IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Court of Appeal Case No. HCC 44/2015

High Court of Gampaha Case No. HC 69/2009

Don Chandana Priyantha Rupasinghe

Accused

AND NOW BETWEEN

Don Chandana Priyantha Rupasinghe

Accused Appellant

V.

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

Complainant Respondent

BEFORE : **K.K. WICKREMASINGHE, J**

K. PRIYANTHA FERNANDO, J

COUNSEL : Shavindra Fernando PC with Ananda Weerasinghe for the Accused Appellant.

Rohantha Abeysuriya ASG for the Respondent.

ARGUED ON : 30.09.2019

WRITTEN SUBMISSIONS

FILED ON : 26.01.2018 by the Accused Appellant.

05.03.2019 by the Respondent.

JUDGMENT ON : 26.11.2019

K. PRIYANTHA FERNANDO, J.

01. The Accused Appellant (Appellant) in this case was indicted in the High Court of Gampaha on one count of murder. The victim (deceased) Thejani Rupasinghe was Appellant's wife. After trial the learned High Court Judge found the Appellant guilty of the charge and sentenced him to death. Being aggrieved by the said conviction and the sentence the Appellant preferred the instant appeal. The grounds of appeal as urged by the counsel for the Appellant at the argument stage are:

    1. That the learned Trial Judge erred in concluding that the weapon was fired from a distance of 30cm away from the head of the deceased

when in fact the evidence disclosed that the nozzle of the weapon was almost touching the head of the deceased when the shot was fired.

2. That the learned Trial Judge made the distance the whole ground for rejecting the defence claim that it was a case of suicide.

3. That the learned Trial Judge took into account hearsay evidence which was of great prejudicial value against the Appellant.

4. That the learned Trial Judge failed to consider the defence in a fair manner and the Appellant was deprived of a fair trial.

02. Brief facts of the case are, that the Appellant and the victim (deceased) were husband and wife. Appellant was a serving Brigadier in the Sri Lankan Army. On the fateful night the Appellant had been sleeping with the deceased in their bedroom upstairs. PW2 who was the brother of the victim had been sleeping in another bedroom upstairs with the son of the Appellant (PW1). All bed rooms had been air-conditioned. PW2 had heard a noise. He had thought that someone threw a stone at the gate. Then the Appellant had come shouting saying "අපි ඉවරයි අපි ඉවරයි". PW1 had followed the Appellant to the bedroom that the Appellant and the deceased were sleeping, to see the deceased was on the bed straight. He had seen saliva coming out of her mouth as if she was having an epileptic fit. He had then seen blood on her head.

03. Soldiers who had been downstairs had come with the son (PW1) and they had taken the deceased to the hospital. Appellant had driven the vehicle to

the hospital. Deceased had succumbed to her injuries about 2 hours after admission to the hospital.

04. There is no dispute that the shot was fired from the personal weapon of the Appellant and that the deceased died of that gunshot injury. The version of the Appellant is that the deceased committed suicide by shooting herself. Appellant gave a lengthy dock statement. While he was sleeping with the deceased, he had heard a noise of cocking a weapon. From the light emerged from the window he had seen the deceased holding the weapon towards her head. He had tried to grab the weapon but the deceased had shot herself. He had quickly called the son. He had rushed the deceased to the hospital with the son, brother in law and with the assistance of the soldiers. PW1 (son of the deceased) listed in the indictment was called to give evidence by the defence.

05. The only eye witness to the shooting who is among the living is the Appellant. The version of the prosecution is that the Appellant had shot at the deceased. Version of the Appellant is that the deceased committed suicide. Therefore, it is the duty of the Trial Judge to carefully analyze all the evidence direct and circumstantial including the medical evidence and to decide whether the prosecution has proved beyond reasonable doubt that it was the Appellant who shot at the deceased.

06. All four grounds of appeal can be considered together as they all are based on the same footing where the issue is whether it was homicide or suicide. I have carefully considered the evidence adduced at the Trial, Judgment of the learned High Court Judge, grounds of appeal urged by the Appellant,

written submissions filed by counsel and oral submissions made by counsel for the Appellant as well as the Respondent at the argument.

07. Counsel for the Appellant submitted that the learned High Court Judge erred when he decided that at the time the shot from the firearm was fired, the distance between the firearm and the head of the deceased (injury) had been 30 centimeters. The Consultant Judicial Medical Officer Dr. Wijewardena who testified on behalf of the defence was more qualified and experienced than the Medical Officer Dr. Lansakkara who testified for the prosecution, counsel submitted. Dr. Lansakkara had never observed the blood platter seen in the photograph of the victim's hand marked as 4V13(3) that was taken by the SOCO officers. It is the contention of the counsel for the Appellant that those blood platter shows that it had been a suicide as the blood would spread on the hand of the person who holds the weapon when that person commits suicide by shooting herself according to Dr. Wijewardena.

08. Counsel further submitted that the investigating officers have failed to check the fingerprints on the weapon so that they could have excluded suicide if there were no fingerprints of the deceased on the weapon. PW2 who is the brother of the deceased had been bias towards the prosecution. On the material points PW1 who was called to give evidence by the defence has contradicted the evidence given by PW2, counsel submitted. The learned Trial Judge was wrong when she found that the bullet had travelled parallel to the floor as according to entry wound and the exit wound the bullet had travelled upwards.

09. Counsel for the Respondent submitted that the position taken by the defence is improbable. As the deceased had used the weapon twice prior to this instance, the Appellant should have taken more precautions to keep the weapon safe. However, counsel for the Respondent conceded that the learned Trial Judge has misinterpreted the range, when she said at page 1194 of her Judgment that the distance between the head and the weapon at the time the shot was fired was 30 centimeters as that was not the evidence of the Medical Officer who gave evidence for the prosecution.

10. It is the contention of the counsel for the Appellant that the deceased had received a blood platter on her hand as she shot herself. Counsel refers to the evidence of Dr. Wijewardena. The photograph of the victim's hand marked as 4V13(3) was taken by the SOCO officers. Dr. Wijewardena testified that a blood platter is visible on the hand of the deceased. Dr. Wijewardena who testified on behalf of the defence had not personally observed the body of the deceased. He merely gives evidence on seeing the photograph after 5 years. Further, there is a possibility of blood getting onto the hand even when the deceased was being taken to the hospital or when she was given initial treatment at the hospital. Therefore, I am of the view that it is unsafe to conclude that the blood platter seen on the hand of the deceased would have spread on the hand when she shot herself with the pistol.

11. In her Judgment at page 45 (page 1194 of the brief) the learned Trial Judge said;

> *"මරණකාරියට වෙඩි තැබීම සිදුවන විට ගිනි අවිය සහ තුවාලය අතර දුර සෙ.මී. 30 ක් බවට විත්තියෙන් කැඳවන ලද වෛද්‍යවරයාද පිලිගනී. සියදිවි නසා ගැනීමකදී බොහෝ විට ගිනි අවිය පැවතිය හැක්කේ* ***Contact Range*** *එනම්, එය සිරුරට ස්පර්ශව බව පැහැදිලි කෙරිනි. ඒ*

අනුව ගිනි අවිය හා සිරුර අතර පැවති පරතරය මෙම මරණය සියදිවි නසාගැනීමක් බවට නිගමනය කිරීමට අවකාශයක් නැත.

ඉහතින් සඳහන් කළ කරුණු අනුව චිත්තිය මෙම මරණකාරිය සියදිවි නසාගැනීමක් කළ බවට හුවා දැක්වීමට උත්සාහ කළද, එය අධිකරණයට පිළිගත නොහැක."

12. Dr. Lansakkara, the witness for the prosecution who conducted the autopsy on the body of the deceased in his evidence said that the weapon has been almost touching the head of the deceased at the time it was fired. In his evidence at page 465 he said;

"මගේ නිරීක්ෂණ අනුව මෙය සාමාන්‍යයෙන් කොණ්ඩය තිබෙද්දී ටැටුවින් නමැති ක්‍රියාවලිය කොණ්ඩය හරහා යාමේ සම්භාවිතාවය ගොඩක් අඩුයි. කොණ්ඩය අස්සේ වෙඩි බෙහෙත් නතර වුන නිසා මාගේ නිගමනය වුනේ මෙය සමට කිට්ටු, කොණ්ඩය අස්සේ, සමට කිට්ටුම තැනකදී පත්තු වුන වෙඩි උණ්ඩයක් නිසා සිදුවූ තුවාලයක් බවයි."

13. Dr. Wijewardena who testified for the defence clearly said that the nozzle of the weapon had been almost touching the head when the weapon was fired. At pages 971 and 972 the witness said;

ප්‍ර : ඔබට යෝජනා කළහොත් මේ පශ්චාත් මරණ පරීක්ෂණ වාර්තාවේ සඳහන් අනුව, සෙන්ටිමීටර් 30 ක් අතර දුරක දී සිදුවූ තුවාලයක් කියලා යෝජනා කළහොත් ඔබ පිළිගන්නවාද?

උ : මැතිනියට, හිසට ආසන්නයේ හිසට ගෑවෙමින් පවතින අවස්ථාවකදී ගිනි අවි ක්‍රියාත්මක වෙව්ව තුවාලයක් බැවින් සෙන්ටිමීටර් 30 වෙඩි වැදීමකින් වෙව්ව තුවාලයක් වශයෙන් පිළිගන්නවා.

14. Therefore, it is clear that the learned Trial Judge was wrong when she said that the Doctor Wijewardena who testified for defence admitted that the range between the head and the weapon had been 30 centimeters. Learned Additional Solicitor General for the Respondent conceded to the fact that the learned Trial Judge has misdirected herself when she concluded that the gap between the nozzle and the head had been 30 centimeters and that the doctor who testified for defence has admitted so. As submitted by the counsel for the Appellant, the learned Trial Judge has excluded suicide mainly on that wrong premise as said in her Judgment at page 1194.

15. The learned Trial Judge in her Judgment, accepting the evidence of Government Analyst on the damage to the mosquito net and the almirah, has concluded that the bullet had gone parallel to the floor. She has rejected the evidence of Dr. Wijewardena on that point as Dr. Wijewardena had gone to the scene after 5 years. Learned Trial Judge has again excluded the possibility of suicide on that basis stating that the bullet had travelled parallel to the floor. It is unlikely that the bullet could travel parallel to the floor if the deceased had shot herself, the learned Trial Judge concluded (page 1192).

16. However, the learned Trial Judge has again misdirected herself on the travel line of the bullet. According to the post mortem report of the deceased and the evidence of Dr. Lansakkara who conducted the autopsy

the entry wound had been 7 centimeters above the right ear (page 462) and the exit wound had been 12 centimeters above the left ear on the top of the head (page 471). Therefore, the bullet had clearly travelled upwards. Therefore, the learned Trial Judge was wrong when she excluded possibility of suicide on the basis that the bullet had travelled parallel to the floor. The travel line of the bullet has to be decided on the entry wound and the exit wound. The entry and the exit wounds also can clearly be seen in photographs marked and produced as 4V12(1) and 4V12(2).

17. The learned High Court Judge in her Judgment at page 1189 had said that the deceased was a housewife who had no weapon training and therefore the position taken by the defence that she had previously tried to shoot herself cannot be accepted. In his statement from the dock the Appellant had said that once the deceased had threatened to shoot one of his drivers named Galappaththi aiming the pistol to his head. In another incident the deceased had threatened to shoot herself holding the pistol after an argument. The above-mentioned Galappaththi who was the army driver attached to the Appellant also gave evidence on behalf of the defence. He testified to the fact that on an issue of the Appellant going to Anradhapura, the deceased had threatened to kill him with the pistol aiming the pistol at him. That had been about 5 months before the incident in this case. Prosecution had failed to mark any contradiction in his evidence to attack the credibility of Galappaththi. His evidence had been consistent. Although there is no evidence to say that the deceased was given weapon training, as a wife of a Brigadier in the army she had been familiar with the weapons, especially with the personal weapon of the Appellant.

18. Brother of the deceased who is the brother in law of the Appellant in his evidence has tried to show that the Appellant deliberately tried to delay

taking the deceased to hospital. Contrary to his evidence, the son of the deceased and the Appellant Chathura Dhananjaya Rupasinghe has given evidence. Although the above witness was the PW1 listed in the indictment, he was not called by the prosecution. He was called by the defence. He said that the Appellant drove the vehicle fast to the hospital. Although this witness was cross examined at length by the prosecution, his evidence was not challenged on this point. It is apparent that the witness PW2 was an interested witness who was bias towards the prosecution. PW1 also said in evidence that there had been instances where the deceased threatened to commit suicide while holding the pistol. The learned Trial Judge has failed to consider the evidence of the son PW1, when she came to the conclusion that the Accused was not telling the truth about the deceased trying to commit suicide before. She has only mentioned about the dock statement on that issue, but not considered the evidence of PW 1 who was called by defence.

19. As submitted by the counsel for the Appellant and conceded by the counsel for the Respondent, investigating officers have failed to check for the fingerprints on the pistol. Prosecution has failed even to produce evidence on whether the deceased was right-handed or left-handed. If she was left-handed, that evidence could have excluded suicide as the entry wound was above the right ear of the deceased.

20. As submitted by the counsel for the Respondent, the firearm used had been issued to the Appellant officially. As there had been previous incidents of handling the weapon by the deceased, the Appellant could have taken extra precautions in looking after the weapon preventing the deceased getting access to it. As further submitted by the counsel for the Respondent, there

is no evidence to see where the weapon was kept that day before the couple went to sleep.

21. In case of ***Queen V. Sumanasena (66 N.L.R. 350)*** Court held;

> *"In a criminal case suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence."*

22. It is for the prosecution to prove beyond reasonable doubt that it was the Appellant who fired the shot on the deceased by direct or circumstantial evidence and to exclude suicide. In the above premise I find that the prosecution has failed to prove the charge beyond reasonable doubt against the Appellant. In the circumstances I see there is merit in the grounds urged on behalf of the Appellant. Therefore, we set aside the conviction and the sentence of death passed on the Accused-Appellant and acquit him.

Appeal is allowed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL