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

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

**Court Appeal Case No.**
**CA/HCC/ 0204/2020**
**High Court of Hambantota**
**Case No. 31/2014**

Aluthgamage Upul Ramyathilaka

**ACCUSED-APPELLANT**

**vs.**

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

**COMPLAINANT-RESPONDENT**

**BEFORE** : **Sampath B. Abayakoon, J.**

**P. Kumararatnam, J.**

**COUNSEL** : **Darshana Kuruppu with Shehan Weerasinghe and Tharushi Gamage for the Appellant.**

**Dishna Warnakula, DSG for the Respondent.**

**ARGUED ON** : **14/12/2023**

**DECIDED ON** : **08/05/2024**

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**JUDGMENT**

**P. Kumararatnam J**

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General for committing the murder of Wellappili Arachchige Wijayaratne on or about 25/05/2010 an offence punishable under Section 296 of Penal Code.

The trial commenced before the High Court Judge of Hambantota as the Appellant elected for a non-jury trial. The prosecution had called 07 witnesses, marked production P1, P2 and X, and closed their case. When the defence was called, the Appellant electing to make a statement from the dock, denied the allegation levelled against him.

The Learned Trial Judge, believing the evidence presented by the prosecution, convicted the Appellant on the count of murder and sentenced him to death on 04/09/2020.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court seeking to set aside the conviction and sentence imposed on him.

The Learned Counsel for the Appellant informed this court that the Appellant had given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via zoom from prison.

**Back ground of the case**

According to PW1, Wijedasa, he is the elder brother of the deceased. On the day of the incident, at around 5.30pm he had gone to his ancestral house in Pahala Kumbuk Wewa to meet the deceased as he had been involved in a fight in the evening where he had said to have assaulted the Appellant's wife. When the deceased came there, he had inquired about the said incident from the deceased and advised him to avoid such incidents in future. Listening to the advice given, the deceased had left the house saying that he is going to Mahagalwewa. Around 7.30pm PW2, Nimal Ranjith had come and informed that the deceased was fighting with the Appellant at the junction.

Hearing the news, PW3, Sarathchandra had gone first in his motor bike and PW1 had gone after about 5 minutes of the information. When PW1 went to the place of incident, found the deceased was fallen on the road near a boutique owned by a person called Ajith. At that time the deceased had told PW1 that Upul had assaulted him. PW3 had taken the deceased to the Sooriyawewa Hospital in a three-wheeler. PW1 had gone to the hospital in his motor bike. The deceased was pronounced dead upon admission.

According to PW3, when went to the place of incident, he had seen the Appellant holding the neck of the deceased. When he shouted to identify who was assaulting his late brother, the Appellant drove his motor bike over the deceased's body.

PW07, the JMO who held the post-mortem opined that the death of the deceased was caused due to throttling and a blow to chest wall and bleeding into the chest cavity.

On behalf of the Appellant following Grounds of Appeal are raised.

1. The Trial Judge has misdirected himself by imputing the burden on the Appellant to explain his innocence.
2. The Learned Trial Judge has misdirected himself by failing to apply the established legal principles to evaluate the testimony of PW1 and sole eye witness PW03.
3. The Learned High Court Judge has misdirected himself by failing to direct himself on the issue of a sudden fight between the deceased and the Appellant when such circumstances have been clearly revealed from the testimonies of the prosecution witnesses.

In the initial ground of appeal, the Learned Counsel argued that the conviction is legally flawed as the Trial Judge incorrectly shifted the burden onto the Appellant to prove his innocence.

The concept of reversed burden of proof is a legal doctrine that shifts the obligation of proving a fact from the usual party responsible for doing so to the opposing party. This means that in criminal cases, the burden of proof can be transferred from the prosecution to the defense.

In criminal law, the presumption of innocence is a fundamental principle mandating that the prosecution must establish the guilt of the accused beyond a reasonable doubt. Nevertheless, there are instances where the law imposes a reverse burden of proof on the accused, necessitating them to demonstrate their innocence on a specific issue.

The application of the reversed burden of proof is contentious, as it may be perceived as infringing upon the presumption of innocence and the right to a fair trial. However, in certain circumstances, it is viewed as a necessary measure to safeguard public interests and ensure accountability for those causing harm.

The Learned Counsel, highlighting the below mentioned portion of the judgment, strenuously argued that the Learned High Court Judge had reversed the burden to the Appellant to prove his innocence.

Page 213-214 of the brief.

ඒ අනුව පැමිණිල්ල විසින් චෝදනාව චූදිතට එරෙහිව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කිරීමට ප්‍රමාණවත් වන්නා වූ ප්‍රබල සාක්ෂි මෙහෙයවා ඇති බවට නිගමනය කල හැකිය. අපරාධ නඩුවක පැමිණිල්ල විසින් චෝදනාව ඔප්පු කිරීමට ප්‍රමාණවත් ප්‍රබල සාක්ෂි මෙහෙයවා ඇති විට චූදිත චෝදනාවට නිර්දෝෂි වන්නේ නම් තම නිර්දෝෂි භාවය පැහැදිලි කල යුතුය.

In a prima facie case, the accused is afforded the chance to present evidence challenging every aspect of the crime that the prosecution has established. Conversely, the prosecution must demonstrate each element beyond a reasonable doubt. Typically, the accused's main objective is to raise doubts about the prosecution's evidence. Should they succeed, the case may be dismissed.

While an accused individual is not obligated to provide an explanation, if the prosecution presents a compelling case against them, they may choose to offer circumstances indicating their innocence. In the absence of such an explanation from the accused, evidence may be construed unfavourably against them. This principle has been examined in numerous cases both domestically and internationally.

In **Rex v Cochrane 1814 Gurney's Report 479** Lord Ellenborough stated that:

> *"No person accused of a crime is bound to offer any explanation of his conduct or of any circumstances of suspicion which attack him but nevertheless if he refuses to do so where a strong prima facie case has been made out, and when it is own power to offer evidence, if such exist in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence. It is reasonable and justifiable conclusion that he refrains from doing so*

*only from the conviction that the evidence would operate adversely to his interest."*

In **Prematilake v Republic of Sri Lanka** 75 NLR 506 the Court held that:

*"When the telling evidence of this mass of eloquent circumstances remain unexplained by the accused, no reasonable jury could have retuned any verdict other than a verdict of guilt."*

In **Somaratne Rajapakse Others v The Attorney General** [2010] 2 SLR 113 the Court held that:

*"With all this damning evidence against the appellants with the charges including murder and rape, the appellants did not offer any explanation with regard to any of the matters referred to above. Although there cannot be a direction that the accused person must explain each and every circumstance relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound of offer any explanation of his conduct, there are permissible limitations in which it would be necessary for a suspect to explain the circumstances of suspicion which are attached to him. As pointed out in Queen v. Santin Singho if a strong case has been made out against the accused, and if he declines to offer an explanation although it is in his power to offer one, it is a reasonable conclusion that the accused is not doing so, because the evidence suppressed would operate adversely on him. The dictum of Lord Ellenborough in R v. Lord Cochrane which has been followed by our Courts R v. Seeder de Silva Q v. Santin Singh, Premathilake v. The Republic of Sri Lanka, Richard v. The State Illangantillake v. The Republic of Sri Lanka described this position in very clear terms."*

Considering the judgments cited above and the portion of the judgment of Learned High Court Judge re-produced, it is very clear that the Learned High

Court Judge had not reversed the burden, but has only explained the legal principle that had been adopted in the above cited judgments. Therefore, the first ground adduced has no merit at all.

In the second ground of Appeal, the Appellant contends that the Learned Trial Judge has misdirected himself by failing to apply the established legal principles to evaluate the testimony of PW1 and sole eye witness PW03.

Assessing evidence in a criminal trial is a vital task for a judge. Evidence may take different forms, including testimonies, documents, physical items, or digital records. However, not all evidence carries the same level of reliability, relevance, or persuasiveness. To evaluate the quality and weight of evidence, the presiding judge must employ critical thinking skills and take into account several factors such as credibility, consistency, adequacy, standard, relevance, and strength of the prosecution's case.

The Learned Counsel extending his argument on the second ground of the appeal submitted to Court that although PW2 informed that the deceased was fighting with the Appellant, he had not seen the incident. According to PW3, he is the first person who went to the scene of crime and witnessed that the Appellant was holding the deceased on his neck at the time. PW3 had further testified when he went close to the place, the Appellant ran the motor bike over the body of the deceased. Therefore, he is an eye witness to the incident and his evidence needs to be considered very carefully. It is also submitted that the statement of PW3 was recorded after 05 days of the incident.

When PW3 gave evidence at the trial he was never questioned about the delay in giving statement to the police. This was only raised by the Counsel for the Appellant.

When PW2 informed about the incident, PW3 had first had gone to the place of incident and had taken the deceased to hospital in a three-wheeler. PW1 who came second to the place had lodged the first complain to police before

he went to the hospital. PW3 expressed that he was deeply shaken by the unexpected loss of his close brother, who had been a constant source of support in his life. This profound shock left him feeling purposeless and adrift. As a result of this profound grief, he was not been in a position to provide his statement to the police immediately. Hence why it has taken 5 days. This delay in his statement can be attributed to the emotional turmoil he was experiencing. Therefore, it can be argued that the evidence provided by PW3 did not prejudice the Appellant.

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In **Pouline De Cross v The Queen** 71 NLR 169 the Court held that:

> *"Just because the statement of the witness is belated the court is not entitled to reject such statement, if the reasons for the delay adduced by the witness are justifiable and probable the trial judge is entitled to act on the evidence of the witness who had made a belated statement."*

According to PW1, when he arrived at the scene, he had seen the deceased in an uncomfortable condition and told him that the Appellant had assaulted him. This witness had further said that there was no enmity existed between him and the Appellant.

According to PW3, he had taken the deceased to the hospital in a three-wheeler and on the way the deceased had told him that the Appellant had assaulted him.

PW7, the JMO who held the post-mortem stated that the deceased could have lived 5-6 minutes after receiving injury to his cervical spine. This clearly shows that the deceased was in able position of talking.

To rely on the dying declaration made by the deceased it is very important to discuss the relevant laws pertaining to the acceptance of dying declaration as evidence in criminal trials under our law.

<u>According to Section 32(1) of Evidence Ordinance</u>,

Statements, written, or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases: -

(1) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under the expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question.

The following requirements must necessarily be established before any evidence is led under section 32(1) of the Evidence Ordinance.

1. That the maker of the statement is dead.
2. That the statement made by the deceased refers to his/her cause of death or to the circumstances of the transaction which resulted in his/her death.

Hence such evidence would become admissible only where the cause of death of the person making the statement is in question in the particular judicial

proceedings. Admissibility of such evidence would ultimately be decided by the trial judge as per Section 136 of Evidence Ordinance.

In **Dharmawansa Silva and Another v. The Republic of Sri Lanka** [1981] 2 Sri.L.R.439 it was held:

> *"When a dying statement is produced, three questions arise for the Court. Firstly, whether it is authentic. Secondly if it is authentic whether it is admissible in whole or part. Thirdly, the value of the whole or part that is admitted. A dying deposition is not inferior evidence but it is wrong to give it added sanctity"*

In **Sigera v Attorney General** [2011] 1 Sri.L.R. 201 it was held that:

> *"An accused can be convicted of murder based mainly and solely on a dying declaration made by a deceased".*

In this instance, the Learned High Court Judge meticulously analysed the legal principles regarding the admissibility of the dying declaration. The Judge was convinced that the deceased had communicated with PW1 and PW3, implicating the Appellant as the individual responsible for the assault.

Next, the Learned Counsel contended that the contradictions and the commission highlighted by the defence were not considered in favour of the Appellant.

In **Bharwada Bhoginbhai Hirjibhai v State of Gujarat** 1983 AIR 753, 1983 SCR (3) 208 the Court held that:

> *(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is replayed on the mental screen;*
>
> *(2) ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often*

*has an element of surprise.The mental faculties therefore cannot be expected to be attuned to absorb the details;*

*(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another;*

*(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder;*

*(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends. On the 'time sense' of individuals which varies from person to person.*

*(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up, when interrogated later on;*

*(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts; get confused regarding sequence of events, or fill up details from imagination on the spur of moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish, or being disbelieved, though the witness is giving a truthful and honest account of the occurrence witnessed by him- Perhaps itis a sort of a psychological defence mechanism activated on the spur of the moment."*

*"Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important 'probabilities-factors' echoes in favour of the version narrated by the witnesses."*

Drawing from the principles outlined in the referenced case, the Learned High Court thoroughly examined the contradictions and omissions presented, ultimately reaching a sound conclusion that these discrepancies did not undermine the essence of the case. Therefore, this Court can only conclude that the second ground of appeal lacks merit.

In the final ground of appeal, the Learned Counsel contended that the Learned High Court Judge had misdirected himself by failing to direct himself on the issue of sudden fight between the deceased and the Appellant, when such circumstances have been clearly revealed from the testimonies of the prosecution witnesses.

The offence of murder in terms of Section 294 of the Penal Code is reduced to culpable homicide not amounting to murder under Section 293, if any of the five exceptions to Section 294 could be shown to apply. The exceptions are as follows:

1. Grave and sudden provocation.
2. Exceeding in good faith the right of private defence.
3. Bona fide overstepping of the limits of his authority by a public servant.
4. The plea of sudden fight.
5. The case of a mother who causes the death of her child under the age of twelve months when the balance of her mind is disturbed by reason of her not having fully recovered from the effect of giving birth to a child or by reason of the effect of lactation consequent to the birth of the child.

Considering the Exception 4 to Section 294 of the Penal Code reads as follows:

> "Culpable homicide is not murder if it is committed without premeditation is a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

In **Bandara v Attorney General** [2011] 2 SLR 55 Dr. Shirani A. Bandaranayake,CJ. held that:

> *"A sudden fight cannot be premeditated as the word ' sudden' clearly means that there cannot be any such pre-arrangements. It should also be noted that the lapse of time between the initial argument and the final fight is material for an accused to come within Exception 4, since the lapse of time may grant the opportunity for an accused to premeditate and make arrangements for a fight. Such a fight is not spontaneous and therefore cannot be regarded as one that could be described as sudden."*

According to PW1, the deceased was involved in a fight with the wife of the Appellant. This is the cause which end up in the murder of the deceased. In this case the deceased had sustained very serious injuries around his neck. The JMO has opined that great force had been administered which clearly shows the murderous intention of the Appellant. Moreover, riding a motorbike over the deceased's body could be deemed inherently dangerous, carrying a significant likelihood of causing death.

In **Pandurang Narayan Jawalekar v State of Maharashtra** AIR 1978 SC,1082 the Indian Supreme Court, whilst stating that there was a sudden quarrel and that the fight was not premeditated to cause death. It was held that:

*"it would be necessary to show that the injury caused is not a cruel one."*

Considering the brutality of the offence, the amount of force used, the gravity as well as the seriousness of injuries, I conclude this is not the case which falls under the Exception 4 to Section 294 of the Penal Code. Therefore, I answer the final ground of appeal in negative.

Considering all the evidence presented against the Appellant, I conclude that the prosecution had succeeded in adducing highly incriminating evidence against the Appellant and thereby has established a strong prima-facie case against him. As such we conclude that this is not an appropriate case in which to interfere with the findings of the Learned High Court Judge of Hambantota dated 04/09/2020. Hence, we dismiss the Appeal.

Appeal dismissed.

The Registrar of this Court is directed to send this judgement to the High Court of Hambantota along with the original case record.

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree

**JUDGE OF THE COURT OF APPEAL**