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

In the matter of an Appeal made under 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/0422/2018

High Court of Kandy
Case No. HC/124/2011

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

COMPLAINANAT

Vs.

1. Muniyandi Chandramoorthy
2. Muniyandi Harischandra

ACCUSED

NOW AND BETWEEN

1. Muniyandi Chandramoorthy

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE	:	**Sampath B. Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**Indica Mallawaratchy for the Appellant.** **Maheshika Sila, DSG for the Respondent.**
ARGUED ON	:	**05/10/2022**
DECIDED ON	:	**02/11/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) along with 2nd accused were indicted by the Attorney General on following charges:

1. On or about the 22nd May 2008 the accused committed the murder of Suppiah Sathiyaseelan which is an offence punishable under Section 296 read with Section 32 of the Penal Code.
2. In the course of the same transaction for committing simple hurt to Suppiah Raja which is an offence punishable under Section 314 read with Section 32 of the Penal Code.
3. In the course of the same transaction for committing mischief to a three-wheeler which is an offence punishable under Section 410 read with Section 32 of the Penal Code.

As the Appellant and the 2nd accused opted for a non-jury trial, the trial commenced before a judge and the prosecution had led seven witnesses and marked production P1-2 and closed the case. Learned High Court Judge having satisfied that the evidence presented by the prosecution warrants a case to answer, called for the defence and explained the rights of the accused. Both the Appellant and the 2nd accused gave evidence from witness box and closed their case.

After considering the evidence presented by both the prosecution and the defence, the Learned High Court Judge had convicted the Appellant for 1st and 2nd counts and acquitted from 3rd count. Accordingly, he was sentenced to death for the count 01 and imposed 06-months rigorous imprisonment for the 2nd count with a fine of Rs.1000/-. In default, 03 months rigorous imprisonment ordered. Also ordered a compensation of Rs.5000/- payable to PW2. In default 03 months rigorous imprisonment imposed.

The 2nd accused was acquitted from the 1st and 2nd counts and was convicted for the 3rd count only. Accordingly, he was sentenced to 1-year rigorous imprisonment and suspended the same for 10 years. Further a fine of Rs.10000/-was ordered with a default sentence of 6 months rigorous imprisonment. He was ordered to pay a compensation of Rs.75000/- to PW1 and in default, 1-year rigorous imprisonment was imposed. Finally, the 2nd accused was ordered to pay Rs.2000/-to the fund set up under Section 29 of Assistance to and Protection of Victims of Crime and Witnesses Act No. 04 of 2015 with a default sentence of 03 months rigorous imprisonment.

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

The Learned 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. At the hearing the Appellant was connected via Zoom platform from prison.

The following Grounds of Appeal were raised on behalf of the Appellant.

1. The Learned High Court Judge has failed to address his judicial mind to the element of mens rea on the part of the Appellant, as to whether he entertained a murderous intention as opposed to knowledge.
2. The Learned High Court Judge has failed to evaluate the defences of sudden fight, private defence and grave and sudden provocation embarked upon by the Appellant thereby occasioning in a serious miscarriage of justice.
3. Medical evidence too warrants a lesser culpability.

The background of the case *albeit* **briefly is as follows:**

According to PW2, Rajendran, on the date of incident he had come to attended a funeral at Kabaragala. As he could not come on time, he could not attend it but stayed at the deceased's house where the funeral took place. As he had come to Kabaragala after about 20 years, his deceased brother had suggested to visit his sister Valliamma, whose house is situated about 10 Km away from the deceased's house. For this visit 05 people had gone in a three-wheeler. PW1 had driven the three-wheeler while PW2, the deceased, his sister and another person travelled in the rear seat. All left the house at about 9.30 p.m. and reached there at about 11.00 p.m. Firstly, this witness and his sister had gone to Valliamma's house and knocked the door. As no immediate response from the house, the deceased also came there and shouted that relations from Colombo had come to see Valiamma. After that the door was opened but the 2nd accused had shouted that they don't have any relations in Colombo. Due to these unpleasant utterances a fight had erupted between them. Hearing the commotion, the Appellant had come to the scene armed with a pole and tried assault PW2, but had struck on the stomach of the deceased. As it was a painful blow, the deceased was taken

to Madolkelle Hospital, but was sent back home declaring that the injury was not serious one. But he died after two days of the incident at his residence.

In the cross examination the witness admitted that all men except PW1 had consumed liquor and they were under influence of liquor at that time.

PW1 and PW3 also corroborated the evidence given by PW2.

According to the JMO who held the post mortem, had stated that the death had occurred due to Peritonitis following perforation of small intestine following blunt trauma due to an assault with a blunt object.

The Appellant along with the 2nd accused had surrendered to the police after the death of the deceased. Both had given evidence from the witness box and closed their case.

As the appeal grounds raised by the Learned Counsel for the Appellant are interconnected, I decided to consider all the appeal grounds collectively.

The Learned Counsel for the Appellant strenuously argued that the incident had happened due to a sudden fight which had been created by deceased's party when they went to pay a visit to Valliamma's house. PW2 admitted that all three men including him and the deceased were under influence of liquor at that time and the deceased's party had gone to Valliamma's house at the late hours of the day. All eye witnesses admitted that a fight had ensued between the parties at that time. Further PW2, had specifically said that the single assault which had been aimed at him struck on the deceased's stomach. With this evidence the Learned Counsel argued that the prosecution has failed to prove the existence of murderous intention of the Appellant.

The essence of criminal law said to lie in the maxim "actus non facit reum nisi mens sit rea". The essence of an offence is the wrongful intent, without which it cannot exist. In this case it is very clear from the evidence given by

PW2, that although the said single blow was aimed at him, but had struck on the deceased.

In **Alo Singho v. Attorney General** [1984] 1 SLR 30 the court held that:

> *"It is important to note that, in the instant case, the appellant had inflicted only a single stab injury in circumstances indicative of the fact that he had acted on the spur of the moment, without pre-meditation. No motive was alleged by the prosecution against the appellant. Having regard to the above facts, it seems to me that the misdirection complained of, could well have caused prejudice to the appellant. In my view, it is unsafe to assume that the jury would have found a murderous intention to have been proved beyond reasonable doubt, had they been told that the presumption was one of fact which could be rebutted on a consideration of all the circumstances of the case. However, there could be no doubt that the appellant had the knowledge that the injury was likely to cause death, and was, therefore, guilty of the lesser offence of culpable homicide, not amounting to murder".*

In **King v. Kolonda** 5 NLR 236 the court held that:

> *"The extent of his guilt must be determined by his intention when he struck the blow, and not by its subsequent and possibly unforeseen effects".*

The Appellant in his evidence told court that when he was at his house which is about 100 meters away from his mother Valliamma's house, one of his sisters informed that a group of people were assaulting his brother, the second accused. Having disturbed of this information he had ran towards his mother's house and witnessed that his mother had fallen on the ground

and others assaulting his brother. Removing a pole from the fence nearby he had dealt a single blow to save his brother which had struck on the deceased's stomach. This evidence is clearly corroborated by the evidence of PW2.

Considering this evidence, it clearly shows that the Appellant had not entertained a murderous intention which is a pre-requisite to find him guilty to the murder charge. This has been conveniently escaped from the attention of Learned Trial Judge in this case.

The Learned High Court Judge after analysing the evidence given by both parties had come to a conclusion that both actus reus and mens rea have been proved by the prosecution and therefore, the Appellant is guilty to the murder charge and to causing simple hurt.

The Evidence led at the trial clearly shows that there is evidence of a sudden fight. The incident had taken place close to the compound of the Appellant's mother's house. It further shows that the deceased's party had come under the influence of liquor and went to meet Valliamma. The Appellant had come to the scene to rescue his brother from the assault. He had dealt a blow aiming at PW2 but had struck on the deceased.

According to the medical evidence 3 non-grievous external injuries had been noted on the deceased's body. The internal injury was likely to cause death but if the victim remained in hospital with proper medical attention the said injury could have been cured. The JMO further stated that it was due to the fact that the victim was not treated at the hospital that the injury resulted in the death of the victim.

In this case although the evidence presented by the prosecution and the defence manifested the availability of a plea on the basis of a sudden fight, the Trial Court had failed to address its judicial mind to consider the same.

The exception 4 to Section 294 (Murder) of the Penal Code states 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.

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."*

In **King v. Lewis Singho** 43 NLR 491 the court held that:

> *"Where in a charge of murder the evidence discloses that the accused may have committed the offence 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, it is the duty of the Judge to direct the Jury to bring in the lesser verdict. …….In such a case it is immaterial which party offers the provocation or commits the first assault".*

In this case the Learned High Court Judge must have directed his mind to ascertain whether there are extenuating circumstances would bring the case against the Appellant within a general or special exception available under Section 294 of Penal Code.

Although the prosecution on their own motion obtained two dates to consider whether this case could be considered under lesser culpability, however had not considered before the trial commenced. This is a very serious lapse on the part of the prosecution. (Pages 45-46 of the brief)

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 imposed under count 01 and convict the Appellant for culpable homicide not amounting to murder under Section 297 of the Penal Code. I sentence the Appellant for 04 years rigorous imprisonment commencing from the date of conviction namely 03/12/2018.

The conviction and sentence imposed in respect of 2nd count is affirmed and I order the 06 months rigorous imprisonment to run concurrent to the

sentence imposed in count 01. The fine and the compensation ordered to remain the same.

Subject to the above variation the appeal is dismissed.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL