

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

Bandula Gunaratne

**Appellant**

Vs.

The Attorney- General

**Respondent.**

**C.A.Appeal No. 23/11**

**H.C.Badulla No.64/2001**

Before : **Sisira J. de Abrew,J. and  
P.W.D.C.Jayathilake,J.**

Counsel : Amila Palliyage Assigned Counsel for the accused-  
appellant  
Thusith Mudalige SSC for the A.G.

Argued and

Decided on : 28.08.2013

**Sisira J. de Abrew, J.**

Heard both counsel in support of their respective cases.

The accused-appellant in this case was convicted of the offence of culpable homicide not amounting to murder on the basis of grave and sudden provocation which is an offence punishable under Section 297 of the Penal Code and was sentenced to a term of 15 years rigorous imprisonment and to pay a fine of Rs.7500/=carrying a default sentence of 06 months rigorous imprisonment. Being aggrieved by the said conviction and the sentence the accused-appellant has appealed to this Court. The facts of this case as narrated by the prosecution witnesses may be briefly summarised as follows:

Witness Raja was running a vegetable stall in Welimada market. The Local Authority of the area has allocated this particular Vegetable stall to the accused-appellant. On the day of the incident around 11.00 am the accused-appellant came to the vegetable stall run by Raja and questioned him whether he was still running the vegetable stall. There was an argument between Raja and the accused-appellant over the failure on the part of Raja to vacate the Vegetable stall. The deceased who was reading a newspaper near this vegetable stall also joined the argument and told the accused-

appellant to keep away without disturbing the innocent people. The accused-appellant thereafter left this place and the deceased too left the place. This was the summary of the evidence of witness Raja. Little later Sahabdeen who was working in a beef stall saw the accused-appellant chasing after the deceased person. He also saw the accused-appellant hurling a stone at the deceased person which did not strike him the (deceased.) Thereafter the accused-appellant took a knife which was in the beef stall. On seeing this, the deceased person too took a knife from one of the fish stalls in the same market. The accused-appellant then attacked the head of the deceased person with the knife. The deceased person did not attack the accused-appellant. After the attack on the deceased person, the accused-appellant went away carrying the knife.

The accused-appellant who gave evidence under oath stated that he exercised his right of private defence when the deceased person attacked him with a knife. The accused-appellant had sustained an injury.

The most important question that must be decided in this case is whether the accused-appellant sustained an injury as a result of the attack by the deceased person with a knife as claimed by the accused-appellant. I now advert to this question. Although the accused-appellant says that he sustained an injury on his forehead as a result of the attack by the deceased

person with a knife, he in his evidence says that he sustained this injury as a result of the fight between him on one side and Raja and Peter on the other side. He, at page 241 of the brief, stated this story before he stated the story relating to the attack by the deceased person. Therefore it appears from his own evidence that he has sustained an injury as a result of the fight between him on one side and Raja and Peter on the other side.

The accused-appellant went to the police station in a threewheeler driven by Ajith Samarasinghe. When Ajith Samarasinghe questioned about his bleeding injury, he ( accused-appellant ) did not tell him that the deceased person attacked him with a knife. If he was attacked by the deceased person with a knife, one would expect him to disclose the way in which he sustained injuries at the very first opportunity. The accused-appellant had not done this in this case.

Although the accused-appellant had taken up the defence of right of Private defence, when Sahabdeen gave evidence he did not suggest to him (Sahabdeen) that he exercised his right of private defence. This shows that at the very inception of the trial he was not ready to put forward the defence of private defence. His failure to suggest that he exercised his right of private defence to the eye witness Sahabdeen renders his evidence unacceptable. Further failure to suggest that he acted in his right of private

defence leads to the inference that the defence of right of private defence is an afterthought. The accused-appellant at the trial had the opportunity of challenging the eye witness's evidence by suggesting the right of private defence to the witness. But he had not done so. Thus it leads to the conclusion that the accused-appellant has not challenged the evidence of the eye witness at the trial. The accused-appellant had only suggested to the witness that he had not seen the incident and had given false evidence. What happens when evidence given by a reliable witness on a material point is not challenged in cross - examination. In the case of *State of Himchal Pradesh vs. Thakur Dass* 1983 2 Cri.L.J. 1694 at page 1701 V.D. Misra C.J. held : "Whenever a statement of fact made by a witness is not challenged in cross examination, it has to be concluded that the fact in question is not disputed". When I consider all the above matters, I hold that the defence of right of private defence put forward by the accused-appellant cannot be accepted and that the said defence does not create any reasonable doubt in the prosecution case. For the above reasons, I hold that the learned trial judge was right when he rejected the defence of right of private defence put forward by the accused- appellant. According to medical evidence led at the trial, the deceased person had sustained a cut injury on the back of his head. The depth of it was 6.5 cm. When I consider the evidence led at the trial, I am of the opinion that I should not interfere with the judgment of the learned Trial Judge.

For the above reasons, I affirm the conviction and the sentence and dismiss the appeal. I direct the Prison Authorities to implement the sentence from date of this Judgement.

*Appeal dismissed.*

**JUDGE OF THE COURT OF APPEAL**

**P.W.D.C.Jayathilaka.J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**

**WC/-**