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

C.A. Appeal No.331/2007
H.C. Kurunegala No.230/01

Dissanayake Mudiyanselage Jayasiri

Accused- Appellant

Vs.

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent

C.A.Appeal No.331/2007 H.C.Kurunegala No.230/01

Before : **Sisira J. de Abrew, J. &**
P.W.D.C. Jayathilake, J.

Counsel : Indika Mallawarachchi for the Accused-Appellant.
Haripriya Jayasundera DSG for A/G.

Argued &
Decided on : 14.11.2013

Sisira J. de Abrew, J

Heard both counsel in support of their respective cases.

The accused-appellant in this case was convicted for the murder of a woman named Tellemulle Hettiarachchige Dulani Shiromala and was sentenced to death. Being aggrieved by the said conviction and the sentence, he has appealed to this Court. Facts of this case may be briefly summarized as follows:-

On the day of the incident around 10.15 a,m. the deceased woman(Shiromala) was bringing pot of water to her house. At this time she was accompanied by her brother Janaka Premalal. Janaka Premalal was going ahead of Shiromala. On hearing certain words uttered by Shiromala, Janaka Premalal looked back. Then he saw the accused-appellant hacking Shiromala

with a manna knife. In fear of being attacked, he ran to his house. On hearing the cries of Janaka Premalal and Shiromala, their mother Gnanawathie came out and then saw the accused-appellant straightening himself up after attacking Shiromala with a manna knife. According to the medical evidence there were five cut injuries. Two injuries were on the back of the head. One inquiry had severed the spinal code. Janaka Premalal had made a prompt statement to the police. When the police visited the scene, the investigating officer found a pot of water fallen at the scene. He also observed that the water had got spilt from the pot. There were blood stains at the scene. Thus the story of the prosecution is corroborated by the police observation. The accused-appellant made a dock statement. His dock statement may be briefly summarized as follows:-

> "When the accused-appellant was pruning his hedge, Janaka Premalal and deceased woman who were passing the place threatened him with death saying you all will be killed. They also came to squeeze the neck of his child. At this time Premalal attacked with a club."

Learned Counsel for the accused-appellant contended that the accused-appellant had not taken up the position that Premalal attacked him. But when we read the dock statement it is clear that his position had been that Premalal attacked him with a club. According to the evidence led at trial the accused-appellant had not sustained any injury. The position taken up by Premalal in his evidence was that the son of the accused-appellant was not at this place. But

in the evidence given at the inquest he has admitted that son of the accused-appellant was near the house. This has been marked as P1. In our view this contradiction is not a vital contradiction.

Learned Defence Counsel had suggested that the witness Janaka Premalal and the deceased woman threatened to squeeze the neck of the son of the accused-appellant. This had been denied by the witness. Witness Premalal had further taken up the position that the son of the accused-appellant was not at the scene of offence. As I pointed out earlier the accused-appellant had not sustained injuries although he claims that he was attacked with a club. When we consider all the above matters we hold that the rejection of the dock statement of the accused-appellant by the learned trial Judge is correct. We hold that the dock statement cannot be believed and is not capable of creating any reasonable doubt in the prosecution case.

Learned Counsel appearing for the accused-appellant contended that the learned trial Judge has committed certain misdirections. Learned trial Judge in his judgment has observed that the deceased woman squeezed the neck of the son of the accused-appellant. But there is no such evidence to conclude that the deceased woman squeezed the neck of he son of the accused-appellant. He had made this observation when considering the dock statement of the accused-appellant. Learned trial Judge had also in his judgment observed that the

accused-appellant chased after the deceased. There is no such evidence. The evidence is that the accused-appellant had chased after Premalal.

When we consider the evidence led at the trial, we are of the opinion that the said misdirection committed by learned trial Judge has not caused any prejudice to the accused-appellant. Learned trial Judge has observed that if the accused-appellant takes up any exception or special exception he should prove it. Learned Counsel for the accused-appellants contends that the decree of burden of proof has not been stated by the learned trial Judge. She therefore contends that this was a misdirection. When considering this argument it is relevant to consider Illustration 'b' of the Section 105 of the Evidence Ordinance which reads as follows:-

> " A, accused of murder, alleged that, by grave and sudden provocation, he has deprived of the power of self control. The burden of proof is on A"

It is well settled law that if an accused person raises exception or special exception as a plea the burden is on him to prove it on a balance of probability. The said Illustration under Section 105 of the Evidence Ordinance clearly proves this position. Thus when the learned trial Judge made the said observation, in my view, he has not committed any misdirection. I therefore reject the contention of the learned Counsel for the accused-appellant.

Learned Counsel contended that the learned trial Judge had erred by applying the dictum of Lord Ellenborough. The prosecution in this case has put forward very strong case. Therefore when the learned trial Judge observed that Ellenborough's dictum applied to the facts of this case he has not committed any misdirection. I therefore reject the submission of learned Counsel.

Learned Counsel contended that the learned trial Judge had considered certain matters that had not been led in evidence. Learned trial Judge had observed that the matters set out in dock statement are contrary to the position taken up by him at the non summary inquiry. It appears that the accused had not given any evidence at the non summary inquiry. Thus it appears to be a misdirection on the part of the learned trial Judge. But when we consider the evidence led at the trial, this misdirection has not caused any prejudice to the accused-appellant. We therefore decide to apply the Proviso to Section 334 of the Criminal Procedure Code which reads as follows:-

> "provided that Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

We have considered the evidence led at the trial. We are of the opinion that the misdirections committed by the learned trial Judge have not occasioned

any miscarriage of justice or failure of justice. When we consider the evidence led at the trial, we are of the opinion that the prosecution has proved its case beyond reasonable doubt. We hold that there is no any merit in this appeal. For the above reasons we affirm the conviction and death sentence imposed on the accused-appellant and dismiss the appeal.

Appeal dismissed

JUDGE OF THE COURT OF APPEAL

P.W.D.C.Jayathilake, J.

I agree.

JUDGE OF THE COURT OF APPEAL

KLP/-