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

In the matter of an Appeal made under 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/ 0250/2016

Dicwella Vidanage Jagath Jayantha

High Court of Polonnaruwa
Case No. HC/237/2006

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL	:	**Rienzie Arsekularatne, P.C with C. Arsekularatne, and Thilina Punchihew for the Appellant.** **Anoopa De Silva, DSG for the Respondent.**
ARGUED ON	:	**04/08/2023**
DECIDED ON	:	**30/11/2023**

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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 offence as mentioned below.

On or about the 21st of March 2001, the Appellant committed the murder of Ginasiri Ruwanpura at Polonnaruwa which is an offence punishable under Section 296 of Penal Code.

The trial commenced before the High Court Judge of Polonnaruwa as the Appellant opted for a non-jury trial. The prosecution had led 07 witnesses and marked production P1-09 and closed the case. The Learned High Court Judge having satisfied that evidence presented by the prosecution warranted

a case to answer, called for the defence and explained the rights of the accused. The Appellant made a very brief dock statement and closed his case.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant as charged and sentenced him to death on 25/11/2016.

Being aggrieved by the aforesaid conviction and the sentence, the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant had given his consent to argue this matter in his absence due to the Covid 19 pandemic. At the hearing, the Appellant was connected via Zoom platform from prison.

The Appellant had raised following grounds of appeal on his behalf.

1. The Appellant has not been offered a fair trial.
2. Although PW2 and PW3 contradicted each other, the Learned High Court Judge considered that evidence corroborating each other.
3. The Learned High Court Judge has failed to consider "Sudden Fight" in his judgement.

The background of the case *albeit* **briefly is as follows:**

According to PW1 Lal Ranasinghe, he functioned as a prison guard on the day of the incident. As usual he escorted prisoners to the Polonnaruwa Magistrate Court with other officers at about 9.00 am. Before the Court started, while he was talking to his uncle who had come to see him on that day, he suddenly heard a commotion in front of the Court house. When he rushed to the place, had seen two persons engaged in a scuffle and a fight. He had seen the Appellant and the deceased in a scuffle. Immediately he had gone in search of PW2, who functioned as the Court Officer in the Polonnaruwa Magistrate Court. As he could not meet the Court officer, he

reverted back to the place of incident but still the scuffle was continuing between the Appellant and the deceased. At that time the sarong worn by the Appellant had fallen up to his knees. The witness had seen the Appellant stabbing the deceased 4-5 times. Thereafter, the deceased had fallen on the ground.

In the meantime, PW2, Eriyagama had overpowered the Appellant took him to his custody. When the Appellant was seized, he shouted out saying "I am innocent". The Appellant had dropped the knife on to the ground at that time, which is six inches long. The Appellant was handed over to another prison officer Dayaratne by PW2. According to PW1, the deceased was not armed with any weapon. He had identified the Appellant and the knife during the trial.

When PW2 reached the place of incident, he had seen lots of people gathered there. He too had witnessed the scuffle and at the same time he had seen one person walking towards the Court Complex and the other person was holding the collar of the shirt of the who was walking towards the Court Complex. When the witness seized the Appellant, the other person had fallen on the ground while bleeding. At that time the Appellant's sarong was lying on the ground. After handing over the Appellant to a prison guard, steps were taken to dispatch the deceased to the Polonnaruwa Hospital. He too had identified the Appellant and the knife during the trial.

PW3, Rathnasiri, who was guarding the main entrance of the Court Complex corroborated the evidence given by PW1 and PW2.

PW4 Rasika is the wife of deceased who identified the body at the post mortem inquiry. According to her, the deceased worked as a person who cuts trees for the State on contract. The deceased had gone to the Court on the fateful day to Court to recover rent arrears due to him from 15 shops that he had given on rent. The Appellant was also one of the defaulters among others. On a previous occasion the Appellant had gone to the deceased's house in his absence and levelled death threats to the deceased.

PW7 IP Gunasekera from the Polonnaruwa Police Station had visited the Polonnaruwa Police Station first and inspected the body. Thereafter he had visited the scene of crime and conducted the investigation. At the place of incident, he had recovered a blood-stained knife, a shirt pocket, two pressed cigarettes and three buttons coupled with a sarong. Next, he had proceeded to arrest the Appellant who was in the custody of the prison officer, recovered his blood stained, torn, pocket less white shirt. At the Post-Morten, he had recovered a shirt and a sarong with blood and cut marks.

According to the JMO, PW7 Palitha Yapa, had noted 7 cut and stab injuries were on the deceased's body. First and second injuries had been on the stomach which extended to the large intestines. Fifth injury had been on the left shoulder and according to the JMO, the above-mentioned injuries are sufficient in the ordinary cause of nature to cause death. According to the JMO, the other injuries were categorised as simple injuries. He further opined; the knife shown to him could have caused all seven injuries. Even if the deceased was treated within a short span of time the, the deceased's life could not have been saved. He confirmed that the death was caused due to shock and haemorrhage following a stab wound to spleen and by other wounds.

After calling the defence, the Appellant making a very short dock statement denied the charge.

It is trite law that the burden of proof is on the prosecution in all criminal cases.

In **The Queen v. K.A. Santin Singho 65 NLR 447** the court held that:

> *"It is fundamental that the burden is on the prosecution. Whether the evidence the prosecution relies on is direct or circumstantial, the burden is the same. This burden is not altered by the failure of the appellant to give evidence and explain the circumstances.*

This case rests on direct and circumstantial evidence.

As the grounds of appeal raised by the Appellant are interconnected, all grounds will be considered together in this appeal.

The right to a fair trial guarantees fair court proceedings. A fair trial means that the court follows all procedures correctly and treats all parties equally, so that the trial itself is fair and effective, regardless of the decision and outcome. The right to a fair trial encompasses requirements for the court and its constitution as well as procedural guarantees during proceedings.

The Constitution in Sri Lanka expressly guarantees the right to fair trial. The Article 13(3) which states that; "Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court."

What is meant by the right to a fair trial had been examined by the Supreme Court in **Attorney General Vs. Segulebbe Latheef and Another** 2008 (1) SLR 225; wherein the following had been stated thus;

> *"Like the concept of fairness, a fair trial is also not capable of a clear definition, but there are certain aspects or qualities of a fair trial that could be easily identified. The right to a fair trial amongst other things includes the following." 1. The equality of all persons before the court. 2. A fair and public hearing by a competent, independent and impartial court or tribunal established by law. 3. Presumption of innocence until guilt is proven according to law. 4. The right of an accused person to be informed of promptly and in detail in a language he understands of the nature and cause of the charge against him. 5. The right of an accused to have time and facilities for preparation for the trial. 6. The right to have a counsel and to communicate with him. 7. The right of an accused to be tried without much delay 8. The right of an accused to be tried in his presence and to defend himself or through counsel. 9. The accused has a right to be informed of his rights. 10. If the accused is in indigent circumstances to*

provide legal assistance without any charge from the accused. 11. The right of an accused to examine or have examined the witnesses against him and to obtain the evidence and examination of witnesses on his behalf under the same conditions as witnesses against him. 12. If the accused cannot understand or speak the language in which proceedings are conducted to have the assistance of an interpreter. 13. The right of an accused not to be compelled to testify against himself or to confess guilty".

The Learned President's Counsel submitted that the Learned High Court Judge who wrote the judgment has not heard the case but only listened to the submissions made by the both parties. Thereby contended that the Appellant has not afforded a fair trial in this case.

When this case came up before the Learned High Court Judge who wrote the judgment on 03.02.2016, both parties had agreed to adopt the evidence led up to that point and agreed to continue the case.

Section 48 of the Judicature Act sates as follows:

> In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to resummon the witness and commence the proceedings afresh:
>
> Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be resummoned and reheard.

In **Herath Mudiyanselage Ariyaratne V. Republic of Sri Lanka. (CA 307/2006** [17.7.2013]) where His Lordship Justice Sisira De Abrew said:

> *' ... I now again turn to the contention that succeeding HCJ in a criminal trial cannot, under Section 48 of the Judicature Act, continue with the proceedings recorded before his predecessor. When a HCJ is transferred from his station he ceases to exercise his jurisdiction in his area and thereby he suffers from disability to function as HCJ of the area. Thus, in my view, transfer of a HCJ from a station is covered by the words 'other disability ' in Section 48 of the Judicature Act. '*

Therefore, it is clear that the learned High Court Judge who wrote the judgment had the discretion and the authority to continue with the case. Therefore, it is incorrect to say that the Appellant has not been afforded a fair trial in this case.

Any contradiction if proven in accordance with the provisions of the Evidence Ordinance, can impeach the credibility of the witness and can help in rejecting the evidence of the prosecution in criminal trials and of the other side in civil trials. Contradictions have to be proved in accordance with the procedure prescribed under the Evidence Ordinance, otherwise it would have no evidentiary value and would not be admissible. A witness can be contradicted with its previous statements either made by him in writing or reduced into writing by someone.

For contradiction to be essential and to affect the decision of a trial court, such contradictions must be material and fundamental. They must create doubt in the mind of the court to such a degree that the court believes that the doubt must be resolved in favour of the accused. Therefore, it is very much important to evaluate the evidence given by the witnesses in a criminal trial very carefully.

The Learned President's Counsel contended that the evidence given by PW1 and PW2 are contradictory which certainly vitiates the conviction in this case.

In this case, the incident happened in the Court premises where public attend to resolve their legal disputes through the Court. According to the evidence given by PW4, deceased's wife, the deceased too had come to Court on that day to resolve dispute regarding non-payment of rent to 15 shops own by him. The Appellant was also one of the persons who defaulted rent to one of the shops. Hence, both the deceased and the Appellant had come to Court with a reason.

In this case, PW1 is a prison officer who had escorted suspects to Court on that day. PW2 is a police officer who functioned as a Court officer on that day. Both had witnessed the incident when they came to the place of incident. When PW1 witnessed the incident, he had seen the Appellant and deceased were grappling each other and the Appellant stabbing the deceased with a knife 4-5 times.

Although this witness was subjected to a lengthy cross examination the defence could not contradict him on material points. The marked contradictions in the evidence creates no doubt at all.

According to PW2, when he came to the place of incident, he had seen the deceased holding the Appellant by his collar. When he held the Appellant who was without his sarong, the deceased went few feet ahead and fallen on the ground facing downwards. At that time, he had seen the deceased bleeding. The deceased was hospitalized within 15 minutes. Although a contradiction was marked in his evidence, it too had failed in creating a doubt in the prosecution's case.

In the case of **The Attorney General v. Sandanam Pitchi Mary Theresa** (2011) 2 Sri L.R. 292 held that,

> *"Witnesses should not be disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter.....The court*

observed further, that human beings are not computers and that it would be dangerous to disbelieve the witness and reject evidence based on small contradictions or discrepancies".

Both PW1 and PW2 had given evidence after about 09 years of the incident. A photographic memory cannot be expected from them. As the defence could not create a doubt over their evidence, the argument brought by the Learned President's Counsel that the PW1 and PW2 had given contradictory evidence cannot be sustained.

Next, the Learned President's Counsel contended that the Learned High Court Judge had failed to consider the defence of sudden fight in this case.

It is a trite law that if the defence had not raised any alternative remedy against the charge, it is the duty of the judge to consider such circumstances before he could be convicted for the main charge.

In **The King v Bellana Vitanage Eddin** 41 NLR 345 the court held that:

"In a charge of murder, it is the duty of the judge to put to the jury the alternative of finding the accused guilty of culpable homicide not amounting to murder when there is any basis for such a finding in the evidence on record, although such defence was not raised nor relied upon by the accused".

In **Luvis v. The Queen** 56 NLR 442 the court held that:

"Having regard to the evidence, the fact that sudden fight was not specifically raised as a defence did not relieve the trial judge of the duty of placing before the jury that aspect of the case."

The Learned High Court Judge in his judgment had very correctly had considered whether this incident could be brought under exception 1 or 4 of Section 294 of the Penal Code. This is one step further to the contention

raised by the Learned President's Counsel. The relevant portions are re-produced below:

Pages 337-340 of the brief.

294 වගන්තිය :-

මෙහිදී මින් මතු බැහැර කරනු ලැබූ අවස්ථාවල දී හැර පහත දැක්වෙන පරිදි වුවහොත් සාවද්‍ය මනුෂ්‍ය ඝාතනය මිනී මැරුමක් වේ. එනම් :-

පළමුවනුව :

මරණය සිදු කළ ක්‍රියාව මරණය සිදු කිරීමේ අදහසින් කරනු ලැබූවක් වීම හෝ,

දෙවනුව :

පීඩාව සිදු කරනු ලැබූ තැනැත්තාගේ මරණය සිදු විය හැකි අන්දමේ ශාරීරික පීඩාවක් වන බවදකරු දන්නා වූ පාඩුවක් කිරීමේ අදහසින් එය කරනු ලැබීම හෝ,

තෙවනුව :

ශාරීරික පාඩුව යම් තැනැත්තෙකුට කිරීමේ අදහසින් හා කරනු ලැබ එසේ කිරීමට අදහස් කරනු ලැබූ ශාරීරික පාඩුව ස්වභාවික කටයුතු අතර දී මරණය සිදු කිරීමට ප්‍රමාණවත් වීම හෝ,

හතරවනුව :

අන්තරාය කොපමණ ආසන්නව ද කිවහෝත සෑම අතින්ම මරණය සිදු විය හැකි බව හෝ මරණය සිදුවිය හැකි ශාරීරික පාඩුවක් විය හැකි බව ක්‍රියා කරන්නා දැන ගෙන සිටිමින්ම මරණය සිදු කිරීමේ හෝ ඉහත කී ලෙස පාඩුවක් සිදු කිරීමේ අවධානමකට මුහුණ පෑමට සමාව දිය හැකි හේතුවක් නොමැතිව ම එකී ක්‍රියාව කිරීමක් වේ.

නමුත් මෙම වගන්තිය මඟින්ම මනුෂ්‍ය ඝාතනයක්, මිනී මැරුමක් නොවනා අවස්ථාවන් ලෙස සැලකිය හැකි ව්‍යතිරේක පහක් සඳහන් කරනු ලැබ ඇත. මෙම අවස්ථාවට අදාළ වන සාක්ෂි සලකා බැලිමේ දී මා විසින් සොයා බැලිය යුතු වන්නේ එකී ව්‍යතිරේකවලින් 01 වන සහ 04 වන ව්‍යතිරේකය යටතට මෙම සිදුවීම ගැනිය හැකි බවට සාක්ෂි අනාවරණය වන්නේ ද වන අතර එකී 01 වන සහ 04 වන ව්‍යතිරේකයන් පහත පරිදි වේ.

ව්‍යතිරේඛය 01.

බරපතල වූත්, හදිසි වූත්, ප්‍රකෝප කිරීමක් නිසා ආත්ම දමනය කිරීමේ බලය නොමැතිව සිටින විට තමා ප්‍රකෝප කර වූ තැනැත්තාගේ මරණය හෝ වැරදීමකින් හෝ අහම්බෙන් වෙන තැනැත්තෙකුට මරණය වරදකරු විසින් සිදු කරනු ලැබුවහොත් සාවද්‍ය මනුෂ්‍ය මිනීමැරුමක් නොවේ.

ඉහත ව්‍යතිරේඛය පහත දැක්වෙන අතුරු විධානවලට යටත් වේ.

පළමුවනුව :-

ප්‍රකෝප කරවීම කෙනෙකුගේ මරණය සිදු කිරීම සඳහා හෝ කෙනෙකුට පීඩාවක් කිරීම සඳහා සමාවේ හේතුවක් වශයෙන් සොයා ගිය දෙයක් හෝ කැමැත්තෙන් ම ප්‍රකෝප කරනු ලැබූවක් නොවිය යුතුය.

දෙවනුව :-

ප්‍රකෝප කරවීම නීතිය පිළිපැදීමක් වශයෙන් කරනු ලැබූවකින් හෝ රජයේ සේවකයකුගේ බලතල නීත්‍යානුකූලව පාවිච්චි කිරීමේ දී, රජයේ සේවකයෙකු විසින් කරනු ලැබූ යමකින් වූවත් නොවිය යුතුය.

තුන්වනුව :-

ප්‍රකෝප කරවීම ආත්මරක්ෂාවේ බලය නීත්‍යානුකූලව පාවිච්චි කිරීමේ දී, කරනු ලැබූ යමකින් වූවක් නොවිය යුතුය.

පැහැදිලි කිරීම :-

වරද මිනීමැරමක් නොවීමට තරම් එම ප්‍රකෝප කරවීම බරපතල ද, හදිසි ද, යන්න සිද්ධිය පිළිබඳ ප්‍රශ්නයකි.

එසේම 294 වගන්තියේ 04 වන ව්‍යතිරේඛය පහත පරිදි වේ :-

හදිසි සටනක හදිසි දබරයක දී කෝපය ඇවිස්සුණු අවස්ථාවකදී කල් තබා කල්පනා කිරීමක් නොකර වරදකරු අනිසි වාසියක් නොලබා හෝ කෲර ලෙස හෝ අස්වාභාවික ලෙස ක්‍රියා නොකොට මරණය සිදු කරනු ලැබුවේ නම්, ඒ සාවද්‍ය මනුෂ්‍ය ඝාතනය මිනීමැරුමක් නොවේ.

පැහැදිලි කිරීම :-

ප්‍රකෝප කිරීම සිදු කරනු ලබන්නේ ප්‍රථම පහරදීම කරනු ලබන්නේ කිනම් පාර්ශවය විසින් ද යන්න එබදු අවස්ථාවලදී සැලකිය යුතු නොවේ.

Further, the Learned High Court Judge had very correctly considered the evidence given by PW1, PW2 PW3 and other witnesses and had reached the conclusion that the Appellant had committed the murder of the deceased on 21.03.2001 at the premises of the Court Complex of Polonnaruwa. Hence, the grounds of appeal raised by the Appellant have no merit at all.

As the Learned High Court Judge had rightly convicted the Appellant for the charge levelled against him in the indictment, I affirm the conviction and dismiss the Appeal of the Appellant.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL