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

Sudu Hakuruge Kumarasiri

Accused-Appellant

C.A. Case No. 150/2015

HC Matara 153/09

V.

Hon. Attorney General,

Attorney General's Department

Colombo 12.

Complainant-Respondent

BEFORE : **K.K. WICKREMASINGHE, J**

K. PRIYANTHA FERNANDO, J

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

Dilan Rathnayake D.S.G. for A.G.

ARGUED ON : 10.05.2019

WRITTEN SUBMISSIONS

FILED ON : 31.07.2018 by the Complainant-Respondent
02.02.2018 by the Accused-Appellant

JUDGMENT ON : 11.06.2019

K. PRIYANTHA FERNANDO, J.

01. The Accused Appellant (Appellant) was indicted in the High Court of Matara with one count of murder punishable under section 296 of the Penal Code and one count of attempted murder punishable under section 300 of the Penal Code. According to the particulars of the offences, it is alleged that the Appellant committed the above offences with one Suduhakuruge Gunapala who was deceased at the time of the trial.

02. After trial the learned High Court Judge found the Appellant guilty of both counts and convicted accordingly. The Appellant was sentenced to death on count No.01, and on count No.02, was sentenced to 10 years rigorous imprisonment and imposed a fine of Rs. 5000/-. Being aggrieved by the said conviction, the Appellant preferred the instant appeal on the following grounds as submitted in the written submissions.

1. The learned Trial Judge has failed to consider that the evidence of PW1 does not pass the test of reliability owing to its material inconsistencies and *per se* contradictions.

2. The learned Trial Judge has failed to consider the absence of intention on the part of the Accused-Appellant to commit murder and it was done on the spur of the moment without any advance preparation or deliberation.

3. The learned High Court Judge has failed to consider that the medical evidence contradicts the evidence of PW1.

03. I have carefully considered the evidence adduced at the trial, judgment of the learned High Court Judge, Grounds of appeal, written and oral submissions made by counsel for both parties at the argument of this appeal.

Case for the prosecution in brief

04. Main witness for the prosecution was PW1, M.D. Karunaratne. According to PW1, on the date of the incident he had gone to meet a friend with his brother (deceased) on a motor bike to Deegala. On their way, the Appellant had blocked their way by putting a motor bike on to the middle of the road. Appellant had been with his father Gunapala and one Sumanasiri. Gunapala had held the handle of their bike and Appellant had stabbed the deceased on his chest once. When the PW1 tried to get down from the bike, the Appellant had also stabbed him on the chest. Deceased brother had run and the Appellant had followed him. PW1 had run towards another direction. He had gone to a house and had locked himself in. A man had then taken him to a boutique through the jungle and a person known to him had taken him to the hospital. Later, he had got to know that his brother had died.

Defence Case

05. Appellant made an unsworn statement from the dock. He denied killing the deceased. He said that PW1 lied in Court. There had been a previous incident where another brother of PW1 was killed and PW1 had suspected Appellant and Appellant's father for that murder. They were discharged by Court. He said that the other suspect Sumanasiri had a dispute over some money with PW1. As police were looking for them, they have surrendered. He denied the allegation. Defence called two more witnesses to give evidence.

Ground No. 01

06. Counsel for the Appellant submitted that, although PW1 initially said that he with his brother went to meet a friend, in cross examination he reluctantly admitted that he accompanied the deceased for his security. Further it was submitted that in further cross examination it was revealed that they went in search of Gunapala, father of the Appellant.

07. The learned Trial Judge has carefully considered this aspect in pages 17, 18 and 19 (Pages 350-352 of the appeal brief) of his judgment. He has sufficiently explained as to why he found the PW1 a credible and truthful witness. PW1 was cross examined at length and the counsel for the Appellant has put confusing questions to him. As the learned Trial Judge rightly found in page 18 of his judgment, it is natural for a person to divert to another place before going to the place he initially intended to go.

08. Contradictions *inter se* as well as *per se* should not be considered to discredit a witness unless those are material that go to the root of the case. Indian Supreme Court in ***State of Uttar Pradesh V. M.K Anthony [1984] SCJ 236/ [1985] CRI. LJ. 493 at 498/499*** held;

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of a witness read as a whole appears to have 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, drawbacks 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 tender 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 and there from 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 weightily 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."

This was referred to and followed in case of ***Oliver Dayananda Kalansuriya V. Republic of Sri Lanka CA 28/2009*** (13.02.2013).

09. In the instant case, as I mentioned before, cross examining the witness at length and by confusing him, defence had tried to take undue advantage of the answers given by PW1 on his reason to travel to Appellant's area on the day of the incident.

10. It is the Trial Judge who has the opportunity to observe the demeanour and deportment of a witness. He is the best person to decide on the credibility and the testimonial trustworthiness of a witness.

In case of ***Fradd V. Brown & company Ltd. (20 N.L.R. Page 282)*** Privy Council held:

"It is rare that a decision of a Judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a Judge of first instance has in matters of that kind, as contrasted with any Judge of a Court of Appeal, who can only learn from paper or from narrative of those who were present. It is very rare that, in question of veracity, so direct and so specific as these, a Court of Appeal will over-rule a Judge of first instance'

The learned Trial Judge was the best person to decide on the credibility of the PW1 in this case.

11. Counsel for the Appellant citing case of ***Bhagwan Sahai V. State of Rajastan (Criminal Appeal No. 416 of 2016)*** submitted that, as PW1 has suppressed the genesis and origin of the occurrence of crime, the Accused Appellant is entitled to get the benefit of doubt. The facts in *Bhagwan Sahai* are quite different to the facts of this case. In *Bhagawan Sahai*, prosecution party had caused injuries to the Appellant's father causing his death. That fact was not revealed by the prosecution. In the instant case there is no evidence of such an incident, nor such suppression of facts were revealed. As I said before, the learned Trial Judge has given good and sufficient reasons for acting upon the evidence of PW1.

12. The learned Trial Judge has sufficiently considered the evidence of PW1 and I find no reason to interfere with his finding that PW1 was a reliable witness whose evidence could be acted upon. Hence ground of appeal No.01 has no merit.

Ground No.02

13. Counsel for the Appellant contended that the Appellant was not aware of the arrival of PW1 and the deceased to their village. Therefore, it can be concluded that the murder was not pre planned or done with intention. It has happened on the spur of the moment. If the Appellant had the intention to kill, he could have stabbed the deceased more and inflicted more injuries to the deceased. It is the contention of the counsel for the Appellant that the learned Trial Judge could have considered convicting him for culpable homicide not amounting to murder.

14. It is pertinent to note that it was suggested to the PW1 by the defence at the trial, that it was Sumanasiri who stabbed the victims. Further, while denying any involvement to the incident, in his dock statement the Appellant had said that PW1 had a dispute with Sumanasiri and that victims implicated them because of the previous enmity.

15. There is no evidence of pre-planning for days to commit murder as submitted by the Counsel for Appellant. However the evidence is that the Appellant and his father blocked the road and Appellant stabbed the deceased and PW1. There is no evidence of a sudden fight.

16. Although the deceased had only one stab injury other than the abrasions on the face, shoulder, knee, and ankle, the stab injury had been on the chest. It has pierced the heart. Therefore, it is clear that the intention was to cause death of the deceased when he was stabbed on the chest piercing the heart. The stab injury to PW1 was also on his chest.
The intention to kill can be formed at any moment, not necessarily after pre-planning. In the above premise, ground of appeal No. 02 should fail.

Ground No. 03

17. Counsel for the Appellant submitted that although PW1 said that the incident took place at about 5.30 pm, according to the doctor who conducted the post mortem, the death has occurred around 5 pm.
18. As submitted by the counsel for the Respondents, the half an hour difference will not create any doubt about the incident. Further, one cannot expect the

victim to look at the watch to see the exact time when he is being stabbed. This argument of the counsel for Appellant is without substance.

19. Counsel for the Appellant further submitted that according to the doctor who examined the PW1, he had stated that one Karunasena stabbed him. It is submitted that Karunasena must be some other person.

20. On perusing the evidence of the doctor who examined the PW1, it is clear that according to the doctor PW1 had given the name of the person who stabbed him as Kumarasena, not Karunasena. (page 223 of the appeal brief). Name of the Appellant is Kumarasiri. PW1 had mentioned to police and also to court about Kumarasiri, the Appellant. It is obvious that the doctor had made a mistake by taking the name down as Kumarasena, instead of Kumarasiri. This ground of appeal also should necessarily fail.
Hence the conviction and sentence of the learned High Court Judge is affirmed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL