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/0032/21

High Court of Kuliyapitiya

Case No: HC/62/16

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Herath Mudiyanselage Rathnayake

ACCUSED

AND NOW BETWEEN

Herath Mudiyanselage Rathnayake

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Tilak Marapana, P.C. with R. Y. D. Jayasekara and C. Marapana for the Accused Appellant

: Riyaz Bary, D.S.G. for the Respondent

Argued on : 03-04-2023

Written Submissions : 10-02-2022 (By the Accused-Appellant)

: 07-04-2022 (By the Respondent)

Decided on : 31-05-2023

Sampath B. Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Kuliyapitiya for causing the death of one Arampath Mudiyanselage Wijeratne Bandara on 03rd June 2015 at a place called Konduruwapola Junction in Bihalpola, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

After trial without a jury, the learned High Court Judge of Kuliyapitiya found the appellant guilty as charged by his judgement dated 05th March 2021. He was sentenced to death accordingly.

Being aggrieved by his conviction and the sentence, the appellant preferred this appeal.

Facts in Brief

On the day of the incident, the wife of the deceased (PW-01) was at their home attending to her daily affairs. Her husband (the deceased) was a carpenter by vocation, and they had a land master tractor, a van, and a motorbike. Around 10.30 in the morning of the day of the incident, the appellant had come in a

motorbike along with his wife to the house of the deceased. At that time, the deceased was out of the house. He had gone to get some water pipes in his land master tractor. The appellant has inquired from PW-01 about the deceased and when he was informed that he is out of the house, he has threatened her with a knife stating that he came to kill her husband. Without being satisfied by her answer, the appellant had entered the house and searched it, and after waiting for about 10 minutes, had left the house with his wife.

A short while later, she has heard the sound of the approaching land master tractor of her husband and heard a commotion nearby. When she went towards the commotion, she has seen the appellant leaving in his motorbike and her husband fallen near the land master tractor with injuries. The fellow villagers had admitted the deceased to the hospital, but he was pronounced dead on admission.

Under cross-examination, the appellant has taken the stand that he went to the house of the deceased to leave his wife with the deceased, because he found out about an illicit affair he had with his wife and has denied that he threatened PW-01.

The prosecution has called PW-03 and 04 who were young persons of about 16 and 17 years of age at the time of the incident, and were travelling in the land master tractor when this incident occurred. According to their evidence, they have seen the appellant near the junction in his motorbike and had seen his wife also with him. The appellant had signaled the tractor driven by the deceased. However, the deceased, without seeing the signal had proceeded a little further, but was forced to stop the tractor after the appellant who has come in his motorbike and crossed the path of the tractor. Thereafter, they have seen the appellant approaching the deceased and both of them grappling with each other, which has resulted in the deceased falling into a ditch nearby. They have observed the deceased with several bleeding injuries and the appellant leaving the scene in his motorbike.

Under cross-examination, PW-03 has admitted that while giving evidence at the inquest, he stated that the deceased attempted to grab a club from the toolbox of the tractor while this confrontation was taking place.

PW-04 in his evidence in chief has stated the same thing, but the Counsel who represented the appellant has confronted him in his cross-examination on the basis that he has failed to mention that fact to the police.

Under cross examination PW-03 has stated that he came to know later that the incident was due to a clandestine affair between the deceased and the wife of the appellant.

According to the evidence of the Judicial Medical Officer (JMO), he has observed 11 cut and stab wounds on the body of the deceased. The1st cut injury was near the left shoulder while the 3rd to 11th cut injuries had been in the hands of the deceased. Injury number 02 which was the fatal stab wound had been at the heart of the deceased and the JMO has opined that the said injury number 02 was essentially a fatal injury where death would be inevitable within a short span of time.

When the appellant was called upon for a defence at the conclusion of the prosecution case, he has chosen to give evidence under oath.

It had been his evidence that on the day of the incident, he came home to have a cup of tea after attending to his vegetable cultivation around 10 a.m., and saw a mobile phone in the bedroom of the house. Upon inspecting the phone, he discovered that it was a phone belonging to the deceased. It was his evidence that there was a rumour in the village about an illicit affair between the deceased and his wife, and when he confronted his wife, she admitted that it was given by the deceased to her. Due to anger, he smashed the phone, and it had been his evidence that he informed his wife that he would hand over her to the deceased and took her in his bike to the house of the deceased. Unable to find the deceased in his house, he returned but saw him coming driving a land master and confronted him.

It was his position that due to his intervention into their life, he wanted to hand over his wife to him. The deceased threatened him and took an iron rod from the land master tractor and attempted to assault him. He has admitted that he was carrying a knife, but has claimed that it was at his waist. It had been his position that he took out the knife to defend himself and stabbed the hand of the deceased in order to grab the iron rod from him. He has also stated that he stabbed the deceased several times in order to get the iron rod released from the deceased and both of them fell into a ditch and he left the scene after that. He has claimed that he surrendered to police along with the knife but has claimed that he had no intention of or plan to do such a thing, but the incident happened as a result of him attempting to resolve the mobile phone issue and due to the fact of the deceased trying to attack him.

The Judgement

In his judgement, the learned High Court Judge has considered the evidence led by the prosecution and has concluded that it was the appellant who attacked the deceased with a clear intention to cause his death. Considering the number of injuries, the deceased has received, he has decided to reject the evidence of the appellant.

It had been determined that the appellant has raised his defence only when he gave evidence. The learned High Court Judge has concluded that the position taken up by the appellant when the relevant witnesses gave evidence had been rejected by the said witnesses, and had opined that the position taken up by the appellant was only a concocted story. Accordingly, the appellant had been convicted as charged.

The Grounds of Appeal

At the hearing of this appeal, the learned President's Counsel representing the appellant formulated one ground of appeal for the consideration of the Court, namely;

1. The learned High Court Judge has failed to consider the defence put forward by the appellant that he acted in the exercise of his right of private defence.

In other words, the main contention of the learned President's Counsel was that the appellant was forced to cause injuries to the deceased acting in self defence because the deceased attacked him using an iron rod. It was his contention that he should have the benefit of the defence of the right of private defence in terms of section 89 of the Penal Code which says that, "Nothing is an offence which is done in the exercise of the right of private defence."

The learned President's Counsel was specific that he is not relying on exceptions mentioned in section 294 of the Penal Code, where culpable homicide is not murder if it can be shown that the actions of the appellant fall under exception 1 or exception 4 of section 294 of the Penal Code.

The learned President's Counsel relied heavily on the injuries found on the body of the deceased to claim that the injuries to the fingers and hands of the deceased are injuries caused when the appellant attempted to grab the iron rod, the deceased was attempting to use against him. It was his contention that the evidence led in this action clearly suggests that the appellant acted using his right of private defence and the learned High Court Judge has failed to appreciate or consider that aspect in his judgement. On that basis, he argued strenuously that the conviction should be overturned and the appellant should be acquitted of the charges.

However, the learned President's Counsel also admitted that, at the trial, the evidence of the wife of the deceased has not been challenged at material points, and at one point, took up the position that the appellant may have exceeded his right of private defence.

The learned President's Counsel cited the judgement of **The Queen Vs. S. A. Jogrest Perera 70 NLR 27** to substantiate his argument.

The position of the learned Deputy Solicitor General (DSG) was that there was no basis for the appellant to maintain a stand that he acted exercising his right of private defence. Referring to the evidence of the eyewitnesses and also to the medical evidence, it was his position that the deceased has attempted to evade being attacked, which resulted in him receiving most of the injuries that has been described by the JMO as defensive injuries.

Under the circumstances, it was his position that given the facts of this matter, it would not attract the provisions of the exceptions in terms of section 294 of the Penal Code and the appeal should be dismissed.

Consideration of the Ground of Appeal

It is clear from the evidence placed before the trial Court that the appellant has never taken up the position that the incident was an act by him in exercising his right of private defence. In fact, the Counsel who represented the appellant had suggested to PW-03 who was an eyewitness to the incident that the incident was a result of a sudden fight due to the fact of the deceased attempting to assault the appellant.

It is at the stage of the hearing of this appeal, the learned President's Counsel contended that the evidence clearly points to an act of right of private defence being exercised by the appellant.

It is the view of this Court that as in a case of a plea in terms of section 297 of the Penal Code, even if an accused person has not taken up a plea of right of private defence, if it can be shown that the evidence placed before the trial Court can lead to such a conclusion, such a defence should be considered by the trial Court.

In the Indian case of **Munshi Ram and Others Vs. Delhi Administration (1968) AIR 702, Hegde, J.** held that,

> *"It is well settled that even if an accused does not plead self defence, it is open for the court to consider such a plea if the same arises from material*

on record. See ***In Re- Jogali Bhaige Naiks and Another A.I.R. 1927 Mad.97****. The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.*"

In the Indian case of **Kuduvakuzinyil Sudhakaran Vs. State (1995) Cri. L.J. 721**, the plea of self defence was rejected where the evidence showed that the deceased was unarmed and was not the aggressor.

In the Indian Supreme Court case of **Laxman Vs. State of Orissa (1988) Cr. L.J. 188 SC**, it was held that,

> *"The right of private defence is available only to one who is suddenly confronted with immediate necessity of averting and impending danger not of his creation."*

When it comes to the facts of the appeal under consideration, the evidence before the trial Court clearly establishes the fact that the deceased was not the aggressor. It was the appellant who has gone looking for the deceased armed with a knife. He has gone to the house of the deceased and looked for him and threatened his wife. Unable to find him there, he has even searched the house looking for him. The fact that the appellant was armed with a knife when he visited the house of the deceased had not been challenged when the wife of the deceased gave evidence before the trial Court.

The evidence of PW-03 and 04 clearly establishes that it was the appellant who stopped the hand tractor driven by the deceased forcefully and confronted the deceased. The eyewitnesses to the incident speak about a grapple between the two. Although witness number 03 has stated in his evidence before the inquest held in that regard, that when this confrontation was taking place, the deceased took out an iron rod from the toolbox of his tractor. There is no evidence whatsoever to show that he had attempted to assault the appellant using the iron rod. In fact, there is no evidence to show that the appellant received any injury during the confrontation. The injuries found on the hands of the deceased

had been clearly defined by the JMO by expressing the opinion that 10 out of the 11 injuries are defensive injuries which means that the deceased has attempted to avoid him being attacked by the appellant.

I am in no position to agree with the contention that the injuries observed by the JMO on the fingers and hands of the deceased are injuries sustained by him when the appellant attempted to take the iron rod from the deceased, as there was no evidence placed before the Court to come to such a conclusion.

For the reasons considered as above, I find no merit in the ground of appeal raised by the learned President's Counsel.

It is clear from the evidence before the trial Court that the appellant has maintained the position that the incident occurred as a result of him discovering an illicit affair between his wife and the deceased. It had been his position that he wanted to confront the deceased along with his wife and hand over her to him, and that was the reason why he went to the deceased's house and later confronted the deceased while he was driving the hand tractor.

In giving evidence under oath before the Court, he has maintained the same position, but has claimed that when he confronted the deceased, it was the deceased who attempted to assault him with an iron rod, which resulted him attacking the deceased using the knife he was carrying. I have already decided that being the aggressor and being the person who was armed, when he first confronted the deceased, the appellant has no basis to claim that he exercised his right of private defence.

Although the appellant has not directly taken up the position that he acted due to being deprived of self-control by grave and sudden provocation, where his action would fall under section 297 of the Penal Code, which amounts to culpable homicide not amounting to murder, it is trite law that there is a duty cast upon the trial Judge to consider whether there is evidence before the Court to come to such a conclusion.

Although section 105 of the Evidence Ordinance has provided that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions of the Penal Code or within any special exception or proviso contained in any part of the same Code, or any law defining the offence, is upon him, our Superior Courts have consistently held that even if no such plea has been taken by an accused person, it is the duty of the Court to consider whether such facts are in existence.

In the case of **King Vs. Belana Withanage Eddin 41 NLR 345** 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."*

In **King Vs. Vidanalage Lanty 42 NLR 317** the Court of Criminal Appeal observed the following;

> *There was evidence in this case upon which it was open to the jury to say that it came within exception 04 of section 296 of the Penal Code and that the appellant was guilty of culpable homicide not amounting to murder. No such plea, however, was put forward on his behalf. In the course of his address the presiding judge referred to this evidence as part of the defence story, but not as evidence upon which a lessor verdict might possibly be based.*
>
> **Held:**
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> > *"It was the duty of the presiding judge to have so directed the jury and that in the circumstances, the appellant was entitled to have the benefit of a lesser offence."*

In his judgement, the learned High Court Judge has considered the prosecution evidence and also had considered the evidence of the appellant given under oath at the trial. He appears to have considered the evidence of the appellant which amounts to pleading an exception in terms of section 294 of the Penal Code in the following manner.

> "ඔහු පොල්ල අත්නොහැරි බවත් පසුව තමා ඔහු බදාගෙන පොර බැදූ බවත් එම අවස්ථාවේදී තමන් දෙදෙනාව පෙරලුනු බවත් පසුව ඔහු කෑගැසූ බවත්, තමා නැගිට බලන අවස්ථාවේ ඔහු වැටී සිටි බවත් පසුව තම නිවසට පැමිණි බවත් තම අසල්වාසීන් කීපදෙනෙකු සමග පොලිසියේ භාරයට පත්වූ බවත් සිදුවූ සිදුවීම තමා හිතාමතා සැලසුම් කල දෙයක් නොවන බවත් ජංගම දුරකතනයේ ප්‍රශ්නය විසන්දගැනීමට යාමේදී ඇතිවූ බවත් පවසා ඇත.
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> පැමිණිල්ලේ හරස් ප්‍රශ්න වලට ලක්වූ අවස්ථාවේ ඔහු විසින් එල්ල කල පිහි ඇනුම් පහරකින් බණ්ඩාර මියගිය ඇති බව පිළිගෙන ඇත. ඔහු වැඩි දුරටත් ප්‍රකාශ කර ඇත්තේ තමා ජීවිතය නැති කිරීමට නොගිය බවත් පොර බැදීම නිසා ඇනීමක් සිදුවූ බවයි."

The above passage and the other considerations by the learned High Court Judge in the judgement clearly appears that the learned High Court Judge has considered whether the actions of the appellant falls within an exception to section 294 of the Penal Code.

However, it has been determined that the position of the appellant cannot be accepted since he has taken up this position for the first time when he gave evidence in Court and due to the fact that his claim of being attacked by the deceased had not been admitted by the eyewitnesses to the incident. On the basis that the appellant had the clear intention and the knowledge to cause the death of the deceased, and that he has acted with a clear pre-planned motive, his defence has been rejected.

It is the considered view of this Court that the intention of causing death and causing such bodily injury as is likely to cause death is a consideration which

can vary the sentence that can be imposed on a person convicted in terms of section 297 of the Penal Code.

In terms of section 294 of the Penal Code, even though if a person had the intention or knowledge of his actions, if it can be established that such an action falls within one of the exceptions of section 294, it falls within culpable homicide not amounting to murder.

Execption1 of section 294 of the Penal Code reads as follows.

> ***Exception*** **1. Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave provocation or causes the death of any other person by mistake or by accident.**
>
> **The above exception is subject to the following provisos.**
>
> > ***Firstly*****- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.**
> >
> > ***Secondly*****- That the provocation is not given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant.**
> >
> > ***Thirdly*****- That the provocation is not given by anything done in the lawful exercise of the right of private defence.**
> >
> > ***Explanation*****- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.**

When it comes to the facts as revealed in evidence in this case, I find a basis to the appellant's evidence and the stand that he found a mobile phone in his house which belongs to the deceased and because of the previous rumours of an alleged affair between his wife and the deceased, he went to the house of the deceased

to confront him. I find that his position acceptable since he has gone along with his wife to the house of the deceased, which suggests that he had been provoked due to the alleged affair and he wanted to confront the deceased in front of his wife.

Although the appellant has claimed that he went there to hand over his wife to the deceased, the uncontradicted evidence of the wife of the deceased clearly establishes the fact that he was armed with a knife and had threatened her with death to her husband. After a short while, the appellant had confronted the deceased, and in the ensuing confrontation, the deceased has sustained the fatal injury which resulted in his death. It is evidence that at that instance also he was with his wife.

The evidence where it has been stated that the deceased also took an iron rod in his hand is clearly an action when he faced with the confrontation of the appellant. There is no evidence to show that he has used the iron rod to attack the appellant other than using it to defend himself as clearly suggested by the injuries sustained to his hands.

However, it is my view that the evidence clearly suggests that the appellant has acted under the provocation in his belief that the deceased was carrying on an affair with his wife. It appears that he has lost his self-control due to that reason. There had been no previous enmity between the parties. The evidence provides a clear picture that there was no time gap between the alleged finding of a phone by the appellant and his going to the house of the deceased with his wife and later confronting the deceased.

In a criminal case it is necessary to consider the evidence of the prosecution and that of the defence on an equal footing and in its totality and come to a finding in that regard.

In the case of **James Silva Vs. The Republic of Sr Lanka (1980) 2 SLR 167,** it was stated that;

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters adduced before the Court whether by the prosecution or by the defence in its totality without compartmentalizing and asking himself, whether as a prudent man, in the circumstances of the particular case, he believed the accused guilty of the charge or not guilty."*

It was held in the case of **Don Samantha Jude Anthony Jayamaha Vs. The Attorney General, C.A. 303/2006 decided on 11-07-2012** that;

> "Whether the evidence of the defence or the dock statement is sufficient *to create a doubt cannot be decided in a vacuum or in isolation because it needs to be considered in the totality of evidence that is in the light of the evidence for the prosecution as well as the defence."*

In his analysis of the evidence, it appears that the learned High Court Judge has decided to reject the stand of the appellant on the basis the there was clear evidence before the Court that the appellant had the intention of causing the death of the deceased and he has taken up the position that he was attacked by the deceased for the first time when he gave evidence.

I find that the determination that the appellant has taken this position for the first time in his evidence was a clear misdirection. In fact, the appellant has maintained this position when the relevant witnesses were cross examined at the trial. I am of the view that the basis upon which the learned High Court Judge decided to reject the evidence of the appellant was not after a proper analysis of the evidence in its totality.

I am of the view that if considered in its correct perspective there was evidence before the trial Court to come to a finding that the actions of the appellant were due to him being provoked in his belief that the deceased and his wife was

carrying on an illicit relationship although it was not a direct face to face provocation.

Due to the above reasoning, I am of the view that the conviction of the appellant should have been in terms of section 297 of the Penal Code in terms of exception 01 of section 294.

Accordingly, I set aside the conviction and the sentence imposed upon the appellant and convict him in terms of section 297 of the Penal Code for culpable homicide not amounting to murder on the basis as stated above.

I am of the view that since it has been established that the appellant had the intention of causing the death, his sentence should be in terms of the first limb of section 297.

Having considered the facts and the circumstances, the appellant is sentenced to 15 years rigorous imprisonment. In addition, he is ordered to pay a fine of Rs. 25000/-. In default of paying the fine, he is sentenced to one-year simple imprisonment.

Considering the fact that the appellant had been in incarceration from the date of his conviction on 05-03-2021, it is also ordered that the sentence shall deem to have taken effect from that date, namely, 05-03-2021.

The appeal is allowed to the above extent.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal