

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

Mahage Sugith PushpaKumara,

Petitioner

CA 231/2009

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

RESPONDENTS

C.A. 231/2009

H.C. Colombo Case No: 3335/06

Before : Deepali Wijesundera,J. &
L.U. Jayasuriya,J.

Counsel : Neranjan Jayasinghe for the accused-Appellant.
Shanka Wijesinghe DSG. for the Respondent.

Argued &

Decided on : 01.11.2016

Deepali Wijesundera,J.

Heard both Counsels.

The Accused-Appellant in this case has been convicted for murder of one Bomariyage Siripala Gomas on 13.09.2005 under Section 296 of the Penal Code, and sentenced to death, by the High Court of Colombo.

This appeal is filed against the said judgment and the conviction.

The main witness at the trial one Daraniyagalage Karunawthie Pieris who was an eye witness giving evidence has stated, she did not see any

exchange of words between the appellant and the victim, before the appellant stabbed the victim. She was cross examined at length and her evidence has been consistent.

Counsel appearing for the appellant in his defence took up two grounds of appeal.

- 1) Inadmissible evidence have been considered by the High Court Judge namely I.B. extracts of the main Investigating Officer who was dead by the time of the trial were marked without narrating what was recorded. We find it is not correct according to the evidence on pages 100 and 101 of the brief where it has been marked according to the Section 167 of the Evidence Ordinance. This evidence can be considered under Section 167 of the Evidence Ordinance which states

“ The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision”.

The learned High Court Judge has relied upon the I.B. extracts marked X1 to X5 and has said that the evidence by the 1st

witness has been corroborated by the Investigating Officer. There is no provision in the Code ^{of} Criminal Procedure Act to rely upon the inquiry notes. Anyway this has not caused any prejudice to the appellant as the 1st witness has given cogent evidence with regard to the incident. The only instance where the High Court Judge is permitted to rely ^{on the} inquiry notes is provided for in Section 110 (4) of the Code of Criminal Procedure Act .

This witness has recognized the hand writing and the signature of the main Investigating Officer who ^{was} ~~is~~ dead by that time. Therefore this evidence will have to be accepted under Section 167 of the Evidence Ordinance .

2. The next ground of appeal was cumulative provocation has not been considered in this case. The charge should have been brought down to a lesser offence according to the evidence of the main eye witness.

The learned D.S.G. in his argument stated the Accused in his dock statement has totally denied the incident at the time of the trial. Therefore the appellant at this moment cannot say that he want to plead for a lesser offence whereas he has totally denied the incident. Therefore the cumulative provocation does not arise.

For the aforesaid reasons, we find that the two grounds of appeal argued by the appellant is not sufficient to set aside the said judgment which we find has been delivered after carefully considering the evidence placed

before the learned High Court Judge. Therefore we decide to dismiss the appeal and affirm the judgment and conviction given on 20.11.2009.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

L.U. Jayasuriya,J.

I agree.

JUDGE OF THE COURT OF APPEAL

Jmr/-