

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

Iddamalgodage Weerasinghe alias Saman
Accused-Appellant

C.A.No.60/2010

H.C.Vavuniya No.HCV 1916/06 Vs.

The Attorney-General
Respondent

Before : Sisira J. de Abrew, J.
P.W.D.C.Jayathilake, J.

Counsel : Dr. Ranjith Fernando for the Accused-Appellant
M.I.Peiris SSC for the A/G.

Argued on : 20.05.2013 and 21.05.2013

Decided on : 22.05.2013

Sisira J. de Abrew, J.

Heard both Counsel in support of their respective cases.

The accused-appellant in this case was convicted of the murder of a man named Arunasiri Yasarathne and was sentenced to death. Being aggrieved by the said conviction and the sentence the accused-appellant has appealed to this Court. Case for the prosecution depended on the circumstantial evidence.

~ Prosecution led the following items of ~~the~~ circumstantial evidence to prove its case.

1. The accused-appellant was living in the adjoining land of the deceased person.
2. On the day of the incident the deceased person who left his home in the evening came back around 8 p.m. on the accused-appellant's bicycle. At the time he left the house he did not have the bicycle of the accused-appellant.
3. Around 11 p.m. on the day of the incident both deceased person and accused-appellant came to Kanthilatha's boutique and purchased cigarettes.
4. The dead body was recovered in consequence of a statement made by the accused-appellant to the police.
5. A knife was recovered in consequence of a statement made by the accused-appellant to the police.

The accused-appellant in his dock statement denied the charge.

Learned Counsel appearing for the accused-appellant submits that the accused-appellant, on the evidence led at the trial, should have been convicted of the offence of culpable homicide not amounting to murder on the basis of a sudden fight. The accused-appellant did not take up such a defence at the trial. The question that must be considered is whether an accused person can be convicted of the offence of culpable homicide not amounting to murder when such evidence suggesting the defence of sudden fight or grave and sudden provocation is available in the prosecution case although the accused does not take up such a defence. In finding an answer to this question I am guided by the judicial decision in King vs. Bellana Vithanage Eddin 41 NLR page 345 wherein 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 of record, although such defence was not raised nor relied upon by the accused."

In the case of King vs. Albert Appuhamy 41 NLR page 505 Court of Criminal Appeal held thus:- "failure on the part of the 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 defence if it raises on the evidence. In King vs Vidanalage Lanty 42 NLR page 317, Court of Criminal Appeal held thus:- "there was evidence in this case upon which it was opened to the jury to say it that it came within

exception 4 to Section 294 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 charge the presiding Judge referred to this evidence as part of the defence story but not as evidence upon which a lesser verdict might possibly be based.

Held that 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 the lesser verdict". Applying the principles laid down in the above judicial decisions I hold that in a case of murder the accused-person can be convicted of the offence of culpable homicide not amounting to murder if such defence is available in the evidence although the accused does not take up such a defence. The next question that must be decided in this case is whether such defence was available in the evidence led at the trial although the accused appellant has not taken up such a defence. In order to find an answer to this question it is important to note following items of evidence.

1. The accused-appellant was living in the adjoining land of deceased person.
2. There was no evidence to suggest that there was a dispute between the accused-appellant and the deceased person. The prosecution has not led any evidence to suggest a motive for the case.

3. The deceased person who left the house in the evening came back on the accused-appellant's bicycle.
4. Around 11 p.m. on the day of the incident both accused-appellant and the deceased person came to the boutique of Kanthilatha and bought cigarettes.
5. When the deceased person came home around 8 p.m. he took cooked meat saying that there was a party.

The above items of evidence suggest that relationship between the accused-appellant and the deceased person was cordial. Then what was the reason for the accused-appellant to stab the deceased. When considering this question it is important to note that the accused-appellant, according to the Medico Legal Report and the medical evidence, had sustained an injury on his middle finger. According to Post Mortem Report there was smell of alcohol in the stomach contents of the deceased person. The above items of evidence suggest that there has been some kind of cross talks or arguments between the deceased person and the accused-appellant after 11 p.m. up to the time of his death. Therefore it is seen from the prosecution evidence itself that there has been a fight between the deceased person and the accused-appellant. Therefore it is reasonable for this Court to convict the accused-appellant of the offence of culpable homicide not amounting to murder on the basis of sudden fight which is an offence under Section 297 of the Penal Code. The learned trial Judge has

unfortunately not given his mind to this aspect of the case. For the above reasons we set aside the conviction of murder and the death sentence and substitute a conviction of culpable homicide not amounting to murder on the basis of a sudden fight. We sentence the accused-appellant to a term of 15 years rigorous imprisonment and to pay a fine of Rs.10,000/- carrying a default sentence of three months simple imprisonment. We direct the Prison Authorities to implement the sentence from the date of conviction (30.03.2010).

Subject to the above variations of the verdict and the sentence appeal of the accused-appellant is dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C.Jayathilake, J.

I agree.

JUDGE OF THE COURT OF APPEAL

KLP/-