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

In the matter of an Appeal in terms of Article 154 (P) (6) of the Constitution of the Democratic Socialist Republic of Sri Lanka and Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:

CA/HCC/0364/367/2018

High Court of Kandy

Case No: HC/422/06

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Govindan Kandasami
2. Somasundaram Sundararaj
3. Ammawasi Thangeswaram
4. Arumugam Alagan

ACCUSED

AND NOW BETWEEN

1. Govindan Kandasami
2. Somasundaram Sundararaj
3. Ammawasi Thangeswaram
4. Arumugam Alagan

ACCUSED-APPELLANTS

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Indica Mallawaratchy for the Accused Appellants.

: Anoopa de Silva, DSG for the Respondent

Argued on : 03-10-2022

Written Submissions : 11-09-2019 (By the Accused-Appellant)

: 17-03-2021, 28-10-2019 (By the Respondent)

Decided on : 08-11-2022

Sampath B Abayakoon, J.

The four accused appellants (hereinafter referred to as the appellants) were indicted before the High Court of Kandy on following counts.

1. That they caused the death of one Arumugam Peththan on 17-09-2004, and thereby committed the offence of murder, punishable in terms of section 296 of the Penal Code.
2. At the same time and at the same transaction, caused damage to the property of Yelukamalan for a value of Rs. 166140/-, and thereby committed the offence of mischief, punishable in terms of section 410 of the Penal Code.

3. At the same time and at the same transaction, caused injuries to earlier mentioned Yelukamalan, and thereby committed an offence punishable in terms of section 315 of the Penal Code.
4. At the same time and at the same transaction, the appellants caused injuries to Peththan Parameshwari *alias* Paramasivam, and thereby committed an offence punishable in terms of section 315 of the Penal Code.

After trial without a jury, all four appellants were found guilty as charged by the learned High Court Judge of Kandy of his judgement dated 22-10-2018. Accordingly, all of them were sentenced to death on count one.

On count two, the appellants were sentenced to two years each rigorous imprisonment, and they were ordered to pay a fine of Rs.10000/- each. In default, they were sentenced to six months each rigorous imprisonment. In addition, each of the four appellants were ordered to pay Rs.50000/- each to PW-02, and in default, they were sentenced to six months each rigorous imprisonment.

On count three, each of the appellants were sentenced to two years rigorous imprisonment and in addition, they were ordered to pay a fine of Rs. 10000/- each. They were sentenced to six months rigorous imprisonment in default of paying the fine. In addition to the above, each of the appellants were ordered to pay Rs.15000/- each as compensation to PW-02 and in default they were sentenced to six months each rigorous imprisonment.

On the fourth count, each of the appellants were sentenced to two years rigorous imprisonment, and in addition they were ordered to pay a fine of Rs. 10000/- each. They were sentenced to six months rigorous imprisonment in default of paying the fine. In addition to the above, each of the appellants were ordered to pay Rs.15000/- each as compensation to PW-03, and in default they were sentenced to six months each rigorous imprisonment.

All the appellants ordered to pay Rs. 6000/- each to the fund that has been established in terms of section 29 of the Victims and Witness Protection Act No. 04 of 2015. It has been decided to recover the said amount as a fine and in default the appellants were sentenced to six months each rigorous imprisonment.

Being aggrieved by the said conviction and the sentence, the appellants preferred this appeal.

At the hearing of this appeal, the learned Counsel for the appellants intimated to the Court that she is not in a position to establish that the trial Court has failed to offer the option available to the appellants as to whether they elect to be tried by a jury or by a High Court Judge, in its correct manner in terms of section 195 (ee) of the Code of Criminal Procedure Act, and hence, she is not pursuing that as one of her grounds of appeal.

Accordingly, the learned Counsel for the appellants urged the following two grounds of appeal for the consideration of the Court.

1. The medical evidence adduced at the trial does not support a conviction for murder as the prosecution has failed to prove that the injuries suffered by the deceased were sufficient to cause death in the ordinary cause of nature.
2. In any event, the evidence led at the trial warrants consideration by the Court of a lesser culpability.

The facts that led to the incident as made available by way of evidence before the trial Court can be summarized in the following manner.

This incident has happened on 17-09-2004 around 8.00 pm. On the mentioned day, there had been a Kovil festival at the Kovil managed by the deceased. That night's festival ritual was scheduled to be conducted by the villagers. The person who was to be carrying the statue of the God for whom the Kovil has been

dedicated has been selected by drawing lots, where the 12-year-old grandson of the deceased has been selected for that purpose.

The appellants who were present at the festival had objected for allowing the boy to carry the statue and this has led to a verbal altercation with the deceased. As a result, it is alleged that the first appellant attacked and cut the hand of the deceased using a pruning knife that he was carrying. With the cut injury to his hand, the deceased has returned to his house which was nearby. The four appellants who followed the deceased has assaulted and caused further cut injuries to the deceased. This has happened in front of the line room where the deceased was living. Thereafter, they have entered the line room and had caused damage to the household items and has caused cut injuries to the wife of the deceased, namely Yelukamalan and also to one Parameshwari.

The appellants have denied that they were involved in the incident, although they have admitted that there was an altercation among the people who were present at the Kovil festival. They have taken up this position when they were called upon for a defence at the conclusion of the prosecution case by making separate dock statements.

Consideration of the grounds of appeal

As the two grounds of appeal urged by the learned Counsel are interrelated, I will now proceed to consider the said grounds of appeal together.

Pointing to the evidence of the doctor who has given evidence as PW-08 at the trial, where he has marked his postmortem report as P-01, it was the main contention of the learned Counsel that the doctor has failed to provide evidence to show that the injuries suffered by the deceased were injuries that can be termed as sufficient to cause the death of the deceased in the ordinary course of nature.

The learned Counsel pointed out that the evidence of the doctor in this regard cannot be evidence that can be considered as evidence of the above mentioned fact.

The learned Counsel contended that, out of the six injuries suffered by the deceased, three cut injuries had been to the hand and to the right thigh of the deceased. In the absence of any evidence to establish that those injuries or other contusions observed by the doctor are injuries sufficient to cause death in the ordinary course of nature, the evidence needs to be considered in that perspective.

It was also the contention of the learned Counsel that, given the facts and the circumstances of the case, this was an incident where the learned High Court Judge should have considered the evidence in terms of section 294 exception 4 on the basis of a sudden fight.

It was contended further that although the appellants have not taken up such a position at the trial, the learned High Court Judge should have considered that fact and convicted the appellants in terms of section 297 of the Penal Code.

Having considered the factual situation and the relevant law, the learned Deputy Solicitor General on behalf of the respondent, the Hon. Attorney General, invited the Court to consider the facts and the circumstances and to reach a suitable conclusion in this regard.

Dr. Sri Hari Singh Gour discusses the significance of the medical evidence in relation to a cause of death in his book **Penal Law of India, 11th Edition at page 2398** in the following manner.

> *"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 bounded 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 a 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."

Stated further;

"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."

In the case under consideration, the doctor who performed the postmortem on the deceased has failed to give a definite finding as to whether the injuries suffered by the deceased are fatal in the ordinary course of nature. Considering the fact that the three cut injuries found on the body of the deceased have been to the hand and the right thigh, the trial Court would not be in a position to determine that fact without being supported by medical evidence.

Accordingly, I find merit in the first ground of appeal urged by the learned Counsel.

However, it was the contention of the learned Counsel that the evidence adduced before the trial Court has provided a sufficient basis for the learned trial Judge to consider whether there was a sudden fight which resulted the deceased and the others being injured in evaluating evidence. It is the view of this Court that even if the accused party denies any involvement in the commission of the offence, it is the duty of the learned trial Judge to consider that fact and determine accordingly.

In the case of **The King Vs. Bellanavithanage Edwin 41 NLR 365,** the Court of Criminal Appeal held thus;

> *"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 of such a finding in the evidence on record, although such defence was not raised nor relied upon by the accused."*

In the case of the **The King Vs. Albert Appuhamy 41 NLR 505**, the Court of Criminal Appeal held that,

> *"Failure on the part of a prisoner or his Counsel to take up a certain line of defence does not relieve a judge of the responsibility of putting to the jury such a defence if it arises on the evidence."*

The contention of the learned Counsel for the appellants is that the incident and the actions of the appellants falls within the interpretation of section 294 exception 4 of the Penal Code. The said exception 4 reads as follows.

> **Exception 4. Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon sudden quarrel 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 necessary requisites of such a plea have been crystalized by **Ratanlal and Dhirajlal** in their book **Law of Crimes, 24th Edition 1998 at page 1339** referring to section 300 of the Indian Penal Code which section and the exceptions are identical to section 294 of our Penal Code identifying that the following requisites must be satisfied.

1. **It was a sudden fight.**
2. **There was no premeditation.**
3. **The act was committed in a heat of passion; and**
4. **The assailant had not taken any undue advantage or acted in a cruel manner.**

When considering the facts of the matter under consideration, it is very much apparent that an argument as to who should carry the statue of the God has sparked this incident as a sudden fight. It is also clear that there had been no premeditation and the appellants had acted in the heat of passion. According to the evidence, the 1st appellant has used the pruning knife he was carrying in committing the cut injuries. A prune knife is a tool used to prune tea bushes and a knife often carried by estate laborers as of habit. The evidence suggests that no undue advantage has been taken and the cut injuries clearly show that no injuries have been caused to the vital organs of the body of the deceased.

Considering the above facts and the circumstances, I am of the view that this is a fit and proper case where the learned High Court Judge should have considered as to whether this was an offence that comes under exception 4 of section 294 and punishable in terms of section 297 of the Penal Code, on the basis of culpable homicide not amounting to murder. I find that there was sufficient evidence before the learned High Court Judge to come to such a conclusion for the reasons adduced as above.

Accordingly, I set aside the conviction of the appellants on the first count preferred against them and replace the said conviction with a conviction for culpable homicide not amounting to murder in terms of section 297 of the Penal code.

Having considered the facts and the circumstances, I sentence the accused appellants to a period of 10 years each rigorous imprisonment for the offence they are now convicted. In addition, a fine of Rs. 10,000/- each is ordered on the

accused appellants; in default they shall serve periods of six months each rigorous imprisonment.

The sentences and the fines imposed as well as the compensation and the amounts ordered to be paid in terms of Act No. 04 of 2015 and the default sentences ordered in that regard by the learned High Court Judge in relation to the 2nd, 3rd and the 4th counts shall remain the same.

Having considered the mischief that has been caused to the house of the deceased and injuries cause to separate females at the same incident, the sentences ordered in relation to all four counts shall be served consecutively to each other.

Since the appellants have been in incarceration form the date of the conviction, it is ordered that the sentence shall deem have been commenced from the date of the conviction on 22-10-2018.

The appeal is partly allowed to the above extent.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal