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

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

Complainant

CA 18/2015

Vs.

H.C. Chillaw – HC:206/2005

M. Joseph Oliver Fernando

Accused

AND NOW BETWEEN

M. Joseph Oliver Fernando

Accused – Appellant

Vs.

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

Complainant – Respondent

BEFORE: P. R. WALGAMA J. P/CA

S. DEVIKA DE LIVERA TENNEKOON J.

COUNSEL: **Accused – Appellant – Dr. Ranjith Fernando**
Complainant – Respondent – Chethiya Gunasekara DSG

ARGUED ON - **06.09.2016**
30.01.2017

WRITTEN SUBMISSIONS – **Defendant – Appellant – 07.11.2016**
Complainant – Respondent - 06.03.2017

DECIDED ON: **15.06.2017**

S. DEVIKA DE LIVERA TENNEKOON J.

The Accused Appellant (hereinafter sometimes referred to as the Appellant) was indicted in the High Court of Chillaw for the offence of the murder of one W. Michael Maximus alias Ravindra under Section 296 of the Penal Code and for the offence of attempted murder of one Chaminda Fernando (PW2) in the course of the same transaction, under Section 320 of the Penal Code.

The Appellant pleaded not guilty to the said charges and the prosecution led the evidence of one M. G. Dinidu Samal Fernando (PW1), PW2 mentioned above, W. Francis Joseph Fernando (PW4), the Judicial Medical Officer G. L. Danapala Weerasekara (PW8),PoliceConstable M.Karunasena(PW11),

Inspector of Police U. Siripala (PW10) and Dr. Mary Margaret Fernando (JMO) (PW9) and closed the case.

The case in brief for the prosecution is that on 21.11.2000 PW1, PW2 and the deceased and some others had being at PW4's residence when subsequently Christy (the brother of the Appellant) and one Pradeep had come to the house of PW4. *Prima facia* it may be inferred that PW4 sold alcohol and 'bites' at his residence and as such was operating an illegal tavern patronized by the locals of the vicinity. Allegedly, under the influence of liquor the said Christy and Pradeep had had a verbal altercation with the deceased which resulted in PW4 expelling these individuals from his residence.

Thereafter the deceased, PW1 and PW2 had gone to a hopper boutique in the locality, on two bicycles. When these persons were having hoppers the said Christy and Pradeed had come to the shop and assaulted the deceased and PW2. PW2 retaliated with a 'Sprite' bottle which missed the said Christy who thereafter had run away from the shop. It is important to note that the said Christy's residence was in close proximity to this hopper boutique. At this stage Christy's wife (sister-in-law of the Appellant) who was altered to the squabble, had telephoned 'Oli' (a reference to the Appellant – 'Oliver') and had informed him that his brother Christy was involved in a fight.

The Appellant who also resided in close proximity had arrived at the said hopper boutique moments later in a white van bearing registration number 252 – 3417 and attempted to assault the said persons and thereafter, allegedly, threated

the deceased, PW1 and PW2 saying that he will "run them over" and had thereafter left.

The deceased had then requested to borrow the bicycle from PW1 who had agreed to lend it to him and therefore these three individuals had proceeded to PW1's house on the two bicycles. PW1 was riding on one and PW2 on the other with the deceased seated on the top tube of the bicycle. Whilst en route they had noticed a van driving towards them at an excessive speed. Soon thereafter they had recognized that it was the Appellant behind the wheel and had therefore attempted to avoid a collision by steering to the far left of the road however the side mirror of the van had hit PW1's bicycle throwing him off instantly and then had proceeded to knockdown the bicycle ridden by PW2 and the deceased.

PW2 states in evidence that the impact threw the deceased on to the windshield of the van shattering it immediately at which point the deceased fell back on to the road after which the Appellant had driven the van over the body of the deceased and had driven away from the scene.

PW11, Police constable M. Karunasena who was on mobile patrol duty at the material to the incident had stopped van driven by the Appellant which was driven towards PW11 fleeing the said collision. It was observed by PW11 that Appellant seemed tense and that the said van, with a shattered windscreen, appeared to have met with an accident. Therefore, PW11 had instructed the Appellant to go to the Police Station after which the said Police Constable had proceeded towards the scene of the incident to find the deceased and PW2

seriously injured and lying on the left side of the street where the collision had taken place.

After the injured were attended to and finding that the Appellant had not gone to the Police station as instructed by PW11, the Police had gone in search of the Appellant who was found at his residence with the damaged van parked outside of his house. PW11 had thereafter arrested the witness around 12.45 am, a short while after the said incident.

The Appellant responded to the narration of the prosecution by way of a statement from the dock denying any culpability stating that he had tried to avoid an accident which unfortunately, he was unsuccessful in doing resulting in a collision with the bicycle(s). The Appellant stated that when he noticed people gathering around the point of collision he had fled the scene in fear and had rushed home and informed his family of the incident after which he had taken the van to the Police Station and surrendered to the Police.

The learned High Court Judge thereafter by judgment dated 02.04.2015 found the Appellant guilty of the aforementioned chargers and thereafter sentenced him to death for the 1st charge and *inter alia* 10 years rigorous imprisonment for the second charge.

Being aggrieved by the said judgment the learned Counsel for the Appellant preferred the instant appeal by Petition of Appeal dated 08.04.2015 in which the grounds of Appeal are stated numbered (a) to (i).

The crux of the instant Appeal, as submitted by the learned Counsel for the Appellant, is whether the learned Trial Judge had erred in fact and in law by concluding that the required *mense rea* / murderous intention had been established under Section 296 of the Penal Code beyond reasonable doubt in light of the several grounds of Appeal as submitted by him.

The required *mense rea* / murderous intention is found in Section 294 of the Penal code which reads;

> "Except in the cases hereinafter excepted, culpable homicide is murder-
>
> Firstly- if the act by which the death is caused is done with the intention of causing death; or
>
> Secondly- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused ; or
>
> Thirdly- If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> Fourthly- If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

I shall now consider whether as provided for and illustrated in the penal code the Appellant had the required *mens rea* when committing the *actus reus* which resulted in the death of the deceased and caused serious injury to PW2. For sake of prudence it must be noted that the *actus reus* in the instant Appeal is not in dispute. If one were to shoot another with a gun after proclaiming that 'I will shoot you' it is clear that such an act coupled with such intention after the utterance of such words amounts to murder, as it satisfied the elements contained in Section 294 of the Penal Code.

In the instant case the weapon used to execute the *actus reus* is the van bearing registration No. 252 – 3417 belonging to the Appellant. It is alleged that the Appellant had entered the hopper boutique mentioned above and prior to leaving the said boutique had said, in the words of PW1 "I will run down all four of you" and in the words of PW2 that "I will run you down". The learned Counsel for the Appellant submits that the testimony of these witnesses do not precisely collaborate each other and that they were an afterthought which was not mentioned in their statements to the Police. The learned DSG refers to the case of the Indian Supreme Court Bharwada Bhoginbhai Hirjibhai vs State Of Gujarat 1983 AIR 753 1983 SCR (3) 280 in which it was held *inter alia* in relation to a case of rape that;

> "Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities- factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1)

> By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details; (3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another; (4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder;"

As observed by the learned High Court Judge both these witnesses have not contradicted each other when giving evidence in chief and in essence have corroborated each other's testimony. Further the learned Trial Judge's reasons in judgment; that the mere fact that a statement was not made to the police is only an omission in law which cannot discredit the witness or make his testimony untrustworthy.

As submitted by the learned DSG the learned Trial Judge has correctly held that the circumstances in which the statement to the Police was made and the evidence in chief was led are different.

This Court finds that when considering whether such an omission is fatal to the case of the prosecution one must consider such omission *in toto*; with due relevance to material elements of the evidence placed before the trial judge. In such totality I see no merit in the Appellants contention that failing to mention the threat by the Appellant jeopardizes the testimonial trustworthiness of the said witnesses, this is more so in light of the fact that both the said witnesses admitted that they failed to inform the police about the threat made by the Appellant that he will "run them down".

Notwithstanding the threat alleged to have been proclaimed by the Appellant what this Court must discover is the required *mens rea* / murderous intention on the part of the Appellant to have murdered the Deceased and to have attempted the murder of PW2. Did the Appellant use the weapon (the van) with the intention of killing the deceased? If affirmative, then in the same transaction he may be deemed to have had the required *mens rea* to have attempted the murder of PW2.

It is material to note the location in which the *actus reus* occurred. As corroborated by the PW1, PW2, PW11 and PW10 the Deceased, PW1 and PW2 were traveling on the left side of the road when the collision happened and not as contended by the Appellant i.e. that the Deceased, PW1 and PW2 had come on to the middle of the road. PW 10 the Police Inspector, who investigated the scene of the collision, has given evidence that the Appellant had come on the wrong side of the road from the opposite direction and that there were tire marks 140ft long to the place of the collision. This Court finds this trace to be imperative in deciding the *mens rea* / murderous intention of the Appellant.

A skid mark is the visible mark left by any solid which moves against another, and is an important aspect of trace evidence analysis in forensic science and forensic engineering. Skid marks caused by tires on roads occur when a vehicle wheel stops rolling and slides or spins on the surface of the road. Skid marks may be divided into "acceleration marks" created on acceleration, if the engine provides more power than the tire can transmit; "braking marks," if the brakes "lock up" and cause the tire to slide; or "yaw marks", if the tire slides sideways. It is evident that the tire marks found at the scene were neither "brake marks", since the vehicle would eventually have come to a stop and not continued for 140ft nor were they "yaw marks" considering the nature of the said marks. It has to be "acceleration marks" left behind from a vehicle rapidly accelerating towards a target, and in the instant collision, towards the Deceased, PW1 and PW2.

This Court therefore finds that the Appellant possessed the required *mens rea* / murderous intention to have committed the *actus reus* of murder and attempted murder as charged in the indictment, as evidenced by the tire marks found at the scene by targeting and attacking the Deceased and PW2 with the van with the intention of causing death and / or with the intention of causing such bodily injury as contained in Section 294 of the Penal Code.

As submitted by the learned DSG the learned Trial Judge had correctly noted the fact that as per the evidence of PW10, who was on the scene of the collision moments after its occurrence, there were no signs that the Appellant had taken

any steps to prevent the collision and there was no evidence to suggest that the bicycle had moved towards the van.

Further, it is submitted by the learned Counsel for the Appellant that the learned Trial Judge had erred in Law by attaching a critical / diluted probative value to the contents of the Dock Statement made by the Accused and consequently rejecting it – with no consideration that it has to be regarded as "Evidence" in the Case.

However, the evidence of PW10 who intercepted the Appellant after the said collision contradicts the dock statement of the Appellant. The Appellant was first intercepted by PW10 after fleeing the scene of the crime and then advised to proceed to the Police Station but however, he was only later arrested at his residence although the Appellant states that he voluntarily surrendered himself to the Police. As such the credibility of the Appellant is greatly questioned and therefore I concur with the findings of the learned Trial Judge who rightly rejected the dock statement of the Appellant.

In this context and for the reasons as more fully described above this court is of the view that the learned High Court Judge, who had the privilege to witness, asses and understand the demeanour and level of credibility of the witnesses giving evidence under oath, had correctly evaluated and analysed the evidence elucidated at trial and has arrived at the finding that the Appellant is guilty beyond reasonable doubt of the chargers contained in the indictment.

For the aforesaid reasons this Court affirms the judgment and the sentence of the learned High Court Judge dated 02.04.2015 and dismiss the instant appeal.

Appeal Dismissed.

Judge of the Court of Appeal

P. R. WALGAMA J P/CA

I Agree.

Judge of the Court of Appeal