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

In the matter of an Appeal under Section 11 of the High Court of the Provinces (Special Provisions) Act No. 19/1990 read with Section 331 (1) and (4) of the Code of Criminal Procedure Act.

C.A.No.15/2016

H.C. Embilipitiya No. 35/2013

Karandeniya Mahadurage
Karunathilake

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI J.

COUNSEL : Darshana Kuruppu with Buddhika Thilakaratne for the Accused-Appellant.

Madhawa Tennakoon S.S.C. for the respondent

ARGUED ON : 18th October 2018

DECIDED ON : 28th January, 2019

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ACHALA WENGAPPULI J.

The Accused -Appellant (hereinafter referred to as the "Appellant") was indicted for the attempted murder of *Batuwantudawa Kankanamge Tushara Namal Batuwantudawa* (PW1) by shooting at him on 12.08.2007. After trial without a jury, the Appellant was convicted by the trial Court and was imposed a ten-year term of imprisonment. He was also imposed of a fine of Rs. 5000.00 with default term of two-years.

Being aggrieved by the said conviction and sentence the Appellant at the hearing of his appeal raised the following grounds of appeal in challenging its validity;

a. The trial Court has failed to consider the fact that there was no evidence of shooting at *Batuwantudawa* by aiming a gun at him by the Appellant.
b. The trial Court has failed to appreciate the fact that there was no evidence that the Appellant had the requisite knowledge of inflicting an injury which is sufficient to cause death since there was no motive established by the prosecution.

The Appellant, in support of his grounds of appeal, has contended that none of the prosecution witnesses who testified at the trial claimed that they have seen the Appellant firing a gun at *Batuwantudawa*. They only heard a gunshot. Only *Batuwantudawa* claimed that the Appellant aimed a gun and fired at him. The Appellant relied on the evidence of the prosecution witnesses *Kumara* and *Ratnayake* who stated in their evidence they did not see the Appellant firing at *Batuwantudawa* to substantiate his submission. It is his contention that in the absence of any evidence that the Appellant had aimed his gun at *Batuwantudawa* before firing it, the prosecution has failed to establish the requisite mental element in relation to the attempted murder charge that had been levelled against him.

In view of the submissions of the Appellant, two considerations arise for determination. Firstly, this Court must decide whether there was sufficient evidence before the trial Court to sustain the conclusion it reached that the Appellant had in fact shot at *Batuwantudawa* ?

Secondly, it is incumbent for this Court to decide whether the evidence presented before the trial Court are sufficient to establish the requisite mental element against the Appellant ?

Both these considerations should have been established by the prosecution before the trial Court beyond reasonable doubt.

In view of the grounds of appeal, it is important to consider the evidence that had been placed before by the prosecution as well as the Appellant *albeit* briefly.

Prosecution Witness No.1 *Batuwantuda*wa, was the Commanding Officer of the Army Training Camp at *Kadurugasara* during the relevant time and the Appellant was a Lance Corporal serving under him. On 11.08.2007 he was informed by Captain *Dikkumbura* and also by the Officer-in-Charge of *Walasmulla* Police Station that the Appellant was wanted for causing death of two persons in his home town. *Batuwantudawa* had then altered his men to conduct a search for the Appellant, after an enquiring whether he had returned to the camp or not.

Sergeant *Dias* (PW3) was conducting a search as per the command of his superior and observed a person hiding in a pit. When he flashed his torch, that person got up and ran towards the quarters of *Batuwantuda*wa. At that time the witness identified the Appellant as the person lying in the pit. Then he chased after him and shouted out to alert *Batuwantuda*wa of the approach of the Appellant towards his quarters. The Appellant had then kicked twice on the door of the Officers' quarters. At that juncture, witness grabbed the Appellant by his midriff. *Ratnayake* (PW4) too had joined him to restrain the Appellant. At this time the witness noted

*Batuwantuda*wa (PW1) coming out of the entrance to his quarters. They shouted at him not to come and sound of a shot was heard by them at the same time. *Dias* has seen a *Galkattas* in the hand of the Appellant immediately after the sound.

Batuwantudawe, stated that he had heard the shouting from outside and heard loud banging on his door. Despite the warning by his men, he decided to come out of his quarters. What prompted him to come out was that he was with his pregnant wife at that time and he did not want her to get scared upon the commotion. He saw the door pane falling and outside of the entrance, his men were grappling with the Appellant. As he came out, he was shot at by the Appellant who had a firearm in his hand. He fired only one shot, which narrowly missed him and thereafter hit on the plastered wall behind him making a hole in it.

Then the Appellant shouted at him " මම උඹ ඉවරකරන්න ආවෙ, උඹ මිහිපිට ඉන්න ඕන පුද්ගලයෙක් නොවේ. Investigating officers have also testified confirming a repeated utterance of the Appellant indicating his mind in their presence. Later he had examined the firearm used by the Appellant and noted it to be a *Galkattas* weapon. The incident was reported to Police and the firearm was handed over to them.

The Appellant's claim that there was no evidence to prove that he has fired at *Batuwantuda*wa is unacceptable. There is clear and direct evidence that the Appellant had a firearm with him and he has fired it at *Batuwantudawe(* PW1). It is correct that only *Batuwantuda*wa has seen the Appellant discharging a firearm at him. *Dias* who was holding the Appellant at that time had not seen the firing but only heard the noise. The

Appellant sought to use this *"inconsistency"* to his advantage. The evidence however clearly provided an explanation for this difference in their evidence.

Dias was holding the Appellant around his waist by his hands and was trying to pin him to the wall. He saw the arrival of *Batuwantuda*wa by seeing through the right arm pit of the Appellant. *Dias* also said that he was holding the Appellant by positioning himself in front of the Appellant. This left the two arms of the Appellant free. *Dias* did not notice a firearm until it was fired by the Appellant. Immediately after the noise of the gun shot, *Dias* saw a *Galkattas* in Appellant's hand.

In view of these clear evidence the first consideration that arose for determination by this Court had to be decided against the Appellant. It is our considered view that there is sufficient evidence to prove beyond reasonable doubt that it was the Appellant who shot at *Batuwantudawa.* Contrary to submissions of the Appellant, there was evidence that the Appellant had fired directly at *Batuwantudawa.* The hole noted in the plastered wall by the Police and the subsequent recovery of a bullet embedded in it supports the fact that the shot was aimed at the chest level of *Batuwantudawa.* The shot was fire in the direction of its intended victim.

The second consideration that whether the evidence presented before the trial Court are sufficient to establish the requisite mental element against the Appellant should be considered now.

In ***Sudu Banda v The Attorney General*** (1998) 3 Sri L.R. 375, Jayasuriya J considered this issue and having recognised the applicability

of the tests of Proximity and Equivocality in determining the requisite mental element in a charge of attempted murder, stated thus:-

> *" ... if the charge one of attempted murder, intent becomes the principal ingredient of the offence. Thus, if A attacks B intending to do grievous bodily harm and death results, that is murder, but if A attacks B and only intends to do grievous bodily injury and death does not result, it is not attempted murder but wounding with intent to do grievous harm. This statement of the law emphasises and stresses that in the offence of attempt, intention is the essence of crime."*

The said judgment is in relation to an incident of shooting. There was evidence that a shot emanated from the gun held by the Accused-Appellant, but it did not hit the witness because he (the witness) had taken defensive action in sprawling on the ground and thereby avoided receiving any gunshot injuries.

Having considered this factual situation, his Lordship states that:-

> *"... the accused appellant has clearly manifested by his utterance his intention to commit the murder of the Police officer in whose direction he had fired the shot after making the aforesaid utterance. The act establish by the prosecution evidence satisfy both the Proximity Rule and the*

Equivocality Test which are the correct criteria to determine whether the act of the accused constituted an attempt to commit murder."

In applying the Proximity test to the evidence presented by the prosecution before the trial Court in relation to the appeal before us, we are of the view that the Appellant's of act hiding in a pit and no sooner his discovery, rush to the door of *Batuwantudawa's* quarters, his repeated kicking on it until it gave way and despite the physical restraint imposed by two of his colleagues, firing at his superior who was at an arm's length are sufficient to hold that these circumstances satisfy the requirements of the said test.

The circumstances that are adverted to in the preceding paragraph also satisfy the Equivocality Test, since they are clearly termed as " ... *acts which are nearly enough related to the crime to amount to attempt to commit ...*". In addition, the Appellant had unambiguously indicated his mind when he repeated in his statement "මම උඹ ඉවරකරන්න ආවෙ, උඹ මිහිපිට ඉන්න ඕන පුද්ගලයෙක් නොවේ. " in the presence of the Police officers who arrived there to investigate the incident. There was no denial to either of these statements by the Appellant that are attributed to him by the prosecution witnesses.

In view of the above reasoning, we hold that the appeal of the Appellant necessarily devoid of merit. Accordingly, we affirm the conviction and sentence imposed on the Appellant by the High Court of *Embilipitiya* on 17.03.2016.

The appeal of the Appellant is dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL