IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

C.A. No. 148/2009

H.C. ANURADHAPURA- 81/2004

HERATH BANDARAGE MAHINDA
DISSANAYAKE,
BOGAHAWEWA
RANORAWA.

ACCUSED- APPELLANT

VS.

ATTORNEY GENERAL
ATTORNEY GENERAL'S DEPARTMENT
COLOMBO 12.

RESPONDENT

BEFORE : ANIL GOONARATNE , J &

P.R. WALGAMA, J

COUNSEL : TREENCE WICKRAMASINGHE for the Accused-Appellant

CHETHIYA GOONASEKARA – DSG for the Respondent

ARGUED : 12.11.2014

DECIDED : 12.12.2014

P.R. WALGAMA, J.

The Accused- Appellant (herein after sometimes called and referred as the accused) has preferred the instant appeal to this Court against the Judgment and the conviction of the Learned High Court Judge dated 13.10.2009, by which judgment the Accused had been convicted for attempted murder punishable under Section 300 of the Penal Code. By the afore said conviction the Learned High Court Judge has imposed a jail term of 10 years of Rigorous imprisonment and a fine of Rs. 30,000/ carrying a default sentence of 2 ½ years. Being aggrieved by the said conviction and the sentence the Accused had lodged this appeal to have the conviction and the sentence set aside accordingly.
Shortly stated facts of the prosecution emerge thus;

The testimony of the victim was that on this fate full day at or about 10 o clock at night four people had forcibly entered the bouquet where he was lying and covered his head with the bed sheet and had dealt a blow on his head. At this time there had been a lamp burning and from the light of the lamp the victim, has identified the assailant as the Accused. Further it is said that the accused had attacked him with a knife. The victim has further explained as to the ongoing enmity between two fraction, which resulted in this attack.

In the cross-examination certain contradictory statement were marked as to time of the incident and the number of people accompanied the accused.

The testimony of the victim was that he has very clearly identified the Accused and it is said it was accused who stabbed twice on

his head. In the cross examination he was confronted with the statement made to the police and the testimony to Court as regards the number of intruders came on that day and the time of the assailant attacked him. But it is seen that these two contradictions do not attack the credibility of the victim's version and do not go to the root of the prosecution case.

In the above setting it is abundantly clear that the prosecution has proved the intelligible motive on the part of the Accused to inflict the injury to the victim. The said position was considered by the Learned Trial Judge in arriving at the decision that it was the accused who was responsible for the alleged attack. Besides it is to be noted that the identity of the accused by the victim. The evidence revealed that the accused was known to the victim, and there was no doubt as to the identity of the wrongdoer. It is intensely relevant to note that the victim has identified the accused not at a fleeting glance as the Counsel for the Accused has adverted the attention of Court the necessity to have recourse to the rational embedded in the Turnbull Theory. As it was mentioned above the Learned Trial Judge has arrived at the conclusion that it was the accused who should be held responsible for committing of the alleged crime. Therefore this Court is of the view that the identity was clearly established by the prosecution, and same was the finding of the Learned Trial Judge in which this Court is call upon to up hold the same.

It is to be noted the contradictions that were marked by the defence do not attach any weight in deciding the case against the Accused as there were strong cogent evidence against the accused which brings more light to the prosecution case. In this case the stance of the Accused was that victim was in a habit of peeping through the windows of the neighboring houses and

doing so he was subject to an assault by a neighbour. But the said position was not attacked by the accused when the victim was giving evidence in court. Therefore the Learned High Court Judge has totally rejected the said allegation.

According to the brief history given by the victim to the Doctor apparently after 7 days after the alleged incident is another important factor that was taken in to consideration by the Learned Trial Judge in evaluating the evidence before her. In examining MLR it is being noted that the said report indicates three categories of wounds which are identified as grievous injuries. But nevertheless they do not fall in to the limb of that the injuries sufficient in the ordinary course of nature to cause death.

The Learned Judge in the impugned judgment has extensively dealt with the evidence adduced by the Accused at the trial. The Accused in evidence to Court has totally denied his involvement in the alleged incident and had stated that he does not go the village where the victim lives. The accused had also admitted the fact that he has enemies in the village where the victim lives. The said position confirms the plank of the plaintiff. Further the accused had made a statement to the police wherein he has stated that he came to know that through one Ananda that some person at Kokunewa had been attacked. In evaluating the Accused testimony in court the Learned Trial Judge was of the view that the Accused position lacks probative value and dialuted evidence of the Accused cannot attacked the testimonial trustworthiness of the victim and the other witnesses for the prosecution. When the evidence is reviewed in its totality this court see no plausible reason to interfere with the impugned judgment.

The counsel for the Accused had specifically adverted court to the fact that 3rd limb of the MLR is left empty as the injuries described under the 2nd limb are not injuries sufficient in the ordinary course of nature to cause death. In the said back drop the Counsel for the Accused has urged that the charge under Section 300 to be commuted to one of grievous hurt which is punishable under Section 317 of the Penal Code.

Hence in the said back drop we are unable to accede to the above mentioned grounds, but nevertheless this Court has taken serious note of what is stated in the MLR which only indicate the fact that the injuries received by the victim has only established the fact that the injuries are of such nature that the Accused should have been convicted for having committed an offence punishable under Section 317 for causing grievous hurt.

The Learned Trial Judge by her impugned judgment had convicted the Accused and imposed a sentence of 10 years rigorous imprisonment and a fine of Rs. 30,000/ carrying a default term of 2 ½ years.

For the foregoing reasons we are of the view that this is a fit and proper case for substitution of the charge 317 of the Penal Code for Section 300.

The Accused is incarcerated for 5 years and 2 months. Therefore in the above setting we vary the sentence and allowed the appeal in part.

The jail term is commuted to 5 years and 6 months, and to be effective from the date of conviction.

The fine imposed and the default term will stand accordingly.

JUDGE OF THE COURT OF APPEAL

Anil Gooneratne,J.

I agree.

JUDGE OF THE COURT OF APPEAL