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

In the matter of an Appeal under and in terms of Article 154P (6) of the Constitution read with Provision 11 (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

Vs

1. Randeniya Koralalage Ajith Udaya Kumara
   Surakkulama
   Mudalakkuliya.
2. Herath Mudiyanselage Mahesh Erranga Herath
   Surakkulama
   Mudalakkuliya

   ACCUSED

Case No. CA 25/2017

HC (Chilaw) Case No. HC 115/2005

AND NOW BETWEEN

1. Randeniya Koralalage Ajith Udaya Kumara
   Surakkulama
   Mudalakkuliya.

ACCUSED – APPELLANT

Vs

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

BEFORE : **Deepali Wijesundera J.**
: **Achala Wengappuli J.**

COUNSEL : Anura Maddegoda PC with Jayani Jayasundera for the Accused – Appellant
Anoopa De Silva S.S.C. for the Respondent.

ARGUED ON : 20th June, 2019

DECIDED ON : 05th July, 2019

Deepali Wijesundera J.

The appellant with another person was indicted in the High Court of Puttalam for causing the death of Illeperuma Arachchige Don Gunatilake an offence punishable under section 296 of the Penal Code.

After trial first accused appellant was found guilty and convicted and sentenced to eight years RI under section 297 of the Penal Code. The second accused was discharged and acquitted at the end of the prosecution case under section 200 (1) of Criminal Procedure Code.

The evidence of the prosecution was that on the day in question at about 8.30 in the night, the first and second accused had come to the housed of the deceased in a three wheeler and called the deceased to go somewhere which he had refused. Then the appellant is alleged to have taken a fence post from the nearby fence and dealt a blow on the deceased's head after which he had fallen to the ground. He was taken to the closest hospital from where he has been transferred to Colombo National Hospital where he had succumbed to his injuries. The daughter of the deceased who was the main witness at the High Court trial had testified that she was in the kitchen when she heard the sound of a three wheeler and came out to see who had come. She had said she saw and identified the appellant and the other accused. When questioned on how she identified them she had said from the light of the lamp which was burning in the housed and also from the front light of the three wheeler. She has admitted in evidence that her father was drunk at the time. The other eye witness the son-in-law of the deceased had gone to the back of the house to bring a katty knife to attack the appellant and the second

accused who were attacking the deceased. Sujeewa had prevented Anura from attacking the second accused, according to her evidence.

Witness Anura has testified that he was seated on a pile of bricks in the garden when the three wheeler came. The learned counsel for the appellant argued that these two witnesses contradicted each other regarding the presence of witness Anura during the alleged incident. On perusal of the evidence of these two eye witnesses we find that both have given different evidence regarding the blow alleged to have been dealt on the decease's head. Sujeewa has said that she saw the deceased taking the fence pole and hitting the deceased where as the other witness said they both saw the deceased being hit but out of fear did not do anything. Sujeewa has testified that Anura brought a katti knife to attack the appellant but she prevented him from doing so. This part of evidence is not there in Anura's testimony. He does not say anything about going to the defence of the deceased. (vide pages 96 to 98 of the brief).

The appellant has given evidence on oath and has denied the incident. He has been cross examined at length and has stated that he found the deceased lying on the road drunk and that he helped him on to a bench near the gate to his house and that there was a boy said to be the son of the two eye witnesses who helped him. According to the

evidence of Anura the deceased was sitting on the said bench when the appellant attacked him.

The learned counsel for the appellant submitted that the learned trial Judge failed to apply the tests of credibility, consistency and interestedness when the evidence was considered. On the contradictions marked the reason given by the prosecution was the long years it had taken for the trial to commence and hence the witnesses could not remember what was said earlier. This could be considered and the contradictions as stated by the trial Judge are not very material to the prosecution evidence.

The learned trial Judge has convicted the appellant for culpable homicide not amounting to murder under grave and sudden provocation punishable under Section 297 of the Penal Code. The appellant's counsel argued that there was no evidence to convict him under this section. On perusal of the evidence of the two eye witness apart from a mere mention of some money taken by the first witness from the appellant's wife which was not returned there is no evidence to say that the deceased provoked the appellant. Apart from this there is nothing to say the deceased and the appellant had any animosity towards each other or that there was an argument prior to the attack. In page 255 of the brief the trial Judge has

stated that the evidence revealed provocation and a previous animosity among the parties, this is not correct. (page 19 of the judgment).

> "විත්තිකරු විසින් මරණකරු හට පහර දෙන අවස්ථාවේදී මරණකරු සහ විත්තිකරු අතර බහින්බස් වීමක් සිදු වී ඇති හෙයින් ද, විත්තිකරු මරණකරු සමඟ අමනාපයෙන් සිටි බවට පැමිණිල්ලේ සාක්ෂි වලින් හෙළිදරව් වන හෙයින් ද, විත්තිකරු විසින් මරණකරු හට පහර දෙන අවස්ථාවේදී ප්‍රකෝපවීමක් හේතුවෙන් පහර දී ඇති හෙයින් ද, විත්තිකරුට මරණකරුගේ මරණය සිදු කිරීමේ චේතනාවක් තිබුණා යැයි ඔප්පු කිරීමට පැමිණිල්ලට හැකියාවක් පැන නොනගී."

This is a misdirection on the part of the trial Judge there is no evidence on provocation.

The learned Senior State Counsel citing the judgment in **Sunil vs AG 1999 3 SLR 191** said that there is an embroidery of facts in the instant case. This we find is not relevant to the instant case. The learned Senior State Counsel argued that the learned trial Judge after summarizing the evidence has analysed the evidence and referred to pages 253 and 254 of the judgment.

The appellant's counsel submitted that the learned trial Judge failed to consider the defence evidence and failed to consider the pertinent evidence and has considered irrelevant evidence. The

judgments in **Wijepala vs AG CA 80/95 SC 104/99** was cited where it was stated *"that the evidence of the sole eye witness raised strong doubt as to the guilt of the appellant and the court should have given the benefit of that doubt to the appellant".*

He also cited the judgment in **James Silva vs The Republic CA SC 5/78** where it was said;

> ***"There is a serious misdirection in law. It is a grave error for a trial Judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence."***

Citing the judgment in **Moses vs State 1999 3 SLR 401** where it is stated;

> ***"S. 203, s. 283 (1) – Make provision that the judgment shall be written by the Judge who heard the case and shall be***

dated and signed by him. It is a mandatory requirement – A duty is cast on the Judges to give reasons for their decisions, as their decisions are subject to review by superior courts."

The appellant's argument was that the learned trial Judge failed to comply with Section 283 (1) of the Criminal Procedure Code by failing to give reasons for his findings and thereby deprived the appellant a fair trial. This case is not relevant to the instant case.

In this case the trial Judge had failed to give reasons but in the instant case he has given reasons but failed to apply the relevant tests properly analysing the evidence.

In **Chandrasena and others vs Munaweera 1998 3 SLR 94** it was held;

"The mere outline of the prosecution and defence without reasons being given for the decision is an insufficient discharge of duty cast upon a Judge by the provisions of S.306 (1).

The weight of authority is to the effect that the failure to observe the imperative provisions of S.306 is a fatal irregularity."

We find that the learned trial Judge has failed to analyse and evaluative the evidence that was led before him in a very sparse and scanty judgment. A mere outline of the prosecution and defence evidence without giving reasons for the decision is not sufficient to discharge the duty cast upon a trial judge as stated above in the said judgment.

The learned trial Judge has misdirected himself when he decided that there was evidence to prove grave and sudden provocation when there was no evidence of provocation. The trial Judge has seriously misdirected himself and thereby caused injustice to the appellant.

Credibility of a witness has to be decided by applying the tests of probability and improbability, consistence and inconsistence, interestedness and disinterestedness and spontaneity and belatedness. In the instant case the trial Judge has failed to employ these tests.

For the afore stated reasons we find that the trial Judge has convicted the appellant without evaluating the evidence properly and arrived at the wrong conclusion on grave and sudden provocation. We set aside the judgment and conviction dated 08/03/2017 and acquit the appellant.

Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Achala Wengappuli J.

I agree.

JUDGE OF THE COURT OF APPEAL