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

In the matter of an appeal from the Judgment of the Learned High Court Judge of Galle dated 2013/09/03 delivered in case No. HC 3033 in terms of the provisions of Section 331 (1) of Chapter xxvii part-A of the Code of Criminal Procedure Act No.15 of 1979 as amended.

CA Case No: CA 178/2013

High Court Galle: HC 3033

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant

Vs.

1. Iswaran Sathasiwam

2. Subramaniam Thillenathan

Accused - Appellants

And Now

1. Iswaran Sathasiwam
   Petiyagoda watte, Thellambura,
   Nakiyadeniya.

2. Subramaniam Thillenathan
   Petiyagoda watte, Thellambura,
   Nakiyadeniya.

Accused Appellants

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

BEFORE : H.N.J. PERERA, J

P.W.D.C. JAYATHILAKE, J

COUNSEL : Prasantha Lal de Alwis P.C with

T. Mulawwethantri for the Accused Appellant.

Dappula de Livera P.C, A.S.G for

the Respondent.

ARGUED ON : 15.10.2014

DECIDED ON : 27.11.2014

P.W.D.C. Jayathilake, J

Eshwaran Sathasiwam and Subramanium Thillenadhan the 1st and the 2nd Accused respectively have been indicted for the murder of Ammavasi Balakrishnan under Sec. 296 read with Sec.32 of the Penal Code. Both Accused have been convicted for culpable homicide not amounting to murder under Sec. 297 of the Penal Code and have been sentenced to seven years rigorous imprisonment and a fine of Rs: 10000/= was imposed on each. Further it has been ordered to pay Rs: 50000/= by each accused to the wife and children of the deceased as compensation carrying a default sentence of one year rigorous

imprisonment. Being dissatisfied with the said conviction and the sentence Accused Appellants have filed this appeal in this court.

Facts of the above case are briefly as follows;

The two Accused Appellants and the deceased were members of estate workers families, who were residing in estate line rooms. On the day of the incident when the two Accused Appellants were returning after playing cricket Suppaiyah, the father in law of the deceased had questioned them of their uttering filthy words. Then the 1st Accused Appellant had removed his pair of shorts up to knees to exibit his private part and thereafter had pushed Suppaiyah. When Suppaiyah had fallen, the deceased, son in law of Suppaiyah had come to the scene where Suppaiyah had fallen. At that moment, the 1st and the 2nd Accused Appellants had assaulted the deceased with a wooden bat and a club. Balakrishnan, the deceased had died after admission to the hospital.

There had been two fatal injuries caused to the head of the deceased according to the evidence of the Judicial Medical Officer. The Medical Officer was not certain whether one of the two injuries had been caused either by a blow on the head or by the head hitting the floor.

An allegation brought by the learned counsel for the Accused Appellant against the prosecution case is that failure to call a vital witness to the incident as a

witness in the prosecution case. He brought the attention of the court to the evidence of ASP Prasad Ranasingha who had conducted the preliminary investigations, and had accepted the suggestion made by the defense counsel of the trial, that one Karuppan Shivalingam came forward to give evidence when the Magistrate observing the crime scene, and questioning the people who had gathered there whether there was anyone who had seen the incident. ASP has further stated that he had given instructions to the police officer who was assisting him to record the statement of the said person. The argument of the learned counsel was that inference which could be drawn of not calling the said person as a prosecution witness was that his evidence was unfavorable to the prosecution case. He also submitted that it was a fact revealed in evidence that two gangs of residents living in line rooms had pelted stones at each other. He further pointed out that admittedly the productions marked by the prosecution at the trial were not related to the crime.

The learned Additional Solicitor General made the following submissions in supporting the conviction. The incident of crime had taken place in broad day light in an open area. All parties connected to the case were well known to one another as they were relations and also neighbours. Two injuries of the deceased had been caused by a blunt weapon according to the medical

evidence and this opinion is consistent with eye witnesses' testimony. The use of a bat as a weapon had not been challenged at the trial.

The learned Solicitor General argued that the contents of statements of the witnesses whom had not been called by the prosecution are not known to this court. But they were available to the prosecution, the defense counsel and the trial judge. Therefore if the defense had wanted to call any of those witnesses either to refute the prosecution case or to support the defense case there had been no bar in doing so. He moves that the verdict of the trial court to be set aside and the Accused Appellants to be called upon to show cause why they should not be convicted for the charge of murder. The learned Deputy Solicitor General made an application to enhance the sentence imposed by the trial judge.

When the learned trial judge was analyzing the evidence of the prosecution witnesses he had observed that even though the 2nd Accused Appellant had come to the place of incident carrying a club, three witnesses who have given evidence had not seen the 2nd Accused Appellant assaulting the deceased. But it was the conclusion of the learned trial judge that as the 2nd accused carrying a club had come along with the 1st accused, it shows that he had acted in common intention with the 1st accused. Learned trial judge has convicted the Accused Appellants for culpable homicide not amounting to murder on the

basis that it appeared that they had no intention of killing the deceased when considering the number of blows received by and the nature of injuries caused to the deceased.

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death" is said to commit culpable homicide according to Sec.293 of the Penal Code. There are three means of committing the offence of culpable homicide according to the above mentioned section. One is having the intention of causing death, the second is having the intention of a physical injury which may cause death and the third is being aware that his act could lead to death. The definition about culpable homicide described in Sec.293 includes the offence of murder and the culpable homicide not amounting to murder. An act included in the above definition becomes a murder under the instances described in Sec.294 only. Firstly, if the act is committed with the intention of causing death; the second is causing a physical injury which he knows could result in death; the third is causing a physical injury intentionally which is sufficient to cause death; and fourthly if the person committing the act is aware that it is so dangerous that it necessarily leads to death. **Where one needs to know what is meant by culpable homicide not amounting to murder is, what has to be done is to**

deduct the Sec. 294 from Sec. 293. Then, the remainder is the culpable homicide not amounting to murder.

As stated earlier, the opinion of the learned trial judge expressed in convicting the Accused Appellants for culpable homicide not amounting to murder was that *"actus reus"* of the Accused Appellants does not reflect *"mens rea"* required for convicting one for a murder. If the opinion of the trial judge is interpreted to say that the intention is necessary ingredient in convicting for a charge of murder, obviously it is an erroneous conclusion, as the limb IV of 294 refers to the "knowledge" in the absence of intention. But my opinion here is that even if the trial judge has not implicitly stated, what he had meant here was that the degree of knowledge reflected by the act of Accused Appellants was insufficient to convict them for the charge of murder.

It is pertinent to quote a passage from the judgment of H.N.G. Fernando CJ in the case of Somapala v. The Queen (72 NLR 121)

"The 3rd limb of s.294 postulates one element which is also present in the second clause of s.293, namely, the element of the intention to cause bodily injury; but whereas the offence of culpable homicide is committed, as stated in the second clause of s.293, when there is intention to cause bodily injury likely to cause death, the offence is one of murder under the 3rd limb of s.294 only when the intended injury is sufficient in the ordinary course of nature to cause

death. In our opinion, it is this 3rd limb of s.294 which principally corresponds to the second clause of s.293; and (as is to be expected) every intention contemplated in the latter second clause is not also contemplated in the former 3rd limb. An injury which is only likely to cause death is one in respect of which there is no certainty that death will ensue, whereas the injury referred to in the 3rd limb of s.294 is one which is certain or nearly certain to result in death if there is no medical or surgical intervention. This comparison satisfies us that the object of the Legislature was to distinguish between the cases of culpable homicide defined in the second clause of s. 293, and to provide in the 3rd limb of s. 294 that only the graver cases (as just explained) will be cause of murder. If this was not the object of the Legislature, then there would be no substantial difference between culpable homicide as defined in the second clause of s. 293 and murder as defined in the 3rd limb of s. 294. It will be seen also that if the object of the 2nd limb of s. 294 was to adopt more or less completely the second clause of s. 293, then the 3rd limb of s. 294 would be very nearly superfluous."

His Lordship has further stated in the said judgment that

"There is evidence also of a similar design in the 4th limb of s. 294; knowledge, that an act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, is knowledge, not merely of the likelihood of causing death, but of the high probability of causing death

or injury likely to cause death; so that many cases which fall within the third clause of s. 293 will not be murder within the meaning of the 4th limb of s. 294."

It is the accepted principle that where there is doubt whether the degree of knowledge reflected in the act is insufficient to convict the Accused Appellant for the charge of murder, benefit of the doubt should be exercised in convicting the offender for lesser culpability. Therefore, I do not think that this court shall interfere with the verdict of the learned trial judge in convicting the Accused Appellants for culpable homicide not amounting to murder.

The sec. 297 comprises two parts in respect of imposing a sentence; one is that in a situation where the offence is committed with the intention, sentence could be one extending up to 20 years imprisonment; the other is that in a case where offense is committed with the knowledge, but without intention, sentence shall extend only up to 10 years.

Rex v. Punchiappuhamy (35 CLW 101) was a case where *"The jury, in returning a verdict of culpable homicide not amounting to murder, stated that "they found the accused inflicted an injury which was likely to cause death without a murderous intention". The trial Judge passed a sentence of twelve years rigorous imprisonment".*

In that case it was held by soertsz, SPJ *" That where there was doubt whether the jury appreciated the real distinction between intention that the act was likely to cause death and knowledge that the act was likely to cause death, the accused was entitled to the benefit of the doubt".*

In this case as the learned trial judge has convicted the Accused Appellants under latter part of the Sec. 297 he has sentenced them for seven years rigorous imprisonment. Therefore, the opinion of this court is that no interference shall be made with the sentence too imposed by the learned trial judge.

Therefore, we affirm the conviction and the sentence of the trial court and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA J

I agree

JUDGE OF THE COURT OF APPEAL