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

In the matter of an Appeal in terms of Article 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

Andra Hennadige Sameera Lakmal

Deceased Accused-Appellant

Court of Appeal No:

CA/HCC/195/18

High Court of Trincomalee

HC/806/2017

Vs.

The Hon. Attorney General

Attorney General's Department

Colombo 12

Respondent

Before : Menaka Wijesundera J.

K.M.G.H Kulatunga J.

Counsel : Indika Mallawarachci for the Accused-Appellant

Jayalakshi De Silva, S.S.C for the State.

Argued on : 12.11.2024

Decided on : 10.12.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgement dated 03.07.2018 of the High Court of Trincomalee.

The accused-appellant, hereinafter referred to as the appellant, has been indicted for committing the murder of his stepfather on or about 11.01.2011.

The main witness of the prosecution is PW-01,who is the sister of the appellant and although she is the main witness she speaks of only circumstantial evidence. The entire case is based on circumstantial evidence. Apart from her evidence, the evidence of the doctor and the investigating officers have been placed before the trial court by the prosecution.

It is a well founded principle in our criminal law that when a case is based on circumstantial evidence all the circumstances placed before court by the prosecution must draw the irresistible and the one and only inference that the accused is guilty of the offence.

The learned trial judge, after considering the evidence placed before him, found the appellant guilty of the offence in the indictment and sentenced him accordingly.

The instant appeal is lodged against the said conviction and sentence.

The learned counsel for the appellant raised the following grounds of appeal,

1. The judgement of the trial judge is legally and factually flawed,
2. The prosecution has failed to prove that the injuries inflicted on the deceased were sufficient to substantiate the final finding of the trial judge

The main evidence of PW-01 is as follows,

- On the date of offence, she had returned on leave to her mother's house where the accused, deceased and herself were at home on the fateful day
- The mother of the accused and the witness had gone to Dambulla
- The deceased had been a habitual drunkard who was her step father and whom she refers to as the uncle.
- On this day also, he had been consuming some liquor and muttering at about 9.20 in the night (page 34 of the brief)
- The witness had gone to sleep in her room and the accused has gone to sleep in his room
- At 10.15 in the night, she had heard the accused tapping on the door to her room. She had opened the door and had seen the accused having a blood stained knife in his hand and he had said "uncle problem" and that he has fallen down.

  He had further said that he has to go to the police station to hand over the knife and thereafter he had left before she could ask anything
- The witness had been worried and she had gone to call some neighbours, and in the neighbour's house she had informed the police over the phone
- With the neighbour she had come back to the house and had found the deceased badly injured on the bed and the police had taken the deceased to hospital and he had died 5 days later
- Immediately afterwards she had gone to the police and had made a statement at 10.30 in the night

The evidence of the investigating officers are as follows

- While the police were on night patrol they had received a call from PW-01 and had proceeded to the place of the incident
- The deceased had been found on the bed injured, a blood stained pillow was found on the ground, splashes of blood on the floor, blanket covering the deceased had also been cut, the mosquito net also had been hanging loose

- The accused had surrendered to the police with the knife but no injuries had been observed on him
- The blood stained knife had been taken into custody and later marked in court and the Government Analyst had identified human blood stains on the knife
- PW-02, namely Nadawathi the neighbour, had corroborated PW-01
- The doctor who had conducted the post-mortem had observed 14 injuries on the deceased, out of which 5 had been cut injuries starting from the head of the of the deceased and the rest have been observed as abrasions.
- The cut injuries have been identified as being the cause of death. But the doctor had said that the cut injuries had been sufficient to cause death in the ordinary cause of nature.

  The doctor had been showed the knife, which has been marked as p1 and the doctor had said that there is a possibility of it causing the fatal injuries. Some clothes had been recovered subsequent to the statement of the accused but it had not been recovered upon the directions of the accused. As such, it cannot be considered as a section 27(1) recovery.

Thereafter, when the prosecution concluded its case, the defence had been called but the appellant had remained silent. The prosecution witnesses had been cross-examined but they had not been cross-examined as to a possible defence by the appellant.

The learned counsel for the appellant observed that the learned trial judge had been misguided to conclude that the clothes taken into custody by the police were recoveries made under the s. 27(1) of the evidence ordinance, which this court also observes to be correct.

The learned counsel for the appellant further submitted that the learned trial judge has misdirected himself when he had considered the Ellenborough

Dictum before considering the circumstantial evidence of the prosecution, which we find to be correct.

She also submitted to court that the English translation of the judgment had said in many places that the defence did not rebut the position of the prosecution but upon going through the original brief, which was in the Tamil language, we find that the word 'rebut' used in the translation is wrong but in fact, what the trial judge had said is that the defence had not **challenged** the prosecution evidence.

The other ground urged by the counsel for the appellant is that the prosecution had not proved beyond a reasonable doubt that the injuries on the deceased, although is sufficient to cause death in the ordinary course of nature, has not proved the possibility level of these injuries to cause death, whether it is a mere likelihood or of a high degree.

Upon the consideration of the submissions of both parties, it is very clear that the learned counsel for the appellant did not dispute or challenge the evidence of PW-01. But she challenged the medical evidence of the prosecution as set out above and certain interpretations of the law.

Therefore, she submitted that the finding of murder by the trial judge cannot be sustained.

As such, if the counsel for the appellant is accepting the evidence of PW-01, the circumstances against the appellant as stated by PW-01 have been enumerated above.

Upon consideration of the above circumstances, it is the opinion of this court that on the fateful day, the appellant had caused the death of the deceased because the circumstances above point out to the irresistible inference that it is the appellant and no one else who caused the bodily harm on the deceased.

But now what this court has to decide is whether the said bodily harm caused by the appellant was sufficient to cause death in the ordinary course of nature

with a high degree of probability of death resulting from the injuries as opposed to a mere likelihood.

In the instant matter, the doctor had observed 5 cut injuries, which he had observed to be serious but the prosecution has failed to question the gravity of the seriousness of the injuries. The doctor had said that the injuries were sufficient to cause death in the ordinary course of nature but had not spoken to the degree of probability of death resulting from the injuries inflicted as opposed to mere likelihood.

Under **Section 294(3) of our Penal Code** says that *"if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient to in the ordinary course of nature to cause death is murder."*

In the case of ***Chandrasena vs AG*[2008] 2 Sri L. R. 255 at 256, Justice Sisira De Abrew** stated,

> *"In order to establish a charge of murder under the third limb of Section 294 the prosecution must prove the following ingredients beyond reasonable doubt.*
>
> 1. *Accused inflicted bodily injury to the victim*
> 2. *The victim died as a result of the above bodily injury*
> 3. *Accused had the intention to cause the bodily injury*
> 4. *The said injury was sufficient to cause the death of the victim in the ordinary cause of nature"*

In the case of ***Bandara vs AG* [2006] 2 Sri L. R,** it has been stated that the accused, by throwing acid on to the deceased, had intended to cause the injuries which were actually caused. The injuries caused had been identified to be sufficient in the ordinary cause of nature to cause death. The injuries were said to be fatal and the deceased succumbed to the injuries within 24 hours.

Moreover, in the case of ***Farook v AG*** **[2006] 3 Sri L. R. 174 at 181, Justice Eric Basnayake** stated,

> *"In our judgment the expression 'sufficiency in the ordinary course of nature to cause death' only means in normal or due course or at best may envisage a high probability of death but certainly does not mean that the injury should invariably or inevitably lead to death."*

In the case submitted by the Counsel for the appellant,***CA/27/2003 decided on 22.09.2006 decided by his Lordship Justice Eric Basnayake***, where it has been discussed the difference between murder and culpable homicide not amounting to murder and has cited the relevant section in the Indian Penal Code, which is section 300(3) and the definition of murder has been defined as per the said section, as being;

> *" Culpable homicide is murder if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death is murder."*

In the same judgement the case of ***Rajwant Singhe vs State of Kerala AIR 1966*** has been cited, which has held that,

> *"What distinguishes these two offences of murder and culpable homicide not amounting to murder is that 'presence of a special mens rea which consists of four mental attitudes in the presence of any of which the lesser offence becomes greater."*

In the same judgement the following also has been quoted that it

"To establish section **300(3) of the Indian Penal Code** the following two things must be established that is;

1. There should be intention to cause bodily injury

2. The injury caused should be sufficient in the ordinary course of nature to cause death

It further goes on to explain that 'best it may envisage a high probability of death'

Thereafter, their Lordships have held with regard to the parallel section in our Penal Code which is section 294(3), "the expression sufficient in the ordinary course of nature to cause death is in normal or due course or at the best may envisage a high probability of death but certainly does not mean that injury should invariably or inevitably lead to death. The distinction between the expressions of 'high probability of death' and 'death invariably or inevitably taking place' though fine is substantial and if overlooked may result in gross miscarriage of justice."

This is the exact position argued by the learned counsel for the appellant, her position is that although she has accepted the evidence of PW-01 which has enumerated beyond a reasonable doubt that the appellant was the culprit, the prosecution by failing to place before court the level of probability of the injuries causing the death of the deceased has caused a miscarriage of justice which challenges the conviction of the trial judge.

Therefore, on perusal of the above material on the circumstances placed by PW-01 and the investigating officer's evidence this court can draw the irresistible inference that it was the appellant and no other who caused the injuries on the deceased. This factor has been proved by the prosecution beyond a reasonable doubt.

But on consideration of the medical evidence placed before court, this court has to consider whether the conclusions of the trial judge can be substantiated under section 294(3) of the Penal Code.

Having considered the cases cited by the learned counsel for the appellant, it is the opinion of this court that the prosecution has failed to question the doctor

whether the injuries on the deceased had a very great antecedent probability of death resulting as opposed to a mere likelihood. Therefore, the bare cause of death given by the doctor has been followed by the trial judge without considering the shortcomings in the medical evidence elicited by the prosecution.

Therefore, on the medical evidence available it is the opinion of his court that the conclusion of the trial judge that the appellant was guilty of murder should be varied to one falling within the meaning of 'culpable homicide not amounting to murder' on the basis of knowledge, punishable under section 297 of the Penal Code considering the following matters,

1) The appellant causing injuries on a sleeping man,
2) The behavior of the appellant after committing the act,
3) The type of the weapon used and the nature of the injuries caused.

As such, the instant appeal is allowed subject to the above variation in the conviction and we also set aside the death sentence imposed by the trial judge and impose a sentence of 8 years to be operative from the date of the conviction by the High Court.

Judge of the Court of Appeal

Hon. K.M.G.H Kulatunga

I agree.

Judge of the Court of Appeal