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

Court of Appeal No: CA 191 / 2012

High Court of Embilipitiya No: 24/2010

In the matter of an appeal under and in terms of Article 138(1) of the Constitution read with Section 11(1) of the High Court of the Provinces [Special Provisions] Act No.19 of 1990

The Democratic Socialist Republic of Sri Lanka,

Complainant

Vs.

Yakgahavita Liyanage Wijesiri

Accused

And Now

Yakgahavita Liyanage Wijesiri

Accused – Appellant

The Democratic Socialist Republic of Sri Lanka

Complainant – Respondent

BEFORE: W.M.M. MALINIE GUNARATNE J
S. DEVIKA DE LIVERA TENNEKOON J

ARGUED ON: 09.02.2016

DECIDED ON: 13.06.2016

COUNSEL: **Razik Zarook PC with Rohan Deshapriya & Chanahya Liyanage for the Accused Appellant.**

Shanil Kularathne for the Hon. Attorney General

S. DEVIKA DE LIVERA TENNEKOON J

The Accused – Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Embilipitiya for causing the death of Kankanamge Dias at Miriswelapotha in Embilipitiya area on 30th July 1991, punishable under section 296 of the Penal Code and causing hurt to Wijenayake Kankanamge Dayawathie in the Course of the same transaction punishable under Section 315 of the Penal Code. After trial the Appellant was convicted and sentenced to death on the 1st count and was sentenced to 2 years rigorous imprisonment for the 2nd count. This is an Appeal against the said conviction and sentence.

In order to establish the case against the Appellant, in addition to the medical and police evidence, the prosecution had relied on the evidence of W.K. Tilakaratna (PW1) a brother of the deceased, W.K. Dayawathie (PW2) a sister of the deceased who was injured during the course of the incident, M.A Gunathilake Miduiyanse (PW3), Viraj Emmanuel Perera (PW4) the brother in law of the

deceased and the husband of Dayawathie. At the end of the case the Appellant made a statement from the dock taking up the position that the incident had taken place in the course of a sudden fight, although no suggestion had been put to the prosecution witnesses to that effect at the time of cross examination.

At the initial trial which had been heard in the High Court of Rathnapura , the Accused Appellant in the instant case Yakgahawita Liyanage Wijesiri and one Dapane Podi Mahatthaya was indicted on the same counts punishable under section 296 and 315 of the Penal Code. At the conclusion of the trial the 1st Accused was convicted and the 2nd Accused Dapane podi Mahatthaya was acquitted. The 1st Accused of the initial trial had preferred an appeal against the said conviction and sentence of the Learned High Court Judge of Ratnapura. Due to non compliance of the provisions of Section 196 of the Criminal Procedure Code Act, the Court of Appeal had made an order for re-trial against the 1st Accused Appellant and had sent back the case to the High Court of Ratnapura .

The second trial was held in the High Court of Embilipitiya as per the Journal Entry dated 05/07/2010 and it proceeded only against the 1st Accused as directed by the Court of Appeal. After trial, the Learned High Court judge convicted the Appellant on both counts and thereafter sentenced him to death on the 1st count and was sentenced to 2 years rigorous imprisonment on the 2nd count.

Consequent to the said conviction and sentence the Appellant filed the instant Appeal against same.

When this appeal was taken up for hearing the Learned President's Counsel for the Appellant based his argument mainly on the following grounds;

i. The evidence of the witness W.K. Dayawathie (PW2) is not credible and she cannot be treated as an eye witness to the incident.

ii. The Learned Trial Judge had failed to appreciate the fact that the incident had taken place in the course of a sudden fight.

iii. Since the Court of Appeal had ordered a re-trial previously, the fresh trail should have proceeded against both the Accused.

The Respondent submitted *inter alia* that W.K. Dayawathie (PW2) is a credible witness and therefore there is no merit in the Appellant's contention. The Respondent further submitted that there is no basis to lessen the charge to Section 297 of the Penal Code as no evidence had transpired during the prosecution case that the incident happened consequent to a sudden fight. The Respondent further submitted that now the Appellant cannot take up the position that the trial *de novo* should have been proceeded against both the accused without challenging or canvassing the order of the Court of Appeal.

Before giving my mind to the above matters it is pertinent to refer briefly to the facts of the case.

The incident relating to the above offences had taken place in a boutique, that belongs to one M.A Gunathilake Miduiyanse (PW3) on the night of 30.07.1991. The deceased Kankanamge Dias had been living with his parents and his siblings in their family home. As revealed by W.K. Dayawathie's (PW2) evidence she had gone to the tube well, with her husband Viraj Emmanuel Perera (PW4), which was in close proximity to the aforesaid boutique in which the incident occurred. According to Dayawathie, the deceased had left the house around 7.30pm and gone to the boutique.

While W.K. Dayawathie (PW2) was washing her face at the tube well she saw the Appellant and Dapane Podi Mahatthaya entering the boutique. Thereafter she heard the voice of her brother (the deceased) sounding "මරනවෝ" coming from the direction of the boutique. The time was around 9.00 pm– 9.30 pm. When she rushed in that direction she saw Dapane Podi Mahatthaya stabbing the deceased in the head with a knife. Dapane Podi Mahatthaya , seeing Dayawathie ran away from the back door of the said boutique. Dayawathie's evidence was that she witnessed the Appellant stabbing the deceased on the back of the chest several times. The

Appellant had also stabbed Dayawathie on her forehead while he was coming out from the boutique.

At the High Court trial the District Medical Officer Dr. Somasiri Abeykoon who examined the deceased had given evidence in detail with regard to the 14 injuries on the body of the deceased of which 3 – 14 were stab injuries. Dr. Jean Perera gave evidence with regard to the injuries sustained by Dayawathie and produced the medico legal report. In addition, the Learned Trial Judge has evaluated the evidence of witnesses W.K. Tilakaratna (PW1), M.A Gunathilake Miduiyanse (PW3), Viraj Emmanuel Perera (PW4) and the police evidence.

The Learned President's Counsel at the commencement of the argument made submissions to the effect that the evidence of the witness W.K. Dayawathie (PW2) is not credible and that she cannot be treated as an eye witness to the incident.

I find myself unable to agree with the argument advanced by the Learned President's Counsel as he has failed to substantiate same. On perusal of the judgment of the Learned Trial Judge, it is apparent that he has judicially evaluated and analysed the evidence of W.K. Dayawathie (PW2). It is to be noted that the defence had not challenged the trustworthiness of W.K. Dayawathie (PW2). It is relevant to note, despite the long drawn cross-examination, the defence counsel

was unable to make a dent on the credibility of the witness except for marking one contradiction (V1) which had not gone to the root of the case, and failed to establish to Court that the witness ought not to be believed. Hence I am unable to

agree with the contention of the Learned President's Counsel that the evidence of the witness W.K. Dayawathie (PW2) is not credible. The injuries sustained by Dayawathie confirms her evidential testimony that she was there at the time and place of the incident.

In The Attorney General Vs. Sandanam Pitchi Mary Theresa 2011 (2) SLR 292 it was held that; "Credibility is a question of fact and not law. Appellate Judges have repeatedly stressed the importance of trial judges observations of the demeanour of witnesses in deciding questions of fact. Demeanour represents the trail Judges' opportunity to observe the witness and his deportment."

Further the Learned President's Counsel for the Appellant has submitted that the Learned High Court Judge had completely rejected the part of evidence relating to Dapane Podi Mahatthaya of Dayawathie but has considered her evidence against the Appellant. This contention has been correctly evaluated by the Learned Trial Judge as follows;

, සාක්ෂිකාර දයාවතීගේ කිසිදු පරස්පරතාවයකට ලක් නොවූ සාක්ෂියේ වැදගත් කොටසක් වනුයේ විත්තිකරු මිය ගිය අයගේ පිට දෙසට පිහියකින් පාරවල් කිහිපයක් අනිනවා දුටු බවය. එමෙන්ම දාපනේ පොඩි මහත්තයා නැමති අය හිස පිටුපසට පිහියකින් අනිනවා දුටු බවටද සාක්ෂි දී ඇත. ඒ කෙසේ වෙතත් ඔහු මෙම නඩුවේ විත්තිකරුවෙක් නොවේ. එබැවින් ඔහුට විරුද්ධව ඇති සාක්ෂි සලකා බැලිය යුතු නොවේ. එහෙත් ඇයගේ සාක්ෂිය මෙම අධිකරණයට පිළිගත හැකි විශ්වසනීය එකක් වන්නේද යන්න අනෙකුත් ස්වාධීන සාක්ෂිකරුවන් මෙම අධිකරණයේ දෙන ලද සාක්ෂි සමග විශ්ලේෂණය කල යුතුය. ,

Having said that the Learned Trial Judge has proceeded to evaluate Dayawathie's evidence against other witnesses before determining the credibility of that witness. As such, I am not agreeable with the submissions of the Learned President's Counsel. Hence I am of the view that there is no merit in the submissions made by the Learned President's Counsel with regard to the credibility of witness Dayawathie.

The second ground of the Appeal is that the Learned Trial Judge had failed to consider the fact that the incident had taken place in the course of a sudden fight.

In the written submissions filed in this Court by the Learned President's Counsel for the Appellant it was contended that the Trial Judge has failed to consider the dock statement of the Appellant. The Appellant's statement was that while returning home after visiting his sister in Hanwella and reached hometown around 7.30 in the night. After getting down from the bus at Miriswelpotha junction, he went to the boutique to buy something to take home. The deceased seeing him entering the boutique, had come to the Appellant and pulled him by his shirt collar and tried to stab him. The Appellant grabbed the knife and a sudden fight broke off.

It is pertinent to consider Exception 4 of Section 294 of the Penal Code in this regard. The evidence of sudden fight is introduced **for the first time** in the dock statement of the Appellant. On perusal of the judgment it appears that the Learned Trial Judge has carefully and judicially analysed and evaluated the dock statement of the Appellant and have come to the conclusion that no evidential value could be placed on the dock statement. Hence I am not agreeable with the Learned President's Counsel 'submission that the Learned High Court Judge has failed to consider the dock statement of the Appellant.

It is significant to note that no suggestion had been put to the prosecution – witnesses to that effect at the time of cross examination.

It is the stance of the Learned President's Counsel that it is trite law that in a criminal case the burden of proving the chargers against an accused, beyond reasonable doubt lies in the prosecution. It is not an arguable fact. In the instant case the Learned Trial Judge has decided that the prosecution has proved the charge of murder beyond reasonable doubt.

In The King V. Bellana Vitanage_Eddin 41 N.L.R. 345, it was held "In a charge of murder it is the duty of the Judge to put to the jury the alternative of finding the accused guilty of culpable homicide not amounting to murder **when there is any basis for such a finding in the evidence on record,** although such defence was not raised nor relied upon by the accused."

In King Vs. Albert Appuhamy 41 N.L.R. 505, it was held "Failure on the part of a prisoner or his Counsel to take up a certain line of defence does not relieve a Judge of the responsibility of putting to the jury such defence **if it arises on the evidence."** Gamini Vs. AG 2001(1) S.L.R. followed the same principle.

Hence, the principle laid down in the said judicial decisions applied to the instant case is that, even though the Appellant did not take up a defence, the trail judge is obliged to and must consider a plea of sudden fight in favour of the Appellant **if it emanates from the evidence of the prosecution.**

In the instant case it is significant to note that no evidence of a sudden fight emanates or arises from the evidence of the prosecution or suggested in cross-examination.

The stance of the Learned President's Counsel for the Appellant is that, there is no burden cast upon the defence to avail himself from the said chargers. He has contended that it is trite law that in a criminal case the burden of proving the chargers against an accused, beyond reasonable doubt lies in the prosecution. But if the Appellant relies on an exception under Section 294 of the Penal Code, **the burden is on the Appellant to prove that his version is more probably true than not.** The Learned Trial Judge contended if the defence version creates a reasonable doubt in the case for the prosecution that would entitle the defence to a verdict in its favour. This was the position enumerated by Moonemalle J in the case of Wijesinghe And Three Others 1984 SLR (1) 155 at 165, which was tendered in support of the Appellants contentions.

It was held in R.P.D. Jayasena Vs. Queen 72 N.L.R. 313 that when an exception to murder is pleaded by an accused it is not sufficient for the accused to raise a mere doubt as to whether he is entitled to the benefit of the right of private defence and that section 105, read with section 3, of the Evidence Ordinance imposes upon the accused the burden of proof on the issue of private defence.

Hence it is a fundamental principle that if an accused expects to plead an exception to murder he must prove it on a balance of probability.

The Learned President's Counsel for the Appellant relied on exception 4 to Section 294 and submitted that the Learned Trial Judge had not evaluated the said possibility of a sudden fight. Exception 4 to Section 294 of the Penal Code reads as follows;

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner."

A careful consideration of the said exception indicates that the basis for the mitigation is purely dependent on the fact that the murder had taken place in a sudden fight, which had occurred in the heat of passion upon a sudden quarrel. An

important ingredient which is necessary in such instance would be that there was no malice or vindictiveness.

In terms of Section 294 of the Penal Code, the following requisites must be satisfied;

(i) It was a sudden fight,

(ii) There was no premeditation,

(iii) The act was committed in a heat of passion, and

(iv) The assailant had not taken any undue advantage or acted in a cruel manner.

All the above conditions must exist in order to invoke Exception 4 to Section 294. Considering the circumstances of this case the conditions mentioned above do not exist and there was no evidence of a sudden fight between the deceased and the Appellant. There was no evidence adduced to substantiate the fact that the deceased was armed and it was not revealed that the deceased had caused any injury to the Appellant. Furthermore, no less than four fatal injuries were inflicted by the Appellant with a knife on the chest of the deceased which is a formidable weapon on an unarmed victim. In addition the evidence led, disclosed ten stab injuries to the deceased.

The nature of the injuries shows that extensive damage was caused to the chest and the lungs of the deceased and the nature of the evidence is such that it indicates that there was no sudden flight and therefore the limbs of Section 294 are not satisfied.

In several Indian cases specifically in Ahmad Sher & others Vs. Emperor AIR (1931) Lahore 513, Gajanand And Ors. vs State Of Uttar Pradesh Ceveator AIR (1954) SC 695, Dharman vs State Of Punjab AIR (1957) SC 324 it had been clearly held that when the deceased was unarmed and did not cause any injury to the Appellant, the Appellant following a sudden quarrel had inflicted fatal blows to the deceased, that Exception 4 to Section 300 of the Indian Penal Code would not apply.

Considering the aforesaid it is quite clear that the Appellant cannot come within Exception 4 to section 294 of the Penal Code.

The third ground of Appeal is that since the Court of Appeal had ordered a re-trial, the fresh trial should have proceeded against both the accused.

At the initial trial the 1st Accused had invoked the jurisdiction of the Appellate Court in which the 2nd Accused was not a party. The Court of Appeal

had directed the High Court to initiate fresh trial against the Appellant as indicated by the Journal Entry dated 05.07.2010.

The Appellant has not canvassed the order made by the Court of Appeal at that stage. The Appellant had gone through a long drawn trial and had not complained that it was only against him. It is only now, at the Appeal stage that the Appellant is challenging the trial conducted solely against him.

I must further state that above and in view of the Latin maxim "*vigilantibus non dormientibus jura subveniunt*", which says that the law assists those who are vigilant and not those who sleep over their rights I find no merit in the Learned President's Counsels contention that the fresh trial should have proceeded against both the accused.

It was also submitted by the Leaned President's Counsel for the Appellant that the other two witnesses M.A Gunathilake Miduiyanse (PW3) and Viraj Emmanuel Perera (PW4) did not state that they witnessed the actual incident. On perusal of the Judgment of the Learned Trial Judge it is clear that the evidence of each witness has been carefully analysed and had given due consideration to the facts of the case.

For the reasons stated above, the grounds urged by the Learned President's Counsel on behalf of the Appellant are untenable and should fail. Hence I uphold the conviction and the sentences imposed on the Accused-Appellant and dismiss the Appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

MALINIE GUNARATHNE J

I agree.

JUDGE OF THE COURT OF APPEAL