

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

1. R.D.Aranolis.
2. R.D.Gunadasa

Accused-Appellants

C.A. Appeal No.165-166/11 vs.
H.C.Moneragala No. 103/2008

Attorney-General

Respondent

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

Counsel : Dr.Ranjith Fernando for the Accused-Appellants.
 Rohantha Abeysuriya DSG for the Attorney-General.

Argued &

Decided on 03.09.2013.

Sisira J.de Abrew, J.

Heard both Counsel in support of their respective cases.

The two accused-appellants in this case were convicted of the murder of a man named Bokutuwewattegedera Piyadasa and was sentenced to death. Being aggrieved by the said conviction and the sentence they have appealed to this Court. Facts of this case may be briefly summarized as follows:

The deceased's family and the accused's family, at the time of the incident, living in adjoining lands. On the day of the incident both families were working in their respective paddy fields. When the deceased person was making the boundary line between the two paddy fields, the 1st and the 3rd accused requested the deceased not to continue with the work as the boundary line which he was making was not correct. The deceased who did not heed to the request made by the two appellants continued with his work. At this stage the 1st accused took his mamoty which he was using to do the work in the paddy field and attacked the head of the deceased. The 3rd accused too at this stage attacked the deceased with his mamoty. Assailants have used severe force to inflict these two injuries. Doctor has observed two fractures on the head. When we consider the facts of this case we feel that the two accused had got provoked by said the action of the deceased person. It appears from the evidence that the two accused attacked the deceased when they were provoked by the action of the deceased person. Learned DSG upholding the best traditions of the Attorney-General's Department too concedes this position. We are pleased with his submission. When we consider the above matters we hold that the both accused could not

have been convicted of the charge of murder. On the prosecution evidence itself, the learned Judge should have convicted both accused-appellants on the offence of culpable homicide not amounting to murder on the basis of grave and sudden provocation which is an offence under section 297 of the Penal Code.

The accused-appellants had not taken the defence of grave and sudden provocation. They have taken the defence of right of private defence. The question that should be considered is whether the trial Court could have convicted the accused-appellants of the offence of culpable homicide not amounting to murder on the basis of grave and sudden provocation when the accused persons did not raise such a defence at the trial. Answer to this question is found in the judgment in the case of the *King vs Bellana Vithanage Eddin* 41 NLR page 345. His Lordship Howard C.J. held thus: " in a charge of murder it is the duty of the judge to put to the jury the alternative of finding the accused guilty of culpable homicide not amounting to the murder when there is any basis for such a finding in the evidence on record, although such defence was not raised nor relied upon by the accused." In the case *King vs Albert Appuhamy* 41 NLR page 505, His Lordship Howard C.J. held thus: " failure on the part of a prisoner or his counsel to take up a certain line of defence does not relieve a judge of the responsibility of putting to the jury such defence if it arises on the evidence." As I pointed out earlier the defence of grave and sudden provocation has arisen from the evidence of the prosecution. For the above reasons we hold that the

conclusion reached by the learned trial Judge convicting the accused-appellants of the offence of murder is erroneous. We therefore set aside the conviction of murder and the death sentence and convict both accused-appellants of the offence of culpable homicide not amounting to the murder on the basis of grave and sudden provocation which is an offence punishable under Section 297 of the Penal Code. We sentence each accused-appellant to a term of 15 years rigorous imprisonment and to pay a fine of Rs.5000/- (each accused should pay the fine of Rs.5000/-) carrying a default sentence of six months simple imprisonment. We direct the Prison Authorities to implement the sentence of 15 years rigorous imprisonment from the date of sentencing by the learned trial Judge (07.12.2011).

Verdict altered.

JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilaka, J

I agree.

JUDGE OF THE COURT OF APPEAL

KLP/-