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

In the matter of application for appeal under section 331 of the Criminal Procedure ACT No.15 of 1979 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Case No:
CA 126/15

Wanniarachchi Kankanamge Jinawansa

HC Matara
Case No. HC 31/12

Accused-Appellant

The Attorney General
Attorney General's Department
Colombo 12

Respondent

Before : **Devika Abeyratne,J**

P.Kumararatnam,J

Counsel : Sharon Serasinghe for the Accused Appellant

Shaminda Wickrama, SC for the Respondent

Written Submissions On : 12.02.2018 (by the Accused-Appellant)
10.09.2018(by the Respondent)

Argued On : 16.02.2021

Decided On : 31.03.2021

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Devika Abeyratne,J

The accused appellant in this case *Wanni Arachchi Kankanamge Jinawansha* was convicted of the murder of one *Wanni Arachchi Kankanamge Somasiri* and sentenced to death by the High Court of *Matara* in case No 31/12. The appeal is against the said conviction and the sentence.

The case for the prosecution relied mainly on the only eyewitness *Wanni Arachchi Kankanamge Nimosha Budhdhika*, the nine year old son of the deceased who was with his father at the time of the incident.

PW 2 *Nimosha* was 12 years old when he gave evidence at the trial. At the hearing of the appeal it was strongly contended by the Counsel for the appellant that *Nimosha* is not a credible witness and was lying. It was further contended that when such an event takes place, specially a young child would not remember what really happened and hence, his evidence creates a doubt.

According to *Nimosha* the appellant is his uncle, (*Peeris Bappa*) who lives in close proximity to their house. Appellants' house is at the end of the disputed land where the incident had taken place. It transpired in the evidence that there was an on going dispute about the ownership of the land which *Nimosha* referred to as the *Maha Idama,* to where he had gone on the day of the incident with the deceased father. He had been about 7 feet behind the father who had cut three banana trees with the curved knife he had with him. The appellant who came with a knife and a pole had stated "either you or me" (එක්කෝ මම, එක්කො උඹ) and had assaulted his father with the pole. The first strike had been to the back of his father's shoulder and then father had fallen. As the appellant was continuing with his assault, PW 2 had run and informed PW 3 *Janaka* that his father was being assaulted by *Peeris*. PW 3 who had come in the three wheeler, after seeing the injured had got frightened. He, together with *Nimosha* and

another woman had gone to inform the wife of the deceased who was at work. Thereafter, he has taken them to the Police Station where both the wife of the deceased and PW 2 have given their statements.

When PW 2 was being cross examined, the trial had to be postponed twice as he had vomited and fainted on one occasion and on the other occasion he had complained of dizziness. It is obvious that the child who must be traumatized after witnessing his father being attacked in such a brutal manner, having to recall the incident again.

Nonetheless, when the evidence of PW 2 is considered, it appears that he has been very consistent and clear in his evidence and whenever a lapse on the part of his evidence was brought to his attention by the defence Counsel, he has given clear intelligent answers without any hesitation. Two contradictions and an omissions were highlighted from the evidence of PW 2 which the learned trial judge very correctly has held that it did not affect the root of the case and that the credibility of the witness was not affected by them.

A sword and a knife had been recovered by the Police from the locked house of the appellant subsequent to a section 27 statement.

According to the JMO *Dr Kithsiri Wijeweera* who performed the post mortem, 12 injuries inflicted by a blunt weapon have been identified and injuries No 7 and 8 on the head of the deceased were said to be necessarily fatal.

The evidence of the appellant under oath was to the effect that he and the deceased are not related, who he has known all his life and that they are from the same

village. It transpired that there was an animosity and ill will existing between them stemming from the ownership of the land where the incident had occurred. It appeared that the appellant was claiming the entirety of the land which was the cause for the dispute. In page 226 of the brief the appellant had stated that there were 18 complaints to the police regarding the disputed land and they were not in good terms for at least the last 10 years. In page 237 he has stated that the deceased was in the habit of assaulting him and had once set fire to his bicycle. This evidence was unchallenged.

The sequence of events according to the appellant is that, on the day of the incident, the deceased followed him home with a curved knife and a pole, blocked the doorway of the house and when he inquired why the deceased came inside the house, the deceased is alleged to have said that he too has a right to it and after an argument assaulted him with the knife which got entangled with his hair, and as a result he fell in a sitting position. The deceased had continued to assault him with a knife at which point the accused had taken the pole from the hand of the deceased and tried to fend him off defending himself with the help of the pole. Thereafter, both of them had fallen on some wooden planks which fell on their heads and legs, at which point, the deceased who was after liquor, had run away and was sighted fallen near the *jak* tree.

The appellant thereafter, had locked the house and gone to the town and after returning, he had spent the night on a hill. He had watched a police officer knocking on his door on three occasions and later forcing it open. Around midnight he had gone to the temple to spend the night and then has left to *Weligama* to check about some work and was arrested by the *Weligama* Police and handed over to the *Akuressa* Police. His estranged wife and child, were said to be in *Weligama* and according to his evidence before he could find their place, he has been arrested by the police. It transpired in his evidence that the wife and the child have been living in *Weligama* for over four years and he has never visited them.

The suggestion by the prosecution that the deceased was his uncle's son (*bappa's* son) was denied by him (page 249). However, it is noted that both have the same surname. On a closer reading of the evidence of the appellant there are obvious contradictory evidence which the appellant has not been able to explain. He has been constantly changing his stance.

It is noted that the learned trial judge while the accused was being cross examined in page 267 of the brief, had observed the strange behaviour of the appellant and had referred him to obtain a psychiatric report from the *Angoda* Hospital. The report from the consultant psychiatrist *Dr Neil Fernando* has recommended that he is fit to plead and stand trial and that the appellant is not suffering from any mental disorder.

Some unusual and strange steps have been taken thereafter. After the report was filed in court on 30.01.2015, an application has been made by the assigned counsel to conclude the matter adopting a short cut and to plead for a lesser offence of culpable homicide not amounting to murder on exception 4 to section 294 of the Penal Code.

On the following trial day being on 26.02.2015, the assigned Counsel *Mr. Thilak Amaratunga* had moved Court to discharge him from being the assigned Counsel on personal grounds. The learned trial judge in page 273 of the brief had made a comment that it was unusual for a Counsel to make such a request at the tail end of a case but nonetheless, as it was on personal grounds, his application had been considered and he had been discharged from being the assigned counsel for the appellant.

On the request of the appellant and with his consent, attorney at law, *Mr A.G Amerasinghe* has been appointed as the new assigned counsel for the appellant.

Subsequently, the evidence of JMO of the *Kalutara* Hospital *Dr. Maximus Fernando* has been led on behalf of the appellant. This doctor was also of the same opinion as *Dr Kithsiri Wijeweera* PW 6, who in his evidence said that the injuries to the head of the deceased could not have been caused by knocking his head on the *Jak* tree when running downhill. The expert witness had stated that the deceased would have had to run at such a high speed like *Ussain Bolt* to suffer the injuries to his head if it was to be from knocking against the *Jak* tree as suggested by the Counsel for the accused appellant.

PW 6 also had testified that the deceased would have had to run like a horse to get those injuries and has opined that they were from severe blows to the head. Further, no blood stains have been visible on the tree according to Police observations.

The only eyewitness PW 2 had testified he witnessed his father being attacked by his uncle the appellant. The Counsel for the Appellant was consistent in her argument that the son of the deceased was not present at the scene of the incident and anyhow he is not a credible witness.

It is important to note that the defence had not challenged the competency of PW 2 to give evidence at any stage of the trial. It is also observed that the learned State Counsel before leading evidence has endevoured to elicit from the child whether he was competent to give evidence by asking various general questions as to parents, siblings and school. It appears that only after establishing the competency of PW 2 to testify, the Counsel has commenced questioning about the incident.

E.R.S.R. Coomaraswami in his treatise " Law of Evidence" Vol 2 book 2 at page 658 has stated as follows referring to child witnesses:

"There is no requirement in English law, that the sworn evidence of a child witness needs to be corroborated as a matter of law. But the jury should be warned, not to look for corroboration, but of the risks involved in acting on the sole evidence of young girls or boys, though they may do so if convinced of the truth of such evidence…… This requirement is based on the susceptibility of children to the influence of others and to the surrender to their imaginations."

At page 659 it states, *"As regards the sworn testimony of children, there is no requirement as in England to warn of the risks involved in acting on their sole testimony, though it may be desirable to issue such a warning, though the failure to do so will generally not affect the conviction."*

It was stated in *Panchchi vs the State of U.P* (1998) 7 SCC 177, that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child can be easily swayed by what others tell him and thus a child witness is an easy prey to tutoring.

M.Ajith Kumara alias Ajith Vs. Attorney General in CA No 2018/2012, decided on 26.09.2014 is a case where a small child when he was about 5/6 years old at the time of the incident had witnessed his own mother, grandmother and the grandfather, being murdered. His evidence had been led when he was about 15 years of age and the trial judge who observed the demeanor and deportment of the child witness had considered him to be a truthful witness. *Gooneratne* J, had held that there was no basis to intervene and interfere in the reasoning of the trial judge and further went on to state that the " *defence had not succeeded in making any breakthrough in the evidence of the child witness to favour the defence case.'*

Likewise, in the instant case, the testimonial trustworthiness of the evidence of PW 2 was not affected by the cross examination. It appears that he had been cross examined as if he were an adult which was unfair which had made the learned trial judge to comment in page 15 of the judgment (page 302 of the brief)as follows:

"…මෙය කුඩා ළමයෙකු ව්‍යාකුලකර අසාධාරණ වාසියක් ලබා ගැනීමට කරන ලද වෘත්තිය ආචාර ධමර් වලට නොගැලපෙන ක්‍රියාවකි."

It is established that while the assault was in progress PW 2 has run to get assistance and had informed PW 3 and had come back almost immediately with PW3 and thereafter, had made a statement to the police with his mother . Further, on a perusal of the evidence of *Nimosha* PW 2 as stated earlier, his evidence has been intelligent, consistent and credible and therefore, believable. PW 3 has corroborated the evidence of PW2 that he was informed by PW 2 that his father was being assaulted by *Peeris Bappa* and immediately when he went to the scene and had witnessed the deceased fallen and injured. The evidence of PW 3 was unchallenged. Therefore, the appellants position that PW 2 was not present when the incident took place cannot be sustained.

On consideration of the totality of the evidence it is obvious that the version of the prosecution witnesses is more probable and anyhow, that the evidence of PW 2 is credible evidence who has witnessed the assault to his father which led to his demise. The prosecution has established beyond reasonable doubt that it is the act of the appellant that has caused the death of the deceased.

I will now turn to consider the submission of the Counsel for the defence to consider lesser culpability of the appellant under exception 4 of section 294 of the Penal Code and that there was no intention to commit murder on the part of the appellant. The judicial decisions in *Murugesu Vs The King* (1951) 52 NLR at page 471-472, *The King*

Vs Jinasekere 46 NLR in page 246, have been referred to by the Counsel for the appellant to justify his proposition.

It is unfortunate that the position of the defence regarding the continuous land disputes between the deceased and the enmity of the appellant was not put to the prosecution witnesses.

However, we are of the opinion that the following facts ought to be considered from the evidence that was elicited; the appellant bringing a sword and a knife to the place of incident; the utterance 'either you or me"; the previous complaints to the police and the admitted enmity between the parties; the deceased cutting or more aptly destroying the banana bushes for no apparent reason in the backdrop of existing disputes regarding the ownership of the land; the deceased having in possession a half empty, quarter bottle of liquor and the medical evidence that the deceased was under the influence of liquor to some mild degree; the amount of injuries on the body of the deceased.

The bone of contention seems to be the ownership of the land. Thus, the deceased felling the banana bushes would have definitely angered and upset the appellant. Although the appellant has stated that the act of the deceased cutting the banana bushes did not make him angry, it is hard to believe that to a prudent person, considering the past behaviour of the appellant where the land matters were concerned.

In such circumstances any prudent man could accept that the appellant has acted on cumulative provocation.

The learned Counsel for the Respondent has submitted that the evidence of the accused appellant, to the effect that the deceased encountered the injuries by running in to the *Jak* tree does not support his defence of cumulative provocation. Further, that the murderous intention was established by the injuries to the skull and face area. It was also submitted that the fact that the appellant leaving the area and being apprehended two days later does not help him with the plea of cumulative provocation.

It is important to consider the circumstances under which the alleged offence had taken place. It transpired that at least for a period of ten years there was an enmity existing between the deceased and the appellant based on the ownership of the "*Maha Idama*". The appellant refuses to acknowledge a relationship to the accused who bear the same surname. It is understood that merely on the surname a relationship cannot be established. However, from the evidence of PW 2 and the deceased claiming rights from the *Maha Idama,* it is a fair assumption that the parties could be relations. In that background the deceased felling the banana plants would have definitely angered the appellant.

In *King VS Bellana Vithanage Eddin* 41 NLR page 345 Court of Criminal Appeal observed thus;

> *"...In a charge of murder it is the duty of the Judge to put to the jury the alternative of finding. The accused guilty of culpable homicide not amounting to murder when there is any basis for such a finding in the evidence an record, although such defence was not raised nor relied upon by the accused."*

Therefore, it is our considered view that on the evidence that transpired in this case, it is the duty of the Court to consider whether the appellant is entitled to have the benefit of the lesser culpability.

It is on record that even at a late stage while the evidence of the accused appellant was in progress the Counsel has made such an application to Court to consider lesser culpability. It is obvious that the learned trial judge has either not given his mind or considered the application in the background of the afore stated evidence.

In consideration of the totality of the evidence in this case, that the appellant is guilty of the offence of culpable homicide not amounting to murder on the basis of sudden fight on cumulative provocation.

We therefore, set aside the finding and conviction for the offence of murder imposed by the trial judge and we find the appellant guilty of the offence of culpable homicide not amounting to murder an offence punishable under section 297 of the Penal Code. We set aside the sentence of death imposed by the trial judge.

We impose a sentence of 10 years rigorous imprisonment on the accused and a fine of Rs 5000/= and in default of which we order a further term of one year simple imprisonment.

Having regard to the fact that the accused appellant is incarcerated from the date of conviction, we further make order that the 10 year rigorous imprisonment should operate from 10.07.2015, namely the date of conviction.

The registrar is directed to send a copy of this judgment together with the original case record to the High Court of *Matara.*

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL