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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Case No: 55/2014
H.C. Matara Case No: 224/2009

The Democratic Socialist Republic of Sri Lanka

Complainant

-Vs-

Loku Yaddehige Jagath alias Chutta

Accused

-And Now Between-

Loku Yaddehige Jagath alias Chutta

Accused-Appellant

-Vs-

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

Complainant-Respondent

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

&

K. Priyantha Fernando J.

Counsel : Chathura Galhena with Manoja Gunawardana for the Accused-Appellant.

P. Kumararatnam, SDSG for the Respondent.

Written Submissions of the Accused-Appellant filed on: 16/02/2018

Written Submissions of the Complainant-Respondent filed on:08/08/2018

Argued on : 07/02/2019

Judgment on : 15/03/2019

A.L. Shiran Gooneratne J.

The Accused Appellant (herein after referred to as the Appellant) was indicted in the High Court of Matara for causing the death of Yakdehige Dayawathi (herein after referred to as the deceased) in terms of Section 296 of the Penal Code. Upon conviction the Appellant was sentenced to death.

The facts of the case, briefly are as follows;

Shanika Surangi (PW1), an eye witness, is the eldest daughter of the deceased, who was 14 years at the time of this incident. According to her

evidence, around 10.30 PM on the date of the incident, the deceased had identified a voice to be that of chutta who was insisting that he be given a cup. Chutta disliked the deceased, since she had rebuked the Appellant for consuming alcohol with her husband. Having taken a cup from the kitchen which was outside the house, Chutta had come back to returned the cup and had insisted that the deceased opened the door. Since the door was not opened Chutta in an abusive manner had said that he had certain matters to be settled with the deceased. At that moment, the deceased had screamed for help and since no one had responded, the deceased and PW1, armed themselves with two clubs, which were inside the house. Moments later, the witness had observed the thatch made out of coconut leafs pushed aside from the door way, and the deceased screaming. At this point PW1 had seen the Appellant pulling a knife from the chest of the deceased.

PW1 had held on to the deceased and realized that the deceased was bleeding. At this moment PW1 had seen Chutta who was armed with a knife running towards the road and she had given chase to him for a distance of about 45 meters. Medical evidence reveals a gaping stab injury measuring 3cm x 1cm in size, situated over the front of the left upper chest wall. Lokugamage Guneratne (PW7), the investigating officer had observed blood stains at the entrance to the house, which corroborates the evidence of the eye witness where the stabbing took place.

The first ground of appeal advance by the Appellant is that;

(1) The identification of the Appellant is not supported by evidence.

According to the evidence of PW1, the house that the deceased lived consisted of a single room which had a temporary thatch made out of coconut leafs to cover the entrance to the room. The eye witness describes the Appellant as a person well known to her father and a frequent visitor to their house. She also stated that the Appellant lived close to their house and the Appellants father was also known to her. She re-calls that the incident took place on a full moon poya day. The Appellant had been seen carrying a torch made out of coconut leafs (පොල්අතු කෑල්ලක් පත්තු කරගෙන....) in hand, when he came to get the cup and also when he came to return it. She has identified the Appellant running towards the road soon after the stabbing of the deceased. She also re-calls a lamp burning inside the house. She had made a statement to the police within hours from the incident.

In cross examination the defence suggested that the Appellant came to the house that night in the company of a person named Palitha, which the witness has flatly denied. She admits seen three people running on the road soon after this incident. There is no denial on the part of the defence that the Appellant had come to the house of the deceased that night. The defence has suggested that the Appellants sudden anger after consuming liquor has resulted in the death of the deceased. We observe that the defence has failed to raise a single question on mistaken identity.

It is also observed that the prosecution has dealt sufficiently with circumstances in which the eye witness first recognized the Appellant. PW1 recognized a person who was known to her and did not testify to any difficulty in recognizing the Appellant. This is not a case where the eye witness abruptly came across the Appellant. The witness had identified the Appellant on two separate occasions and on both occasions did not entertain any doubt regarding the identity of the Appellant. In the circumstances we are of the view that the prosecution has established the identity of the Appellant beyond reasonable doubt.

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."*

I will now turn to issues No. 2 and No. 3.

(2) has the learned trial judge analyzed the contradictions marked in its proper context.

(3) has the learned high court judge failed to evaluate the evidence of PW1, which goes to the root of culpability of the Appellant.

Since both the above grounds of appeal arise from the evidence given by PW1, I will deal with both issues together.

The counsel for the Appellant submits that the trial judge has not properly analyzed the contradictions marked V1 to V3, which arise from the statement made by the eye witness to the police.

Contradiction marked V1, relates to the time of the commencement of the transaction. The contradiction arises from an alleged time discrepancy of 1 hour. Contradiction marked V2, is whether the cup asked for by the Appellant was given by the deceased or whether it was taken from the kitchen by the Appellant. V3 relates to whether the thatch covering the door was kept aside from the door way by the Appellant or whether it was throne outside the house.

We observe that the learned trial judge has considered V1 to V3 and has come to the conclusion that the contradictions do not go to the root of this case.

> *"When a statement had been contradicted by an earlier statement the earlier statement does not become evidence of the fact stated in it and the inconsistency is relevant only regarding the credibility of evidence. It can never be substantive evidence.* ***(Dias vs. Kiriwantha (1918) 5 C.W.R. 187)"***

The credibility of a witness can be impugned by the test of inconsistency Per Se. Section 155 (c) of the Evidence Ordinance sets out that credibility of a

witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

It is important to note that evidence given by PW1 relates to a traumatic experience which took place 10 years prior to giving evidence. She has given an eye witness account of a moving incident, where she witnessed the murder of her mother. The defence failed to assail the credibility of her evidence on contradictions or omissions, where the Court could have arrived at a deferent conclusion. Therefore, we see no merit in the grounds of Appeal No. 2 and No. 3.

Muthumala Ariyadasa (PW9), hearing cries of the deceased, had gone to the house of the deceased moments later, and had seen the deceased fallen on the ground. When inquired as to what took place, the deceased had said *Sudda stabbed me*. (සුද්දා මට පිහියෙන් ඇන්නා). The medical evidence confirms that there could be no impairment of speech of the deceased for about 20 minutes from the time of the fatal stab injury. The defence has not denied the making of the said dying declaration. PW9 identified the Appellant as the person referred to as Sudda, and stated that the Appellant was known in the village as Sudda. According to PW1, the Appellant was known as Chutta. The learned trial judge when analyzing the dying declaration, at page 281, has concluded that the deceased referred to the person who stabbed her as Sudda alias Chutta, which is not supported in evidence. Therefore the 4th ground of Appeal was raised on the basis that.

(4) the learned high court judge has misdirected himself when analyzing the dying declaration.

It is noted that the prosecution did not question PW9, as to whether the Appellant was also known as Sudda. Therefore, the said discrepancy remain unanswered which concerns the identity of the Appellant. We observe that the said discrepancy has not been considered in its context, by the learned trial judge. It is trite law that due care and caution must be exercised in considering the weight to be given to a dying declaration.

In ***Meharban Singh Vs. State of M.P., AIR 2002 SC 299 (300)***, court held that;

> *"where evidence of witnesses coupled with medical evidence and other surrounding circumstances proved that dying declaration given by the deceased was true, the conviction of accused was not interfered."*

We are also mindful of the decision in ***Weerappan vs. The Queen (1971) 76 NLR 109,*** where ***H. N. G. Fernando C.J.*** held;

> *"it would be a non-direction amounting to a misdirection if the trial Judge omitted to direct the jury that a statement of a deceased person must be considered with care, because the person himself is not before the Court, is not under oath, and cannot be cross-examined."*

The dying declaration is not the only evidence relied upon by the learned High Court Judge to base the conviction. Considering the cogent evidence given by PW1 and the unchallenged medical evidence and the evidence of the investigating officer, we have already held that the identity of the Appellant is proved beyond reasonable doubt. Therefore, we do not see any reason to disbelieve PW1 or to look for further corroboration regarding the identity of the Appellant. Accordingly, the Court is of the view that it could safely rely on the evidence of PW1, the eye witness to this incident, to affirm the conviction of the Appellant for the offence charged.

In the circumstances, we see no reason to interfere with the conviction dated 13/02/2014, and the corresponding sentence.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL