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

In the matter of a petition of appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979 in the Democratic Socialist Republic of Sri Lanka.

C.A. Case No.73/2012

H.C. (Thangalla)

Case No. 18/2007

The Democratic Socialist Republic of Sri Lanka.

Complainant

Palliyaguruge Chaminda Sunil Shantha

Accused

AND

Palliyaguruge Chaminda Sunil Shantha

Accused – Appellant

Vs.

The Democratic Socialist Republic of Sri Lanka.

Complainant – Respondent

BEFORE : **H.N.J. PERERA, J**

P.W.D.C. JAYATHILAKE, J

COUNSEL : Razik Zarook P.C. with Rohana Deshapriya and Chanakya Liyanage for the Accused Appellant.

Shaveendra Fernando P.C., A.S.G for the Respondent.

ARGUED ON : 04.03.2015

DECIDED ON : 17.07.2015

P.W.D.C. Jayathilake, J

Premawathie Liyanapathirana was a retired school teacher. She had been living with her daughter, Gayani Nadeeka who was studying for her Advanced Level Examination. Premawathie had done two things for living, making sweets and lending money on interest. Their house had been burgled twice by the year 1999. The said mother and daughter had gone to bed after 10.00 p.m on 28.08.1999. Gayani woke up in the night as the mother called her. They felt that thieves had entered the house. Gayani had heard the sound of breaking doors. They had cried for help. Ultimately, the door of their bed room was

broken. Both Premawathie and Gayani had gone out of the room carrying torches. Gayani had felt that five six persons had been present. She had heard the mother uttering, "Chaminda did you also come?" There after she had heard the sound of shooting her mother. Gayani too had been struck with a gun shot and she had been stabbed repeatedly, she had been lying embracing her mother. Gayani had been taken to hospital the following morning. Premawathie had been dead on the spot.

Ranaweera Palliyaguruge Chaminda Susil Shantha alias Kutuwatthe Chaminda (Dinga) was indicted under Sec. 140, 435 read with 146, 296 read with 146, 300 read with 146, 435 read with 32, 296 read with 32 and 300 read with 32 of the Penal Code for committing the offenses of unlawful assembly, murder and attempted murder on seven counts. He had been tried in absentia and had been convicted for 5th, 6th and 7th counts for the offenses of criminal trespass, attempted murder of Gayani Nadeeka and the murder of Premawathie. He had been sentenced to 20 years rigorous imprisonment for the 5th count, 20 years rigorous imprisonment for the 7th, count and sentence to death for the 6th count. Being aggrieved with the said convictions and the sentences, the Accused Appellant has preferred this Appeal to this court.

It is an accepted concept of law that convicting a person after trying absentia is not a barrier to prefer an Appeal against the said conviction. And also the fact that trying in absentia is not a matter to be taken into consideration in the Appeal. It was held by Sharvananda C J in Sudharman De Silva V.A.G.[1] that the right of appeal is statutory and can be asserted as of right by the accused although he had jumped bail and was absconding at the trial.

The learned trial judge, in his judgment has discussed the legal principles and the judicial precedence pertainting to

(a) The offenses related to the indictment ,

(b) The trial in absentia and

(c) The relevance of depositions of the non summary proceedings as evidence.

Thereafter, in analyzing evidence, he has relied on the words of the deceased that Gayani Nadeka is said to have heard, Chaminda did you also come to connect the Accused Appellant to the incident, in attaching an evidentiary value to the said words. He has not been concerned about what those words actually mean when taken those words in isolation. In my opinion, the only inference which could be drawn from the said utterance is that one Chaminda

known to the deceased had been present with other perpetrators at the time of the incident.

In the deposition of Chaminda Abeysiriwardana, it is stated that the Accused Appellant had told him that he went alone and committed the murder. Chaminda Abeysiriwardana is a person who was originally produced in court as a suspect. He had been discharged and listed as a witness on the direction of Attorney General. It is not clear whether Chaminda AbeySiriwardane had been discharged just for the sake of the need of a witness.

The learned President's Counsel who appeared for the Accused Appellant contended that the evidence of this witness cannot be acted upon for several reasons. One is the fact that the purported statement that the Accused Appellant went alone and killed the deceased is contrary to the evidence of the eye witness, because the eye witness Gayani states that two or three people came into the house at the time of the incident. The other ground which is based on the procedural defect in regard to tendering of the copy of the deposition of Chaminda Abeysiriwardane without proving that the said witness was dead.

As mentioned earlier, if the evidence of Gayani was considered separately, there is no evidentiary value as against the Accused Appellant, as she has categorically stated that she did not see the people who entered the house that night. Therefore, her evidence does not establish the fact that the Accused Appellant was present at the time of incident. On the other hand the evidence of Chaminda Abeysiriwardane has to be considered carefully as he was one of the suspects arrested by the police in connection with this crime, especially because he was one Chaminda.

The learned Additional Solicitor General who appeared for the Attorney General did not hold a different opinion to the opinion of the counsel who appeared for the Accused Appellant. In complying with the traditions of the Attorney General Department the learned Additional Solicitor General submitted that he was not in a position to support the conviction as there was no sufficient evidence to convict the Accused Appellant for the charges levelled against him.

For the above reasons this court too is of the opinion that the prosecution has failed to prove the charges beyond reasonable doubt. Therefore, we set aside

the conviction and the sentence passed by the trial court and acquit the Accused Appellant.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA, J

I agree

JUDGE OF THE COURT OF APPEAL

(1986 1 SLR 09)