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

In the matter of an appeal under and in terms of Section 331 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.

The Democratic Socialist Republic of Sri Lanka

CA HCC 133/20

Complainant

High Court Trincomalee

Vs.

Case No: HCT/920/2019

Henda Hewage Anura Ishantha

No. 38/1, School Mawatha,

Andankulama,

Trincomalee

Accused

AND NOW BETWEEN

Henda Hewage Anura Ishantha

No. 38/1, School Mawatha,

Andankulama,

Trincomalee

Accused – Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant- Respondent

Before : Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel : J. P. Gamage with Chamara N. Fernando, Theekshana Ranaveera and Harsika Ranaweera for the Accused-Appellant.

Dilan Ratnayake, S.D.S.G for the State.

Argued on : 16.11.2023

Decided on : 30.11.2023

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 18.11.2020 of the High Court of Trincomalee.

The accused appellant (hereinafter referred to as the appellant) has been indicted for committing the murder of his wife on 14th February 2018.

The version of the prosecution is that the deceased had made two dying declarations to the police and to PW2 to whom she had said that the appellant had set fire to her in her own house, after bringing petrol in a half cut bottle.

The testimony of PW 2 is that she had heard shouting from the house of the deceased and she had seen the deceased in flames and pouring water on her body and the appellant running away from the scene. Then the deceased is supposed to have shouted to the villagers to apprehend the appellant who had

been running away according to the witness. But all this had not been said by the witness to the police nor at the Magistrates Court which the trial judge had not considered. The trial judge had merely said that it has not challenged the evidence of the prosecution. But we see that as the entire case is based on the dying declarations and circumstantial evidence the truthfulness of the witnesses is of utmost importance.

Another neighbor who had gone to the house for the noise had seen the appellant running away from the house and he had caught him and had handed the appellant over to the police.

The Woman Police Constable who had recorded the statement of the deceased in hospital had said that the deceased had been groaning in pain and that she had not been able to sign because of the burn injuries, but she had made a very lengthy statement in which she had said that while she had been at home the estranged husband had come from behind and had set fire.

The doctor who had conducted the postmortem report had not been called as a witness but another doctor who can identify his hand writing has given evidence but there is no evidence to say whether the deceased was in a position to give a lengthy statement to the WPC soon after the incident. The trial judge had said in his judgment that the deceased had been in a position to speak but this Court is unaware as to how he has arrived at this conclusion when there is no scientific evidence to say so. The trial judge had relied on the evidence of Kalyani who had said that the deceased spoke after the incident, this we think is entirely unreliable and unacceptable because to conclude whether the deceased was in a position to speak, he must rely on scientific and medical evidence and not on lay witnesses. (Page 210)

According to evidence of the police she had died after 15 days from the incident and the extent of the injuries had been 30 percent and a sepsis also had set in and most of her intestines had been infected.

The evidence of the prosecution had further said that the deceased had been shouting asking that the appellant should be apprehended and handed over to the police but this too this Court is unable to accept because it has not been asked from the doctor whether a person in the condition of the deceased would be able to shout and give instructions to others.

But we observe that the trial judge had failed to consider this but has only reproduced the evidence of the doctor who had been called to give evidence.

The post mortem report had said that there had been 30 percent burn injuries and the cause of death had been identified as being due to "sepsis due to severe burns" hence , the deceased has had a supervening condition as opposed to the original cause , if that is so Court has to ascertain whether **in**

the ordinary course of nature as opposed to a mere likelihood of the supervening condition arising as a consequence of the injuries inflicted , and also of the supervening condition whether it is sufficient to cause death. This has been discussed, in Mendis vs The Queen 54 NLR 177.

This theory of causation has been discussed in the case of Sumanasiri vs Attorney General 1999 1 Sri LR 309 in which it has been held that "Any contravened issue relating to the theory of causation ought to be decided according to rational and common sense theories. Where there was no breach in the line of causation despite the fact that the surgical operation performed at a time posterior to the infliction of the injury and at a point of time anterior to the death, the offence is murder if the act is done with the intention of causing murder.

In the instant matter according to the dock statement made by the appellant it reveals a back ground where the deceased and the appellant has been having a lot of differences and the deceased has on many a occasion displayed suicidal tendencies, which had been his defense right along and the trial judge had very obviously chose to disregard the same which is a clear indication that the defense of the appellant has not been considered at all and the trial judge appears to be totally unaware of the theory of causation which has been discussed so vividly in many of our decided cases when there is a supervening cause which has been active at the time of the death of the deceased, and if it has over taken the original cause , then the charge of murder is reduced to culpable homicide not amounting to murder, if not it is murder.

The appellant also has brought in several witnesses including the daughter of the deceased and the appellant and she had corroborated the dock statement of the appellant. The evidence of this witness also had not been considered by the trial judge.

The farther of the deceased also had when giving evidence in the case for the prosecution and had said that there were disputes between the appellant and the deceased.

Hence, we find that the trial judge had failed to give a fair trial to the appellant which is in fact in the Constitution of the country. He had concluded that the prosecution has proved its case beyond a reasonable doubt long before he has considered the defense case. (Page 239)

The appellant right along has taken up the defense that the deceased has had an extra marital relationship and it had led to a lot of disputes between the two but he had tolerated but on many occasions the deceased had attempted suicide and the instant incident also is a matter of the same.

The appellant has further said that after the incident he had feared that the people would assault him because all the neighbors were relations of the deceased, he had left the house and had been walking towards the police when he had been taken and handed over to police by the prosecution witness Amila Dharmaratne at page 84, who had said that the appellant had been walking on the road and not running, but the trial judge had considered PW 2 who had said that the appellant ran away after the incident which had been said in Court for the first time.

But as said before the trial judge had failed to consider the same but had whole heartedly accepted the evidence of the prosecution without even considering the infirmities in the same and the defense put forward by the appellant which signals out a situation where the deceased has been having suicidal tendencies of which the appellant has spoken to very lengthily and if that is so can the appellant be convicted for the charge in the indictment or of a lesser charge, especially in view of the medical evidence.

The trial judge had concluded that the act by the appellant is premeditated but he has failed to consider the position of the appellant in the dock statement which he has taken up right throughout the case, and even the daughter of the appellant had spoken to the erratic behavior of the mother the deceased.

The appellant had stated in his dock statement he had burnt himself in trying to douse the fire which had been observed by the police that there were injuries on the appellant.

All these items have not been considered by the trial judge but of course he had reproduced chunks of evidence led by the prosecution without analyzing the same.

Further more the prosecution had alleged that in the dying declaration to the police the deceased is supposed to have said that the appellant had brought the inflammable substance in a bag in a bottle which was half cut from the top which arouses the mind to think whether it is humanly possible to carry a substance which is inflammable in a bag when the bottle is half open.

The police had recovered the said bottle from the scene of crime and the Government Analyst had said it had contained petrol.

But none of these possibilities and improbabilities have been considered by the trial judge.

Hence it is very clear that there had been an incident of fire on the fateful day and the deceased had sustained burn injuries and that she had died of the sepsis which had set in due to the burn injuries which shows that there had been a supervening condition subsequent to the original issue.

But what Court has to consider is whether it was a mere likelihood which is sufficient to cause death or not or whether it was suicide.

The fact that whether it was suicide had been ruled out by the doctor who had given evidence on the report prepared by the judicial medical officer who had conducted the post mortem, hence suicide is ruled out.

But the cause of death is a sepsis which has set in due to the burn injuries which is according to the theory discussed above a supervening condition had set in subsequent to the original cause.

Hence there is no way that the judge could have found the appellant guilty for murder. As such we are compelled to set aside the conviction for murder.

Hence the next question is whether the appellant can be convicted for a lesser offence under Section 297 of the Penal code.

But in view of the improbabilities mentioned above and the unsafe evidence of the prosecution witnesses and the medical evidence we are of the view that it is not safe to find the appellant guilty even for a lesser offence not amounting to murder.

As such we are compelled to allow the instant appeal.

Judge of the Court of Appeal

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal