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 CPC read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A Appeal No: 73/2011
High Court Badulla

Case No: HC **175/2003**

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Kamaldeen Faizal

Accused

And Now;

Kamaldeen Faizal

Accused-Appellant

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

BEFORE : L.U Jayasuriya J.

Deepali Wijesundera J.

COUNSEL : Faisz Musthafa P.C. for the Accused-Appellant.

Ayesha Jinasena Senior DSG for the A.G.

ARGUED ON : 4th November, 2016

DECIDED ON : 10th January, 2017

L.U Jayasuriya J.

The Accused-Appellant (hereinafter sometimes referred to as the Appellant) was indicted in the High Court of Badulla under section 296 of the Penal Code for murder of his wife Fathima Safaya. He was convicted after trial and sentenced to death. Being aggrieved by the conviction and the sentence the Appellant has appealed against the same.

The grounds urged by the Appellant's Counsel are;

i. That there is no analysis of the evidence placed before the High Court.
ii. That there is manifest evidence of intoxication which had not been considered by the Learned High Court Judge.

The learned President's Counsel for the Appellant submitted that there is no evaluation of evidence but only a narration of evidence Referring to the evidence of the main eye witness, the daughter of the deceased which states that the deceased doused herself with Kerosene oil and asked for a match stick.

The learned President's Counsel argued that the main witness was seven years of age at the time of the incident, she has seen the incident under dim light and it was a fleeting moment. He further argued that it would have been an accident. She was seventeen years of age when she testified and her memory had to be prodded. The learned President's Counsel submitted that this piece of evidence has not been properly evaluated and therefore a retrial should be ordered.

The other ground urged by the learned President's Counsel is that there was manifest evidence of intoxication on the part of the Appellant, which had not been evaluated by the learned High Court Judge.

Citing the judgments in **Jayathilake V. A.G. 2003 2SLR 110** and also **Udalagama V. A.G. 2002 2SLR 109**, the counsel submitted that the degree of voluntary intoxication has not been analyzed and assessed and stated that the learned High Court Judge has failed to do so according to the above authorities.

The learned D.S.G countered the argument of the learned President's Counsel and stated that the learned High Court Judge has properly evaluated the evidence and had reached her finding. The Counsel stated that the incidents that the main witness has forgotten do not go into the root of the case. The Counsel further submitted that the prosecution has presented both direct and circumstantial evidence to prove the charge. The Counsel then referred to the evidence of the main eyewitness who has seen the mother drinking Kerosene Oil and the Appellant setting fire to the deceased. The mother of the deceased, Sulela, has corroborated this piece of evidence. (Pages 52 and 53 of the brief)

Independent of the evidence of the sole eye-witness the learned D.S.G. stated that there are dying declarations made by the deceased; one to the neighbor Raheem and the mother of the deceased. The Counsel further submitted that the defense had not challenged this dying declaration. The Counsel referred to S.294, 3rd limb of the Penal Code, said that this incident comes under this particular section, and referred to **Hapugasthanne Mamalage Chandrasena V. A.G. CA Application No 34/2002** decided on 19.07.2002.

Referring to the subsequent conduct of the Appellant, the Learned A.S.G argued that if the deceased set fire to herself, there has to be evidence to say that the Appellant tried to save her. The main eyewitness however has seen the Appellant setting fire to the deceased with a matchstick and going out of the home. (Vide pages 50, 52 and 53 of the brief). There is no evidence to infer that the Appellant tried to save her. The neighbour Raheem had found the Appellant near the railway line, which was about 35 feet away from the house. Referring to pages 106 and 108 of the judgment the learned D.S.G stated that the learned High Court Judge had properly analyzed all the above-mentioned evidence.

This court finds that the main eyewitness's evidence has been corroborated by Sulela's evidence and the learned High Court Judge has analyzed such evidence properly. The main argument of the Appellant is that there is no proper analysis of the evidence, which we find is incorrect. The learned High Court Judge has properly evaluated the evidence from pages 107 to 109, correctly analyzing evidence from all the witnesses.

The learned High Court Judge (at page 106 of the brief) in her judgment refers to the habitual drinking of the Appellant and therefore, this court is not inclined to consider the degree of voluntary intoxication of the Appellant considering the evidence given by the daughter, the mother and the neighbor of the deceased.

We observe that the dying declaration of the deceased had not been challenged in the High Court. The main investigating officer who arrested the Appellant had observed burn injuries on the right-hand and on the forehead of the Appellant. The Appellant had failed to explain these injuries in his dock statement. The learned High Court Judge had referred to the above in her judgment.

This court moves to decide that the learned High Court Judge has carefully considered the evidence placed before her and arrived at her final decision.

For the afore mentioned reasons, This court decides to affirm the conviction and the sentence given by the High Court Judge of Badulla Dated 28.09.2011.

The Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

<u>Deepali Wijesundera J.</u> :

I Agree.

JUDGE OF THE COURT OF APPEAL