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 Case No.
CA/HCC/0032/2016

High Court of Chilaw
Case No. HC/91/2009

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

Vs

COMPLAINANAT

1. Hettiarachchige Rohan Christy Kumara Appuhamy
2. Pallawattage Chandana Madhushan Costa
3. Warnakulasuriya Peruthotage Nuwan Ameera Fernando

ACCUSED

AND NOW

Pallawattage Chandana Madhushan Costa

ACCUSED-APPELLANT

Vs

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Anil Silva, PC with Aman Bandara and S.Neranga for the Appellant.**
Azad Navavi, DSG for the Respondent.

ARGUED ON : **13/03/2023**

DECIDED ON : **16/05/2023**

****

JUDGMENT

P. Kumararatnam. J,

The above-named Accused-Appellant (hereinafter referred to as the Appellant) along with 1st and 3rd accused were indicted for committing the murder of Warnakulasuriya Joseph Rohan Fernando on 12/07/2008 which is an offence punishable under Section 296 of the Penal Code.

After a non-jury trial, the Learned High Court Judge has found the Appellant guilty of the charge and sentenced him to death on 29/02/2016. The Learned High Court had acquitted 1st and 3rd accused from the charge. The prosecution had called five witnesses and marked productions P1-6 at the trial. The Appellant along with the 1st and 3rd accused had made dock statements and closed their case.

Being aggrieved by the aforesaid conviction and 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 consent to argue this matter in his absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via zoom platform from prison.

Background of the Case

In this case the deceased was the owner of the Melgahawatte Coconut Estate. PW1 and PW2 are husband and wife who worked under the deceased at that time, and they were provided with accommodation in the same estate.

According to PW1, she had worked as a domestic maid at a house. Her husband PW2, worked as a labourer. On the day of the incident when PW2 returned home, his son was not to be seen. PW1 had told PW2 that their son had gone to the Appellant's house for play. After hearing this, PW2 had gone

to the Appellant's house and brought his son back. Before he could remove his son, he had assaulted him in front of the Appellant.

On the following day, i.e., 12/07/2008, the Appellant along with 1st and 3rd accused had gone to PW1's house and attempted to assault PW2 who manged to lock himself inside the house. At that time, the Appellant carried a sword and the 3rd accused carried a knife. When PW2 locked himself inside the house, the 3rd accused had dealt a blow on the door which resulted in the door getting damaged. At that time, the deceased had come to the scene and had inquired as to why they were harassing the innocent people. At that time, the Appellant had dealt several blows on the deceased's head with the sword. During that situation PW1 had run away from the scene due to fear and returned to the scene of crime only after people gathered there. She had not seen the 1st and 3rd accused assaulting the deceased. Upon admission the deceased was pronounced dead. The sword had been identified by this witness.

PW2, who locked himself in the house had witnessed the incident through the hole on the door created by the 3rd accused. He had corroborated the evidence given by PW1.

According to PW4, Dr. Illangaratna Banda, the death has occurred due to multiple deep incised wounds involving scalp, skull bone and underlying brain substance.

PW7, CI/Sumith Fernando of Chilaw Police Station had conducted the investigation. The 1st accused and the 2nd Appellants were arrested on 19.07.2008 and the 3rd accused was arrested on 15.07.2008.

The following grounds appeal were advanced by the Learned President's Counsel.

1. In the absence of adoption of evidence can the conviction be sustained in this case.

2. Has there being a denial of an effective assistance of a Counsel, and thereby denied a fair trial.
3. In the circumstances of this case should a mitigatory plea under Section 297 of Penal Code should have been considered.

The Learned President's Counsel for the Appellant under the first ground of appeal argued that the Learned Trial Judge who continued and delivered the judgment has failed adopt the proceedings as required by Section 48 of the Judicature Act.

It was held in the case of **Herath Mudiyanselage Aruyaratna v. Republic of Sri Lanka CA/307/2006** decided on 17/07/2013 that:

> *"Transfer of a judge to another station covers the words 'other disability' as stated in Section 48 of the Judicature Act, hence the succeeding judge has no disability to continue with a trial".*

This Court already held in Case No.**CA/HCC/0168/2015 decided on 24/02/2022** that:

> *"In the case under consideration, it is clear from the proceedings that the succeeding High Court Judge has decided to continue with the case by calling the remaining witnesses as formally adopting the evidence previously recorded was not a matter that needed the attention of the Learned High Court Judge, as there was no such requirement, and the provision is for the continuation of the trial.*
>
> *.......... although it has been the long-standing practice of our judges to formally adopt the evidence led before their predecessors, it is not a mandatory requirement".*

As this Court had already held that formal adoption of evidence is not a mandatory requirement, this ground of appeal will not be perused any longer.

In the second ground of appeal, the Learned President's Counsel has contended that the Appellant had been denied of an effective assistance of a Counsel, and thereby denied a fair trial.

To substantiate his argument the following portions of evidence and the portion of the judgment are highlighted.

Under cross examination of PW1, the following question had been put forward.

(Page 85 of the brief)

ප්‍ර : තමා පොලිසියට කටඋත්තර දෙන අවස්ථාවේ එසේ කිව්ව බවට සටහන් වෙලා තිබෙන නිසා එය අවධානයට ලක් කරනවා. " නුවන් සහ රොෂාන් මධුෂාන්ට කොටන්න එපා කියමින් කඩුව ගන්න හැදුවා." එහෙම සටහන් වෙලා තිබෙනවා නම් හරිද?

උ : හරි.

(Pages 95-96 of the brief)

ප්‍ර : තමා පොලිසියට කටඋත්තර දුන්නා 2009.07.12 දින. ඒ කටඋත්තරය තමාට කියවලා දුන්නා මතකද ? තමන් එහි ප්‍රකාශ කරලා තිබෙනවා මෙහෙම ? "නුවන් සහ රොෂාන් මධුෂාන්ට කොටන්න එපා කියමින් / පොරබදිමින් කඩුව ගන්න හැදුවා" තමාට පහල අධිකරණයේ මේක කියවලා දීලා තිබෙනවා. මේකෙ තිබෙන බව පිළිගන්නවාද එහෙම කියපු බව සටහන් වෙලා තිබෙනවා ?

උ : නැහැ. පොර කෑවා. ඒ කට්ටියම එකට.

ප්‍ර : ඒ පොරකෑවේ මොකටද?

උ : ඒක දන්නේ නැහැ.

(Pages 241-242 of the brief)

පැමිණිලිකාර පාර්ශවය වෙනුවෙන් ඉදිරිපත් වී ඇති සාක්ෂියන්ට අවධානය යොමු කලවිට 01, 03 චූදිතයින්, මරණකරුට 02 චූදිත විසින් පහර දුන් ස්ථානයේ සිටි බවට කරුණු ඉදිරිපත් වී ඇතත්

එම චූදිතයින් විසින් මරණකරුට පහර දීමට 02 චූදිතව දිරි ගැන්වූ බවට සාක්ෂියක් ඉදිරිපත් වී නැත. 02 චූදිතට ඒ සඳහා ආයුධයක් ලබා දුන් බවට සාක්ෂි ඉදිරිපත් වී නැත. මරණකරුට පහර එල්ල කිරීමට පහසුවන ක්‍රියාවක 01, 03 චූදිතයින් නියැලුන බවට සාක්ෂි ඉදිරිපත් වී නැත. 02 චූදිත අත තිබූ කඩුවේ එල්ලී ඉන් 02 චූදිත විසින් පහරදීම වැලැක්වීමට 01, 03 චූදිතයින් උත්සහයක යෙදුනු බවට සාක්ෂි අනාවරණය වී ඇත.

The Learned President’s Counsel highlighting the above-mentioned portions of evidence of PW1 argued that the Appellant had been deprived a fair trial which is guaranteed under our Constitution due to the deficient performance of the Counsel who appeared in the High Court. Had the Counsel who defended the Appellant in the High Court conducted himself professionally, that the result of the proceeding would have differed. To support his argument following passage was quoted from the Book titled **“Professional Ethics and Responsibilities of Lawyers” authored by Dr. A.R.B.Amerasinghe at page 360.**

Sri Lanka provides as follows in rule 8:

> Where a conflict arises between the interests of two or more clients for whom the attorney-at-law is acting, the attorney-at-law shall ease to act for all his said clients unless he decides that he can without professional impropriety or embracement to himself appear for any one or more of such clients provided such other clients or agree that he might so appear.

“Although the Rule appears under the Chapter entitled ‘Acceptance of instructions’, it really covers cases where there was no conflict at the time of the acceptance of a matter but where it subsequently arises in a matter in which the attorney is already ‘acting’. Generally, where the attorney cannot consider, recommend, or carry out a course of action for a person who seeks his services because of his other responsibilities or interests, which in effect would foreclose alternatives that would otherwise be available to such a person, and might materially limit his effectiveness,

the matter should be declined. If the conflict arises after he accepted the matter, he should cease to act in the matter. Rule 8 permits an attorney to appear in a matter if the other client agrees or the clients agree that he might so appear and if the attorney decides that he can act for the several parties 'without any professional impropriety or embarrassment to himself'. There is no guidance given by the rule on how professional impropriety or embarrassment may be avoided".

Ineffective assistance of a Counsel will lead to a violation of the defendant's right to a fair trial. If the ineffectiveness comes after the trial and the accused was found guilty, to the remedy the situation the best course of action would be either the Court reverse the guilty verdict or order a new trial.

In this case, PW1 had clearly witnessed all three accused who came to her house. The Appellant who was carrying a sword came after PW2, who ran inside their house and closed the door. At that point, the deceased had come to the scene only to rescue PW1 and PW2 from the group. But the Appellant had cut the deceased on his head. Although the deceased raised his hands to cover from the shots that were being directed on him, he could not save his life.

Although PW2 had given cogent and convincing evidence in corroborating the evidence given by PW1, strangely the Learned High Court had not considered the evidence given by PW2 in his judgment. This is a serious flaw on the part of Learned High Court Judge.

Considering the evidence given by PW1 and PW2, finding the Appellant guilty to the charge has not caused any prejudice to the Appellant. Hence, I consider this is an appropriate case to consider under the proviso of the Article 138 of the Constitution.

<u>Article 138 of The Constitution of The Democratic Socialist Republic of Sri Lanka states:</u>

> "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 restitution in integrum, of all cases, suits, actions, prosecutions, matters and things of which such High Court of First Instance, Tribunal or other institution may have taken cognizance;
>
> > **Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect, or irregularity, which has not prejudiced the substantial right of the parties or occasioned a failure of justice". [**Emphasis added**]**

The above-mentioned provision of the Constitution clearly demonstrates that any failure to adhere to the legal provisions can be considered only if such failure prejudices the substantial rights of the parties or occasions a failure of justice.

In this case, the Learned High Court Judge considered the evidence presented by the prosecution very carefully and had come to the conclusion that that the Appellant is responsible for committing the murder of the deceased. This finding has certainly not prejudiced the Appellant's right to a fair trial. Hence, no re-trial can be ordered. Therefore, this ground has no merit.

In the third ground of appeal, the Learned President's Counsel contended that in the circumstances of this case should a mitigatory plea under Section 297 of Penal Code have been considered.

In this case, evidence presented by both the prosecution and the defence did not reveal any mitigatory circumstances that had existed at the time of committing the offence. Hence, this ground of appeal also devoid any merit.

Considering the evidence led in this case and guided by the judgements mentioned above, I conclude that this is not an appropriate case in which the judgement delivered by the learned High Court Judge on 29/02/2016 against the Appellant can be interfered upon. Therefore, the appeal is dismissed.

The Registrar of this Court is directed to send a copy of this judgment to 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