IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an Appeal under Section 331 of the Criminal Procedure Act No. 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Plaintiff

Court of Appeal Case No. HCC/0358/2019

V.

High Court of Kandy Case No. HC/216/2007

Veebeddehenegedara Upali Nawaratne

Defendant

AND NOW

Veebeddehenegedara Upali Nawaratne

Accused - Appellant

V.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J. (P/CA)**

SAMPATH B. ABAYAKOON, J.

COUNSEL	:	Palitha Fernando, PC with Neranjan Jayasinghe for the Accused – Appellant. Shaminda Wickrema SC for the Respondent.
ARGUED ON	:	26.10.2021 and 27.10.2021
WRITTEN SUBMISSIONS FILED ON	:	01.11.2021 and 25.09.2020 by the Accused - Appellant. 17.11.2021, 22.07.2021 and 15.03.2021 by the Respondent.
JUDGMENT ON	:	16.12.2021

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K. PRIYANTHA FERNANDO, J.(P/CA)

1. The accused appellant (hereinafter referred to as appellant) was indicted in the High Court of *Kandy* on one count of murder punishable in terms of Section 296 of the Penal Code. Upon conviction after trial, he was sentenced to death. Being aggrieved by the conviction and the sentence the appellant preferred the instant appeal.

2. The following grounds of appeal were urged by the counsel for the appellant:
   I. The evidence of the main witness of the prosecution (PW2) fails the test of credibility and the test of consistency.
   II. The evidence of PW3 regarding the dying declaration fails the test of credibility.
   III. The reasons given by the learned High Court Judge to reject the dock statement of the accused appellant are against the law.
   IV. The learned High Court Judge has convicted the accused appellant for murder when there is evidence to bring down the culpability of the accused appellant under one or more of the exceptions in Section 294 of the Penal Code.

3. Although the above four grounds of appeal were urged in the written submissions, the learned President's Counsel for the appellant pursued at the argument only the grounds 1 and 4.

4. Facts in brief:

The facts of the case as related at the trial by the only eyewitness to the incident PW2 (wife of the deceased) are as follows:

> On the day of the incident her husband (deceased) had gone for an interview, and in the afternoon the witness had gone to a meeting of *Kandurata* Development Bank Thrift and Credit Co-operative Society held at the village temple, with the child who was about one and half years old. On the way back home both of them have met each other. When the two of them were walking towards their house, the deceased had gone fast to change his clothes as he had been wearing shoes from morning and she had been walking slowly carrying the child. According to her, she had been carrying the child and at times the child had walked with her slowly. When she was coming close to her house, she had seen her husband after changing clothes looking at them wearing a sarong. The distance between the witness and the deceased had been about twenty-five feet. At that point in time, she has seen the appellant coming from the right-hand side of the deceased carrying a knife. Then she has shouted to alarm the husband. The appellant has then cut the deceased's left hand. When he cut the deceased for the second time, she had become unconscious. When she regained consciousness, she had felt her vision was blurred and the child had also been there. She had then followed the trail of blood. Then one *Kumarasinghe* had told her that her husband was there and to bring somebody to take him. Then she has seen the villagers carrying the husband on a chair. She has made a statement to the police and she also had identified the husband's body before the doctor at the hospital.

5. At the argument stage the learned President's Counsel for the appellant pursued only the grounds of appeal no. 1 and 4. The learned President's Counsel submitted that the wife of the deceased (PW2) could not be considered a credible witness. It is the contention of the President's Counsel that PW2 has never seen the incident and that is why she conveniently fell unconscious so that she need not testify as to how the deceased received the rest of the injuries and how the deceased went or was dragged to the land where he was found.

6. The learned State Counsel submitted that PW2 has been consistent right throughout and that she could be relied upon. Her evidence suggests that she was telling the truth and that she was not framing the appellant.

7. PW2 in her evidence has given a clear account of what happened and what she saw on the fateful day. Although no contradiction was marked in her evidence and her previous statements, she was questioned by the defence Counsel at the trial that she had told the learned Magistrate that one *Rajini* told her that the deceased was fallen with injuries in *Raja's* land. She has said that she could not remember saying so. However, it is to be noted that no omission was brought to the notice of the learned High Court Judge that she has not mentioned to the learned Magistrate what she saw as testified in the High Court. Her evidence has been consistent. The prosecution has failed to discredit her, and her evidence could be relied upon.

8. The main argument urged by the learned President's Counsel for the appellant is that the prosecution has failed to prove the elements of murder against the appellant and therefore the learned High Court Judge erred when he convicted the appellant for murder instead of culpable homicide not amounting to murder. It is the contention of the learned President's Counsel that the prosecution has failed to prove that the appellant intended to cause the death of the deceased. Further, prosecution has failed to prove by medical evidence that the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. The learned President's Counsel argued that therefore, the prosecution has failed to prove the offence of culpable homicide committed by the appellant amounts to murder as it failed to fulfill the necessary requirements mentioned in section 294 of the Penal Code.

9. The learned State Counsel for the Respondent submitted that the prosecution has proved beyond reasonable doubt that the appellant intended to cause the death of the deceased. It is his contention that the sequence of events proves the intention of the appellant. The learned State Counsel submitted that it is not necessary to go into the knowledge as the murderous intention is proved as provided in limb 1 of section 294 of the Penal Code.

10. The learned State Counsel brought to the attention of the Court the decided case of ***Bastian Silva v Appuhamy 4 NLR 47*** where it was held that it is not the nature of the wound but the intention of the accused which is decisive as to the nature of the crime committed. In ***Bastian Silva*** the accused after wounding the victim, wounded with a knife three other persons who tried to arrest him. The accused in that case was charged for causing hurt to one *Bastian Silva* and wounding three other persons. After taking into consideration the evidence including the medical evidence, the Court held that it was consistent with this being an attempt to murder.

11. In the instant case there were eleven injuries altogether observed by the Judicial Medical Officer. All were abrasions and superficial cut injuries except for injury no.11 which is a deep cut injury over the front aspect of the left elbow which injured the muscles, nerves, vessels and bone. However, the Medical Officer *Dr. Arjuna Thilekaratne* (PW5) in his evidence clearly stated that out of the injuries, injury no. 11 was the deep injury which was grievous. It was categorized as an injury endangering life. He further said however injury no.11 cannot be considered as an injury which will certainly cause the death of the deceased. In his evidence he said (at pages 150 -151 of the brief),

ප්‍ර "බරපතල ලෙස මහත්මයා විසින් හදුනාගත් එක් තුවාලයක් තියනවා කිවුවා එය තමයි 11 වන තුවාලය?"

උ "ඔව් ජීවිතයට හැනි පැමිණවිය හැකි තුවාලය."

ප්‍ර "එය කැපුම් තුවාලයක් මේ 11 වන තුවාලය?"

උ "ඔව්."

ප්‍ර "මහත්මයා කිවුවා අනිවාර්යයෙන් මරණය ගෙන දිය හැකි තුවාලයක් ලෙස හදුනාගන්න බැහැ කිවුවා?"

උ "ඔව්."

ප්‍ර "අප්‍රමාදීව ප්‍රතිකාර කලානම් 11 වන තුවාලය සුවකරගන්න තිබුනා?"

උ "ඔව්."

12. In the case of ***R.G. Somapala v The Queen 72 NLR 121*** it was held:

"The 3rd limb of s. 294 postulates one element which is also present in the second clause of s. 293, namely, the element of the intention to cause bodily injury; but whereas the offence of culpable homicide is committed, as stated in the second clause of s. 293, when there is intention to cause bodily injury likely to cause death, the offence is one of murder under the 3rd limb of s. 294 only when the intended injury is sufficient in the ordinary course of nature to cause death. In our opinion, it is this 3rd limb of s. 294 which principally corresponds to the second clause of s. 293 ; and (as is to be expected) every intention contemplated in the latter second clause is not also contemplated in the former 3rd limb. An injury which is only likely to cause death is one in respect of which there is no certainty that death will ensue, whereas the injury referred to in the 3rd limb of s. 294 is one which is certain or nearly certain to result in death if there is no medical or surgical intervention. This comparison satisfies us that the object of the Legislature was to distinguish between the cases of culpable homicide defined in the second clause of s. 293, and to provide in the 3rd limb of s. 294 that only the graver cases (as just explained) will be murder. ..."

13. In terms of the 3rd limb of section 294 of the Penal Code, culpable homicide is murder if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. If the prosecution relies on the above 3rd limb of Section 294, it is incumbent upon the prosecution to prove that the said bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. This issue has been discussed in *Penal Law of India by Dr. Sri Hari Singh Gour 11th Edition* at page 2398. It is stated at page 2398 :

> *"In all cases where a person dies, it is the duty of the prosecutor to put a question to the doctor when he is examined in Court, as to the nature of the injuries, i.e., whether they were sufficient in the ordinary course of nature to cause death, or likely to cause death, because the intention or the knowledge of the person is to be inferred only from the nature of the injuries. Especially in the case of a murder, it is the bounden duty of the prosecutor to put the question to the doctor. Whatever may be the opinion of the judge or the prosecutor, it is always the duty of the Court as well as the prosecutor in murder case to have medical evidence on the point of the nature of the injuries. Where this is not done the sessions judge, when the case comes up before him, ought to examine the doctor."*
>
> It was further stated, *"Absence of medical evidence, the Court must regard the injury as a lesser injury, and hold that it is not a case of culpable homicide, amounting to murder. It all depends on the evidence about the injuries. If the injury is such that the Court might itself think it to be sufficient in the ordinary course of nature to cause death, even without medical testimony, it may not be open in some cases to say that it is a case of murder, and , therefore, it is desirable that there must also be medical testimony."*

14. In the instant case the Medical Officer who did the autopsy on the body of the deceased was called to give evidence. However, the prosecution has failed to elicit from the Medical Officer whether the injury no. 11 or the other injuries were sufficient in the ordinary course of nature to cause death, or likely to cause death. As mentioned before, neither the prosecutor nor the Judge has clarified this position from the Medical Officer. Therefore the prosecution has failed to prove that the culpable homicide in this case amounts to murder in terms of limb 3 of Section 294 of the Penal Code.

15. I am unable to agree with the submission of the learned State Counsel that according to the evidence adduced in the trial Court when the accused caused the injuries on the deceased he intended to kill him. If he intended to kill him, the accused could have cut a vital part of the body like the head, neck, chest or abdomen before he left the deceased. Hence I find that it is unsafe to convict the accused for murder. I set aside the conviction for murder and the consequential sentence to death and convict the accused appellant for culpable homicide not amounting to murder punishable in terms of Section 297 of the Penal Code.

16. The appellant is sentenced to ten years' rigorous imprisonment. In addition the appellant is ordered to pay a fine of Rupees Ten Thousand, in default of payment of the fine, three months' simple imprisonment to be served.

Appeal is allowed to the above extent.

PRESIDENT OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL