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

In the matter of an Appeal against an order of the High Court under Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

C.A.No.243/2010

H.C. Ratnapura No.HCR/29/2006

Lokugamaralalage Abeyratne

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12

Complainant-Respondent

****

BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI, J.

COUNSEL : Indica Mallawarachchi with K. Kugaraja for the Accused-Appellant.

Chethiya Goonesekera D.S.G. for the respondent

ARGUED ON : 14th February, 2019

DECIDED ON : 17th May, 2019

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ACHALA WENGAPPULI, J.

This is an appeal by the appellant, against his conviction for murder and sentence of death. He was convicted by the High Court of *Ratnapura* after trial without a jury for committing the murder of one *Edirisinghe Mudiyanselage Chandana Somasiri* on or about 24.03.2003 at *Noragolla.*

The prosecution case was that the appellant, who was the 2nd husband of the mother of the eye witness to the incident, *Jayalath Menike,* came in the evening at about 7.00 p.m. to the house where the deceased (her brother) lived. *Jayalath Menike,* having visited her brother that evening had met her other sister who also came to see the deceased, with her

husband *Sisira* at their brother's place. The appellant had arrived there at that time with two others. The appellant had found fault with the deceased over an unspecified issue. In the process he also threatened that he would kill his wife, the mother of the deceased, who was staying with him at that time. Seeing *Sisira,* the appellant wanted to know the reason of his presence at the house of the deceased at that time. *Sisira* replied that had nothing to do with the appellant's problem. The appellant responded to *Sisira's* said remark with an attempt to assault him. At that point of time the deceased sought to intervene but was stabbed in the chest by the appellant. The deceased, who had no weapon with him at any point of time, never said anything to the appellant or had at least made an attempt to do anything to challenge him, even though he was verbally abused by the appellant,

The medical evidence reveals that the necessarily fatal stab injury suffered by the deceased had penetrated into the chest cavity through intercostal space and caused a piercing injury to the ventricle of his heart.

At the hearing of his appeal, learned Counsel for the appellant sought to challenge the said conviction on the basis that the trial Court had erroneously denied the appellant of the benefit of lesser culpability on the basis of sudden fight, when it found him guilty to murder. Learned Counsel relied heavily on the evidence of the police officer who made scene observations to impress upon this Court that there was in fact a

sudden fight and it was during that fight the deceased was stabbed by the appellant.

In the judgment of ***Kumarashighe v The State*** 77 N.L.R. 217 of the Court of Criminal Appeal, it was held by *H.N.G. Fernando* CJ that the effect of a plea of sudden fight "*... is that the accused is guilty only of culpable homicide not amounting to murder, despite the fact that he did entertain a murderous intention.*"

Apparently, in view of the reasoning contained in the judgment of ***Farook v Attorney General*** (2006) 3 Sri L.R. 174, learned Counsel for the appellant did not challenge the trial Court's determination on murderous 1intention entertained by the appellant at the time of inflicting one stab injury to the deceased which proved to be a necessarily fatal injury. Instead, she sought to bring the case against the appellant within the scope of Exception 4 of Section 294 of the Penal Code by placing reliance on the police observation that there was a "sudden fight".

The Supreme Court, in its judgment of ***Bandara v Attoney General*** (2011) 2 Sri L.R. 55, laid down the conditions that should be satisfied if an accused were to receive the benefit from the plea of sudden fight. Dr. *Bandaranayake* CJ states in her judgment that;

> *" ... in order to come within the Exception 4 of Section 294 of our Penal Code, it is necessary to satisfy the specific requisites referred to in Section 294 of the Penal Code, viz;*

1. *it was a sudden fight;*
2. *there was no premeditation;*
3. *the act was committed in a heat of passion; and*
4. *the assailant had not taken any undue advantage or acted in a cruel manner."*

Having identified these requisites, the apex Court added further that when a deceased was unarmed and did not cause any injury to the appellant, the appellant following a sudden quarrel had inflicted fatal injuries to the deceased, that the Exception 4 to Section 294 would not apply. The process of reasoning adopted by the Court in coming to such a determination, is explained as the Court observes that;

> *"... the lapse of time may grant the opportunity for an accused to premeditate and make arguments for a fight. Such a fight is not spontaneous and therefore cannot be regarded as one that could be described as sudden. If there was a lapse of time between incidents prior to the final assault, it is quite clear that the heat of passion upon the quarrel would have subsided and the death on such an instance would be regarded as a murder."*

This Court, in an unreported judgment of ***Gemunutileka v Hon. Attorney General,*** CA No. 131/2000 - decided on 10.09.2008 - adopted the same approach as it observed that ;

> *"... testimony neither bears out there was an exchange of words between the appellant and the deceased nor that the deceased attacked or attempted to attack the deceased. The balance of probability tilts in favour of prosecution that it was more likely that the appellant took advantage of the situation and with deliberate design attacked the deceased with a deadly weapon."*

In these circumstances, their Lordships have held that *"there is no evidence to suggest that the appellant acted in a heat of passion generated by the alleged sudden fight."*

The trial Court, in its impugned judgment, has considered the evidence presented before it and decided that the appellant is not entitled to the benefit of the Exception 4 of Section 294 of the Penal Code.

This Court concurs with the conclusion reached by the trial Court on this issue. The appellant did not cross examine the eye witness on the basis that there was a sudden fight. Witness *Jayalath Menike* was cross examined on the basis that it was to *Sisira* that the appellant made an attempt initially. It was her evidence that after the act of stabbing, she grappled with the appellant to wrest his knife out of his hand and the appellant, in

the process, bit her hand. She intervened to disarm the appellant at that point as he has threatened that he would kill her mother as well.

It is obvious that the appellant targeted the deceased as he was responsible in providing shelter to his estranged wife. The appellant first verbally abused the deceased in the presence of his two companions and then made an attempt to initiate a quarrel with *Sisira*. *Sisira* avoided any interaction with the appellant. The Appellant then made an attempt to assault *Sisira*. It is at that point of time the unarmed deceased made an attempt to intervene, perhaps to save his brother- in- law from stabbing. It is at that juncture that the deceased was stabbed by the appellant. Clearly the evidence points to clear case of premeditation and negates any inference that the *"...appellant acted in a heat of passion generated by the alleged sudden fight."*

Learned Counsel for the appellant heavily relied on the observations made by the Police officer at the scene of crime that he saw several foot prints on the front garden, outside the entrance to the deceased's house. In his evidence, the witness stated that there may have been some movement by several people or even a scuffle, judging by the disturbance of soil. He clarified, upon being questioned by Court that what he saw was the signs of few people hanging around (ගැවසිලා තියෙනවා). The police officer's inconclusive observations cannot supplement for the absence of any direct evidence that there was a scuffle, especially when there is evidence to the contrary.

Having considered the submissions of the learned Counsel, against the evidence placed before the trial Court, we are of the view that the conclusion reached over the issue of sudden fight by the Court was correct. Therefore, we hold that the appeal of the appellant is without merit and ought to be dismissed for that reason.

Accordingly, the conviction and sentence imposed on the appellant by the trial Court is hereby affirmed and his appeal stands dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL