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

In the matter of an Appeal made under  
Section 331 of the Code of Criminal  
Procedure Act No.15 of 1979.

**Court of Appeal Case No.  
CA/HCC/ 0254/2017  
High Court of Gampaha  
Case No. HC/111/2008**

Kaluarachchige Don Sampath  
Samantha Kumara

**ACCUSED-APPELLANT**

**vs.**

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

**COMPLAINANT-RESPONDENT**

**BEFORE : Sampath B. Abayakoon, J.  
P.Kumararatnam,J.**

**COUNCEL : U.R. De Silva, P.C. with Savithri Fernando  
for the Appellant.  
Chethiya Goonesekera, ASG for the  
Respondent.**

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**ARGUED ON** : **29/03/2022**

**DECIDED ON** : **24/05/2022**

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**JUDGMENT**

**P. Kumararatnam, J.**

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Gampaha under Section 300 of the Penal Code for committing attempted murder of Rupasinghe Liyanage on or about 05<sup>th</sup> May 2005.

The trial commenced before the High Court Judge of Gampaha. As the Appellant absconded when this case came up for hearing, Learned High Court has held an inquiry under Section 241(1) of the Code of Criminal Procedure Act No.15 of 1979 and fixed the case for trial in absentia of the Appellant.

When the trial was to commence on 10/03/2011, a counsel submitting a letter written by the Appellant sought the court's permission to defend the Appellant in his absence. The court acting under Section 241(2) of the Code of Criminal Procedure Act No.15 of 1979 granted permission to the defence counsel to appear on behalf of the Appellant in his absence.

In **Thilakaratne v. Attorney General** [1989] 2 SLR 191 the court held that:

*“Section 241(2) contemplates a case where an absent accused or someone else on his behalf retains a counsel to appear for him in absentia. It can also apply in a case where, at the commencement of a High Court trial, the accused is represented by counsel (assigned or*

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*retained), and during the course of the trial the accused absconds. In such a case it is possible for a counsel to continue to appear for him in absentia right till the end of the trial.”*

After the conclusion of the prosecution case, the learned High Court Judge had called for the defence. As the Appellant was tried in absentia the case was closed without adducing any evidence on behalf of the Appellant. After considering the evidence presented, the learned High Court Judge had convicted the Appellant under Section 300 of the Penal Code and sentenced him to two years rigorous imprisonment with a fine of Rs.1000/- with a default sentence of two months simple imprisonment.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Counsel for the Appellant, U. R. De Silva, P.C. had filed a motion on 28/03/2022 indicating that he receives no instructions from the Appellant and there is no way of contacting him as he was absconding throughout the trial as well as during the period of this appeal. As such, the counsel wishes to withdraw from this appeal. This position was endorsed by his junior counsel who appeared before this court on that day.

Hence, the court decided to adjudicate this matter based on the written submissions filed by the parties. The ASG, who appeared for the Respondent have no objection.

As no separate grounds of the Appeal filed by the Appellant, this court has decided to adjudicate this appeal on following grounds extracted from the written submission filed on behalf of the Appellant.

1. Evidence given by the victim PW1 is not credible as it contains many contradictions inter se and per se.
2. The Learned High Court Judge had shifted the burden of proof on to the Appellant.

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3. The Learned High Court Judge had failed to evaluate the defense case which creates a reasonable doubt over the prosecution's case.

### **Background of the Case**

In this case the victim PW1 and the Appellant are neighbours. On the day of the incident around 5 p.m. when the victim was making his way to the well for bathing as usual, he had been intercepted by the Appellant and an argument had ensued between the Appellant and the victim. Then the Appellant had started to assault the victim which had turned to a fight between the two. Initially, the victim was unaware that the Appellant was in possession of a knife but saw it only when he was being stabbed by the Appellant. At that time when the victim had grabbed the knife from the Appellant, the Appellant had gone home. The victim has been bleeding when he returned home and had sought first aid from a neighbour but the neighbour had refused to treat him. Hence, he was taken to a hospital nearby for treatment. He had been in Ragama Teaching Hospital for about 18 days and under gone a surgery performed on his abdomen. He had given a statement to police while receiving treatment in the hospital and handed over the knife which he grabbed from the Appellant to the police. The knife was marked as P1 at the trial.

In the first ground of appeal the contention of the Appellant is that the evidence given by the victim is not credible as it contains so many contradictions inter se and per se.

The victim, during cross examination stated that although this matter was referred to the Mediation Board it was not settled. He further said that no verbal exchange happened between them but both had a fight and the victim had retaliated with the bucket he was carrying at that time. Victim was not sure as to when he had taken the knife to the hospital and handed it over to the police. As he was not stable when he was admitted to the hospital, his position was that he can't remember everything accurately. Denying that he

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carried a knife at the time of the fight, he further denied giving false evidence in the court.

Although 13 contradictions were marked on the evidence given by the victim most of them are related to how he handed over the knife to the police and the nature of the knife. Some contradictions are based on the memory of the victim. As none of them attack the root of the case, the Learned High Court Judge had very correctly admitted the victim's evidence as true in order to come to his conclusion.

In **Attorney General v. Sandanam Pitchi Mary Theresa** (2011) 2 SLR 292 held that:

*“Discrepancies that do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance.”*

In this case as the evidence given by the victim is not tainted with doubt or ambiguity and do not go to the root of the case, I conclude that the Learned High Court Judge is correct to accept the victim's evidence to arrive at his findings. Therefore, the first ground has failed without any merit.

In the second ground of the appeal the contention of the Appellant is that the Learned High Court Judge had shifted the burden of proof onto the Appellant.

On careful perusal of the Judgment, it is apparent that nowhere in the judgment does the Learned High Court Judge shift the burden of proof onto the Appellant. The Learned High Court Judge very correctly, considering all the evidence in accordance with the Evidence Ordinance, declared that the prosecution has proved the case against the Appellant beyond reasonable doubt. Hence, this ground also has no merit.

In the final ground the Appellant contends that the Learned High Court Judge had failed to evaluate the defence case which creates a reasonable doubt over the prosecution's case.

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The Learned High Court Judge had very correctly analyzed the evidence adduced by both parties to arrive at his finding. As the Appellant was absconding during the pendency of the trial and when the defence was called by the court, the Appellant had failed to adduce evidence on his behalf. Despite that the Learned High Court Judge without prejudicing himself, had properly analyzed the evidence presented and had come to a correct finding. Hence, this ground too has no merit.

In this case the prosecution had adduced strong and incriminating evidence against the Appellant. The Learned High Court Judge had properly analyzed and considered all the evidence presented by both parties and come to his conclusion that the Appellant is guilty of the charge levelled against him.

As the Learned High Court Judge had rightly convicted the Appellant for the charge of attempted murder and had given a very lenient custodial sentence, I affirm the conviction and dismiss the Appeal of the Appellant.

The Registrar is directed to send a copy of this judgment to the High Court of Gampaha along with the original case record.

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

**JUDGE OF THE COURT OF APPEAL**