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

In the matter of an Appeal under Section 154(P) of the Constitution read with Section 331 of the Criminal Procedure Act No. 15 of 1979.

C.A. Case No: 275/2014

H.C. Colombo Case No: 5194/2010

Hon. Attorney General

Complainant

-Vs-

Millage Sunil Fernando

Accused

-And Now-

Millage Sunil Fernando

Accused-Appellant

-Vs-

Hon. Attorney General

Complainant-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

K. Priyantha Fernando J.

Counsel : Neranjan Jayasinghe for the Accused-Appellant.

Azard Navavi, SSC for the Respondent.

Written Submissions of the Accused-Appellant filed on: 16/07/2018

Written Submissions of the Complainant-Respondent filed on:18/09/2018

Argued on : 05/02/2019

Judgment on : 11/03/2019

A.L. Shiran Gooneratne J.

The Accused-Appellant (hereinafter referred to as the Appellant) was indicted under Section 296 of the Penal Code in the High Court of Colombo for causing the death of Millage Sarath Fernando (hereinafter referred to as the deceased) in the 1st count and for causing simple hurt to Don Liyanapathiranage Sisira Kumara, in the 2nd count, an offence punishable under Section 315 of the Penal Code. At the conclusion of the trial, the Appellant was found guilty in the 1st count and was sentenced to death. He was acquitted in the 2nd count.

Aggrieved by the said conviction and sentence, the Appellant has raised the following grounds of appeal;

(1) has the learned trial judge relied on the uncorroborated testimony of PW1 to convict the Appellant

(2) was there sufficient light at the scene of the crime to have made a positive identification of the Appellant

(3) has the learned trial judge taken into consideration the contradictory nature in evidence regarding the place where the deceased had fallen after the attack

The wife of the deceased, Erandi Neranjana (PW1), states that around 10 PM on the date of the incident, she heard footsteps from the rear compound of the house, and she felt the presence of a person. She thought that the deceased was trying to frighten her. Around 5 to 10 minutes later the deceased had tapped at the window and wanted her to prepare dinner for "Sisira Uncle" (Sisira) as well, who lived in a shack in the compound of the house. PW1 had alerted the deceased of the unusual sound she heard from the rear compound of the house and the deceased had gone to check on it. A while later she had heard the deceased saying, Sunil why are you hear.

"මට ඇසුනා එයා කතා කරනවා සුනිල් අයියේ මොකද මෙහේ කියලා."

Sunil, identified by PW1 as the Appellant, is a close relation of the deceased who lived 20 to 30 meters away from the house of the deceased. The

witness speaks of an animosity which prevailed between the parties regarding a land dispute. PW1 did not like the presence of the Appellant in their compound at that time of the night. Being curious, she had gone close to the window, where she saw the Appellant with his arm around the deceased. The deceased had wanted her to bring a glass of water and when she went out with the glass in hand, she heard the deceased saying "Baba Aiye". Baba Aiya is a person who lives close to the house of the deceased, under whom the deceased was employed. At that moment the witness had seen the Appellant pulling a knife out from the chest of the deceased. She also heard Sisira shouting, Sunil what have you done to him. PW1 had seen the Appellant standing under the street light looking down on the deceased fallen on the ground. Later she had seen sisira with bleeding injuries on his hand. The said injured was not present in the High Court nor his deposition in the non-summery inquiry admitted as evidence, in terms of the Evidence Ordinance. The Appellant was arrested less than 2 hrs. after the attack. A knife recovered from the Appellant at the time of arrest was not produced in evidence. The fact that the knife was recovered from the possession of the Appellant, was not challenged by the defence.

In cross examination PW1, stated that from the street light she saw the compound of the house and beyond, extending up to the road. We observe that in cross examination, not a single question has been posed to the witness regarding the light condition or a mistaken identity of the Appellant. We also observe that

Contradictions marked V1 and V2, are related to events prior to the attack taking place and does not go to the root of this incident which could impeach the credibility of the evidence given by PW1.

According to the medical evidence, death was caused due to hemorrhage and hemothorax due to penetrating stab injury to the aorta.

In the light of the said evidence, I will now turn to the 1st and 2nd grounds of appeal.

The stand taken by the defence is that, since the eye witness heard the deceased uttering the name of "Baba Aiya", there is a possibility that "Baba Aiya" is the person who stabbed the deceased.

It is in evidence, that the deceased had identified the Appellant at the scene of the crime moments before the attack took place and was surprised to see him in the compound of his house at that time of the day. At the time of the attack the Appellant has been clearly identified by the eye witness pulling a knife out from the chest of the deceased. The eye witness does not speak to the presence of Baba Aiya. However, the stand taken by the counsel for the Appellant that Baba Aiya stabbed the deceased was never put to this witness. Therefore, the eye witness evidence on this point stands unchallenged.

In the case of ***Ajith Samarakoon vs. State 2004 2 SLR page 209 at page 230 Ninian Jayasuriya, J.***, observed that;

"evidence not challenged or impugned in cross examination can be considered as admitted and is provable against the accused."

In ***Edrick de Silva vs. Chandradasa de Silva 70 NLR page 169 at 170 Justice H.N.G. Fernando,*** observed that;

"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 "prove" 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."

In this case, after lengthy cross examination, the eye witness evidence stands strong and even though uncorroborated, can be safely acted upon.

IP Upul Samarasinghe (PW7), the investigating officer who arrived at the scene at 00.10 AM, on 24/08/2005, has observed that there was sufficient light at the scene of the crime emanating from the street light and from a bulb burning inside the house. He has identified the deceased fallen close to the street light and also has observed blood marks stretching from the scene of the crime to the place where the deceased was found fallen with injuries.

Even though, the Appellant has serious concerns about the light condition at the time of identifying the Appellant by the eye witness, the defence has failed

to suggest or to draw any inference that the prevailing light was not sufficient for a proper identification. On the contrary PW7 has observed that there was sufficient light at the scene of the crime. The doubt urged regarding the light condition and of the identification of the Appellant should have necessarily put in cross examination to the investigating officer or any other officer who participated in the investigation, which the defence has failed to do. In the circumstances we are convinced that the identification of the Appellant by the eye witness is proved beyond any reasonable doubt.

The 3rd ground of appeal is in relation to the evidence of PW1 and the evidence of PW7 regarding the place where the injured fell after the attack. PW7 clearly states that he observed blood marks from the place of attack to the place where the deceased was fallen. P.S. Gamaathige Lionel, (PW9), in his evidence states that, he had observed blood marks from the compound of the house to the place where the deceased was fallen. This clearly shows that there has been a movement of the deceased from the place of attack to where he was fallen. An alternate position has not been taken up or suggested to any of the prosecution witnesses by the defence. Accordingly, we see no infirmity in acting upon the said evidence by the trial judge.

In ***CA Appeal 78-80/2001, Ranjith Silva J. cited with approval the judgment in Fraad Vs. Brown & Company Ltd., 20 NLR at page 283,*** where the Privy Council observed that;

"It is rare that a decision of a Judge so express, so explicit upon a point of fact purely, is over ruled by a Court of Appeal, because the Court of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in questions of veracity so direct and so specific as these, a Court of Appeal will over-rule a judge of first instance."

For all the above reasons, we are of the view that the conviction should stand. Accordingly, the conviction dated 24/11/2014 and the corresponding sentence is affirmed and the appeal dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL