on the accused to prove that by reason of the intoxication there was an incapacity to form the intention necessary to commit the crime".*

It is relevant to consider the Section 105 of the Evidence Ordinance which reads as follows:

> *" When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code , or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."*

Illustrations (a) to Section 105 of the Evidence Ordinance is relevant in this regard. Illustrations (a) reads as follows:

> *A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of act. The burden of proof is on A.*

After considering the above legal literature, I hold that in a case of murder if an accused person raises the plea of drunkenness under

Section 79 of the Penal Code, the burden is on the accused-appellant to prove on a balance of probability that he had reached the state of intoxication in which he could not have formed a murderous intention at the time of the alleged act was done.

In the present case has the accused discharged his burden?

Learned counsel submits that when the accused-appellant came to the house of his mother-in-law at 4.30 p.m., he was drunk. At the time of arrest and at the time of examination by doctor, he was drunk. Is this evidence sufficient to prove that he was in a state of intoxication at the time he stabbed the two deceased persons. For the accused-appellant to take the defence under Section 79 of the Penal Code, it is necessary for him to prove that he was in a state of intoxication at the time he committed the offence.

I will now consider whether he was in a state of intoxication at the time he committed the offence. If he was not in a state of intoxication, he is not entitled to claim the relief under Section 79 of the Penal Code.

Following matters are relevant in order to decide the said question.

01. At the time he came to his mother-in-law's house around 4.30 p.m. he came on a bicycle.

02. He questioned his son as to why he did not come to see him

03. He tried to stab his own son.

04. At this time the sister-in –law of the accused-appellant Rohini Priyanka came to rescue the accused-appellant's son. At the time she held the hand of the accused-appellant, he twisted her hand and stabbed her on the back.

05. After stabbing Rohini Prinka the accused-appellant ran in the direction of the kitchen and kicked the kitchen door and stabbed the father-in-law.

06.Thereafter he uttered the following words; "I will kill another".

07.After the stabbing, he took his bicycle and went away from the place.

08. At the time of his arrest he threatened the police officers with a knife uttering the following words; " If your come closer, I will stab all of you".

When I consider the above items of evidence, I hold that at the time he stabbed his sister-in-law Rohini Priyanka and his father-in-law Michel Fernando, he had not reached the state of intoxication.

For the above reasons, I hold that he is not entitled to the benefit of Section 79 of the Penal Code. When I consider the evidence led at the trial, I hold the view that he was not entitled to have the benefit of the Section 79 and 78 of the Penal Code.

For the reasons stated above, I affirm the convictions and the death sentence and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL.

P.W.D.C. Jayathilaka, J.

I agree.

JUDGE OF THE COURT OF APPEAL.

/mds