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

Lakshman Jinadasa
459, Lekam Niwasa
Polmalagama, Meethalawa,
Gampola.

ACCUSED-APPELLANT

Vs.

C.A 154/2008
H.C. Panadura 1526/2001

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

RESPONDENT

BEFORE: Anil Gooneratne J. &
P.W.D.C. Jayathilake J.

COUNSEL: Anil Silva P.C., for the Accused-Appellant
Dilan Ratnayake S.S.C. for the Respondent

ARGUED ON: 21.03.2014

DECIDED ON: 02.04.2014

GOONERATNE J.

The Accused-Appellant was convicted of murder and sentenced to death (1st count). He was also convicted of attempted murder and sentenced to a term of 5 years rigorous imprisonment on the 2nd count. The Accused-Appellant being aggrieved by the said conviction and sentence, has appealed to this court. The facts of this may be briefly summarized as follows:

Witness No. 1 for the prosecution, a Sub-Inspector of Police at the time he gave evidence before the High Court, was on guard duty at the residence of Minister Gamini Lokuge. He was attached to the Piliyandala police. The residence of Minister was situated at Mavithhara in the Piliyandala on the Kottawa Piliyandala Road. This witness was on duty from 6 p.m to 6 a.m on the day in question. Witness describes the situation of the house and the place where he was on guard duty, details of the entrance gate (one entrance) and about sufficient light provided by the search light affixed to the telephone post just outside the residence on the road leading to the house which gives sufficient light even to the garden and premises of the house. At about 10.30 p.m a person in Army uniform armed with a T56 weapon (Accused-Appellant)

came near the gate and the witness inquired from the Accused-Appellant about his presence. Accused-Appellant informed the witness that he is from the Panagoda Army Camp and had been assigned for guard duty, at the Minister's residence. Witness had replied that such an arrangement was not made known to him, and in order to verify this fact witness turned back to inquire from another police officer (deceased) who was resting inside the premises (Hewage Ratnayake) as to whether an Army guard was also assigned for guard duty. When deceased Ranatunge replied in the negative both of them went up to the Deceased-Appellant, and spoke to him. Accused-Appellant referring to the Minister as 'boss' said he wants to meet the Minister. When he was told that the Minister is not available and both the witnesses and deceased Ranathunga turned to walk towards the road and almost at the same moment the Accused shot the witness at a distance of about 2 ½ feet, with the T 56 gun. He fired 3 shots. Witness sustained injuries to his stomach and the deceased who was attempting to get away from that place also was shot. Deceased ran towards the shops on the other side of the road but the Accused-Appellant gave chase behind the deceased and shot him. Witness saw the deceased falling on the ground.

The witness thereafter tried to locate the deceased who was proceeding towards the shops or the road side, but at that moment could not locate the deceased as well as the Accused. Witness also heard another gun shot. Witness had identified the Accused-Appellant.

At the hearing before this court the learned President's Counsel for the Appellant did not contest the above incident as such but took up a novel Position. It was his submission that his client the Accused-Appellant did not have a fair hearing since his defence had not been properly placed before the learned High Court Judge mainly due to the reason that about 4 counsel appeared for the Accused at different and various stages of the trial.

The learned President's Counsel also thought it fit to submit to this court that the position in the United Kingdom is that a fair trial would mean inter alia that the defence of an Accused need to be placed properly before court without any prejudice being caused to the Accused and in the event the legally acceptable defenses are not placed by counsel the accused person would be entitled for a fresh trial or re-trial.

Article 13(3) of the Constitution enacts:

Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.

Section 41(1) of the Judicature Act states that :

Every Attorney-at-Law shall be entitled to assist and advise clients and to appear, plead or act in every court or other institution established by law for the administration of justice and every person who is a party to or has or claims to have the right to be heard in any proceeding in any such court or other such institution shall be entitled to be represented by an attorney-at-law.

The right to be heard as contained in the above provision would mean right to be heard by counsel. This is no doubt part of the adversarial process. Section 26 of the Code of Criminal Procedure gives an Accused person the right to legal representation in court. As such the law on point does not seem to extend to the point stressed by learned President's Counsel, Nor can court test the competency of counsel and give directions to Accused persons the manner of conducting the trial where the accused has retained counsel, or represented by assigned counsel. I cannot find any statutory provision to support the views of learned President's Counsel. What is stressed in our law is that the Accused cannot be denied representation through counsel or Attorney-at-law.

However before I conclude I prefer to get to a closer point of learned President's Counsel argument. The following may be noted – Judicial Conduct Ethics & responsibilities – A.R.B. Amarasingeh pg. 832.

What is the position if, counsel, by 'agreement or concessions, tacit or explicit', erroneously take a certain view of the law? Bennion said:

> The court ought not to feel itself inhibited by the fact that what seems to it was the correct view of the law was advanced by neither side in argument. Counsel should however be given an opportunity to comment on the conclusion reached in such a judicial departure.

It is not only prudent but also a judge's duty, howsoever learned a judge may suppose himself or herself to be, to approach a case with inquiry and doubt. Bacons aid in his *Essays* that a judge should be 'more learned than witty (ingenious)' 'more advised than confident', and that 'it is no grace to a judge first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent ... Let not the judge meet the cause half way, nor give occasion to the party to say, his counsel or proof were not heard.

At the hearing of an appeal of this nature court will hear the defence version initially and then hear the prosecution with a right to reply and decide the case. The point raised by President's Counsel is of much interest and the law need to develop in our jurisdiction. However we are not inclined to test this point mainly due to the fact that all 4 counsel retained to appear for the appellant were the choice of the Accused-Appellant. Nor can this court comment on the competency of counsel except to decide the appeal on the lapses/weakness and or the strength of the prosecution case according to law.

The learned High Court Judge has considered the case with extra care and comprehensively dealt with the case. There is in fact very strong direct evidence and the only conclusion to arrive is a conviction. We see no basis to interfere with this appeal. We are unable to intervene in the conviction and sentence. As such the appeal is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilake J.

I agree

JUDGE OF THE COURT OF APPEAL