

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

*In the matter of an Appeal in terms of
section 331 (1) of the Code of Criminal
Procedure Act No- 15 of 1979, read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.*

Court of Appeal No:

CA/HCC/0384/18

High Court of Gampaha

Case No: HC/19/2002

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Mahawage Calistus Perera *alias* Jude

ACCUSED

AND NOW BETWEEN

Mahawage Calistus Perera *alias* Jude

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : I. B. S. Harshana, Assigned Counsel for the Accused-Appellant
: H. Jayasundara, ASG for the Respondent
Argued on : 25-09-2023
Written Submissions : - (By the Accused-Appellant)
: 04-04-2023 (By the Respondent)
Decided on : 24-01-2024

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Gampaha, for causing the death of one Sirisena Perera *alias* Victor on 28th December 1993, at a place called Weliweriya within the jurisdiction of the High Court of Gampaha, and thereby committing the offence of murder punishable in terms of section 296 of the Penal Code.

After trial without a jury, the appellant was found guilty as charged of the judgement dated 25-10-2018 by the learned High Court Judge of Gampaha and accordingly, he was sentenced to death.

Being aggrieved by the said conviction and the sentence, the appellant preferred this appeal.

At the hearing of this appeal, the learned Counsel for the appellant formulated the following ground of appeal for the consideration of the Court.

1. Whether the prosecution has proved the case against the appellant beyond reasonable doubt.

However, having formulated the said ground of appeal, the learned Counsel for the appellant conceded that he has no basis to challenge the judgement of the learned High Court Judge as it is a judgement pronounced after having well considered the evidence placed before the Court, the relevant law, and other attendant circumstances.

The learned Additional Solicitor General (ASG) who represented the respondent made submissions bringing to the notice of the Court, the evidence led before the trial Court and the fact that the appellant in his dock statement has admitted the incident. She pointed out that the learned High Court Judge has well considered whether the evidence led by the prosecution has proved the charge beyond reasonable doubt, and also whether there was any basis to consider the incident in terms of section 297 of the Penal Code. It was her position that there exists no basis whatsoever to allow this appeal.

The evidence led at the trial discloses the fact that the deceased and the appellant are relatives. Both of them had been fishmongers. It appears that the deceased has opposed the appellant engaging in selling fish near the place where the deceased used to sell fish over a long period of time.

The sole eyewitness (PW-01) to the incident had been deceased when this matter was taken up for trial. However, the prosecution has led the deposition he made during the non-summary proceedings before the Magistrate's Court in terms of section 33 of the Evidence Ordinance. It is clear from the Magistrate's Court proceedings that the appellant had been represented by an Attorney-at-Law, and PW-01 had been duly cross-examined.

The evidence of the wife of the deceased establishes the fact that after coming home for the day, the deceased had left the house around 6.00 – 6.30 in the afternoon to go to a neighbour's house to watch Television. The incident had occurred while the deceased was walking on the main road.

According to the deposition made by the eyewitness PW-01, while he was in a shop near the main road, he has heard someone pleading “කොටන්න එපා” and has

seen the deceased being chased by the appellant. The PW-01 has seen the appellant having a manna knife in his hand and attacking the deceased who fell on the ground.

After the arrest of the appellant, the said manna knife had been recovered based on a statement made by the appellant in terms of section 27 of the Evidence Ordinance.

The Government Analyst had identified human blood on the manna knife recovered upon the statement of the appellant, and sent before him for analysis.

According to the evidence of the Judicial Medical Officer (JMO), there had been 8 cut injuries on the body of the deceased. The fatal cut injury had been to the head, and the JMO has expressed the opinion that the said injuries can be caused by a heavy sharp weapon and the manna knife marked P-2 can be used to cause such injuries.

When called for a defence at the conclusion of the prosecution evidence, the appellant has made a dock statement. In his dock statement, he has stated that the deceased was his father's younger brother and he used to sell fish near Weliweriya junction for some time, and he too started selling fish near the same place which resulted in an animosity between them.

He has claimed that on the date of the incident, there was a verbal altercation with the deceased around 8.30 in the night and after that the deceased went to a nearby shop and came with a manna knife to attack him. After grappling with him, he managed to take the manna knife from his hand and because of the anger, he attacked the deceased using the same manna knife.

Since the appellant had admitted causing injuries to the deceased, the learned High Court Judge has very correctly considered whether whose version can be believed as to the way the incident has occurred. The deposition of the sole eyewitness has been considered having in his mind, the inherent weaknesses of such a witness as his deposition, although he has been cross-examined at the

non-summary inquiry, he was not before the trial Court to give the evidence and to face the test of cross-examination.

The learned High Court Judge has considered whether the actions of the deceased were a result of exercising his right of private defence. After having considered the evidence made available to the trial Court, it has been determined that there was no basis to come to such a conclusion.

Thereafter, the learned High Court Judge has considered whether the action of the appellant would fall under the exceptions for murder as provided in section 294 of the Penal Code.

The learned High Court Judge has well considered whether the incident would fall under exception 01, where grave and sudden provocation is applicable, and exception 04, where sudden fight in the heat of passion upon a sudden quarrel shall become applicable.

Although the appellant has claimed of a sudden fight and provocation, there was no evidence before the trial Court to substantiate such a fact. The PW-01 has seen the deceased being chased by the appellant and him pleading for his life saying not to attack. Despite this, the appellant has attacked him and has caused serious cut injuries using a manna knife which shows that the appellant had the clear intention and the knowledge of causing the death of the deceased.

Even though the motive is not an essential requirement to prove in a charge of this nature, the evidence clearly shows that because of the deceased's objections for the appellant having a fish stall near his one, has contributed to this attack on the deceased.

It needs to be noted that it is the same Judge who heard the entirety of the evidence has pronounced the judgement. Therefore, it is abundantly clear that the learned trial Judge had the advantage of hearing the evidence in its entirety and observing the demeanour and deportment of the witnesses.

In the case of **Alwis Vs. Piyasena Fernando (1993) 1 SLR 119, G. P. S. De Silva, J. (As he was then)** reiterated that the Court of Appeal would not likely disturb the findings of primary facts made by a trial Judge unless it is manifestly wrong as they have the priceless advantage of observing the demeanour of witnesses which the Judges of the Court of Appeal does not have.

For the reasons as considered above, I find no merit in the sole ground of appeal urged by the appellant.

Accordingly, the appeal is dismissed. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal