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

In the matter of an application under and in terms of Section 331 of the Criminal Procedure Code Act No. 15 of 1979.

Court of Appeal
Case No: 174/2017

H.C. Gampaha No:200/2006

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

Complainant

-Vs-

Kasadoruge Dulip Sanjeewa

Accused

-And Now Between-

Kasadoruge Dulip Sanjeewa

Accused-Appellant

-Vs-

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

Complainant-Respondent

Before : **S. Thurairaja PC, J**

&

A.L. Shiran Gooneratne J.

Counsel : Jayakith Mathuratne for the Accused-Appellant.

Parinda Ranasinghe (Jnr.) P.C., ASG with L. Dissanayake, SC for the Respondent.

Written Submissions of the Accused-Appellant filed on: 26/02/2018

Written Submissions of the Complainant-Respondent filed on: 26/11/2018

Argued on : 14/11/2018

Judgment on : 07/12/2018

A.L. Shiran Gooneratne J.

The Accused Appellant (hereinafter referred to as the Appellant) was indicted under Section 296 of the Penal Code for committing the murder of Amarasinghe Arachchilage Jayasena (hereinafter referred to as the deceased in the 1st count) and Halawathage Indrani, (hereinafter referred to as the deceased in the 2nd count) in the High Court of Gampaha. At the conclusion of the trial, by judgment

dated 01/06/2017, the learned High Court Judge convicted the Appellant on both counts and was sentenced to death.

The prosecution, *inter alia*, relied on the evidence of Amarasinghe Archchilage Kalani Nisansala (PW1), the daughter of the deceased in the 1st and 2nd counts, who identified the Appellant at the material time. PW1, an 8 year old at the time of the incident, has identified the Appellant as the person who tapped at their door the night in question, and requested for a roofing sheet from the deceased in the 1st count. The said deceased had walked out of the house and moments later PW1 had heard the deceased screaming at which point the deceased in the 2nd count had walked out of the house accompanied by PW1, and had seen the Appellant attacking the said deceased. At this moment the deceased in the 2nd count had tried to prevent the deceased in the 1st count from further attack, when the Appellant had attacked the deceased in the 2nd count.

In the said background, I will now turn to the 1st ground of appeal, that is,

- The learned trial judge failed to consider that the prosecution has not established the identity of the Accused-Appellant beyond reasonable doubt.

It is in evidence that the Appellant was known to PW1, who lived close to the house of the deceased and has identified the Appellant as a known person to the deceased. PW1 states that, she clearly identified the Appellant at the time the deceased in the 1st count opened the door and further states that she saw the Appellant attacking the said deceased. It is noted that, at the time an oil lamp had

been burning inside the house. However, when asked as to whether the light from the oil lamp assisted her to identify the Appellant, her reply was that, "I am used to seeing him. He is the one." It is observed that the identification of the Appellant by PW1 has been consistent from the date material to this incident, with no contradictions whatsoever. Soon after the attack PW1 rushed to a neighbouring house located within walking distance from the place of the incident to seek assistance, at this point she had specifically identified the Appellant by name to Lalitha Perera (PW2).

PW1 had the opportunity of identifying the Appellant at two different locations at close proximity. There is also no evidence that the observation of identity of the Appellant was impeded by any intervenient circumstances. When PW1 was cross examined, the defence failed to put forward the issue of identification of the Appellant to this witness. Leave alone creating a doubt, not a single question has been put to this witness regarding any deficiency of identification of the Appellant. Therefore, on the strength of the evidence led by the prosecution as discussed above, I am convinced beyond reasonable doubt that the identity of the Appellant was adequately established by the prosecution.

Lalitha Perera (PW2), states in her evidence that she had taken the deceased in the 2nd count to the Gampaha Hospital, around 9 PM as informed by PW1 on the date in question. When the said deceased was taken in for treatment, she had heard

the deceased stating to the doctor that "Dulip stabbed her", referring to the Appellant.

Warnasuriya Arachchilage Munasinghe (PW15), retired police officer, stated in evidence, that he was on duty at the police post attached to the hospital when the deceased in the 2nd count was brought to be hospitalized. When inquired, the said deceased had stated that "Mudungoda Dulip" had stabbed her, referring to the Appellant. This witness had made an entry to that effect, however at the time of giving evidence the relevant information book which contained the said entry had been destroyed.

Accordingly, as the 2nd ground of appeal the Appellant submits that;

- the Learned Trial Judge has not considered the inherent weaknesses of the dying declarations referred to by PW2 and PW15.

A dying declaration tendered in evidence is to be considered in terms of ***Section 32(1) of the Evidence Ordinance***, which states,

> *"when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question."*

The Appellant is challenging the evidence of PW2 on the basis that, she was uncertain of the time that the said dying declaration was made. Taking into

consideration the evidence of PW2, it is abundantly clear that the dying declaration was made at the time the deceased in the 2nd count was admitted for treatment by the hospital staff.

In ***Edrick de Silva Vs. Chandradasa de Silva 70 NLR 70, Justice H.N.G. Frenando*** observed,

> *"where there is ample opportunity to contradict the evidence of a witness but is not impugned or assailed in cross examination, that is a special fact and feature in the case. It is a matter falling within the definition of the word "proved" in section 3 of the evidence ordinance and a trial judge or court must necessarily take that fact into consideration in adjudicating the issue before it"*

It is observed that when PW2 was cross examined no fact in issue and/ or relevant fact deposed to by the said deceased pertaining to the verbal dying declaration was disputed by the Appellant and/ or suggested that it suffers from any infirmity.

The dying declaration referred to by PW15, is challenged on the basis that the said witness failed to substantiate his claim by not producing the note books which contained such information and therefore, the witness has failed to corroborate the evidence given by him. The said assertion is made on the basis that the witness was not in a position to re-call an event which took place 15 years ago. PW15 has explained to Court, the reason why the information book

which contained the relevant deposition cannot be produced in Court. The Court was possessed of the fact that the said information book was destroyed due to lapse of time. Apart from the said contention the defence has failed to take up any infirmity arising out of the said dying deposition. The fact that the deceased exclaimed the name of the Appellant on the brink of death has been established by the evidence of PW2 and PW15. It is also noted that PW15 is an independent witness.

In ***Dole v. Romanis Appu 40 NLR 449 per Abraham C.J.,*** observed that,

> *"corroboration must be supplied by evidence from an independent and not a self-serving source."*
>
> *"Many things which indicate or might be thought to indicate, that a witness is speaking the truth, do not corroborate him in law (Cross, 6th Ed. 225)."* This passage has been cited, with approval, in Bench Book Law of Evidence at page 146.

Therefore, as submitted by the Appellant, to seek corroboration to a fact and/ or a relevant issue, taking into consideration evidence deposed to by one and the same witness is a misstatement. Corroboration required by law is to support, confirm or strengthen the principal evidence by an independent source. Accordingly, the said ground of appeal is clearly unfounded.

The Appellant formulated the 3rd ground of appeal on the basis that,

- the learned Trial Judge has failed to give due consideration to inter se and per se contradictions marked by the Appellant during the cross examination of the prosecution witnesses.

It is observed that the date of offence material to this incident is 16/10/2002. However, the leading of evidence commenced on, 22/02/2017. The long delay to prosecute this action has reminded me to an observation made by ***Justice F.N.D. Jayasuriya in Wickramasuriya Vs. Dedoleena and others, (1996) 2 SLR 95,*** which states,

> *"this is a characteristic feature of human testimony which is full of infirmities and weaknesses specially when proceedings are led long after the events spoken to by witnesses. A judge must expect such contradictions to exist in the testimony. The issue is whether the contradictions go to the root of the case or relates to the core of a party's case"*

Reference is made to contradiction marked V1, where PW2 has claimed in her statement to the police that she was informed of the incident in question by Kanthi, who accompanied the two children of the deceased, whereas, PW2 in her evidence has not referred to Kanthi or that the siblings of PW1 accompanying her. The counsel for the Appellant also makes reference to the evidence of PW2, in respect of an observation made at the time the said dying declaration was made by the deceased in the 2nd count when taken in for treatment by the hospital staff. We

find that the said issue is more of credibility of the witness than of the admission of the dying deposition. As noted earlier, the consideration relevant to the admission of the said dying declaration has been already discussed.

In ***Attorney General Vs. Visuvalingam 47 NLR 286***, the court held that,

> *"when contradictions are marked, judge should direct his attention to the issue whether they are material or not and witness should be given an opportunity of explaining those that matter."*

It is noted that, when dealing with the issue of credibility the trial judge has directed his attention to this issue, and PW2 was given an opportunity to explain the exact point where the said dying deposition was made. The said evidence has been well considered by the trial judge and therefore, we do not wish to interfere with the said findings. We observe that, PW2 giving evidence has been consistent and has withstood the test of cross examination. Her testimony taken as a whole does not reflect any attempt of suppression or an attempt to depart from the truth. In the circumstances, we observe that the said contradiction highlighted by the appellant, per se or inter se is not a material contradiction which goes to the root of the case.

In ***AG v. Sandanam Pitchi Mary Theresa (2011) 2 SLR 292,*** the Court held that,

> *"Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance"*

Ranjith Perera (PW4), states that on the date of the incident around 8.00PM, the Appellant had come to his house armed with a knife and had threatened him by stating "I came here after killing sister and her husband (referring to the two deceased) I will kill you, but I will not kill you". The counsel for the Appellant raised objection to the admission of the said confession made to PW4 on the basis that there was no reason for the Appellant to meet PW4 at the time in question and confess that he committed a murder. It is observed that PW4 is connected to the Appellant by marriage and resides 100 meters away from the house of the Appellant. It is an admitted fact that the Appellant had visited the house of PW4 in the afternoon, of the date material to this incident.

In the trial Court the Appellant contended, that he never met PW4 that night. As noted earlier, the Appellant questions the admission of the said confession on the basis that, it is not probable that a person accused of such a serious offence would make a verbal statement confessing to murder in the given circumstances.

When evaluating evidence of PW4, it is noted that the confession made by the Appellant is relevant and admissible and consists of material facts which suggest an inference that the Appellant committed the offence. It is also noted that there is no infirmity suggested by the defence that the confession was made under circumstances of threat or deception and therefore made involuntarily. Accordingly, we see no reason to reject the said confession, and therefore can be safely acted upon.

A further ground of appeal, raised by the Appellant that the learned trial judge failed to evaluate evidence led under Section 27 of the Evidence Ordinance was not supported by the Counsel for the Appellant.

Accordingly, for all the above reasons, we uphold the conviction dated 01/06/2001, and the corresponding sentence and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

S.Thurairaja PC, J

I agree.

JUDGE OF THE COURT OF APPEAL