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

In the matter of an Appeal in terms of Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka. read with Section 331 of the Criminal Procedure Code and Section 19(B) of the High Court of the Provinces (Special Provisions)Act No. 19 of 1990.

C.A.No.175/2014

H.C. Gampaha No. 121/2009

Habakkala Kankanamalage
Pathmasiri Jayalath Wijeratne

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12

Complainant-Respondent

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BEFORE	:	**DEEPALI WIJESUNDERA, J.** **ACHALA WENGAPPULI J.**
COUNSEL	:	Dharshana Weerasekea (Assigned Counsel) for the Accused-Appellant. Shanaka Wijesinghe D.S.G. for the respondent
ARGUED ON	:	08th November 2018
DECIDED ON	:	08th February, 2019

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ACHALA WENGAPPULI J.

The Accused-Appellant (hereinafter referred to as the "Appellant") has invoked the appellate jurisdiction of this Court seeking to set aside his conviction for the offence of culpable homicide not amounting to murder and sentence of 20-year imprisonment.

In the indictment against the Appellant, he was accused of committing the murder of *Habakkala Kankanamalage Wijeratne* on or about 21st December 2000. The Appellant is the eldest son of the deceased and the witnesses for the prosecution included, among other witnesses, his mother and two younger brothers.

It is revealed from the prosecution case that the deceased is an alcoholic and would return home in the evening under the influence of

liquor on a daily basis. He would then start a quarrel with his wife and sometimes involving the Appellant as well.

On the day of the incident the deceased had returned home at about 5.30 p.m. and was drunk as usual. He picked up an argument with his wife *Gunaseeli* and was prevented from assaulting her by their sons who were there at that time. Her two younger sons have thereafter left the house and have played cards at one of their friend's place. The deceased had a fight with the Appellant and when the deceased started pelting stones to the house, *Gunaseeli* also left the house for the safety of her granddaughter. When she returned, the deceased was fallen inside the house with bleeding injuries on his head. The Appellant was seen outside of their house by his mother *Gunaseeli*. He then left the scene of the incident. She had raised cries and whilst on transit to a hospital, the deceased has succumbed to his injuries.

Jayakanatha said he left their house when his father and the Appellant started to fight. They played a game of cards. At about 6.00 p.m. they heard their mother's call of distress and when rushed back, saw the deceased lying in the house with bleeding injuries. He searched for the Appellant but there was no trace of his whereabouts. His other brother *Tilakasiri* was dead at the time of the trial before the High Court and his evidence was led after the application of the prosecution under Section 33 of the Evidence Ordinance which was allowed by the trial Court. *Tilakasiri* said in evidence at the preliminary inquiry that the Appellant did not attend the deceased's funeral although they kept his body for two days.

The Police have arrested the Appellant about a ½ kilometre away from their house on 23rd December 2000 and during their investigations, recovered a mamoty from the back garden of the house of the deceased, upon information provided by the Appellant. Medical expert was of the opinion that mamoty may have been used in the four long cut injuries that were seen on the deceased's body and particularly injury No. 1, which is a 12 cm long curved cut injury resulted in the fracture of his mandible while damaging the left jugular vein and 3rd cervical vertebra, is sufficient in the ordinary course of nature to cause death. The death of the deceased was due to cardio respiratory failure following shock and haemorrhage due to cut injury to left jugular vein and fracture of 3rd cervical vertebra.

The Appellant, in his statement from the dock claimed no knowledge of the incident since he was elsewhere.

It is the contention of the Appellant in challenging the validity of the conviction that there was no evidence that he had attacked the deceased. Therefore, he contended that the *actus reas* has not been established by the prosecution depriving the trial Court of a reasonable basis to arrive at the finding of his guilt.

The prosecution presented a case against the Appellant based on items of circumstantial evidence. It has been held consistently that "... *in a case of circumstantial evidence if an inference of guilt is to be drawn against the accused such inference must be the one and only irresistible and inescapable inference that the accused committed the crime*" (vide ***Samantha v Republic of Sri Lanka*** (2010) 2 Sri L.R. 236). In view of the Appellant's contention this

Court must consider whether there were evidence before the trial Court to reach the conclusion it did satisfying the above quoted criterion.

The prosecution evidence clearly establishes the facts that within the 30 minute period, the deceased was last seen alive fighting with the Appellant. The Appellant was there at the scene where the deceased was seen with bleeding injuries, when his mother returned home. His two brothers were away playing cards. The Appellant had the knowledge of the place where the mamoty which could well have used in the fatal wounds on the deceased. His subsequent conduct of disappearing from the scene leaving his mother and brothers to attend to the then fatally injured deceased, coupled with the fact of not attending his father's funeral although he was within ½ kilometres from their home, in our view are sufficient to draw the *"one and only irresistible and inescapable inference that the accused committed the crime"*.

In addition to his statement from the dock, the Appellant called a consultant psychiatrist to give evidence on his behalf in support of the fact that he was diagnosed of suffering from Schizophrenia. Dr. Neil Fernando, in his report indicated that *"Reasoning and judgment would have been impaired at the time of the alleged offence due to his mental disorder"*. However, his brothers stated in evidence that the Appellant had no signs of any mental abnormality during that period and the trial Court concluded that he is not entitled to the defence of insanity since he did not establish it on balance of probability.

The principle that the defence of insanity should be established by the person who relies on that plea on a balance of probabilities was

reiterated by this Court in ***Chandra and Another v Attorney General*** (2012) 1 Sri L.R. 119. The trial Court, therefore applied the relevant principle of law correctly.

However, it must be noted that the trial Court in determining lesser culpability of the Appellant convicted him for the offence of culpable homicide not amounting to murder on the basis of sudden fight.

Upon full appreciation of the evidence that had been placed before the trial Court, we are of the considered view that they disclose more of an instance of grave and sudden provocation with a significant degree of cumulative provocation rather than a sudden fight. The injuries suffered by the deceased are suggestive of the fact that the Appellant had acted rather cruelly in inflicting those injuries on the neck and head of his father with a mamoty.

Although, the medical evidence regarding the mental state of the Appellant did not help him in the defence of insanity, certainly it would have a bearing on the general exception of grave and sudden provocation. It is clearly stated by the consultant psychiatrist that the Appellant is prone to provocation due to his mental condition.

Therefore, we alter the judgment of the trial Court to read that the Appellant was convicted for the offence of culpable homicide not amounting to murder on the basis of grave and sudden provocation.

The sentence of 20-year term of imprisonment, although legally valid, could not be considered as an appropriate sentence in these circumstances. The trial Court, though noted that he was in remand pending trial for a long period, opted not to grant a concession on that

account. We consider a term of imprisonment for 15 years would meet the ends of justice. We further make order that it should start to run from the date of his conviction, which is 05.08.2014.

In these circumstances, the appeal of the Appellant is dismissed subject to the variation on the basis of lesser culpability and sentence.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL