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

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act 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/0220/2017

High Court of Chilaw Case No:

HC/22/2012

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Alpenerislage Nishantha Jayalath alias Pol Kandana Nishantha

ACCUSED

AND NOW BETWEEN

Alpenerislage Nishantha Jayalath alias Pol Kandana Nishantha

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Anil Silva, P.C. with A. Bandara,

for Accused Appellant

: Sudarshana De Silva D.S.G. for the Respondent

Argued on : 28-03-2022

Written Submissions : 14-05-2018 (By the Accused-Appellant)

: 29-08-2018 (By the Respondent)

Decided on : 23-05-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and sentence of him by the learned High Court Judge of Chilaw.

The appellant was indicted before the High Court of Chilaw on the following counts:

1. For causing the death of Harabage Samantha Kumara on 08-08-2010 and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.
2. At the same transaction causing injury by use of a sharp cutting instrument to Kandasami Dewadasa and thereby committing an offence punishable in terms of 315 of the Penal Code.

After trial, the learned High Court Judge of Chilaw found the appellant guilty on both the counts and he was sentenced to death with regard to the first count and was sentenced to two-year rigorous imprisonment with regard to the second count. He was also ordered to pay a fine of Rs. 7500/- and default he was sentenced to 6 months simple imprisonment.

At the hearing of this appeal, the learned President's Counsel urged the following two main grounds of appeal on behalf of the appellant.

1. There was no fair trial afforded to the appellant and hence, the conviction and the sentence cannot stand.
2. The evidence placed before the Court clearly establishes the basis for a conviction for culpable homicide not amounting to murder in terms of exception 4 of Section 294 of the Penal Code on the basis of a sudden fight, and therefore the conviction in terms of Section 296 of the Penal Code cannot be sustained.

The main basis for the first ground of appeal urged by the learned President's Counsel was that the Counsel who appeared for the appellant in the original Court had no right to withdraw from the case, whilst leading evidence of the appellant in his defence on the basis that the appellant was not giving evidence as per his advice.

It was his contention that this action of the learned Counsel has led to a great prejudice being caused to the appellant which amounts to no fair trial has been afforded to him.

However, since this Court is of the view that considering the first ground of appeal in detail would not be necessary, if the second ground of appeal urged, namely, that the conviction should have been in terms of Section 294 exception 4, rather than Section 296 of the Penal Code has merit, the said ground of appeal will be considered in preference to the first ground of appeal.

The facts placed before the High Court reveals that on the day of the incident namely, 08-08-2010, there was an 'elle' tournament at the Morakale ground which was the place of the incident. After the tournament, at around 7:00 p.m. in the night, several of the participants, including the deceased, the appellant, as well as the eyewitnesses were consuming liquor at the ground. They have all been sitting when the incident has occurred.

According to the evidence of PW-01 Kandasami Dewadas, who was also the injured in the incident, while the consuming of liquor was going on, he has suddenly seen the appellant attacking the deceased Samantha who was also seated with them using what he thought was a club. In order to prevent the attack, he has put his hand in between and received a cut injury as a result. He has realized that it was not a club only because of the cut injury he has received. He has seen the deceased being attacked several times by the appellant. He was clear in his evidence that prior to the attack there was no previous quarrel between them and they were singing and enjoying the moment and the appellant was standing and the deceased was seated.

The evidence of all the other eyewitnesses was on the same line which clearly suggests that there was no previous provocation and the incident was a result of an unexplained sudden fight. It appears from the line of defence taken by the Counsel who represented the appellant at the High Court trial was that there was a fight between all of the persons who were present over the liquor they consumed, and this incident occurred as a result.

He has not put forward a defence based on a sudden fight between the appellant and the deceased. Which may be the reason why the Counsel who represented the appellant at the trial decided to withdraw from the case when the appellant gave evidence under oath in his defence.

The appellant giving evidence has admitted that it was he who caused the injuries to the deceased. He has reasoned out by saying while they were consuming liquor and having a party at the ground, there was a fight over a liquor bottle and as a result the deceased tried to attack him and he got hold of what he was being attacked and hit the deceased twice and ran away from the scene.

It appears that his position before the learned Counsel who appeared for him withdrew from the case had been that it was somebody else who had attacked the deceased. It is therefore clear that the appellant has taken different stands

at different points of the trial, which appears to be the reason for the learned High Court Judge to reject his defence of sudden fight and finding him guilty as charged.

It was the position of the learned Deputy Solicitor General (DSG) for the respondent that although there is evidence to suggest that this was a result of a sudden fight, he is supporting the conviction mainly based on the injuries inflicted on the deceased by the appellant and the police investigations relating to the incident and also the recovery of the murder weapon in terms of Section 27 of the Evidence Ordinance, about 150 feet away from the scene of the crime.

It was contended by the learned DSG that according to the medical evidence, there were 18 injuries inflicted on the deceased and injuries number 2 to 7 have been necessarily fatal cut injuries. All the injuries were on the rear side of the body and evidence clearly establishes the fact that the deceased was in a seated position when the attack occurred. It was his stand that since the appellant has not put forward any defence on the basis of a sudden fight, the witnesses called on behalf of the prosecution had not been afforded an opportunity of explaining such a stand and therefore, it was correct for the learned High Court Judge to reject the appellant's stand taken only when he was giving evidence in his defence.

He brought to the notice of the Court the necessity of putting forward any defence taken up by an accused person when the relevant witnesses were giving evidence. It was his view that the conviction and the sentence need not be disturbed as the learned High Court Judge has reached his conclusions correctly and having considered the evidence placed before the Court in its correct perspective.

Having considered the submissions made by the learned President's Counsel on behalf of the appellant, as well as the learned DSG on behalf of the respondent, this Court is of the view that the evidence placed before the High

Court has clearly established that it was the appellant who caused the fatal injuries resulted in the death of the deceased. Hence, the question that needs to be determined by this Court is that whether the incident amounts to murder, punishable in terms of Section 296 of the Penal Code as determined by the learned High Court Judge and supported by the learned DSG, or whether the incident amounts to culpable homicide not amounting to murder in terms of Section 294 exception 4 of the Penal Code, punishable in terms of section 297 of the Penal Code.

Exception 4 of Section 294 of the Penal Code reads 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 and unusual manner.**
>
> ***Explanation:***
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> **It is immaterial in such cases which party offers the provocation or commit the first assault."**

It is clear from the evidence adduced before the Court; the appellant has failed to raise a defence based on a sudden fight in terms of exception 4 of Section 294 of the Penal Code until he raised that defence when he was giving evidence under oath.

However, it is settled law that there is a duty cast upon a trial judge to consider whether there was evidence before the Court for such an exception to be considered, even if no such defence has been taken.

In the case of **King Vs. Belana Withanage Eddin 41 NLLR 345**, the Court of Criminal Appeal held:

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

In the case of **King Vs. Vidanalage Lanty 42 NLLR 317**, the Court of Criminal Appeal observed the following;

> There was evidence in this case upon which it was open to the jury to say it came within exception 4 of Section 294 of the Penal Code and that the appellant was guilty of culpable homicide not amounting to murder, however no such plea was put forward in his behalf. In the course of his address the presiding judge referred to this evidence as part of the defence story, but not as evidence upon which a lesser verdict might possible.
>
> **held:**
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> *"It was the duty of the presiding judge to so direct the jury that under the circumstances, the appellant was entitled to have the benefit of a lesser offence"*

In the appeal under consideration, the evidence led by the prosecution in itself clearly shows that there was no premeditation and it was a sudden fight and in the heat of passion upon a sudden quarrel. The evidence shows that the deceased, the appellant, as well as the other eye witnesses were enjoying their day, while consuming liquor when this incident happened suddenly. There was no evidence whatsoever of any premeditation by the appellant. There was no evidence to show that the appellant went searching for a weapon as a result of the sudden fight, but assaulted the deceased from a sharp cutting weapon that was available within his reach. This shows that the offender has not taken undue advantage of the situation. It is also evident that, all the persons present at the time of the incident were under the influence of liquor.

I am unable to agree with the contention of the learned DSG that there is no basis to consider the incident where the death of the deceased occurred, in terms

of Section 297 of the Penal Code, although he agrees that the incident has happened as a result of a sudden fight. Justifying his position, it was his contention that the medical evidence shows 18 injuries to the deceased out of which injuries 2 to 7 are necessarily fatal cut injuries and also the fact that the deceased had been attacked from behind.

He further points out that the medical evidence shows the injuries have been inflicted by using excessive force where it should have not been the case if it was a sudden fight happened at the spur of the moment. Hence, the clear intention of the appellant to kill the deceased has been established.

As I have discussed before, the evidence of the prosecution witnesses itself shows that the deceased and the appellant had no previous enmity between them, although the appellant in his evidence has stated that the deceased was in the habit of demanding ransoms during the weekend in the form of liquor and cigarettes.

The evidence shows that on the day of the incident, they were consuming liquor and enjoying. There is no evidence to show any premeditation by the appellant to attack the deceased. The only conclusion that can be reached under the circumstances is that the incident was a result of a sudden quarrel and the attack has been a result of the heat of passion.

There is no evidence to show that the appellant took undue advantage as evidence shows that he took something that was available in the vicinity and attacked the deceased, although there was no evidence as to who brought the sharp cutting weapon to the place where they were consuming liquor.

It is correct that the deceased has received 18 injuries to his body, but that in itself is not a reason to conclude that the appellant acted in a cruel or unusual manner. It is quite possible for a person to keep on attacking another due to a sudden emotion or passion that arises between the attacker and the attacked.

The position of the learned DSG that the appellant clearly had the intention of causing death when he attacked the deceased and therefore, his actions amount to an act of causing murder is concerned, I find that the provisions of Section 297 provide for situations of causing death with intention or causing such bodily injury as is likely to cause death or causing death by an act without any intention to cause death or to cause such bodily injury as is likely to cause death.

Section 297 provides for different levels of punishment depending on the intention and knowledge. I am of the view that the learned High Court Judge's rejection of the evidence of the appellant on the basis that such a ground of sudden fight was not taken when the prosecution witnesses gave their evidence was a misdirection. As discussed above, I am of the view that the evidence of the prosecution witnesses itself has established that this was culpable homicide not amounting to murder.

If the learned High Court Judge looked at the evidence in its totality, as he should have been, it is my considered view that the conviction should have been in terms of Section 297 of the Penal Code. Therefore, I hold that the conviction and the sentence on the first count preferred against the appellant cannot be allowed to stand, and hence, the conviction and the sentence on the 1st count is hereby set aside.

I hold that the appellant is guilty of culpable homicide not amounting to murder in terms of exception 4 of Section 294 of the Penal Code on the basis of a sudden fight, punishable in terms of section 297 of the Penal Code, and find him guilty on that basis on count 01.

Accordingly, I sentence the appellant for a term of 10 years rigorous imprisonment and for a fine of Rs. 25000/-. In default he shall serve an additional period of one-year simple imprisonment.

However, the sentence imposed on the appellant for the second count preferred against him shall remain the same.

Considering the fact that the accused has been in incarceration from the date of the sentence, the sentence is ordered to be effective from the date of the sentence, namely, 27-09-2017.

In view of the above determination, this Court is of the view that considering the first ground of appeal urged in detail would not be necessary.

Appeal allowed to the above extent.

Judge of the Court of Appeal

P. Kumararatnam,J.

I agree.

Judge of the Court of Appeal