

**IN THE COURT OF APPEAL OF THE DEMOCRATIC 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/0094/0095/2016

**High Court of Nuwaraeliya**

**Case No:** HC/111/2009

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

1. Peduru Arachchige Ashokalal Pathirane
2. Wickramasinghe Mudiyansele

Biyo Kumari Wickramasinghe

**ACCUSED**

**AND NOW BETWEEN**

1. Peduru Arachchige Ashokalal Pathirane
2. Wickramasinghe Mudiyansele

Biyo Kumari Wickramasinghe

**ACCUSED-APPELLANTS**

**Vs.**

The Attorney General,  
Attorney General's Department,  
Colombo 12

**RESPONDENT**

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

**Counsel** : Widura Ranawaka with Menaka Warnapura for the  
1<sup>st</sup> Accused Appellant  
: Shanaka Ranasinghe, PC with Niroshan  
Mihindukulasooriya for the 2<sup>nd</sup> Accused Appellant  
: Rohantha Abeysuriya, P.C., ASG, for the Respondent

**Argued on** : 18-10-2022

**Written Submissions** : 30-07-2018 (By the 1<sup>st</sup> Accused-Appellant)  
: 30-07-2018 (By the 2<sup>nd</sup> Accused-Appellant)  
: 14-11-2018 (By the Respondent)

**Decided on** : 25-11-2022

**Sampath B Abayakoon, J.**

This is an appeal by the first and the second accused appellants (hereinafter sometimes referred to as the appellants) on being aggrieved by the conviction and the sentence of them by the learned High Court Judge of Nuwaraeliya.

Both the appellants were indicted before the High Court of Nuwaraeliya for causing the death of one Wickramasinghe Mudiyanseelage Somasiri on 26<sup>th</sup>

January 1995, an offence punishable in terms of section 296 read with section 32 of the Penal Code.

The 1<sup>st</sup> accused was also indicted for causing injuries to one Wickramasinghe Mudiyansele Anil Kumara at the same transaction, an offence punishable in terms of section 315 of the Penal Code.

After trial without a jury, the learned High Court Judge of Nuwaraeliya found both the appellants guilty as charged by his judgement dated 30<sup>th</sup> June 2016. Accordingly, both the appellants were sentenced to death on the 1<sup>st</sup> count and the 1<sup>st</sup> appellant was also sentenced for a rigorous imprisonment period of six months on count two.

At the hearing of this appeal, the only ground of appeal urged by the learned Counsel for the appellants was that the learned High Court Judge has failed to consider in the correct perspective that there was evidence placed before the Court to establish culpable homicide not amounting to murder in terms of section 297 of the Penal Code.

The evidence adduced in this matter establishes that the deceased was the father of the second accused appellant. During the time relevant to this incident, she was running a security service in the Ragala area and the first accused appellant had been an employee under her. The second accused appellant was separated from her husband at that time. When this incident happened, the first accused appellant had been at the house of the second accused appellant. The evidence establishes that the deceased, who had his suspicions about an illicit relationship between the appellants had come to the house, which had led to an altercation. This has resulted in injuries to the deceased, which led to his ultimate death.

PW-01 who has given evidence in this case was the son of the second accused appellant who was about 8 years old at that time.

Because he has been treated as an adverse witness in terms of section 154 of the Evidence Ordinance, during the re-examination of him by the prosecution, the learned High Court Judge has decided to disregard his evidence in his judgement.

Apart from his evidence, there are no eyewitnesses to the incident. The evidence of PW-02 Anil Kumara who was the injured in this incident had been that he saw the first accused appellant jumping out of a window of the house with a knife in his hand and running away. He has received minor injuries when he had attempted to stop the first accused appellant.

The main piece of evidence relied on by the learned High Court Judge to convict both the appellants for the charge of murder had been the purported dying declaration by the deceased Somasiri to PW-08 Police Sergeant 2861 R.M. Kumaradasa, while being at the hospital. The said dying declaration had been marked as P-01 at the trial. It is clear from the deposition of the deceased that this incident has sparked off as a result of the deceased coming to the house of the second accused appellant and the verbal altercation he had commenced with the appellants. In the dying deposition, the deceased has stated that the 1<sup>st</sup> accused appellant attacked him with a knife and the 2<sup>nd</sup> accused appellant pushed him onto a bed, and after the 1<sup>st</sup> accused appellant ran away from the place of the incident, the 2<sup>nd</sup> accused appellant also stabbed him twice.

The learned President's Counsel representing the 2<sup>nd</sup> accused appellant and the learned Counsel representing the 1<sup>st</sup> accused appellant pointed out several infirmities in the dying declaration that do not match up with the evidence of other witnesses. However, it was their firm contention that the incident was a result of the unexpected sudden fight, which has arisen because of the deceased's arrival at the house and staring and altercation with the appellants.

It was their view that although the learned High Court Judge has considered this aspect in the judgement, his conclusions in that regard were not in the correct perspective.

The learned Additional Solicitor General (ASG) representing the respondent, the Honourable Attorney General, agreed that this is a matter where the evidence should have been considered in terms of section 297 of the Penal Code, which amounts to an offence of culpable homicide not amounting to murder in terms of exception 4 of section 294 of the Penal Code.

### **Consideration of the Ground of Appeal**

As the conviction has been solely based on the dying declaration of the deceased and other circumstantial evidence, I would like to draw my attention to the relevant legal provisions in that regard.

Section 32 (1) of the Evidence Ordinance, which refers to the relevancy of a statement by a person who is dead, and as to the transaction which resulted in his death reads as follows;

**32 (1). When the statement is made, by a person as to the cause of his death, or to any of the circumstances of the transaction which resulted in his death, in cases in which cause of death of that person's death comes into question.**

**E.R.S.R. Coomaraswamy** in his book **the Law of Evidence Volume 1 at page 469** citing several decided cases discuss the probative value of such evidence, the infirmities that need to be considered, the necessary directions in the following manner;

*“The probative value of dying declarations relevant under section 32 (1) would depend on the facts and circumstances of each case. But there is no doubt that such evidence suffers from certain intrinsic infirmities. Two of*

*these defects are the fact that the statement was not made under oath and the absence of cross-examination of the deponent of the statement.*

*The following matters requires consideration in regard to the proper directions.*

- 1. The deceased not been before the Court as a witness, and not having made the statement under oath this is an infirmity in the evidence of the statement.*
- 2. The statement has not been tested by cross-examination.*
- 3. The weight of that should be attributed to the statement admitted in the circumstances of a given case.*
- 4. If in a dying declaration, there is material favourable to the accused, the judge should refer to it.*
- 5. Corroboration is not always necessary to support a dying declaration.”*

In the case of **The King V Asirwadan Nadar 51 NLR 322**,

*“Where in a trial for murder, the dying deposition of the deceased was led in evidence against the accused under section 32 (1) of the Evidence Ordinance.*

***Held: that the attention of the jury should have been specifically drawn to the question how far the other facts and the surrounding circumstances proved in evidence might be said to support the truth or otherwise of the deposition.”***

There cannot be any dispute in this matter that the incident has occurred due to the fact of the deceased coming into the house of the 2<sup>nd</sup> accused appellant and engaging in a verbal altercation with the appellants because of his suspicions that both of them were having an affair. The evidence of PW-02 establishes the fact that after the incident, the 1<sup>st</sup> accused appellant had run away with a knife in hand. In the dying deposition, the deceased has also

implicated the second accused appellant for having stabbed him after the first accused appellant left the scene, his statement in that regard has not been supported by any other circumstantial evidence.

This goes on to establish that there was a definite sudden fight, which has resulted in this incident and also there was no premeditation by the appellants in causing injuries to the deceased. The relevant exception 4 of section 294 of the Penal Code reads thus:

***Exception 4 – 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.***

It is apparent from the judgment that the learned High Court Judge was well aware of the requirement of considering whether there was evidence placed before the Court, which amounts to culpable homicide not amounting to murder, even no such position has been taken up by the accused in the case.

In the case of **The King Vs. Bellana Vithanage Eddin 41 NLR 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.”*

Although this aspect has been considered by the learned High Court Judge, I am not in a position to agree with his finding that there was no basis for him to convict the appellants on the basis of section 297 of the Penal Code.

As pointed out correctly by the learned Counsel, I find that if considered in the correct perspective, there was sufficient evidence before the learned High Court Judge to consider this matter in terms of exception 4 of section 294 of the Penal Code.

As I have determined earlier, there was clear evidence that this incident was a result of a sudden fight in the heat of passion upon a sudden quarrel. It is also clear that there was no premeditation of any kind on the part of the appellants. The weapon used had been a knife which may have been available at the house when this incident happened, which shows that the assailant had not taken undue advantage.

For the reasons adduced as above, I am of the view that this is not a case where the appellants should have been convicted for the offence of murder.

Accordingly, I set aside the conviction of the appellants on count one and convict them for the offence of culpable homicide not amounting to murder under section 297 of the Penal Code on the basis of a sudden fight in terms of exception 4 of the section 294 of the Penal code.

Having considered the facts and the circumstances of this case, I sentence the 1<sup>st</sup> and the 2<sup>nd</sup> accused appellants for a term of 10 years rigorous imprisonment. In addition, the first and the second accused appellants are ordered to pay a fine of Rs. 20000/- each. In default, I direct that they should serve 6 months each of simple imprisonment.

The sentence imposed on the 1<sup>st</sup> accused appellant in relation to the second count preferred against him shall remain the same.



Considering the fact that the accused appellants have been in incarceration since the date of conviction on 30-06-2016, I direct that the sentence of 10-year rigorous imprisonment imposed on each of the two accused appellants shall deem to have commenced from 30-06-2016.

The appeal is partly allowed to the above extent.

The Registrar of the Court is directed to communicate this judgement along with the original case record to the relevant High Court forthwith.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal