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

In the matter of an application against an order of the High Court under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

1. Mangodage Nandasiri
2. Mangodage Jayasena

ACCUSED – APPELLANTS

CA 68 – 69/2015

HC Polonnaruwa 283/06

Vs.

The Hon. Attorney General,
Attorney Generals Department,
Colombo 12.

RESPONDENT

BEFORE: **P.R. WALGAMA J**

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: **Dr. Ranjith Fernando for the Accused Appellant**
Dilan Ratnayake D.S.G. for the Respondent

ARGUED ON: **20.07.2016**

WRITTEN SUBMISSIONS – 01.09.2016

DECIDED ON: **28.10.2016**

S. DEVIKA DE LIVERA TENNEKOON J

The Accused- Appellants (Hereinafter sometimes referred to as the Appellants) were indicted in the High Court of Polonnaruwa under Section 294 and punishable under Section 296 read together with Section 32 of the Penal Code of Sri Lanka for committing the murder of Konagedera Upali Wijenanda on or around the 1st of September 2000.

Consequent to a trial before a judge of the High Court the Appellants were convicted for the offence of murder and sentenced to death.

The facts pertaining to this case may be set out briefly as follows, as per the evidence led by the prosecution. The incident occurred around noon in the vicinity of the village temple namely Buddhayaya Serathilakaramaya Temple when the Head Priest was away. The "English Teacher" who had been entrusted to look after the temple by the head priest in his absence was alerted by a person pelting stones at the temple. The "English Teacher" thereafter requested the Appellants who were from the adjacent land to assist in expelling this person and both the Appellants and another person had acceded to the request and confronted this intruder. After an exchange of abusive words the Appellants had assaulted this person with bricks and rafters which were collected from the surrounding area. Subsequently the deceased person had collapsed and thereafter the villagers who gathered at the scene had tied the intruder to a tree and the Police was informed. After which the deceased had succumbed to his injuries.

The postmortem report revealed that there were 23 external injuries which mainly consisted of contusions, abrasions and lacerations and that the cause of death was asphyxia. The learned trial Judge in evaluating the medical evidence observed that injuries Nos.1 and 2 were such that were caused by blunt objects and were sufficient in the ordinary course of nature to cause death within 10 minutes of such injuries.

The Appellants made their respective dock statements by which they admitted only their presence at the scene but denied assaulting the deceased. The learned Counsel for the Appellants in the instant application urge that the learned Trial Judge has erred in fact and law by concluding that the mens rea / murderous intention had been established under Section 294 of the Penal Code beyond reasonable doubt.

The learned High Court judge has correctly observed that although it is established that the Appellants were present at temple at the time of the incident it cannot be said that they entered the scene with the common intention of causing the death of the deceased. There is no evidence that either of the Appellants knew the identity of the deceased prior to the incident. Therefore there is no evidence of a prearranged plan or premeditation to cause death on the part of the Appellants. It is the subsequent conduct of the Appellants which the learned High Court judge has evaluated to have indicated that they shared the common intention to cause the death of the deceased at the time of assaulting him.

At this stage it is pertinent to consider certain items of evidence in this case to determine whether there is culpability for a lesser offence on the basis of grave and sudden provocation.

Considering the material evidence placed before the High Court it appears that the Appellants were provoked by the deceased pelting stones at the temple which had gone on for some time and it was said in evidence by the PW1 Somasundara that the deceased appeared to be drunk at the time. The learned High Court Judge has accepted that the Appellants were unarmed when arriving at the scene. It is pertinent to note at this stage that the Appellants presence at the scene was only because they were called upon by the "English Teacher" to assist in expelling the intruder from the temple premises and therefore the Appellants in the instant case cannot be held to have entertained a murderous intention.

In the case of Gamini Vs. Attorney General 2011 SLR (1) 236 it was held that 'Though the accused-appellant in his defense did not take up the defense of grave and sudden provocation, the trial judge must consider such a plea in favor of the accused- appellant if it emanates from the evidence of the prosecution.'

In the case of The King V. Aldon 44 NLR 575 it was held that the accused should be given the benefit of the doubt and sentenced under the latter part of section 297 of the Penal Code where, in a charge of murder, if the Court of Criminal Appeal is satisfied that there was some doubt as to whether the jury were of opinion that the accused had a murderous intention or merely the knowledge that what he did was likely to cause death. The King v. Ponnasamy (43 N.L.R. 359) followed.

In the case of Somapala, R. G. Vs. The Queen 72 NLR 121 it was held that 'there was misdirection in- that there was a lack of appreciation of important points of difference between Section 293 and Section 294 of the -Penal Code. While the act of causing death with knowledge that the act is likely to cause death is culpable

homicide, such an act is not murder, unless either (a) the offender intends to cause bodily injury and has the special knowledge that the intended injury is likely to cause the death of the person injured, or (b) the offender knows that, because the act is so imminently dangerous, there is the high probability of causing death or an injury likely to cause death.'

In the circumstances of the case it is clear that the Appellants did not entertain a murderous intention and as such they must be considered under Section 297 of the Penal Code since the Appellants have not had any intention to cause the death or to cause such bodily injury as is likely to cause the death of the deceased.

As correctly submitted by the learned Deputy Solicitor General the learned trial judge has not addressed his judicial mind as to whether the Appellants ought to be given the benefit of lessor culpability. In the instant case the learned Deputy Solicitor General does not object to altering the conviction of the Appellants by convicting the Appellants for the lesser offence under Section 297 of the Penal Code.

In the circumstances this Court takes the opportunity to reiterate and emphasis the principle accepted by the Court of Criminal Appeal of this Country that the mitigatory plea of gave and sudden provocation must be considered by the trial Court in favor of he accused if it emanates from the evidence of the prosecution even if it is not been taken as a defense.

For the above reasons I set aside the conviction of murder and the death sentence and substitute a conviction of culpable homicide not amounting to murder on the basis of a lack of murderous intention by the Appellants.

Considering the above I sentence the 1st and 2nd Appellants to a term of 7 years rigorous imprisonment each on the offence of culpable homicide not amounting to murder which should be implemented from the date of conviction in the High Court which is from 26.04.2015.

Further I order a fine of Rs. 10,000/- on each of the Appellants and in default a term of 3 months simple imprisonment.

The learned High Court judge is directed to issue a fresh committal indicating the sentence imposed by this Court.

Appeal allowed.

JUDGE OF THE COUTR OF APPEAL

P.R. WALGAMA J

I agree

JUDGE OF THE COURT OF APPEAL