

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

Vidanagamage Dimuthu Udaya Kumara

ACCUSED-APPELLANT

C.A. 166/2012
(H.C. Embilipitiya 146-2007)

Vs.

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

RESPONDENT

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Saliya Peiris with Amila Suyana for the Accused-Appellant
Haripriya Jayasundera D.S.G., for the Respondent

ARGUED ON: 20.05.2014

DECIDED ON: 01.07.2014

GOONERATNE J.

Accused-Appellant was indicted in the High Court of Embilipitiya for the murder of the Abeykoonge Asoka Jayasiri on or about 15.4.2006. The deceased was the brother-in-law of witness No. 1. It is this witness's evidence that is being relied upon by the prosecution to prove the prosecution case to a very great extent. The case of the prosecution in brief is as follows.

Witness No. 1 Rohitha visited the house of the deceased's brother-in-law in the evening of the day of the incident. Deceased had indicated that he wants to purchase a bottle of arrack, and requested the witness to accompany him. The witness, the deceased and another brother-in-law of the deceased went to purchase a bottle in a three wheeler. When they proceeded towards the Galagama dispensary near a junction the witness saw about 25/30 persons in a crowd near the junction. The deceased got down from the three wheeler and proceeded in the direction of the crowd. At that moment itself the witness saw the Accused stabbing the deceased with a knife. Deceased was stabbed several times. The deceased also uttered the words "මට කුමාර පිහියෙන් ඇන්න".

The learned counsel for the Accused-Appellant submitted to this court that the Accused could not have been convicted of murder. It was his position that the death was as a result of a sudden fight. Learned counsel drew the attention of this court to the dock statement of the Accused person wherein the Accused attempt to demonstrate a sudden fight. Learned counsel also referred to the evidence at pg. 39-44-45 where it transpired that prior to the incident in question the deceased on the same day was involved in an altercation, at a party. He also drew the attention of court to the evidence of defence witness to demonstrate at least a prior involvement. He also submitted that it is unsafe to act upon the dying declaration of the deceased.

Learned Deputy Solicitor General submitted to court that the Accused person was armed with a knife and came forward towards the deceased and stabbed him several times. Medical evidence too support that position. It was the position of learned Deputy Solicitor General that there is no material to come to the conclusion that there was a sudden fight, though the Accused refer to same or such a position in their defence to court. It was also stressed that there had been no suggestion of a sudden fight elicited from the prosecution witnesses. Nor could it be said that the Accused exercised his right of private defence. Learned Deputy Solicitor General maintained that

considering the totality of evidence no benefit could accrue to the Accused based on the exceptions described in Section 294 of the Penal Code.

This court having considered the submissions and the case of either party, it is evident that an incident occurred and there is direct and circumstantial evidence to establish the death of the deceased, was due to the act of stabbing by the Accused. So much of cross-examination of the main witnesses had not taken the case, to cause any doubt in the prosecution case. Even if a prior incident took place prior to the main incident I find it difficult to stretch a point to bring it within the exceptions as stated above. The evidence led support the fact that:

- (a) the injuries were caused by a knife (P3) used for the commission of the offence and the witness No. 1 gives a proper description of the stabbing and the place where the knife struck the deceased to be the area covering the heart. Such evidence is consistent with the medical evidence led at the trial.
- (b) There is strong direct and circumstantial evidence. Witness No. 1 was travelling a trishaw with the deceased and another, had been planning to buy a bottle of arrack. (during the New year period) Witness described the deceased getting down from the trishaw and walking towards the crowd and at that moment itself he saw the act of stabbing and the deceased going backwards. When this act was done utterances made by persons in the crowd as “කුමාර තිකන් තිටපත් තිකන් තිටපත්”.

- (c) Later on, the witness having informed the persons in the household visited the deceased in hospital and the deceased told the witness “මට කුමාර පිහියෙන් ඇත්ත”.
- (d) There were no material contradictions in the evidence of witness No.1.
- (e) Accused’s dock statement, it was admitted that he stabbed the deceased once (but in self defence) and this part of the evidence support the conviction and medical evidence.
- (f) Evidence of police witness Sisira Kumara recording the injured persons’ (deceased) statement at the hospital also support the dying declaration. Evidence on point was that “කෙසෙල් කරුණේගේ ඥාතියෙකුගේ පුතෙකු වන කුමාර යන අය පිහියෙන් ඇත්ත බව”
- (g) Police evidence of Inspector Yasapala is also material on a Section 27 statement of the Evidence Ordinance recovered the knife (P3) and pair of shorts (P4) from an aunt’s house. Police witness identified P3 & P4
- (h) Dock statement of Accused and the witness Dahanayake who gave evidence on behalf of the Accused contradict each other as regards recovering of knife P3. Witness Dahanayake states he collected the knife (P3) and shorts (P4) from the sister’s house and gave it to Inspector Yasapala. Nor has Dahanayake made a statement to the police soon after the commission of the act of murder.
- As such trial Judge very correctly does not rely or consider the value of evidence produced on behalf of the Accused
- (i) Government Analyst’s report (P7) admitted by defence. The report also support the medical evidence.

(j) Position of the Accused (a) sudden fight (b) right of private defence never suggested in cross-examination of the main witness for the prosecution, on lines that the deceased came armed with a knife (Accused position in the dock statement) to cause injury to accused. This would be important to establish any one of the exceptions since the position of a sudden fight and private defence was the main argument advanced by the defence counsel and the position put in cross-examination of prosecution witness. However the exact method adopted to prove (a) & (b) above had not been put in cross-examination. As such the trial Judge correctly reject the defence position. Nor can I find in cross-examination, of the utterance made by deceased to the Accused to prove that Accused had been threatened. Then was no cross-examination of the prosecution witness as regards above.

This court note the contents of findings of the trial Judge, in his judgment. It is suggested by the trial Judge directly or indirectly that so much of cross-examination of the prosecution witness had not:

- i) Diminished the credibility of the prosecution witness.
- ii) The suggested defence had not properly and correctly surfaced in cross-examination .
- iii) As such (b) above would provide material for the trial Judge to disbelieve, reject and to understand that the credibility of the defence witness had diminished. Especially the defence witness Dahanayake who

gave evidence 6 years subsequent to the incident who had not provided any evidence or statement immediately after the incident.

- iv) Contradiction of prosecution witness was not on relevant and material facts.
- v) Consistent approach of the prosecution case

In all the above facts and circumstances of this case, we are not inclined to disturb the findings of the learned High Court Judge. We affirm the conviction and sentence, and proceed to dismiss this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL