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

In the matter of an Appeal made in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

C.A. Case No: **CA 118/2015**

H.C. Embilipitiya Case No:
HCE 273/2006

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Kadawathagama Arachchige Sarath

Accused

AND NOW BETWEEN

Kadawathagama Arachchige Sarath

Accused-Appellant

Vs.

The Attorney General
Attorney-General's Department,
Colombo 12.

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. K. Priyantha Fernando, J.
COUNSEL	:	AAL Gayan Perera with AAL Prabha Perera for the Accused-Appellant Haripriya Jayasundara, SDSG for the Complainant-Respondent
ARGUED ON	:	30.05.2019
WRITTEN SUBMISSIONS	:	The Accused-Appellant – On 25.01.2018 The Complainant-Respondent– On 06.02.2018
DECIDED ON	:	29.08.2019

K.K.WICKREMASINGHE, J.

The Accused-Appellant has filed this appeal seeking to set aside the judgment of the Learned High Court Judge of Embilipitiya dated 29.07.2015 in case No. HCE 273/2006.

Facts of the case:

The accused – appellant (hereinafter referred to as the 'appellant') was indicted in the High Court of Embilipitiya for causing death of one Kadawathagama Arachchilage Jayawardana on or about 13.04.2002, an offence punishable under section 296 of the Penal Code. At the conclusion of the trial, the appellant was convicted for Murder and was sentenced to death on 26.11.2010. Thereafter, the appellant preferred an appeal to this Court and the Court decided to send the case back for re-trial since the appellant was not given a jury option at the beginning of the trial. Accordingly, a fresh trial commenced on 29.07.2013 and the Learned

High Court Judge by the judgment dated 29.07.2015, convicted the appellant for Murder and sentenced him to death.

Being aggrieved by the said judgment dated 29.07.2015, the appellant preferred this appeal.

The Learned Counsel for the appellant submitted following grounds of appeal;

1. The Learned Trial Judge has not properly evaluated the evidence of the eye witness, Amarasinghege Indrani
2. The evidence of the witness Indrani is not constant and does not corroborate with the evidence of the Judicial Medical officer
3. The 27(1) recovery of the production has not been proved beyond reasonable doubt
4. The evidence available is not sufficient to convict the appellant for a capital punishment

It is observed that the prosecution called 07 witnesses for the prosecution case whereas the appellant made a dock statement and concluded the case for defence. The prosecution led the evidence of an eye witness, namely Amarasinghege Indrani, who was the wife of the deceased. As per the evidence of said Indrani (hereinafter referred to as the 'PW 01'), the appellant is the son of her mother's brother. The appellant and the deceased were employed in the same place as masons in Deniyaya. The PW 01 testified that, about one week prior to the incident in question, the appellant visited her and told that the deceased was having an affair with another woman. Thereafter, the appellant pulled the hand of the PW 01 and she had shut him out of the house. She later had informed this incident to the deceased when he returned home. On the date of the incident, the PW 01 and the deceased had heard footsteps outside their house when they were getting ready to

sleep. The deceased had gone out with a torch and a club whereas the PW 01 followed him with a bottle lamp. Both of them had gone around the house and the deceased stopped in front of the house to observe a ditch that was in the compound. The witness had heard a noise similar to a cracker when the deceased bent down to inspect the said ditch. At the same time of the noise of the cracker, the deceased had fallen. The PW 01 had seen the appellant with a gun in hand as she looked towards where the noise came. She had seen him about 10 to 12 feet away from the direction she heard the firing. Thereafter, the PW 01 had seen the appellant was leaving with a gun in his hand. Even though the PW 01 raised cries, nobody came to help and therefore she ran with her child to the house of her mother who was living in a very close distance. The PW 01 further testified that she heard another shot being fired while she was running towards the house of the mother.

As per the evidence of the PW 02 (the mother of the PW 01), on the date of the incident, the PW 01 came running to her house shouting that the appellant shot the deceased.

The Judicial Medical Officer (PW 06) testified that there had been 07 injuries on the deceased's body caused by firearm injuries. There had been an entry wound on the face of the deceased and a bullet had been found in the brain. There had been injuries on the neck and chest and corresponding exit wounds which fractured the ribs of the deceased. It was further explained that the brain, lungs and bones were damaged due to these injuries. The JMO further testified that these wounds could be inflicted even from a single firing and the said injuries were capable of causing instantaneous death. (Page 498 & 499 of the brief)

Two investigation officers testified with regard to the receiving of the complaint, inspection of the crime scene and recovery of the weapon used for the offence, upon a statement made by the appellant.

I wish to consider grounds of appeal 01, 02 and 04 together. All these grounds of appeal address the issue of evaluating the evidence. The Learned Counsel for the appellant contended that the Learned Trial Judge has not properly evaluated the evidence of the eye witness Indrani and her evidence does not corroborate with the evidence of the Judicial Medical officer.

It is imperative to note that the Learned High Court Judge has thoroughly evaluated each and every contradiction marked in the testimony of the PW 01, by the defence. The Learned High Court Judge made the following observation with regard to the evidence of the PW 01;

> "...චිත්තිය විසින් මෙම සාක්ෂිය ඌණතා හා පරස්පරතා ගණනාවක් දක්වා තිබුණද මෙම සිද්ධිය ඇසින් දැකීම හා අපරාධකරු හඳුනාගැනීම සම්බන්ධයෙන් ඇය දී ඇති සාක්ෂියේ පරස්පරතා යම් සැකයක් ඇති කිරීමට හේතු වන්නේද නැත..." (Page 593 of the brief)

Thereafter, the Learned High Court Judge made the following observation;

> "...චිත්තිකරු සමීප දුරක සිටි බවටත් පැ.සා. 01 විසින් දුන් සාක්ෂිය වෛද්‍ය සාක්ෂියෙන්ද ඒ අනුව තහවුරු වේ. වඩාත් වැදගත් කරුණ වන්නේ වෛද්‍ය සාක්ෂිවලින් සමීප දුරක සිට වෙඩි තැබීම සිදු කළ බව තහවුරු වන නිසා චූදිත හඳුනා ගැනීමද වඩාත් හොඳින් තහවුරු වීමයි..." (Page 596 of the brief)

I observe that the JMO testified that there had been 07 injuries on the deceased's body caused by firearm injuries and there were burning marks around the entry wound on the face of the deceased. Accordingly, the JMO was of the opinion that such burning marks could be found when firing was taken place within a close

proximity of 02–03 meters (Page 495 of the brief). The PW 01 testified that the appellant was standing of a distance of 10 – 12 feet from the deceased at the time of firing. Therefore, the evidence of the PW 01 tallies with the findings of the JMO. Accordingly, the Learned High Court Judge came to the conclusion that the evidence of the PW 01 was reliable and in fact corroborated with the medical evidence. Further, it is noteworthy that the identification of the appellant by the PW 01 was not challenged and even the PW 02 testified that the PW 01 mentioned about the appellant to her.

In the case of **Dharmasiri V. Republic of Sri Lanka [2010] 2 Sri LR 241,** it was held that,

> *"Credibility of a witness is mainly a matter for the trial Judge. Court of appeal will not lightly disturb the findings of trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong. This is because the trial Judge has the advantage of seeing the demeanour and deportment of the witness..."*

In the case of **The AG V. Potta Naufer and others (2007) 2 Sri L.R. 144,** it was observed that,

> *"When faced with contradictions in a witness's testimonial, the court must bear in mind the nature and significance of the contradictions, viwed in light of the whole of the evidence given by the witness. The court must also come to a determination regarding whether this contradiction was an honest mistake on the part of the witness or whether it was a deliberate attempt to mislead court..."*

In the case of **A.K.K. Rasika Amarasinghe V. Officer-in-Charge, Special Investigation Unit and another [S.C. Appeal 140/2010 – decided on 18.07.2018]**, it was held that,

> *"We note that learned Magistrate who heard the case has considered all the above contradictions and the learned High Court Judge has also considered the said contradictions. We note that the learned Magistrate who heard the case has convicted the Accused. Therefore the learned Magistrate who saw the deportment and demeanor of the witnesses has the opportunity to assess the evidence..."*

In light of above, it is understood that an appellate court shall not disturb findings of a trial Judge unless such finding is manifestly wrong. I observe that the Learned High Court Judge, in the instant case, had the opportunity of hearing the whole trial from the very beginning and had the advantage of observing the demeanour and deportment of witnesses who testified before him. Upon perusal of the proceedings and the judgment of the Learned High Court Judge, I am satisfied that the Learned High Court Judge had very correctly evaluated the evidence placed before him (Page 593 to 599 of the brief) and therefore, the above mentioned three grounds of appeal should fail.

The Learned Counsel for the appellant contended that the 27(1) recovery of the production has not been proved beyond reasonable doubt. The PW 08 testified that he recovered the gun used for the commission of this offence, subsequent to a statement made by the appellant. The relevant portion of the said statement was marked as 'P.02". The PW 08 further testified that the gun was in working condition and he even smelt the gun powder at the time he recovered the weapon. I observe that the defence was unable to mark any contradiction or omissions in the testimony of the PW 08, other than making several suggestions in the cross-

examination that the said recovery of the weapon subsequent to the statement of the appellant was false. Therefore, I see no merits in the above ground of appeal for the appellant.

Considering above, I am of the view that the Learned High Court Judge was correct in coming to the conclusion that the prosecution has proved its case beyond reasonable doubt. Accordingly, I affirm the conviction and the sentence imposed on the appellant, by the Learned High Court Judge.

The appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL