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

In the matter of a petition of appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979 Democratic Socialist Republic of Sri Lanka.

High Court (Kegalle)

Case No: 2577/07

C.A. Case No:15/2012

Attorney General,

Attorney General's Department,

Colombo 12.

Complainant

Vs.

Batagoda Gallage Dona Dharmarathna Manike

Accused

AND

Batagoda Gallage Dona Dharmarathna

Manike alias Batagoda Nahallage Dona

Dharmarathna Manike

No. 26,

Dinidugama,

Paragammana,

Kegalle.

Accused Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

BEFORE	:	**H.N.J. PERERA, J** **P.W.D.C. JAYATHILAKE, J**
COUNSEL	:	Dr. Ranjith Fernando with Samanthi Rajapakshe for the Accused Appellant. S.Wijesinghe DSG for the Respondent.
ARGUED ON	:	28.02.2014
DECIDED ON	:	12.03.2015

P.W.D.C. Jayathilake, J

Watagoda Gallage Dona Dharmaratna Menike, the Accused Appellant has been convicted for committing the murder of Rajapaksalage Prasanna Rajapaksa on the 07th of February 2006 and sentenced to death. Being aggrieved with the

said conviction and the sentence, the Accused Appellant has submitted this appeal in this court.

The Accused Appellant was a married woman with two children, 18 year girl and 15 year boy by 07.02.2006. They were residing at Gurudeniya in Kegalla. They had their old house as well as the new house situated adjoin. They were residing in the new house. Since the new house didn't have a lavatory they used the lavatory of the old house. On this particular day only the Accused Appellant and her two children were at home. As the Accused Appellant wanted to go to the toilet at about 9.30 p.m, she went to the old house asking the daughter to keep the door closed of the new house. While she was walking through the kitchen, the person called Sampath who was hiding there embraced her. Sampath covered her mouth with his hand and told her not to shout. Then she had thought that Sampath would harass her daughter. Just then, she had remembered that there was some acid in the kitchen. She had somehow escaped after struggling, poured acid into a saucepan and thrown it turning back. She had done so for the sake of safety. She too had got injured on her eyes, mouth, hands, legs and lips.

This is the version of the defence made by the Accused Appellant at the High Court trial.

Sampath alias Prasantha Rajapaksa was 34 years by 07.02.2006. He was unmarried and one in the family of 3 brothers. He was engaged in firewood business in estates as a contractor. On the day of the incident, Sampath returned home after work at about 6.30 p.m and again went away and returned home at about 8.30 p.m. Then, he had gone to the Accused Appellant's place without the knowledge of his home people. Around 9.30 p.m. he had come home shouting " Amme, Amme..." and said to his mother that the aunty, uncle Piyasena's wife was telling him to go away, and did this. The mother of Sampath noticed that there was smoke from the wet shirt and the face which had been turned red. Chandana, a cousin brother of Sampath, Wasantha, the younger brother of Sampath and another relative called Tharanga took Sampath to hospital in a three wheeler. There was a bad smell from Sampath. On their way to hospital, Sampath related what had happened to him says Chandana. Deceased had told Chandana that he had gone to Accused Appellant's house at about 9.30p.m as she had told him to come there. He had met her at the old house and she had scolded him saying that she couldn't go into the public as she had been condemned all over. Thereafter, she had flung acid at him.

The above is the evidence of Chandana and Sampath's mother. The injuries referred to in the post mortem report are as follows. Burns on face, neck,

chest, forearms, penis and legs. About 20% of the body surface involved. The cause of death was the multi organ failure following corresponding burns.

The deceased had made a statement to the police when he was under treatment at the National Hospital in Colombo five days after the incident. He has stated the following facts in the said statement.

The deceased was unmarried and had a illicit love affair with the Accused Appellant. When her husband, who was a mazon, was away from home, he used to go there on her request. He stopped this connection with her consent as the relations and friends advised him. Thereafter, he came to know that she had started another affair with another person in the village. He had told the people in that village about it. On the day of the incident, the Accused Appellant requested the deceased to come to her place saying that the husband was not at home. When he went to her place she scolded him asking him why her character was being condemned. Thereafter, she invited him to their old house. Later, she opened the door of that house and threw at him something like water holding a utensil like a saucepan by both hands. The deceased has further stated in his statement that he thought that the Accused Appellant did this due to her anger caused by the fact that he had told the villagers about her other affair.

The ground of appeal raised by the learned counsel for the Accused Appellant was that the failure of the learned trial judge to consider lesser culpability and the exception of private defence in the teeth of the evidence led by both prosecution and defence. The learned counsel emphasized that it has been erroneously concluded that the Accused Appellant had preplanned the incident and that the defence version improbable.

The learned Deputy Solicitor General who appeared for the Attorney General contended that if the Accused Appellant had wanted to escape from the deceased, the Accused Appellant would have cried for help. He argues as the Accused Appellant had stated that she had a torch with her, she could have assaulted the deceased with that exercising her private defence.

However, if the deceased had been in an uncontrollable state, until she could found the bottle of acid, opened it, poured the acid into an utensil and thrown acid at him how did the deceased wait passively without attempting to prevent it? On the other hand if the throwing of acid by the Accused Appellant was a preplanned one, the question arising is why acid had not been poured into the saucepan in advance.

In the opinion of the deceased, the cause of the incident was his spreading of scandals about the Accused Appellant.

According to the above facts, there are a few questions arising to which this court needs to work out answers, namely,

(i) Whether the Accused Appellant wanted to teach a lesson to the person who tarnished her character.

(ii) If it was so, whether she wanted to kill him.

(iii) However, at the time of the incident whether she acted with the knowledge that the deceased would die from her act.

In answering these questions what this court could apply is the evidence available with regard to the previous conduct and the subsequent conduct of the Accused Appellant. The Accused Appellant may not have come out with the whole truth in her evidence, but she has accepted the fact that she threw acid at the deceased. She too had received injuries as she had not taken any precautions for her protection. Wasantha says that the Accused Appellant called him while he was sleeping in his house and said she threw acid at the deceased and he was lying there, go and see. Any prudent man would not accept that this series of her acts are acts performed by a person having the intention of killing another. She may have acted on cumulative provocation, still for all, it cannot be counted as sudden provocation. But the question here is that whether the Accused Appellant had the knowledge that her act would

definitely lead to the death of this person. It is evident that the Accused Appellant who was a mother of a teenager girl, had been under outrage due to the feeling that the act of the deceased detrimanted herself respect. Therefore under those circumstances, the answer of this court to the 3rd question raised above is that the Accused Appellant had no knowledge that her act would result definitely in the death of the deceased.

The doctor states that the acid burns, of the deceased had been affected by germs and it was the influence of germs on burns damaged the internal organs of the deceased and this condition had caused his death. The learned trial judge in her judgment has stated that medical evidence does not clearly says that these injuries necessarily cause death or they cause death in the ordinary course of nature. However, she had acted on an opinion expressed in a decided case, namely, ***Chandrasena*** alias ***Rale*** Vs ***A.G***[1] that the opinion of the medical officer is only a guidance for the judge and arriving at the judgment of the judge shall not be vested on the medical officer. The learned judge has further followed an Indian decision, namely, ***Sudarshan Kumar*** Vs ***state of Delhi***[2] in which the Indian Supreme Court has decided, as the injuries caused

1. (2008) 2 SLR 255
2. AIR 1974 SC V01 61 page 2328

were sufficient in the ordinary course of nature to cause death, the Accused was guilty of an offense punishable under Sec. 302. In that case, Court has observed that the act of the Accused in pouring acid on the body was a preplanned one and he intended to cause injury which he actually caused. Following these decisions, the learned trial judge has come to the conclusion that the Accused Appellant with premeditation making the deceased come to her place and caused the death of the deceased by throwing acid at him. If the learned trial judge had independently, looked at the facts of this case without applying them to the facts of those two decisions, she could have come to a different decision, I suppose.

"Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death" is said to commit culpable homicide according to Sec.293 of the Penal Code. There are three means of committing the offence of culpable homicide according to the above mentioned section. One is having the intention of causing death, the second is having the intention of a physical injury which may cause death and the third is being aware that his act could lead to death. The definition about culpable homicide described in Sec.293 includes the offence of murder and the culpable homicide not amounting to murder. An act included in the above

definition becomes a murder under the instances described in Sec.294 only. Firstly, if the act is committed with the intention of causing death; the second is causing a physical injury which he knows could result in death; the third is causing a physical injury intentionally which is sufficient to cause death; and fourthly if the person committing the act is aware that it is so dangerous that it necessarily leads to death. **Where one needs to know what is meant by culpable homicide not amounting to murder is, what has to be done is to deduct the Sec. 294 from Sec. 293. Then, the remainder is the culpable homicide not amounting to murder.**

It is pertinent to quote a passage from the judgment of H.N.G. Fernando CJ in the case of ***Somapala*** v. ***The Queen***[3]

"The 3rd limb of s.294 postulates one element which is also present in the second clause of s.293, namely, the element of the intention to cause bodily injury; but whereas the offence of culpable homicide is committed, as stated in the second clause of s.293, when there is intention to cause bodily injury likely to cause death, the offence is one of murder under the 3rd limb of s.294 only when the intended injury is sufficient in the ordinary course of nature to cause death. In our opinion, it is this 3rd limb of s.294 which principally corresponds to

3. (72 NLR 121)

the second clause of s.293; and (as is to be expected) every intention contemplated in the latter second clause is not also contemplated in the former 3rd limb. An injury which is only likely to cause death is one in respect of which there is no certainty that death will ensue, whereas the injury referred to in the 3rd limb of s.294 is one which is certain or nearly certain to result in death if there is no medical or surgical intervention. This comparison satisfies us that the object of the Legislature was to distinguish between the cases of culpable homicide defined in the second clause of s. 293, and to provide in the 3rd limb of s. 294 that only the graver cases (as just explained) will be cause of murder. If this was not the object of the Legislature, then there would be no substantial difference between culpable homicide as defined in the second clause of s. 293 and murder as defined in the 3rd limb of s. 294. It will be seen also that if the object of the 2nd limb of s. 294 was to adopt more or less completely the second clause of s. 293, then the 3rd limb of s. 294 would be very nearly superfluous."

His Lordship has further stated in the said judgment that

"There is evidence also of a similar design in the 4th limb of s. 294; knowledge, that an act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, is knowledge, not merely of the likelihood of causing death, but of the high probability of causing death

or injury likely to cause death; so that many cases which fall within the third clause of s. 293 will not be murder within the meaning of the 4th limb of s. 294."

It is the accepted principle that where there is doubt whether the degree of knowledge reflected in the act is insufficient to convict the Accused Appellant for the charge of murder, benefit of the doubt should be exercised in convicting the offender for lesser culpability.

Gratiaen J, in ***Mendis*** Vs ***the Queen***[4] held that the prosecution in presenting a charge of murder should be held in a position to place evidence before the court to establish that in the ordinary course of nature there was a very great antecedent probability (as opposed to a mere likelihood)

(a) Of the supervening condition arising as a consequence of the injury inflicted, and also

(b) Of such supervening condition resulting in death.

I am of the opinion that the framework of facts of this case is, the remainder when the Sec. 294 is taken off the Sec. 293. If this is further clarified, when the facts of this case are substituted for the explanation 2 of Sec.293, since any one of the 4 limbs in Sec 294 are not found among those facts, what we find here is not a murder, but a culpable homicide not amounting to murder.

4. (1952) 54 NLR 177

When there is an intention to cause bodily injury likely to cause death which is in the 2nd clause of Sec. 293 and the injury caused is not necessarily results in death in the ordinary cause of nature such an act comes within the first part of Sec. 297 of the Penal Code. Therefore, we are of the opinion that the learned trial judge erred in convicting the Accused Appellant for the charge of murder under Sec.296 of the Penal Code. Therefore, this court sets aside the conviction and the death sentence passed by the trial judge and convict the Accused Appellant for the charge of culpable homicide not amounting to murder under Sec.297 of the Penal Code. After taking the facts and circumstances into consideration this court decides to sentence the Accused Appellant for 15 years rigorous imprisonment and impose a fine of Rs. 10,000/= carrying a default sentence of six months' simple imprisonment.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA J

I agree

JUDGE OF THE COURT OF APPEAL