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

In the matter of an application under and in terms of section 331 (1) of the Criminal Procedure Code Act No. 15 of 1979 and Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Republic of Sri Lanka

Complainant

CA Case No: HCC 49/2020

HC Gampaha Case No: 148/08

Vs.

Hikkaduwa Withanage Sajeevan Prasanga

Accused

AND NOW BETWEEN

Hikkaduwa Withanage Sajeevan Prasanga

(Presently at Welikada Prison)

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Vishwa de Livera Tennakoon for the Accused-Appellant
Anoopa De Silva , DSG for the State

Written Submissions: 23.02.2022(by the Accused-Appellant)
31.05.2022 (by the Respondent)
On

Argued On : 12.05..2023

Decided On : 17.07.2023

Sasi Mahendran, J.

The Accused-Appellant abovenamed (hereinafter referred to as 'the Accused') was indicted before the High Court of Gampaha for having committed the offence of murder of one Kongasdeniyage Ajith Kumara Sampath an offence made punishable under Section 296 of the Penal Code.

Prosecution led the evidence of five witnesses and evidence marked as P1 to P14. The accused made a dock statement. After the trial, the Learned High Court Judge convicted the accused for the murder, and the death sentence was imposed.
Being aggrieved by the said conviction and the sentence the Accused has appealed to this court.

The following grounds were set out in the written submission.

i. In arriving at the judgment, has the learned Trial Judge failed to consider the contradictions in the testimonies between PW2 and PW3 which have gone to the root of the case?

ii. Has the Learned High Court Judge not considered the infirmities and contradictions between the evidence of the eye witness PW2 and the Specialist Judicial Medical Officer (PW14)?

iii. Has the Learned High Court Judge misdirected himself when he determined that it was not possible to challenge the failure of PW14 to identify the signature of the deceased doctor who compiled the post mortem Report since the deceased's qualifications etc, and death was recorded as admissions under Section 420 of the Criminal Procedure Code No 15 of 1979?

iv. Although both PW2 and PW3 have clearly stated in evidence that the deceased and the Appellant had fought with each other, has the Learned High Court Judge erred when he determined that there was no such fight between the deceased and the appellant and thereby wrongly concluding that the right of Private Defence is not available to the Appellant in an occasion of a sudden fight?

v. Has the Learned Trial Judge in his judgment failed to consider to the benefit of the Accused Appellant the fact that PW2 and PW3 have both stated in evidence that they have not seen the stabbing incident and further the contradictions in the

evidence in relation to the actual place where it is alleged that a fight broke out between the Accused and deceased?

vi. Has the Learned Trial Judge failed to consider that, the position taken by the Appellant in his Dock Statement, that he was defending himself when this incident happened challenges the evidence of the prosecution?

vii. Has the Learned Trial Judge erred when considering the Appellant's Dock Statement in isolation and not against the entirety of the evidence led?

viii. Has the Learned Trial Judge erroneously considered presumptions as to the behaviour of the Appellant not recognized in law?

ix. Has the trial judges failed to consider that the evidence of PW3 corroborates the Dock Statement of the Appellant?

x. In the totality of the evidence led, has the Learned Trial Judge failed to consider whether the alleged act of the Appellant could be treated as one falling under a limb of culpable homicide not amounting to murder?

xi. Has the Learned High Court Judge failed to accrue the benefit of the doubt manifest when considering the totality of evidence to the appellant?

When the matter came for argument on the 10th of June 2020. It was the contention of the Appellant that the Prosecution had failed to establish beyond reasonable doubt cementing that it was the Accused that caused the death of the Deceased.

The facts and circumstances giving rise to this appeal are that:

According to the evidence given by the eye witness PW2 namely Panagoda Liyanage Sanjeewa Lakshman Seneviratne, on the day in question 27th of May 2006, he hired a three wheeler driven by the Deceased to visit his mother at Weerasooriya Kanda. Due to PW2's necessity to take a call they stopped by a nearby shop which upon reaching they found to be closed.

They both sat on a bed that was placed on the veranda of the shop and waited until the shop opened. Later on, they saw PW3 arrive along with his daughter. Subsequently, the Accused visited the shop and asked if the shop was closed and left right afterward. After 30 minutes, the Accused returned to the shop at 4:00 pm this time carrying an umbrella, charged at the Deceased closing the umbrella and engaged in a scuffle and stabbed the Deceased in front of the shop where they were seated.

On Page 95 of the brief:

ප්‍ර : ඒ ආවට පස්සේ මොකද උනේ?

උ : කුඩය අකුලලා එක පාරට ත්‍රීවිලර් එකේ අයියා ලගට දුවගෙන ආවා ඊට පස්සේ දෙන්නා රණ්ඩු වුනා.

පිහියෙන් ඇන්නා වගේ වුනා.

ප්‍ර : කව්රු කාට ඇන්නා වගේද වුණේ?

උ : කුඩේ ඉහලාගෙන ආපු කෙනා ඇන්නා.

It must be noted that the distance between PW2 and the transpiring scuffle was 6 feet away. Albeit PW2 states that he did not see the knife but he did see the Accused stabbing the Deceased which was affirmed in his cross examination. After the fatal events the Accused left the crime scene with his umbrella and thereafter the Deceased holding on to his injured and bleeding neck approached PW2 and handed the keys to PW2 to drive the three wheeler, PW2 who possessed no knowledge of driving a three wheeler made two stops before ultimately reaching a three wheel park upon which he sought help from another three wheel driver who helped take the deceased to the hospital. After admitting the deceased at the hospital, PW2 visited the Nitambuwa Police station to lodge his complaint which he later

learned that the deceased had passed away.

On Page 96 of the brief

ප්‍ර : ඊට පස්සේ මොකක්ද කලේ?

උ : දෙන්නා රණ්ඩු වුණා. ත්‍රීවිලර් රථ රියදුරු බෙල්ල අතින් අල්ලාගෙන නැගිට්ටා නැගිටලා බේරන්න හැදුවේ. ඊට පස්සේ එහෙමම පඩියෙන් පල්ලෙහාට බැහැලා දිව්වා.

ප්‍ර : කව්ද පඩියෙන් පල්ලෙහාට බැහැලා දිව්වේ?

උ : රියදුරු.

ප්‍ර : එයාට ඇන්න කෙනා මොකද කලේ?

උ : එයා එතනම හිටියා. ඉදලා එයා කුඩෙත් අරගෙන ගියා.

The main objection taken by the defense was that the witness PW2's evidence could not be believed as there are a number of contradictions and discrepancies. For that, the counsel for the Accused has mentioned the following contradictions.

1. Prior to the alleged act of the stabbing, he did not see the Accused and the Deceased engaged in a scuffle according to the cross examination. Whereas the evidence-in-chief says that he had seen the scuffle in his witness statement.

2. Further contradictions between this witness and PW3's version. regarding to not mentioning the group of people near the van and also not mentioning the other person's name (Dileepa). We are mindful that PW2 is a stranger to this area and PW3 is a resident of that area.

   When we pursue his evidence, we don't see any major contradictions in PW2's evidence, as he is consistent throughout. Minor contradictions in evidence are usually found in witness testimony, especially when the witness has to recollect their memory years after the events. We're mindful of the observations made by **Justice Thakkar** with regard to the contradiction in **Bharwada Bhoginbhai Hirjibhai vs State of Gujarat 1983 AIR HC 753;**

"... (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. (2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details. ***(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.*** *(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder. (5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment 1.1 at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time- sense of individuals which varies from person to person..."*
(emphasis added)

In **State of Uttar Pradesh v. M.K. Anthony, by D. A. Desai J**, reported in Supreme Court Journal 1984 (2) page 498,

"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would

not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. ***Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."***

(emphasis added)

The above said judgement was referred by **Sisira De Abrew J,** in the case of **Oliver Dayananda Kalansuriya alias Raja Vs The Democratic Socialist Republic of Sri Lanka, CA 28/2009 decided on 13.2.2013** his Lordship held:

"His conduct is, therefore, in my view, very much compatible with a conduct of a normal human being. It is an accepted principle that a criminal case cannot be proved with a mathematical accuracy as it has to be proved by the evidence given by human witnesses. Thus discrepancies, errors and contradiction are bound to occur. If they do not create a reasonable doubt in the prosecution case court should disregard them. Courts should not reject evidence of witnesses on the basis of minor discrepancies and contradictions."

Upon assessing the above authorities we hold that this contradiction pointed out by the accused are trivial matters and unrelated to the main incident, therefore there is no reason to reject his evidence.

We further hold that it is perspicuous according to what is found in the cross examination of PW2, we cannot reject his testimony as he acts as a sole unbiased witness and these discrepancies are not material to decide the issues in this case. Therefore PW2's witness testimony is paramount evidence in establishing that the stabbing by the Accused against the Deceased transpired.

On Page 102 of the brief:

ප්‍ර : ඇදෙන් බිමට පෙරලුනාද?

උ : ඇදෙන් බිමට පෙරලුනේ නැහැ. පිහියෙන් ඇන්නට පස්සේ එයා නැගිට්ටා.

ප්‍ර : එතන මොකුත් කතා බහක් ඇති වුනාද?

උ : ඒ ගැන මතක නැහැ. මටත් හිතා ගන්න බැරිව ගියා මොකද වුනේ කියලා.

PW3 namely Athugal Pedige Viraj Niroshan Amarasinghe testified according to what he witnessed on the 27th of May 2006 at the premises of the shop he had visited along with his daughter. Where he had met with the Deceased and PW2 while waiting for the shop to be opened, he then went on to sit on the other side of the shop with his child.

Further, he narrated that two other people arrived one being Dileepa and the other being the Accused whom he recognized to be Sajeewa from his village. Sajeewa returned to the shop again after 5 to 10 minutes where he had changed his clothes previously from a brown colored saron to a pair of brown pants and a shirt along with an umbrella, according to PW3 the Accused had gone up to the Deceased, PW3 then heard a noise out of fear he left the shop. He dropped his daughter off at his house which was 2 to 3 meters away when he returned, he witnessed the Deceased running away drenched in blood where he was helped onto the three wheeler by two other men and left the area whilst the Accused also left the scene of the crime where he was last seen heading towards his house.

On Page 106 of the brief:

ප්‍ර : සජීව කියන අය දෙවැනි සැරේ ඇවිත් මොකද වුනේ?

උ : එයා කඩේට ඇවිත්, මේ දෙන්නා ඇදේ වාඩිවෙලා සිටියා. සීයා පත්තරේ බල බලා සිටියා. මම දුවත් එක්ක ගෙදර යන්න එහා පැත්තට ටිකක් වෙලා හිටියා.

ප්‍ර : ඉන්පසුව කුමක්ද වුනේ?

උ : ඒ ඉන්නකොට එක පාරට ශබ්දයක් ආවා. දෙන්නා පොර කැවා. දුව මගේ අතේ හිටිය නිසා මීටර දෙක තුනක් එහා අපේ ගෙදර තියෙන්නේ. මම ගෙදරට ගියා දුවව දෙන්න. දුව දීලා එනකොට ත්‍රිවිල් එකේ රියදුරු ලේ පෙරාගෙන පහලට යනවා දැක්කා. සජීව පාර දිගේ එයාගේ ගෙවල් පැත්තට ගියා.

According to this evidence, it had been established the way the Accused behaved after seeing the Deceased had gone home and changed his clothes, and returned with an umbrella where the umbrella was used to stab the Deceased.

This witness has corroborated the evidence of PW2 regarding the fight, the fact that the Accused was carrying an umbrella, and the Deceased covering his bleeding neck.

PW7 Walpola Arrachilage Nihal Walopa Police inspector, states that he arrived at the scene of the crime at 5:30 pm on the 27th of May 2006 along with some police officers. Upon arriving at the scene of the crime, he discovered blood stains near the bed. PW7 also states that he had visited the Accused's house in search of him which was situated 50 meters away from the shop but was unable to find him. Later on in the night, the Accused surrendered himself to the Nittambuwa police at 11:45 pm on the day in question. The Accused's statement was obtained on the 28th of May 2006 at 6:40 am. Thereafter PW7 states that the Accused opted to show where the knife was hidden when they conducted their search at 7:10 am on the same day, the Accused presented the knife which was concealed under a rock near a well which was situated in the property belonging to the Accused.

This piece of evidence was not challenged by the Accused when he gave evidence in the dock statement.

Our courts have considered the impact of the recoveries made on the information provided by the Accused.

In **Ariyasinghe And Others V Attorney General (G. C. Wickremasinghe Abduction Case) 2004 (2) Sri L.R 357 at 386 Amaratunga J** held that;.

"According to the analysis, there were three ways in which the accused persons could have acquired their knowledge about the places where G/66 notes were found. The following are the three ways.

i. The accused himself concealed those G/66 notes found in the place where they were found.
ii. The accused saw another person concealing the notes in that place
iii. A person who had seen another person concealing those notes in that place has told the accused about it."

In the instant case, the accused had not raised any objection regarding the recoveries made under Section 27 (1) of the Evidence Ordinance.

The Accused not only gave the information but also guided the police to find the knife. Considering the facts of this case, it is conspicuous that the Accused owes an explanation to the court but he has failed in providing one. Other than a flat denial there is no explanation offered by the Accused that would pronounce that there is no specific denial nor explanation for the recovery of the said knife by the Accused.

PW14 Bulathsinhalage Chaminda Suranga Perera the Judicial Medical officer, as contained in the postmortem report, it is documented that there had been 6 wounds consisting of 2 stab wounds and 4 cut wounds. It is evident that the 1st injury which is deduced as a stab wound was found on the left side of the neck, the cause of death had resulted from the haemorrhage and shock which had manifested from the injuries sustained.

The Judicial Medical officer in his expert opinion gives evidence, the injuries are likely caused by a knife like causative agent and that some force is required in order to inflict such harm on the Deceased.

When we consider this medical evidence, the Court can come to a conclusion based on how much force was used to inflict such an injury.

Another objection taken by the Accused was that the prosecution has failed to prove the murderous intention.

It is pertinent that we follow the fundamental elements laid out by **E,R,S,R, Coomaraswamy in his Book "The Law of Evidence" (Book 2 Vol. 2 page 932)** which states;

> "The judge must in a case of murder or culpable homicide direct the jury on the necessary ingredients of the relevant offence;
>
> a. The death of the deceased;
> b. That the accused caused the death;

c. That the accused had the murderous intention in a case of murder or the necessary intention or knowledge in a case of culpable homicide not amounting to murder."

We are mindful of the observation made by **Sisira De Abrew J** in the case of **CA 112.2006 Thommeyahakuru Somasiri vs. Republic of Sri Lanka.** decided on the11.02.08 held: "In a criminal case it is difficult for the prosecution to find direct evidence to establish the murderous intention. The murderous intention must be understood from the factors such as, *place of injury, the weapon used, number of injuries, gravity of the injury and the force used by the assailants*".

In my view, to establish a murderous intention the authority held by His Lordship Justice Sisira De Abrew is relevant to the instant case. It is true that there is no direct evidence with regard to the murderous intention of the Accused In such a case, medical evidence is very helpful to find out whether the Accused had a murderous intention to cause the death of the Deceased. In line with the reasoning given in the above judicial authorities.

If we apply the above dictum the injury caused on the neck of the Deceased and the force used by the Accused it is possible to establish that the Accused had a murderous intention. In other words, the medical evidence establishes that the Accused had a murderous intention to cause the death of the Deceased.

Now we have to consider whether the dock statement made by the Accused has created reasonable doubt. According to the dock statement, the Accused stated that the deceased had a knife and he had started the fight and his version not was put forward to any witnesses.

This court is mindful that the observation made by **W.L.Ranjith Silva,J** with regard to the defense version in the case **CA 186/2009 Kiribandara Muhandiramlage Rohana Tissa Kumara v. AG decided on 18.10.2011**

"When the prosecution witness gave evidence, the investigating officer the Appellant never challenged him or at least suggested to him that three other people or strangers

assaulted the deceased. Therefore the defence put forward by the Appellant that three other people assaulted the deceased was never suggested to the witnesses for the prosecution in cross examination and the failure to challenge or suggest the defence version to the witnesses would be detrimental to the defence. In other words this position taken by the appellant has to be treated as an afterthought."

We hold that the learned High Court Judge had correctly rejected the defense tendered by the Accused.

We find that the Prosecution had submitted sufficient evidence to prove the case beyond reasonable doubt. Therefore, we see no reason to interfere with the judgement dated on the 10th of June 2020, the conviction and the sentence are affirmed, and the appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL