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

In the matter of an Appeal under and in terms of section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

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

Court of Appeal Case No. HCC/012/19

Complainant

High Court of Kegalle Case No. HC/3514/15

Vs.

Pathiraja Arachchilage
Chandrathilaka alias Thilake

Accused

AND NOW BETWEEN

Pathiraja Arachchilage
Chandrathilaka alias Thilake

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**

WICKUM A. KALUARACHCHI, J

COUNSEL : Anil Silva PC with A. Bandara for the Accused-Appellant

Azard Navavi, DSG for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 17.09.2019 (On behalf of the Accused-Appellant)

14.12.2021 (On behalf of the Respondent)

ARGUED ON : 18.05.2022

DECIDED ON : 08.06.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Kegalle for having committed the murder of Vithana Arachchilage Indra Piyasiri Jayampathi on or about 12th August 2011, an offence punishable under section 296 of the Penal Code.

After the trial, the learned High Court Judge found the accused-appellant guilty and sentenced him to death. This appeal has been filed against the conviction and the sentence. Both parties filed written submissions prior to the hearing of the appeal, and the learned President's Counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions at the hearing.

The doctor who performed the autopsy and provided the post-mortem report stated that the cause of death was hemorrhagic shock caused by

several injuries to the neck, chest, and abdomen. According to the doctor's testimony, there were five stab injuries and two cut injuries.

In the "Galapitamada Junction," PW2 ran a boutique and PW4 ran a hotel. Prosecution witnesses 2, 4, and 5 have spoken about some of the details regarding the incident. These three witnesses are not related to the deceased or the appellant and have no special relationship with them. Witnesses recognized the deceased and the appellant as residents of the village.

The incident occurred around 9:00 p.m. PW2's home was also near her boutique. When she was at her front door, she observed the deceased approaching her and said, "තිලකේ මට පිහියෙන් ඇන්නා, මාව ගෙනියන්න" (page 33 of the appeal brief). PW4 was at her hotel at the time. Inside the hotel, she heard a loud boom. Then she noticed the deceased and the appellant running into the hotel and heard glasses crashing. She testified that afterward, the deceased fled the hotel and the appellant chased him. Following that, she witnessed the deceased fall with injuries a few meters away from the hotel.

In the circumstances, no one witnessed the appellant causing injuries to the deceased. No facts have been discovered in consequence of information received from the accused-appellant in terms of section 27 of the Evidence Ordinance. Therefore, the prosecution case is based on circumstantial evidence and the dying declaration.

Although it is stated in the written submission tendered on behalf of the appellant that there was a doubt whether the deceased was able to speak at the time, when the alleged dying declaration was made, the learned President's Counsel conceded at the hearing of the appeal that the evidence regarding the dying declaration had never been challenged.

In the circumstances, the learned President's Counsel for the appellant confined his arguments to the defence of a sudden fight.

The PW2 has given evidence regarding the dying declaration. As conceded by the learned President's Counsel for the appellant, the dying declaration was never challenged in cross-examination. However, to act upon a dying declaration, the trial judge must be satisfied beyond a reasonable doubt on certain matters. Those matters are specified in the case of Ranasinghe Vs. Attorney General – (2007) 1 Sri L.R. 218, as follows:

a. Whether the deceased in fact made such a statement.
b. Whether the statement made by the deceased was true and accurate.
c. Whether the statement made by the deceased could be accepted beyond a reasonable doubt.
d. Whether the evidence of the witness who testifies about the dying declaration could be accepted beyond a reasonable doubt.
e. Whether the witness is telling the truth.
f. Whether the deceased was able to speak at the time the alleged declaration was made.

The above-mentioned matters a, b, c, d, and e do not have to be considered because the fact of the dying declaration being made by the deceased and the contents of the dying declaration have never been challenged on behalf of the appellant. Even then, before acting on the dying declaration, it is safe to consider the matter ' f ' because the doctor expressed his opinion that the death of the deceased could have occurred within 2 to 4 minutes after being injured. As pointed out by the learned Deputy Solicitor General, the doctor has given a clear answer to this issue in the following manner.

ප්‍ර: වෛද්‍යතුමනි, එම කාල සීමාව ඇතුළතදී මෙම මරණකරුට යම් කාර්යයක් කිරීමට එහෙමත් නැත්නම් දුවන්නට හෝ ඇවිදින්නට හැකියාව තිබිය හැකිද?

උ: එහෙම හැකියාවක් තියෙනවා ස්වාමීනි.

(Page 83 of the appeal brief)

In cross-examination:

ප්‍ර: තුවාල ලැබීමෙන් පසුව මේ මිය ගිය තැනැත්තාට කතාකිරීමේ හැකියාවක් තිබෙන්න ඇද්ද?

උ: වචන කීපයක් කතා කිරීමට හැකියාවක් තිබෙන්න පුළුවන් ස්වාමීනි.

(Page 83 of the appeal brief)

So, the doctor clearly stated in his evidence that the deceased could walk, run, or speak within the said 2 to 4 minutes. Therefore, it is apparent that the deceased could speak at the time PW2 asserts he made the dying declaration. Hence, it could be safely concluded that the deceased had in fact made the dying declaration as described by PW2 in her testimony.

Now, the only matter remaining to be considered is the defence of a sudden fight. The learned President's Counsel contended that the learned High Court Judge had not considered the possibility of a sudden fight. I regret that I am unable to agree with that contention because, on page 23 of the impugned judgment, the learned High Court Judge stated that it was not revealed in the trial that the act committed by the accused falls within any exception to section 294 of the Penal Code.

It is to be noted that even if a sudden fight is accepted as a defence, it is not a defence to get an acquittal. If the defence of sudden fight is accepted, the appellant is guilty of the offence of culpable homicide not amounting to murder. So, if the accused-appellant relies on the exceptions to section 294, it is his duty to demonstrate that the offence committed by him comes under the exceptions.

However, the appellant has never taken the defence of a sudden fight. Only the following two sentences comprise his very brief dock statement.

"මේ චෝදනාවට මම කිසිම සම්බන්දයක් නැහැ. මම නිවැරදිකරු."

(Page 95 of the appeal brief)

It appears that the appellant has simply denied his involvement in any offence.

In addition, it is pertinent to mention that no prosecution witness was ever questioned about a sudden fight; there was not even a single suggestion on behalf of the appellant to any of the prosecution witnesses regarding a sudden fight; and the accused-appellant said nothing about a sudden fight in his dock statement.

Nevertheless, the learned President's Counsel for the appellant contended that since there is evidence of a sudden fight, the learned High Court Judge could consider the defence of a sudden fight. In any case, the learned President's Counsel conceded that the items of evidence on page 36 of the appeal brief are the only items of evidence pertaining to a sudden fight. The following are the said items of evidence:

"අපි නිදාගෙන සිටියේ ස්වාමීනි. එළියේ ගොඩක් කට්ටිය කෑ ගහන සද්දය ඇසුනා. මම නැගිටලා බැලුවා. මම නැගිටලා බලන විට ස්වාමිපුරුෂයා සිටියේ නැහැ. ඊට පසුව මම එලියට යන විට දොර ඇරලා තිබුණා. මම එතැනට ගිහින් තමයි බැලුවේ."

ප්‍ර: කෝලාහලයක් වගේ සද්දයක් තමයි තමන්ට ඇසුනේ?

උ: ඔව්. ඒ වගේ සද්දයක් තමයි.

(Page 36 of the appeal brief)

I am of the view that the aforementioned piece of evidence could lead to

the conclusion that there was a big noise from a crowd. This noise may occur when there is a fight between two or more persons. At the same time, such a commotion may occur shortly after a crime of this nature. Therefore, it cannot be said with certainty that the shouting was due the sudden fight.

In her testimony, PW4 indicated that the deceased ran to her hotel and that the appellant followed him. She stated that the appellant then chased the deceased when the deceased ran out of her hotel. (The said items of evidence are found on pages 38, 39, and 40 of the appeal brief). Although the appellant was given the opportunity to cross-examine the PW4, no single question was asked on behalf of the appellant. Thus, her evidence has never been challenged. According to PW4's evidence, it is obvious that there could not be a sudden fight because the appellant came behind the deceased when the deceased rushed to PW4's hotel and the appellant chased the deceased when he ran out of the hotel. The said circumstances transpire that the deceased tried to escape from the appellant. Hence, the evidence in this case clearly demonstrates that there was no sudden fight. For these reasons, I hold that the defence of a sudden fight would not succeed. Taking all the circumstantial evidence and the dying declaration into account, it could be concluded beyond a reasonable doubt that the appellant and no one else committed the murder.

At the hearing of the appeal, the learned President's Counsel for the appellant did not point out any other flaw or shortcoming in the impugned judgment. When perusing the judgment of the learned High Court Judge, it becomes clear that the learned High Court Judge carefully and properly evaluated the evidence in the case and correctly decided that the appellant is guilty of murder.

For the reasons stated above, I affirm the judgment dated 24.01.2019, as well as the conviction and sentence.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL