

**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 Criminal Procedure Code No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/118/2019

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Colombo Case No:

HC/303/2017

Kumarapeli Arachchige Gamini Alias Police
Gamini

ACCUSED

AND NOW BETWEEN

Kumarapeli Arachchige Gamini Alias Police
Gamini

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : K Priyantha Fernando,J.
: Sampath B Abayakoon,J.

Counsel : Duminda De Alwis with Charuni De Alwis for the Accused
Appellant
: Susantha Balapatabendi, P.C., Additional Solicitor
General for the Respondent

Argued on : 18-01-2021

Written Submissions : 05-02-2021 (by the Accused-Appellant)
: 18-02-2021 (by the Respondent)

Decided on : 11-02-2021

Sampath B Abayakoon, J.

This is an appeal by the accused-appellant (hereinafter referred to as the appellant) on being aggrieved by the judgment dated 20-02-2019 and the sentence imposed in consequence to the judgment on him by the learned High Court Judge of Colombo.

The appellant was indicted before the High Court of Colombo for causing the death of one R.A.Rathnasiri on or about 31st October 2009, thereby committing the offence of Murder, punishable under section 296 of the Penal Code. However, from the impugned judgment the learned High Court judge found him guilty of the offence of culpable homicide not amounting to murder under section 297 of the Penal Code.

After considering the submissions of the parties as to the sentence, the learned trial judge sentenced the appellant for a term of 18 years rigorous imprisonment and also imposed a fine of rupees 50,000/-.

At the hearing of the appeal, the appellant who is in the remand custody was not produced by the prison authorities due to the COVID pandemic situation prevalent in the country. However, the learned counsel for the appellant informed the Court that he has full instructions from the appellant to argue his appeal before us, which resulted in hearing the parties in consideration of the appeal. Even though the accused was physically not present in Court, he had the opportunity of observing the proceedings from the prison premises via a video link from Zoom virtual platform.

At a later stage of the hearing and at the request of the learned counsel for the appellant, the matter was adjourned for enable him to obtain further instructions from the appellant. On the resumption of the arguments, it was informed by the learned counsel that he has instructions from the appellant that the appellant is no longer pursuing the appeal with regard to the conviction, but only on the sentence imposed by the learned High Court Judge. As a result of the said stand, this Court proceeded to affirm the conviction and allowed the parties to make their submissions as to the sentence imposed by the learned High Court judge.

It was the contention of the learned counsel for the appellant that the appellant is a partially deaf person of 57 years of age, who surrendered to the Police soon after the incident. It was submitted that the evidence suggests that the appellant and the deceased were in fact friends, and the incident was a result of a sudden quarrel and that the appellant had no murderous intention. The learned counsel brought to the notice of the Court the established facts that both the deceased and the appellant had been after liquor and the appellant also had suffered injuries during the altercation.

It was further submitted that the appellant was in remand custody for a period of over two and half years from the date of the incident until he was granted bail.

It was urged by the learned counsel for the appellant to consider the above circumstances in considering the revision of the sentence imposed on the accused, which in his view was excessive.

It was the contention of the learned Additional Solicitor General who represented the Attorney General that the Court should be mindful of injuries suffered by the deceased at the hand of the appellant, although it may have been a result of a sudden altercation between the deceased and the appellant. The learned Additional Solicitor General also points out the established fact that the deceased has attempted to get away from the appellant in order to escape the attack and was a disabled person. He invited the Court to consider these factors in deciding the appropriateness of the sentence imposed on the appellant.

It has to be noted that although the original charge against the appellant was one of murder, punishable under section 296 of the Penal Code, eventually it was under the provisions of section 297 of the Penal Code he has been found guilty and sentenced.

Section 297 of the Penal Code, which stipulates the punishment for culpable homicide not amounting to murder reads as follows;

297. Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or causing such bodily injury as is likely to cause death;

Or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

In the case of **Ravij Vs. State of Rajasthan (1996) 2 SCC 175**, it was held that;

“It is the nature and gravity of the crime and not the criminal which are germane for consideration of appropriate punishment in a criminal case.

The Court will be failing in duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong.”

In **M Gomes Vs. W.V.D. Leelaratne 66 NLR 233** it was stated that;

“A judge in determining the proper sentence should first consider the gravity of the offence as it appears from the nature of the act itself. Should have regard to the punishment provided in the Penal Code or the Statute under which he is charged.”

When it comes to the facts of the instant case and the judgment, it is clear that the appellant has been convicted for an offence punishable under section 297 of the Penal Code on the basis of exception 4 of section 294 of the Penal Code.

However, I am very much mindful of the grievous nature of the injuries suffered by the deceased and the necessity to consider the rights of the victims of crime and the society at large while considering the imposition of appropriate punishment.

Given the aggravating and mitigatory factors mentioned before, and the basis upon which the appellant has been convicted for culpable homicide not amounting to murder, I am of the view that the sentence of 18 years rigorous imprisonment out of the maximum 20-year period that can be imposed under section 297 of the Penal Code is excessive.

In consideration of all the mitigatory factors pleaded on behalf of the appellant and the submissions of the learned Additional Solicitor General, I find that a period of 15 years rigorous imprisonment would be an adequate punishment for the offence for which the appellant was convicted.

Therefore, I vary the sentence imposed on the appellant by imposing a 15-year rigorous imprisonment on the appellant, to be effective from 20-02-2019, the date on which the appellant was sentenced. The fine and the default sentence shall remain the same.

The appeal against the sentence is allowed subject to the above variance to the sentence.

Judge of the Court of Appeal

K Priyantha Fernando, J.

I agree.

Judge of the Court of Appeal