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

In the matter of an Appeal under Section 11(1) of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 138(1) of the Amendment Act No. 13 of the Constitution.

C.A.No.189-190/2016

H.C. Matara No. HC 121/2012

1. Nambukara Thanthrige Mahesh Maduranga alias Suddha
2. Raigam Koralage Dinesh Dheerasekera

Accused-Appellants

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

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BEFORE	:	**DEEPALI WIJESUNDERA, J.** **ACHALA WENGAPPULI, J.**
COUNSEL	:	Indica Mallawarachchi with K. Kugaraja for the 1st Accused-Appellant. Dr. Ranjit Fernando for the 2nd Accused-Appellant Sudharshana de Silva D.S.G. for the respondent
ARGUED ON	:	21st June, 2019
DECIDED ON	:	06th August, 2019

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ACHALA WENGAPPULI, J.

This is an appeal by the 1st and 2nd accused-appellants (hereinafter referred to as the "1st and 2nd appellants") challenging their conviction for the offence of murder alleged to have been committed on *Talpawila Kankanamge Vipul Ram* on 18.11.2008 at *Hittatiya* and also for causing grievous hurt to *Samaratunga Vidana Arachchige Priyanka Lakmali* by the High Court of *Matara* on 25.07.2016, after a trial without a jury.

It is the prosecution evidence that the two appellants have forcibly entered the house of the deceased at about 10.30/11.30 p.m. and had attacked the deceased who was sleeping with his wife *Priyanka Lakmali* and their two children with cutting weapons. *Lakmali* too had suffered several

cut injuries when she tried to intervene to ward off the attack. It is also evident that the deceased was brought home that evening by some of his family members in a heavily intoxicated state and was laid on the bed. *Lakmali* had clearly identified the two appellants and sought assistance of her immediate neighbour to make a phone call to someone who could take her husband to hospital.

The deceased was eventually admitted to *Matara* Hospital where he succumbed to his injuries two days later.

The prosecution led the evidence of *Srimali Priyanka* who stated that the two appellants have entered her house at about 10.30 p.m. on the same night looking for her husband who had already left for fishing. The 1st appellant had a long bladed knife with him and had threatened her that she too would be cut.

Chief Inspector *Abeysekera* of *Matara* Police conducted investigations into the incident and noted that the front door of the deceased's house, built with wooden planks, was forced open and had a damaged latch. He also noted large patches of blood on the bed and observed that the mosquito net too had been cut in several places.

The deceased had suffered 18 cut and stab injuries in total and died due to acute peritonitis which was caused by the penetrating injuries through his intestines while his wife *Lakmali* had suffered total of seven injuries which included several long cut injuries and a broken bone. She had implicated *"Dinesh and another"* in the attack and stated that she sustained injuries when she tried to save her husband.

When the trial Court ruled that the appellants had a case to answer, they made short statements from the dock totally denying any involvement with the incident. The appellants have called two witnesses, *Vinitha* and the mother of the 1st appellant, *Gunaseeli* to give evidence on their behalf.

Vinitha stated that the wife of the deceased sought her assistance to call for help soon after the incident. *Lakmali* only stated that they were attacked but when enquired as to who it was, she replied that she did not identify them. *Gunaseeli* in her evidence stated that the deceased, his brother *Susantha* and another have attacked the 1st appellant at their home. They damaged the window panes and the cabinet. She had then set off to police to lodge a complaint at about 10.00 p.m. and returned home after midnight.

In support of the appeal of the 1st appellant, learned Counsel contended that the trial Court had erroneously rejected the defence evidence which she submitted on a fatally flawed basis and causing serious prejudice to the 1st appellant. She also relied on the ground that the trial Court had failed to consider the lesser culpability on the basis of sudden fight to which there were clear evidence.

Learned Counsel for the 2nd appellant submitted that the trial Court had failed to consider the provocation offered by the deceased and his associates since the evidence revealed that the attack on the deceased is immediately after an act of assault and mischief on the appellants.

The several grounds of appeal, as urged by the appellants could be considered together since the underlying issue is the consideration of

lesser culpability of the appellants. The evidence of *Gunaseeli* does not seek to absolve any of the appellants from the allegation mounted by the prosecution against them but only to highlight the attendant circumstances that immediately preceded the attack.

In this appeal, the appellants have totally denied any involvement with the death of the deceased in their statements from the dock. Hence, in order to derive the benefit of lesser culpability upon any of the general exceptions of Section 294 of the Penal Code, the appellants had to rely on the available evidence. The only available evidence in relation to the claim of sudden fight are the answers given by the lay witnesses of the prosecution to the suggestions made by the appellants during cross-examination and the evidence of *Gunaseeli* who claims to have witnessed an attack on her son, the 1st appellant by the deceased and two of his companions.

During the cross-examination of *Lakmali and Srimali Priyanka* the appellants have suggested two propositions. Firstly they suggested that the deceased and two others have attacked the 1st appellant in his own home about half an hour before the attack on the deceased. *Lakmali* only admitted that she had heard of such an incident but what she heard is that only the younger brother of the deceased was attacked and not the 1st appellant. The witness had consistently denied the suggestion that the deceased and two others were waiting to pounce upon the 1st appellant near the former's house. She also denied the suggestion which had been repeatedly put to her in more than six times that the attack on the deceased took place in his compound (මිදුල) and not inside the house.

Secondly, witness *Srimali Priyanka* was also suggested by the 1st appellant that she, being a neighbour, should have heard the commotion at his house over the attack by the deceased and her husband *Susantha*. She denied the suggestion on the footing that it was normal in that house to have such commotions on a daily basis.

Thus, in view of the denials consistently maintained by these two witnesses, the position advanced by the 1st appellant that the deceased and two others have attacked him that night remains only as suggestions and not as "evidence" in the case. In this context, the evidence of his witness becomes more important for she is the only person who gave evidence of such an attack. Since the appellants maintained a total denial in their evidence. During cross-examination of CI *Abeysekera,* the 1st appellant had elicited that the complaint lodged by his mother was investigated by him when he visited his house that night. The officer had observed that the glass sheet of the "cabinet" was broken. It is strange, as pointed out by the learned DSG, that the 1st appellant further elicited that the investigations conducted by the witness revealed that it was the 1st appellant himself who damaged the "cabinet". This position was repeated by the witness when the 1st appellant clarified the issue at a later point and thereby negating any mistake of fact on the part of the police officer in giving that evidence.

This item of evidence, that had been presented before the trial Court by an independent person, was not contradicted by the 1st appellant and was left unchallenged. It is clear that the 1st appellant had heavily relied on this alleged act of mischief by the deceased in support of his claim of sudden fight. However, the 1st appellant had left this issue in conflict with his mother's evidence. The prosecution highlighted an important omission

of *Gunaseeli's* evidence. She had not mentioned about this incident in her statement to Police. It is reasonable to expect that she should have mentioned it in her statement, if that was the case, since she too was placed in remand in connection with this murder when she made the said statement. Cumulative effect of these factors points clearly to the reasonable inference that this is obviously an afterthought by the 1st appellant who led his mother's evidence before the trial Court in support of his case. Hence the rejection of the appellant's evidence by the trial Court becomes justified conclusion contrary to the submissions of the appellants.

The Court of Criminal Appeal, in the judgment of ***The King v Andris Silva*** 41 N.L.R. 433, held that:

> *" ... jury should not pay the slightest attention to any suggestions put to the witnesses in cross examination unless those suggestions were supported by proof."*

Thus, in the absence of any "evidence" before the trial Court that is capable of supporting the claim of lesser culpability on the basis of a sudden fight, the trial Court is entitled to hold that the offence of murder is made out.

In delivering the judgment of ***The King v Johanis et al*** 44 N.L.R. 145, in the Court of Criminal Appeal, *Hearne* J cleared a misunderstanding that was evident in the appeal before his Lordship on the principle enunciated

in the judgment of ***The King v Chandrasekere*** 44 N.L.R. 97 as his Lordship states (at p.147);

> *"This case lays down that if the existence of circumstances which would bring "the case within one of the exceptions" is involved in doubt, the existence of those circumstances cannot be said to have been proved. It does not lay down that if two possible views may be taken of a set of proved circumstances, the Jury is precluded from adopting either or those two views. In fact, as it appears to me, just as inevitably as one cannot have one side of a sheet of paper without the other, there cannot be one view of a matter and not the contrary view as well. If, for instance, an accused rests his defence upon exception 1 of section 294 of the Penal Code, the Jury may decide that he has proved, within the meaning of proof in section 3 of the Evidence Ordinance, the circumstances alleged by him and yet may hold or not hold that, he lost his self-control in consequence of the provocation to which he was subjected. Similarly, when circumstances are in evidence which the Jury regard as having been proved, they may or may not hold that those circumstances established that there was a sudden fight, upon a sudden quarrel, and that the accused "did not take undue advantage, & c." It is only if they are in doubt as to whether they should or should not hold that circumstances existed which brought the case within*

exception 4 of section 294 of the Penal Code, that the existence of such circumstances cannot be said to have been proved. Even if two views are possible they may have no doubt as to which of these views they prefer to take on the basis of probability."

This pronouncement of the Court of Criminal Appeal concerns two situations. Firstly, it deals with the situation where the "evidence" presented by an accused to bring his case within one of the exceptions "*is involved in doubt*", then "*the existence of those circumstances cannot be said to have been proved*".

Secondly, it deals with a situation where the evidence of the accused to bring his case within one of the exceptions is "proved" as per Section 3 of the Evidence Ordinance but fails to satisfy that those circumstances could bring his case within any of the exceptions of Section 294 of the Penal Code.

Essentially, their Lordships have approached the issue on two levels. In order to successfully bring his case within one of the exceptions an accused must establish the circumstances that he relied on have existed in the first place. Thereafter, he must also establish whether those circumstances that he relied on are sufficient to bring his case within the exception that had been relied upon.

The evidence of the prosecution clearly points that the appellants have attacked the deceased when he was sleeping with his family on the bed. The observations made by the investigating officer offers ample support for *Lakmali's* evidence to that effect. The trial Court is duty bound to consider the available evidence even if the appellants maintained a total denial as per the judgments of ***The King v Edin*** 41 N.L.R. 345 and ***Chandradasa v The Queen*** 55 N.L.R. 439. Perusal of the judgment of the trial Court indicates that it did.

In reference to the appeal before this Court, it is clearly seen that the appellant's have failed to go beyond the first stage since the circumstances they relied on in support of the claim of sudden fight have not been established. The appellants have totally denied any involvement to the death of the deceased. As a result, the appellants had to rely on the evidence of the 1st appellant's mother and the suggestions made to the prosecution witnesses. As noted earlier on, the suggestions of the appellants were denied by the prosecution witnesses and therefore offers no help to the appellants in this regard. The evidence of *Gunaseeli,* even if one were to consider them in spite of its lack of credibility, also does not support the appellant's claim of sudden fight.

When this Court considers the claim of the appellants, that the injuries that resulted in the death of the deceased were caused to him during a sudden fight, in the light of the reasoning contained in the

judgment of ***The King v Johanis et al*** (supra) it becomes clear that there was no grave and sudden provocation, no self-defence and there was no sudden fight during which the deceased had come by his death. The appeal of the appellants is therefore without merit and ought to be dismissed on that account.

The conviction and sentence entered by the High Court against the appellants on both counts are therefore 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