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

In the matter of an Appeal made under and in terms of Section 331 of the Code of Criminal Procedure Act No.15 of 1979 to be read with Article 138 of The Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0102/103/20

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT

Vs.

High Court of Kuliyapitiya

Case No: HC/39/09

1. Basnayaka Appuhamilage Sudath Rohana Thissera

2. Madurawalage Janaka Pradeep Kumara

ACCUSED

AND NOW BETWEEN

1. Basnayaka Appuhamilage Sudath Rohana Thissera

2. Madurawalage Janaka Pradeep Kumara

ACCUSED-APPELLANTS

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Chathura Amarathunga for the 1st Accused-Appellant
	: Nalin Ladduwahetty, P.C. with Kavithri Ubeysekera for the 2nd Accused-Appellant
	: Dilan Ratnayake, A.S.G. for the Complainant-Respondent
Argued on	: 03-04-2024
Written Submissions	: 01-12-2021 (By the 1st Accused-Appellant)
	: 24-03-2022 (By the 2nd Accused-Appellant)
	: 04-05-2022 (By the Respondent)
Decided on	: 26-06-2024

Sampath B. Abayakoon, J.

The two accused-appellants (hereinafter sometimes referred to as the appellants) were initially indicted before the High Court of Kurunegala for causing the death of one Mohomad Anzarge Rumesh Imran on 17-04-2007 at Pannala, Morakalewaththa area, and thereby committing the offence of murder punishable in terms of section 296 read with section 32 of the Penal Code.

The case was transferred to the High Court of Kuliyapitiya after its establishment, and after a trial without a jury, the learned High Court Judge of Kuliyapitiya found the appellants guilty as charged by the judgment dated 04-09-2020. Accordingly, both the appellants were sentenced to death.

Being aggrieved by the said conviction and the sentence, the appellants preferred this appeal.

The facts in Brief

It was the mother of the deceased (PW-02) who has given evidence as the sole eyewitness to the incident. This incident has occurred around 6.30 in the evening of 17-04-2007. PW-02's husband (the father of the deceased) has been engaged in recruiting people for overseas jobs. There had been several issues in that regard between the husband of PW-02 and those who paid money to him expecting to go for overseas jobs, as he has failed to secure the jobs as agreed. Although she and her family members opposed his business, and wanted him to quit, he has continued with it despite their objections.

On the day of the incident, the deceased, who was 20 years of age at that time had been playing carom in front of their house with some of his friends. At that time, four persons including the appellants, all of whom were well known to her and frequent visitors of her house had come in two motorbikes. She has identified the first appellant as Thissera and the second appellant as Janaka at the trial. She has testified that another person called Milinda also came along with the appellants. She has come to know that they came in search of her

husband. When informed that he is not at home, the 1st appellant has gone inside the house and searched the rooms to check whether her husband was inside.

According to her evidence, when they found out that the husband was not at home the person called Milinda had started assaulting her. When this happened, her son who has been playing carom has intervened questioning as to why they were assaulting his mother. Thereafter, the 2nd appellant Janaka has started assaulting the deceased. The 1st appellant also has joined the others. Her attempts to rescue her son has failed. She has later seen her son running away and the two accused chasing after him. She has also run behind them pleading not to assault the son. After running about 100 feet, the deceased had fallen onto the ground, and PW-02 has seen the 1st appellant kicking her son, while the 2nd appellant was assaulting him. She has then seen the 2nd appellant Janaka repeatedly stabbing her son towards his abdominal area. She has also seen the 1st appellant pushing her son to a side of the road. The 2nd appellant has assaulted her as well.

After the assault, the appellants had left along with the others and the deceased had been admitted to the hospital where he later succumbed to his injuries.

Under cross-examination, she has stated that the 1st appellant was also a person who worked with her husband while he was working in Saudi Arabia. She has admitted that she came to know about one week before the incident that her husband has promised to send the two accused, and several others for overseas employment, and they were after her husband because of his failure to do so. She has also admitted that when the appellants and others came to their house, there were two other neighbouring women in their house who were having some cakes.

Her evidence has established the fact that the appellants and others came to their house asking to return the money her husband has taken from them by

promising to send them for overseas employment and this was the main reason for the incident.

It has been suggested to her that she has failed to say anything in her police statement that the 2nd appellant assaulted her son, for which she has replied stating that she said.

While cross-examining the witness, it has been admitted on behalf of the appellants that an incident took place, which resulted in the deceased being injured as a result of a sudden fight. However, at the same time, it has been suggested to the witness that she came and got involved in the brawl having in her hand a knife, and the injuries suffered by her son were caused by that knife, which the witness has denied.

According to the evidence of the Judicial Medical Officer (JMO) who conducted the post-mortem, the deceased has received one stab wound to his abdominal area which has resulted in loss of blood, which has contributed towards his death.

After leading the evidence of the investigating officers, the prosecution has closed the case.

When the appellants were called upon for a defence based on the evidence placed before the Court, the 1st appellant has made a dock statement. He has stated that the husband of PW-02 took money from them promising to provide overseas employment and once took them to the airport and cheated them. Because of that, they used to visit his house frequently to get their money returned, and the husband of PW-02 was in the habit of evading them. It has been his position that he wanted them to come on 17-04-2007, and when they went to his house around 7.00 p.m. saw a party going on at the house and several persons playing carom. When asked for the person whom they wanted to meet, they have been informed that he is not in the house. Although they have searched the house, they could not find him, and when they came out of the house, they had a verbal altercation with his son who is the deceased. One of the persons who went with

them named Milinda has had a physical altercation with the deceased, which had resulted in a brawl between the deceased, PW-02, and those who came in search of the husband of PW-02. He has claimed that it was PW-02 who came with a knife and had stated this incident, which resulted in an unfortunate occurance.

The 2nd appellant has not stated anything and has decided to remain silent.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the 1st accused-appellant formulated the following grounds of appeal for the consideration of the Court.

1. The prosecution has not proven the common intention of the 1st accused-appellant.
2. The learned High Court Judge has not evaluated the dock statement of the 1st accused-appellant.
3. There was evidence relating to culpable homicide not amounting to murder, and the learned High Court Judge has failed to evaluate evidence in that regard.

The learned President's Counsel who represented the 2nd accused-appellant urged the following grounds of appeal while associating himself with the submissions made by the learned Counsel for the 1st accused-appellant.

1. Did the learned High Court Judge err in prematurely judging the case before the analysis of the defence evidence.
2. Did the learned High Court Judge err in wrongly casting a burden on the accused to rebut the evidence against them.
3. Has the learned High Court Judge erred in failing to correctly to evaluate the evidence of PW-02.
4. Has the learned High Court Judge erred in accepting the evidence of PW-02 with regard to the omissions and other infirmities.

5. Has the learned High Court Judge erred in wrongfully evaluating common intention or non-evaluation of common intention.
6. Has the learned High Court Judge erred in not considering the law in relation to culpable homicide not amounting to murder.
7. Do the failure to adopt previous proceedings fatal to sustain a conviction.

The Consideration of The Grounds of Appeal

Although several separate grounds of appeal were urged on behalf of the two appellants, since both the Counsel raised a ground of appeal on the basis that the learned High Court Judge had failed to consider whether there was evidence to convict the appellants on the basis of culpable homicide not amounting to murder, I will now proceed to consider the said ground of appeal, before considering the other grounds of appeal, if necessary.

I am of the view that if it can be determined that the conviction should have been on the above-mentioned basis, considering the other grounds of appeal would not be necessary.

I find that this is a case where most of the facts relating to the reason behind this incident have been admitted by the prosecution witnesses, as well as the appellants. It is clear that the father of the deceased had been engaged in providing foreign employment to others and he has failed to secure employment as promised, although he has taken money from the appellants, as well as others in that regard. It is clear that the appellants have been frequently visiting the house with the others claiming to return the money paid by them to the father of deceased. The fact that the two appellants along with two others visited the house on the day of the incident in order to demand the money from the father of the deceased (husband of PW-02) was also not a disputed fact. The fact that when they came to the house, the deceased and some others were playing carom in front of the house and two other neighboring women enjoying some cakes inside the house, were also not disputed.

When informed that the husband of PW-02 was not home, the fact that the appellants and others who came had entered the house and searched it was also undisputed.

Although how the incident of assault started differs from the version of PW-02 and that of the appellants, it is certain that it has started as a result of the issues the appellants had with the husband of PW-02.

According to the version of PW-02, she had been assaulted by another person who was with the appellants, and her son got involved because of that. According to the appellants, when they were looking for the father of the deceased, the deceased has told them if they have any issues with the father, to settle it with him, which resulted in the brawl including them, the deceased, and the PW-02.

Although the appellants have not directly admitted causing injuries to the deceased, the dock statement of the 1st appellant clearly shows that the deceased had been injured as a result of the brawl they had with him.

The evidence led before the Court clearly establishes the fact that when the appellants and two others came to the house of the deceased, they had no intention of harming the deceased under any circumstances. It is therefore clear that the incident where the deceased received a fatal injury has sparked off as a sudden fight due to the appellants being deprived of their self-control as a result of the grave provocation that resulted, although the deceased was not the person who may have caused the initial provocation.

However, it is clear that this incident has resulted because of the cumulative provocation the appellants may have developed due to the actions of the father of the deceased. Although PW-02 has claimed in her evidence that the deceased was repeatedly stabbed by the 2nd appellant, in fact, he has received only one injury, which shows that it was a sudden fight and not an intentional attack on the deceased.

I find that in fact, the learned High Court Judge has also considered these factors in the judgment, but has not drawn his attention to consider whether the actions of the appellants would fall under the general exceptions as stated in section 294 of the Penal Code, which would fall it under culpable homicide not amounting to murder.

It is trite law that even in a situation where the accused party has not taken up such a position before the trial Court, it is the duty of the trial Judge to see whether there is evidence before him that would fall the offence to one of culpable homicide not amounting to murder.

In the case of **King Vs. Bellana Withanage Eddin 41 NLR 345,** a 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 for such a finding in the evidence of record, although such defence was not raiser nor relied upon by the accused."*

In the case of **Gamini vs. The Attorney General (2011) 1 SLR 236**, it was held,

> *"1. Though the accused-appellant in his defence did not take up the defence of grave and sudden provocation, the trial Judge must consider such a plea in favour of the accused-appellant if it emanates from the evidence of the prosecution.*
>
> *2. Failure on the part of the petitioner or his Counsel to take up a certain line of defence does not relive a Judge of the responsibility of putting to the jury such defence if it arises on the evidence."*

It is well settled law that in a criminal case, a trial Judge has to consider the evidence placed before the Court in its totality without compartmentalizing it, be it the evidence of the prosecution or that of the defence.

I am of the view that if considered in its correct perspective, there was sufficient evidence for the learned High Court Judge to decide in terms of section 294 exception 1 that the incident where the death of the deceased occurred was culpable homicide not amounting to murder.

The said exception 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 the provocation, or causes the death of any other person by mistake or accident.**
>
> **The above exception is subject to the following provisos –**
>
> ***Firstly*****- that the provocation is not sort or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.**
>
> ***Secondly*****– that the provocation was not given by anything done in obedience of the law or by a public servant in the lawful exercise of the powers of the public servant.**
>
> ***Thirdly*****– that the provocation is not given by anything done in the lawful exercise on 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.**

Having considered the facts and the circumstances of this matter, I am of the view that the death of the deceased was very much an unfortunate incident, where the deceased had to pay for his father's sins. However, the actions of the appellants would fall into the category of culpable homicide not amounting to murder, punishable in terms of section 297 of the Penal Code.

Although it was contended on behalf of the 1st appellant that the part played by him in the incident does not establish the common intention, I am in no position to agree.

The relevant section 32 of the Penal Code reads as follows.

> **32. When a criminal act is done by several persons in furtherance of common intention of all each of such persons is liable for that act in the same manner as if it were done by him alone.**

The evidence placed before the trial Court clearly establishes the fact that although the 1st appellant may not have inflicted the stab wound on the deceased, he was a part of the group that assaulted the deceased. Therefore, it is clear that the 1st appellant has also acted in furtherance of the common intention which resulted in the death of the deceased.

For the reasons as considered above, I find that considering the other grounds of appeal would not be necessary, since the appeal can succeed in the considered ground of appeal alone.

Hence, I set aside the judgment dated 04-09-2020 by the learned High Court Judge of Kuliyapitiya, where the appellants were found guilty for the offence of murder, punishable in terms of section 296 of the Penal Code as it cannot be allowed to stand.

Based on the aforementioned reasons, I convict the appellants in terms of section 297 of the Penal Code for culpable homicide not amounting to murder under exception 1 of section 294 of the Penal Code.

Having considered the facts and the circumstances, I am of the view that the punishment for the offence now they stand convicted should be in terms of the 2nd limb of section 297 of the Penal Code.

Accordingly, I sentence the two appellants for a period of 10 years each rigorous imprisonment, and to a fine of Rs. 25,000/- each.

If the appellants fail to pay the said fine, they should serve a term of 1 year each simple imprisonment as a default sentence.

Although the death of the deceased cannot be calculated in financial terms for a mother, I find that this is a fit and proper instance where compensation should be ordered against the appellants, and should to be paid to the mother of the deceased, namely PW-02.

The two appellants are ordered to pay Rs. 500,000/- each as compensation to PW-02. In default, it is ordered that the said compensation should be recovered as a fine. In the case of default in the payment as a fine, the appellants shall serve a rigorous imprisonment period of 2 years each.

Having considered the fact that the appellants have been in incarceration from their date of conviction from 04-09-2020, it is ordered that the period of 10 years each rigorous imprisonment shall deemed to have commenced from that day, namely, 04-09-2020.

The appeal is partly allowed to the above extent.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal