

**IN THE COURT OF APPEL OF THE DEMOCRATIC SOCIALIST**  
**REPUBLIC OF SRI LANKA.**

In the matter of an appeal under  
and in terms of the section 331 of  
the code of Criminal Procedure  
Act.

CA 95/2008

## High Court of Ratnapura

Case No.25/2002

The Attorney General of the  
Democratic Socialist Republic of  
Sri Lanka.

Vs.

1. Meewaduma Arachchige Udayasiri.
2. Pestheru Liyanaralalage Lasantha Shaymal Cooray.
3. Kukule Kankanamlage Mahthun

4. Soosai Ganeshan.

Accused.

And now between.

1. Meewaduma                      Arachchige  
Udayasiri.

2. Pestheru                      Liyanaralalage  
Lasantha Shaymal Cooray.

3. Kukule                      Kankanamlage  
Mahthun.

Appellants.

Vs.

The Attorney General of the  
Democratic Socialist Republic of  
Sri Lanka.

Respondent.

**BEFORE : W.L.R. Silva, J. &  
H.N.J. Perera, J.**

**COUNSEL:** Shanaka Ranasinghe for the accused appellant

Shanil Kularatne,s.s.c. for the State

**ARGUED ON : 3.2.2012**

**DECIDED ON : 22.6.2012**

**H.N.J. Perera, J.**

This is an appeal from the Judgment of the High Court of Ratnapura dated 9.7.2008. The accused appellants (hereinafter referred to as the appellants) together with another accused were indicted on 11.1.2002 for committing the murder of Mohamed Subair Mohamed Kalilan an offence under section 296 read with section 32 of the Penal Code. After trial, the appellants were convicted under section 297 of the Penal Code and the Learned Trial Judge imposed a sentence of 7 yrs imprisonment. Being aggrieved by the aforesaid conviction and the sentence, the appellants have preferred this appeal to this court.

The facts briefly are as follows:

All four accused and the deceased had been employed at a gem mine situated at Balangoda. The 2<sup>nd</sup> accused appellant had been the manager of the gem mine whilst the 1<sup>st</sup> accused appellant had been employed as a supervisor. 3<sup>rd</sup> and the 4<sup>th</sup> accused appellant along with the deceased had been working as labourers with some others. On the day of the incident a valuable gem was found and the said stone was placed in a tray of flowers until the day's work was over. However in the evening upon concluding the day's work they found the precious stone missing from the place where it was kept in the morning. Thereafter the 2<sup>nd</sup> accused had questioned the fellow workers and had assaulted the 4<sup>th</sup> accused, and the 4<sup>th</sup> accused had implicated the name of the deceased as the person responsible for the crime. It is in evidence that the owners of the gem mine too had visited the scene and had warned everyone present to co-operate to find the precious stone before the next date. After the departure of the owners 1<sup>st</sup> to 3<sup>rd</sup> accused had started to assault the deceased with wooden clubs. Evidence had been placed before the High Court that even the 4<sup>th</sup> accused had assaulted the deceased. The medical evidence revealed that the deceased had injuries on both his hands and the right thigh, and that the injuries were sufficient to cause death in the ordinary course of nature. The doctor who performed the autopsy has specifically stated that the probability in resulting death as a result of the assault

was more than 90%.The doctor has further stated that death was due to internal haemorrhage consequent to the assault.

At the conclusion of the prosecution case all four accused had made dock statements. The 1<sup>st</sup> to 3<sup>rd</sup> accused appellants have admitted that they assaulted the deceased and had stated that they assaulted the deceased in order to recover the missing gem stone. The Learned Trial Judge had found all the accused guilty for committing the offence of culpable homicide not amounting to murder in terms of section 297 of the Penal Code and imposed a sentence of seven years rigorous imprisonment and a fine of Rs 5000/- carrying a default sentence of 12 months rigorous imprisonment on all accused. Being aggrieved by the aforesaid conviction and sentence, the 1<sup>st</sup> to 3<sup>rd</sup> accused appellant's had preferred this appeal to this court. After oral submissions, counsels on both sides have filed written submissions. Having perused the entirety of the proceedings before the High Court, the judgment of the Learned trial Judge and the written submissions tendered by both parties, I now proceed to evaluate the several contentions raised in this appeal.

The Learned Trial Judge had arrived at the conclusion that the acts committed by The appellant's causing injuries to the deceased was committed without a murderous intention, but with the knowledge that it is likely to cause death or cause such

bodily injuries likely to cause death. It was submitted on behalf of the appellant's that having arrived at the aforementioned conclusion ,the Learned Trial Judge misdirected herself when arriving at the conclusion that the accused appellant's exceeded the right given to them in law in the exercise of the right of private defence as the Judge had earlier come to the conclusion that the appellant's did not have a murderous intention at the time they inflicted injuries on the deceased. Whilst stating that the accused appellant's had exceeded their right of private defence, the Learned Trial judge has come to the conclusion that at the time of the assault the accused appellant's had individually possessed knowledge that it is likely to cause death, but the assault has taken place without any intention to cause death. It is the contention of the counsel for the Respondent that it is very clear that the Learned Trial Judge had totally got the ingredients of murder, as opposed to the concept of private defence and knowledge mixed up when evaluating the evidence. According to the Respondent it seems that the Learned Trial Judge has considered the concept laid down under section 33 of the Penal Code when finding the accused appellant's guilty for their individual acts under section 297 of the Penal Code on the basis of knowledge. Even though the prosecution does not agree with the findings of the Learned Trial Judge with regard to this aspect, it is the contention of the counsel for the Respondent that no prejudice has been caused

to the accused appellant's though the Learned Trial Judge was totally misconceived in law when analyzing the concept of private defence as defined in sections 96 and 98 of the Penal Code.

From the submissions made by both parties it is clear that they are of the view that the Learned Trial Judge has come to a wrong conclusion that the accused appellant's had committed the offence whilst they were exercising their private defence over property. The main contention of the Respondent is that this mistake or error committed by the Learned Trial Judge has not caused any prejudice to the accused. I too concede the fact that an irregularity has been committed by the Learned Trial Judge in analyzing and evaluating the evidence in this case yet my view is that this has not caused any prejudice to the accused or occasioned a failure of justice. In this regard I would like to refer to the proviso to article 138 and proviso to section 334 of the Criminal Procedure Code.

The proviso to Article 138 reads;

"provided 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."

The proviso to section 334 of the Criminal procedure Code reads;

“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.”

Though section 334(2) refers to cases of trial by Jury, it applies to non jury trials as well. (moses vs state 1999 (3) SLR 40) In CA. No. 124/2003 –HC.Ampara case No 693/2002 decided on 18.06.2007 Ranjith Silva, J Sisira Abrew. J agreeing dismissed the appeal of the appellant in that case notwithstanding the fact that the learned trial judge had committed an error of law in the evaluation of the dock statement .

Section 33 of the Penal Code reads thus:-

“when an offence is committed by means of several acts, who ever intentionally co-operates in the commission of that offence by doing any one of those acts, either single or jointly with any other person, commits that offence.”

The learned Trial Judge has proceeded to convict the accused appellant's under the second limb of section 297 on the basis that the accused appellant's did not share the intention to cause death even though each accused had possessed the knowledge that the acts were likely to cause death. When one consider the evidence led in this case it is clear that the motive for the assault had been to recover the precious stone and the Learned Trial Judge had come to the conclusion that at the time



of the assault accused appellant's had individually possessed knowledge that their acts were likely to cause death .

Although there appears to be some irregularity committed with regard to the evaluation of the evidence led in this case. in view of the other cogent evidence available in this case I am of the view that this irregularity must be disregarded as it has not caused any prejudice to the substantial rights of the accused or occasioned a failure of justice. The medical evidence revealed that the deceased had injuries on both his hands and the right thigh and that the said injuries were sufficient to cause death in the ordinary course of nature. 1<sup>st</sup> to 3<sup>rd</sup> accused appellant's have admitted in their dock statements that they assaulted the deceased. The doctor who performed the autopsy has linked the death to the assault and has specifically stated that the probability of death resulting from the assault is more than 90% and has further stated that the death was due to internal haemorrhage consequent to the assault. Therefore I see no reason to interfere with the decision arrived at by the learned Trial Judge on the basis that the accused appellant's individually possessed knowledge that the acts were likely to cause death of the deceased.

For the above reasons, I affirm the conviction and sentence and dismiss this appeal. Appeal dismissed

Judge of the Court of Appeal

W.L.R.Silva, J.

I agree.

Judge of the Court of Appeal