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

In the matter of an appeal in terms of section 331 of the Criminal Procedure Act No.15 of 1979.

CA No: CA/HCC/ 0291/2017
HC: Puttalam: HC 08/2011

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

Complainant

Vs.

Coas Mohomod Mohomod Akbar

Accused

And now between

Coas Mohomod Mohomod Akbar

Accused- Appellants

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Pradeep Perera, AAL and Thisara Chamara AAL for the Accused-Appellant

Janaka Bandara, DSG for the Complainant-Respondent

Written Submissions: By the Accused-Appellant – 08.06.2018

By the Complainant-Respondent – Not filed

Argued on : 10.10.2022

Decided on : **31.10.2022**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Puttalam, dated 02.11.2017, by which, the accused-appellant, who is before this court via zoom platform, was convicted and sentenced to death for having murdered Siththi Kuressiya (the deceased) and committing the offence of murder, under section 296 of the Penal Code.

The charge against the accused persons was as follows;

> that on or about 04.11.2008, committed the offence of murder at Ethkalaya by causing the death of Siththi Kuressiya, which is an offence punishable under section 296 of the Penal Code.

On 04.12.2014 the learned State Council decided to amend the indictment for the culpable homicide not amounting to murder punishable under section 297 of the Penal Code. It was read over to the accused person on 02.03.2015 and the accused-appellant pleaded not guilty and opted for a non-jury trial which continue before the learned High Court Judge of the High Court of Puttalam on 02.03.2015. The prosecution led in evidence eight witnesses and for the defence, the accused-appellant gave a dock statement.

The judgment was delivered on 02.11.2017 and the death sentence was pronounced on the same date.

Being aggrieved by the said conviction and the death sentence the appellant preferred this appeal seeking to set aside the said judgment and the sentence dated 02.11.2017.

Learned Counsel for the accused-appellant has raised the following grounds of appeal;

(i.) The learned Trial Judge has failed to consider the contradictions.

(ii.) The learned Trial Judge has failed to consider that the prosecution has failed to prove the case beyond a reasonable doubt.

(iii.) The learned Trial Judge not considered the defence and the dock statement of the appellant.

(iv.) The learned Trial Judge has failed to consider the provocation and the exercising of the right of private Defence.

(v.) The learned Trial Judge considered the Evidence and circumstances and imposed an excessive sentence.

(vi.) The Learned Trial Judge has failed to consider the fact that the benefit of the doubt favours the Accused.

When this appeal was taken up for argument learned counsel for the accused-appellant informed court that he is challenging only the sentence. The deceased and the appellant both were from the same village. On 04.11.2008 on the date of question the appellant had an argument with the deceased's son called Naleer in respect of a mischief said to have been done to a foot bicycle which belonged to the appellant's disabled child.

The argument led to fighting between the appellant and the deceased's son. At that time the deceased came out of her house and requested them to go to the police station due to the

argument with her son. Soon after the request the appellant rushed to his house nearby and armed with a shotgun and opened fire at the gathering. As a result of the said firing, the deceased person got injured and succumbed to death.

The Learned Counsel for the accused-appellant argued that the Trial Judge has not considered the facts of the case and evidence elicited at the trial when imposing the death sentence on the appellant.

The Learned Trial Judge has not properly evaluated the plea of grave and sudden provocation and erred in law by applying the illustration of 294 (d) Murder which is as follows;

> 294 (d) A, without any excuse, fires a loaded gun into a crowd of persons and kills one of them. A, is guilty of murder, although he may not have had a pre-meditated design to kill any particular individual;

The Learned Trial Judge has failed to apply the ambit of proviso in law that read with section 294 of the Penal Code. The Trial Judge at the end of the trial ought to have considered all evidence led before court and impose the sentence accordingly by amending the indictment for a lesser conviction if there is sufficient evidence led for a lesser conviction.

In the cross-examination, PW 05 stated that there was an argument with the deceased's son based on mischief which was said to have been done to a foot bicycle which belonged to the appellant's child. The learned Counsel for the accused-appellant submitted that in terms of the evidence of PW 21 the appellant had no intention or pre-meditated design or prior plan to use any deadly weapon against the deceased or any other person involved in this case.

The Learned Trail Judge has erred in law by not appreciating the fact of this case which amounts to culpable homicide not amounting to murder on the basis of knowledge of the appellant at the time of the incident. On behalf of the appellant, it was further argued that the learned Trial Judge has failed to properly evaluate the evidence elicited from prosecution which exhibited the appellant had a reasonable cause to have an argument with the deceased’s son.

The learned Counsel for the accused-appellant states that the learned Trial Judge has failed to analyse the evidence in a fair and just manner. In setting out the legal principles, he has misdirected himself about how contradictions and omissions should be considered. Since the dispute was between known parties and as the witnesses were closer in a relationship as well as affinity to the deceased as demonstrated through their evidence, they were impartial witnesses as found to be by the learned High Court Judge.

It is my view that the learned High Court Judge has gone out of the way to find excuses for the contradictions and omissions and therefore failed to give the benefit of the doubt to the appellant as required in law in a criminal case.

It was the contention of the learned Deputy Solicitor General who appeared for the respondent that the prosecution case was based on strong eyewitness testimony. He has strongly implicated the culpability of the accused. It is important to note that the said argument has some merit. At the same time, it cannot be ignored that the deceased and the appellant were engaged in a fight before this unfortunate incident that took place. That fact was not seriously considered by the learned Trial Judge.

The learned Trial Judge observed that the accused-appellant was not having a murderous intention. I do agree with that as there was no evidence to prove it was a pre-planned murder.

The accused-appellant argued with the deceased's son.

In the case of Farook vs. AG 2006 (3) SLR 174, it was stated as follows;

> "As regards the attempt to bring the case to one of culpable homicide not amounting to murder mainly on the basis that there is no intention to cause death."

In Ariyadasa vs. AG 2012 (1) SLR 84 it was held, that the prosecution must prove that the injury is sufficient to cause the death in the ordinary course of nature among the following facts;

(i) It must establish quite objectively that a bodily injury is present.

(ii) The nature of the injury must be proved. These are purely objective investigations.

(iii) It must be proved that there was an intention to inflict that particular body injury.

(iv) That is to say that it was not accidental or unintended or some other kind of injury was intended.

Once the aforesaid 4 elements are established only, then the offence of murder under section 294 is established. If the prosecution was not able to prove even a single condition amongst the above, then the offence of murder will not be proved.

The first limb in section 294 states that culpable homicide is murder if the act in which death is caused is done to cause death. The second limb deals with acts done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom, that harm is caused. The third limb discards the test of subjective knowledge. It deals with acts done to cause bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. The fourth limb comprehends generally, the commission of imminently dangerous acts which must in all probability cause death.

Per Soertsz J in R v Chandrasekera 44 NLR 97, Where "by involving the fact in issue in sufficient doubt the accused *ipso facto* involves in such doubt an element of the offence that the prosecution had to prove .... In such a case the proper view seems to me to be that the accused succeeds in avoiding the charge of murder, not because he has established his defence but because by involving the essential elements of intention in doubt, he has produced the result that the prosecution has not established a necessary part of its case. "

When this matter was taken up for argument the learned counsel for the accused-appellant submitted that he is not challenging the conviction. As the learned Trial Judge was convicted for murder, the indictment was amended on the 04.12.2014, for the offence of culpable homicide not amounting to murder, under section 297 of the Penal Code. The learned counsel for the appellant and the respondent requested for a lessor punishment as the accused-appellant did not have any intention or motive to inflict injury. It is evident that the important facts were not considered by the learned Trial Judge on convicting the accused-appellant of the murder charge.

The learned Trial Judge has imposed the death sentence for the culpable homicide not amounting to murder under section 297 of the Penal Code. The Court was shocked over the said sentence. However, the circumstances in this case clearly establish the fact that the accused-appellant would have lost control over the incident which has taken place near his residence.

In this case, the learned Trial Judge has failed to consider the dock statement of the accused-appellant and the fact that the deceased's son provoked the accused-appellant and caused the sudden fight. The accused-appellant had to exercise the right of private defence.

The attendant circumstances warrant a conviction of culpable homicide not amounting to murder based on continuous and cumulative provocation. Our Judgements interpreted the phrase sudden provocation to mean that provocation should consist of a single act which occurred immediately before the killing so that there was no time for the anger to cool and the act must have been such that it would have made a reasonable man to react in the manner as an accused-appellant did.

Therefore, it is my view that imposing the death sentence is not reasonable, just and equitable and it is a violation of the right to self-defence.

For the reasons set out above, I conclude that the learned High Court Judge had misdirected himself by failing to evaluate the said material in favour of the accused-appellant.

I, therefore, decide to set aside the death sentence and replace it with 7 years of rigorous imprisonment with effect from 02.11.2017 and a fine of Rs. 5,000/- and in default 3 months simple imprisonment. Further, I decide to impose Rs. 100,000/- as compensation to the immediate relation of the deceased person. In default of that 10 months, simple imprisonment is imposed.

Sentence altered.

Appeal partly allowed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal