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

An Appeal was filed interims of Article 138 of the Constitution and Section 331 of the Criminal Procedure Code Act No. 15 of 1979.

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

Court of Appeal No CA-HCC-0259/2015 **Complainant**

HC Kalutara 706/2006 **Vs.**

Aluthgedarage Ratnasiri alias Susil

Accused

And now between

Aluthgedarage Ratnasiri alias Susil

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Tenny Fernando AAL for the accused-appellant

A. Navavi DSG for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 12.10.2021

By the Complainant-Respondent 11.03.2022

Argued on : 10.03.2022

Decided on : 07.04.2022.

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Kalutara, dated 15.12.2015, by which, the accused-appellant, who is before this Court, was convicted and sentenced to death for having committed the murder of one Mohamed Izzadeen Mohamed Izzad (the deceased) on or about 07.01.1999.

The accused-appellant had been indicted on 08.08.2006 in the High Court of Kalutara for committing the murder of Mohamed Izzadeen Mohamed Izzad on or about 07.01.1999, which is punishable in terms of section 296 of the Penal Code.

The trial had commenced on 23.10.2008 after the accused-appellant opted for a non-jury trial. The prosecution had, led evidence of 8 witnesses and marked the productions පැ - 1 and පැ - 2. Once the prosecution had closed its case the accused-appellant gave evidence from the witness box and had called his brother as a defence witness. At the conclusion of the trial, the accused-appellant had been found guilty on the murder charge and sentenced to death. Aggrieved by the said decision the accused-appellant preferred this appeal.

The case for the prosecution relied on direct and circumstantial evidence. There were 2 eyewitnesses in this case namely PW 1 and PW 2. The learned High Court Judge has decided to disregard the evidence of the mother of the deceased who was the PW 1. She has forgotten the incident which took place 10 years ago. The learned Counsel for the respondent argued that the decision of the learned High Court Judge to disregard the evidence of PW 1 was a justifiable decision due to her old age and being illiterate.

Mohamed Izzadeen Mohamed Imran (PW-02), giving evidence before the learned trial Judge nearly 14 years after the indent, has stated that the deceased is his elder brother and as at the date of the incident, he was living with his wife and children. That was in his wife's house and the deceased brother and their parents were living separately, three houses away.

This was a date during the Islamic Holy month of Ramadhan and he was fasting. He had returned from the mosque after performing the noon prayers. While he was inside the house, he had heard a sound and when he came out of the house, he had seen his deceased brother, hitting a boy named Saman for plucking and stealing 'Kurumba' from the deceased brother’s plantation. Thereafter said 'Saman' (brother of the appellant) had been crying and proceeded towards his house. The deceased brother had proceeded towards a boutique of Zarook, that was situated in the vicinity. He had then gone back into the house and while he was engaged in religious activity, he had heard the person named 'Sunil' (Appellant) calling his brother.

The second incident of accused-appellant, took place having arrived near their house and calling for the deceased. It took place around half an hour after the first incident of his brother assaulting a boy named Saman. Though this witness has come out of the house, the appellant has asked as to where 'Izzad' the deceased has gone. Then he had told this witness' I have no issues with you and I will resolve it with 'Izzad' and proceeded towards the direction of the Boutique of `Zarook'.

While the appellant was calling the name of the deceased and proceeding toward the boutique of Zarook, the deceased had responded and come in the direction of where the appellant was. At that time the appellant had questioned the deceased as to why he hit his (appellant's) brother. When the deceased had asked in return as to whether he came to assault him, the appellant has answered in the affirmative and pulled out a knife and stabbed the deceased on the left side of the chest.

Thereafter the appellant had chased behind this witness and while he was trying to run away, he has fallen. Though the appellant has attacked him with the knife too fortunately for him it did not strike him and thus when he got up and pursued the appellant had escaped from the scene. Subsequently, he had proceeded towards the shop of Zarook where his deceased brother was fallen and taken steps to rush the deceased to the hospital. The deceased had been pronounced dead on admission.

The learned counsel for the respondent argued that PW 3 and PW 4 who are independent witnesses have corroborated most of what was narrated by PW 2. Though they have not witnessed the act of stabbing, the other incidents that took place before the incident has been confirmed by these two witnesses in their testimony. Though PW 1, who was the mother of the deceased and PW 2, was called by the prosecution, the learned High Court Judge has decided to disregard her evidence. The learned counsel for the respondent submitted that it was a justifiable decision to do so, as observed by the learned High Court judge due to her old age.

The Doctor (PW 6) in his evidence has stated that he observed 2 injuries on the body of the deceased and has stated that in his opinion Injury number 1 that was found on the left side of the chest was a fatal injury. It was the opinion of the doctor that the said injury ought to have been inflicted with considerable force, while the deceased was in a standing position. Further, he has opined that haemorrhage due to severe bleeding caused by the stab injury is the cause of death. It was observed that the doctor, on being asked about the possibility of the deceased sustaining the injury by falling onto a weapon, while involved in a scuffle, has very clearly stated that the proposition could be excluded, considering the material available.

The learned Trial Judge after the case for the prosecution was closed called for defence and the appellant testified under oath and called his younger brother to give evidence and closed the defence case.

It is important to note that there were 26 contradictions in the evidence of PW 1. The learned trial Judge very correctly decided to disregard her evidence. The evidence of PW 2 was also considered by the learned trial judge along with some contradictions.

On his evidence in chief, PW 2 states that he was living in his wife's house with his wife and their kid. But according to his police statement, he was living at his parents' house.

Learned Counsel for the accused-appellant argued that PW 2 and PW 4 were having *per se* contradictions in their evidence and the learned trial judge could not consider them as material contradictions. They are as follows;

Vide page 386 of the appeal brief is as follows;

ප්‍ර : තමුන්ගේ නිවසේ කවුද හිටියේ?

උ : මමයි මගේ බිරිඳයි දරුවයි.

Vide page 388 of the appeal brief is as follows;

ප : තමුන් පොලීසියට මෙහෙම කිව්වද?

"4 වන අයියා මොහොමඩ් ඉසෙඩ් එයයි, මමයි, අම්මයි, තාත්තයි එක්ක පදිංචි වෙලා ඉන්න මේ ගෙදර, වෙන කවුරුත් නැහැ." එහෙම තමුන් පොලීසියට ප්‍රකාශ කළාද?

උ : ඒක හරියට මතක නැහැ.

ප : තමුන් ස්ථිර වශයෙන් කිව්වා මේ සිද්ධිය වෙන දවසේ පදිංචි වෙලා හිටියේ තමුනුයි, තමුන්ගේ බිරිඳයි, තමුන්ගේ දරුවයි කියලා? ඒක ස්ථිරයිද?

උ : ඒක ස්ථිරයි.

ප : මේ මම කියපු ප්‍රකාශය වැරදියිද?

උ : ඒක මතක නැහැ.

PW 2 states that there were some of his relatives living in that same house other than his parents and his brother.

Vide page 363 of the appeal brief is as follows;

ප : ඒ ලිපිනයේ වෙන කවුද සිටියේ?

උ : මගේ මව, මගේ පියා, තවත් අපේ පුංචි අම්මලා, මාමලා හිටියා.

PW 2 states in his evidence in chief that the accused did not come inside to deceased house. According to his evidence, the accused came in front of the house. But, in his police statement, he stated that the accused came inside the deceased house.

Vide page 399 of the appeal brief is as follows;

ප : එතකොට මේ පුද්ගලයෝ ගෙදරට එනකම් තමා දැක්කේ නැහැ නේද?

උ : දැක්කේ නැහැ. ගෙදරට නෙමේ ගේ ඉස්සරහට.

Vide page 404 and 405 of the appeal brief is as follows;

ප : තමා මෙහෙම කිව්වද පොලිසියට?

"අපි එතන ඉන්නකොට බිලිඳායි එයාගේ අයියා වන සුනිලුයි එයාගේ යාළුවෙකුයි ඒ ගොල්ලන්ගේ ගෙවල් පැත්තේ ඉදලා පාර දිගේ අපේ ගේ පැත්තට ආවා, ඇවිත් අපේ පඩිය උඩට නැගලා ගේ තුලට ආවා"

උ : කවුද.

ප : සුනිලුයි බිලිඳයි තවත් තැනැත්තෙකුයි ගේ ඇතුලට ආවාද?

උ : ගේ ඇතුලට ආවා කියලා මට කියන්න බැහැ.

PW 2 in his evidence in chief and the cross-examination stated that he did not see anything in access's hand. But in his police statement, he has mentioned that the accused lifted his shirt and took a knife from his waist.

Vide page 411 and 412 of the appeal brief is as follows;

ප්‍ර : තමන් මේ සාක්ෂි දෙද්දි කිව්වා තමාට මතකද මුලික සාක්ෂි දෙද්දී කියූ සුනිල් කියන අයගේ අතේ මොකුත් දැක්කේ නැහැ ගෙදරට එන වෙලාවේ කියලා?

උ : අතේ මොකුත් දැක්කේ නැහැ.

ප්‍ර : තමා ඒක ස්ථිර වශයෙන්ද කියන්නේ?

උ : එහෙමයි.

Vide page 412 of the appeal brief is as follows;

ප්‍ර : මෙච්චර වෙලා සාක්ෂි දුන්නේ ඉනේ තිබිලා ගන්නවා දැක්කේ නැහැ කියලා නේද? ඉනේ තිබිලා ගන්නවා තමා දැක්කේ නැහැ නේද?

උ : නැහැ.

.....

.....

ප්‍ර : තමා මෙහෙම පොලීසියට කිව්වාද?

"කමිසය උස්සලා ඉනේ තිබුණ පිහිය ඇදලා ගත්තා." එහෙම තමා කිවවද නැද්ද පොලීසියට,?

උ : ඒක ස්ථිරව මතක නැහැ.

PW 2 stated in his evidence in chief that the deceased got stabbed by the accused-appellant only once. But in his police statement, he was told a different story and said that the accused stabbed the deceased twice.

Vide page 426 of the appeal brief is as follows;

ප්‍ර : එක වාරයකට වඩා වැඩි ගානක් පිහියෙන් අනිනවා දැක්කාද?

උ : නැහැ.

ප්‍ර : ඒක ස්ථිරයිද?

උ : ඔව්.

ප්‍ර : පොලිසියට මෙහෙම කිව්වද?

"පිහිපාර ඇන්න ගමන් අයියා කැරකුනා, එතකොට සුනිල් තවත් පාරක් පිහියෙන් ඇන්නා" ඒක වැරදිද?

උ : එක පිහිපාරයි ඉනේ තිබුනේ.

On his cross-examination, PW 2 states that he and the other witnesses went to the mosque when they heard about the death. He also stated that they went to the mosque before they went to the police station. But on his re-examination, he has stated that they did not have time to go to the police station.

Vide page 430 of the appeal brief is as follows;

ප්‍ර : ඒ පොලිසියට යන්න කලින්ද පස්සෙද?

උ : පල්ලියට ගියා මරණය සිදු වුනාට පස්සේ.

ප්‍ර : ඊට පස්සේද පොලිසියට ගියේ?

උ : ඔව්.

Vide page 436 of the appeal brief is as follows;

ප්‍ර : පොලිසියට යන්න කලින් පල්ලියට යන්න අවස්ථාවක්, වෙලාවක් තිබුනද?

උ : නැහැ. මට රෝහලෙන් කිව්වා පොලිසියට යන්න කියලා.

On his evidence in chief, PW 4 stated that he did not go to Uvais's shop on that day. But in his statement to the police, he has stated that he went to Uvais's shop.

Vide page 138 of the appeal brief is as follows;

උ : මම උවයිස්ගේ කඩේට ගියේ නැහැ.

Vide page 143 of the appeal brief is as follows;

"එදින දවල් 1.00 ත්, 1.30 ත් අතර වෙලාවකදී අපගේ නිවස අසල ඇති උවයිස් යන අයගේ වෙළඳ සැලට ගියා" යන කොටස ඩී 2 වශයෙන් ලකුණු කිරීමට චිත්තියේ නීතිඥ මහතා අවසර පතයි.

PW 4 stated in his evidence that he never drinks alcohol. But in his police statement, he stated that he had a beer with some others. But he denied it and said that he didn't say such a thing.

Vide page 144 and 145 of the appeal brief is as follows;

ප්‍ර : තමා එහෙම පොලිසියට කිව්වද?

උ : මම එහෙම ප්‍රකාශයක් කලෙත් නැහැ. මම ජීවිතේට බොන්නෙත් නැහැ. මගේ පපුව නරක් වෙලා, මට බොන්න එපා කියලා තියෙන්නේ.

ප්‍ර : මේක වැරදිද?

"බියර් බෝතලයෙන් 1/2ක් බිව්වා" කියන එක වැරදිද?

උ : වැරදියි.

ඒ අනුව "මා මේ ස්ථානයෙන් විනාඩි 10 ක් පමන එම අය සමඟ කතා කරමින් සිට ඉසඩ් යන අය විසින් මිලදී ගත් බියර් බෝතලයෙන් 1/2 ක් බී මෙම වෙළඳසැලේ සිට යාර 50 ක් පමණ කුඩලිගම දෙසට පිහිටි ජයසේන යන අයගේ වෙළඳ සැලට අවශ්‍යතාවයකට ගියා" යන කොටස වී 4 ලෙසට ලකුණු කරයි.

In his evidence, PW 4 stated that he did not go to call a three-wheeler. But in his police statement, he has stated that he went to Weyangolla junction to call a three-wheeler. He has failed to give any explanation for that statement.

Vide page 154 of the appeal brief is as follows;

ප්‍ර : ත්‍රීවිල් එකක් ගේන්න තමුන් ගියාද?

උ : නැහැ.

ප්‍ර : තමුන් මතුගම පොලිස් ස්ථානයට කල ප්‍රකාශයේ මෙහෙම කිව්වද?

"පසුව මම තුවාලකරු රෝහලට ගෙන යාම සඳහා ත්‍රීරෝද රථයක් ගෙන ඒමට වෙයන්ගොල්ල හන්දියට ගියා" කියලා කිව්වද?

උ : එහෙම වෙන්න ඇති.

ප්‍ර : තමුන් එහෙම පොලිසියට කියලා තිබුනේ තමුන් නොකරපු දෙයක් නේද?

උ : පිලිතුරක් නැත.

Learned Counsel for the accused-appellant further argued that PW 1, PW 2, PW 3, PW 4, PW 6 and PW 7 were having *inter se* contradictions in their evidence and the learned trial judge failed to consider them as material contradictions. They are as follows;

PW01 states that there was no one at home except herself.

Vide page 169 of the appeal brief is as follows;

ප්‍ර : ඔය සිද්ධිය වන දවසේ කව්ද ගෙදර හිටියේ?

උ : මම විතරයි ඒ ගෙදර හිටියේ.

Further PW 1 said that PW 2 was not at home when the deceased got stabbed by the accused-appellant and PW 2 came home after they took the deceased to the hospital.

Vide page 178 of the appeal brief is as follows;

උ : නැහැ. ඉම්රාන් කියන පුතා රැකියාවට ගොස් හිටියෙ. ඒ පුතා මේ සිද්ධිය ගැන කිසි දෙයක් දන්නේ නැහැ.

ප්‍ර : කව්ද මේ සිද්ධිය සම්බන්ධව කිසි දෙයක් දන්නේ නැහැ කිව්වේ?

උ : ඉම්රාන් කියන පුතා සවස් වෙලා තමයි ගෙදරට ආවේ.

ප්‍ර : සාක්ෂිකාරිය කියන්නේ තමාගේ ඉම්රාන් කියන පුතා මේ ඉසෙඩ්ගේ මරණය සම්බන්ධයෙන් කිසි දෙයක් දන්නේ නැහැ කියලද?

උ : නැහැ.

ප්‍ර : ඒ කියන්නේ ඉම්රාන් ආවේ මේ සිද්ධිය ඉවරවෙලා. සවස් යාමේද ඉම්රාන් ගෙදර ආවේ?

උ : ඒ වෙනකොටත් ස්වාමිනි නාගොඩ රෝහලට අරගෙන ගිහිල්ලා.

ප්‍ර : ඉම්රාන් එනකොට ඉසෙඩ්ව නාගොඩ රෝහලට අරගෙන ගිහිල්ලත් ඉවරයිද?

උ : ඔව්.

PW 2 says that he did not go to work on that day and he was at home. He also says that he only went to church and returned home.

Vide page 365 of the appeal brief is as follows;

ප්‍ර : ඒ දිනයේ ඔබ මොනවද කලේ?

උ : ඒ දිනයේ මම පල්ලියට ගිහිල්ලා ගෙදර ආවා.

ප්‍ර : ඒ දිනයේ රැකියාවට ගියාද?

උ : නැහැ.

Vide page 386 of the appeal brief is as follows;

ප්‍ර : මම තමුන්ට යෝජනා කරනවා තමුන් එදා වැඩට ගිහින් හිටියේ කියලා. නිවසේ හිටියේ නැහැ කියලා?

උ : නිවසේ හිටියේ.

ප්‍ර : තමුන් වැඩට ගිහින් කියලා කවුරු හරි කියනවා නම් ඒක බොරුවක්ද?

උ : ඒක බොරුවක්.

PW 1 says that the decease did not hit Saman.

Vide page 172of the appeal brief is as follows;

ප්‍ර : මියගිය පුතා පොල් කඩපු තැනැත්තාට ගැහුවද?

උ : නැහැ.

PW 2 says that he saw that the deceased hitting Saman.

Vide page 368 of the appeal brief is as follows;

ප්‍ර : ඔබට දැනගන්න පුළුවන් වුනාද ඒ ශබ්දය මොකක්ද කියලා?

උ : ඉසෙඩ් කියන එක්කෙනා කුරුම්බා කැඩුවා කියලා කෝටුවකින් ගහනවා දැක්කා.

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ප්‍ර : තමුන්ගේ සහෝදරයා සමන්ට කෝටුවකින් ගහනවා තමුන් දැක්කාද?

උ : ඔව්.

PW 1 states that she was cooking when the accuser's brother came to their house and she further states that the accuser's brother came to the rear side of the house. But, later, on page 188 of the appeal brief, she states that the accuser's brother did not come to that part of the house but was on the front side of the house.

Vide page 179 of the appeal brief is as follows;

ප්‍ර : තමාගේ නිවසේ පිටුපස පැත්තෙන්ද තමා ඔය විත්තිකරුගේ මල්ලී එනවා දැක්කේ?

උ : ඔව්. ඇතුලට ඇවිත් මට කතා කළා.

Vide page 188 of the appeal brief is as follows;

ප්‍ර : විත්තිකරුගේ මල්ලී පිටුපස්සෙන් ඇවිල්ලා කථා කළාද?

උ : ඉස්සරහින් ඇවිල්ලා තමයි කථා කළේ.

PW 1 stated that the deceased was sleeping at home when the accused person calls his name.

Vide page 181 of the appeal brief is as follows;

ප්‍ර : පුතා මිය ගිය අවස්ථාව වෙනකොට පුතා කොහේද හිටියේ?

උ : අපේ නිවසේ හිටියේ.

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ප්‍ර : දැන් ඔය සිද්ධිය වෙනකොට කවුරු කවුරුද ගෙදර සිටියේ?

උ : මමයි මගේ පුතායි හිටියා.

Vide page 198 of the appeal brief is as follows;

ප්‍ර : ඒ අවස්ථාවේදී ඉසෙඩ් කොහේද හිටියේ?

උ : ගේ ඇතුලේ නිදා ගෙන හිටියෙ.

PW 2 stated that the deceased was not at home when the accused-appellant calls his name.

Vide page 371 of the appeal brief is as follows;

ප්‍ර : මරණකරු ඒ වෙලාවේ එතන හිටියද?

උ : එතන හිටියේ නැහැ.

PW 2 stated that deceased came from Daru's shop but not from house.

Vide page 372 of the appeal brief is as follows;

ප්‍ර : අයියා යම්කිසි අවස්ථාවක ආවද?

උ : සුනිල් ඉසෙඩ් ඉසෙඩ් කියලා කතා කෙරුවා ඊට පස්සේ ඉසෙඩ් ආවා.

ප්‍ර : කොහේ ඉඳන්ද ආවේ?

උ : දරුගේ කඩේ පැත්තේ ඉදන් ආවේ.

PW 1 stated that there was no conversation between the accused and the deceased.

But PW 2 says there was a conversation between them.

Vide page 374 of the appeal brief is as follows;

ප්‍ර : දැන් සුනිල් සහ ඔබ මේ ආකාරයෙන් බලා ගෙන ඉන්නකොට ඉසෙඩ් සහ සුනිල් අතර කතා බහක් ඇති වුනාද?

උ : ඔව්.

ප්‍ර : මොනවද කිව්වේ?

උ : සුනිල් ඇහුවා උඹ අපේ මල්ලිට ගැහුවාද කියලා.

PW 1 said that the accused-appellant was using a different path to go to his house.

PW 2 states that the accused-appellant had to pass his house to go to his home.

Vide page 398 of the appeal brief is as follows;

ප්‍ර : කුඩලිගම ඉදලා එනකොට තමාගේ නිවසට තමාගේ මීයගිය සහෝදරයාගේ නිවස පසුකරගෙන යන්න ඕන නේද වූදිතගේ නිවසට?

උ : එහෙමයි.

PW 3 says that accused-appellant ran to the paddy field after the incident.

Vide page 236 of the appeal brief is as follows;

උ : මෙයා කුඹුරට පැනලා දිව්වා.

PW 4 vide page 118of the appeal brief is as follows;

උ : ගෙවල් පැත්තේ ඉදලා දුවගෙන ඇවිත් කැලේට පැන්නා.

PW 3 on his evidence in chief states that, he did not see the deceased before that incident on that particular day. But according to the police statement given by PW03, he had seen the deceased earlier on that day. He had stated that the deceased came to his boutique and bought some cigarettes.

Vide page 241 of the appeal brief is as follows;

ප්‍ර : ඒ අවස්ථාවට ඉස්සෙල්ලා යම්කිසි සිද්ධියක් නොවී ඉසෙඩ්ව දැක්කාද?

උ : නැහැ.

Vide page 242 of the appeal brief is as follows;

ප්‍ර : මෙම සිද්ධියට කලින් ඉසෙඩ් බඩු ගන්න කඩේට ආවද?

උ : නැහැ.

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ප්‍ර : සාක්ෂිකරු පොලීසියට ප්‍රකාශයක් දෙන විට කිව්වද මම තනියම කඩේ හිටියේ. කඩේ ලඟ පදිංචි වී සිටින ඉසෙඩ් කඩේට ආවා, කඩේට ඇවිත් ගෝල්ලිෆ් සිගරට් එකක් ගන්න කඩේට එනකොට දහවල් 1ට විතර ඇති කියලා පොලීසියට ප්‍රකාශයක් කළාද?

උ : සිගරට් එකක් අරගෙන ගියා කියලා පොලීසියට කිව්වා.

Police complain PW 7 stated in his evidence that according to the police record someone call Fathima came to the police station and made a statement about this death and said that her son was stabbed and killed. So, according to the police records the deceased mother is Fathima, not lynoor Sifaya (PW 1).

Vide page 296 of the appeal brief is as follows;

ප්‍ර : තමා අද රැගෙන ඇවිත් තියෙන පොතේ සඳහන් වෙලා තියෙනවද පාතිමා නැමැති අය ස්ථානයට පැමිණ මෙසේ කියා සිටියා. ඇයගේ පුරුෂයා වන, ඉසෙඩ් නැමැති අයට පිහියෙන් ඇන්න බව කියා සිටී. කියලා සටහන් වෙලා නියෙනවද?

ඌ : ඇයගේ පුතා වන කියලා සඳහන් වෙලා තියෙන්නේ. "ඇයගේ පුතා වන ඉසඩීන් මොහොමඩ් ඉසඩ් නැමැති අයට පිහියෙන් ඇන මනුෂ්‍ය ඝාතනය සිදුකර ඇති බව" කියලා සඳහන් වෙලා තියෙනවා.
එම කොටස වි 25 වශයෙන් ලකුණු කිරීමට අවසර පතයි.

Did accused-appellant stabbed the deceased more than once? PW 1

Vide page 176 of the appeal brief is as follows;

එක පාරයි ඇන්නේ ස්වාමිනී, පිහිය කරකවලා ගත්තා. එතන වැටිලා පුතා මියගියා. ඊටපසුව වෑන් එකක් ගෙනැවින් නාගොඩ රෝහලට රැගෙන ගියා.

PW 2 stated in his evidence in chief that the deceased got stabbed by the accused-appellant only once.

PW 6 is the JMO who did the post mortem. According to the evidence given at the trial, there were two wounds on the deceased body.

Vide page 316 of the appeal brief is as follows;

ප්‍ර : ඔබ මරණකරුගේ තුවාල කීයක් නිරීක්ෂණය කළාද?

ඌ : 2 ක් නිරීක්ෂණය කලා.

According to the above contradictions can see that there is no consistency in the evidence of the prosecution side.

Thantiriee Plyasena vs. Bribery Commission CA/31/98 dated 29.01.2001 to Investigate Allegations of Bribery and Corruption;

> "There are material contradictions *inter se* in the evidence of Bandara and Fonseka regard to the incident except on the matter of acceptance Rs. 3000/- by the accused-appellant. Such discrepancies in their evidence would make the Court reluctant to act on their testimony since it is doubtful as to which witness is speaking the truth. Further in a case where the raid had been organized such discrepancies in the evidence of the witness who had taken part in the raid cannot be excepted. Because of the contradictions and other infirmities as referred to above, it would appear that the evidence of these two witnesses is unreliable and therefore it is dangerous and unsafe to convict the accused-appellant on such evidence."

Padmatileke (SGT) vs. Director General, Commission to Investigate Allegations of Bribery and Corruption SC/99/2007;

> "Where the material witnesses make inconsistent statements in their evidence on material particulars, the evidence of such witness becomes unreliable and unworthy of credence, thus making the prosecution case highly doubtful."

AG v Manjula Priyantha HA (PHC) APN 19/99 dated 26.09.2000 …. furthermore, the prosecutrix went to the extent of saying that there was blood in her trousers (nicker) which she had washed after returning home. If that was the case, the doctor should have observed some injuries. On this matter, one cannot ignore her evidence where she said that she was not wearing a nicker

on the date of the alleged sexual act. All these matters go to show that she has not been truthful to Court,

Hewage Chandarapala vs. AG, CA/131/2001 dated 05.08.2005. The principal eyewitness to the incident was the wife of the deceased Anula Gunawardene in her evidence she had stated that she identified the 1st, 2nd and 4th accused-appellants. She could not identify the other two persons who were present near her house. The other inmate Manika who was present at the time of the incident had failed to identify anyone and she had told the father of Anula (Peththa) that the suspects who came to the house of the deceased were wearing masks.

Kanattha Gamage Wijetilaka and two others vs AG, CA/189/2000 dated 02.10.2009 the case against the 2nd and 3rd accused-appellants depended on the evidence of Jayanthi, the sister of the deceased. Jayanthi when giving evidence in the Magistrate Court was unable to say the weapon that the 3rd accused was carrying. But in her evidence in the High Court, she stated that the 3rd accused was having a sword. This contradiction was marked as V 1.

Jayanthi in her statement made to the Police says that she did not see the 3rd accused attacking the deceased. But in her evidence in the High Court, she stated that she saw the 3rd accused attacking the deceased with a sword. Jayanthi in her evidence in the High Court has stated that the three accused came on bicycles. But she has failed to maintain this fact in her statement made to the Police, at the inquest and the non-summary inquiry. According to Jayanthi soon after the attack on her brother she met her aunt Danawathie and told Danawathi that it was the 1st accused who killed her brother. She failed to maintain to Dhanawathie the fact that the 2nd and 3rd accused attacked her brother.

Court held “when we consider all these matters, we think that Jayanthi is not a credible witness. The learned trial judge has considered the said contradictions and omissions. But he failed to appreciate the value of the said contradictions and omissions in deciding the credibility of Jayanthi.”

It is important to note that in the above-mentioned authorities the contradictions and omissions which go to the root of the case should not be ignored lightly and the trial Judge should give proper attention when he finally decides whether the accused is guilty or not for the offence he was charged.

In the present case, PW 2 failed to mention Saman's name in the police statement. This is marked as an omission by the defence counsel.

Vide page 393 of the appeal brief is as follows;

> **“මේ අවස්ථාවේදී ඉතාමන් ගෞරවයෙන් සැල කරන්නේ** 1999.01.10 **වන දින මතුගම පොලීසියට කරන ලද ප්‍රකාශයේ කිසිදු ස්ථානයක සමන් කියන නම සඳහන් කර නොතිබීම ඌනතාවයක් ලෙස සඳහන් කරන බවයි.”**

In his police statement, PW 3 stated that he was not at the boutique until 1.00 pm and he failed to mention in his police statement that he was going to the boutique and coming out several times.

Vide page 251 of the appeal brief is as follows;

“මේ අවස්ථාවේදී මෙම සාක්ෂිකරු විසින් ගරු අධිකරණයේ සාක්ෂි දෙමින් දවල් 1.00 වන තෙක් කඩේ නොසිටි බවට සාක්ෂි දෙමින් කියා, ඉන් පසුව ගන්නා ස්ථාවරය වන කඩේට නොයෙක්වර එමින් යමින් සිටියාය යන ප්‍රකාශය ඔහුගේ පොලිස් ප්‍රකාශයේ සඳහන් නොවීම ඌණතාවයක් වශයෙන් අධිකරණයේ අවධානය යොමු කරනවා.”

The learned counsel for the accused-appellant submitted that several places in his evidence PW 2 state that he cannot recall the incident properly and he also stated that this incident took place a long time ago. According to his statements, he is not sure whether he is telling the correct thing or not.

Vide page 415 of the appeal brief is as follows;

ප්‍ර : මතක හැටියට කිව්ව එක වැරදියිද?

උ : මතකයේ හැටියට මම පැවසුවේ.

ප්‍ර : මතකයේ හැටියට දුන්න සාක්ෂිය වැරදියි නේද?

උ : වැරදියි කියලා කියනවා නම් වැරැද්ද බාර ගන්න වෙනවා.

PW 2 says in vide page 417 of the appeal brief is as follows;

ප්‍ර : අද දෙන සාක්ෂිය නිවැරදි සාක්ෂියක් කියලා කියන්න බැහැ නේද?

උ : සමහර ඒවා වැරදි වෙන්න පුළුවන්. සමහර ඒවා නිවැරදි වෙන්න පුළුවන්

අධිකරණයෙන්:

ප්‍ර : ඇයි වැරදි වෙන්නේ?

උ : සම්පූර්ණ දේ මතක නැහැ.

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ප්‍ර : තමුන්ට මතක නැත්තේ කමිසය උස්සලා පිහිය ඇදලා ගන්නවාද?

උ : කමිසය උස්සලා ඇදලා ගත්තාද කියලා මතක නැහැ.

PW 3 says in vide page 247 of the appeal brief is as follows;

උ : එහෙම කිව්වද කියා මට මතකයක් නැහැ.

PW 4 says in vide page 148 of the appeal brief is as follows;

සරම පාට ගැන මට පැහැදිලි නැහැ

PW 4 says in vide page 151 of the appeal brief is as follows;

ඇඳුම්වල පාටවල් කියන්න දන්නේ නැහැ.

When considering the police evidence and police records the police witness PW 7, doesn't have a proper memory regarding the incident. His statement revealed that he had failed to maintain a complete record of the incident to give evidence in court. Without a proper and complete record, he cannot explain the situation or what happened.

Vide page 283 of the appeal brief is as follows;

ප්‍ර : ඒ ගිය අවස්ථාවේදී මෙම මරණකරුගේ මව වන අයිනූරි සිපායා නැමැත්තිය හිටියාද?

උ : පිලිතුරක් නැත.

ප්‍ර : මහත්මයා සටහන් යොදා තියෙනවාද කියා බලලා කියන්න?

උ : නෑ උතුමාණනි, ඒ අවස්ථාවේදී මව හිටියාද කියා මතක නෑ. ඒ ගැන සටහන් යොදා නෑ.

Vide page 284 of the appeal brief is as follows;

ප්‍ර : දැන් මහත්මයා මරණ පරීක්ෂණයේදී වැඩ බලන මහේස්ත්‍රාත්තුමා නියෝගයක් කළා නේද සාක්ෂිකරුවන් සිටී නම්, ඉදිරිපිට පැමිණ සාක්ෂි දෙන්න කියලා?

උ : එහෙමයි.

ප්‍ර : ඒ අවස්ථාවේදී කවුරු හරි ඉදිරිපත් වෙලා සාක්ෂි දුන්නද?

උ : ඒකත් මට මතක නෑ.

The weapon used was never produced in Court and was not identified by the Doctor as the weapon used for the murder. He could have identified the weapon and said that it could have caused the injuries. It can be argued that production in a case could have been considered circumstantial evidence against an accused. Learned counsel for the accused-appellant argued that when there is no cogent evidence given by eye-witnesses or when there is not sufficient evidence to warrant a conviction it would not always be necessary to produce the weapon which used for the crime. In the present case, the Prosecution failed to produce the weapon. The prosecution witnesses including PW 1 and PW 2 testified that the wound was caused by a knife. But the doctor said the weapon should be something longer than a knife.

Vide page 323 of the appeal brief is as follows;

ප්‍ර : වෛද්‍ය වාර්ථාවට අනුව සඳහන් වෙනවා ආයුධයක්?

උ : කඩුවක් වැනි එකක්. තියුණු බර ආයුධයක්.

ප්‍ර : කඩුවක් කියන්නේ දිග, සාමාන්‍යයෙන් පිහියක් වගේ නොවෙයි. පිහියකට වඩා දිග අයුධයක්?

උ : එහෙමයි.

According to PW 2, the accused-appellant stabbed the deceased only one time. But according to his evidence, it was revealed that he has not seen the incident. He had testified by seeing the wound of the deceased. Learned Counsel for the accused-appellant submitted that since PW 2 is not an expert to identify the wounds and give his opinion his evidence is not credible regarding the wounds.

Vide page 425 of the appeal brief is as follows;

ප්‍ර : එකපාරයි කියලා කියන්නේ කොහොමද?

උ : මම අරගෙන යනකොට දැක්කා.

ප්‍ර : එක තුවාලයක් දැක්කාද?

උ : ඔව්.

PW 3 stated that the statement he made to the police was not true. He said that he did not see the deceased on that particular day before the incident. PW 3 was not a trustworthy witness. Cannot rely on his evidence to corroborate PW 2's evidence. He admitted that he was telling the story he heard from other people after the incident.

Vide page 245 of the appeal brief is as follows;

ප්‍ර : දවල් 1.00 ට විතර ඉසෙඩ් ගෝල්ඩ්ලීෆ් එකක් ගන්න කඩේට එනකොට තමා කඩේ සිටියේ නැහැ නේද?

උ : නැහැ.

ප්‍ර : එහෙම නම් තමා මතුගම පොලිසියට කරන ලද ප්‍රකාශය නොදැක කල දෙයක් නේද? තමා කළ ප්‍රකාශය අසත්‍යයක් නේද?

උ : ඔව්.

.....

Vide page 246 of the appeal brief is as follows;

ප්‍ර : තමන් ගරු අධිකරණයේ පිළිගත්ත නේද පොලිසියට කලේ අසත්‍යය ප්‍රකාශයක් කියා?

උ : ඔව්.

Vide page 247 of the appeal brief is as follows;

ප්‍ර : තමා එදින සිද්ධිය වුනාට පස්සේ එක එක අය කල කතා බහ අහගෙන ඉඳලා තමාගේ ප්‍රකාශය කළා නේද?

උ : එහෙමයි.

Vide page 256 of the appeal brief is as follows;

ප්‍ර : මේ ඉසෙඩ් කියන අයට තුවාල සිදු වීම සම්බන්ධයෙන් වෙච්ච සිද්ධිය තමා දැක්කේ නැහැ නේද?

උ : නැහැ.

Vide page 248 of the appeal brief is as follows;

ප්‍ර : තමාට යෝජනා කරනවා මතකයක් නැහැ කියන්නේ මෙම සිද්ධිය වෙන අවස්ථාවේ එතන නොසිටි නිසා කියලා?

උ : ඔව්.

According the story of the accused-appellant he says that his brother Saman was beaten by the deceased. Saman, with a bleeding ear, came to him and told him what happened. PW 4 also said that he saw that deceased slapped Saman. It was revealed by the accused-appellant that there was no animosity between him and the deceased. When they were passing the deceased house, the deceased came with a knife to them in an aggressive manner. The learned counsel for the accused-appellant submitted that he used his private defence and tried to prevent the attack by the deceased. When they were struggling together, the accused-appellant saw the bleeding on the deceased.

"The right is essential of defence, not retribution. As pointed out by Russell in Law of Crimes.

The Text Book on the Indian Penal Code by K.D. Gaur, Fourth Edition at pages 178 and 179 are as follows;

> "A man is justified in resisting by force anyone who manifestly intends and endeavours by violence or surprise to commit a known felony against either his person, habitation or property. In these cases, he is not obligated to retreat, and may not merely resist the attack where he stands but may indeed pursue his adversary until the danger is ended and if in a conflict between them, he happens to kill his attacker, such killing is justifiable."

Chacko Mathai v State of Kerala AIR 1964 KER 222 was held as follows;

> "The right of private defence is a highly prized gift granted to the citizen to protect themselves by effective self-resistance against unlawful aggression. No man is expected to fly away when he is attacked. He could fight back and when he apprehends death or grievous hurt could see that his adversary is vanquished without modulating his defence step by step. Faced with a dangerous adversary, no man can act with a detached reflection and under such circumstances, if he travels a little beyond the limit, the law protects him and hence courts should not place more restrictions on him than the law demands."

On the other hand, according to the prosecution witnesses, it reveals that the deceased was an aggressor. He had issues with his brother and he attacked Saman as well. According to prosecution evidence on that faithful day, he fought with his brother too.

It is a settled principle under criminal law that the prosecution should prove their case beyond a reasonable doubt. When there are witnesses it is reasonable if one witness cannot recall the incident and testifies a different thing about the incident. But it is quite suspicious if all the witnesses tell different stories about the same points. The learned Counsel for the accused-appellant argued that when we consider the evidence of this case we can believe that there are no actual eyewitnesses. Prosecution witnesses contradicted the evidence given on material points which they gave in the examination in chief and cross-examination. They have given different versions.

The Evidence of PW 3 and PW 4 is based on hearsay evidence and several contradictions affect the root of the case. The learned counsel for the accused-appellant further argued that it is a cardinal principle that unreliable and unacceptable evidence cannot be rendered credible, simply because there is some corroborative material. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The benefit of the doubt, to which the accused is entitled, is reasonable doubt; the doubt which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind.

It is my view that the evidence of the accused-appellant attracts the plea of a grave and sudden provocation and self-defence. This court came to the said conclusion of the present appeal, considering the following evidence:

(I) The total absence of any pre-plan or premeditation: it is manifestly clear from the evidence led at the trial that the accused-appellant was provoked after his brother was assaulted by the deceased and later on when they met each other the deceased had come to attack the accused-appellant.

(II) The appellant has further testified that the scuffle between him and the deceased had accidentally resulted on the deceased causing his death thereby attracting the plea of a grave and sudden provocation and self-defence as embodied in special exceptions 1 and 3 to section 294 of the Penal Code.

However, had the trial court considered the above-mentioned factors in its correct judicial perspective, the trial court would have come to an accurate factual finding that the accused-appellant caused the death of the deceased by accident upon being provoked by the deceased consequently affording the plea of a grave and sudden provocation to the accused-appellant. Not only that, this court can consider the accused-appellant must have used his right of private defence to protect himself when the deceased came to attack him.

I wish to say that the failure to take into account the afore-cited extenuating circumstances amounts to a non-direction resulting in a miscarriage of justice.

In this case, the appellant had proved the right of private defence and grave and sudden provocation and sudden fight. Even though the accused had acted excessively when inflicting the said injury using a big knife, the matters already discussed above indicate a sudden fight without premeditation and without taking any undue advantage in the heat of passion.

For the reasons set out above, I conclude that the learned trial Judge had misdirected himself by failing to evaluate the said material in favour of the accused-appellant. I, therefore, decide to set aside the conviction and sentence imposed by the learned High Court Judge of Kalutara on 15.12.2015 and replace it with a conviction for culpable homicide not amounting to murder under section 297 of the Penal Code based on sudden fight and self-defence and impose a sentence of rigorous imprisonment for 7 years.

We direct that the sentence should take effect from the date of imposition. Therefore, the sentence imposed should take effect from 15.12.2015.

The appeal is allowed.

Registrar is directed to send a copy of this judgment along with the main case record to the High Court of Kalutara and a copy of the Judgement to the prison authorities forthwith.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal