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

In the matter of an appeal in terms of Section 331 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.

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

Court of Appeal Case No. **Complainant**

CA/HCC/0155/2020

High Court of Kalutara **Vs.**

Case No. HC 481/2012

Suppan Ravichandran.

Appellant

AND NOW BETWEEN

Suppan Ravichandran.

Appellant-Appellant

Vs.

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

Complainant-Respondent

BEFORE : P. KUMARARATNAM, J

K.M.G.H. KULATUNGA, J

COUNSEL : Samantha Premachandra for the Appellant-Appellant.
Shanil Kularatne, PC, ASG for the Respondent.

ARGUED ON : 24.02.2025

DECIDED ON : 08.05.2025

K.M.G.H. KULATUNGA, J.

JUDGEMENT

1. The appellant was indicted for committing the murder of Kandasamy Rajendran and after a trial before the Judge, the appellant was found guilty as charged, convicted and sentenced to death. This appeal is preferred against the said conviction and sentence.

2. The appellant has raised several grounds of appeal in the petition of appeal and their written submission. However, when this matter was taken up for appeal, the learned Counsel did not pursue with all the said grounds of appeal. Accordingly, this appeal will be considered on the following grounds of appeal:

    i. the Trial Judge failed to consider the absence of evidence to prove the intention under the 3rd limb of Section 294 read with 296 of the Penal Code;
    ii. the Trial Judge failed to consider the contradictions and omissions *per se,* and inconsistencies *inter se*; and
    iii. the Trial Judge failed failure to consider and or evaluate the dock statement.

Facts

3. The prosecution relies on the evidence of two eyewitnesses PW-1, Karuppaiya Sittu and PW-2, Ponnasamy Devika. The facts of this incident as emanating from the said witnesses may be summarized as

follows. The witnesses, the appellant as well as the deceased were all line-room occupants in a plantation and are related to each other. The appellant and the deceased are brothers-in-law. The deceased was married to the first cousin of the appellant. PW-1 happened to be the mother-in-law of the deceased and an aunt of the appellant. PW-2 is the cousin sister of the appellant and the sister-in-law of the deceased. The crux of the evidence of PW-1 is that when she was in her line room, maybe between 4:00 and 6:00 PM, she had seen the appellant walking with an axe. The appellant had waited somewhat concealed and then alighted 2-3 blows on the deceased with the axe. The deceased had then fallen, and the appellant had left.

4. PW-2 testified that the appellant had come to her line room and said that *he cut and chopped the deceased*. ("රාජේන්ද්‍රව කපලා කොටලා දැම්මා"). Then, the appellant had gone towards the deceased who had fallen and dealt two more blows with the axe. The deceased had then been taken to the local hospital at Kalutara but transferred to the General Hospital of Colombo. However, upon being transferred, he succumbed to his injuries during the early hours of the following morning just as he was being prepared for surgery.

Ground of Appeal No.1 - The Trial Judge failed to consider the absence of evidence to prove the intention under the 3rd limb of Section 294 read with 296 of the Penal Code.

5. Though not raised as a ground of appeal in the written submissions, the main ground of appeal advanced during the argument is the apparent absence of the murderous intention and the failure to prove the same. The argument is twofold. Firstly, that the deceased had not received any treatment immediately and he had died towards the early hours of the following morning after the lapse of some time and that there is no evidence to prove that the injuries carry a high antecedent probability of causing death. Then it was submitted that the main injuries to the head and the abdomen as observed by the pathologist

were blunt force trauma injuries. According to the pathologist, these fatal injuries were probably caused by handle-end of an axe. The argument is that the appellant acted with a murderous intention one would expect him to have directly attacked with the sharp end of the axe. Therefore, the evidence does not establish the murderous intention.

6. The medical evidence becomes relevant in view of this argument. The prosecution has called and led the evidence of the pathologist, Prof. Sarathchandra Kodikara. The prosecutor by and large has merely led the contents of the Post-Mortem Report (PMR) through the pathologist. No doubt, the description of the injuries as observed has been elicited. However, the prosecutor had failed to elicit the effect, degree and the seriousness of the injuries; the prosecutor has not directly elicited if these injuries are necessarily fatal, or to that matter, if they are sufficient in the ordinary course of nature to cause death or if they carry a high antecedent probability of causing death. Based on this, the Counsel for the appellants argued that the prosecution has not proved the requisite murderous intention to come within the four limbs of Section 294 of the Penal Code.

7. The Penal Code defines murder in Sections 293 and 294. Murder is the acceleration of death where the act by which the death is caused is done; with the intention of causing death or; with the intention of causing bodily injury and the injury inflicted is very likely to cause death in the ordinary course of nature or; with the knowledge of the imminent danger of death being caused in all probabilities.

8. I observe that the prosecutor, whilst leading medical evidence has basically elicited the description of the injuries as described in the PMR. There is a failure to elicit from the pathologist the effect, nature and the degree of the injuries and the opinion if the injuries observed on the deceased are sufficient in the ordinary course of nature to cause death or if there is a high antecedent probability of death being caused.

9. According to the medical evidence, the deceased has clearly sustained extensive blunt force trauma to the head and abdomen. According to the pathologist, the skull had compound fractures and correspondingly the brain matter dura and sub dura had injuries of a serious nature.

10. The said injuries on the head are injuries No. 1A and 1B as referred to in the PMR. Both these are linear lacerations externally, with corresponding underlying depressed compound commuted fractures, and with linear fractures running down to the base of the skull. Correspondingly, the pathologist has observed sub-dural haemorrhage (internal bleeding) in the head with cerebral oedema, meaning damage to the brain matter and a shifting of the brain to the left. In his opinion, these head injuries have been caused due to blunt force trauma with a heavy weapon and substantive force. In his opinion, it probably may have been by the handle end of an axe-head.

11. The pathologist has then explained as to how the death will be caused by these two injuries. According to him, with the internal bleeding, the brain is subject to pressure, which affects the breathing, heartbeat, and thereby, causes a cessation of breathing and the functions of the heart. This had resulted in the death. The cause of death according to the PMR is primarily the cranio-cerebral injuries due to blunt force trauma. This is due to injury No. 1A and 1B. In addition thereto, a second cause is also referred to as being haemorrhagic shock due to liver laceration and blood aspiration. Injury No. 7 is observed on the right side of the anterior abdominal wall. Corresponding to this injury, a rupture of the liver has also been observed. This injury is attributed to blunt force trauma, probably caused by the blunt end of an axe.

12. It was argued that there is no evidence that these injuries are necessarily fatal or there is a high degree of death being caused. It was also submitted that if the appellant acted with a murderous intention, one would expect him to have used the cutting end of the axe to inflict

the injuries. Based on this argument, it is submitted that the prosecution has failed to prove the intention as required by any one of the four limbs of Section 294 of the Penal Code.

13. To come within the 3rd limb of Section 294, it is sufficient to say that it is murder, if the act by which the death is caused is done with the intention of causing death or bodily injury of a sort that is likely to cause death.

14. On a perusal of the medical evidence, it is apparent that the prosecutor has certainly failed to elicit the exact nature and the degree of the injuries and their probable effect in the direct form. Certainly, the prosecutor has been remiss or negligent in the extreme. However, from the available evidence the fact that at least three blows have been dealt on the head and the abdomen using extensive force is established. The eyewitnesses clearly state that the weapon used was an axe. No doubt, the production (the axe) had not been shown to the eyewitnesses. Unfortunately, the prosecutor has been remiss and negligent here too. However an axe, which was a production, had been shown to the pathologist, who expressed the opinion that these injuries would most probably have been caused by such an axe. Though the eyewitnesses were not shown the axe, they have both clearly described the weapon used to be an axe. Therefore, the fact that the appellant used an axe to attack and inflict the injuries on the deceased, is well established by the oral evidence of the eyewitnesses. An axe is a known weapon and the description may suffice. The failure to produce the real evidence or the material production thus does not in any way diminish the value of the oral testimony of the witnesses. Therefore, the failure to show the production to the eyewitnesses PW-01 and PW-02, does not affect the finding of the learned Trial Judge that the appellant did attack the deceased using an axe.

15. That being so, the pathologist corroborates the fact that the fatal injuries may be inflicted by the use of the blunt side of an axe. It is the evidence

of the pathologist that the death was primarily caused due to the head injuries. He had explained the process by which death results due to the direct effect and consequence of injuries No. 1A and 1B.

16. The argument advanced on behalf of the appellant is that there was a delay in obtaining the required medical attention, and this resulted in the death of the deceased. According to the totality of the evidence, the appellant had dealt multiple blows on the head, neck, and abdomen using an axe. The pathologist confirms that the injuries No. 4, 11, and 12, found on the forearm and the hands of the deceased, are probably defence injuries. This inferentially establishes that the deceased had made an attempt to wade off the blows, but despite his effort, the appellant had succeeded in inflicting blows with extreme force. When a person uses the blunt side (the handle end of the axe head) and directs the blows to the head and the abdomen, the only intention that is inferentially possible is that he intends at least to cause bodily injury to the victim. The medical evidence confirms that the said injuries No. 1A and 1B did cause his death notwithstanding the immediate attention of blood transfusion and saline being given. The deceased had died around 05:45 AM at 04.08.2006. This is approximately within 12 hours of sustaining the injuries. As explained by the pathologist, the death has been so caused as a direct consequence of the brain damage, affecting the functions of the heart and the lung. Therefore, even if there was no medical intervention, it is established without any doubt that the nature of the head injuries was such that it was sufficient in the ordinary course of nature to cause the death. Accordingly, the evidence has clearly established that the appellant had acted with the intention of causing bodily injury and the injury so inflicted was sufficient in the ordinary course of nature to cause the death of the deceased. This comes within the 3rd limb of Section 294 of the Penal Code.

17. In the post argument written submission, the appellant submits that the medical evidence reveals that there was a scuffle or a fight between the assailant and the deceased. On the perusal of the medical evidence,

there are certain defence injuries in the hands and the forearm of the deceased as opined by the pathologist. There is no suggestion or any other evidence of a sudden fight between the appellant and the deceased. When the person is attacked with a weapon it is quite normal and natural for such person to defend himself. The injuries as observed as defence injuries are no more than injuries so caused. There is absolutely no evidence of any degree indicative or suggestive of a sudden fight. This submission is totally baseless and misconceived.

18. The appellant relies on the Judgement of Justice Sisira De Abrew in **Vinitha and Another vs. Republic of Sri Lanka** 2007 (1) SLR 169 in which His Lordship held that, "*… the intention contemplated in the 3rd limb of sec. 294 is the intention to inflict a bodily injury. According to 3rd limb of sec. 294, this injury must be sufficient to cause death in the ordinary course of nature. The emphasis in the 3rd limb of sec. 294 is on the sufficiency of the injury in ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary course of nature which evidence must be elicited from the doctor who conducted the post-mortem who is called upon to express an opinion on the post-mortem report.*"

19. It is true and correct that the prosecutor has been negligent and has failed to directly elicit the evidence of sufficiency that of the high probability of death been caused in the ordinary course of nature. Ninian Jayasooriya J., in **Sumanasiri Vs. Attorney General**, 1999 (1) SLR 309 also held a similar view as follows:

> "*Clause 3 of Section 294 requires that the probability of death resulting from the injury inflicted was not merely likely but very great though not necessarily inevitable.*"

20. It is true that medical evidence as to the effect and the likely result of the injury should be elicited from the pathologist. However, the first requirement under limb 3 is that the accused has acted with the intention of causing bodily injury. The appellant has clearly dealt

several blows on vital areas (head and abdomen) with a heavy instrument; an axe. This evidence sufficiently proves the subjective intention being none other than to cause bodily injury. There simply cannot be any other reasonable inference or hypothesis. As to the sufficiency in the ordinary course of nature to cause death is required to be considered objectively (*vide* **Farook vs. Attorney General**). It was held as follows:

> "*The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not.*"

21. Accordingly, the operative element of limb 3 of Section 294 is the intention of the appellant to cause bodily injury. As to the nature of the injury there is no requirement of proving that the appellant had the subjective knowledge of its consequences. This limb appears to have been formulated based on the presumption that the person intends the natural and probable consequences of his conduct. Hence, when the appellant intends to cause bodily injury, it shall be presumed that he also intends natural and probable consequences of such injury so inflicted. In **Chandrasena vs. Attorney General** (2008) 2 SLR 255, the ingredients to establish murder under limb 3 of Section 294 are as follows;

    i. *The accused inflicted a bodily injury to the victim;*
    ii. *The victim died as a result of the above bodily injury;*
    iii. *The accused had the intention to cause the above bodily injury;*

iv. The above injury was sufficient to cause the death of the victim in the ordinary course of nature.

22. Now applying the objective test to the sufficiency of the injuries, judicial authority holds that it should be elicited from the doctor who conducted the post-mortem. The prosecutor in this appeal has not elicited this fact directly in that form. However, medical evidence was led to prove that the injuries to the head was of such a nature that it has damaged the cranio-cerebral matter of the victim. Correspondingly, the process of the death been caused due to such an injury was explained by the doctor. Such injury directly affects the heartbeat as well as the lung functions. As argued, the deceased had succumbed to the injuries during the early hours of the following day during which period it is alleged that medical attention was not received promptly. The doctor's evidence is that the death resulted shortly before the deceased was to be taken in for surgery. It is in evidence that he was receiving immediate medical attention prior to that. Considering the totality of this evidence the only inference is that the death of the deceased was due to the blunt force trauma caused by the blows dealt by the appellant. When the heart function as well as the lung function are both affected, it is obvious and apparent that the likelihood of death being caused is very great. The pathologist in his evidence clearly explains this basis of causing the death. Therefore, the evidence is sufficient to establish that the injuries inflicted on the deceased carries a very high probability of causing the death.

23. Further as testified by PW-02 Devika, the appellant had come to their house and stated that he had attacked and killed the deceased ("මම රාජේන්ද්‍රන් ව කපලා කොටලා දැම්මා"). This is an admission that amounts to confession, which is admissible and relevant against the appellant. After so informing, the appellant is alleged to have gone back and dealt further blows on the deceased who was on the ground. This buttresses and further confirms that the appellant was clearly actuated and acting with a murderous intention. The blows be it with the handle end or the

cutting end makes little difference when several blows are aimed on the head with substantial force with a heavy weapon like that of an axe. The appellant himself in his dock statement admits the axe he had at that time was heavy.

Ground of Appeal No. 02 - The Trial Judge failed to consider the contradictions and omissions *per se* and inconsistencies *inter se*.

24. At this juncture, it is opportune to consider the next argument of the contradictions *inter se* between PW-01 and PW-02. That PW-01 does not confirm or testify as to the second attack. PW-01 is the witness who had seen the commencement and the initial attack. She had seen the appellant positioning himself in a concealed manner and then throwing two or three blows at the deceased using an axe. It is thereafter that the appellant appears to have gone up to PW-02's house and made the aforesaid admission. Having so stated the appellant was seen by PW-02 proceeding to the fallen deceased and throwing several more blows with the axe. It is argued that PW-01 does not speak as to the second round of attack. Therefore, the evidence of the two witnesses cannot exist together. The place of incident is within the vicinity of the two line rooms in which the two witnesses were at the time of the incident. PW-01 had seen the initial attack from her line room. The second incident as narrated by PW-02, takes place shortly thereafter, in quick succession. The victim has been on the ground on a somewhat uneven ground of at a lower elevation (a ditch), which PW-01 narrates as follows:

> "ඔව්, අපිට පේන්නේ නැහැ වැටිලා ඉන්නේ, ඉස්සෙල්ලා ඔහුට ගහපු පාරට වැටිලා වලක් වගේ තියෙනවා පේන්නේ නැහැ අම්මා දුවගෙන ආවා මම බලනකොට මෙයත් දුවගෙන ගිහිල්ලා මෙහෙම කොටනවා." (Emphasis added.)

25. Therefore, in all probabilities, the second attack may have not been within the sight and seeing of PW-01 as the deceased was on the ground and was at a lower level. If so, how was PW-01 able to see the initial attack? It is simply that the victim was upright and walking when he was initially attacked. In that position, the blows alighting on the head

would certainly be visible even from a short distance away, where PW-01 claims to have been. Therefore, there is no contradiction or inconsistency *inter se* as argued. Accordingly, this argument is misconceived, and I see no merit in the same.

Ground of Appeal No. 03 - The Trial Judge failed to consider and or evaluate the dock statement.

26. The appellant had made a brief dock statement, according to which he admits meeting the deceased around 7:30 PM, and having several axes in his possession. He also admits that the deceased did try to get into an argument with him, however, claims that he did not engage with the deceased but avoided him and proceeded home. Later on, he had heard some people shouting and learnt that the deceased was taken to hospital. Accordingly, he denied assaulting the deceased.

27. The Trial Judge had adverted to the fact of the appellant making the dock statement and summarised it at page 31 of the judgement. The Trial Judge has clearly said that he would be considering the dock statement in determining this matter. It was argued that the Trial Judge has only considered that which is favourable to the prosecution and not evaluated the dock statement in its correct context and perspective. The appellant relies on the judgement of **Queen vs. Kularatne** 75 NLR 259, and several other cases, which followed the said decision, in support of the appellant's argument where it was held that that:

> "*…when an unsworn statement is made by the accused from the dock, the jurors must be informed that such statement must be looked upon as evidence, subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony. But the jury must also be directed that (a) if they believe the unsworn statement it must be acted upon, (6) if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and (e) that it should not be used against another accused.*"

28. On a perusal of the judgement, it is apparent that the Trial Judge has not considered the dock statement separately and determined if the said dock statement creates any doubt or to that matter, there is no express rejection of the dock statement. To that extent, the ground raised appears to have some merit.

29. In this backdrop, I would consider the effect of the dock statement in the context of the totality of the prosecution evidence. The sum total of the dock statement is one of denial. Whilst admitting his presence at or about the time the incident took place and meeting the deceased, his position is that he proceeded to his house, avoiding any confrontation with the deceased. In the same breath, the appellant claims to have heard some commotion, and finding out that the deceased was taken to hospital and the appellant then decides to leave and abscond. The police evidence confirms that the appellant did so abscond. The appellant and the deceased are close relatives living in the same neighbourhood. They work together on a regular basis. The appellant claims that he had no previous enmity with the deceased.

30. That being so, is it natural and normal to have surreptitiously so left? As I see, there is no reason or rationale for the appellant to avoid and leave in that manner as claimed. In the normal course of events, one would expect the appellant to have rushed to the assistance of his relative. It is specially so if he happened to hear or see him in trouble. This sequence of events and the position taken up by the appellant is inherently improbable and contrary to the normal course of conduct of any rational person. Thus, the dock statement is inherently improbable, it must in all probabilities be false.

31. Then it is also relevant that the events as narrated in the dock statement have not been suggested to any of the prosecution witnesses. That being so, the position so taken up by the appellant in his dock statement lacks consistency. On the other hand, the appellant having made a dock

statement had completely failed to explain the incriminating evidence that emanated from PW-1 and PW-2. An accused certainly has a right to remain to silent, and the presumption of innocence will always be in his favour. If the appellant exercised such right and remained silent, no adverse comment is warranted in law. However, when the appellant opts to make a dock statement, he on his own volition abandons his right to remain silent. Then he cannot claim the full benefit of such right to remain silent.

32. When a dock statement is made the failure to explain the incriminating circumstances makes such dock statement deficient (*vide* Jayasuriya J., in **Ajit Samarakoon vs. The Republic** (Kobaigane Murder Case) [(2004) 2 Sri LR 209]. Thus, the dock statement of the appellant, whilst being inherently improbable and deficient, it is extremely probable that it is a false position taken up at the end of the trial to save himself. A dock statement, which is improbable, incomplete and apparently false cannot create any reasonable doubt and should be rejected. The only reasonable conclusion that a trier of fact could arrive on this evidence is nothing but a total rejection of the dock statement.

33. The Trial Judge has considered and adverted his mind to the contents of the dock statement. Thereafter, at page 35 of the judgement, the Trial Judge has once again, evaluating the totality of the evidence, considered the defence position as narrated in the dock statement. Then, concluded that the prosecution had proved the charges beyond reasonable doubt. The only inference is that the trial judge had rejected the dock statement and concluded that no reasonable doubt was created by the said dock statement. In the absence of a direct rejection and requiring corroboration of the dock statement is a misdirection to that extent. Thus, in view of the aforesaid this is a fit matter to act under the proviso to Section 334 of the Code of Criminal Procedure Act.

34. Section 334(1) reads as follows:

> *"The Court of Appeal on any appeal against conviction on a verdict of a jury shall allow the appeal if it thinks that such verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before which the Appellant was convicted should be set aside on the ground of a wrong decision of any question of any law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;*
> *Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."* (Emphasis added).

This provision decrees that the court must allow the appeal if there was a miscarriage of justice but it also provides that the court may dismiss the appeal if actually there has been no substantial miscarriage of justice. How do we reconcile this? As I see the proviso *inter alia* enables and requires an appellate court to evaluate the trial error, non-direction or the mis-direction in light of the totality of the evidence to determine if a conviction should be set aside and quashed. To this end the Appellate court will have regard to the nature of the error, the strength of the properly admitted evidence and the totality of the circumstances in assessing and determining if the verdict should be set aside and reversed. The ground raised by the appellant when considered in isolation may have merit and be decided in favour of the appellant, and there may be a miscarriage of justice when so considered. However, if there be overwhelming evidence that would inevitably have led a judge or jury properly directed to a conclusion of guilt then no substantial miscarriage of justice can actually occur and such appeal may be thus dismissed.

35. In this regard, H. S. Yapa, J., in **Moses vs. State** [(1999) 3 SLR 401] held that:

"*Though Section 334(1) refers to cases of trial by jury, it is reasonable and proper to assume that the intention of the legislation must necessarily be the same, whether it is a trial before a Jury or Judge sitting alone. The deciding factor being that there should be evidence upon which the accused might reasonably have been convicted."* (Emphasis added).

36. Then the proviso to Article 138(1) of the Constitution reads thus:

"*The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes , suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance:*

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice." (Emphasis added).

37. In these circumstances, the failure of the Trial Judge to expressly reject the dock statement and requiring corroboration has caused no miscarriage of justice, and as afore stated a properly directed jury or judge would necessarily have come to the same conclusion on this evidence. Thus, no substantial miscarriage of justice has actually occurred and has not prejudiced the substantial rights of the appellant or occasioned a failure of justice.

38. In the above circumstances, the appeal is accordingly rejected. The conviction and the sentence are affirmed.

Accordingly, this appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J

I agree.

JUDGE OF THE COURT OF APPEAL