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/120/2013

Adhikari Appuhamilage Krishan Sampath Rupasinghe

H/C Colombo case No. 3253/06

ACCUSED

And,

Adhikari Appuhamilage Krishan Sampath Rupasinghe

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

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

S. Devika De L. Tennakoon J

Counsel: Dr. Ranjit Fernando for the Accused-Appellant

Dileepa Peiris, SSC for the Attorney General

Argued on: 25.01.2016

Written Submissions on: 29.02.2106, 01.04.2016

Decided on: 09.09.2016

Order

Vijith K. Malalgoda PC J

Accused-Appellant Adikari Appuhamylage Krishan Sampath Rupasinghe was indicted before the High Court of Colombo for causing the death of one Arumugam Baskaran and causing simple hurt to one Hameed Yardin by rash and negligent act, by driving the vehicle bearing number 67-3141 along with trailer bearing number 290-0613, offences punishable under section 298 and 328 of the Penal Code.

As revealed before us the Motor Traffic Accident referred to this case had taken place on 10th July 2005 at Peliyagoda beyond the colour lights at Thotalanga on Sirimavo Bandaranayake Mawatha around 5.00 pm.

At the conclusion of the trial before the High Court of Colombo, the Learned High Court Judge after convicting the accused on the indictment had imposed a sentence of 04 years Rigorous Imprisonment with fine of Rs. 1000/- and compensation of Rs. 100000/- on the 1st count with default sentence of 1 month and 3 months imprisonment and six months imprisonment with a fine of Rs.1000/- and compensation of Rs. 50000/- on the and 2nd count with default sentences of 1 month and 2 months imprisonment.

Being aggrieved with the said conviction and sentences, the accused-appellant had preferred the present appeal before us.

The Learned Counsel for the accused-appellant had argued that the prosecution had failed to establish the case to the required standard since in a case of criminal negligence there must be proof that the negligence of the accused went beyond a mere matter of compensation between the subjects and such disregard for the life and the safety of others as to amount to a crime against the state and conduct deserving punishment.

I will now discuss the evidence of the prosecution in order to consider the merits of the above argument. Prosecution had relied the evidence of several witnesses including the evidence of two eye witnesses and of the investigation officer in establishing the prosecution case.

Out of the two eye witnesses, witness Gopala Pillai Ramakrishna who was a porridge seller had only looked at the incident after hearing an application of brakes by a vehicle. At that stage he saw man being thrown away due to collision and the vehicle involved in the accident, a container truck moving beyond the centre island by breaking a post fixed on the centre island and knocking against another vehicle.

This witness neither could identify the driver who drove the container truck, nor had seen the incident proper and therefore no importance can by attached to his evidence.

The next witness summoned by the prosecution was an army soldier attached to Rock House Camp one Liyanage Niculas Mervin Perera.

According to the evidence of this witness, he was at a bus stand on Sirimavo Bandaranayake Mawatha in order to return home from his work on that day. He had seen the deceased person standing near the bus stand for some time and crossing the road 2-3 meters away from the pedestrian crossing. When he went 3-4 feet beyond the centre island the witness had seen this person being

knocked by a container which came from the direction of Peliyagoda and thrown away. After the collision, the container truck moved on to the opposite direction of the road towards him and stopped after knocking against some vehicles.

When the people tried to hit the driver, witness had prevented this and was involved in dispatching the injured to the hospital. He could identify the driver of the container truck at the trial.

The next witness the prosecution had relied was the injured Hameed Yardeen. According to his evidence, he was on his way to Katunayake Air Port in the Pajero vehicle which was officially allocated to him by his employer. On his way to Katunayake, somewhere closer to Madampitiya, all of a sudden the container truck which involved in this accident had moved towards him after breaking some posts on the centre island and knocked against his vehicle. His vehicle was pushed nearly 20 feet before the truck was stopped. The post which was knocked down by the lorry too had entered from the front windscreen and went out from the rear. According to the witness he had a narrow escape specially due to the fact that he was wearing seat belt at that time and his vehicle was badly damaged due to the accident.

He sustained minor injuries due to this accident but he had to get himself admitted to Apollo Hospital to take treatment due to the shock he suffered from this accident. Witness had further said that he saw a person fallen on the other side of the road when the truck collided with his vehicle.

From the evidence of the witnesses Mervin Perera and Yardeen, even though they do not speak of the speed of the vehicle, it is clear that the container truck driven by the accused had first knocked down a pedestrian who was crossing the road two meters ahead of a pedestrian crossing and then collided with a post in the centre island and thereafter knocked against a moving vehicle on the opposite traffic and pushed the said vehicle towards the extreme right of the road before halt.

The next important item of evidence in the case has come from Sub-Inspector of Police S.M. Sunil Samarakoon, Officer In Charge of the Traffic Branch, Grandpass Police Station.

According to the evidence of this witness, he received the information with regard to this accident around 17.35 hours and arrived at the scene around 17.45 hours. According to him the accident had taken place on Sirimavo Bandaranayake Mawatha after passing the colour light at Thotalanga Junction towards Colombo. When he reached the scene the injured was removed to the hospital and he observed the container truck bearing number 67-3141 and 290-0613 stopped on the other side of the road after knocking against a Pajero Jeep. He observed the break mark and other important changes which could be observed at that time and thereafter prepared a sketch after taking the necessary measurement.

According to this witness, he had observed a brake mark of 26.7 meters prior to the collision with the pedestrian. After the collision the pedestrian was thrown and the container truck after knocking against a post on the centre island had moved 19 meters to the opposite direction prior to knocking against the Pejero Jeep. After collection it had further moved 8.7 meters towards the edge of the road pushishing the Pejero Jeep and stopped.

This witness had further observed a distance of 125 meters from Thotalanga colour light to the place of 1st impact.

The witness who is an experience police officer who had worked for 32 years in traffic branches and a person who had also undergone a vehicle management course, in his evidence before the High Court whilst referring to break mark of 26.7 meters prior to the 1st collision with the pedestrian and moving 27.7 meters before coming to a halt has given an opinion before the High Court that the vehicle driven by the accused had come at a uncontrollable speed at that time.

Even though witness Samarakoon has not summoned as an expert to give his opinion in the present case, in the absence of any evidence with regard to the speed of the vehicle driven by the accused-appellant it is important for this court to consider this aspect little further.

In the case of ***State of H.P. Vs, Jai Lal (1999) 7SCC 280*** who can be considered as an expert witness was discussed as follows;

> "An expert witness is one who has made the subject upon which he speaks a matter of particular study, practice or observation and he must have a special knowledge of the subject.
>
> In order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience there in or in other words that he is skilled and has adequate knowledge of the subject."

When considering the experience and the training counted by this witness; as an officer in the traffic branch handing traffic offences for 32 years with special training he has received in traffic management, I see no reason for this court, not to consider him as an expert in his area of expertise, and to reject his evidence given with regard to the speed of the vehicle at the time of the incident.

Even if this court decides to consider the opinion given by the police officer as an expert opinion, this court is not bound to act on the said opinion, unless the said opinion is based on the material that could be justifiable before us.

During the argument before this court the Learned Senior State Counsel who represented the Attorney General brought to our notice the importance of the distances referred to by the witness Samarakoon in considering the speed and recklessness of the accused-appellant.

As observed by the above witness the incident had happened during the day light around 5.00 pm. The road was a straight road leads to Colombo passing Thotalanga Junction. There were about 3 lanes on each side of the road. The accident had taken place 2 meters ahead of a pedestrian crossing. Under

these circumstances a person who is crossing a road is clearly visible and there is no reason for the vehicle to move 55 meters (over 160 feet) to come to a halt after colliding with the centre island, a post erected on the centre island and a moving vehicle to the opposite direction, unless it was driven at an excessive speed. In his dock statement the accused-appellant had taken up the position that the vehicle driven by him was stopped at colour light before the accident, but witness Samarakoon in his evidence has ruled out this position since the vehicle driven by the accused-appellant could not have picked such a speed within 125 meters to cause such an impact before halt.

Even though the accused-appellant in his dock statement had taken up the above position, he has failed to chellenge the position taken up by witness Samarakoon on this issue.

In this regard this court is mindful of the decision in ***Gunasiri and two Others V. Republic of Sri Lanka [2009] 1 Sri LR 39*** where Sisira de. Abrew J with Abeyratne J agreeing observed,

"Although the 3rd accused-appellant took up the position that he was at the temple at the relevant time with the priest, he never asked for summons on the priest nor did he file a list of witnesses indicating the name of the priest. The trial commenced on 29.11.2001and the defence case was concluded on 19.09.2003. Thus during a period of 2 years he failed to move Court to get summons on the priest. Although the 3rd accused-appellant raised an alibi in his dock statement, he failed to suggest this position to prosecution witnesses. The Learned Counsel who appeared for the defence did not suggest to the prosecution witnesses the alibi raised by the 3rd accused-appellant. What is the effect of such silence on the part of the counsel. In this connection I would like to consider certain judicial decisions. In the case of Sarwan Singh V. State of Punjab 2002 AIR SC iii 3652 at 3656 Indian Supreme Court held thus: "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in Bobby Mathew V. State of Karnataka, 2004 CR LJ 3003. Applying the principles laid

down in the above judicial decision, I may express the following view. **Failure to suggest the defence of alibi to the prosecution witnesses, who implicated the accused, indicates that it was a false one.** Considering all these matters I am of the opinion that the defence of alibi raised by the 3rd accused-appellant is an afterthought."

The vehicle driven by the accused-appellant was a container truck with a trailer fitted to it. A person who is driving a heavy vehicle of this nature has a duty to be mindful of the others who used the road and if he drives such vehicle without due consideration on the other who used the road at an excessive speed, as it was revealed in the evidence it is clear that the said negligent act committed by the accused-appellant has gone beyond the mere matter of compensation.

The accused-appellant disregarded the life and the safety of the others when he was driving a container truck with a trailer attached at an excessive speed.

In this regard this court is guided by the decision ***in Laurensz V Vyramuttu 42 NLR 472*** where Howard CJ had cited with approval a passage from the English' case of R.V. Batsman [94 LJKB 791] as followes;

"In explaining to juries the test they should apply to determine whether the negligence, in particular case, amounted or did not amount to crime, judges have used many epithets such as 'culpable', 'criminal', 'gross', 'wicked', 'clear', 'compete'. But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subject and showed such disregard for the life and safety of other as to amount to a crime against the state and conduct deserving punishment."

In this regard we observe that the Learned Trial Judge had carefully evaluated each and every item of evidence led before the High Court and had considered them even though the Learned Judge had not

specially referred to the principle behind it. This court is of the view that the trial judge with a trained legal mind was alive and mindful of the relevant principles of law and has applied them when arriving at her conclusion.

In the case of ***Dayananda Loku Galappaththy and eight others V. The State (2003) Sri LR 362*** the above position was discussed as follows;

"In a jury trial an accused is tried by his own peers. Jurors are ordinary laymen. In order to perform their duties in section 232 of the code, the Trial Judge has to inform them of their duties. In a trial by a Judge of the High Court without a jury, there is no provision similar to section 217. There is no requirement similar to 229 that the Trial Judge should lay down the law which he is to be guided. In appeal the Appellate Judges will consider whether in fact the trial judge was alive and mindful of the relevant principles of law and has applied them in arriving at his conclusion. The law taken for granted that a judge with a trained legal mind is well possessed of the principles of law, he would apply."

For the reasons given above, we see no merit in the appeal before this court. Therefore we dismiss this appeal. Conviction and the Sentence imposed by the High Court is affirmed.

Appeal dismissed conviction affirmed.

PRESIDENT OF THE COURT OF APPEAL

S. Devika De L. Tennakoon J

I agree,

JUDGE OF THE COURT OF APPEL