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

In the matter of an appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No.15 of 1979, read with Article138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA - HCC 145-2020

High Court of Kalutara
Case No: HC 335/2004

Vs.

1) Wendersonge Siripala

Accused

And Now Between

1) Wendersonge Siripala

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Asela Serasinghe

for the Accused-Appellant

Shanil Kularathne, SDSG

for the Respondent

ARGUED ON : 22/03/2022

DECIDED ON : 24/05/2022

R. Gurusinghe, J.

The Accused Appellant (the appellant) was indicted in the High Court of Kalutara for committing the murder of Paramullage Don Karunapala on or about the 18th of October 1997at Neboda.

The prosecution led the evidence of PW2, PW8, PW3, PW5, PW9, PW12, PW7, PW10 and the Registrar of the Magistrate Court of Matugama.

The appellant gave evidence for himself from the witness stand and called two other witnesses.

After trial, the learned Trial Judge found the appellant guilty of the charge and sentenced him to death.

Being aggrieved by the said conviction and sentence, the appellant preferred this appeal.

The grounds of appeal relied upon by the appellant are as follows:

1. A fair trial has been denied to the appellant because he has been convicted for murder and sentenced to death, purely on the evidence of PW1, who is dead, which evidence has been adopted purportedly in terms of section 33 of the Evidence Ordinance.

2 The Learned Trial Judge has failed to assess the trustworthiness and credibility of PW1's evidence, adopted under section 33 of the evidence ordinance.

3. The Learned High Court Judge has failed to consider whether any general exception contained in chapter 4 of the Penal Code applied to the facts of this case.

4. The Learned Trial Judge has failed to consider whether any special exception contained in section 294 of the Penal Code applied to the facts of this case.

5. The learned Trial Judge has failed to properly consider the evidence given by the accused.

The principal evidence for the prosecution to drive home the capital charge against the appellant emerged through a non-summary deposition of the eye witness to the incident (PW1) who was dead by the time when this case was taken up for trial in the High Court. The prosecution placed this evidence before the High Court of Kalutara by virtue of Section 33 of the Evidence Ordinance.

As per the evidence, there was some sort of animosity between the deceased and the appellant. On the 18th of October 1997, around 8.30 pm. The deceased and PW1 were on their way home. There was a festival at a nearby temple, and there was sufficient light at that time to witness the incident. The learned

Senior Deputy Solicitor General concedes that as per the evidence of PW1, there was a fight between the appellant and the deceased. The deceased was on his way home with PW1; the appellant wanted him to stop. The deceased and the appellant had a fight instantly. There was a 10-centimetre long cut on the appellant's right-hand palm. The doctor described it as a defence injury. As per the evidence of PW1, both the deceased and the appellant fell on the ground. Then the appellant ran towards 'Anil stores', and the deceased came towards PW1. The deceased had been covered with blood all over him. There were no other people around at that time. According to the doctor's evidence, there was a two-inch-wide ½ inch deep 4 inches long horizontal cut in front of the neck that had gone through the trachea. (the windpipe)

Section 33 of the Evidence Ordinance provides as follows:

"Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; Provided-

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceeding had the right and opportunity to cross-examine;

(c) that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation-A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

In the case of *Francis Samarawickrema vs Dona Enatto Hilda Jayasinghe Supreme Court* appeal 7/2004 decided on 7th May 2009, Justice Masoof stated as follows:

"In this connection, it is relevant to note that E. R. S. R. Coomaraswamy, The Law of Evidence, Vol. I, at pages 492-493, states as follows:

"The court has to exercise the power given in Section 33 with great caution and must insist on strict proof before holding that the witness is dead or cannot be found or has become incapable of giving evidence or has been kept out of the way by the adverse party or his presence cannot be secured without an unreasonable amount of delay and expense. But once any of the first four conditions of death, not being found, incapacity to give evidence or being kept out of the way by the adverse party, has been proved, the court has no discretion and must admit the deposition since Section 33 declares such deposition to be relevant and, therefore, admissible." (emphasis added).

Coomaraswamy concedes that a court of law does have the discretion with respect to the last condition in Section 33 relating to a witness whose presence in court cannot be obtained without an amount of delay or expense which "the court considers unreasonable". The present case does not arise from such a situation, and there is no way in which the dead witness can be made to give evidence. Accordingly, I am firmly of the opinion that Section 33 of the Evidence Ordinance is applicable in the circumstances of this case, and that the Court had no discretion in the matter."

"Section 33 is one of the many exceptions found in the Evidence Ordinance to the hearsay rule, and has been considered by this Court in decisions such as Herath

v. Jabbar 41 NLR 217, Cassim v. SuppiahPulle 41 NLR 275, Kobbekaduwa v. Seneviratne 53 NLR 354 and Sheela Sinharage v. The Attorney-General [1985] 1 Sri LR 1."

When it states that evidence given by a witness in a judicial proceeding or before any person authorized by law to take it is relevant in a subsequent judicial proceeding or in a later stage of the same proceeding provided the three conditions laid down in S.33 are present, such evidence is relevant for the purpose of proving the truth of the facts which it states.

Merely because the eyewitness testimony at the trial emerges from a section 33 conduit, it does not lose its weight if it contains sufficiently probative material.

The provisions of law allow to admit evidence given in judicial proceedings as admissible for the purpose of proving the truth of facts when that witness is dead, provided the said evidence had been between the same parties, and the accused had the right and opportunity to cross-examine the witness whose statement is to be admitted in evidence, and that the issue was substantially the same in both the proceedings.

The narrated testimony acquiesced in by S.33 was originally given on oath and was subject to cross-examination. The solemnity of the previous occasion and the circumstance that the evidence was capable of being filtered, as it were, by cross-examination justify its reception in the later proceeding. Thus, the first and second grounds of appeal cannot be succeeded.

The next contention was that the Learned Judge had failed to consider any exception contained in S.294 of the Penal Code.

The position of the appellant is that he grappled with the deceased during the brawl, as the deceased tried to use a knife, which caused the injury on his palm. There was evidence that the appellant was a toddy tapper and always had a sharp knife with him. The appellant tried to say that he did not know

how the deceased sustained the necessary fatal injury to his neck. There were important contradictions in the testimony of the appellant. It is clear that the appellant caused the fatal injury to the neck of the deceased. However, as conceded by the learned Senior Deputy Solicitor General, there was a sudden fight.

> Exception 4.—Culpable homicide is not murdered if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

In the circumstances, the appellant should have been given the benefit of the mitigatory plea of sudden fight under exception 04 to S.294 of the Penal Code. Therefore, we set aside the conviction for murder and the death sentence imposed on the accused-appellant, which substitutes a conviction for culpable homicide not amounting to murder on the basis of a sudden fight, and imposed the appellant a term of seven years rigorous imprisonment, to be effected from the date of conviction, namely 25th June 2020. In addition, I impose on the appellant a fine of Rs. 10,000/- and in default, a six months Simple Imprisonment.

Subject to the above variation, the appeal is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal