

**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.

The State

CA/167/2015
HC Matara/127/09

COMPLAINANT

Vs.

Andra Hannadige Pathmasiri

ACCUSED

AND NOW

Andra Hannadige Pathmasiri

ACCUSED – APPELLANT

Vs.

The Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before : P.R. Walgama, J

: S. Devika de L. Tennekoon, J

**Council : Anil Silva P.C. with Dhanaraja Samarakoon
for the Aced – Appellants.**

: L. Karunanayake S.S.C. for the State.

Argued on : 21.07.2016

Decided on : 28.11.2016

P.R. Walgama, J

On 31.08.2015, following a trial before a Judge, the Accused-Appellant was convicted for murder on Gamaaratchige Janaka Kumara, and for causing attempted murder on Samantha Rohitha, on 16th November 2002, punishable under Sections 296 and 300 of the Penal Code. Accordingly a death sentence was passed on the 1st count and in addition was sentenced to 12 years Rigorous Imprisonment, and Rs. 5000 as a fine and carrying a default sentence of 6 months simple imprisonment, in respect of the 2nd count in the indictment.

The conspectus of the relevant facts are as follows;

The incident pertaining to the crime revolves on a sudden fight due to provocation, aggressor being the deceased. As claimed by the Accused- Appellant the deceased had taunted the Appellant by following him by getting in to the same bus after an altercation between the parties.

The main witness for the prosecution was Samantha Rohitha the injured by the alleged incident, did testify to the facts led to the alleged incident. In that it is said, the scuffle ensued due to the Accused- Appellant accidentally stepping on the deceased's foot.

Further he had witnessed the Accused stabbing the posterior of the Deceased, and in the process he too was stabbed.

It is salient to note that the provocative act deducible from the evidence of the Appellant is that while the Deceased and two others were getting down from the bus the Deceased had dragged him down from the steps where he was standing and allowing them to get down from the bus. The Accused -Appellant gave evidence on oath and testified to the above and had further stated that the Deceased had a knife with him and in self defence he grabbed the knife and dealt some blows, and stabbed the above witness (the injured) too.

In the course of the trial it transpired that the Accused - Appellant also received injuries as a result of this attack. Nevertheless he was not produced before a Medical Officer by the investigating officer.

The counsel for the Accused- Appellant had adverted court to the fact that the prosecution has led only the evidence of the injured, although it was possible to fortify their case by calling another eyewitness namely Nimal, and also the driver of the bus in which both parties were travelling.

Further it is contended by the counsel for the Accused- Appellant that he has given plausible reason for his conduct after the alleged incident.

In the wake of the above it is ostensible that the Accused - Appellant was not the aggressor, and it emanates from the said backdrop that the result which brought about death of the deceased was due to a sudden fight which occurred due to sudden provocation. The provocative act deducible from the evidence of the Accused -Appellant was that, by inadvertently having trampled the deceased's foot.

In the above setting the counsel for the Accused-Appellant urged that the Accused could be convicted for culpable homicide not amounting to murder on the basis of grave and sudden provocation or sudden fight. Further it is noted that the Counsel for the Respondent also had conceded for the sentence to be reduced to a lesser culpability, by imposing a sentence for culpable homicide not amounting to murder.

It was conceded by the Learned SSC that the position of the state was that, it would be appropriate to convict the Accused- Appellant for a lesser culpability viz, culpable homicide not amounting to murder. Further it is stressed by the State that the facts emerged from evidence of this case only warrants a conviction under Section 297

of the Penal Code and not under Section 296 of the Penal Code.

The evidence transpired in the course of the trial also established the fact that there was no previous enmity between these two parties.

The Leaned SSC has adverted court to the Doctors testimony who held the post mortem of the deceased and examination carried on the injured party. It is also seen from the MLR that there was only one stab injury. Further the state has admitted that there was no evidence to establish that the Accused- Appellant has acted in a cruel manner.

In the above setting it is the position of the State that the Accused- Appellant has acted in the heat of passion caused by a sudden fight and hence it is stated that the 1st charge against the Accused- Appellant come within the ambit of exception 4 of Section 294 of the Penal Code.

There are host of decided judicial decisions which has recognised the commuting the death sentence to a life imprisonment or culpable homicide not amounting to murder.

Even if there has been an interval between provocation and the act of murder and the evidence established that all the time during the interval the accused suffered a loss of self control. In such

situation the proper verdict should have been a conviction for culpable homicide not amounting to murder and not for murder punishable under section 296 of the Penal Code. It was so held in the case of SAMATHAMBY .VS. THE QUEEN- 75. NLR- 49

Further it is pertinent to note that the above exposition of the law and facts only warrants a conviction for a lesser culpability, viz culpable homicide not amounting to murder on the ground of sudden provocation/ sudden fight.

This position is explicitly stated in the Exception 4 to Section 294 of the Penal Code, which states thus;

“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”

Explanation- It is immaterial in such cases which party offers the provocation or commits the first assault .It is also pertinent to note that the alleged incident was of consequence of a sudden chance meeting, and therefore no premeditation or preparation for the act could be imputed under the circumstances.

Hence in the circumstances attended above this court is persuaded to set aside the conviction for murder and substitute for culpable homicide not amounting to murder on the first count and impose a jail term for 12 years, and a fine of Rs. 10, 000/ carrying a default sentence of 6 months of Rigorous Imprisonment, In respect of the second count shall impose a jail term of three years and a fine of Rs. 5000/ carrying a default term of 6 months, simple imprisonment. The jail term imposed here by for the 1st and the 2nd counts will operate concurrently, but the default term imposed in the event of failure to pay the fine will run consecutively and will be operative from the date of this judgment, 28.11.2016.

Subject to the above variation appeal is dismissed.

Accordingly we dismissed the appeal.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J

I agree.

JUDGE OF THE COURT OF APPEAL