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

Nayanalage Wimalasena

ACCUSED-APPELLANT

C.A. 62/2007
H.C. Ampara 802/2003

Vs.

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

COMPLAINANT-RESPONDNET

BEFORE: Anil Gooneratne J. &
Sunil Rajapaksa J.

COUNSEL: Indika Mallawarachchi for the Accused-Appellant

Kapila Waidyaratne A.S.G. for the Complainant-Respondent

ARGUED ON: 01.04.2014

DECIDED ON: 30.07.2014

GOONERATNE J.

The Accused-Appellant was indicted for two counts in the High Court of Ampara for the murder of one Chaminda Ratnayake alias Nissanka and for attempted murder of M. Dhammika Perera. He was convicted only on the count of murder and sentenced to death on 21.3.2007. Deceased was a nephew of the main prosecution witness Dhammika. Accused was a Town Guard at Pannalagama. The deceased had on the day in question, been working on the adjoining land of the witness clearing the land with a katty. It is also said that the Accused also had a field in close proximity to the land and house of witness No. 1.

The prosecution version is that whilst the deceased had been working on the adjoining land the Accused had come on a bicycle got down and kept the cycle near the stream and gone across the stream armed with a gun strapped on to his body, and walked towards where the deceased had been clearing the land. The witness who was in the garden at that time had seen the Accused going towards the deceased, had run in that direction. Witness wanted to speak to the Accused from a distance and the Accused had

turned towards the witness and fired a gun shot in the direction of the witness. The gun shot had been fired from a distance of about 10 meters. Thereafter the Accused turned towards the deceased and fired several gun shots and the deceased fell. The witness had told the Accused that she would go to the nearby camp to inform about the incident and the Accused left the scene of the crime on his cycle. This seems to be the prosecution story which attracted lengthy cross-examination of witness No. 1. Case of the prosecution is based on direct evidence.

Learned counsel for the Accused-Appellant urged the following points in her oral and written submissions before this court.

1. Rejection of defence evidence by learned High Court Judge is untenable as the trial Judge relied upon inadmissible evidence.
2. Misdirection of trial Judge comparing the defence evidence with prosecution evidence and thereby reverse the presumption of innocence.
3. Misdirection on the burden of proof when the defence relied on a special or general exception.
4. Defence embarked on the defence of private defence prior to conviction. Trial Judge has not evaluated the defence case.
5. Relies on James Silva Vs. The Republic of Sri Lanka 1980 (2) SLR 167.

   It was held that: A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and ask himself

whether as a prudent man in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty.

6. Defence also relies on Kamal Addaraarachchi case 2002 (1) SLR 312

(Court observes that what is stated in the written submissions appears to be a mistake or misstated, may not be deliberate)

At the Appeal (2) above had been focused and appeal limited to (2) above.

The learned Additional Solicitor General in his submissions having narrated the evidence of the two main witnesses for the prosecution, emphasized that the evidence that transpired from witness Dhammika was un-contradicted and uncontroverted and only mere suggestions were made by the Accused-Appellant that the witness was lying but the witness denied such a position. Nor has the defence position of self defence put to the material witnesses of the prosecution. It was the same position as above regarding witness Chandrasiri and Chandrapala. Learned Additional Solicitor General drew the attention of this court to the police evidence. There is emphasis made in the written submissions to the medial evidence. Such evidence show 2 wounds at the front and 4 wounds at the back of the body. Entirety of medical evidence prove that injuries were caused by gun shots. Entry wounds

at the back and exit wounds in front. Wounds were caused by a distance. It was the position as submitted on belief of the Respondent that argument as regards the burden of proof and presumption of innocence on the part of the Appellant is misstated and misinterpreted. I would incorporate the following in this judgment, the material utilized to convey such position.

In the case of James Silva itself, Rodrigo J. refers to the Privy Council case of Jayasena v. The Queen (1969) UKPC 22, 72 NLR 313, which elucidates clearly the order in which evidence should be evaluated in a case of private defence as opposed to a case of mistake. Lord Devlin states that at page 4:

> "Proof of intentional killing <u>does not negative</u> the answer of private defence; on the contrary, it is <u>only after intentional killing is proved</u> that private defence need be put forward. But proof of intentional killing does negative accident.'

Lord Devlin then quotes Soertz J. in R v. Chandrasekera 44 NLR 97, and the relevant parts of that quotation is summarized thus:

> "The position is however different ..... if on the charge of murder ... the Jury were in sufficient doubt as to whether the death of the deceased .... was the result of an accident or not ..... the proper view seems to me to be that the accused succeeds in avoiding the charge of murder, not because he has established his defence, but because, by involving the essential element of intention in doubt, he has produced the result that the prosecution has not established a necessary part of its case".

After quoting Soertz J in R v. Chandrasekera, Lord Devlin then concludes that:

> "... It must be remembered that the evidence on which the accused relied, may go to challenge the prosecution's case as well as to establishing his own. The present case... is a clear case of confession and avoidance; the defence admitted the intention to kill and relied entirely upon private defence."

Learned defence counsel has referred to certain specific instances drawing the attention of court to the some of the pages in the brief, to establish the defence point of view. However I will at this point of the judgment consider the trial Judge's Judgment before perusing the identified items suggested by learned defence counsel.

Judgment of the learned High Court Judge consists of a narration of evidence of each and every witness for the prosecution and the evidence of the Accused party. Trial judge having narrated the evidence of a witness, had thereafter proceeded to express his views on the entirety of evidence of a particular witness. This is the style the trial judge adopts and it cannot be faulted. His reasons gradually emanate, in the process of writing the Judgment. On the main witness's version trial Judge refer to the factual position as transpired from her testimony and the identity of the weapon used in the commission of the offence and that of the Accused. I cannot fault the

factual reference made to the testimony of the main witness. The main witness was known to both the deceased (close relative) and the Accused who was a home guard. Judge refer to the rejection by the main witness, of the defence position, i.e self defence, prior incident of breaking a fence on the land that was cleared by the deceased, and animosity between witness and Accused subsequent to shooting. Very correctly trial Judge explains that the deceased being a close relative of the witness, it is natural for the witness to be angry about the incident. Trial Judge having considered the evidence states that the defence had not been successful in getting any break through or point out a lapse of the witness's testimony. Nor was any suggestion made by the defence that the witness is a liar. Therefore the trial Judge state he has no reason to doubt the testimony of the witness. As such the natural tendency of any judge would be to place reliance on the testimony of the witness. If the Accused party could not, by probing the witness achieve its defence and objective, and when the eye-witness provide material of the incident by un-contradicted direct evidence, that would be a plus point for the prosecution to prove guilt.

In the above manner the trial Judge has analysed the evidence of all prosecution witnesses inclusive of police evidence. At pg. 372 trial Judge has

made a special reference him to be extra careful and cautious due to the reason that good part of the evidence had been heard by his predecessor. Accused party had no objection for the trial Judge to continue hearing the case. At pg. 376/377 learned High Court Judge observes that the prosecution case rest on direct evidence, and he has no reason to reject the evidence of the main eye-witness. Therefore I find that reference is made to several items of evidence which corroborate the testimony of the main eye-witnesses, i.e hearing of gun shorts, place of crime and locality, promptness of conveying the incident by eye-witness to others. It is also stated that the main witness's evidence had also been corroborated by the testimony of the official witnesses which are more or less circumstantial evidence.

I note the following in this regard.

(a) Place, scene of crime or incident of crime.
(b) Observation of clearing the land by some persons.
(c) The place where the body was found with blood stains.
(d) Signs of firing gun shorts and recovering of casings or 4 shells found.

It is clear that (a) to (d) above are all items of evidence referred to by the prosecution witnesses. Therefore there is ample and sufficient corroboration of the testimony of the main witness. As such the trial Judge

cannot be faulted for arriving at the conclusion that the prosecution case had been proved beyond reasonable doubt. I note that the official witnesses who could be described as independent witness, and all of these official witnesses provide circumstantial evidence inclusive of (a) to (d) above, no doubt corroborate the versions of the main prosecution witness.

The case in hand cannot be considered in the way and by the dicta in James Silva's case. I have already stated and reliance could be placed with the prosecution case as there is no irregularity in analyzing and considering the intentional killing to ascertain whether the prosecution story is established beyond reasonable doubt, and then only the defence of private defence need to be proved on a basis of probability. What is first and what is second should not be mixed up for mere convenience to rely on the dicta of James Silva's case..

Let me now take the reference made by learned counsel for the Accused at pgs. 382 & 384. In approaching this point trial Judge refer to the evidence of official police witness Maithripla who took the Accused to custody and immediately recorded his statement and on the same day produced the Accused before the Magistrate. Defence position of recording a false statement cannot be accepted. This is what the trial Judge has stated at that

point and the Accused's position clearly rejected. This court observes that there is justification for the trial Judge to observe and do so. Trial Judge's further observation on that point, of state counsel's cross-examination of Accused which resulted in making contradiction and considering the story prosecution case would lead him to reject the Accused's evidence. In the next para at pg. 382, trial Judge states that based on the evidence of the Accused and his brother, has not created a doubt in the prosecution case. As such the defence version is rejected. This would certainly not amount to support the dicta in James Silva case.

There are some important points which I gathered from the material furnished to this court. The evidence of the Accused in a nut shell is that being a home guard he is usually entitled to carry a gun. On the day in question Accused crossed the stream with his cows to tie them at their usual grazing spot. As he finished tying the cows he saw a shadow of a man holding a ketty creeping behind him. Due to fear the Accused turned towards the man and fired at him. He realized it was the deceased-appellant and claim that the incident took place on his land. Distance between the deceased and Accused 7/8 feet. The gun was an automatic gun.

In the above background of the Accused version the locality or scene of crime, use of weapon (automatic gun) distance of shooting, presence of any other persons would have to be unshakable evidence, if the version is to be believed. Then what comes next to any prudent mans mind is whether the Accused version is the truth and nothing but the truth. On the other hand independent prosecution official witnesses, being their duty, provide answers to all above points raised by the Accused party. In these circumstances can it be said it is comparison with the prosecution case? To observe the scene of the crime, collect and identify suspicious objects such as knife, weapons, empty shell, spot for blood stains, recording of evidence of witnesses are normal usual things that need to be performed by official witnessess.

This is the normal function of any investigator. Then the medical evidence should be considered. Such evidence provide details and history of injuries and the type of weapon that could the cause the injury. Whether one compares or not, if the two versions differ in any material aspects, more weight need to be given to the official version unless properly and correctly disputed in cross-examination to demonstrate a different position. In the case in hand the defence had not succeeded in projecting a story compatible with the Accused party in their cross-examination of all official witnesses. The

following material remains un-contradicted, emanating from the official witnesses.

(a) Incident took place in the field, deceased had been working on the day in question.

(b) Recovery of empty shells at the scene of crime

(c) Distance between Accused and deceased when gun shots were fired. Official witness testify a considerable distance which is compatible of using a weapon like a gun.

(d) Medical evidence of entry wounds at the back of the deceased. No signs of burn marks, singeing or tattooing around the wounds. As such gun cannot be fired at close range. Direction of firing differ from the position maintained by Accused.

Above 'a', 'b' 'c' & 'd' does not support the defence position at all. As Such the trial Judge cannot be blamed for drawing adverse inferences from the defence case. He is entitled to observe that value of evidence of the defence case would be diminished and is a doubtful version, and then take the other step of ruling that a reasonable doubt in the prosecution case had not been established. As such the test of the required proof of 'probability' has failed.

I would also advert to the proviso to Section 334(1) of the code and state that no substantial miscarriage of justice has occasioned, having in mind the question raised by learned counsel for Appellant that contradiction though

marked were not proved. It is a mere irregularity which cannot have a bearing on the verdict. There is ample overwhelming evidence both direct and circumstance to prove the prosecution case beyond reasonable doubt. In this regard I refer to Mannar Mannan Vs. The Republic of Sri Lanka 1990(1) SLR 280, misdirection by the learned Trial Judge as to the burden of proof, if there has been no substantial miscarriage of justice, the appeal still may be dismissed.

This court having considered the versions of the prosecution and the defence, wish to observe that all evidence that transpired in this case support the prosecution case and the defence suggested by the Appellant has not had any impact to give any benefit to the Accused-Appellant. As such we cannot find any cogent reasons to interfere with the verdict of the learned High Court Judge. Conviction and sentence affirmed. Appeal dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

N.S. Rajapaksa J.

I agree.

JUDGE OF THE COURT OF APPEAL