

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

Nandiratna Durage Jayalath

ACCUSED-APPELLANT

C.A. 171/2008

(H.C. Galle 2534/2005)

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

RESPONDENT

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Indika Mallawarachchi for the Accused-Appellant
Wasantha Navaratne Bandara A.S.G. P.C., for the Respondent

ARGUED ON: 13.05.2014

DECIDED ON: 03.07.2014

GOONERATNE J.

Two Accused were indicted in the High Court of Galle on charge of murder against the 1st Accused and the 2nd charge against the 2nd Accused for aiding and abetting the 1st Accused to commit murder of the deceased named in count No. 1. The trial Judge acquitted the 2nd Accused on the 2nd count, leveled against him. The prosecution case very briefly is that over a dispute on a parapet wall/fence where one party allege encroachment, the incident of murder had taken place on or about 18.4.2000. Three lay witness inclusive of the deceased's mother gave evidence for the prosecution. Witness No. (1) & (2) more or less provided circumstantial evidence whilst witness No. (3) gave direct evidence of stabbing by the 1st Accused of the deceased, in front of a common friend's house of either party, called Dinesh.

The 1st Accused-Appellant made dock statement, from which a sudden fight had been projected. Learned counsel for the Appellant presents her main argument to this court based on the dicta in James Vs. Republic of Sri Lanka and demonstrated to court that the trial Judge in rejecting or disbelieving the material contained in the dock statement and the evidence surfaced therein had compared the prosecution version and evidence of the

prosecution evidence. If that be so and if it relates to a material aspect of the case of murder, same would be a misdirection of the trial Judge.

To demonstrate the question of sudden fight learned counsel for the Appellant drew the attention of court to the items of evidence at pgs 126, 129, 130 (exchange of words) 137. When we carefully examine that aspect eye witness had rejected the position of a sudden fight, and had given clear evidence of stabbing by the Accused-Appellant. We also find the incident of murder being corroborated by other circumstantial evidence.

The learned Addl. Solicitor General argued that the evidence that transpired in the trial court does not suggest any kind of sudden fight. He also emphasized the fact that the Accused-Appellant surrendered to the police. The case of the prosecution is supported by sound evidence and supported by motive. The main witness's version is corroborated by medical evidence and the witness was able to reject the defence position without any hesitation.

When we consider the entirety of evidence placed before the trial court it is argued that the incident of murder had been established by the prosecution evidence, and the defence had not been able to create a reasonable doubt to get any benefit. In the dock statement of the Accused-Appellant it is stated:

- (a) Dispute over a parapet wall or boundary;
- (b) In order to settle the dispute police had informed the Accused to be present in the police station at about 2.00 p.m.
- (c) As such Accused left for work and had the intention of going to the police. Thereafter left the house at about 8.30 a.m.
- (d) In front of the house of Dinesh (Wit No. 3) the deceased with 4/5 others attacked the Accused with clubs. The Accused in order to get out of this problem ran towards the police and on the way picked up a knife and went to the police along with it. The 2nd Accused came on a push cycle and along with him went to the police.

The trial Judge no doubt has examined the dock statement very carefully. Learned Trial Judge observes that the incident occurred due to a dispute pertaining to a wall as stated in the dock statement. He merely observe that witnesses No. 1 & 2 also testified to that effect.

The trial Judge also stated that according to the evidence of witness No. 3 Dinesh, the incident occurred in front of his house. The Accused also admits this fact in the dock statement. What is important as relied upon by the defence is whether on the material aspects as to whether the trial Judge made any comparison with the prosecution case? In this regard we cannot find any comparison since the trial Judge specifically states (229) that the Accused by his statement exclude the incident of stabbing and went towards the police

and picked a knife. Trial Judge refer to the statement and states that the Accused by rejecting or excluding the incident of stabbing, the trial Judge gave his mind to the fact as to why the Accused took the knife to the police, when he does not refer to any act of stabbing. Based on Section 27 statement of the Evidence Ordinance, made to the police by the Accused the knife (P1) was recovered. On the above basis the trial Judge reject or disbelieve the Accused-Appellant's version. It is the position of the trial Judge that based on the Accused dock statement and the statement made to the police as per Section 27 of the Evidence Ordinance, appellant's version is disbelieved. A careful examination of the trial Judge's findings amply demonstrate that rejection of the Accused's version is based solely on his testimony. The place of incident and motive are only ancillary factors, and facts admitted by both parties. As such we are not inclined to accept the position that the learned High Court Judge had misdirected on the lines suggested in the dicta of James Vs. the Republic of Sri Lanka. As presented to this court, defence' version would not be capable of creating any doubt in the prosecution case. It must also be kept in mind that a special defence or a general exception vest the burden of proof on the defence. In this instance that burden had not been discharged by the Accused party, of the alleged sudden fight.

We have also noted the evidence of the deceased's mother (1 W) who testified about a previous incident between the Accused and witness No. 2 (2 W), who is the brother of the deceased regarding the parapet wall. It is her evidence that the parties had another incident and a police complaint had been lodged. Police had requested the parties to be present in the police station. The witness had as narrated in her evidence, deceased went to the house of wit. No. 3 which was in very close proximity. At that moment the witness saw the Accused going with a knife and in anticipation of another altercation the witness had also gone in the same direction, and she saw the deceased coming with blood stains in his body. She also saw the Accused going away with the 2nd Accused on a push cycle. The utterance made by the witness is also recorded. The above evidence had been confirmed by witness No. 2. The evidence testified by both witnesses No. 1 & 2 are strong circumstantial evidence. The evidence of witness No. 3 is direct evidence.

In all the above circumstances the prosecution has established the case beyond reasonable doubt, on the basis of strong direct and circumstantial evidence. The material elicited for the defence of sudden fight, has not been proved, in the manner as urged by learned counsel for the accused-Appellant. Nor can we hold that the dicta in James Vs. Republic of Sri Lanka could be

made to apply to this case in the context and circumstances of this case. Therefore we affirm the conviction and sentence of the learned High Court Judge, and proceed to dismiss this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL