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

C.A. No. 131/2011

H.C.Kegalle No. 1653/2001

W.A.Kumarasiri alias Kumara

Accused Appellant

Vs

The Attorney General

Attorney-General's Department

Colombo 12

Respondent

BEFORE : M.M.A. Gaffoor J.,

Mrs . K.K. Wickremasinghe J.,

COUNSEL: N. A. Chandana Sri Nissanka for the Accused Appellant

Dileipa Peeris, S.S.C., for the Attorney General

ARGUED ON : 28.06.2016

DECIDED ON: 22.07.2016

Gaffoor J.,

The Accused Appellant (hereinafter sometime referred to as the "Appellant") was indicted with 8 others before the High Court of Kegalle for being members of an unlawful assembly, punishable under Section 140 of the Penal Code and whilst being members of that unlawful

assembly committing the murder of Kiwulpana Wahumpurayalage Wimalasena, punishable under Sec. 296 of the Penal Code read with Section 146. After trial without a jury, the appellant who was the 8th accused in the case was found guilty of the murder of Kiwulpana Wahumpurayalage Wimalasena and sentenced to death. All other accused were acquitted.

Being aggrieved by the aforesaid conviction and the sentence, the Appellant has tendered this appeal to this court.

The incident has taken place on 17.06.1995 around 7.00 p.m in front of the house of Publis, who was the 1st accused in the trial as well as the father in law of the appellant. At the time of this incident it had been revealed that appellant's pregnant wife was with her parents in this house, apparently the appellant had also stayed there. According to the version of the eye witness Pw1 Sunil Prematilake, the deceased was his brother. He was about18 years old at the time of this incident. On the day of this incident he had gone to one of his uncle named James's house to get a lime chant to his brother's ailment at his groin. A nephew named Wasantha was also with them. They had to pass the house of the Pubilis who was also their uncle. Pubilis, James and the mother of this witness are siblings. So, naturally, the appellant is a close relative of the deceased.

As they were passing the house of Pubilis, someone had flashed a torch and attacked them with a bottle. Then a team of persons identified as the 8th accused had attacked them. Appellant had run to the scene armed with a knife and stabbed the deceased. Having been stabbed, the

deceased had run to the house of Rosalin, a neighbouring woman. So that the crux of his position in his evidence in chief was that they were attacked by the accused, while they had been proceedings to James's house.

The Defence had cross examined him on the footing that the deceased, this witness and Wasantha went to Pabilis's house to create a problem over a dispute between the brother Premaratne and Publis on the same day. The witness had admitted that they went to their brother Premaratne's house prior to this incident. He has stated that he did not see Premaratne soon prior to this incident but witness Wasantha Kumara who was with this witness by the time of this incident has given evidence saying that they saw Premaratne soon before this murder at his house. This witness has taken the firm view that he did not know about the problem between Publis and Premaratne by the time of this murder but the defence has marked vital contradiction "V1" to show that in fact this witness had mentioned about such an incident to the Police in his police statement. The defence has taken up the position that the aggrieved party came to Publis's house to create a problem and Publis was also injured as a result of what happened there. The case record shows the attempts of the defence counsel to get down the MLR of Publis. It is the duty of the Attorney General to disclose the existence of such a fact to the court as well as to the defence. Sub Inspector Atukorale has given evidence that the 1st accused Publis was in hospital but there is no evidence to show whether MLR was issued to him by the police. So that I

have to conclude that the lack of a proper investigation regarding the injuries of Publis has caused a serious injustice to the appellant.

On the other hand this witness namely, "Sunil Prematilake said that he was attacked by the accused. Witness Wasantha Kumara had corroborated that fact but there is neither MLR nor charge in respect of the injuries caused to "Sunil Prematilake". As a result I have to conclude that he was not injured and he had lied in saying that he was injured.

Witness Premaratne, who is the brother of the deceased had given evidence saying that he was attacked by the accused sometime before this incident at the same place where the 2nd incident took place. He said they assaulted him for no reason. Can we believe this evidence ? It is completely out of normal human affairs. Then he proceeded to say that he did not reveal this incident to anyone. This is also obnoxious to normal human conduct. Under cross examination he has stated that he did not meet his brother between assault and murder. Then again his evidence contradicts the evidence of witness Wasantha kumara.

As a result I have to conclude that the evidence given by the above mentioned relatives of the deceased are not reliable. If there is a lapse or doubt in their evidence, the cardinal rule is that the benefit of doubt should be given to the accused so that this appellant has to get the benefit of these doubtful areas of evidence. Moreover, I have to be mindful of the fact that the scene of crime as observed by the chief investigating officer was in front of Publis's house.

Now I avert to consider whether this case falls within the ambit of the mitigatory exception 2 of Section 294 of the Penal code, exceeding the right of private defence. The appellant has given evidence in the trial. He had taken up the position that he stabbed the deceased in order to save his pregnant wife from the aggrieved party. However, the learned State Counsel had been able to attack the credibility of his position. However, notwithstanding this fact I am mindful of the whole scenario. As a result I hold that we should look at the large picture. In Chandradasa vs Queen (1955 NLR 459). It had been held that even in a situation where the accused tenders an exculpatory plea and does not specifically raise the mitigatory plea of a special exception such as sudden fight, there is a duty cast on court to consider the mitigatory plea where facts and circumstances of the case come within the ambit of such a plea. In this case the learned senior state counsel appearing for the Respondent also conceded that this is not a murder case. Hence I hold that the finding of learned trial Judge ia bad in law.

In the case of King vs Muttu (47 NLR 418) – the accused admitted that he caused injuries to the deceased, but pleaded that he had acted in the exercise of right of private defence. It was revealed by the accused that the deceased came on with the sword and the accused fired the fatal shot at a distance of 8 to 10 feet. This was done because the accused feared that he would be killed.

In the case of King vs Vitanage Eddin 41 NLR 345 – Howard C.J. referring to a defence that had not been raised nor relied upon at the trial

said that, that fact was not in itself sufficient to relieve the Judge of the duty of putting this alternative to the jury 'If there was any basis for such a finding (i.e. culpable homicide not amounting to murder) in the evidence on record."

These decisions show that even though an accused or the defence counsel asks for a complete acquittal on the ground of self defence, it is the duty of the trial Judge to give a direction to the jury to find out whether on the facts of the case they would bring a verdict of culpable homicide not amounting to murder. It is the duty of the Judge to direct the jury as asked by the accused or the defence counsel to consider whether they could acquit the accused on the ground of self defence. At the same time the Judge must direct them to consider whether on the evidence placed before them they could find the accused guilty of murder. The middle course is to direct the jury to find out whether he is guilty of culpable homicide not amounting to murder on the ground of self defence or on any other ground coming within the Exception to section 294 of the Penal Code.

A similar view was expressed by the Court of Criminal Appeal in the case of The King vs Albert Appuhamy - 41 NLR 505.

In the case of Soysa vs The Queen - 55 NLR 252 – The accused gave evidence to the effect that he had killed the deceased in self-defence. The learned trial Judge explained to the jury the right of private defence and its limits and directed them that if the accused had acted in self

defence and *""within the ambit of the right given to him by law"* he was guilty of no offence.

As regards the exception (2) in question he said : *"But if you (Jury) think he was defending himself , but that he exceeded the right of private defence your verdict will be culpable homicide not amounting to murder."*

In Gamini vs The Attorney General (C.A. 227/2008) and R.M.Karunaratne vs The Attorney General – (C.A.181/2009) Sisira de Abrew J., held *"Although "A" in his defence did not take the defence of grave and sudden provocation trial Judge must consider such a plea in favour if it emanates from the prosecution evidence."*

In Bemu Chetty (1924) 27 Criminal Law Journal 617 – there was a quarrel between a brother and a sister as to possession of a store room. The sister was roughly handled when she raised cries. Then her husband came there and found his wife being assaulted by her brother and another. He also saw that hands were injured. Then the husband struck the brother one deadly blow with an instrument and when the other person attacked him (the husband) he dealt another fatal blow to him also. In this case it was held that the accused had reason to suppose that his wife might be severely injured and the blows struck by him on both men were in the exercise of the right of defence of his wife and himself. Here the accused did not exceed the right given to him by law.

Therefore, I hold that this case falls within the ambit of mitigatory exception 2 of Sec.. 294 of the Penal Code, exceeding the right of private defence by acting this Appellant in defending his father in law.

Hence, I set aside the conviction and sentence of the learned High Court Judge of Kegalle dated 07.12.2011 and convict this appellant for culpable homicide not amounting to murder. I impose 6 years' R.I. which should be operated from 07.12.2011 and a fine of Rs. 25,000/- and six months' simple imprisonment, in default.

Subject to the above mentioned variations the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

(Mrs) Wickremasinghe J.,

I agree.

JUDGE OF THE COURT OF APPEAL