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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA/180/2008

H/C Matara case No. 129/2007

Badathuruge Kasun Jayarathne

ACCUSED

And,

Badathuruge Kasun Jayarathne

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**

H.C.J. Madawala J

Counsel: Anil Silva PC, for the Accused-Appellant

Kapila Waidyaratne SASG, for the AG

Argued on: 21.09.2015, 22.09.2015

Written Submissions on: 19.10.2015, 18.12.2015

Judgment on: 20.05.2016

Order

Vijith K. Malalgoda PC J

The accused-appellant Badathuruge Kasun Jayarathne was indicted before the High Court of Matara for committing the murder of Thuppahi Patambedige Amila Chathuranga on or about 27 July 2002 at Pelana an offence punishable under section 296 of the Penal Code.

The indictment was served on the accused-appellant on 17. 09. 2007 and was selected to be tried before the Learned High Court Judge without a Jury. At the conclusion of the trial, the Learned High Court Judge Matara had convicted the accused-appellant on the indictment and was sentenced to death. Being dissatisfied with the above conviction and sentence the accused-appellant had preferred this appeal before the Court of Appeal.

Prosecution in the present case was mainly relied upon the evidence of one Palliya Guruge Saman Kumara a close associate of the deceased.

The defence had taken up two important positions during the trial and the alibi taken up by the accused-appellant was the 1st and the act which resulted the death of the deceased was committed by the mother of the accused-appellant in self defence was the next position taken up by the defence during the High Court Trial.

During the trial at the High Court the prosecution had led the evidence of three main witnesses namely Palliya Guruge Saman Kumara, Inspector of Police Visumperuma Arachchige Premasiri and the Judicial Medical Officer Usliyanage Clifford Priyantha Perera.

When the defence was called the accused-appellant made a statement from the dock and called his mother Watudura Bandanage Chandrika as a defence witness.

According to the evidence of the only eye witness Palliya Guruge Saman Kumara, on the evening of 27.07.2002 he had gone for a haircut accompanied by the deceased. As there was a failure in the supply of electricity at the salon, both of them had returned to go to the house of the deceased, on the rail track as the house of the deceased was on the side of the rail track.

At one stage witness had seen the accused-appellant coming towards them on the rail track. They met near the house of the accused-appellant which was also on the side of the rail track.

At that instance the accused-appellant had knocked against the shoulder of the deceased. The deceased whilst questioning "උඹ මොකද කියන්නේ" had bent to hold his sarong which had loosened. Instantly the accused-appellant had stabbed the deceased on the forehead and had run away towards his house.

Witness had rushed the deceased first to the Walana Hospital with the help of some others and later transferred to Karapitiya hospital where he succumbed to his injuries.

On the same evening around 7.30 pm witness had made the first complaint to Weligama Police. He had accompanied the police officer to the scene of crime and assisted them in conducting investigations.

The investigating officer IP Premasiri in his evidence had confirmed that the above witness had made the 1st complainant at 7.30 pm and at 7.40 pm a statement from the mother of the accused-appellant one Watudura Bandanage Chandrika too was recorded by the police. He had visited the scene accompanied by witness Saman Kumara who had shown the place of incident which was around 25 meters from the house of the accused-appellant. Even though the witness had pointed out the place, he did not observe any special marks or signs at the place which was about 2-3 feet away from the rail track. He could not arrest the accused-appellant on that day or even thereafter until he surrendered to courts through a lawyer, since the accused-appellant was absconding.

The next witness the prosecution had relied upon was Doctor Priyantha Perera who performed the post mortem inquiry. According to his evidence before court, he had observed one stab injury on the left side of the forehead which was 2.5 cm in depth and above the left eye.

The Doctor had identified this injury as a necessarily fatal since the injury had caused damage to the brain matter as well as pierced the left ear.

Since the medical evidence led at the trial plays a major role in this case, I would like to discuss the defence case and thereafter consider the medical evidence in order to consider the grounds of appeal raised by the accused-appellant before this court.

The accused-appellant whilst making a dock statement had taken up a defence of alibi. According to him he was away from his village since 3-4 pm in the evening witnessing the Devundara Esala Festival. After watching Perehera he went to the house of his mother's elder sister in Meddewatte-Matara. Since he was informed of some troubles in the village by the inmates of the said house he had

gone to his mother's younger sister's house in Thotamuna- Matara around 10.30 pm. From there he got to know that 4 of his relatives houses had been set fire and his Grandfather had been murdered, he feared to come to the village. Later he got to know about the incident happened at his house, to his mother and that the police is looking for him, he had surrendered to courts through an Attorney at law.

After the said dock statement, mother of the accused-appellant Watudura Bandanage Chandrika too had given evidence on behalf of the defence. In her evidence she had stated that she was employed as an attendant in the Matara Hospital and when she returned home after work on 27 evening, she had found the front door of her house opened. Inside the house she had found two boys namely Amila the deceased and another named Sanjeewa. They attempt to abuse and assault her. The deceased who was armed with a knife had pointed it to her and Sanjeewa had attempted to remove her cloths. When witness fought back, the deceased had tried to stab her. At that instance she had used her force and hit the hand of the deceased while struggling with them. As a result the knife had moved towards the face of the deceased and she had seen him bleeding. She specifically stated that she hit the hand in order to avoid her being stabbed but the knife struck the face of the deceased. Both the deceased and Sanjeewa had left the house immediately thereafter and she had seen the deceased fallen outside the house and few others outside the house.

Immediately thereafter she left the house and went to her mother's house, change her torned cloths and gone to Weligama Police Station to lodge a complaint. At the police station she saw one Saman Kumara and Sanjeewa making a statement. According to her, she too had received injuries due to the struggle, but admitted that she neither seek medical assistance nor faced a medical examination. It was further admitted that she did not assist the police investigation to show the place of the incident as alleged by her.

Since these were the only evidence led at the trial, this case had to be decided by evaluating the said evidence placed before court.

As observed by me the importance of the medical evidence in this case, I would now like to consider the medical evidence in the light of the evidence given by the defence witness Chadrika.

As submitted by witness Chandrika the deceased had received the fatal injury, when the deceased tried to stab her with a knife, the deceased was having in his hand, and when she used her force to hit the hand of the deceased while struggling with him.

When the Judicial Medical Officer who performed the Post Mortem Examination was giving evidence the prosecution has confronted the said position to the witness as follows;

Page 106;

ප්‍ර: සාක්ෂිකරු තමා කියා සිටියා මොලයේ වම් ශංඛක අස්ථියත්, ඊට යටින් තියන මොලයේ ආවරණයත්, පිණ්ඩයත් යන ස්ථර හතරම සිදුරුවී බාහිර අංක 1 තුවාලයට අදාලව තිබුනු බව

උ: ඔව්

Page 107;

ප්‍ර: එවැනි තදබල විනිවිදයන ආකාරයට ඇනුම් තුවාලයක් සිදුවීම සඳහා තුවාල සිදුකරන පුද්ගලයා විසින් කොයි ආකාරයේ බලයක් යෙදියයුතුද?

උ: ඒ සඳහා දැඩි බලයක් යෙදියයුතු වෙනවා. හිස්කබලේ අස්ථීන් ඉතාම තදයි එවැනි අස්ථීන් සිදුරු කිරීමට වැඩි බලයක් අවශ්‍යයි

Page 108;

ප්‍ර: යම් අවස්ථාවක මෙම මරණකරු සමග පිහියක් අතැතිව පුද්ගලයෙක් පොරබැඳීමක් වන අවස්ථාවකදී අහම්බෙන් පිහිය වැදීමෙන් මෙවැනි ආකාරයේ තුවාලයක් වියහැකිද?

උ: අහම්බෙන් පිහිය වැදීමෙන් මතුපිට සම තුවාල වියහැකියි. නමුත් මොලය දක්වා යන තුවාලයක් අහම්බෙන් පිහියක් වැදීමෙන් වියනොහැකියි.

ආයාසයකින් හෝ කෙලින්ම තුවාලයක් සිදුකලානම් ආයුධය හිස්කබලේ අදාල අස්ථිය පසාරු කරගෙන ඇතුලට යනවා අහම්බෙන් වුනානම් එතනින් එහාට තුවාල සිදුවීමට අමාරුයි.

Page 109;

අධිකරණයෙන්,

ප්‍ර: අහම්බෙන් වුනානම් හිස්කබලේ අස්ථීන් පසාරු වියහැකිද?

උ: අහම්බෙන් වුනානම් හිස්කබලේ අස්ථීන් පසාරු කිරීමේ හැකියාවක් නැහැ

Page 110;

ප්‍ර: අවසාන වශයෙන් පශ්චාත් මරණපරීක්ෂණය පවත්වා තිබුණා

මරණකරුගේ මරණයට හේතුව වශයෙන් මහත්මයාගේ නිගමනය?

උ: පශ්චාත් මරණපරීක්ෂණ වාර්ථාවේ තිබෙනවා

තියුණු මුහුණතක් සහිත ආයධයකින් ඇනීම නිසා හිසේවම් පැත්තේ අස්ථීන් කැපී මොලය තුවාලවීම නිසා මරණය සිදුවූ බවයි.

It is observed by this court that the Judicial Medical Officer had clearly ruled out the possibility of causing the injury during the struggle, under examination in chief by the prosecution and in contrary the defence had neither questioned nor suggested to the doctor the defence version as to how the said injury was caused.

The following is the only question directed by the defence, to the Judicial Medical Officer with regard to the manner in which the injury could have inflicted to the deceased,

Page 113;

ප්‍ර: මෙම මියගිය තැනැත්තාට මේ සිදුවී ඇති අංක 1 දරණ ඇනුම් තුවාලය ඔහු කුමන ඉරියව්වකින් සිටිනවිට සිදුවුන එකක්ද කියා කීමට පුළුවන්ද?

උ: මෙම තුවාලය තවත් කෙනෙක් විසින් කල එකක් නිසා විශේෂයෙන් හිටගෙන සිටින අවස්ථාවක සිදුවන්නට පුළුවන් නැත්නම් වැටී සිටින අවස්ථාවක හෝ හිටගෙන සිටින අවස්ථාවක සදුවිය හැකියි එසේ නැත්නම් සිද්ධිය වූ ආකාරය විස්තර කලහොත් ඒ සම්බන්ධයෙන් කීමට හැකිය

නැවත ප්‍රශ්ණ :නැත

In the said answer the doctor was specific on two issues,

1. The injury has caused by another person
2. The doctor was open to submit his opinion if it can explained to him, as to how the injury caused.

The defecne had failed to challenge the 1st position and also to put forward the defence version before the doctor to submit his opinion before the trial court.

Under these circumstances the only expert opinion which was before the trial court was that the injury No. 1 found on the body of the deceased was caused by another person, not during a struggle as indicated by the defence witness.

Defence witness Wathudura Bandanage Chandrika had referred to a struggle with the deceased and one Sanjeewa when they tried to molest her and thereafter escaping from them after the deceased received the injury.

Even though the witness had referred to a struggle between them, and making a prompt statement to police, the investigators have not observed any injuries on her body. She was not subject to any medical examination as well. As observed by the Learned Trial Judge in his judgment, the witness being a hospital employee had neither taken any interest to get herself examined by a Judicial Medical Officer nor informed the police of the injuries received by her in her statement to police.

During the argument before this court the President's Counsel who represented the accused-appellant submitted that the Learned Trial Judge when considering the two versions before him believe one version and tailor reasons to support that version. Whilst referring to the Judgment at page 216 the Learned Counsel submitted that the observations on the demeanour and deportment of the witness is factually incorrect.

As observed by this court the Leaned Trial Judge in the present case had the advantage of hearing all the witnesses before him prior to the judgment been delivered. Our courts were reluctant to interfere with the observations made by a trial judge with regard to the demeanour and deportment of a witness since he is the best person who could comment on the demenour and deportment of the witness who testified before him.

In the case of ***Alwis Vs, Piyasena Fernando 1993 (1) Sri LR 119 at 122*** G.P.S de Silva CJ stated that "it is well established that finding of primary facts by a trial judge are not to be lightly disturbed in appeal.

Whilst challenging the observations made by the Learned Trial Judge, the counsel had further submitted that the said witness under cross examination, on several occasions had answered questions in stating that "he cannot remember" and therefore the observations at page 216 are factually incorrect.

When analyzing the evidence of witness Saman Kumara it appear that the said meeting between the two parties were a chance meeting without any previous arrangement. In such a situation, the extent to which a witness could remember would change from person to person.

In one such occasion when the witness was cross examined as to how the accused-appellant had knocked against the deceased, the witness had answered as follows;

Page 57;

ප්‍ර: තමන් දැක්කද මොනම වෙලාවක හරි කසුන් හිතාමතාම වගේ අමිලගේ පපුවේ වැලමිට හප්පනවා

උ: මතක නැහැ

ප්‍ර: ගරු මහේස්ත්‍රාත් අධිකරණයේ සාක්ෂි දීල එහෙම කිවුවද?

උ: මතකයක් නැහැ

ප්‍ර: තමන් ගරු මහේස්ත්‍රාත් අධිකරණයේදි මරණපරීක්ෂණයෙදි "කසුන්ගේ වම්අත ඉනට තබාගෙන අපේ ඉදිරියට ඇවිත් අමිලගේ පපුවේ අත හැප්පුවා" එහෙම කිවුවනේද?

උ: එහෙම දෙයක් මතක නැහැ

ප්‍ර: අත හැප්පුවෙ නැහැ

උ: නෑ

<u>අධිකරණයට</u>

ප්‍ර: එහෙම දෙයක්වුනා කියල මතකද?

උ: මතක නැහැ

ප්‍ර: මොකද මතක නැත්තේ?

උ: ඉනට අත තබාගෙන ආවද කියලා

From the answers given above, it is obvious that the witness was speaking the truth since he could not remember whether the accused-appellant walked while keeping his hand on the hip or not. In such a situation the Leaned Trial Judge who observed and properly comprehended the evidence of the witness in the proper context cannot be found fault and criticized for determining the witness to be truthful and dependable.

The Learned Counsel for the accused-appellant had challenged the prosecution decision not to call the barber as a witness and argued that out of the two versions submitted before court the barber would be the best person who could support the prosecution version. In strengthening the said argument the Learned Counsel relied on the contradiction which was marked as ඒ-1 by the defence.

In the case of ***Walimunige John V. The State 76 NLR 488 at 490*** G.P.A. Silva SPJ (President) of the Court of Criminal Appeal held that, "the prosecution is not bound to call all the witnesses whose name appears on the back of the indictment or to tender them for cross examination. Further it is not incumbent on the trial judge to direct the jury save in exceptional circumstances that they may draw a presumption under section 114 (f) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all.

The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such witness constitute a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called not have supported the prosecution"

The person to whom the Learned President's Counsel had referred is neither an eye witness to the incident, nor a person withholding any material in unfolding the narrative of the prosecution version since the deceased and the witness were returning from the barber either after a hair cut or without a hair cut due to power failure which is not the main issue before the trial court. In the said circumstances I see no merit in the said argument.

The Learned President's Counsel for the accused-appellant further alleged that the trial judge had just brushed aside the defence of alibi taken by the accused-appellant on the basis that it was intrinsically interwoven with the mother's evidence.

As observed by me the accused-appellant whilst making a dock statement took up the position that he left for Devundara to witness the Esala Festival around 3-4 pm on the day in question and did not return to the village on that day.

When an accused person took up a defence of alibi there is no burden cast upon the accused to establish the said position. As observed in a series of decided cases, what required in such a situation is to create a sufficient doubt whether he was present or not at the given time in the place of incident.

This position was discussed in the case of ***King V. Marshall 51 NLR 157*** as follows;

"An alibi is not an exception to criminal liability, like a plea of private defence or grave and sudden provocation. An alibi is nothing more than an evidentiary fact, which like other facts relied on by an accused, must be weighed in the scale against the case for the prosecution. If sufficient doubt is created in the minds of the jury as to whether the accused was present at the scene at the time the offence was committed then the prosecution has not established its case beyond reasonable doubt, and the accused is entitled to be acquitted.

When considering the defence of alibi, except for the two extreme positions, the importance of considering the intermediate position was also considered as important by our courts.

In the case of ***Yahonis Singhe V. Queen 67 NLR 8***, it was held that, the omission to direct the jury on the intermediate position where there was neither an acceptance nor a rejection of the alibi was a non-direction on a necessary point and constitute a misdirection.

However in the case of ***Lionel alias Hitchikolla V. Attorney General 1988 (1) Sri LR 04*** it was held that the failure by the trial judge in his direction to jury to refer directly to the plea of alibi will not vitiate a conviction for murder where the judge in fact read the entire dock statement to the jury and told them it should be considered as substantive evidence in the case irrespective of whether they can or cannot decided whether it is true or not, if it is raises a reasonable doubt as to the truth of the prosecution case, a verdict of acquitted must be returned.

In the case in hand, as observed by us the Learned Trial Judge was mindful of the defence of alibi taken up by the accused-appellant during the trial before him, but for reasons he had given he has totally rejected the dock statement and therefore question of considering the intermediate position as referred to in the said case of ***Yahonis Singhe V. Queen*** will not arise.

Since the Learned Counsel for the accused-appellant had challenged the said reasons given by the Learned Trial Judge for the total rejection of the dock statement, I would now consider the said reasons given by the Learned Trial Judge.

At the page 19 of his Judgment, (page 228 of the brief) the Learned Trial Judge has observed as follows;

"මවිසින් විත්තිකරුගේ මවගේ සාක්ෂි ඇගයීමට ලක්කරන අවස්ථාවේදී දෙනුලබන හේතූන් අනුව මවිසින් තීරණය කර ඇත්තේ විත්තිකරුගේ මවගේ සාක්ෂිය අසත්‍ය සාක්ෂියක් බවය. විත්තිකරු විසින් විත්තිකූඩුවේ සිට කරනලද ප්‍රකාශය විත්තිකරුගේ මවගේ සාක්ෂිය හා සමග වෙන්කල නොහැකි ලෙස බැඳී ඇති ප්‍රකාශයක් වන අතර විත්තිකරුගේ මවගේ

සාක්ෂිය අසත්‍ය වීමේ හේතුවෙන්ම විත්තිකරු විත්තිකුඩුවේ සිට කරනලද ප්‍රකාශයද අසත්‍ය බවට පත්වේ.

මෙම සියලු කරුනු හේතුවෙන් විත්තිකරු විත්තිකුඩුවේ සිට කරනලද ප්‍රකාශය මම සම්පූර්ණයෙන්ම ප්‍රතික්ෂේප කරමි."

In my judgment I too have considered the evidence of witness Chandrika and observed several reasons to disbelieve her evidence. Her evidence clearly contradicts the medical evidence as observed by me and in addition, the defence had failed to submit her position before the Judicial Medical Officer in order to get his opinion, even though the said witness had given an opportunity to the defence.

Witness had further referred to a struggle between the two young boys when they tried to molest her but she was neither subject to any medical examination, nor referred to any such injuries in her statement to the police.

She being a Hospital Employee had not taken any steps to get herself examined by a Medical Officer after the so called incident.

Even though she had gone to the police station and made a prompt statement, had failed to assist the investigations by accompanying the police to the scene of crime.

The Learned Trial Judge after considering all these facts had decided to reject her evidence and I see no reason to interfere with the said findings of the Learned Trial Judge.

As against the said evidence given by witness Chandrika, the accused-appellant who had surrendered to court after 9 months from the incident had taken up an alibi saying that he was in Devundara witnessing the Esala Festival at that time. As observed by the Learned Trial Judge the said defence of alibi and the prompt statement made to police by the mother of the accused-appellant implicating the deceased for attempting to molest her are connected to each other so closely and therefore this court see no reason to interfere with the finding of the Learned Trial Judge to reject the dock statement of the accused-appellant since he is disbelieving and rejecting the evidence given by the mother of the accused-appellant Watudura Bandanage Chandrika.

As observed by this court the deceased Amila Chathuranga witness Saman Kumara and the accused-appellant were all below 20 years at the time when this incident had taken place.

Witness Saman Kumara did not speak of any previous enmity between the parties but referred to an incident which took place on 27th July when the accused-appellant knocked against the deceased on the rail track. The deceased while questioning "උඹ මොකද කියන්නේ" had bent to hold his sarong and at that moment the accused-appellant had instantly stabbed the deceased on the forehead.

According to witness Saman Kumara he was returning home with the deceased on the rail track from a saloon since there was no electricity. Witness did not speak of the accused-appellant waiting for them in front of his house, but had seen the accused-appellant too was coming towards them on the rail track. In these circumstances it is clear that the said meeting of the two parties had been a chance meeting.

The deceased had received a single injury on his head which penetrated into the brain and from the evidence of witness Saman Kumara it is revealed that the said injury was inflicted when the deceased was bending down to hold his sarong.

Even though the accused had acted excessively when inflicting the said injury using a knife, when considering the material already discussed above indicates a sudden fight without premeditation in a heat of passion without taking any undue advantage.

For the reasons set out above I conclude that the Learned Trial Judge had misdirected himself by failing to evaluate the said material infavour of the accused-appellant. I therefore decide to set aside the conviction and sentence and replace it with a conviction for culpable homicide not amounting to murder under section 297 of the Penal Code on the basis of a sudden fight and impose a sentence of 12 years Rigorous Imprisonment.

Appeal is partly allowed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala

I agree,

JUDGE OF THE COURT OF APPEAL