
**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/0058/2018**

**High Court of Gampaha
Case No. HC/64/2013**

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

COMPLAINANT

Vs.

Karunanayake Pathirenehelage Sunil
Wickramaratne alias Nilame

ACCUSED

NOW AND BETWEEN

Karunanayake Pathirenehelage Sunil
Wickramaratne alias Nilame

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Nalin Ladduwahetty, PC with Hafeel Fariz,**
Kavithri Ubeysekera, Rajith Samarasekera
and Menuka Premashantha for the
Appellant.
Maheshika Silva, DSG for the
Respondent.

ARGUED ON : **28/11/2022**

DECIDED ON : **19/01/2023**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General on following charge:

On or about the 25th September 1992 the accused committed the murder of Pathirennhelage Dayaratna which is an offence punishable under Section 296 of the Penal Code.

As the Appellant opted for a non-jury trial, the trial commenced before a judge and the prosecution had led six witnesses and marked production P1-3 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.

On the day of the defence trial, the Appellant through his Counsel informed the court that after considering the evidence adduced by the prosecution, he was willing to tender a plea under Section 297 of the Penal Code.

Having considered the application of the Appellant, the Learned State Counsel extended his willingness to accept a plea under Section 297 of the Penal Code on basis of a sudden fight, which is an exception to Section 294 of the Penal Code.

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.

Having heard the submissions of both parties and considering the evidence presented by the prosecution, the Learned High Court Judge had convicted the Appellant for culpable homicide not amounting to murder under Section 297 and sentenced him to 12 years rigorous imprisonment with a fine of Rs.1000/-. In default, 01 months simple imprisonment ordered.

Being aggrieved by the aforesaid 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 Learned President's Counsel extended his argument on the basis that the facts and circumstances of this case only warrants a sentence under the second limb of Section 297 of the Penal Code.

Section 297 of the Penal Code states as follows:

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

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

According to PW1, Jayasundara, when the unfortunate incident happened, he was the Assistant Station Master attached to Keenawala Railway Station. On 25th of September 1992, when he was on duty at the aforesaid railway station, at about 6.30 p.m. suddenly he had seen a person chasing another shouting "don't run". When he came out of his office had seen a person being stabbed by another on the railway platform. As a result, the victim had fallen on the platform. He had identified the Appellant as the assailant as he is a well-known person of the area. Although he had asked the Appellant what he was doing, the Appellant had threatened the witness and stabbed the

deceased. Further, the Appellant had stabbed the deceased again on his neck. This witness had noticed that the Appellant was drunk at that time.

According to the JMO who held the post mortem examination, had stated that the death had occurred due to two stab injuries on the lung. The doctor had noted 10 stab wounds on the deceased's body.

The Learned State Counsel in his sentencing submission submitted that both the Appellant and the deceased had consumed liquor prior to this incident. PW1 in his evidence too admitted that the Appellant was drunk at the time of stabbing.

In **Don Shamantha Jude Anthony Jayamaha v. The Attorney General CA/303/2006 and C.A.L.A. 321/2006** decided on 11/07/2012 the Court held that:

“It is trite law that even if the accused does not specifically take up the defence of a general or special exception to criminal liability, if the facts and circumstances before the court disclose that there were such materials to sustain such a plea then the court must consider whether the accused should be convicted for a lesser offence”.

In this case the prosecution evidence revealed that there is some degree of voluntary intoxication on the part of the Appellant. Even the State Counsel who appeared for the prosecution submitted that the appellant was drunk when the incident had taken place this defence was not taken up by the Counsel who represented the Appellant in the High Court and made sentencing submission on that point.

In **Jayathilaka v. The Attorney General [2003] 1 SLR 107** the court held that:

“Though the accused has not taken up the defence of intoxication if such defence arises on the evidence, it is the duty of the jury to consider the same”.

In this case the Learned High Court Judge had not considered the intoxication when the Appellant was sentenced. Had the trial Judge considered the intoxication of the Appellant and the deceased, the Appellant should have been sentenced under second limb of the Section 297 of Penal Code.

Hence, considering all the circumstances of this case, I set aside the sentence imposed on the Appellant and substitute with a term of 10 years rigorous imprisonment. A fine of Rs.1000/- with 06 months default sentence also imposed on the Appellant. As the Appellant is in prison since the date of conviction by the Learned High Court Judge, I order the sentence imposed by this Court be operative from 22/03/2018.

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 Gampaha along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL