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

In the matter of an Appeal made under  
Section 331 of the Code of Criminal  
Procedure Act No.15 of 1979.

**CA 138/2020**

**HC/ Kalutara/700/2006**

1. Nakandalage Don Premasiri  
Jayaratna
2. Rathran Pramadige Vincent  
Wijewardena

**ACCUSED-APPELLANTS**

**vs.**

The Hon. Attorney General  
Attorney General's Department  
Colombo-12

**COMPLAINANT-RESPONDENT**

**BEFORE** : **Devika Abeyratne J**  
**P. Kumararatnam J**

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**COUNSEL : Mr.A.S.M.Perera PC with Ms.Prabothini  
Kumarawadu for the 1<sup>st</sup> Accused-Appellant.  
Mr.Yalith Wijesurendra for the 2<sup>nd</sup>  
Accused- Appellant.  
Mr.Sudharshana de Silva DSG for the  
Respondent.**

**ARGUED ON : 15/11/2021**

**DECIDED ON : 06/12/2021**

### **JUDGMENT**

#### **P. Kumararatnam J**

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted jointly in the High Court of Kalutara under Section 296 of the Penal Code for committing the murder of Jayasuriya Madugodaralalage Saman Gunaratna on or about 30<sup>th</sup> May 2004.

The trial commenced before the High Court Judge of Kalutara as the Appellants had opted for a non-jury trial. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellants had given evidence from the witness box. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants under section 297 of Penal code and sentenced them for 30 months rigorous imprisonment with a fine of Rs.10000/= each on 02/07/2020. In default 06 months simple imprisonment imposed.

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Being aggrieved by the aforesaid conviction and sentence the Appellants preferred this appeal to this court.

The Learned Counsel for the Appellants informed this court that the Appellants have given consent to argue this matter in their absence due to the Covid 19 pandemic. Also, at the time of argument the Appellants were connected via Zoom from prison.

The Appellants jointly contend that the Learned High Court Judge has erred in his judgement that the 2<sup>nd</sup> Appellant exceeded the limits of the power vested in him as a police officer in the incident which led to the death of the deceased.

Further they contend that when considering the circumstances of this case, which concerns an act committed in the course their duties by the Appellants, the Learned High Court Judge ought not to have come to a finding of guilt against either of the Appellants.

### **Background of the Case**

On the 15th of May 2004 around 9.30 p.m., PW01 Anagipura Gnanaratna who is the Grama Sevaka of the area having heard a sound similar to crackers had travelled half a Km towards the area where the sound came from. He had reached the place of incident in ten minutes and observed a Canter lorry which had fallen in to a ditch and had seen blood splatters near the driving seat. He had seen a motor bike bearing No.141-9152 was parked behind the lorry. He had not witnessed the incident but made a formal complaint to the police. He admitted that he knew of a person called Odiris Mudalali residing in his village who grows Teak trees on his land.

PW02 Rapial Fernando hearing a report of a gun at about 9.pm had come out from his house and had seen a Canter lorry which had tilted on its side about 50 meters away from his house. As a person under the lorry was seen to be injured seriously, with help of others he had been extracted from under the lorry and sent to the hospital. He had seen the Appellants at the scene

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and a gun was in the possession of the 1<sup>st</sup> Appellant. He too had not witnessed the shooting.

On the day of the incident at about 8.30pm when PW03 Kamal Gamini was going to his mother's place he was stopped by two police officers at Indigasthuduwa junction. One officer was in police uniform while the other was in civil with a gun. Then both officers had gone towards the place of incident. After about 15 minutes he had heard gunshots. When he proceeded towards that direction had seen a lorry toppled in front of PW02's house. He had seen the deceased under the vehicle and helped others take the deceased out and send him to the hospital.

PW11 was the OIC Crimes of Welipenna Police Station. On the day of the incident, he was on mobile duty and he had gone to the place of incident after being informed about the incident by PW 14 the reserve duty officer of Welipenna Police Station. At the scene of incident, he had seen the Appellants and he recovered the gun from the 1<sup>st</sup> Appellant's possession. According to him there was evidence of illicit transport of timber and had taken 6 logs of Teak and 1 Jack log into his custody.

All above named witnesses confirmed that the road which led to the place of incident had been properly illuminated at the time of the incident.

The JMO who conducted the post mortem had noted one gunshot entry wound in the back of the head of the deceased which had damaged the brain and caused the death. Smell of alcohol had been noted in the stomach contents of the deceased.

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In this Appeal it is appropriate to consider both appeal grounds together.

Firstly, the Appellants jointly contend that the Learned High Court Judge has erred in his judgement that the 2<sup>nd</sup> Appellant exceeded the limits of the power vested in him as a police officer which led to the death of the deceased.

Secondly, they contend that in the circumstances of this case, since this was an act committed in the course of carrying out their duties by the Appellants, the Learned High Court Judge ought not to have come to a finding of guilt against either of the Appellants.

On the day of the incident 1<sup>st</sup> Appellant was in charge of the Welipenna Police Station as most of the police officers were attending a farewell party held at the residence of the outgoing officer in charge. At about 8.45pm they had received information regarding illicit timber transportation at one Odiris Mudalali's house. As five such calls were repeatedly received by the police the 1<sup>st</sup> Appellant who was in uniform called the 2<sup>nd</sup> Appellant to accompany him on the inquiry. The 2<sup>nd</sup> Appellant had gone for the raid in civil, possessing a gun. After making relevant entries, the duo had gone to Indigasthuduwa as per the information. The road leading to Indigasthuduwa is a tarred road. When they were proceeding on the said road, they had seen a Canter lorry coming in the opposite direction with a load of timber. The Appellants immediately got off from the motor bike and using their hands and by flashing the torch had signalled the driver to stop the lorry. Defying their order, the lorry had sped up in the direction of the Appellants threatening their lives. The 1<sup>st</sup> Appellant who is the senior officer had told the 2<sup>nd</sup> Appellant to stop the lorry by any means. Hence the 2<sup>nd</sup> Appellant had opened fire aiming at the tyres of the moving vehicle. As the first shot missed the tyres and hit the ground, he had slightly raised the weapon and fired few more shots. At this instance the lorry went out of control and toppled in to a ditch nearby.

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This situation has to be considered very carefully. After the information was relayed, the Appellant went to place and tried to stop the lorry which carried the timber. PW 11 in his evidence very clearly stated that there was evidence of illicit transportation of timber. Several logs had been taken into his custody.

According to investigating officer PW10, the road where the shooting had occurred is not a level road. The said incident had happened on a slope. According to PW10, it is very difficult to take aim when a vehicle is speeding on a slope.

According to Section 56 of the Police Ordinance 16 of 1865 it states that:

“Every police officer shall for all purpose in this Ordinance contained be considered to be always on duty, and shall have the powers of a police officer in every part of Sri Lanka, it shall be his duty;

- a) To use his best endeavours and ability to prevent all crimes, offences and public nuisances;
- b) To preserve the peace;
- c) To apprehend disorderly and suspicious characters;
- d) To detect and bring offenders to justice;
- e) To collect and communicate intelligence affecting the public peace; and
- f) promptly to obey and execute all orders and warrants lawfully issued and directed to him by any competent authority.”

When a police officer receives information regarding an offence, he is often required to make quick decisions in maintaining the law and order. Further he is only be protected if he discharges his duties in ‘good faith’ that is with due care and protection.

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**Wing-Cheong Chan | Michael Hor | Neil Morgan | Jeeva Niriella | Stantly Yeo** in their book titled “Criminal Law in Sri Lanka” at page 255 state that:

“Some public servants such as the police and military personnel have an important role to play in maintaining law and order or pursuing justice in a civil society. The law imposes certain duties on these public servants which, along with the powers which go with them, are not normally accorded to ordinary civilians. There will invariably be occasions when, in the discharge of these duties, the public servant causes harm which constitute an offence. There will also be circumstances when public servants meet physical resistance when performing their duties, and the Penal Code gives them a number of protections. Generally speaking, the special protections afforded to public servants are the result of the ‘Law and Order’ objectives of 19<sup>th</sup> century British interests in India and outlying colonies”.

In this case the Appellants after receiving information had promptly gone to the place of incident and tried to prevent a crime in good faith. As the 1<sup>st</sup> Appellant told the 2<sup>nd</sup> Appellant that culprits should somehow be apprehended the 2<sup>nd</sup> Appellant with best of his ability tried to stop the lorry but unfortunately a bullet struck the deceased. It is pertinent to note that when the Appellants signalled to the driver stop the lorry, he had driven the lorry towards the Appellants placing their lives at high risk and risking their lives the lorry proceeded non-stop. Further the road is in a declining angle and according to the investigating officer it is very difficult to take aim at that place. According to the JMO the stomach contents of the deceased smelt of alcohol.

Considering the appeal grounds advanced by the Appellant it is quite appropriate that this matter should have been considered under section 69 of the Penal Code. They should have been awarded the benefit under the said Section. The Learned High Court Judge ought not have come to a finding of guilt against either of the Appellants.

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Considering all the circumstances stressed before this court I conclude that this is an appropriate case to consider for the Appellants benefit, their entitlement under Section 69 of Penal Code;

“Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of mistake of law in good faith believes himself to be, bound by law to do it”.

Due to aforesaid reasons, we set aside the conviction and sentence imposed by Learned High Court Judge of Kalutara dated 02/07/2020 on the Appellants. Therefore, they are acquitted from the charge.

Accordingly, the appeal is allowed.

The Registrar is directed to send a copy of this judgment to the High Court of Kalutara along with the original case record.

**JUDGE OF THE COURT OF APPEAL**

**DEVIKA ABEYRATNE, J**

I agree

**JUDGE OF THE COURT OF APPEAL**