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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Court of Appeal No:**
**CA/HCC/ 0366/2017**

Kalapuge Don Chamindaka Ravi Gunawardena

**High Court of Chilaw**
**Case No. HC/58/2014**

**ACCUSED-APPELLANT**

**vs.**

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

**COMPLAINANT-RESPONDENT**

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

**COUNSEL** : **Saliya Peiris, PC with Pasindu Thilakaratna for the Appellant.**
**Riyaz Bary, DSG for the Respondent.**

**ARGUED ON** : **02/11/2022**

**DECIDED ON** : **09/12/2022**

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**JUDGMENT**

**P. Kumararatnam, J.**

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General for committing the offence as mentioned below.

On or about the 25th March 2012 in Madampe the accused-Appellant committed the murder of Mudiyanselage Dishna Sobani which is an offence punishable under Section 296 of Penal Code.

The trial commenced before the High Court Judge of Chilaw as the Appellant opted for a non-jury trial. The prosecution had led three witnesses and marked production P1-4 and closed the case. The Learned High Court Judge having satisfied that evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the accused. The Appellant gave evidence from witness box and called two witnesses on his behalf.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants as charged and sentenced him to death on 29/11/2017.

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

The Learned President's Counsel for the Appellant informed this court that the Appellant has given his consent to argue this matter in his absence due to the Covid 19 pandemic. At the hearing the Appellant was connected via Zoom platform from prison.

In his solitary ground of appeal, the Learned President's Counsel contends whether the Appellant should have been convicted for culpable homicide not amounting to murder under Section 297 of the Penal Code.

**The background of the case** *albeit* **briefly is as follows:**

In this case no direct evidence is available but the case rests on circumstantial evidence.

PW1 is the elder brother of the Appellant. This witness had confirmed that his accused-brother had an affair with the deceased and were living together in their ancestral home situated at Irattakulama at the time of her untimely death. On the date of incident, while he was attending a Sramadhana at Irattakulama, at about 4.00 p.m. the Appellant had given him a call and asked him to come to his house. He had gone to the Appellant's house accompanied by his second brother by his motor bike. When they reached there, the Appellant had requested the witness to bring a three-wheeler to take the deceased to hospital as she was sick. This witness had sent his second brother to bring his three-wheeler. At this time, the Appellant had told this witness that he had fought with the deceased and therefore she had fallen sick. This witness had not taken any endeavour to inspect the condition of the deceased. When his brother brought the three-wheeler, the Appellant went inside the house and informed that the deceased had refused to come. Hence, he had gone home in his three-wheeler.

At about 6.30 p.m. when he returned home after a hire, he had met the Appellant and the Appellant had told him that the deceased was not talking. Hence, he had gone into the Appellant's house and called the deceased but she did not reply. As the Appellant had told him that the deceased seemed to be dead, both had gone to the Madampe Police Station and lodged a complaint.

According to PW5, the investigating officer, the first information about the death was provided by the Appellant. Also, he had handed over a mobile phone and the identity card of the deceased to PW5 who had arrested the Appellant subsequently. Thereafter, he had gone for investigation visited the scene of crime and recovered productions. The witness saw several sticks including a broken broom stick in the house where the deceased lived with the Appellant.

According to the JMO who held the post mortem, 110 injuries were noted on the deceased's body.

1. Head and Neck - 16 injuries.
2. Back of the Body - 10 injuries.
3. On the Chest - 10 injuries.
4. On the abdomen - 05 injuries.
5. On the Right Arm - 24 injuries.
6. On Left Arm - 15 injuries.
7. On Right Leg - 14 injuries.
8. On Left Leg - 11 injuries.

According to the JMO the number of injuries could be more as some cannot be clearly identified. The summary of the injuries is mentioned below:

- The injuries are in different ages; from few days to few hours.
- The causative weapons are blunt; the patterns and the injuries are consistent with those inflicted by poles, sticks, fist blows, forceful

grips, nail marks and being dashed hard on flat surfaces and a ridge and vigorous shaking of the head.

- The injuries had been repeated over the same anatomical parts in different times.
- The actual number of the injuries exceeds the injuries described as some injuries show overlapping. The number of injuries exceed 110.
- The front, back, and the flanks of the body show injuries due to being assaulted from the all-possible directions.
- There are injuries due to resistance and defence but the defence or resistance is proportionately less compared to the total number of injuries.
- The injuries had been intensified with the time.
- Some injuries could make the deceased incapacitated for some time.
- The manifestation of the late injuries became less prominent due to decreased volume of circulating blood due to obscured internal haemorrhage in to soft tissues due to early injuries.
- Injuries are fatal in ordinary cause of nature collectively in many combinations due to hypovolaemia due to internal bleeding.

The Appellant had given evidence from witness box and called one of his brothers and his mother as defence witnesses after the closure of the prosecution case. The Appellant took up the position that he had constant fight with the deceased but did not think the assault would lead to her death. Although he tried to take her to the hospital with help of his brother PW1, the deceased had refused. In the cross-examination, he took up the position that he was not in good mental condition at the time of the incident. He admitted that he had assaulted the deceased using sticks and also admitted that he was a drug addict but had given up after releasing from the rehabilitation camp.

Both the Appellant's brother and the mother gave evidence to say that his metal status was not rational during the period he had lived with the deceased.

In the argument, the Learned President's Counsel strenuously stressed that the Learned High Judge had failed to consider the circumstantial evidence in its correct perceptively.

PW5, the investigating officer in his evidence clearly mentioned how he recovered the productions from the Appellant's house. Those items were not introductions, as claimed by the defence. The items had been recovered under his supervision by the crime investigation officers. He had identified those production in the open court. The Learned High Court Judge had considered this evidence in his judgment.

Next, the Learned President's Counsel contended that the Learned Trial Judge has not considered the evidence of the JMO as to the wounds of the deceased as they were quite old and the said wounds would not amount to the cause death of the deceased. Hence, he stressed that this case is not one that should have been considered under the third limb of Section 294 of the Penal Code.

The Learned President's Counsel citied the Judgement of **Vithana and Others v. Republic of Sri Lanka [2007] 1 SLR 169** to substantiate his argument. In that case Sisira de Abrew, J. held that:

> *"(1) The intention that is contemplated in the 1st limb of Section 294 is the intention to cause death which is commonly known as murderous intention, but the intention that is contemplated in the 3rd limb of Section 294 is the intention to cause bodily injury. This injury should be sufficient, in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury to cause death in the ordinary cause of nature and not the intention".*

In this case, the injuries sustained by the deceased play a decisive role in determination of this case as to whether the Appellant had actuated the murderous intention or not. Hence, the circumstantial evidence pertaining to injuries found on the deceased's body need to be discussed in detail.

PW10, Consultant JMO who examined the body clearly stated that there were large number of injuries on the deceased's body which were calculated to be 110. He had opined that there could be even more injuries which had been inflicted overlapping on existing injuries. These injuries were primarily blunt force injuries. The patterns and the injuries are consistent with those inflicted by poles, sticks, fist blows, forceful grips, nail marks and being dashed hard on flat surfaces and a ridge and vigorous shaking of the head. The injuries are in different ages; from few days to few hours.

According to the JMO, the death was caused due to multiple blunt force injuries over few days and intensified on the date of death causing internal bleeding, leading to Hypovolaemia, acute left ventricle failure and acute sub dura haemorrhage. Lack of food was also noted in the Gastro Intestinal Tract.

The Pattern of blunt force injuries is in keeping with blows inflicted with blunt weapons, dashing the deceased against hard surfaces and a ridge, forceful grips, nail marks and vigorous shaking of the head.

The JMO further stated that the findings are consistent with that the deceased had been subjected to cruelty and extreme violence including (probably, not limited to) deprivation of food, and physical abuse. There is medical evidence of exposure to unnatural acts of sex over period of time in the past. (Deceased's rectum is dilated)

PW10, in his evidence at page 82 of the brief stated although some injures are not directly cause the death but other injuries inflicted on the deceased's body, especially on her head and internal injuries caused to her body which led to Hypovolaemia condition had directly contributed to her death. The relevant portion of the evidence of PW10 is re-produced below:

(Pages 81-82 of the brief)

ප්‍ර : මෙම තැනැත්තිය පරීක්ෂා කිරීමෙන් අනතුරුව මරණය සිදුවීමට හේතුව සහ අනෙකුත් අදාළ මත ඔබතුමා සකස් කරනු ලැබූ පැ. 01 කියන මරණ පරීක්ෂණ වාර්තාවේ දක්වා තිබෙනවා?

උ : එසේය. මරණය සිදුවීමට දින කිහිපයකට පෙර ආරම්භ වී ක්‍රම ක්‍රමයෙන් තීව්‍ර වන ආකාරයට සිදුවූ බහුවිධ මොට බලයකින් සිදුවී තුවාල හේතුවෙන් ඇති වූ සංසරණය වන රුධිර ප්‍රමාණය අඩුවීම හෙවත් හයිකොලිමියා යන තත්ත්වය හේතුවෙන් සහ තීව්‍ර වම් කෝෂිකා අකර්මන්‍ය වීම හේතුවෙන් මොළයේ ඇතිවූ රුධිර වහනය හේතුවෙන් සිදු වූ බවට මා සඳහන් කර තිබෙනවා. එමෙන්ම ඇයගේ ආහාර මාර්ගය තුළ ආහාර අඩුවෙන් තිබූ බව සඳහන් කර තිබෙනවා. එනම් ඇය නිසි ආහාරයක් දින කිහිපයක් තිස්සේ නොලැබූ බවට සනාථ වන ආකාරයක් පෙන්නුම් කර තිබෙනවා. එමෙන්ම තුවාල රටාව මොට ආයුධයකින් සිදුවූ පහරදීම්වලින් සහ මියගිය අය තද පෘෂ්ඨයක සහ දාරයක හැප්පීමෙන් සිදුවූ තුවාල සහ තදින් ග්‍රහණය කිරීමෙන් සහ ඇයගේ හිස තදින් යම්කිසි කෙනෙකු විසින් සෙලවීමෙන් සිදු වූ ආකාරයට සිදු වූ බව පෙන්නුම් කෙරෙන සටහන් තිබෙනවා. මේ සියලුම දත්තයන් සසඳා බැලීමේ දී මෙම මියගිය අය කෲරත්වයට සහ ප්‍රචණ්ඩත්වයට භාජනය වී ඇති අතර අනුමාණ වශයෙන් සහ මා ඉදිරියේ සඳහන් කළ තත්ත්වයන්ට සීමා නොවූ ආහාර ආදියෙන් වැළකීමෙන් එනම් සාගින්නෙන් තැබීමෙන් වූ කායික අපයෝජනයට ලක්වීමෙන් සිදුවූ බවට ප්‍රකාශ කළ හැකියි. එමෙන්ම අස්වාභාවික ලිංගික ක්‍රියාවකට ඇය කාලයක් තිස්සේ පාදක වූ බවට ප්‍රකාශ කළ හැකියි.

ප්‍ර : මෙම තැනැත්තියගේ මරණය සිදුවීමට තුවාල 110 ම බලපා තිබෙනවද එසේ නැත්නම් මේ තුවාල අතරින් යම් යම් තුවාල පමණද මේ තැනැත්තියගේ මරණය සිදුවීමට බලපා තිබෙන්නේ ?

උ : තුවාල 110 අතරින් යම් යම් තුවාල මරණය සිදුවීමට සෘජුව දායක නොවීමට ඉඩ ඇති බව ප්‍රකාශ කළ හැකියි. නමුත් රුධිර වහනය වී ඇය අකර්මන්‍ය වීම හේතුවෙන් හිසේ තිබූ තුවාල සහ ශරීරයේ අභ්‍යන්තරයේ තුවාල සිදු කිරීමට අදාළ තුවාල ඇයගේ මරණයට සෘජුව දායක වී ඇති බවට ප්‍රකාශ කරන්න පුළුවන්.

In this case, PW10 had detailed and given comprehensive evidence about injuries found on the deceased and its causation to death. The deceased had suffered injuries continuously without any medical treatment. She had been

starving and beaten mercilessly. She had willingly come to live with the Appellant but the Appellant had totally neglected, tortured and assaulted her without being seeking medical attention. She had died because of the complication of the beating. Further, there was medical evidence that the deceased was subjected to unnatural act of sex. The post mortem report revealed that her rectum is dilated. The evidence transpired that all the time relevant to this case the only occupiers of the Appellant's house were the deceased and the Appellant.

Considering all the circumstances, I find the Learned Trial Judge had very correctly concluded that that the Appellant is guilty of committing the murder of the deceased.

Finally, the Learned President's Counsel for the Appellant contended that the Learned Trial Judge had failed to consider the mental condition of the Appellant under the plea of Automatism to establish that the Appellant's performance of actions without conscious thought or intention.

The Appellant while giving evidence admitted that he was a drug addict and was incarcerated for a longer period of time. But he admitted that he had fully given up the habit while in the prison. Although he had consumed drugs after his release, he had stopped after the deceased came to live with him. The relevant portions of evidence are re-produced below:

(Pages 117-119 of the brief.)

ප්‍ර : මොන මත්ද්‍රව්‍ය සම්බන්ධයෙන්ද?

උ : හෙරොයින්වලට ඇබ්බැහි වුනා

ප්‍ර : දැන් ඔබ මත්ද්‍රව්‍ය වලින් මිදිලාද සිටින්නේ?

උ : එහෙමයි.

ප්‍ර : බන්ධනාගාරය තුළදී ඔබට මත්ද්‍රව්‍ය භාවිතය සම්බන්ධයෙන් ප්‍රතිකාර ලැබුනාද?

උ : ප්‍රතිකාර කියන්නේ අපේ හිත්වලින්ම තමයි අපි ඒවා අත්හැරියේ.

(Page 119 of the brief.)

ප්‍ර : ඇය සමඟ එකට ජීවත් වෙන්න පටන් ගත්තාම මත්ද්‍රව්‍ය නතර කළාද?

උ : එහෙමයි.

In his re-examination the Appellant suddenly took up the position that in the prison he was put among the insane persons. But he was not sure whether he was treated for any mental disorder.

(Page 150 of the brief.)

ප්‍ර : එකේදි ප්‍රතිකාර ලබා දුන්නද?

උ : බන්ධනාගාර රෝහලෙන් දුන්නා.

ප්‍ර : මොනවද දුන්න ප්‍රතිකාර ?

උ : මොනවා දුන්නද දන්නේ නැහැ.

ප්‍ර : පසුව හෝ දැන ගත්තද මානසික පිස්සෝ ඉන්න වාට්ටුවක ඉන්නේ කියලා?

උ : එහෙමයි.

But the brother and the mother of the Appellant called for his defence gave evidence with regard to some disturbed mental condition of the Appellant.

The Appellant giving evidence never complained of any mental disorder. Further, the PW1 was never questioned about his metal condition. In the cross examination, PW1 admitted that the Appellant was living without any problem with the deceased during the period relevant this case. The relevant portion of the evidence is re-produced below:

(Page 54 of the brief.)

ප්‍ර : මේ සිද්ධියට මේ මරණකරු සහ විත්තිකරු යහපත් ජීවිතයක් ගත කලාද?

උ : ඔව්. ආරවුල් තිබුනේ නැහැ.

The Appellant never put his mental condition as his defence during the trial. Only the defence witnesses had brought in to the trial.

In **Gamini v. The Attorney General [1999] 1 SLR 321** the court held that:

> "*The use of the criterion of external physical factors and internal physical factors to distinguish between plea of automatism and insanity is wholly incongruous in the law of Sri Lanka. Our law is that in a plea of automatism the accused must lay a sufficient foundation for his plea by leading evidence that his mind was not controlling his limits at all at the time of the commission of the offence. It is not sufficient for the accused to lay the foundation and discharge his evidential burden by establishing that his mind was acting imperfectly at that time, if he was still reacting to stimuli and controlling his limbs in a purposive way. In such an event he would fail to lay a sufficient foundation for the plea of automatism. He must establish that his acts were wholly conclusive and not purposive in any manner".*

Considering case for the defence, it is crystal clear that the Appellant had not laid a sufficient foundation for the plea of Automatism. This clearly shows his afterthought to escape from this case. Hence, the ground raised by the Appellant has no merit at all.

As discussed under the appeal ground advanced by the Appellant, the prosecution had adduced strong and incriminating circumstantial evidence against the Appellant. The Learned High Court Judge had very correctly analyzed all the evidence presented by both parties and had come to a conclusion that all the circumstances are consistent only with the hypothesis of the guilt of the Appellant and totally inconsistent with his innocence.

As the Learned High Court Judge had rightly convicted the Appellant for the charge levelled against him in the indictment, I affirm the conviction and dismiss the Appeal of the Appellant.

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

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**