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

In the matter of an Appeal against an Order of the High Court under Sec. 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Kammalge Ravindra Fernando alias Batta,

No. 27/5,

Main Street,

Kegalle.

Accused-Appellant

C. A. No. : 05/2013

H. C. Kegalle Case No. : 2779/08

V.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

BEFORE	:	**H. N. J. Perera, J. &** **K. K. Wickramasinghe, J.**
COUNSEL	:	Eranda M. Sinharage for the Accused-Appellant. Dilan Ratnayake SSC, for the Attorney General.
ARGUED ON	:	16th of March 2015
WRITTEN SUBMITIONS	:	07th of April 2015/ 13th of May 2015
DECIDED ON	:	07th of July 2015

K. K. WICKRAMASINGHE, J.

This is an appeal against the conviction and the sentence imposed by the learned High Court Judge of Kegalle on 20th of February 2013.

In the present case the Accused-Appellant, Kammalge Ravindra Fernando alias Batta, here in after referred to as the 'Appellant', was convicted by the High Court of Kegalle for 'Attempted Murder' of one Gamaralalage Nandika Nayanakantha Gamage, on or about 2007.03.12, which is punishable under the sec. 300 of the Penal Code.

The Appellant was sentenced to a term of six years of rigorous imprisonment with a fine of Rs. 25 000/= carrying a default sentence of two years imprisonment.

In this case four witnesses has given evidence on behalf of the prosecution. At first the Injured (PW1) gave evidence, then the three-wheel driver (PW2), there after the consultant JMO who examined the Injuries of the Injured (expert medical evidence- PW4) and finally the police officer who conducted the investigation (PW5). The defence did not call any witnesses but the Appellant made a blanket dock statement stating "I didn't commit any offence".

During the course of the trial upon an application made by the learned Counsel for the prosecution, the learned Trial Judge has decided the aforesaid second witness as an adverse witness to the prosecution and totally discredited and rejected the evidence given by him (page numbers 65, 68 and 69 of the brief).

However, it is important to note that we do not see any proper basis to totally discredit and reject the evidence given by the second witness for the prosecution. This aspect also had been mentioned by the learned Trial Judge (page number 107 of the brief). Even though there was a problem with regard to two words he uses to express what he saw ("dagalanawa"- moving and "porabadinawa"- struggling, grappling), the evidence he gave was not totally adverse to the prosecution but his evidence corroborate the evidence given by the other witnesses (specially the evidence given by the first witness and the consultant JMO).

The evidence before the court by the prosecution are as follows;

In 2007, the Injured Victim (the first witness of the prosecution) was a member of the Local Government of the area and the Appellant was known to him for about 7 to 8 years. Even though they were not that close, both of them were in good terms with each other and there was no animosity between them.

On 12th March 2007, the day that the incident had occurred, the Injured came to the petrol shed in Kegalle at about 9.00 to 10.00 pm on his motor cycle. When he was leaving the shed, one of his neighbours, a three-wheel driver called 'Nihal' (the second witness of the prosecution) came to the nearby three-wheel park at Kegalle, Gokarella junction, by his three-wheeler. The Injured turned his motor cycle and came to speak with Nihal.

While they were speaking the Appellant came towards them in about 3 or 4 minutes and spoke to the Injured by saying "ah Manthreethuma! (Hay Minister!)" (page number 38 of the brief). The Appellant was very drunk (intoxicated) at that moment. At that time the second witness went back to his three-wheeler (page numbers 38 and 56 of the brief). While the second witness was sitting in his three-wheeler, which was about 15m (20 feet) away from the Injured and the Appellant (page numbers 39 and 59 of the brief), expecting a hire, the Injured and the Appellant were speaking to each other for about five minutes.

According to the Injured, while he was speaking to the Appellant, the Appellant asked for the bike of the Injured, for a ride. The Injured while refusing to give the bike as the Appellant was drunk, told the Appellant "No, no. You'll break the bike. It is a valuable one, therefore can't give" (page number 40 of the brief). Then the Appellant tried to grab the key of the motor cycle from the key hole and the Injured tried to take the key before the Appellant. However, the Appellant took the key and while the Injured was trying and struggling to take the key from the Appellant and then the key fell on the ground. Even though they were struggling to get the key, there were no arguments or any exchange of blows between the Appellant and the Injured (page number 48 of the brief).

When the Injured was bending down in order to pick the key which had fallen on the ground he had received a gunshot injury on his abdomen area (page numbers 40 and 74 of the brief). According to the Injured, the Appellant was 5 or 6 feet away from him at the time he bent down to pick the key but, he has not seen whether the Appellant was facing towards him or not at that exact moment (page number 40 of the brief).

However, Injured had not seen any gun or a weapon of any sort in the Appellant's hands at the time he came towards him or while speaking with the Injured or at the moment that the Injured received the gun shot or even after the incident. Further, he has not seen the Appellant shooting at him or a gun or a weapon of any sort in anyone else's hands (page numbers 47, 48, 49, 58 and 59 of the brief).

Also the Injured cannot remember who else was in close proximity to him when he was receiving the gun shot (page number 41 of the brief). Furthermore, according to him, the Appellant was only 2 or 3 feet away from the Injured when he was looking at them by hearing the report of the gun shot (page number 57 of the brief).

Just after the gun shot, the Injured shouted saying that he received a gun shot and needs to go to the hospital. According to the Injured, the other three-wheelers didn't come to assist him but left the place just after the gun shot and it was only the second witness who came for his help. However, once the second witness brought the three-wheeler near the Injured, it was the Appellant who took the Injured inside the vehicle and guided the second witness to take the Injured to the Kegalle hospital (page numbers 42 and 58 of the brief). It was also the Appellant who has admitted the Injured to the hospital (page number 94 of the brief).

According to the evidence laid by the police, the motor cycle of the Injured has been brought to the hospital by an unknown person on the same day just after the incident and it was found in the hospital premises (page number 94 of the brief).

However, even the police searched for the Appellant in the night of the same day on which the incident occurred, in order to arrest him. But they couldn't find him and he was arrested by the police on the following day at his residence.

The learned Counsel for the Appellant has listed out the following four points as grounds for appeal;

1. The items of circumstantial evidence are not sufficient to prove the prosecutions' case against the appellant 'beyond reasonable doubt'.
2. The medical evidence is not conclusive and the learned Trial Judge has erred in law by convicting the Appellant purely on the medical evidence when there were no other items of circumstantial evidence to prove the charge.
3. The learned Trial Judge has erred in law by failing to consider the evidence in favour of the Appellant and thereby denied a fair trial to the Appellant.
4. The prosecution has failed to prove the 'murderous intention' or 'knowledge' of the Appellant to convict him for 'attempted murder'.

When arguing with regard to the first two grounds, the learned Counsel for the Appellant stated that;

- the place of the incident was not an enclosed area and it was the duty of the prosecution to eliminate all other hypothesis of presence of others at the crime scene but, the prosecution has failed to do so,
- it is the duty of the prosecution to prove it was the Appellant who committed the offence and no one else but, the prosecution has failed to prove this and the learned Trial Judge has failed to consider these factors,
- the learned Trial Judge has relied upon the items of circumstantial evidence available in the trial which are not sufficient to draw an adverse inference that the Appellant is the very person who committed the murder.
- the doctor was of the view blackening and tattooing is not the only yardstick which could be used to ascertain the range of shooting and that could be differed on the clothes which were wearing by the Injured at the time of the incident; therefore it is submitted that the doctor had not excluded all other possibilities of causing the injuries by shooting beyond three feet,
- the learned High Court Judge has not given the benefit of this doubt to the Appellant.

In ***Sumanasena V. Attorney General (1999) 3 S. L. R. 137*** the Court has held that 'Evidence must not be counted but weighted and the evidence of a single witness if cogent and impressive could be acted upon by a Court of Law'.

It is very important to note that none of the witnesses for the prosecution has made any contradictions when giving evidence. It has been pointed out by the learned State Counsel that it can also be seen that the evidence given by the injured is without any exaggeration as nothing prevented him from implicating the accused as having shot him or about observing a weapon in his hands. Further the Injured who gave evidence prior to the consultant JMO may not have realized the significance of the evidence given by them with regard to how close the Appellant was to the Injured at the time of the incident. These facts show the genuineness of the witness whose credibility was well tested.

Even though the injured failed to identify the Appellant as the person who shot the injured and to observe the Appellant in possession of a firearm, he identified the Appellant as the person who struggled with him at the time of the incident and as the only person who was so close to the Injured at the time he received the gun shot.

Among all these evidence the expert evidence given by the consultant JMO is most important. His opinion as to the distance and the direction from which the bullet entered the injured is very clear. According to him that has to be about 1 feet from front (page number 76 of the brief).

He has clearly given the grounds and reasons for his opinion. He based his opinion on his findings of 'tattooing', 'blackening' and 'burning' marks around the bullet entered injury. He said positively that tattooing cannot take place from a gunshot at a distance beyond three feet. Blackening and burning can occur only from a distance of 1 feet or less (page numbers 76 and 77 of the brief). He has also stated that at the time of receiving the gun shot, most probably the injured was standing but when he was asked whether this kind of an injury can occur while a person was bending down, he has answered it positively (page numbers 77 and 86 of the brief). Therefore there is no reasonable basis to have a doubt in or to refuse his evidence in the absence of any evidence to contradict this expert testimony.

The learned Counsel for the Appellant had tried to create a reasonable doubt by pointing the statement made by the consultant JMO that tattooing could be differed based on the cloths that the Injured wore at the time of incident (page numbers 87 and 88 of the brief). However this is a very poor attempt. As mentioned above, the expert has clearly made his opinion as to the distance from which the bullet came by observing the tattooing marks around the injury and the available evidence amply demonstrate the fact that the Appellant was very close to the injured as corroborated by the JMO.

The learned Senior State Counsel has brought to our notice the case ***Ajith Samarakoon v. The Republic 2004 2 SLLR 209*** with this regard. In the case ***Ajith Samarakoon v. The Republic 2004 2 SLLR 209*** at 226 Lord F. N. D. Jayasuriya has stated "The Learned Trial Judge has had the benefit of the media, grounds and reasons fully placed before court by the Examiner of Questioned Documents,... for his considered view and findings... and he had arrived at his adjudications independently, but assisted by expert evidence,...". In the instant case also it is so clear that the learned Trial Judge has correctly considered the expert medical evidence and had arrived at a conclusion based on the reasons for the opinion of the expert by accepting the view independently.

The learned Counsel for the Appellant has pointed out that the learned Trial Judge has not considered the evidence in favour of the Appellant when coming into her conclusion as his third ground of appeal. He pointed out the following arguments;

- The Injured was categorical with regard to the fact that he did not see the person who shot at him.
- It was the Appellant who took the Injured to the hospital immediately after the incident.

- The place of the incident was not an enclosed area (page number 39 of the brief) and therefore the learned Trial Judge has failed to consider the possibility of another person to commit the offence in question.
- It is manifestly clear that there was no enmity between the Appellant and the Injured prior to the incident.

As the fourth ground the learned Counsel for the Appellant has stated that the prosecution has failed to prove the 'murderous intention' or 'knowledge' of the Appellant to convict him for 'attempted murder'.

It is unreasonable to say that the learned Trial Judge has not considered whatever the material in support of the Appellant prior to her finding. According to the page number 101 of the brief the learned High Court Judge has considered the Appellant's subsequent conduct in taking the Injured to the hospital soon after the incident and the fact that the Injured had not seen any weapon or anything in the hands of the Appellant in the course of her judgment. Further at page number 104 she has taken into consideration the fact that it was the Appellant who admitted the Injured to the hospital just after the incident. According to page number 105 of the brief, the learned High Court Judge has also considered the fact that the Injured has not seen the Appellant shooting at him.

When considering the crime scene, it is true that the place was not an enclosed area (page number 39 of the brief) but it is baseless to say that the learned Trial Judge has failed to consider the possibility of another person to commit the offence in question. It is proved by the evidence led on behalf of the prosecution that there was no proximity to commit the offence in question other than the Appellant as he was the only person who was within the distance suggested by the consultant JMO. When we consider the facts proved by the prosecution, they are only consistent with the guilt of the Appellant as stated in the case ***King v. Abeywickrema 44 NLR 254***. Especially when we consider the distance suggested by the expert and the evidence given by the witness with regard to the distance between the Appellant and the Injured at the time of the incident, the one and only inference that can be drawn is that the Appellant committed this offence.

Moreover, this is a case where the defence was confined to a blanket denial from the dock. There were no witnesses called on behalf of the defence and the Appellant's dock statement was also only to the effect that he has not committed any offence. The accused appellant has not taken accident as a defence and there is no evidence to that effect. Thus the learned Trial Judge had very little material to consider on behalf of the Appellant.

As cited by the learned Senior State Counsel, in ***Ilangatilaka and others v. The Republic of Sri Lanka 1984 2 SLLR 38*** the Supreme Court has held "where a strong *prima facie* case has been made out against an accused and when it is in his own power to offer evidence, if such exists, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence it would justify the conclusion that the evidence so suppressed or not adduced would operate adversely to his interests." This presumption is also recognized under the sec. 114(f) of the Evidence Ordinance.

The above presumption has been applied by Justice Kulatilake in the case of ***Bandara v. The State 2001 2 SLLR 63 at 72.*** There he held "when there is a case to answer on the prosecution evidence if the accused-appellant remains silent, court may regard the inference from his failure to testify as, in effect, a further evidential factor to support the prosecution case." In the present case, the prosecution has proved the case beyond reasonable doubt but the Appellant has not made any proper answer to it. This was also held in the case of ***Sarwan Singh v. State of Punjab 2002 AER SC 111, 3652*** at 3655, 3656; "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put this case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted."

Considering above, the learned Trial Judge cannot be faulted for not considering the evidence in favour of the Appellant.

The learned Counsel for the Appellant has pointed out the facts that there was no enmity between the Appellant and the Injured prior to the incident and it was the Appellant who took the Injured to the hospital to show that the Appellant didn't have any murderous intention or knowledge at the time of the incident to commit such an offence. It is in evidence that both these facts are true but this does not prove that the Appellant did not possess any knowledge about the act he committed. There are many instances where the criminals who even give alms giving just after killing his/her beloved once and close friends. Therefore, merely because the Appellant taking the injured to the hospital just after the incident or mealy because there was no enmity between the parties prior to the incident, one cannot come to a conclusion that the accused didn't have any murderous intention or knowledge at the time of the commission of the offence.

In the present case the expert evidence proves that the injuries received by the Injured are sufficient to cause the death of the Injured in the ordinary course of nature (page numbers 78

and 79 of the brief). When we consider the weapon and the distance from which the Appellant had shot at the Appellant, it is evident that the Appellant had committed the offence.

Therefore we are of the view that the judgment of the learned High Court Judge is in order. Accordingly we affirm the conviction. On the application of the counsel for the Appellant, we direct that the sentence imposed on the Appellant be implemented from the date of conviction namely, 20.02.2013.

Subject to the above variation, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

H. N. J. PERERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

1) ***Sumanasena V. Attorney General (1999) 3 S. L. R. 137***
2) ***Ajith Samarakoon v. The Republic 2004 2 SLLR 209***
3) ***King v. Abeywickrema 44 NLR 254***
4) ***Ilangatilaka and others v. The Republic of Sri Lanka 1984 2 SLLR 38***
5) ***Bandara v. The State 2001 2 SLLR 63 at 72.***

6) ***Sarwan Singh v. State of Punjab 2002 AER SC 111***