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

In the matter of an application for Special Leave to Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 130/2016
SC (SPL) LA No. 61/2016
CA No. CA (PHC) APN 74/2014
HC Kandy No. 160/2000

The Democratic Socialist Republic of Sri Lanka.

Complainant.

Vs.

Kathaluwa Weligamage Amararathne.

Accused.

AND

Thisantha Mahendra Vittachchi,
No. 302/71, Gangewatta,
Mahara, Gampola.

Petitioner.

Vs.

1. Kathaluwa Weligamage Amararathne.
2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents.

AND NOW BETWEEN

Kathaluwa Weligamage Amararathne,
No. 113,
Angammana,
Gampola.

Accused 1st Respondent Petitioner.

Vs.

1. Thisantha Mahendra Vittachchi,
No. 302/71, Gangewatta,
Mahara, Gampola.

Petitioner-Respondent.

2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

2nd Respondent Respondent.

Before: BUWANEKA ALUWIHARE PC. J.
PRASANNA JAYAWARDENA PC. J.
L.T.B DEHIDENIYA J.

Counsel: Anil Silva P.C with Nandana Perera for the Accused 1st Respondent Appellant

Dharmasiri Karunaratne for the Petitioner Respondent

Varunika Hettige DSG for Attorney General

Argued on: 29.10. 2018

Decided on: 17.07.2019

Aluwihare PC. J.,

The Accused-1st Respondent-Petitioner-Appellant (hereinafter referred to as the "Accused-Appellant") was indicted before the High Court of Kandy for the offence of the murder of one Henry Peter Vittachchi on or about the 8.8.1997, an offence punishable under Section 296 of the Penal Code.

The Accused-Appellant pleaded not guilty and accordingly the matter went to trial and formal recording of evidence commenced on 22.06.2006. By the 14th March 2014 the prosecution had led evidence of 5 witnesses, including a purported eye witness Prabath Manjula Vittachchi, who was a student of 17 years at the time of the incident.

On the said date (i.e.14.03.2014) however, the Accused -Appellant withdrew his initial plea of not guilty and pleaded guilty to the offence of culpable homicide not amounting to murder on the basis of 'a sudden fight and provocation' and the learned State Counsel informed the Court that the said plea of the Accused-Appellant was acceptable to the State. Both the learned Counsel for the Accused -Appellant, and the learned State Counsel made their respective submissions, to assist the Court to determine the appropriate sentence.

Thereafter, the learned High Court Judge, imposed a sentence of two (2) years rigorous imprisonment on the Accused-Appellant, which sentence was suspended for a period of 15 years, additionally a fine of Rs. 5000 was imposed, default of which would earn a further sentence of 6 months.

Aggrieved by the said sentence imposed by the learned High Court Judge, a son of the deceased, Mahendra Vittachchi (present Petitioner-Respondent) moved

the Court of Appeal by way of revision and urged the Court to revise the sentence imposed on the Accused-Appellant on the basis that the sentence imposed was not commensurate with the gravity of the offence.

The Court of Appeal by its order dated 11.03.2016 set aside the sentence imposed on the Accused-Appellant by the learned High Court Judge and in lieu, imposed a sentence of 6 years rigorous imprisonment plus a fine of Rs.10,000/- and a term of 6 months RI in default.

The present appeal is against the enhancement of sentence.

Special Leave to Appeal was granted on the following questions of law;

(a) Is the judgment contrary to law?

(b) In the circumstances of this case, the Petitioner Respondent could not have filed an application in Revision and therefore is the enhancing of the sentence of the Petitioner contrary to law?

(c) Did the failure of the Learned Judges of the Court of Appeal to consider that the sentence is to take effect about 18 years after the incident, contrary to law, when it is a factor that has always been taken into account in determining an appropriate sentence?

(d) Did the Learned Judges of the Court of Appeal fail to consider that the deceased had only one stab injury which too was a mitigating factor in the circumstances of this case?

(e) Did the Learned Judges of the Court of Appeal misdirect themselves in enhancing the sentence without considering the fact that the Petitioner was intoxicated to such an extent that he could not have formed a murderous intention?

(f) Although the Learned Judges of the Court of Appeal have stated that in imposing an appropriate sentence, the point of view of the accused as well as the interests of the society should be taken into account, in deciding the

sentence, did the failure to consider matters favourable to the Petitioner amount to a miscarriage of justice?

Before I deal with the impugned order of the Court of Appeal and the respective submissions made on behalf of the Accused-Appellant, and the Respondents, it would in my view be pertinent to refer to the facts of this case.

The eyewitness, Prabath Manjula Vittachchi, a grandson of the deceased, Henry Vittachchi was a member of the household of the deceased at the time relevant to the incident. Witness had said that around 8.00 in the evening, while studying, he heard someone abusing his grandfather in foul language, from the direction of the road. According to the witness, he had heard the words to the effect "උඹලා ඔක්කොම බාවනවා", (all would be killed) and his grandfather being referred to as "නාකියා" (old man). At this point his grandfather had said from the house "Amare, if you have consumed alcohol, go home without shouting". Witness had said that his grandfather referred to the Accused-Appellant as 'Amare', as he happened to be his son-in-law. After this, the abusing had worsened and had become louder. Then the deceased had said that he will telephone the police if the Accused-Appellant was not to cease shouting. Thereafter the situation had quietened down. Then his grandfather had gone to his room and his uncle who also had come out of his room hearing the commotion, also had retired to his room. The witness had reverted to his books.

After a lapse of about ten minutes, the shouting had recommenced and someone had started banging on the front door. As the witness turned towards the door, the door had collapsed and the Accused-Appellant had walked in. At this point the deceased was seen standing in the corridor. The Accused-Appellant had rushed towards the deceased and had stabbed him with a weapon the witness describes as a "නියන"(chisel). Upon receiving the stab injury, the deceased had collapsed and through fear this witness had jumped out of a window and had run to an uncle's house nearby to relate the incident and to get help.

Although it had been suggested on behalf of the Accused-Appellant that there was a scuffle between the Accused-Appellant, the deceased, and an uncle of his,

the witness had refuted the suggestion and had said that there was no such scuffle. It had also been suggested that the incident happened in the course of a fight, but the witness again had rejected the suggestion and had said that no fight took place, "පොරකෑමක් සිදු වුනේ නැහැ සීයාට අනින වෙලාවේ මම එනන හිටියා".

It should be noted that the defence had failed to mark any significant contradictions or omissions in the course of the cross-examination of the witness save for a solitary contradiction which is not in any way significant.

The Judicial Medical Officer who conducted the post-mortem of the deceased Henry Vittachchi had testified to the effect that the deceased had sustained one injury to the chest which had penetrated the right Atrium of the heart. He opined that the injury was necessarily a fatal one and no amount of medical care could have prevented his death.

In their submissions before this Court, it was the position of the Petitioner-Respondent, Mahendra Vittachchi that, according to the evidence of the eyewitness who testified before the High Court (witness No.1 Manjula Vittachchi) the Accused -Appellant who was armed with a chisel, had gained entry to the house by crashing through the door of the house where the deceased lived, and had stabbed the deceased. The broken parts of the door through which the Accused-Appellant had gained entry was not an item that formed part of the list of productions in the indictment that was presented to the Court by the Prosecution, but was only added to the list in the course of the trial.

It was also the position of the Petitioner-Respondent that he too sustained an injury and Dr. Seneviratne who testified at the trial had produced the Medico-Legal report pertaining to the injury sustained by the Petitioner -Respondent. It reveals that he too had sustained a grievous injury, although the prosecution had failed to frame a charge in relation to that injury, in the Indictment.

Although it may not be directly relevant to the issues at hand, I would be remiss if no reference is made to the following matters which I feel that trial Judges

should be mindful of, in the discharge of the onerous duties bestowed upon them.

Recording of evidence at the trial in this case commenced on 22.06.2006 and by August 2008, a number of witnesses had testified on behalf of the prosecution. Due to non-availability of some exhibits (productions) the case had gone down on a number of occasions, the main item being the broken door panel which was missing. Even by mid-2009 it was not available. I wish to observe that the prosecution had repeatedly moved for dates to secure the missing 'door panel', unnecessarily delaying the early conclusion of the trial.

In my view, in the context of the case, the non-production of a door panel would not have prejudiced the prosecution case in any way, in light of the evidence of the eye witnesses which could easily have been corroborated through the observations made by the investigating officer. The prosecution had failed to appreciate this fact and as a result the case was dragged on, for no justifiable reason. The learned High Court Judge too had failed to appreciate the insignificance of the missing production and had granted a number of dates to explore the possibility of securing the missing 'door panel'.

When the case came up on **19.05.2010** (four years after the trial commenced) the prosecution moved that the case be taken off the trial roll and a mention date be granted to explore the possibility of concluding the case without going through the entire trial. The Court granted a 'mention date' which was **16.06.2010**.

On the 16.06.2010, again the prosecution raised the issue of misplaced productions, but nothing was stated about concluding the case, and the matter was fixed for inquiry pertaining to the missing productions for **27.10.2010**.

Proceedings of 27.10.2010 are not briefed, but the matter had been called on **10.2.2011** relating to missing productions, and the inquiry was put off for **14.06.2011**. Again on 14.06.2011 no inquiry took place, but the matter was re-fixed for trial on **19.10.2011**.

On 19.10.2011, the defence made an application for a date to consider the possibility of concluding the case by way of a "short cut", meaning a 'plea for a lesser offence', and the Court granted the application and the matter was re-fixed for **14.12.2011,** on which date again the same application was made, and the Court allowed it and re-fixed the matter for **21.03.2012**.

On 21.03.2012 the defence Counsel intimated to the Court that the matter is being discussed with the Attorney General's Department and moved for a further date and the Court granted time and the case was fixed for **22.05.2012**. On 22.05.2012 again the same application was made and a further date was granted and the trial was fixed for **05.06.2012.** The same process of application and re-fixing the matter was repeated on 05.06.2012 and thereafter on 07.06.2012 and 06.07.2012 as well.

On the **6th July 2012**, the matter went down again for the **24th October 2012**. On the 24th October, both Counsel moved for a further date for the same purpose, and the Court granted the application and the matter was fixed for the **21.11.2012**. On 21st November a further date was moved by the learned defence Counsel and the matter was fixed for the **12th February 2013**.

On the12th of February 2013, the learned State Counsel informed the Court that the file had been referred to his supervising officer to obtain instructions with regard to the acceptance of a plea for a lesser offence, and moved for further time and the case is re-fixed for trial on **03.04.2013**.

On 3rd April, the learned State Counsel informed the Court that the matter can be fixed for trial and accordingly, the matter was fixed for trial on **27.06.2013**. On that date the learned high Court judge had been on official leave and the matter having been mentioned on 01.08.2013, was re-fixed for **08.10.2013,** on which date the Accused-Appellant had been absent.

When the matter was finally called on the **14th March 2014,** which was **six years after the last witness for the prosecution had testified**, the Accused-Appellant withdrew his initial plea of not guilty, and pleaded guilty to culpable homicide not amounting to murder on the basis of both 'provocation and

sudden fight'. As referred to earlier, by this date, evidence of five main witnesses had been concluded and with the evidence of a few more witnesses, the case for the prosecution could have been closed.

Both the learned State Counsel and the learned Counsel for the Accused-Appellant made submissions and the learned High Court Judge sentenced the Accused-Appellant as aforesaid. It was the sentence imposed by the learned High Court Judge that was impugned before the Court of Appeal, and the present proceedings before this Court relate to the order of Court of Appeal.

I have to reiterate that the reference made above to the process that took place before the High Court is not of much significance in deciding the questions of law in relation to which Special Leave to appeal was granted. I wish, however, to express my displeasure at the manner in which the learned defence Counsel and several State Counsel who represented the prosecution have handled this case. Counsel, being officers of the Court had both an ethical and a professional duty towards Court to ensure that this matter was concluded without delay, but instead they had made a mockery of the process of administering justice.

I find that several prosecution witnesses, including the witness No. 1 whose evidence was concluded, had been present on many of the days this matter was called before the Court. It is disheartening to note that the Court as well as the Counsel who represented the parties had paid scant regard to the inconveniences caused to the witnesses by having them summoned before the Court, disrupting their daily routines and whatever occupations they were engaged in, for no ostensible purpose.

It must be stressed that Judges have a duty by the public to ensure that unnecessary hardships are not caused to the public by having them summoned before the Court on days their presence is not required and to ensure that they are released no sooner their evidence is recorded.

In the present case, in particular, as briefly alluded to earlier in this judgment, the testimonies of the witnesses clearly established what transpired on the day of the incident. In view of such cogent evidence, there could not have been any

difficulty in deciding whether the incident fell within any of the special exceptions enumerated under section 294 of the Penal Code.

It is the imposition of the enhanced sentence by the Court of Appeal that is impugned in these proceedings.

Questions of law

Of the questions of law reproduced on page 4 of this judgment, the question (a) is of a general nature. At the hearing of the appeal, no specific argument was put forward as to the illegality of the judgement and as such I answer the question of law raised in paragraph (a) in the negative.

As regards the question (b), the principle is, a Court vested with revisionary jurisdiction would interfere with any judgement or order, if the illegality or the impropriety of such judgement or order, shocks the conscience of the Court.

Section 364 of the Code of Criminal Procedure Act empowers the Court of Appeal to exercise revisionary jurisdiction even *ex mero motu*, subject however, to the limitations stipulated in Section 364(3) of the Code. In answering the question raised in paragraph (b), I do not think one needs to go beyond Section 364 of the Code of Criminal Procedure Act. For the sake of clarity, Section 364 of the Code is reproduced below: -

> "The Court of Appeal may call for and examine the record of any case, whether already tried or pending trial in the High Court or Magistrate's Court, for the purpose of satisfying itself as to the **legality or propriety of any sentence** or order passed therein or as to the regularity of the proceedings of such court."

Questions of law referred to in sub-paragraphs (c), (d) and (e) relate to factual matters which the Accused-Appellant alleges that the Court of Appeal ought to have considered before deciding to enhance the sentence and as such I wish to address them together.

It was argued that 18 years had elapsed since the incident had occurred and that, that factor ought to have been considered by their Lordships of the Court of Appeal. Earlier in this judgement, I have referred to the reasons for the delay in concluding the case early and the party of the deceased (aggrieved party) had not contributed in any way to the alleged delay. Her Ladyship Justice Malini Gunaratne had quite correctly referred to the principles laid down in the cases of ***A.G v. Mendis*** **1995 (1) S.L.R 138** and the case of ***Dhananjoy Chatterjee v. State of W.B*** **(1994) 2 SCC 220** where the Courts held that "the Courts must not only keep in view the rights of the criminal, but also the rights of the victim of crime and the society at large while considering the imposition of an appropriate punishment."

I do not think the Accused-Appellant can take advantage of the general delay which is unfortunately prevalent in the system of administration of justice. Furthermore, as referred to earlier, the Accused-Appellant had largely contributed towards that delay, initially by electing to challenge the allegation leveled against him by proceeding to trial and in mid-stream, wanting to withdraw his earlier plea of not guilty by expressing his desire to plead guilty to a lesser offence.

From that point onwards, the case had meandered without any aim or purpose for six long years. Considering the above, I hold that, even had the Court of Appeal considered the lapse of time since the date of offence, still the Court would not have decided differently. Accordingly, I answer the question of law raised in sub-paragraph (c) also in the negative.

It was also pointed out that the Court of Appeal had failed to consider the fact that the deceased had sustained only a solitary injury, which the learned President's Counsel submitted, should have been considered as a mitigatory factor.

The injury, however, cannot be considered in isolation, but the Court is required to consider the other circumstances as well. According to the medical evidence, the injury was a necessarily fatal injury and had penetrated the left Atrium of

the heart. As referred to earlier, the Accused-Appellant had come armed and having crashed through the door, had sought the deceased and had stabbed him in the chest. Thus, the aggravating factors, in particular the conduct of the Accused-Appellant, cumulatively far outweigh the fact that the deceased had sustained only a single injury. In the circumstances, I answer the question raised in sub-paragraph (d) also in the negative.

It was also contended that the Court of Appeal misdirected itself by its failure to consider as to whether the Accused-Appellant was capable of forming the requisite *mens rea* of the offence of murder, by reason of 'intoxication'. It must be pointed out that the Accused-Appellant's plea was on the basis that the incident happened in the course of a 'sudden fight' and under 'provocation', and at no point did the Accused -Appellant take up the position that he should benefit from Section 79 of the Penal Code, as such there was no requirement on the part of the Court of Appeal to consider 'intoxication'.

On the other hand, even when invoking the Section 79 of the Penal Code in a situation of voluntary intoxication, the burden is on the accused to establish that the degree of intoxication was such that he was incapable of knowing the nature of the act he was committing or that it was either wrong or contrary to law. This was elaborated by Justice S.N. Silva (as he then was) in ***Dayaratne v. The Republic of Sri Lanka*** **(1990) 2 S.L.R. 226** where his Lordship stated, "the accused has to establish that at the material time, his state of intoxication was such that he did not know what he was about or that he imagined the act to be something contrary to its true nature. If the accused succeeds in proving that at the material time, he did not have the capacity to form a murderous intention…Section 79 will apply and he would be imputed the knowledge of a sober man, resulting in a conviction for the offence of culpable homicide."

As there was no material placed before Court to that effect, I hold that the Court of Appeal did not misdirect itself on that issue and accordingly, I answer the question of law raised in sub-paragraph (e) also in the negative.

The final question of law raised on behalf of the Accused-Appellant was that the Court of Appeal, in deciding an appropriate sentence, failed to take into account the mitigatory factors in favour of the defence.

The only significant mitigatory factors placed before the High Court on behalf of the Accused Appellant were that, he expressed regret and remorse over the incident and that he and the deceased being members of an extended family, the relations have normalized. It was also stated that he is a father of three children and now leads a peaceful life.

This assertion of the Accused-Appellant, as regard to the good relations between the parties now seems to be in doubt, as it was one of the children of the deceased who filed the revision application before the Court of Appeal.

Unlike the majority of cases where the Court has to rely on the statements made by witnesses, or by the accused to the police and/or depositions of witnesses made at the non-summary inquires, in the instant case, the Court had the advantage of the testimony of an eyewitness who gave a detailed description of the events that took place on the day in question.

As I have referred to earlier, the witness had been subjected to lengthy cross-examination and had come out unscathed. In applying the yardsticks of assessing the credibility of a witness, namely tests of contemporaneity, consistency and probability, the defence had not been able to make the slightest dent of the evidence of the eyewitness. Furthermore, his evidence is corroborated through the independent evidence of the Judicial Medical Officer and the recovery of the chisel in the course of the investigation.

In the light of this evidence, I do not think the Court is justified in coming to any other inference, as to the manner in which the incident occurred, other than the inferences drawn based on the evidence placed before the Court.

I also wish to observe that the state had failed to objectively assess the evidence before accepting the plea for a lesser offence. It is abundantly clear that after the initial incident (of abuse) the Accused-Appellant had returned home and

had come armed with a weapon with the intention of attacking the deceased and the evidence is clearly indicative of pre-meditation on the part of the accused-Appellant. The incident, in my view, comes nowhere near the exceptions under Section 294 of the Penal Code.

At the hearing of this matter, it was submitted by the learned DSG that the 2nd Respondent, the Attorney General, was relying on the written submissions filed on behalf of the AG before the Court of Appeal. The written submissions, at its best are scanty and carry just a bare statement: *"There was evidence of provocation which led to a fight"*. The written submissions do not say what that evidence was, presumably because there was no evidence of either of those factors.

The salient features of grave and sudden provocation are that ***"the provocation is not sought or voluntarily provoked by the defender as an excuse for killing"*** (First proviso to Exception 1 to Section 294 of the Penal Code). In the instant case, if there was an act of provocation, it emanated from the Accused-Appellant, and it was incorrect on the part of the 2nd Respondent to say that "there was evidence of provocation".

On the other hand, an offender can benefit from a sudden fight, only if *"without premeditation in a sudden fight ….and without the offender having taken undue advantage",* he causes the act that brings about the death of the victim. (Exception 4 to Section 294 of the Penal Code).

The 2nd Respondent also complains that the Petitioner-Respondent had suppressed facts by not producing the medical report of the Accused-Appellant along with the petition. It is to be noted that the application before the Court of Appeal was filed by an aggrieved party who was not a party to the High Court case and as such, under the provisions of the Code of Criminal Procedure Act, the aggrieved party would not have been entitled to copies of proceedings or the documents.

The 2nd Respondent had lost sight of the above fact and as this case was based on an Indictment filed by the Attorney General, it should have been the duty of

the Hon. Attorney General to place that material before Court, which had not been done.

For the reasons set out above, I answer the question of law raised in sub-paragraph (f) also in the negative. Accordingly, I dismiss the Appeal and direct the learned High Court Judge to implement the sentence imposed by the Court of Appeal forthwith.

Appeal Dismissed

JUDGE OF THE SUPREME COURT

JUSTICE PRASANNA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT