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

Maharoof Azeez
Accused-Appellant.

C.A.No.76/2011.
H.C.Kalmunai/152/2009

The Hon. Attorney General,
Attorney General's Department
Colombo 12.

Respondent.

BEFORE : M.M.A. Gaffoor J. and
K.K.Wickremasinghe,J.

COUNSEL : Chathura Amaratunga for the Accused-Appellant (Assigned Counsel)

Sarath Jayamanne ASG (P.C) for the A.G.

Argued on : 24.04.2016

Decided on : 20.10.2016

M.M.A.Gaffoor,J.

Heard both counsel.

In this case the accused had been indicted for committing the murder of one Abdul Raheem Rameez on or about 30th March 2008. According to the prosecution the deceased was engaged and was ready to get married to a Muslim girl who happened to be the sister- in- law of the accused. On the day in question the deceased visited the house of the intended bride, at that time the intended bride and her mother were in the rear part of the house, in the kitchen. The intended father- in- law and the brother- in- law were with the deceased in the verandah of the house.

It is alleged that the accused assaulted the deceased with a wooden plank. The injured deceased was taken to the central camp hospital from where he was transferred to Ampara Hospital and finally transferred to Kandy hospital where he had succumbed to injuries and died.

The prosecution heavily relied on the Judicial Medical Offices Post-mortem Report which described seven injuries in the region of the head of the deceased. Among the injuries were a fracture to the head and a laceration to the brain. According to the evidence of the Judicial Medical

Officer even one injury of this nature would have cause death due to hemorrhage and damage to the brain.

The accused did not call witnesses but gave evidence. The evidence for the prosecution was that the father- in -law, eye witness to the case and also the brother- in- law who also corroborated the above evidence. The father- in- law had made a prompt complaint to the police. It is to be noted that no contradictions or omissions were marked in the evidence of the two witnesses. It was not even suggested by the defence that the witnesses were fabricating evidence against the accused. The defence had not challenged the position of the witnesses at the time they gave evidence before High Court. In the Indian case of ***Himal Chandh Pradesh V. Thakur Das (1983) 2 Cri.LJ.1694 AT page*** 1071it had been held that whenever a statement made by a witness is not challenged in cross examination it has to be concluded that the fact in question is not disputed.

In the light of the above background it is paramount duty of this court in the exercise of its appellate power to be mind full of Article 137 of the Constitution in determining whether the substantial rights have been

prejudiced or a failure of the justice has been occasioned in contemplating in reversing or vary of the judgment.

With this guideline in mind I have perused the entirety of the evidence, the judgment, the written submissions an the case law authorities submitted by both parties. I have also considered the submissions made by the defence counsel regarding Section 2 of Section 294 of the Penal Code which amounts to exceeding the private defence and whereby an accused could be convicted for culpable homicide not amounting to murder. It will be seen that this argument does not bear strength to the fact that there had been no instance of private defence as urged by the defence. The learned trial judge in a lengthy judgment has rejected the defence of plea of grave and sudden provocation convicted the appellant for an offence under Section 296 for murder and imposed the death sentence.

The "burden of proving" a special Exception in Section 294 of the Penal Code was discussed by the Privy Council in the case of ***Jayasena V. The Queen 72 New law Reports 313.*** In this case the accused was charged with murder and he admitted at the trial that the deceased died of wounds deliberately inflected

by him with intention to kill and his defence was that he was acting in self-defence.

Lord Devlin in his judgment said : " The right of private defence to a charge of murder is permitted not only as a general exception by Section 93 (of the Penal Code) but also as a special exception in section 294 itself".

Then he mentioned about section 105 of the Evidence Ordinance and said " that the burden of proof is settled by that section (105 of the Evidence Ordinance)". He referred to section 3 of the Evidence Ordinance. The said section (3) is as follows:-

A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers it existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists".

Having referred to the above two sections of the Evidence Ordinance Lord Devlin Observed: ""Section 105 read with section 3 of the Evidence Ordinance imposes upon the accused the burden of proof on the issue of private defence. " When the accused admitted that he deliberately inflicted

the fatal injuries on the deceased with the intention to kill him and that he was acting in self-defence it cannot be contended on behalf of the accused that he has not got to provide any sort of proof that he was acting in private defence . It is not sufficient for the accused to raise a doubt as to whether he is entitled to benefit of right of private defence." This was held by the Private defence". This was held by the Privy Council in the said case (Jayasena V. The Queen).

In relation to the above mitigatory circumstances it is opportune to reiterate the undernoted observations.

1. The accused in order to succeed in the mitigatory defence must prove by way of an objective test that such provocation was likely to destroy the self control of a man of the class of society to which the accused belonged .***Vide Gratiaen J. in Jamis V.Queen – (1952) 53 NLR 401.***

2. The word "sudden" implies that the reaction of the accused should be almost instinctive without any element of scheming or contriving.

3, The test of grave provocation contains the subjective as well as a objective element Rose, C.J. in Muthubanda (1954) 56 NLR 217.

4. The words 'grave" and "sudden" are both of the relative terms. And must at least to a great extent be decided in comparing the nature of provocation with that of the retaliatory act. Vide Lord Goddard (Privy Council) in K.D.J Perera – 54 NLR 266.

5. It is to be noted that the Appellant Court is reluctant to interfere with a judgment pronounced by the High Court on the facts of the case where the judge of the original Court had the opportunity to observe the demeanor of the witness in Court. This has been decided in the case of **King v. Gunarathna 14 CLR at 174 Mcdonald C.J,** observed that the function of an Appellate Court in dealing with a judgment mainly on the facts from a Court which had been heard the facts as follows:-

i) Was the judgment of the Court unreasonably against the Weight of the evidence.

ii) Was there misdirection either on the law or the evidence.

iii) Has the trial court drawn the wrong inferences form the matters in evidence.

The learned Counsel for the defence has reiterated the position that considering the circumstances of the case that the conviction is too harsh and it should be brought down to culpable homicide not amounting to murder.

It is to be noted that as to matters of assessing the sentence in the case of ***A.G. v. HN de Silva – 57 NLR 124 , Basnayake Acting C.J.*** observed that a Judge should in determining the proper sentence.

First consider the gravity of the offence as at appears from the nature of the act itself.

And should have regard for the punishment provided in the Penal Code.

In the case of ***A.G. V. Mendis 1995 1SLR 138*** to decide what sentence to be imposed on an accused the judge has to consider the

point of view of the accused on the one hand and the interest of the society on the other.

Having referred to the above authorities it is clear that the High Court had been guided by the above principles and had taken into the consideration the fact that should be considered in deciding the sentence.

Taking into consideration the above facts this Court sees no reason to interfere with the judgment of the High Court.

In the circumstances, the appeal stands dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.WickremasingheJ.,

I agree.

JUDGE OF THE COURT OF APPEAL