
**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.

Court of Appeal Case No.
CA/HCC/0408/2017
High Court of Gampaha
Case No. HC/19/1999

Herath Mudiyansele Newton
Premasiri

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B.Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Palitha Fernando, P.C. for the Appellant.**
Madawa Tennakoon, DSG for the
Respondent.

ARGUED ON : **05/04/2022**

DECIDED ON : **04/05/2022**

JUDGMENT

P. Kumararatnam, J.

The Accused-Appellant hereinafter referred to as the Appellant and four others were indicted for being members of an unlawful assembly with the common object of causing hurt to Balasuriya Archchilage Sisira Senerath on the 30th of March 1995 and during the course of the same transaction (i.e.: while being members of the said unlawful assembly) causing the death of Karawita Mudiyanseleage Priyantha Nirodha Karawita, an offence punishable in terms of Section 296 read with Section 146 of the Penal Code. They were also indicted for causing hurt to Balasuriya Arachchilage Sisira Senerath, an offence punishable in terms of Section 315 read with Section 146 of the Penal Code. Corresponding charges in respect of death of Karawita Mudiyanseleage Priyantha Nirodha Karawita and causing hurt to Balasuriya Arachchilage Sisira Senerath, on the basis that they were committed in furtherance of a common intention were also included in the indictment.

After a non-jury trial, the Learned High Court Judge has found the Appellant guilty in terms of both sections 296 and 315 respectively and sentenced him to death under section 296 on 22/11/2017. For the charge under section 315 of the Penal Code he was sentenced to 01-month rigorous imprisonment.

During the pendency of the trial the 2nd and the 4th Appellant had passed away. At the conclusion of the trial, the Learned High Court judge had acquitted all the accused except the 1st accused.

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

The Learned President's Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via Zoom from prison.

At the very outset, Learned President's Counsel appearing on behalf of the Appellant had submitted to this court that he will be making submissions only with regards to the sentence as the conviction under Section 296 of the Penal Code cannot stand, whereas it should have been considered under Section 297 of Penal Code on the basis of a sudden fight.

Background of the Case

In this case PW1, the injured person giving evidence said that he worked in a brick kiln and shop which was situated in close proximity to his house. The deceased had also stayed in the land adjoining to PW1's house and the above-mentioned brick kiln in which he worked. Another person called Siriwardena also worked there. In the night of 30/03/1995, around 11.00 p.m. while he was sleeping, he had heard several people shouting in front of his house and had recognised the voice of the Appellant. When he made his way towards the commotion, to check the reason for all the great noise, he had seen the Appellant and all the accused mentioned in the indictment present and standing close to the house of a person named Rathnasuriya. He had observed that the Appellant was carrying a torch and a pointed knife. When he tried to appease the people gathered, the Appellant had raised his voice against him and attacked him with the knife he was carrying. As a result, he had sustained injuries on his abdomen. At that time the deceased had arrived and when he had tried to take him away from the scene, there had ensued a scuffle between the Appellant and all the other accused. As a result, the deceased had sustained a fatal stab

injury which is said to have been inflicted by the Appellant. The deceased had made a dying declaration implicating the Appellant while he was receiving treatment in the hospital and had thereafter passed away.

According to the post mortem report it was revealed that the deceased had consumed alcohol at that time. Further, the Appellant also sustained injuries over his chin which had been sutured in the hospital.

According to the doctor who held the post mortem stated that the death of the deceased had been occasioned by toxæmia.

In **Mendis v. The Queen** 54 NLR 177 the court held that:

“Where toxæmia supervened upon a compound fracture which resulted from a club blow inflicted by the accused and the injured person died of such toxæmia-

(...) as the injured man’s death was not immediately referable to the injury actually inflicted but was traced to some condition which arose as a supervening link in the chain of causation, it was essential in such cases that the prosecution should, in presenting a charge of murder, be in a position to place evidence before the Court to establish that “in the ordinary course of nature” there was a very great probability (as opposed to a mere likelihood) (a) of the supervening condition arising as a consequence of the injury inflicted, and also (b) of such supervening condition resulting in death.”

The Learned President’s Counsel, therefore, submits that the medical evidence is totally inconclusive and contradictory, and that the conviction for murder has not been clarified by the prosecution in this case.

It was also revealed in cross examination that during a previous incident a person named Janaka had been accused of sexually harassing the Appellant’s wife (3rd accused) of the Appellant. Due to this an enmity had existed between these people.

As there was a fight and the Appellant had also sustained injuries, the Learned President's Counsel at the very outset informed this court that he will only be contesting the sentence in this case on the basis of a sudden fight. He made this application under Exception 4 to Section 294 (Murder) of the Penal Code.

The above-mentioned 4th Exception provides as follows:

“Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner”.

Explanation: - It is immaterial in such cases which party offers the provocation or commits the first assault.

The Learned Deputy Solicitor General, in keeping with the highest tradition of the Attorney General's Department, conceded that there is evidence of a sudden fight but made submission in support of the judgment of Learned High Court Judge.

In the event where the defence of sudden fight has not been taken up on behalf of the Appellant, and also the injury alleged to have been inflicted on the Appellant, the Learned High Court Judge should have considered the evidence which favours the Appellant more meticulously.

In **The King v Bellana Vitanage Eddin** 41 NLR 345 the court held that:

"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 on record, although such defence was not raised nor relied upon by the accused".

In **Luvis v. The Queen** 56 NLR 442 the court held that:

“Having regard to the evidence, the fact that sudden fight was not specifically raised as a defence did not relieve the trial judge of the duty of placing before the jury that aspect of the case.”

Considering all the circumstances stressed before this court I conclude that this is an appropriate case to consider for the Appellant’s benefit, his entitlement for a plea of sudden fight under Exception-4 to Section 294 of the Penal Code.

Hence, I set aside the death sentence and convict the Appellant for culpable homicide not amounting to murder under Section 297 of the Penal Code. I sentence the Appellant for 10 years rigorous imprisonment commencing from the date of conviction namely 22/11/2017.

Subject to the above variation the appeal is dismissed.

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

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree

JUDGE OF THE COURT OF APPEAL