

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 Code of
Criminal Procedure Act No.15/1979.

C.A.No.31-32/2012
H.C. Tangalle No.54/2006

01. Mahakumburage Jayathissa alias
Heen Putha alias Gomadiye Sarana
Himi .
02. Mahakumburage Wijesiri alias
Baby

Accused-Appellants

Vs.

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

Respondent

BEFORE : DEEPALI WIJESUNDERA, J.

ACHALA WENGAPPULI J.

COUNSEL : Tenny Fernando for the Accused-
Appellants.

Haripriya Jayasundera D.S.G for the
respondent

ARGUED ON : 11th July 2018

DECIDED ON : 14th September, 2018

ACHALA WENGAPPULI J.

The 1st and 2nd Accused-Appellants (hereinafter referred to as the 1st and 2nd Appellants) were indicted before the High Court of Tangalle for committing the murder of *Mahakumburage Dharmadasa* on or about 19th January 2000. Upon their election to be tried without a jury, the Appellants were convicted for murder and sentenced to death.

Being aggrieved by the said conviction and sentence, the Appellants, at the hearing of this appeal, complained that the trial Court has erroneously held that general exception of sudden fight is not applicable upon the evidence presented before it and as a result they were denied of its benefit of lesser culpability.

The prosecution case is that the deceased and witness *Jayantha* were walking along a public road to a relative's house in the evening of 19th January 2000. They had to walk along the edge of the road to give way to a vehicle which went past them. Then he saw the two Appellants and the deceased are engaged in a scuffle as one bunch. At that time the deceased was rested on the bank of the side drain with his two feet in the drain. The 2nd Appellant has held the deceased by his two hands while the 1st Appellant had stabbed on his chest twice.

When he raised cries witness *Sumanasena* rushed in and the two Appellants ran away from the scene. The deceased was thereafter taken to hospital and on his way had made a declaration implicating the two Appellants as the persons who stabbed him. The medical evidence revealed that the deceased had suffered three stab wounds on his chest and one stab on his abdomen. The corresponding internal injury to the penetrating stab injury on the abdomen was on the aorta and it had been cut about 2/3. This injury had resulted in the death of the deceased which in turn caused loss of blood. He could have talked for a while.

After the arrest of the 1st Appellant, a knife was recovered. According to the medical witness it may have been used to cause the stab injuries to the deceased.

In support of the solitary ground of appeal, learned Counsel for the Appellants submitted that it was a chance meeting and the deceased had suffered these injuries during a sudden fight. About a year ago the deceased had inflicted a cut injury on the 1st Appellant. However, he contended that there was no evidence of premeditation. The trial Court, even though the evidence suggested a sudden fight, deprived them of the benefit of lesser culpability, in convicting the Appellants for murder.

Learned Deputy Solicitor General supported the conviction of murder on the basis that there was no suggestion by the Appellants that it

was a case of sudden fight or of an instance of exercising their right of private defence, in view of their claim that the deceased was armed with a knife. She further submitted that in concluding that the Appellants have committed murder, the trial Court had considered the evidence placed before it quite meticulously and arrived at the determination that it was a premeditated attack.

This Court, in the judgment of CA 131/2000, C.A.M. of 10.09.2008, held in respect of exception 4 to Section 294 of the Penal Code that;

“ ... in order to derive the benefit of this special exception, the following ingredients will have to be fulfilled.

- (a) The suddenness of the fight should be common to all participants and should not be one sided where one of the assailants with deliberate design to exploit the situation wades in and launches an assault.*
- (b) The quarrel should be sudden to all antagonists generating instantaneous heat of passion under the influence of which the offence is committed.*
- (c) The offender should not have an undue advantage such as attacking a defenceless unarmed person with a deadly weapon.*
- (d) The offender should not have acted in a cruel or unusual manner such as dealing repeated stab blows with great force on a defenceless adversary, where the*

intention to kill is not the product of passion generated instantaneously but more likely springing from malice or vindictiveness." (emphasis original)

In addition, it was also held that " ... the burden of proof that the circumstances come within the ambit of the plea of sudden fight devolves on the offender on a balance of probability. Where one or more of the several elements that needs to be proved are in doubt in relation to independent circumstances in each case, then the plea cannot be said to be proved and therefore fail."

When the above quoted principles are applied on the evidence placed before the trial Court in the instant appeal, it is obvious that the Appellants cannot claim the benefit of the exception of sudden fight.

The deceased was unarmed and was on his way to a relative's house and was surprised with a well-coordinated attack. Apparently, the deceased had lost his balance on account of this sudden attack and was resting against the bank of the side drain with his feet in the drain. He was held immobile by the 2nd Appellant while the 1st Appellant stabbed him four times on his chest and abdomen, resulting in a necessarily fatal injury on the aorta. The fact that the stabbing took place while the deceased was pinned to the bank of the side drain by the 2nd Appellant is a clear indication that the two Appellants have acted according to a pre-planned strategy in which the role each of them had to play in the attack was thought about.

There was no evidence that one of the Appellants have instructed the other to carry out what each of them did by uttering clear verbal instructions just before the stabbing. When each of them carried out their specific part in the stabbing, that clearly supports the view there was premeditation. They saw the deceased coming along the public road and have quickly decided on the strategy of their attack and used the passing vehicle as the best opportunity to mount their surprise attack on the deceased as his companion was on the other side of the road. The finding of fact by the trial Court that there was premeditation is a correct conclusion on the available evidence.

In addition, the repeated acts of stabbing on the deceased without any provocation on his part clearly negates any application of the exception of sudden fight since the Appellants have acted in cruel or unusual manner. The claim by the 1st Appellant that it was the deceased who wielded a knife and had got injured during the scuffle was clearly an afterthought introduced through his evidence for the first time in the trial without suggesting it into any of the lay witnesses who had seen the attack on the deceased. Therefore, the Appellant's have failed to discharge their burden in relation to the exception of sudden fight.

In view of the above reasoning we are of the considered view that the ground of appeal raised by the Appellants is devoid of any merit and therefore ought to be rejected.

The conviction and sentence imposed on the Appellants by the High Court of Tangalle is hereby affirmed. The appeal of the 1st and 2nd Appellants is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL