
**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.

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

COMPLAINANT

V.

1. Sandaradura Rathnapala De Silva
2. Sandaradura Wimaladasa De Silva
3. Agampodi Sena Silva

NOW AND BETWEEN

Court of Appeal Case No.

CA/HCC/0154/2020

High Court of Kalutara

Case No. HC/436/2005

Sandaradura Rathnapala De Silva

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Shanaka Ranasinghe, P.C. with Niroshan**
Mihindukulasooriya for the Appellant.
Rohantha Abeysuriya, P.C. ASG for the
Respondent.

ARGUED ON : **18/01/2023**

DECIDED ON : **28/02/2023**

JUDGMENT

P. Kumararatnam, J.

The Accused-Appellant (hereinafter referred to as the Appellant) and 2nd and 3rd accused were indicted for causing the death of Olupathage Jayasena Silva, an offence punishable in terms of Section 296 read with Section 32 of the Penal Code.

After a non-jury trial, the Learned High Court Judge has found the Appellant guilty in terms of Section 296 of Penal Code and sentenced him to death on 14/07/2014.

During the pendency of the trial the 3rd accused had passed away and the indictment was amended accordingly. The prosecution had called 07 witnesses and closed their case. Before the defence was called, Learned Counsel who appeared for the 2nd accused made an application under 200(1) of the Code of Criminal Procedure Act No.15 of 1979 and the Learned High Court Judge accepting submission made by the defence

Counsel acquitted the 2nd accused from this case. Hence, the full trial continued only against the Appellant and at the conclusion of the trial, the Learned High Court Judge had convicted the Appellant for committing the murder of the deceased Olupathage Jayasena Silva and sentenced him to death.

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

The Learned President's 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. Also, at the time of argument the Appellant was connected via Zoom from prison.

At the very outset, Learned President's Counsel appearing on behalf of the Appellant had submitted to this court that he will be making submissions only with regards to the conviction as the conviction under Section 296 of the Penal Code cannot stand, whereas it should have been considered under Section 297 of Penal Code on the basis of a sudden fight.

The evidence presented by the prosecution and the defence jointly revealed that the deceased had attacked the sister of PW1 and PW2 in the morning of the date of the incident. Due to the said attack the sister of PW1 and PW2 had suffered an injury. This had prompted parties to involve in a sudden fight.

The Learned Additional Solicitor General submitted that the consideration of lesser culpability would not arise as the defence in this case has not accepted responsibility in any manner whatsoever for the injuries inflicted on the deceased. This position was not accepted by the Learned High Court Judge who heard the case. But he accepted the defence version and come to the conclusion of existing of a fight in his judgment. The said portion is re-produce below:

(Page 590 of the brief.)

එකී කරුණු වශයෙන් හඳුන්වනු ලබන්නේ මෙම නඩුවට අදාළ සිද්ධිය සිදු වීමට ප්‍රථමයෙන් මරණකරු සහ ඔහුගේ සහෝදරයාගේ බිරිඳ වන අනුලා ශාන්ති අතර ආරවුලක් පැවති බවත් එම ආරවුල හේතු කොට ගෙන මරණකරු විසින් අනුලා ශාන්තිට පහර දී ඇති බවත්ය. ඉන් පසු පළමු විත්තිකරු සමඟ තවත් හතරදෙනෙකු අනුලා ශාන්තිගේ නිවස ඇති ඉඩමට පැමිණ මරණකරු සමඟ ආරවුලක් ඇති කරගෙන බවත් එම කෝලහාලයේදී පළමු විත්තිකරු විසින් පිහියකින් මරණකරුගේ පපුවට තදබල පහරක් එල්ල කිරීම හේතුකොට මරණකරුගේ හෘදය වස්තුවේ මහාධමනිය සහ පෙනහැල්ල තුවාල වී අනිවාර්ය මරණය ගෙන දෙන තුවාලයක් සිදු වී ඇති බවත්ය.

According to the doctor who held the post mortem stated that the death of the deceased had been occasioned due to haemorrhage due to a stab injury to the chest.

As there was a fight erupted between the parties over this incident which had been endorsed by the Learned High Court Judge in his judgment, the Learned President's Counsel made his application under Exception 4 to Section 294 of the Penal Code.

The above-mentioned 4th Exception provides as follows:

“Culpable homicide is not murder 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 this case although Learned High Court Judge had come to the conclusion that the incident had taken place due to a sudden fight, but not awarded the benefit to the Appellant under exception 4 of the Section 294 of the Penal Code. This is a clear misdirection which certainly vitiate the conviction for murder. The failure by the Learned High Court Judge to consider diminishing responsibility as required by the law has caused great prejudice to the Appellant.

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 and convict the Appellant for culpable homicide not amounting to murder under Section 297 of the Penal Code. I sentence the Appellant for 10 years rigorous imprisonment commencing from the date of conviction namely 14/07/2020, which was his previous date of conviction and sentence for the charge of murder.

Subject to the above variation the appeal is partly allowed.

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

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL