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

In the matter of application for appeal under Section 154(P) of the Constitution read with section 331 of the Criminal Procedure Act No. 15 of 1979.

Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal Case NO.
HCC 154/18

High Court of Gampaha
Case No: 09/2003

Vs.

Imiya Pathira Vidanalage Karunaratne

Alias Tailor Karune

Accused

AND NOW BETWEEN

Imiya Pathira Vidanalage Karunaratne

Alias Tailor Karune

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

Before : **Devika Abeyratne,J**

P.Kumararatnam,J

Counsel : Neranjan Jayasinghe for the Accused-Appellant

Suharshi Herath, SSC for the State

Written Submissions on : 07.03.2019(by the Accused-Appellant)
30.04.2019(by the Respondent)

Argued On : 17.02.2021

Decided On : 30.03.2021

****

Devika Abeyratne,J

The Accused-Appellant in this case was convicted for the murder of one *Alankara Devage Ajith Rohana* and sentenced to death. He was also convicted for causing grievous injuries in the same transaction to *Hegalla Dewage Wijesundara* and *Kanduboda Dewage Nirosh Sampath Jayaweera* offences punishable under section 317 of the Penal Code and was sentenced on each count to a term of one year rigorous imprisonment and a fine of Rs 1000/- each and in default, 2 weeks simple imprisonment.

This appeal is against the said convictions and the sentences.

The prosecution case according to witnesses PW 1 and PW 2 who are the injured persons in count two and three is as follows. PW 1 and PW 2 together with the deceased had gone to *Podi Chandi's* house around 7.30 pm on 30.07.1996. According to PW 01 it was to collect a trouser material and according to PW 2 it was to pay for a trouser. When they were close to *Piyasiri Mudalali's* house the appellant, who was hiding behind a flower bush had suddenly come out and stabbed PW 1 and PW 2 and was seen chasing the deceased *Ajith Rohana* who had started to run.

PW 1 had walked to PW 3 *Asilin's* house which is closeby. *Asilin* is the grand mother of the deceased. He had informed *Asilin* that the accused appellant was seen chasing after *Ajith Rohana,* after stabbing PW 2 and him. She had accompanied him to report the incident to the Police. Thereafter, PW 1 had been taken to the *Wathupitiwala* Hospital by the Police.

According to PW 2 he has not seen anyone stabbing him, only a sudden pain in his back, and then felt blood on his hand. He had seen a tall person chasing after *Ajith Rohana.* He had lost consciousness and when he was regaining consciousness he had identified the appellant walking back with something like an iron rod in his hand. Thereafter, PW 2 also had gone to *Asilin's* house and had informed about *Karune* (appellant) attacking him and to check on the deceased who was chased by the appellant. PW 1 had been at *Asilins'* house when he went there. Although he was injured, he has not accompanied PW 1 to the hospital. No reason was given as to why he did not go to hospital that night.

One would expect PW 2 to be rushed to the closest hospital at the earliest opportunity if he was seriously injured. This begs the question whether PW 2's injury was of a grievous nature. This fact will be addressed later in the judgment. It is PW 2 who has shown the place of incident to the police the following morning. He had been dispatched to the *Wathupitiwala* hospital by the police, which further established that he has not gone to the hospital on his own accord.

The appellant was known to both PW 1 and PW 2. They have identified him by moon light. It was specifically stated that they speak with each other and there was no animosity or ill feeling existed between them . Both prosecution witnesses have evidenced that they are unaware of the reason for the sudden attack. PW 02 has in fact obtained the services of the appellant who was a tailor.

There is no direct evidence as to how *Ajith Rohana* came to his death. Only the evidence of PW 1 that he saw the appellant chasing him. PW 2 has seen a tall man chasing the deceased. He has seen the appellant later coming back with an iron rod in his hand. The deceased had only a stab injury.

The version of the accused who gave evidence under oath is that when he was returning from the බුරුපොල after borrowing some money from one *Gamini* to pay the *Baas* who was constructing his house, near the tomb of *Podi Hamine* ,four bare bodied people with clubs had attacked him. In self defence he had brandished the knife he was carrying to ward off the blows. He admitted that he may have injured the people who were assaulting him when he was waiving the knife. The reason given for carrying the knife was to cut *arecanuts* and also for his protection specially in the night.

He has also testified of having been robbed on an earlier occasion and that it was dangerous to be on the road at night in this village. He had admitted consuming liquor on that night. It was his evidence that although he did not know their names, he recognized PW 1, PW2 and the deceased, as the persons who attacked him and then disappeared, when he was waving the knife.

In cross examination at page 271 of the brief, he has admitted that they may have got injured when he was brandishing the knife. Although he had mentioned there were four people who assaulted him with clubs, he had identified only the three referred to above. He had got admitted to the *Wathupitiwala* hospital. He has stated that although there were no visible signs of any wound, there were contusions from the assault with the clubs. He has testified that the police also assaulted him to such a degree, he had admitted to all what was suggested by the police and also admitted that he did not inform the learned Magistrate about the assault by the police.

His unwavering evidence has been that the incident happened near the tomb of *Podi Hamine* and not near *Piyasiri mudalalis* house as stated by the prosecution witnesses and that the tomb is about 50 to 60 meters from the bushes near the house of *Piyasiri mudalali*.

It is interesting to note that the investigating police officer PW 6 has also testified that the body of the deceased was found about 55 meters away from the bushes (වැට) which according to PW 2 is the place of incident. There had been blood stains near the bushes. If what PW 1 and PW 2 are saying is correct, the blood cannot be from the deceased as their testimony is they witnessed the deceased running with the appellant behind him.

If the appellant's version is correct and when the distance to where the body of the deceased was found is considered, the altercation may have happened near the tomb.

The learned trial judge has stated at page 26 of the judgment that the accused appellant had admitted stabbing with the knife that was recovered pursuant to the section 27 statement which may have caused injury to PW 1, PW 2 and the deceased. However, goes on to state that the injuries are such that they could not have been caused by the appellant just brandishing the knife, therefore, the version of the appellant is not probable.

The testimony of the accused appellant is that when he was confronted by four people assaulting him with clubs from the front and the back, he had brandished the knife in all directions, trying to save himself. In a frenzied attack of that nature, one cannot exactly pinpoint where the knife is going to strike. It appears that the learned trial judge has not considered that possibility.

According to the accused appellant he had been warded at the *Wathupitiwala* hospital and the police had come around 10 pm and stood guard over him throughout the night. After informing about the death of the deceased the following morning, the police had got him discharged from the hospital and taken him to the *Nittambuwa* Police Station. The fact that the accused appellant was in hospital is corroborated by the evidence of PW 6, although a medical report was not submitted.

The learned judge commenting about the non-availability of a medical report has cast the burden on the accused appellant.

In *Lakshami Singh vs State of Bihar AIR 1976 SC 2263* the Indian Supreme Court had held:

> *"In a murder case the non explanation of the injuries sustained by the accused at about the time of occurrence or in the course of the altercation is a very important circumstance from which the court can draw the following inferences:(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version; (2) That the witnesses who have denied the presence of the injuries on the person of the accused are Lying in a most material point and therefore their evidence is unreliable;*

In the instant case it was observed that the investigating officer PW 6 had reluctantly admitted in page 251 of the brief that it transpired that the appellant had been admitted to hospital. The evidence of the appellant was that the police stood guard over him at the hospital. It cannot be said that the chief investigating officer was unaware of such a situation, which shows that the prosecution has attempted to suppress certain important facts from the trial court. Not submitting the medical report of the appellant can be considered as one suppression of a material fact in that sense.

The Investigating Officer SI *Rupasinghe* PW 6 , further testified that the body of the deceased was found about 55 meters away from the alleged place of incident where PW 1 and PW 2 were stabbed as shown by PW 2. This witness had recovered the knife on a section 27 statement from a sandpit in the appellant's garden.

The post mortem had been conducted by PW 10 at the scene of the crime and there had been only one stab injury under the arm pit on the left side of the body. The medical expert's opinion was that the injury would have been caused by using severe force. Further, he had opined that the weapon has to be a knife with a point and the blade of the knife should be approximately six inches long. According to him with the injury that was caused there was no way the life of the deceased could have been saved. The knife purported to have been recovered pursuant to a Section 27 recovery, according to PW 10 could have caused the injury to the deceased and injured PW 1 and PW 2.

PW 1 had one injury on the left forearm near the armpit and in the history given to the medical officer he had stated that the accused stabbed him. He had been discharged on the 02.08.1996. PW 02 who was admitted around 09.15 am on 31.07.1996 too had been discharged on the 02.08.1996 and had also informed the doctor that the accused stabbed him on the left shoulder at the scapula.

The injury to PW 2 is one inch wide and half an inch deep stab injury on the left shoulder at the back of the chest, with no damage to internal organs. It had been catergorised as a grievous injury. (P 4). The injury to PW 1 is a one inch wide half an inch deep stab injury on left upper arm also catergorised as a grievous injury.(P 3). It is PW 10 who has prepared all three reports. It is noted, specifically in pages 224, 225 ,227 and 228 of the brief that the injuries sustained by PW 1 and PW 2 are superficial.

In Page 224 (with regard to PW 1)

ප්‍ර : වෛද්‍ය තුමනි ඒ ඇණවුම් තුවාලය නිසා අභ්‍යන්තර අවයවවලට හානි වෙලා තිබුනාද?

උ : පටකවල සිදු වූ හානිය පමණයි.

ප්‍ර : මොන ආකාරයේ තුවාලයක් විදියටද එය වර්ගීකරණය කරන්න පුළුවන්?

උ : ඇණුම් තුවාලයක්.

ප්‍ර : කොමපණ විතර බලයකින් යොදපු බලයක් විය හැකිද එය?

උ : එය සාමාන්‍ය බලයකින් ඇනපු තුවාලයක් විය හැකියි. සිදුරු වී අනික් පසට ගොස් තිබුනේ නැහැ.

In page 225

ප්‍ර : ඒ අනුව වෛද්‍යතුමනි මෙම තැනැත්තාගේ කෙටි ඉතිහාසය සහ ඔබ විසින් කල නිරීක්ෂණ අනුව ඔබට අධිකරණයට ඉදිරිපත් කරන්න පුළුවන් මතය කුමක්ද?

උ : මෙය උල් ආයුධයකින් සිදු වූ මතුපිට තුවාලයක්.

In page 227 (with regard to PW 2)

ප්‍ර : මොන වගේ තුවාලයක්ද ඒක?

උ : එය ඇනුම් තුවාලයක්.

ප්‍ර : එම ඇනුම් තුවාලය තුවාලකරුගේ ශරීරයේ කොතැනද තිබුනේ?

උ : වම් උරහිසේ පිටුපස *scapula* ප්‍රදේශයේ අඟල් එකක් පළල අඟල් එකක් ගැඹුරු උල් ඇනුම් තුවාලයක් තිබුණා. අභ්‍යන්තර තුවාල තිබුනේ නැහැ.

ප්‍ර : කොච්චිවර ගැඹුරුද ඒ ඇනුම් තුවාලය?

උ : අඟල් භාගයයි.

………….

ප්‍ර : ඒ අනුව මේ තැනැත්තාගේ කෙටි ඉතිහාසය සහ ඔබගේ නිරීක්ෂණ අනුව ඔබ අධිකරණයට ඉදිරිපත් කරන මතය කුමක්ද ?

උ : මෙය උල් ආයුධයකින් සිදුකල මතුපිට තුවාලයක්.

When considering the evidence of PW 10 together with P3 and P4 reports, it is apparent that the seriousness of the injuries has not been sufficiently elicited in the evidence. The medical evidence is that the stab wounds are superficial. Then the question arises how the injuries were catergorised as grievous. PW 2 not attending the hospital until the following morning, for approximately 12 hours, also has to be considered in this background. No explanation was forthcoming. The medical officer had been questioned whether PW 1 and PW 2 were under influence of liquor at the time of incident. The answer was that P3 and P4 reports were prepared at the time of discharge which was about 3 days later, therefore, that information will not reflect in the report.

In this regard it seems that the prosecuting counsel and the learned trial judge have failed in their duty to get a proper evaluation of the injuries that were caused to PW 1 and PW 2, considering the medical witness himself admitting that the injuries are superficial. (මතුපිට) .

It is obvious that PW 10 has not been questioned the basis for his medical expert's opinion that PW 1 and PW 2 have suffered grievous injuries. As stated above PW 2 had not even attempted to go to a hospital until the Police took him there. He had been fit enough to show the purported place of incident the following morning.

Section 45 of the Evidence Ordinance merely states that the expert opinion is relevant- **Not** conclusive. (emphasis added) .

It was held in *Ranjit Wijesiri alias Wije vs The Attorney General* CA No 64/96 decided on 11.03.1999 by *Ninian Jayasuriya* J.

> *" Where a Judge or Jury is called upon to decide such a difficult question of science, there must be questioning of the medical expert in detail in regard to the media, grounds and reasons for his opinion, to enable the Judge to educate himself with sufficient knowledge to decide that issue independently of expert's opinion but assisted by the expert. Where they fail to do so, then the Judge would be permitting the expert to usurp his functions and the Judge would also be wrongly delegating his judicial functions to the expert. "*

On examination of medical reports marked as P3 and P4 and the oral testimony of PW 10 and the manner in which PW 2 has acted after receiving the purported grievous injuries, it is my considered view that the opinion of PW 10 with regard to the injuries of PW 1 and PW 2 are not conclusive. Therefore, a doubt has arisen about the seriousness of the injuries of PW 1 and PW 2.

According to PW 10 who inspected the body at the scene, the cause of death is "shock due to bleeding from heart due to a stab injury. In my opinion the deceased had been under the influence of liquor."

The deceased who was 14 years of age at that time had been under the influence of liquor and the doctor in his evidence in page 231 has stated as follows;

ප්‍ර : එසේම මෙම පශ්චාත් මරණ පරීක්ෂණ වාතර්ාවේ ඔබතුමා අමාෂගත තත්ත්වය සඳහන් කළා. ඔබතුමා සඳහන් කළා පාන් සහ වඩේ හඳුනා ගත්තා කියලා?

උ : ඔව්

ප්‍ර : ඒ වගේම මත්පැන් ගඳ වහනය වුනා කියලා?

උ : ඔව් ස්වාමීනි. මෙය ස්ට්‍රොන්ග් අස්වාභාවික තත්ත්වයක් අවුරුදු 14 ක් වයසැති දරුවෙක්. අධික ලෙස මත්පැන් ගඳ වහනය වුනා ආමාශගත ද්‍රව්‍ය වල.

With the medical evidence it is established that the 14 year old deceased was under the influence of liquor at the time of incident .A reasonable doubt has been created in my mind whether the reluctance of the then 17 year old PW 2 to seek medical help that night was due to the fact that he too was under the influence of liquor.

The basis for this is both PW1 and PW2 stating that there was no animosity or ill will between them and they cannot fathom the reason for the sudden attack.

There was no evidence elicited why the appellant who was getting back home to pay the *baas* should be hiding behind a bush waiting to confront the prosecution witnesses and the deceased. There is also no evidence that the appellant had reason to believe that these three people were coming on the road at that particular time.

On the other hand the appellant's version is that he was taken by surprise being confronted by four bare bodied people who assaulted him near a tomb in moonlight.

Both PW 1 and PW 2 have not witnessed *Ajith Rohana* being attacked. In the light of the available material before the trial court there was no evidence to reach a conclusion that the appellant chased after *Ajith Rohana* with an intention to kill him.

It is to be considered that according to the accused he was under attack with clubs which was an unforeseen situation. As stated earlier, the deceased and the prosecution witnesses were with clubs and were bare bodied. It is also established by medical evidence that the 14 year old deceased was under the influence of liquor, which

is not usual behaviour expected of a boy of that age. In such a circumstance, it is difficult to predict the behaviour of such a person.

The testimony of PW 1 and PW 2 corroborates on some points. However, when the evidence of the accused is considered, he has admitted the brandishing of the knife and that he may have caused some injury trying to defend himself. On a perusal of evidence there is no proof beyond reasonable doubt established by the prosecution, that the accused had the intention of causing injuries which in the ordinary course of nature were sufficient to cause death. There is a distinction between an intention to inflict injuries which are only **likely** to cause death and injuries which are sufficient to cause death, as explained in *Ranjit Wijesiri alias Wije vs The Attorney General* (Supra).

When considering the evidence in totality of how the incident had occurred, it is apparent that there was no animosity or ill will existing between the parties and that there was no motive as such to deliberately cause injury to PW 1, PW 2 and the deceased.

The learned Counsel for the State in her written submissions and also at the argument submitted that the injury suffered by the deceased is the left lung and the heart being pierced by a pointed weapon which could have been caused by the weapon identified by the doctor, and that the murderous intention of the accused is established by the attendant circumstances.

It appears that at the trial court the defence has not raised a plea of sudden fight. In this connection I am guided by the following judicial decisions.

In *King VS Albert Appuhamy 41 NLR page 505* wherein the Court of Criminal Appeal held thus:

> *"...Failure on the part of prisoner or his Counsel to take up a certain line of defence does not relieve a Judge of the responsibility of putting to the jury such defence if it arises on the evidence.*

In *King Vs. Vidanalage Lanty 42 NLR page 317*- Court of Criminal Appeal observes thus;

> *"... There was evidence in this case upon which it was open to jury to say that it came within exception 4 to section 294 of the Penal Code and that the appellant was guilty of culpable homicide not amounting to murder. No such plea, however, was put forward on his behalf."*

> *"...Held, that it was the duty of the presiding Judge to have so directed the jury and that in the circumstances that appellant was entitled to have the benefit of the lesser verdict.II*

In *King Vs. Bellana Vithanage Eddin 41 NLR page 345*- Court of Criminal Appeal observes thus:

> *"...In a charge of murder it is the duty of the Judge to put to the jury the alternative of finding. The accused guilty of culpable homicide not amounting to murder when there is any basis for such a finding in the evidence an record, although such defence was not raised nor relied upon by the accused."*

As stated earlier in this judgment, the accused appellant has unequivocally admitted brandishing his knife in self defence in a sudden attack and accepts that he may have accidentally injured PW 1, PW 2 and caused injury that caused the death of the deceased.

It is well settled law that there is a distinction between an intention to inflict injuries which are only likely to cause death and injuries which are sufficient to cause death. Proof beyond reasonable doubt of a very high degree of probability of the act of causing death is required to be established by the prosecution. When considering the totality of the evidence led in this case, it is apparent that the learned trial judge has not given his mind to this distinction.

Ninian Jayasuriya J in *Ranjit Wijesiri alias Wije vs The Attorney General* (supra) has stated that Gratien J has observed in *King Vs. Mendis 54 NLR page 177 if there is doubt or deficiency of the part of the prosecution, that doubt must be resolved in favour of the accused and one must in such circumstances arrive at a finding of culpable homicide not amounting to murder.*"

In page 180 in *King Vs. Mendis* it goes on to say ' *There remains for consideration, however, the more difficult question whether the convictions for murder were justified upon the evidence. In the facts of the present case, this depends on whether there was evidence upon which the jury, properly directed, could reasonably hold that the act of the appellants which caused the death of Vincent Silva. was also from its very nature "sufficient in the ordinary course of nature to cause death". These words in clause 3 of the definition of "murder" contained in section 294 of the Penal Code require that the-probability of death ensuing from the injury inflicted was not merely likely but "very great, though not necessarily inevitable". In re Singaram Padayachi and others [A.I.R: 1944) Mad. 223.]. If, on the other hand, the evidence establishes that there was probability in a lesser degree of death ensuing from the act*

committed, the finding should be that the accused intended to cause an injury likely to cause death and the conviction should be culpable homicide not amounting to murder. Ratanlal's Law of Crimes (16th edition), page 705."

Considering the totality of the evidence adduced in this case, I am of the view that the accused is guilty of the offence of culpable homicide not amounting to murder on the basis of intention to inflict injuries which are likely to cause death.

Accordingly, we set aside the findings and conviction for the offence of murder imposed by the trial judge and we find the accused appellant guilty of the offence of culpable homicide not amounting to murder on the basis of intention, an offence punishable under Section 297 of the Penal Code We set aside the sentence of death imposed by the trial judge.

We take into consideration the facts borne out by the record, for instance that on 18.01.2008, 21.04.2010, 29.10.2010, and 14.11. 2011, the counsel for the accused had made application to consider the lesser culpability of the accused on the basis of sudden fight. At each application, the Prosecuting Counsel had obtained dates to consider the application but nothing had come to fruition. It is very unfortunate that the Honorable Attorney General has taken approximately 4 years to give his opinion to the request to consider the culpability of the appellant to a lesser offence.

We therefore sentence the accused to a term of eight years rigorous imprisonment. But as the accused has been convicted on 12.10.2018 and still in remand after conviction till the disposal of the appeal, we order that the term of eight years rigorous imprisonment will take effect and be operative from 12.10.2018. The conviction, finding and sentence of death imposed by the trial judge is set aside.

The conviction, finding and sentence with regard to count two and three to stand unchanged and the one year rigorous imprisonment for those two counts will take effect and be operative from 12.10.2018 and run concurrently. The appeal is partly allowed.

The registrar is directed to send a copy of this judgment together with the original case record to the High Court of *Gampaha.*

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL