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

In the matter of an Appeal in terms of section 331 (1) of the Criminal Procedure Code No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0018/19

High Court of Tangalle Case No:

HC/23/2004

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Athavudha Witharana pathiranage Gunapala

ACCUSED

AND NOW BETWEEN

Athavudha Witharana pathiranage Gunapala

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: K Priyantha Fernando, J. (P. /C.A.)
	: Sampath B Abayakoon, J.
Counsel	: Dharshana Kuruppu with Sajini Elvitigala for, Accused-Appellant
	: Azard Navavi D.S.G. for the Respondent
Argued on	: 04-10-2021
Written Submissions	: 25-11-2019 (By the Accused-Appellant)
	: 30-06-2020 (By the Respondent)
Decided on	: 26-10-2021

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) filed this appeal on being aggrieved by the conviction and sentence of him by the learned High Court judge of Tangalle.

The appellant was indicted before the High Court for committing the offence of murder of one Sisilihmy Amarakoon, punishable under section 296 of the Penal Code.

After trial, the appellant was found guilty as charged, by the judgment dated 07-01-2019 of the learned High Court judge of Tangalle and was sentenced to death accordingly.

At the hearing of the appeal, the learned counsel for the appellant urged the following three grounds of appeal for the consideration of this Court.

(1) The learned trial judge has failed to address her mind to the material inconsistencies and infirmities in the evidence adduced by the two alleged eye witnesses namely, PW-02 Kanthi Samarasekara and PW-03 Puspika Samarasekara and thereby have failed to consider that the reasonable doubt generated thereby should accrue to the advantage of the accused appellant.

(2) The learned trial judge has failed to consider the serious infirmities in the evidence of PW-02- Kanthi Samarasekara and PW-03 Pushpika Samarasekara with regard to the accused appellant carrying a knife and thereby has failed to consider that the evidence adduced by the said witnesses are highly improbable.

(3) The learned trial judge failed to take into consideration the absence of motive on the part the accused appellant to cause the death of the deceased and thereby has failed to consider that the circumstances of the case suggest involvement of a third party in the incident.

Before considering the grounds of appeal in detail, I would now briefly summarize the facts that led to the death of the deceased as borne out by evidence led in the action.

This is an incident that took place on the 28th of May 1997 at a place called Keselwatta in Katuwana Police area. PW-02 Kanthi Samarasekara the daughter of the deceased operated a small boutique in front of her house which was adjacent to Keselwatte-Udagomadiya road and her mother the deceased used to help her to run the boutique when necessary. According to the evidence of PW-02, her mother who came to the boutique at about 3.30 pm on the day of the incident was sitting on the half wall of the veranda when she saw the appellant who was also a relative, whom she identified as **'උක්කු'** coming from the direction of Udagomadiya. She has also seen her brother's daughter coming towards the boutique.

The appellant who came into the open veranda of the boutique, began assaulting the deceased using his fists, which resulted in her falling off the half wall where she was seated. The witness has intervened and helped her mother to stand. She has also seen the appellant in possession of a knife. Thereafter, the appellant who was in front of the boutique has started scolding them in foul language for making a Police complaint against the brother of the appellant about an illegal felling of timber. While doing so, he has again attacked the deceased using a wooden club which he picked from the ground. When the witness attempted to intervene, the appellant has started dragging her away, holding her hair by one hand and holding the knife by the other. This resulted in the deceased intervening by holding onto the appellant in order to rescue her daughter from the clutches of the appellant. While this was happening, the witness has seen the deceased falling onto the ground with a knife planted deep into her head. The appellant thereafter has run away from the scene. After informing the Police of the incident, the deceased has been admitted to the hospital where she succumbed to her injuries.

The evidence also reveals that the husband of PW-02 who runs a carpentry shed near the house was at home at the time of the incident and a boy who worked with him who has seen the incident had informed him what was happening. However, it appears that he has not intervened or even come out of the house, even though the incident has been going on for about ten to fifteen minutes. Although the learned counsel who appeared for the appellant in the High Court has made an attempt to portray that it was the husband of PW-02 who came with a knife, I am unable to find any basis for such involvement of him in the incident.

The above-mentioned boy, Madura Susantha who has given evidence at the trial has confirmed that the husband of PW-02 had no involvement in the incident.

PW-03 Pushpika Samarasekara was the brother's daughter mentioned by PW-02 in her evidence. According to her, she was in the habit of helping her grandmother at the boutique owned by her aunt. On the day of the incident, she has met her aunt while coming towards the boutique and has also seen the appellant whom she identified as **'උක්කු'** with a knife in his waist. Her evidence was that the appellant came and attacked while dragging PW-02 by holding her from her hair. According to her, it was then the grandmother attempted to rescue PW-02 from the appellant and was assaulted by him using a club. Thereafter, she has seen her grandmother being stabbed by the appellant in the back of her chest. She had seen that even with the injury, the deceased attempting to rescue PW-02 by clinging on to the appellant and being stabbed in the head for the second time. Her evidence also confirms the fact that a person called Thilak had attempted to stop the quarrel between the parties.

The evidence of the Judicial Medical Officer (JMO) clearly establishes the fatal nature of the stab injury suffered by the deceased to her head which has penetrated 95 mm. deep into the head. (Injury 01). The JMO has observed another cut injury on the back of the chest (Injury 02), as well as a scab and an abrasion on the abdomen area and on the knees of the deceased respectively. (Injury 03 and 04).

He has opined that the cut injury No 01 and 02 can be caused by using the Knife marked P-02 and injury No 04 by the wooden club marked P-01, which confirms the evidence of PW-02 and PW-03 who has identified the knife and the wooden pole as the weapons used when they gave evidence. He has also categorically excluded the possibility of injury No 01, namely, the deep stab wound to the head, happening unintentionally in a sudden fight. However, has expressed the opinion that injury No 04 could also be a result of a fall.

When called for a defence at the conclusion of the prosecution case, the appellant has made a statement from the dock and has called the earlier mentioned Thilak as a witness. In his dock statement, he has stated that while

passing an abandoned boutique in the evening, he was attacked by four persons, including witnesses 02 and 03, an old woman and one Darmadasa. It was his stand that in order to escape from them, he removed his clothes and ran away from the scene and he is unaware of anything else.

The earlier mentioned Thilak, who is supposed to have attempted to settle the dispute states in his evidence that when he came to the scene of the incident, both sides were quarrelling and attacking each other using stone, but could not stop the fight and he left the place as a result. His evidence also reveals that all the parties to the dispute are well known to each other as they are closely related.

With the above facts in mind, I will now proceed to consider the grounds of appeal urged by the learned counsel for the appellant in detail.

First and Second Grounds of Appeal: -

As both the above grounds are based on the premise that the learned trial judge failed to consider the inconsistencies, infirmities and the probabilities of the evidence of PW-02 and PW-03, both grounds will be considered together.

The learned counsel brought to the attention of the Court several pieces of the evidence of the two witnesses which he claims inconsistent and contradictory. However, I am in no position to agree with the contention of the learned counsel. One has to bear in mind that this was an incident that has taken place in the year 1997. PW-02 has commenced her evidence on 11-03-2013 and PW-03 on 19-03-2014, some sixteen years after the actual event. PW-03 has been a young school girl at the time.

It is settled law that a witness who gives evidence long after the incident is not expected to have a photographic memory as to the sequence of events that took place within a short span of time like in the given incident.

At this stage it is appropriate to refer to the Indian case of **Bhoginbhai Hitijibhai Vs State of Gujarat (AIR 1983-SC 753 at pp 756-758)** very often cited in our courts. It was held:

1) *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

2) *Ordinarily, so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

3) *The powers of observation differ from person to person. What one may notice, and the other may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part another.*

4) *By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purpose of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*

5) *In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates of such matters. Again, it depends on the time-sense of individuals which varies from person to person.*

6) *Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on.*

7) *A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometime so operates on account of the fear of looking foolish or being disbelieved though the witnesses is giving truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defense mechanism activated on the spur of the moment.*

I am of the view that the mentioned inconsistencies and infirmities of the two witnesses, namely, PW-02 and PW-03 are too trivial in nature to be considered as relevant. Although there is an omission in the evidence of PW-03 as to who was assaulted first by the appellant, her evidence has been consistent as to the events that took place thereafter. Even as to the fact whether the appellant was holding the knife or whether he had it in his waist when the initial assault took place cannot be considered material omissions. When taken as a whole, it is obvious that she has forgotten some of the events that took place on that fateful day due to the passage of time.

The evidence clearly shows that when PW-02 was dragged by the appellant by holding her from her hair, she had no way of looking up as she was facing downwards due to the grip of the appellant. That may be the very reason why she did not speak about the first stabbing on to the back of her mother and even the stabbing to the head. It was the PW-03 who was observing from a little distance away who has clearly seen the stabbing, which is highly probable, given the circumstances of the incident. I am unable to agree with the contention that the evidence as to how the stabbing took place was improbable as it has no basis. I find that the testimonial trustworthiness of the evidence of the witnesses have not been dented in

any manner due to the mentioned omissions as it does not go to the root of the matter.

Although it was contended that the learned trial judge has failed to give due consideration to the evidence of the witness called on behalf of the appellant, I find it was not so. The learned High Court judge has well considered the evidence of Thilak who has come to the place of the incident after it commenced, it appears that he has seen it as a quarrel between the parties due to that fact. I find that in fact his evidence was also in line with the evidence of the prosecution as to the material facts.

For the reasons considered above, I find no merit in the grounds of appeal urged.

Third Ground of Appeal: -

It was contended that there was no basis to suggest that the appellant had any intention to kill, or motive for that matter. Again, it is well settled law that it is not always necessary for the prosecution to prove the motive.

In the case of **The Attorney General Vs. Potta Naufer and others (2007) 2 SLR 144 at page 184**, it was held:

> *"Motive has been defined as 'that which moves or influence the mind'. An action without a motive has been considered to be an effect without a cause. It has been defined in* **Gangaram Vs. Emperor 62 IC 545,** *as something so operating upon the mind as to induce or to tend towards inducing a particular act or course of conduct.*
>
> *With respect to the relevance of motive to a criminal case, it has been stated with clarity that the existence of a motive is not a wholly essential ingredient in the prosecution case. There is no requirement therefore for the prosecution to prove a motive in order to prove a charge. The motive which induces a man to do a particular act is known to him and him alone.*

Therefore, the prosecution is not bound to prove a motive for the offence, though, it can suggest a motive and when it does so the judge may examine the motive so suggested."

Although an attempt had been made to implicate the husband of PW-02 as the person who came to the scene with a knife, the evidence led in this action clearly establish that he was never there, and was sleeping inside the house. I find no basis for the argument that it was a third party who caused injuries to the deceased. Therefore, I find no merit in the third ground of appeal either.

The learned counsel for the appellant in his submissions contended that the learned High Court judge should have considered the evidence on the basis of culpable homicide not amounting to murder under section 296 exception 04 of the Penal Code.

Exception 04 of section 296 reads as follows;

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel and unusual manner.

Explanation; -

It is immaterial in such cases which party offers the provocation or commits the first assault."

It is correct to argue that even if an accused person did not raise a defence based on exceptions to section 296 of the Penal Code, it is the duty of a trial judge to consider whether there is evidence to such an exception, if there is evidence on record.

In the case of **King Vs. Belana Withanage Eddin 41 NLR 345** Court of Criminal Appeal held;

> *"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 of record, although such defence was not raised nor relied upon by the accused."*

In **King Vs. Vidanalage Lanty 42 NLR 317** the Court of Criminal Appeal observed the following;

> *There was evidence in this case upon which it was open to the jury to say that it came within exception 04 of section 296 of the Penal Code and that the appellant was guilty of culpable homicide not amounting to murder. No such plea, however, was put forward on his behalf. In the course of his address the presiding judge referred to this evidence as part of the defence story, but not as evidence upon which a lessor verdict might possibly be based.*
>
> **Held:**
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> > *"It was the duty of the presiding judge to have so directed the jury and that in the circumstances, the appellant was entitled to have the benefit of a lesser offence."*

In the instant action, the appellant has not taken up the position that there was a sudden fight between the parties when the prosecution evidence was led before the High Court, although the witnesses have been cross examined on the basis of a quarrel. However, in his dock statement, it was his position that he was assaulted by the witnesses and he ran away to escape them. He has never taken up the position that the death of the deceased was a result of a sudden fight. There was no evidence on record for the learned High Court judge to consider such a defence.

On the contrary, the evidence led has established beyond reasonable doubt, that it was the appellant who came looking for deceased and assaulted her first owing to a previous animosity between the parties. After that, PW 02 who came to the aid of her mother has also been assaulted and dragged away. When the deceased attempted to rescue the daughter from the clutches of the appellant she has been fatally stabbed, which cannot be attributed to a sudden fight under any circumstances.

However, it clearly appears form the judgment that the learned High Court Judge has carefully analyzed the evidence before her to find whether there was evidence to consider a defence under section 296(4) of the Penal Code and had come to a correct finding in that regard.

The appeal, therefore, is dismissed as I find no merit in the appeal. The conviction and the sentence affirmed.

Judge of the Court of Appeal

K Priyantha Fernando, J. (P. C./A.)

I agree.

President of the Court of Appeal