

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

Lewke Kanagalle Lionel  
Wickramasinghe alais Gamini

**Accused Appellant**

**Court of Appeal Application  
No. C.A. 233/2014**

**High Court of Kegalle 1910/2003**

**Vs.**

The Attorney General  
Attorney General's Department  
Colombo 12.

**Complainant - Respondent**

**Before : P.R. Walgama, J  
: S. Devika de L. Tennekoon, J**

**Counsel : Accused - Appellant is Present in Court  
Produced by the Prison Authorities.**

**: Tenny Fernando for the Accused - Appellant.  
Haripriya Jayasundare DSG for the A.G.**

**Argued on : 01.07.2016**

**Decided on : 23.02.2017**

**P.R. Walgama, J**

In the instant appeal the Accused – Appellant has called in question the legal acceptability of the judgment passed by the Learned High Court Judge dated 16.10.2014, by which judgment the Accused – Appellant (1<sup>st</sup> accused) and the 2<sup>nd</sup> accused who was tried in absentia was sentenced to death.

The Accused – Appellant and his brother the 2<sup>nd</sup> accused arraigned for having committed murder of one Upali Hemantha on 06.12.1998.

At the end of the trial the Learned High Court Judge entered judgment convicting both accused for the charge of murder under Section 296 of the Penal Code, and had passed a verdict of death penalty.

Filtering the unnecessary details, the facts which are necessary to be adumbrated for the adjudication of the instant appeal is stated hereunder;

The alleged incident of murder took place and the deceased came about his death and the scuffle ensued in the boutique of one Senaviratne. As per testimony of the said witness the Accused – Appellant came with his brother the 2<sup>nd</sup> Accused to his boutique and stabbed the deceased who was seated on the half wall of the boutique and after receiving

stab injuries the deceased ran away, but had fallen closer to the said boutique. Further it was his version that before the said stabbing took place there had not been any exchange of words or threats by the deceased for the Accused - Appellant to be provoked. It is the unequivocal position of the prosecution that the evidence deducible does not give the Accused - Appellant to come under the Exception (4) of Section 294 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”.

The witness Shantha Pushapakumara did depose in the similar lines. The above witness was having meals with the deceased when the Accused - Appellant attacked him with a knife. Thereafter the 2<sup>nd</sup> accused had stabbed the deceased in the posterior, and it was his version that the deceased did not get in to a scuffle with the Accused - Appellant.

Therefore the evidence that transpired at the trial does not reveal any scuffle before the stabbing took place.

In determining complicity of the Accused - Appellant in the alleged crime it is vital and fundamental to give much weight to the medical evidence as well as the

observations of the JMO, as regards the injuries sustained by the deceased.

The deceased had suffered five injuries out of which 2 injuries in the exterior and 3 injuries in the posterior. It was the observation of the JMO that the injury No. 1 and 3 have pierced the lung while the 4<sup>th</sup> injury has gone to the chest cavity and the 5<sup>th</sup> injury has pierced the kidney. Further it was categorically stated that injury Nos. 1,3 and 5 are fatal injuries, and there was no sign of a scuffle.

Therefore it is apparent that the Accused - Appellant had the murderous intention to kill the deceased. Further it is worthy to mention that the Accused - Appellant was armed with a knife. Therefore this court cannot give an innocent interpretation to this gruesome act. Thus it was the omnibus allegation of the witnesses that the Accused - Appellant and his brother the 2<sup>nd</sup> accused stabbed the deceased and caused his death.

On being interrogated, the Accused - Appellant made a disclosure statement, and such disclosure being made, the police made recoveries of the articles at the instant of the accused.

Hence in the said back drop, evidence when concatenated proves irrefutably that the death of the deceased was caused by the accused-appellant and his brother the 2<sup>nd</sup> accused who was tried in absentia.

Per contra, the Learned Counsel for the Accused - Appellant has urged in confutation that the Learned High Court Judge has failed to consider the extenuating circumstances that the Accused - Appellant could be convicted for lesser culpability. Nevertheless it is salient to note that the evidence transpired in the court below does not expose the accused for a lesser culpability, viz culpable homicide not amounting to murder.

Further the Learned Counsel for the Accused - Appellant had adverted court to legal authority viz. THE KING VS. BELLANA VITHANAGE EDDIN - 41 NLR-345 which held thus;

“in a charge of murder it is the duty of the judge to put to the jury the alternative of finding the accused is guilty of culpable homicide not amounting to murder when there is any basis for such a finding in the evidence on record, although such defence was not raised nor relied upon by the accused”.

Taking the rationale of the above stated principle it is axiomatic to note that the testimony of the witnesses were such it does not establish the fact that the ground situation did culminate to a sudden fight, or the Accused - Appellant's act was due to sudden provocation.

Hence in the wake of the above legal and factual matrix, I am of the view that there is no substantial and compelling circumstances justifying a lesser sentence.

Thus we accordingly uphold the finding of guilt as against as recorded by the court below and also the sentence imposed in respect of the offence committed by him.

Consequently the appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

S. Devika de L. Tennekoon, J

I agree,

**JUDGE OF THE COURT OF APPEAL**