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

C.A. No. 13/2016
H.C. Kandy No. 12/2001

Rajapakshe Gedera Nandasena alias Kirikolla

Accused-Appellant

Vs.

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

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J. &**
ACHALA WENGAPPULI, J.

COUNSEL : Amila Palliyage with Nihara Randeniya for the Accused-Appellant
A. Navavi SSC for the Respondent.

ARGUED ON : 06th of June, 2018

DECICED ON : 13th July, 2018

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ACHALA WENGAPPULI, J.

The accused-appellant was charged with murder of *Henegedara Munasinhe* on 15th July 1995. After trial, he was convicted as charged and sentenced to death. At the hearing of his appeal and in challenging the said conviction and sentence, the accused-appellant sought to challenge its validity on the following grounds;

i. the trial Court has failed to consider lesser culpability based on knowledge,
ii. the trial Court has erroneously considered the contents of a statement made by PW 4;
iii. the trial Court has failed to adopt the evidence led before his predecessors and thereby failed to comply with Section 48 of the Judicature Act No. 2 of 1979 as amended.

The prosecution is primarily based on the evidence of *Asilin,* the wife of the deceased. In addition, it led evidence of *Sarath,* another lay witness, a Consultant Judicial Medical Officer and the Police officers who investigated and arrested the accused-appellant.

In her evidence, *Asilin* stated to Court that her husband was stabbed on his chest by the accused-appellant in the night at about 8.00/8.30 p.m. The accused-appellant is one of their neighbours. On the previous day, cattle belonged to the accused-appellant has damaged their cultivation of *gherkin.* Upon a complaint, *Grama Niladhari* has directed the accused-appellant to pay Rs. 600.00 as damages and get his cattle released. The

accused-appellant paid Rs. 600.00 to the deceased at the *Grama Niladhari's* office and undertook to come to take his cattle in the night. The reason to come in the night was the torch of the accused-appellant was dead and he was waiting for the moon to come up.

As promised, just before the incident *Sarath* and another came to the deceased's house with the instructions of the accused-appellant to get the cattle released. Then the deceased accompanied by *Asilin* went over to open up *kadulla* enabling the two men to take the cattle. At that juncture, the accused-appellant who was hiding under the shade of a *Domba* tree, has stabbed the deceased once on his chest with a knife. She raised cries accusing the accused-appellant for stabbing of her husband. Thereafter, the deceased fell on the ground having lost consciousness while accused-appellant ran towards his house. She made a statement to Police three days later, once her husband's funeral was over.

At the time of the trial, the medical officer who performed the post mortem examination on the body of the deceased could not be located and his report was tendered through the Consultant Judicial Medical Officer. The expert witness, having described the only external injury as a stab injury, proceeded to explain the corresponding internal injury. According to his evidence, the stab injury has penetrated through the 3rd and 4th ribs and made a 20-mm cut on the left lung, before making another 20-mm cut on the pulmonary artery after damaging the pericardium. The cause of death was attributed to hypovolaemic shock due to cut injury to the

pulmonary artery. The Consultant JMO in his evidence stated that pulmonary artery is equated to aorta in importance and when it is damaged by 20-mm long cut injury, substantial amounts of blood could be lost in an instant and such a large loss of blood leads to shock, which in turn results in death in a short interval of time.

The Police evidence revealed that the accused-appellant has surrendered to *Wilgamuwa* Police post with a knife on the same night after 11.00 pm. He was arrested for the murder of the deceased and later handed over to *Laggala* Police station for further investigations.

In relation to the 1st ground of appeal of the accused-appellant, the trial Court has failed to consider lesser culpability based on knowledge. It was submitted that there was only one stab injury to the deceased and therefore it negates any murderous intention on the part of the accused-appellant and only supports a proposition that he only had knowledge. Learned Counsel for the accused-appellant then contended that the learned trial Judge has failed to consider this aspect before he found his client guilty for murder.

With this argument, the accused-appellant sought to negate the presence of the required mental element as contained in the 1st to 3rd limbs of Section 294 of the Penal Code. This argument has already been considered by this Court in ***Farook v Attorney General*** (2006) 3 Sri L.R. 174

where there was only one stab injury resulted in death of the deceased. In this judgment, Basnayake J quoted the judgment of the Supreme Court of India in ***Rajwant Singh v State of*** **Kerala** AIR 1966 SC 1874, where it was held in relation to parallel provisions in the Indian Penal Code as to limb 2 of Section 294 of our Penal Code;

> *"The second clause deals with acts 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 harm is caused. The mental attitude here is twofold. There is first the intention to cause bodily harm and next there is the subjective knowledge that death will be the likely consequence of the intended injury... The mental attitude is thus made of two elements (a) causing an intentional injury and (b) which injury the offender has the foresight to know would cause death."*

It is correct that the single stab injury was not labelled as a necessarily fatal injury by the Consultant JMO. But his evidence clearly supports that the 20-mm cut injury to pulmonary artery results in quick loss of considerable volume of blood and results in shock, due to that blood loss. The reference to substantial loss of blood in "very short" time and the nature, location, size and result of the injury clearly satisfies the characteristics of a necessarily fatal injury. This approach was adopted by this Court in ***Chandrasena v Attorney General*** (2008) 2 Sri L.R. 255.

The accused-appellant caused the injury by stabbing the deceased on his chest. The accused, with his act, has then satisfied the first part as per the Supreme Court judgment by "*causing an intentional injury*". The second part of the 2nd limb as identified by the Supreme Court, namely ,"*which injury the offender has the foresight to know would cause death*" should be decided upon subjective knowledge of the accused-appellant.

When one stabs deep into another's chest with a knife in between the ribs, right above the heart, then it could safely be inferred that the one who stabs knows that the injury caused by him would cause death.

In delivering the judgment of ***Vithana and Another v Republic of Sri Lanka*** (2007) 1 Sri L.R. 170, De Abrew J held;

> *"In my view an accused person charged with murder cannot claim, when the victim has succumbed to the injury which is sufficient, in the ordinary course of nature to cause death, that he did not intended to cause the death of the victim but only intended to inflict bodily injury and that he should be exonerated from the charge of murder.*

In view of these considerations, it is our view that the 1st ground of appeal fails as it is devoid of merit.

The accused-appellant's 2nd ground of appeal relates to the complaint that the trial Court has erroneously considered the contents of a statement made by PW4. Learned Counsel for the accused-appellant

relied on the wording used by the learned High Court Judge in the judgment to impress upon this point. However, upon examination as to the way in which the learned High Court Judge has described how he reached his conclusion, it is apparent he was merely aided by the contents of the statement to properly evaluate the inconsistency sought to be proved against the witness for the prosecution. The inconsistency was in relation to who asked the deceased to open *Kadulla* that night. He has relied on the evidence placed before him as substantive evidence and not what the witness stated in his statement to Police and compared it with what another witness has testified on the point. Even if he has used the contents of the statement, it caused no prejudice to the accused-appellant as it is in relation to an ancillary point and not in relation to an element of the offence or to his identity. This ground of appeal also accordingly fails.

Thirdly, the accused-appellant complained that the trial Court has failed to adopt the evidence led before his predecessors and thereby failed to comply with Section 48 of the Judicature Act No. 2 of 1979 as amended. Learned Counsel for the accused-appellant relied on the judgments of ***Bandula v Attorney General*** C.A. 122/2006 decided on 09.10.2014, ***Thiyagarajah v Attorney General*** C.A. 216/2010 decided on 27.11.2014, ***Nishantha and Chandrakumara v Attorney General*** C.A. 96/2010 decided on 05.12.2014 and ***Ratnayake v Attorney General*** (2004) 1 Sri L.R. 390 to impress upon this Court that failure to adopt the evidence led before his predecessors is sufficient to vitiate a conviction entered against an accused.

Upon perusal of the proceedings, it is clear that the learned High Court Judge who convicted the accused-appellant decided to adopt the evidence already recorded by his predecessors on 17.09.2014 and obtained the signature of accused-appellant to denote that he consented for such an adoption of proceedings. The accused-appellant was represented by an Attorney-at-Law.

The judgments relied upon by the accused-appellant do not support the view that in every instance the succeeding Judge should recall the already concluded witnesses and record their evidence afresh as an inflexible rule. Instead, their Lordships have opted to leave it to the discretion of the trial Judge.

It is correct that "this case was taken before 7 Judges and evidence taken before 3 High Court Judges" as the accused-appellant submits, but the learned trial Judge when he decided to adopt the already led evidence, he has exercised the discretion vested in him reasonably. The trial is in relation to an incident which took place in 1995. The first witness was called before the High Court only in May 2006, after 11 years. Then after series of adjournments before different Judges, the trial Judge who finally convicted the accused-appellant took over the proceedings in September 2014. Only the evidence of Consultant JMO and the Registrar have been led before him. The judgment is dated 23.02.2016. Considering the circumstances under which he has exercised discretion vested in him under Section 48 of the Judicature Act, we are of the view that he has

adopted a pragmatic approach and decided to proceed with the trial by exercising his discretion fairly and reasonably. Therefore, the 3rd ground of appeal also fails.

Accordingly, we affirm the conviction and sentence imposed on the accused-appellant.

The appeal of the accused-appellant is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL