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

Mathugamage Aruna Shantha

Accused-Appellant

C.A.No.133/2005
H.C. Vavuniya No. HCV1232/2001

Vs.

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

Respondent

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BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULI J.

COUNSEL : Sunil Premadasa for the Accused-Appellant.
P. Kumararatnam D.S.G for the respondent

ARGUED ON : 12.09. 2018

DECIDED ON : 09th November, 2018

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ACHALA WENGAPPULI J.

This is an appeal by the Accused-Appellant (hereinafter referred to as the "Appellant"), seeking to set aside his conviction and sentence imposed by the High Court of *Vavuniya* in case No. HCV 1232/2001 on 06.12.2005. The Appellant was indicted by the Hon. Attorney General for committing murders of *Dunusinghe Arachchige Upul Priyantha Bandara* (hereinafter referred to as the "1st deceased") and *Wagpedigedara Kapila Karunaratne* on 9th November 1997 at *Kankasanthurai.*

Upon the election of the Appellant, he was tried without a jury by the High Court and at the end of the trial, he was found guilty of culpable homicide not amounting to murder in respect of the death of *Dunusinghe Arachchige Upul Priyantha Bandara* on the basis of cumulative provocation. The Appellant was acquitted on the other count of murder due to insufficiency of evidence.

In challenging the validity of his conviction, the Appellant relied on the ground of appeal that the prosecution has failed to discharge its burden of proof in proving the allegations against him. Learned Counsel for the Appellant submitted that the evidence of the prosecution witnesses is improbable, inconsistent and therefore unreliable to act upon.

Since the ground of appeal revolves around the issue of credibility of the prosecution case, it is incumbent upon this Court to refer to the evidence presented before the trial Court for its consideration.

The 1st deceased *Dunusinghe Arachchige Upul Priyantha Bandara* was a 2nd lieutenant of Sri Lanka Army and at the time of the incident was serving as the Commanding Officer of the army detachment located at the *Kankasanthurai* cement factory premises. The other deceased *Kapila Karunaratne* was a soldier attached to the same camp and was assigned to assist the Commanding Officer.

The Appellant was also a 2nd lieutenant and had served as the deputy to the Commanding Officer in the same camp. On 9th November 1997, the 1st deceased wanted the Appellant to report to him upon his return to camp and to give reasons for leaving the camp without his prior approval. The Appellant had returned to the camp only in the afternoon and was conveyed this message by PW 3 *Bandara*. At that time the Appellant had a T 56 rifle with him. The Appellant indicated that he would meet his C.O. in his room and PW 3 returned to his guard room duty.

A little later, the witness has heard about 5 to 6 shots being fired from the direction where the Appellant was. After about another 15 minutes, the witness heard gun shots from the direction of the 1st deceased's room. The witness did not investigate the firing until he was ordered to do so over the radio set and later saw the two deceased being removed to hospital.

Witness *Patirana* PW1, is an eye witness to the shooting of the 1st deceased. According to this witness, there was a message sent by Corporal Chandana where the Appellant was. The 1st deceased directed the witness to investigate and to report back. After about 15 minutes, when the witness

went to inform his C.O., the 1st deceased, he saw the Appellant also coming there with a T 56 rifle. When the 1st deceased opened his room door to speak, the Appellant opened fire at him. Then the 1st deceased fell down with injuries to his neck. The witness ran away from that place when the Appellant trained his gun at the witness. He radioed the incident to his superiors.

PW2, *Wickramaratne,* was serving as the acting Commanding Officer at the *Keerimalai* Army Camp at that point of time and had received the radio message of the incident at 4.15 p.m. at the adjoining camp. Upon reaching the place of the incident, he learnt that the Appellant had shot the 1st deceased. He also learnt that Appellant had dropped the weapon after the incident and had surrendered to Military Police. He inspected the place of the incident which was in front of the 1st decease's room and observed casings of several spent bullets.

Medical evidence in relation to the post mortem examination of the body of the 1st deceased reveals that his death was due to cranio-cerebral injuries caused by high velocity rifled weapon and it had suffered 12 entry wounds.

The Appellant offered evidence under oath. He denied any involvement with the shooting incident and claimed that he was merely arrested on suspicion. He denied having any animosity with the 1st deceased. He also claimed that he suffered from a certain psychiatric illness.

During his cross examination, a contradiction was marked on his statement to police where he stated that he had harboured a grudge

against the 1st deceased for taking disciplinary action against him several times prior to this incident.

It is in the light of the above evidence that the ground of appeal of the Appellant should be considered.

Learned Counsel for the Appellant submitted the following considerations in support of the said ground of appeal in his written submissions;

a. the number of the spent casings recovered from the scene totalling 23 raises a doubt,
b. according to medical evidence there was a burst of firing whereas the evidence of PW1 contradicted this evidence as he heard 7 to 8 shots being fired,
c. whether the claim by PW1 that the Appellant who had already fired 7 to 8 shots, trained his gun at him compelling him run for cover is a probable one,
d. whether it was the PW1 who shot the 1st deceased dead as he too was "arrested",
e. whether the 1st deceased would come out of his room without a weapon whilst being in a high security zone,
f. whether the 1st deceased was killed by a bullet fired from a sniper gun,
g. whether it is probable for the 1st deceased to return to his room after giving instructions to a soldier to investigate the noise of gun fire to continue his study.

In addition, learned Counsel for the Appellant also relied on the fact that the T 56 rifle that was marked during the trial as a production was not proved to be the weapon issued to the Appellant and therefore the claim of the prosecution that he shot the 1st deceased with it could not be relied upon.

It appears that the Appellant had misdirected himself with certain items of evidence when he relied on these considerations. The prosecution never presented its case on the basis of the Appellant had fired the T 56 rifle with a fully loaded magazine attached to it. Therefore, the number of spent bullets has no significance on the evidence of the prosecution. The evidence of 7 to 8 shots being fired was led in relation to the shooting during which the 1st deceased received fatal injuries. PW1 stated that about 7 to 8 shots were fired at the 1st deceased. The medical evidence reveals that the deceased had 12 entry wounds. Thus the number of shots fired from the T 56 riffle could not be ascertained accurately.

Similarly, the claim of contradiction in relation to a burst of gun fire and individual firing is a result of the Appellant misdirecting himself on evidence. The medical evidence does not support a claim that there was burst of gun fire aimed at the 1st deceased. The medical officer only observed 12 individual circular shape entry wounds on the body of the 1st deceased.

Whether the evidence of the PW1 in relation to his conduct and that of the 1st deceased is credible or not had been considered by the learned High Court Judge who has had the advantage of observing the demeanour

and deportment of the witness when giving evidence. The trial Court had accepted evidence of PW1 as credible and reliable. Having found his evidence credible, the trial Court then considered whether there was evidence in relation to the count of murder of the 2nd deceased. Having found none, the trial Court correctly decided to acquit the Appellant from that count.

Credibility of a witness is a question of fact. It was held by the Supreme Court in ***Attorney General v Mary Theresa*** (2011) 2 Sri L.R. 292 that;

> *"Appellate courts are generally slow to interfere with the decisions of inferior courts on questions of fact or oral testimony. The Privy Council has stated that appellate court should not ordinarily interfere with the trial courts opinion as to the credibility of a witness as the trial judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility and whether after careful thought or with reckless glibness and he alone can form a reliable opinion as to whether the witness has emerged with credit from cross examination."*

Upon consideration of the evidence of PW1 and the judgment of the trial Court in determining the issue of his credibility, we are of the view

that the trial Court's decision to accept his evidence and to act upon it is justified.

However, it appears that the trial Court has very compassionately considered the applicability of the general exception of grave and sudden provocation in section 294 of the Penal Code by applying the principle of cumulative provocation, although the Appellant had totally denied any involvement with the incident of shooting. The prosecution evidence is that the 1st deceased wanted the Appellant to report to him for leaving the camp without prior permission, the Appellant had walked up to the 1st deceased's room and without a word opened fire and thereby instantly killed him were considered by the trial Court in applying the general exception. The contents of the contradiction marked off the evidence of the appellant cannot be utilised as evidence in support of cumulative provocation in view of Section 110(3) of the Code Criminal Procedure Act No.15 of 1979. Strangely, the trial Court also utilised its own knowledge as to the mentally traumatic life of a soldier stationed in a war zone who is in constant fear of an enemy attack. This Court reluctantly agrees with the decision of the trial Court that there is material to justify the reduction of criminal liability.

Acting on the principle laid down by the apex Court in the said judgment that *"There is simply no jurisdiction in an appellate court to upset trial findings of fact that have evidentiary support"* we affirm the conviction of the Appellant. The trial Court extended its compassion once again in

sentencing the Appellant by imposing only 8 years of imprisonment and a fine of Rs. 50,000/= with a default term of further six months. The Appellant was since enlarged on bail pending appeal by the High Court. At this late stage this Court would not interfere with the sentence already imposed on the Appellant.

In the circumstances, we dismiss the appeal of the Appellant.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL