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

In the matter of an Appeal in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 331(1) of the Code of Criminal Procedure Act No.15/1979.

C.A.No.188/2011
H.C. Embilipitiya No. HCE 54/2009

Abeygunasekera Wejewantha
Sirisena alias Mahathun

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	:	Indika Mallawarachchi with K. Kugarāja for the Accused-Appellant. Haripriya Jayasundara S.D.S.G for the respondent
ARGUED ON	:	21.09.2018
DECIDED ON	:	07th December, 2018

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ACHALA WENGAPPULI J.

The Accused-Appellant was indicted before the High Court of *Embilipitiya* for committing the murder of his son-in-law, *Kodituwakku Hettiarachcige Samantha*, on 30th April 2007. After a trial without a jury, he was convicted for murder and was sentenced to death.

Being aggrieved by the said conviction and sentence, the Accused-Appellant seeks to challenge its validity before this Court on the basis of following grounds of appeal:-

a. the trial Court failed to consider the evidence of PW3 *Jayasena* to whom the deceased had made his first "dying declaration" which tends to support the position taken up by the Accused-Appellant at the trial, and the conflicting nature of the three such declarations,

b. the trial Court had erred on the overall burden of the prosecution by arriving at the conclusion that it had proved its case before even venturing to analyse the case for the Accused-Appellant,

c. the trial Court had also erred on the burden of proof of the Accused-Appellant.

In view of these grounds of appeal, it is necessary to consider the case presented by the prosecution before the trial Court *albeit* briefly.

The prosecution relied primarily on two utterances by the deceased, as to his cause of death or as to any circumstances of the transaction which resulted in his death, which was made admissible and relevant under Section 32(1) of the Evidence Ordinance.

Witness *Karolis* gave evidence to the effect that whilst attending a meeting, he was told that his son, the deceased, had been found lying on a canal bund. The witness immediately sent for a three-wheeler and rushed to the place, where the deceased was said to be lying. Upon reaching the place he saw the deceased was seated on the ground and few others who have gathered around him. When the witness asked who assaulted the deceased, he merely replied that it was the Accused-Appellant. The witness could not elicit details of the assault since the Police had already arrived there to take the deceased away.

The other instance of the deceased making a statement was revealed upon the evidence of the investigating officer, Sub Inspector Newton. According to this witness, he received a telephone call at about 5.00 p.m.

on 30.04.2007 that a person, under the influence of liquor is behaving in a disorderly manner at a location closer to *Bedigantota* temple. Having arrived at the place as per his information, the witness noted that the deceased was lying on the ground and was drunk. The deceased was thereafter brought to *Suriyawewa* Police Station. Upon questioning, the deceased told the witness that while he was having an argument with his wife, the Accused-Appellant had hit his head with an iron rod from behind. The witness noted an injury on the back of the head of the deceased.

The Police had taken steps to admit the deceased to the hospital which was adjoining the Police Station. In the same evening witness *Karolis* came to Police to lodge a complaint regarding an assault on his son but was directed by the Police to stay with the deceased at the hospital.

Prosecution also called witness *Jayasena* who stated in his evidence that one evening he heard from *Rasika* (wife of the deceased) that the deceased had fallen into the precast canal and sustained injuries. Instead of rushing to canal, the witness went in search of a three-wheeler and thereafter only went to see the deceased. He also saw the deceased was seated near the canal, but the witness did not observe any wetness in the clothing of the deceased. When asked as to what happened to him, the deceased merely replied that he fell down. The deceased had no apparent discomfort at that time and had thereafter walked with them for about half a mile, along the canal, towards the hospital before he sat down for the second time.

PC 2092 *Priyantha* had recorded a statement of the Accused-Appellant and had thereafter recovered an iron rod, that had been buried under a patch of dried grass of his back garden, upon him pointing out the place.

Judicial Medical Officer *Susantha Kumara* stated in his evidence that during the post mortem examination of the body of the deceased, he had observed ten external injuries. In his opinion, the death of the deceased was due to a head injury by a blunt weapon, which had resulted in a fractured the skull bone and damaged underlying brain tissues. This particular injury (injury No.10), which he described as a necessarily fatal injury, could be a result of an attack on the head from behind using a weapon similar to an iron crow bar. Several abrasions were also noted by the expert witness on the body of the deceased. After examining the iron rod that had been recovered upon the information provided by the Accused-Appellant, the expert witness expressed the opinion that the fatal injury that was observed on the head of the deceased, could have caused by it, if attacked with sufficient force. He further expressed the opinion that the deceased may have walked up to a kilometre and talked after receiving the said head injury.

It is against this backdrop of evidence, the several grounds of appeal, as raised by the Accused-Appellant, should be considered by this Court.

In support of the first ground of appeal, learned Counsel for the Accused-Appellant submitted that the prosecution case is based on the "dying declaration" of the deceased to his father *Karolis* that the Accused-

Appellant had assaulted him. The deceased had thereafter made a more detailed statement to Sub Inspector *Newton,* where it was alleged that his father-in-law had dealt a blow on his head with an iron club during an argument with his wife.

However, the deceased had told witness *Jayasena* that he "fell down". The Accused-Appellant therefore claimed that the deceased spoke of his "fall" and that fact is in support of his claim that the deceased, due to his state of heavy intoxication, fell on the bund of the canal resulting the head injury to which he later succumbed. The basis of his complaint against the judgment is that the trial Court had failed to "narrate and analyse" the conflicting evidence of the witness *Jayasena* which was the first of the dying declarations made by the deceased, a vital piece of evidence in his favour contained in the prosecution's case. The Accused-Appellant therefore relied on the reasoning of the judgment of this Court in C.A. 292/2014 - decided on 1st June 2018, to impress upon this Court that he was denied of a fair trial.

This submission is based on one of the positions that had been advanced by the Accused-Appellant during cross examination of some of the prosecution witness. Witness *Rasika* who is the deceased's wife and daughter of the Accused-Appellant was called by the prosecution. During her evidence, she claimed that the deceased had fell on the bund of the canal and suffered the head injury which resulted in his death subsequently. She was treated as a hostile witness by the prosecution and was cross examined as to the position she has taken in her previous statements.

Thereafter, the Accused-Appellant presented a different position during cross examination of the Police witnesses by suggesting them that they had severely assaulted the deceased during the ninety-minute interval that they have kept him in the Police Station that evening and when he died due to that assault, the Accused -Appellant was falsely implicated for his death.

The submission that the trial Court had failed to consider the evidence of the witness who was favourable to the Accused-Appellant is not acceptable for the reason that the trial Court did in fact considered his evidence. In the opening segment of the judgment, the trial Court noted that he has given evidence for the prosecution. Then in the latter part of the judgment, the trial Court refers to the evidence of this witness by name.

It appears that the complaint of the Accused-Appellant is the "dying declaration" in relation to his "fall" has not been considered by the trial Court in assessing the reliability of the said "dying declaration".

Why the claim of the Accused-Appellant that the fatal injury was a result of the "fall" of the deceased into the precast canal was rejected by the trial Court had to be considered, in appreciating the question whether the evidence of *Piyasena* is favourable to the defence as the Accused-Appellant claims.

The expert opinion clearly negates the proposition advanced by the Accused-Appellant that the fatal injury is a result of a "fall". The medical witness in unambiguous terms excluded the probability of the occurrence of such an event by expressing his opinion that for the fatal injury that

was observed on the head of the deceased to occur due to a fall, that fall should be from about a height of 20 feet. Both bunds of the canal is made of earth and only the bottom lining of the canal is made of concrete. The canal itself is only one and half feet deep. Therefore, it is more probable that the fatal injury suffered by the deceased is not due to a fall but due to a deliberate attack on the head with a blunt heavy object with a considerable force as the expert witness stated in his evidence. Therefore, the trial Court has correctly decided this question of fact.

It is also evident from the material before the trial Court that the Accused-Appellant in fact had a fall. *Karolis* received information that his son was lying on the bund. It appears that *Piyasena* did not venture to ask the deceased as to how he has sustained any injury. The mere reference to a "fall" by the deceased is thus could well be confined to his actual fall on the bund after receiving the head injury. The fact of making a short statement by the deceased to *Karolis* and then another detailed statement to Sub Inspector *Newton* is explained by the evidence led by the prosecution.

Therefore, in view of the above considerations we hold that the first ground of appeal of the Accused-Appellant necessarily fails.

In relation to the second ground of appeal of the Accused-Appellant, it was submitted that the trial Court had erred on the overall burden of the prosecution by deciding that it had proved its case even before the Court made an attempt to analyse the case for the Accused-Appellant. It was also submitted on his behalf that therefore the Court had acted contrary to Section 3 of the Evidence Ordinance. The Accused-

Appellant particularly referred to page 241 of the appeal brief where the impugned portion of the judgment appears.

This complaint of the Accused-Appellant against the judgment is reasonable if one were to confine the consideration of the judgment of the trial Court only to a superficial reading of that segment of the impugned judgment. Perusal of the judgment reveals that what the Court had decided before proceeding to consider the defence case is the fact that the prosecution has proved the Accused-Appellant had caused the death of the deceased beyond a reasonable doubt. When the wording of this sentence is compared with the wording of the last sentence of the judgement by which the trial Court concludes that the prosecution has proved the charge levelled against the Accused-Appellant beyond reasonable doubt, it becomes clear what the trial Court meant in presenting its conclusions on questions of facts throughout its judgment. It is the style of presentation by that particular trial Court. The trial Court would consider a particular question of fact and then concludes with the pronouncement of what it holds in relation to that question of fact. This feature is consistently used by the trial Court throughout the judgment.

The trial Court, in considering each facet of the "dying declarations" made by the Deceased, repeatedly concluded that each of the particular fact it considered had been proved by the prosecution beyond reasonable doubt. Similarly, in this particular segment too, what the trial Court concludes is only the involvement of the Accused-Appellant in the death

of the deceased. It reserved its determination on the charge to the last sentence of the 28-page long judgment and that was after considering the evidence of the Accused-Appellant. We agree with the submissions of the learned Senior Deputy Solicitor General that *Karolis* knew who *Mahathun* (the Accused-Appellant) is but not the Police and this explained the more descriptive statement made to Police by the deceased.

Moving on to the last ground of appeal that the trial Court had also erred on the burden of proof of the Accused-Appellant, it was contended by the Accused-Appellant that he need not disprove the prosecution's case to secure an acquittal and the trial Court was wrong in rejecting the defence claim that the death of the deceased who died due to a fall was foisted on the Accused-Appellant as it held that he must satisfy that the prosecution had falsely implicated him as the person responsible for the death of the deceased.

Perusal of the judgment revealed that the trial Court was mindful of the legal position in relation to the Accused-Appellant. This is evident from the pronouncement by the trial Court that the evidence adduced by the Accused-Appellant had failed to raise a reasonable doubt in the prosecution case. Clearly the trial Court had not imposed any burden on the Accused-Appellant. The basis of the complaint of the Accused-Appellant is the wording that had been used in the analysis of defence evidence by the trial Court. It held that if the Accused-Appellant was falsely accused of this crime, he could have taken some action against such an act of gross injustice. It is obvious that the trial Court was merely evaluating the claim of the Accused-Appellant by applying the test of

probability using its perception of natural conduct of a person, which it entitles to do under Section 114 of the Evidence Ordinance.

However, the judgment of the trial Court is defective in its failure to adequately consider the lesser culpability of the Accused-Appellant.

The Court of Criminal Appeal, in delivering the judgment of ***The King v Premaratne*** 48 N.L.R. 199, adopted the view of Viscount Simon in ***Mancini v DPP*** 28 Criminal Appeal Reports p.73, that:-

> *"To avoid all possible misunderstanding, I would add that this is far from saying that in every trial for murder, where the accused pleads Not Guilty, the Judge must include in his summing up to the jury observations on the subject of manslaughter. The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the Jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or at any rate might induce a reasonable doubt whether this was or was not the case."*

Proper discharge of this duty, by the trial Judges had been consistently reiterated by this Court. In ***Saranelis Silva v Attorney General*** (1997) 3 Sri L.R. 182, it was held by De Silva J (as he was then) that;

> *"... it was undoubtedly the duty of the Judge in summing up to the Jury to deal adequately with any defence which might*

reasonably arise on the evidence given and which would reduce the offence from murder to culpable homicide. If there is no evidence before the Court to reduce murder to culpable homicide, then the Judge cannot be faulted for not inviting the Jury to consider lesser offence."

This particular duty was again highlighted in ***Gamini v Attorney General*** (2011) 1 Sri L.R. 236, where De Abrew J, having considered the judgments of ***King v Edwin*** 41 N.L.R. 345, ***King v Appuhamy,*** 41 N.L.R. 505 and ***King v Lanty*** 42 N.L.R. 317 applied the said principle and substituted the conviction to culpable homicide not amounting to murder whether trial Courts have convicted for murder.

In view of the third ground of appeal, this Court must consider whether the trial Court had discharged the said duty correctly in the light of available evidence before it.

It is already noted that the primary item of evidence against the Accused-Appellant is the statement made by the deceased to Sub Inspector Newton at the Police Station. The deceased claimed that he had an argument with his wife and the Accused-Appellant had hit him with an iron rod from behind on his head.

This statement itself contains some considerations in relation to lesser offence of culpable homicide not amounting to murder. The fact that there was an argument with the daughter of the Accused-Appellant added an element of lesser culpability when the antecedents of the deceased is considered. There is clear evidence that he was in a heavily intoxicated

state. He had a violent history as admitted by his father *Karolis* as the witness had previously attempted suicide after having been assaulted by his own son. *Karolis* also admitted that the couple had a troubled marriage at the time of his son's death. There is clear evidence that there was no prior animosity between the deceased and the Accused-Appellant. When considered in the light of these evidence, the trial Court could have considered the general exceptions of exceeding right of private defence and grave and sudden provocation in view of the reasoning of the above judicial precedents.

Clearly when the deceased had an "argument" with the Accused-Appellant's daughter in his heavy intoxicated state, it would not have been limited to mere verbal abuse. The use of a crow bar to attack the deceased from behind without a warning by the Accused-Appellant is clearly suggestive of the fact that he could well have intervened to prevent a more serious situation. Alternatively, he may have been provoked sufficient enough over the probable verbal and physical abuse of his daughter by the deceased.

In addition, the trial Court had apparently failed to consider another more obvious factor in determining the degree of criminal liability of the Accused-Appellant in the attack on the deceased.

Having considered the medical evidence and the nature of the fatal injury, the trial Court had concluded that the Accused-Appellant acted with murderous intention when inflicting the said fatal wound on the head of the deceased by attacking him with heavy iron rod and that too with a considerable force.

In ***Banda v The Queen*** 75 N.L.R. 459, the appeal before the Court of Criminal Appeal against conviction for murder and the appellant before their Lordships had inflicted only a ½ inch deep cut injury on the neck of the deceased with a sword as a result of which there was a cut in the jugular vein.

Their Lordships have set aside the conviction for murder and proceeded to substitute one of culpable homicide as;

> *" ... the appellant had no murderous intention but had only the knowledge that death would be the likely result of his act then he would be guilty of the lessor offence of culpable homicide not amounting to murder."*

It is clear from the medical evidence available in relation to the appeal before us too that the deceased had suffered only one fatal injury. The other superficial injuries that were observed on his body have resulted due to his fall on a rough surface after the attack on the head which may have had left him concussed. It is also revealed from the evidence that the attack on the deceased had taken place around 4.00 or 4.30 p.m. on 30.04.2007 while his death had occurred at about 7.20 a.m. on the following morning. It is also correct that the fatal attack was inflicted on the back of the head of the deceased. However, considering the facts, that only a single fatal injury that had been inflicted on the deceased without repetitive attacks (even though the Accused-Appellant has had the opportunity to inflict more injuries), that the deceased had talked and

walked a considerable distance after the attack, in spite of the injury on the back of the head, the Police keeping him in the cell over an hour due to his high level of intoxication and, finally his death had occurred 15 hours after the attack tends to support the position that there exists a reasonable doubt as to whether the Accused-Appellant had entertained any murderous intention as to satisfy the element of the offence of murder as envisaged in Section 293 of the Penal Code.

These factors cumulatively support the proposition that the Accused- Appellant only had the knowledge of that he inflicts an injury to which that death would be the likely result and not the murderous intention. In considering the basis on which the trial Court adopted to reach the conclusion it finally did by concluding that the Accused-Appellant had acted with a murderous intention, we are of the considered view that the trial Court had not considered the above mentioned factors in the proper perspective.

Therefore, we set aside the conviction entered against the Accused-Appellant for murder and substitute with a conviction of culpable homicide not amounting to murder. In consideration of the material available, we impose a thirteen-year term of imprisonment on the Accused-Appellant along with a fine of Rs. 5,000.00 and if he defaults on its payment, a six-month long term of imprisonment is imposed. In consideration of the period of remand, we further order the Prison

authorities that the term of imprisonment of the Accused-Appellant, should be commenced from the date of conviction i.e. 28-10-2011.

The relevant High Court is directed to issue a committal in line with the above orders of this Court.

Subject to the above variations in the conviction and sentence, the appeal of the Accused-Appellant is partly allowed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL