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

In the matter of an Appeal in terms of Section 331 (1) of the Criminal Procedure Code Act No 15 of 1979.

Attorney General
Attorney General's Department
Colombo 12.

COMPLAINANT

CA/135/2010
H/C Ratnapura case No. 158/2004

Kristho Badhuge Anuruddha

ACCUSED

And,

Kristho Badhuge Anuruddha

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before : **Vijith K. Malalgoda PC J (P/CA) &**

H.C.J. Madawala J

Counsel: Ranjan Mendis with B.S Peterson and Ashoka C. Kandambi

for the 1st Accused-Appellant,

Shanaka Wijesinghe DSG and H. Jayanetti SC for the Respondent

Argued On	: 06.08.2015/ 10.09.2015/ 14.10.2015/ 20.10.2015
Written Submissions On	: 28.10.2015
Judgment On	: 08.02.2016

Order

Vijith K. Malalgoda PC J (P/CA)

The Accused –Appellant in this case Kristo Baduge Anuruddha was indicted before the High Court of Ratnapura for causing the death of Galatura Lekamlage Lakshman on 24.04.2003 an offence punishable under section 296 of the Penal Code.

The Accused –Appellant elected to be tried before the Judge without a Jury and the Learned High Court Judge of Ratnapura after trial before him had convicted the Accused-Appellant for the above offence, and sentenced him for death. Being dissatisfied with the above conviction and sentence the Accused –Appellant had preferred this appeal before us.

During the arguments before us, the Accused-Appellant relied on two grounds of appeal namely,

1. Did the Learned High Court Judge misdirected himself by failing to evaluate the possibility of a sudden fight that spontaneously occurred between the parties
2. Did the Learned High Court Judge misdirected himself when he rejected the plea of insanity pleaded before him by the Accused-Appellant during the High Court Trial.

However during the argument before us both parties agreed to limit their arguments to the 1st ground of appeal, with liberty to press for the 2nd ground of appeal, if necessity arises at a later stage.

Both, the Accused-Appellant and the deceased were three-wheel drivers by their profession. The deceased the prosecution witnesses Wimalasiri and Dayarathne, the defence witness Chandrathilake and the Accused-Appellant's father Upali were all operating as taxi drivers from the one and the same

taxi stand in the Ratnapura Town and the Accused-Appellant was operating his taxi few meters away from the said taxi stand.

One of the main complaint by the Learned Senior Counsel for the Accused-Appellant before this court was that the Learned Trial Judge had failed to consider the items of evidence which are infavour of the Accused-Appellant, specially the five contradictions marked during the trial before him and the evidence of the defence witness, and misdirected himself by failing to consider the possibility of a sudden fight when evaluating the said evidence.

In the case of ***Wijerathne V. The Republic 78 NLR 49*** the Supreme Court concluded that, "When an Accused facing a capital charge it is essential that every point infavour of the Accused, though it may seem trivial, should be placed before the jury. It may well be that all such matters, if so placed before the jury may create a reasonable doubt, the benefit of which the Accused is entitled to, when the circumstances against the Accused are emphasized and the trial judge express his opinion as to the adverse inference that could be drawn from the circumstances, and fails to place the circumstances and inferences infavour of the Accused before the jury, the Accused is deprived of the substance of a fair trial."

The prosecution in this case has relied on the evidence of two eye witnesses namely Polwattage Shantha Wimalasiri and Gilimalege Ranjith Dayarathne two taxi drivers from the same taxi stand.

According to the evidence of witness ShanthaWimalasiri the incident had occurred around 10.45 a.m. when the deceased, who went on a hire had returned to the park and tried to park his three-wheeler at the park. Witness had seen the Accused standing near a Lottery shed and heard the deceased asking the Accused to get in to a side for him to park his three-wheeler. The Accused, who jumped to the left side, had then stabbed the deceased for several times.

However under cross examination two contradictions were marked as වි- 2 and වි- 3 which read as follows,

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ප්‍ර: මහේස්ත්‍රාත් අධිකරණයේ සාක්ෂි දෙන විට ලක්ෂ්මන් ඇවිල්ලා විත්තිකරුගේ ඔර්ටි එකෙන් ඇල්ලුවාට පස්සේ පිහියෙන් ඇන්නේ කියා කිව්වාද?

උ: එහෙම කිව්වේ නැහැ.

එයා ආපු ගමන් පිහියෙන් ඇන්නේ.

පැමිණිල්ලේ සාක්ෂි අංක 01 විසින් ලඝු නොවන නඩුවේදී ලක්ෂ්මන් ඇවිල්ලා විත්තිකරුගේ ඔර්ටි එකෙන් ඇල්ලුවේ කියන කොටස වි- 2 ලෙස ලකුණු කරයි.

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ප්‍ර: තමන් මහේස්ත්‍රාත් උසාවියට මෙහෙම කිව්වාද? " ඔහු එතන හිටගෙන හිටියා. පස්සේ ලක්ෂ්මන් අයියා කිව්වා දකුණු පැත්තට අයින්වෙන්න කිව්වා එයා අයින් වුනේ නැහැ" එහෙම කිව්වාද?

උ: නැහැ.

ප්‍ර: පහල උසාවියට තමන් එහෙම කිව්වා කියා තියෙනවනම් ඒක හරිද?

උ: වැරදියි.

මෙම සාක්ෂිකරු විසින් "ඔහු එතන හිටගෙන හිටියා පස්සේ ලක්ෂ්මන් අයියා කිව්වා දකුණු පැත්තට අයින්වෙන්න කිව්වා එයා අයින් වුනේ නැහැ" කියන කොටස වි- 3 ලෙස ලකුණු කරයි.

Even though this witness under examination in chief said that the deceased at one stage asked the Accused-Appellant to get to a side for him to a park his three-wheeler, under cross examination took up the position that the Accused who jumped to a side when the deceased parked his three-wheeler had all of a sudden stabbed the deceased several times.

However the next witness called by the prosecution Gilimalage Ranjith Dayarathne, maintained the earlier position taken up by witness Wimalasiri and said that he saw the Accused-Appellant standing near the Lottery shed and the deceased had asked the Accused-Appellant to get to a side for him to park his three-wheeler. When the deceased parked the three-wheeler at the stand, the Accused–Appellant, who came from the back, had stabbed the deceased several times.

However under cross examination the following contradiction was marked by the defence

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ප්‍ර: තමුන් පොලීසියට කටඋත්තරයක් දුන්නා කියා පිලිගත්තානේ, තමන් ඒකෙදි පොලීසියට මෙහෙම කිව්වාද?

"මගේ ත්‍රීවිල් එකේ සිට ත්‍රීවිල් දෙකකට මෙහා පොලීසිය පැත්තට වන්නට ත්‍රීවිල් අතරින් දෙදෙනෙක් රන්ඩු වෙනවා දුටුවා මම එම රන්ඩුවෙන තැන බලන්න ගියා" එහෙම කිව්වාද?

උ: එහෙම කිව්වේ නැහැ.

ප්‍ර: පොලීසිය එහෙම කියනවානම් ඒක වැරදියි.

උ: ඔව්.

ස්වාමීනි 2003.04.24 වන දින පැය 11.45ට කරන ලද පොලිස් කටඋත්තරයේ "මගේ ත්‍රීවිල් එකේ සිට ත්‍රීවිල් දෙකකට මෙහා පොලීසිය පැත්තට වන්නට ත්‍රීවිල් අතරින්

දෙදෙනෙක් රන්ඩු වෙනවා දුටුවා මම එම රන්ඩුවෙන තැන බලන්න ගියා" යන කොටස වි- 4 වශයෙන් සලකුණු කිරීමට අවසර ඉල්ලා සිටිනවා.

The Learned Trial Judge in his judgment at page 262 had considered the above three contradictions and concluded that the said contradiction does not go to the root of the case. Whilst rejecting වි-4 he had said "අනිවාර්යෙන්ම මෙහි රන්ඩුවක් සිදුවී ඇති බව අධිකරණයට පෙනීයන කරුනකි එයට හේතුව නම්, මෙවැනි පිහියා ඇනීමක් වන අවස්ථාවකදී රන්ඩුවක් නොවූ බව පැවසීමට කිසි අයකුට නොහැක ඒ අනුව මොහු රන්ඩුවක් දුටුවාද නැද්ද යන කරුනද මෙම නඩුවේ මූලයට බලපාන්නාවූ කරුනක් නොවනබව පෙනීයනු ඇත."

Even though the Learned High Court Judge observed that "in a case of stabbing of this nature, no one can say that there was no fight", the Learned Trial Judge had failed to consider the plea of sudden fight but considered only the exception of Grave and Sudden provocation and the plea of insanity. (Page 264)

The defence summoned a witness by the name Chandrathilake to testify on behalf of the Accused-Appellant. According to the evidence of Chandrathilake he too was operating from the same taxi stand and on the day in question he too was in the taxi stand when the deceased tried to park his three-wheeler at the park. At that time the Accused-Appellant was standing near the Lottery shed and when deceased tried to park the three-wheeler, there were some cross talks between them. He saw the deceased holding the neck of the Accused-Appellant and when he rushed towards them, he saw the deceased going to fall. He helped the others to hold the deceased and put him to Wimalasiri's three-wheeler but said in evidence that he did not see the Accused-Appellant stabbing the deceased or any blood on the body of the deceased person.

This witness admitted that he did not make a statement to police but said that he gave evidence for the Accused-Appellant at the non summary inquiry too. The witness was subject to cross examination but no contradictions or omissions were marked during his evidence.

However the Learned Trial Judge had rejected this evidence since the witness in his evidence did not refer to the stabbing or seen any blood or injuries at that time. But the witness had seen a scuffle between the Accused-Appellant and the deceased and deceased going to fall when he was rushing to the place.

In this regard the Learned Senior Counsel brought to the notice of court to the internal hemorrhage observed by the Judicial Medical Officer in the Post Mortem Report and further submitted that one cannot expect to see the entire episode and give evidence but, expected to say what he saw at that time.

The Learned Senior Counsel took up the position that, the three major contradictions marked during the trial shows a scuffle between the two, where the deceased had hold the Accused-Appellant by his collar and this position is corroborated in the evidence of the defence witness Chandrathilake. However the Learned Trial Judge rejected the three contradictions mentioned above along with the defence evidence and his failure to consider the plea of sudden fight deprived the Accused-Appellant a fair trial.

It is not disputed that the Appellant was convicted on a count of murder before the High Court of Ratnapura. Section 294 of the Penal Code refers to the offence of murder and the definition of murder is given as follows:-

> 294. "Except in the cases hereinafter excepted, culpable homicide is murder-
>
> *Firstly-* if the act by which the death is caused is done with the intention of causing death; or

Secondly:- it is done with the intention if causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

Thirdly:- if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary cause of nature to cause death; or

Fourthly:- if the person committing the act aware that it is so imminently dangerous that it must all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

The said offence of murder in terms of section 294 of the Penal Code is reduced to culpable homicide not amounting to murder under section 293 of the Penal Code, if any of the five exceptions to section 294 could be shown to apply. The exceptions are as follows:-

1. Grave and sudden provocation;
2. Exceeding in good faith the right of private defence;
3. Bona fide overstepping of the limits of his authority by a public servant;
4. The plea of sudden fight and
5. The case of a mother who causes the death of her child under the age of twelve months when the balance of her mind is disturbed by reason of her not having fully recovered from the effect of giving birth to a child or by reason of the effect of location consequent to the birth of the child.

Learned Counsel for the Accused-Appellant relied on Exception 4 to section 294 and submitted that the Learned Trial Judge had not evaluated the possibility of a sudden fight. Learned Counsel submitted that the evidence before the High Court specially the three contradictions he relied upon and the defence evidence clearly established that the incident which resulted in the deceased being injured, fell under Exception 4 to section 294 of the Penal Code and throughout the case that it was the position taken by the Accused-Appellant.

The Exception 4 to section 294 of the Penal Code reads as follows:-

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

A careful consideration of the said exception indicates that the basis for the mitigation is purely depended on the fact that the murder had taken in a sudden fight, which had occurred in the heat of passion upon a sudden quarrel without no malice or vindictiveness.

In this regard the Leaned Deputy Solicitor General relied on the decision in ***Bhagwan Munjaji Pawade V. State of Maharashyra AIR (1979) SC 133*** with reference to Exception 4 to section 300 of the Indian Penal Code which is identical to Exception 4 to section 294 of our Penal Code where Sakaria J held'

> "It is true some of the conditions for the applicability of Exception 4 to section 300 exit here, but not all. The quarrel had broken out suddenly, but there was no sudden fight between the deceased and the appellant. 'Fight' postulates a bilateral transaction in which blows are exchanged. The deceased was unarmed. He did not cause any injury to the appellant or his companions. Furthermore, no less than fatal injuries were

inflicted by the appellant with an axe, which is a formidable weapon on the unarmed victim. Appellant is therefore, not entitled to the benefit of Exception 4...."

According to Learned Deputy Solicitor General, the above decision was followed in the case of **Gurudeniya Lekamgedara Nishantha Bandara SC Appeal 62/2008 SC minute dated 12.10.2011** and submitted that the evidence of the two eye witnesses and the Medical evidence led at the trial warrants a conviction for murder as held in the Indian decision of Bhagwan Munjaji Pawade's case.

However when following the above Indian decision by the Supreme Court in the case of Gurudeniya Lekamgedara Nishantha Bandara was mindful of the events that had taken place on the day in question.

According to the facts of the said case, there had been three incidents that had occurred between 10.30 p.m. and 11.45 p.m. on the day in question. In the first incident the Accused-Appellant had poured blood from an injury caused after a fight, into the dishes where the food was served to the villagers after an arms giving. Few minutes thereafter the second incident had taken place in the compound when the Appellant dashed a chair and assaulted with the same to whom he assaulted little while ago.

The third incident happened thereafter in front of the Accused-Appellant's gate when the deceased with some of his family members walked up to the Appellant's house. The Accused-Appellant had dealt a blow on the head of the deceased with a club.

In the said circumstances, the Supreme Court having considered series of events took place observed that the prerequisite referred to in the said exception had not been fulfilled in order to succeed the plea of sudden fight.

In the case of ***Bandahamy V. Senanayaka 69 NLR 313 at page 322*** Basnayake CJ observed with reference to the English decision in *Quinn V. Leathem* as follows,

It is well settled that a case is only an authority for what it actually decides (*Quinn V. Leathem*) [1 (1901) A.C 495 at 506]. The only decision of authority, on the question whether, before enforcing as a decree of the court an award brought to it in pursuance of Rule 38 (13), the court has power to satisfy itself that the award which is brought to it for enforcement is a valid award made by a person duly authorized by the Ordinance to determine a dispute which has properly arisen for the decision of an extra- judicial tribunal under the Ordinance, is Jayasinhe's case with which I am in entire agreement.

Under these circumstances this court has a duty to consider the events that had taken place when considering whether the Learned Trial Judge had misdirected himself when he failed to consider the plea of sudden fight in the present case.

As referred by me earlier, the Accused-Appellant was standing near a Lottery shed when the deceased tried to park his three-wheeler at the three-wheel park. None of the witnesses referred to any utterances made by the Accused-Appellant when he was asked to get into a side by the deceased. There is no evidence indicative of any previous incidents between the Accused-Appellant and the deceased led at the trial other than the fact that the Accused-Appellant was not allowed to operate his three-wheeler from the same taxi stand.

As observed by me earlier in this judgment, out of the contradictions marked, වි-2, වි-3 and වි-4 which is indicative of a sudden fight between the two prior to the incident was kept away by the two eye witnesses in their evidence before trial court. The Learned Trial Judge had not considered the said contradictions as serious contradiction which goes to the root of the case. This fact was further established by the evidence of the defence witness whose evidence was also rejected by the trial judge.

However when considering the material placed before this court, I am of the view that the said contradictions are vital contradictions and the Learned Trial Judge should have given due consideration to those contradictions and to the evidence of the defence witness.

For the reasons set out above I conclude that the Learned Trial Judge had misdirected himself by failing to evaluate the possibility of a sudden fight in the present case. According to the Medical evidence placed before trial court the deceased had received 5 injuries out of which the 1st is only an abrasion but out of the other injuries, 3 injuries are sufficient to cause death in the ordinary cause of nature and the other (injury no 4) is necessarily fatal.

Even though the accused had acted excessively when inflicting the said injuries using a knife to the chest area of the deceased, when considering the material placed before this court which is indicative of a sudden fight, without premeditation in a heat of passion without taking any undue advantage.

I therefore decide to quash the conviction and sentence and replace it with a conviction for culpable homicide not amounting to murder under section 297 of the Penal Code on the basis of a sudden fight and imposed a sentence of 18 years Rigorous Imprisonment. I further make order to implement the said sentence of 18 years Rigorous Imprisonment from the date of conviction i.e. with effect from 20.07.2010.

Appeal is partly allowed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL