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

In the matter of an appeal from the High Court in terms of section 331 of the Code of Criminal Procedure Act.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA/HCC/201/2017

VS

High Court of Chilaw
Case No: HC 159/2004

Liyanage Neil Chaminda Perera

Accused

And now between

Liyanage Neil Chaminda Perera

Accused– Appellant

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Neranjan Jayasinghe with

Harshana Ananda

for the Accused-Appellant

Riyaz Bary, DSG

for the Respondent

ARGUED ON : 10/10/2022

DECIDED ON : 29/11/2022

R. Gurusinghe, J.

The first accused-appellant (the appellant) and two others were indicted in the High Court of Chilaw for having committed the murder of one Karunapala Perera at Naththandiya on the 05th of September 2001, an offence punishable under section 296 read with section 32 of the Penal Code. The second accused was dead when the trial commenced. The third accused was acquitted by the Trial Judge after trial. The first accused was convicted of the murder and sentenced to death.

Being aggrieved by the aforesaid conviction and sentence, the appellant preferred this appeal to the Court of Appeal.

After the incident, the deceased was admitted to the Marawila hospital, and later, he was transferredto the Ragama hospital, where he died on admission.

As per the evidence of the defence witness (Milindage Anton Dilruk Fernando), he heard a noise of two push bicycles crashing together, when he was inside the boutique reading a news paper. He saw there were four people in the scene and while one of them was taking out a sword, he came out shouting not to attack the deceased (page 314). On pages 324 and 325 he testified that the one who was holding a sword in his hand assaulted the deceased on his head. He further added that there was a cut injury on the deceased person's head. The witness and another person then took the deceased to the Marawilla hospital.

The following points were urged by the Counsel for the appellant, as the grounds of appeal.

1. The evidence of PW3 was not considered by the learned High Court Judge.

2. The learned High Court Judge has failed to analyse the evidence of PW3 in totality.

3. The dying declaration given to the wife of the deceased (PW4) was not reliable and should not have been acted upon it.

4. PW4 in her statement to the police and in non-summary deposition stated that the deceased had said චමින්ද මට කෙටුවා, but in the High Court, she said that චමින්දලා කෙටුවා, with the view to implicate the first and second accused.

The first accused is Liyanage Neil Chaminda, and the second accused was Jayasinghe Arachige Chaminda Perera.

The evidence of the doctor confirms that the injury on the deceased was necessarily a fatal injury. The opinion of the doctor was that usually a person in the position of the deceased, can speak upto a short period of time. On page 258 and 259 he explained that it takes some time for the brain to swell, putting pressure on the brain's stem and inhibiting the breathing process, therefore the period of time such a person can speak, varies from person to person and it can range from half an hour to two hours. PW5 said at pages 139 and 140 as follows:

ප්‍ර: රෝහලට අරගෙන යන කොට කරුණාපාල මොන වගේ තත්ත්වයෙන්ද හිටියේ?

උ: ලොරියෙන් රෝහලට ගෙනල්ලා බලද්දී කෙඳිරි ගෑවා වෛද්‍ය වරයා කිව්වා සිහිය තිබෙනවා මෙහෙමම ඇතුලට ගන්න කිව්වා.

With regard to the dying declaration, it was argued that the wife of the deceased (PW4) would have taken considerable time to go to the hospital, and at the time she went to see the deceased, the deceased was probably not in a position to speak. Even if he spoke, he was not in a proper sense. PW4 received the information of the incident at 11.00 am. The incident took place around10.30 am. PW4 was cross-examined by the defence regarding the dying declaration of the deceased. (On pages 201 and 202) the following questions were put to her by the defence.

ප්‍ර: තමා මූලික සාක්ෂි විභාගයේදි බොහොම පැහැදිලිව කිව්වා තමාගේ ස්වාමි පුරුෂයා තමාට ප්‍රකාශ කලා තමා අතපය වාරු නැතිව වැටෙන්න කලින් චමින්දලා මට ගැහුවා කියලා?

උ: එහෙමයි

ප්‍ර: තමා පොලිසියට කටඋත්තරයක් දුන්නා නේ?

උ: එහෙමයි

ප්‍ර: ඒ කටඋත්තරය තමා අස්සන් කළාද?

උ: එහෙමයි

ප්‍ර: ඒ අත්සන් කරන්න කලින් එම කටඋත්තරය සටහන් කළ නිලධාරියා ඔබට ඒ කටඋත්තරය කියවලා දුන්නා නේ?

උ: එහෙමයි

ප්‍ර: ඒ කටඋත්තරය පොලිසියට ලබා දුන් දිනය මතකද?

උ: මගේ මහත්තයාගේ මරණයට පසු

The defence never suggested that the evidence of PW4 regarding the dying declaration was not true. The difference between Chaminda and Chamindala was not put to the witness and not marked as a contradiction. If she was questioned on that point, she would have had an opportunity to explain it.

Section 145 of the evidence ordinance is as follows:

145(1) A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

145(2) If a witness, upon cross-examination as to a previous oral statement made by him relevant to matters in question in the suit or proceeding in which

he is cross-examined and inconsistence with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such a statement.

Without complying with the provisions in section 145 of the Evidence Ordinance, the defence cannot compare the statement and evidence in court to say that there are contradictions.

The defence had not taken up the position that the deceased was not in a position to speak when PW4 visited the deceased at the hospital. This argument is based on conjectures and cannot be sustained.

Counsel for the appellant argued that the evidence of PW3, the driver of the three-wheeler, was not considered by the learned Trial Judge.As per the evidence of PW3, the incident took place around 10.30 am. and there was a crowd gathered at the crime scene. When he drove slowly near the crowd, the second accused, who was known as Lokka, got into the three-wheeler. PW3 answered as follows;(at page 153.)

ප්‍ර: තමා කියන ඔය චමින්ද නැත්නම් ලොක්කා කියන තැනත්තා තමාගේ ත්‍රිවිලර් රථයට ගොඩ වෙන අවස්ථාවේදී ඔහු සත්තකයේ මොනවා හරි තිබුනද කියලා තමා දැක්කද?

උ: නැහැ මොකුත් තිබුනේ නැහැ.

Then the second accused told him to go forward, and when he proceeded about 400 meters, the first accused, Neil Chaminda, got into the three-wheeler. PW3

knew both accused from childhood. The first and third accused were going on a bicycle at that time. The third accused was riding the bicycle, and the first accused was sitting on the bicycle. The second accused had asked PW3 to slow down the three-wheeler. When the three-wheeler slowed down near the bicycle, the second accused asked the first accused to get into the three-wheeler. At page 158, PW3 stated as follows:

ප්‍ර: නීල් චමින්ද කියන 1 වෙනි විත්තිකරු අතේ මොනවා හරි දකින්න තිබුණාද?

උ: ඒ වෙලේ කිසි දෙයක් පෙනෙන්න තිබුනේ නැහැ

Counsel for the appellant argued that this piece of evidence should have been considered in favour of the appellant. However, PW3 said that when the first accused got down from the three-wheeler, the first accused had a sword, and at the same time, PW3 categorically said (on page 154) that the second accused did not have anything in his possession. PW3 further said that the first and second accused ran after getting down from the three-wheeler. The three-wheeler was not stopped but only slowed down. The evidence of PW3 does not support the version of the appellant. The evidence of PW3 was that at the time when the second accused got into the three-wheeler at the place of the incident, he did not have anything in his possession; PW3 noticed that the appellant (first accused) had a sword in his possession at the time when he got down from the three-wheeler. The first accused got into the three-wheeler about 400 meters away from the place of the incident.

The sword was recovered in consequence of the information of the appellant. As per the police evidence, the sword was not in a place where it could be easily recovered if the appellant did not give the information.

Counsel argued that even though the weapon could be found, it was not proved the connection it had with the first accused. The evidence of PW3 revealed that

the first and second accused got down at the closed boutique room where they stayed. The appellant had the sword in his hand at that time.

The evidence of PW5 revealed that a person with the sword got onto a push bicycle, and another person rode it away. Within 400 meters, PW3 saw the first and third accused were going on the push bicycle. The third accused was riding it. The first accused got into the three-wheeler. When the first accused got down from the three-wheeler, he had a sword with him.

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ප්‍ර: එදා යම් විශේෂ සිද්දධියක් වුනාද?

උ: ඔව්

ප්‍ර: මොකක්ද වුනේ?

උ: එදා මම සේවය කරලා තේ පානය කරන්න එනකොට අපේ ආයතනය අසල කඩයට ආවා. එතකොට ලොකු ශබ්දයක් ඇහුනා. මම ඒ ශබ්දය බලන්න පාර දිගේ ආවා. ඒ වෙලාවේ අපේ ආයතනයේ ගේට්ටුව ඇරලා තිබුනේ. ගේට්ටුව ආසන්නයේදී පුද්ගලයෙක් කඩුවක් අරගෙන තව කෙනෙක් ගොඩ වෙලා හිටිය බයිසිකලයකට නැගලා ගියා. ඒ පාරම මම ඒ ශබ්දය ඇසුන තැනට ආවා. එතකොට ඒ කඩේ අයියා ඉස්සරහාට ආවා. කවුද කෙනෙක්ව කැපුවා කියලා කිව්වා. මම ගිහිල්ලා බලන කොට උඩබැලි අතට එක්කෙනෙක් වැටිලා හිටියා. ඇග හැමතැනම ලේ එනවා.

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ප්‍ර: තමුන් කීව්වා තමුන් සේවා ස්ථානයෙන් එලියට එද්දී කඩුවක් ගත්ත පුද්ගලයෙක් තවත් පුද්ගලයෙක් නැගලා හිටපු මෝටර් බයිසිකලයකට නැගලා එම ස්ථානයෙන් පිටත් වුනා කියලා?

උ: මෝටර් සයිකලයක් නෙමෙයි බයිසිකලයක්.

on page 139

ප්‍ර: තවත් පුද්ගලයෙක් නැගලා හිටියා බයිසිකලේ කඩුවක් අතැති පුද්ගලයෙක් නැගලා ඒ ස්ථානයෙන් ඉවත් වුණා කියලා කිව්වා?

උ: ඔව්

These items of evidence clearly connect the sword and the appellant. It is proved beyond reasonable doubt that the first accused-appellant assaulted the deceased with the sword causing fatal injuries. This injury proved that the appellant had the intention to kill the deceased even though the learned High Court Judge has not referred to some items of the evidence. The evidence is sufficient to justify the conclusion arrived at by the learned High Court Judge. The learned High Court Judge has considered the dock statement of the appellant.

The proviso to Article 138 (1) of the Constitution is as follows:

The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions, matters and things [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance:

Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

When considering the evidence of the case as a whole, the evidence proves the charge against the appellant beyond reasonable doubt. Therefore, I am of the view that any shortcoming in the judgement has not prejudiced the substantial rights of the appellant or occasioned a failure of justice.

Considering the above, I see no reason to disturb the conviction and the sentence imposed on the appellant.

For the above-stated reasons, the appeal is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal