

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

K.A.Shantha Udayalal

Accused-Appellant

C.A.No.25/2010

H.C. Gampaha No.302/2004

The Hon. Attorney-General

Respondent.

Before : M.M.A.Gaffoor,J. and
K.K.Wickremasinghe,J.

Counsel : Indika Mallawaarachchi for the Accused-Appellant
Shanaka Wijesinghe DSG for the A.G.

Argued on : 08/07/2016 and 09/08/2016

Decided on : 15/02/2017

M.M.A., Gaffoor, J.

The accused-appellant caused the death of one Soma Wickremarachchi and he was indicted in the High Court of Gampaha for an offence punishable under Section 296 of the Penal Code.

The Accused-Appellant (K.A.Shantha Udayalal) was a Kapu Mahathtaya at a Kovil in Malsipura and had contracted a marriage which resulted in three children of his own. The Deceased (Hettiarachchi Pathirahalage Soma Wickramaarachchi) herself had contracted two marriages previously and had children from the same, before being romantically involved with the Accused-Appellant. The said Accused-Appellant had left his wife and children and had been cohabiting with the Deceased since the year 1996 for over 08 years at a house owned by the Deceased. On the previous night of 06th February, 2003 the Accused-Appellant, the Deceased and the youngest son of the Deceased 12 years of age at that time (prosecution witness No. 2) had gone to bed at around 9.00 p.m. According to prosecution witness No. 2 the Accused-Appellant at about 10.00 p.m., had brought the axe used for chopping of firewood in the household from the kitchen to the bedroom at which time the Accused-Appellant was said to be under the influence of alcohol. The axe was laid on top of the study table of prosecution witness No. 2 which was located within the bedroom of the residence. On or about the fateful day of 06th of February, 2003 at about 3.00 a.m. the Accused-Appellant and the Deceased had a verbal altercation in relation to money given by the Accused-Appellant to the Deceased in a previous occasion for the purpose of building a Gammaduwa and the Deceased had refused to return

the said money to the Accused-Appellant. The Accused-appellant had then used the axe and had attacked the Deceased on the head using its wooden handle at which point the Deceased at screamed for her life. However, the Accused - Appellant had continued to attack the Deceased further using the blade of the axe which caused heavy cut injuries on the skull of the Deceased, naturally resulting the death of the same. During the said attack prosecution witness No 2 had attempted to interfere by screaming out of fear and the Accused-Appellant had told prosecution witness 2 to remain silent and to sleep. After the attack on the Deceased, the Accused-Appellant had slept for about 3 - 4 minutes and later had woken up and changed his attire and had left the residence at about 7.00 a.m. on the 06th February,2003. After which, prosecution witness 2 had informed the brother prosecution witness No. 4 regarding the incident from a neighboring house.

Although, during the cross-examination the Accused-Appellant categorically stated that the re -existed no verbal altercation or disputes in relation to the money given for safe keeping between the Accused-Appellant and the Deceased, (even though prosecution witness 2 stated otherwise, that the Deceased and the Accused-Appellant had an argument regarding the money given to the Deceased by the Accused-Appellant moments before the attack) however, it was further revealed through cross-examination that the Accused-Appellant was suspicious regarding the Deceased carrying on an extra-marital affair as stated by the Accused-Appellant himself during cross-examination (359pg.).

Therefore, irrespective of the fact that, a verbal altercation occurred between the Accused - Appellant and the Deceased or no; one can presume that the Accused-Appellant was affected by the Deceased having an extra-material affairs, which would entail the Accused-Appellant's eviction from the home owned by the Deceased. Moreover, such eviction would result not simply in but also in homelessness as the Accused-Appellant had abandoned his wife and children from his first marriage (331pg. & 332pg.) and had no place of his own. Thus, due to the above given instances and facing homelessness being the more serious fact or which surrounded the Accused-Appellant as it would be immediate, it is relevant to consider that, as the Accused-Appellant was in a compromised position, it was possible for the Accused - Appellant to lash out at the Deceased which led to the murder of the Deceased.

However, such an attack cannot be ruled out as a sudden act by the Accused-Appellant, for the Accused-Appellant on the night before the attack (05th February, 2003) had brought the axe to the bedroom according to prosecution witness 2 where it was revealed in evidence that the Accused-Appellant had carried the axe from the kitchen to the bedroom (68pg.). An axe is not an instrument which is necessary to aid in sleeping like a pillow nor is it an object which is usually kept in a bed room of a house; for there exists no reason for the need to bring an axe which was used for chopping of firewood to the bedroom unless the Accused-Appellant had an intention which was formerly established. An aggravating factor caused the Accused-Appellant to bring the axe to the bedroom, which was where the body of the Deceased was found. It impossible to state that, the Accused-

Appellant had formed an intention to cause hurt with the use of a dangerous weapon. Therefore, there exists no dispute as to the Accused-Appellant's actions of attacking the Deceased with an axe for it was premeditated and did not occur due to provocation. Furthermore, it is correct to state that, the necessary components of a crime are present. For bringing to the axe from the kitchen to the bedroom; within close proximity of the Accused-Appellant(*actus reus*) is supported by an intention (*mens rea*) which was furthered by intoxication. The likelihood of being evicted from the house by the Deceased could have been anticipated by the Accused-Appellant given the history of relationships the deceased had which would have led the accused-appellant to take an irrational decision. Prosecution witness 2 provided that the Accused-Appellant was intoxicated when the axe was brought from the kitchen to the bedroom (67pg). One can state that, although, an individual intoxicated cannot form a specific intention to commit an offence, such voluntary intoxication cannot diminish the establishment of the *mens rea* component simply due to the fact that the actions of the Accused-Appellant occurred at a circumstance where forming a specific intention was compromised.

Such view was observed in the English case of *AG for Northern Ireland v Gallagher*. Where Lord "If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter.

“Denning stated that; “Thus, it is possible to state that the Accused-Appellant voluntary intoxicated himself to further his premeditated plan”.

The expert medical evidence provided that the Deceased had sustained seven cut injuries out of which five of the cut injuries were located in the head area and the cut injury marked as 01 in the postmortem report was severe in nature for it had penetrated the skull which resulted the brain of the Deceased to be cut (180pg.). It was further clearly stated that, *death is inevitable* in relation to an injury caused to the head (186pg.) and such injuries were sustained by the Deceased. Hence, death was *unavoidable* given the nature of the injuries inflicted. It was further provided that, injuries of such nature could be caused by a heavy sharp weapon with the length of the blade being about 8cm (182pg.).

It was revealed in further examination of evidence that the Deceased had sustained the Said injuries a day or day and half ago at the time the postmortem of the body of the Deceased was carried out on the 07th February,2003 (211pg.). Therefore, establishing that the Deceased had been attacked with the heavy sharp weapon between the late hours of 05thFebruary, 2003 and The early hours of 06thFebruary, 2003 which resulted in the death. Therefore, during the said time frame the Accused-Appellant would have been in the company of the Deceased at the Deceased's home as it was where the body of the Deceased was found.

In the case of *Keerthi Bandara V .AG (2000 (2) SLR 245)* it was held that, the examination of the statement made to the Police contained in the Police information book is limited for the purpose of *aiding the Trial Judge* during an inquiry or trial. Therefore, the use of the information book to *arrive at a decision* in relation to the credibility or to ascertain the truth was seen as "irregular" as it was observed in the cases of: *Paulis Appu V Don David(32 NLR 335) and in Wickramasinghe V Fernando (29 NLR 403)*

Furthermore, the use of the information book in order to arrive at the judgment by a Trial Judge is viewed as to result in miscarriage of justice. This is due to the fact that, the Counsel for the defence is deprived from contesting the contents found in such information book to ascertain the validity of such statement according to the case of *Mohamed Nawas Mohamed Siras aliasJan (CA 179/2010)*.

In the case of *Sheela Sinharage V AG (SC 1985 (1) SLR 1)* ,it was held that "Section 110(4) of the Code of Criminal Procedure Act No. 15 of 1979 empowers the High Court Judge to use a statement made at anon-summary proceeding to aid him at the trial but it cannot be used as evidence in the case."It was further found that the use of such material/or the purpose the judgment without taking any steps to be placed in evidence was illegal and cannot be justified.

However, this Court has been given the power to resolve the issue arisen in relation to the use of such material to base the judgment and it is the view of this

Thus, clearly the Accused-Appellant could not have been away from the home for work purposes despite as to the claim made by the Accused-Appellant by way of an alibi.

This Court not only facilitates appeals but is also empowered to exercise powers to review decisions reached by lower courts in contrary to law. Thus, this Court has the capacity to review and set matters straight ensuring that justice is served without causing prejudice to any party. The Counsel for the Accused-Appellant has brought to the attention of this Court that the Learned Trial Judge had erred in law when the conviction and sentence were reached *based* on the Consideration of evidence found in the statement made to the Police, inquest evidence and the non-summary evidence of prosecution witness 1. Although, such is not the norm found in the law as observed in the case of *K.K.Anura alias Marrai V AG (CA 200/2005)* it does not prevent the Learned Trial Judge from awarding a lesser sentence *by taking into consideration* the evidence disclosed.

However, the statement made to the Police, inquest evidence and non-summary evidence can be utilized by the Learned Trial Judge for the *purpose* of guidance when dissecting the case facts and evidence to ascertain the truth during the course of the trial and *not rely* upon the above to form the judgment without considering the material facts.

Court that irrespective of the fact that the Learned Trial Judge had considered the statement made to the Police, inquest evidence and the non-summary evidence of prosecution witness 1; there exists glaring evidence against the Accused-Appellant in order to conclude that the conviction and the sentence reached by the Trial Judge is correct based on several factors.

The Accused-Appellant himself had disclosed during the course of the trial that the Accused - Appellant had been suspicious regarding the Deceased carrying on an affair with other persons. Although, one can state that, suspicion itself is not sufficient to form the intention to result in murder, the said Accused-Appellant was facing likelihood of homelessness, which can be viewed as an aggravating factor as the Accused-Appellant had no place of his own. The Accused-Appellant had left his family to cohabit with the Deceased and lived in the home owned by the Deceased. The Accused-Appellant had no ownership in relation to the property. Furthermore, it was revealed that the Deceased had compelled her previous lover to leave the residence as it was revealed by the evidence of prosecution witness 2 (92pg). Thus, it is possible to state that the Accused-Appellant could have feared eviction which would result in homelessness. Such factor could give rise to the intention to cause harm to the Deceased.

Furthermore, the existence of an intention to cause harm which resulted in the death of the Deceased was aided by the use of an axe which was brought from the kitchen to the bedroom. It was clearly stated that the axe was used for

chopping of firewood. Firewood is used as a fuel to aid in cooking which takes place in the kitchen of any household irrespective of it being indoor or outdoor. Therefore an axe would be kept where it is needed during cooking. There exists no reason for one to bring an axe to the bedroom; a place where individuals sleep. Thus, the fact that the Accused-Appellant had an intention and that there was premeditation can be found when considering the fact that the Accused-Appellant brought the axe to the bedroom where the scene of crime was.

Moreover, the Accused-Appellant had been intoxicated prior to the attack on the Deceased. It is not a sustainable defence that the Accused – Appellant was impaired from reaching a Rational decision due to intoxication, for voluntary intoxication can be viewed as further aiding the Accused-Appellant to reach the intention of murder. The defence of the Accused-Appellant is questionable as it rests upon an alibi, for there is no concrete evidence to establish the validity of such.

Furthermore, although the case rests upon circumstantial evidence and upon a sole eyewitness, the string of evidence is established by way of finding that there is intention sufficient to cause murder of the Deceased and for such purpose an axe was used while being intoxicated to further the motive formed and lacks any explanation from the Accused-Appellant. Also, the Accused-Appellant does not attempt to offer an explanation sufficient to exclude himself from being convicted. Hence, it can be stated that the failure on the part of the Accused – Appellant to provide a reasonable explanation can amount to the Accused Appellant being guilty

as per *Somaratne Rajapakse & Others vs. AG (SC AP/2/02)* where it was held that, the failure of the accused to explain the incriminating circumstantial evidence against him upon the Lord Ellenborough dictum and came to the conclusion that there is no principle in the law which precludes a conviction in a criminal case being based entirely on circumstantial evidence and the fact that the accused failed to offer any explanation ... "

In King vs. Appuhamy (46 NLR 128) it was held that, *in order to justify the inference of guilt from purely circumstantial evidence the inculprit facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."*

Therefore, this Court will affirm the conviction and the sentence reached by the Trial Judge based on the glaring evidence placed before the trial Court.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL.

K.K.Wickremasinghe,J.

I agree.

JUDGE OF THE COURT OF APPEAL.