

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

In the matter of an Appeal made under  
Section 331 of the Code of Criminal  
Procedure Act No.15 of 1979.

**Court of Appeal Case No.  
CA/HCC/0126/2022  
High Court of Embilipitiya  
Case No. HCE/0024/2016**

Lama Hewage Lohitha  
Wickramasinghe  
Koswatiya,  
Pallebedda.

**Vs.**

**ACCUSED-APPELLANT**

The Hon. Attorney General  
Attorney General's Department  
Colombo-12

**COMPLAINANT-RESPONDENT**

**BEFORE** : **Sampath B.Abayakoon,J.  
P.Kumararatnam, J.**

**COUNSEL** : **Saliya Pieris, PC with Thanuka Nandasiri  
for the Appellant.  
Dishna Warnakula, DSG for the  
Respondent.**

**ARGUED ON** : **16/10/2023**

**DECIDED ON** : **13/12/2023**

**JUDGMENT**

**P. Kumararatnam J**

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Embilipitiya under Section 296 of the Penal Code for committing the murder of Tissawalangu Mudiyanseelage Sadun Kumara alias Podiththa on or about 13<sup>th</sup> November 2004.

The trial commenced before the High Court Judge of Embilipitiya as the Appellant had opted for a non-jury trial. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellant had made a dock statement and closed the case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant as charged, and sentenced him to death on 20.05.2022.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via Zoom from prison.

The Learned President's Counsel at the very outset of the argument submitted that when considering the circumstances of this case, which concerns an act committed in the course of his duties by the Appellant, the Learned High Court Judge ought not to have come to a finding of guilt against Appellant.

### **Background of the Case**

According to PW1, PC 29720 Ranaweera, the incident had occurred near a place called Karamatiara Junction between 10.00p.m. and 12.00 a.m. When PW1 and the Appellant were on duty to search suspicious vehicle near Karamatiara Junction, a motor bike had come there with a rider and a pillion rider. When the Appellant commanded the rider to stop thrice, the said bike proceeded without stopping. When he flashed his torch, had seen an object similar to a gun was carried by one of the persons on his lap. As reasonable suspicious arose on them, the Appellant had opened fire on the motor bike to stop it. He could not obtain the permission to shoot from PW1 as he stood some distance away from the Appellant. The gunshot struck on the deceased's head. As a result, people nearby had gathered the place of incident and they had to face a hostile situation which was controlled by the police who arrived at the scene shortly.

PW2 Saminda Kumara, who was the rider of the motorbike at the time of the incident stated that the incident had happened when they were returning after visiting his girlfriend. As road was muddy and with lots of pot hole, he had riven the motorbike slowly. As it was a rainy day a large umbrella was carried on the lap of the deceased. After receiving gun shot, both had fallen down on a grass surface and he had noticed that the deceased was bleeding.

PW11 SI/Somadasa who had gone with the main investigating officer who had passed away before giving evidence in this case. He had reached the place of incident at about 1.15 a.m. and the place was illuminated with a petromax light. The road was in muddy status with lots of pot holes. He had

seen the deceased was lying fallen on the grass. The motor bike bearing No. was fallen on the road. The witness confirmed that the road which led to the place of incident had not been illuminated at the time of the incident.

The JMO who conducted the post mortem had noted one gunshot entry wound in the back of the head of the deceased which had damaged the brain and caused the death. Two other gunshot entry wound also noted on the deceased body.

On behalf of the Appellant, following ground of appeal were raised:

1. Whether the Learned High Court Judge failed to evaluate the evidence pertaining to the intention of the Appellant.
2. Whether the Appellant has acted upon his powers in good faith.
3. Whether the evidence given by PW2 and the circumstances of the incident make PW2 a trustworthy witness.
4. Whether the Learned High Court judge has properly evaluated the Dock Statement of the Appellant and the evidence favorable for the Appellant.

As the appeal grounds raised are interconnected, it is appropriate to consider all appeal grounds together hereinafter.

The President's Counsel contended that the Learned High Court Judge had failed to consider the circumstances of this case properly, since this was an act committed in the course of carrying out his duties by the Appellant. Hence, the Learned High Court Judge ought not to have come to a finding of guilt against either of the Appellant.

In criminal law, criminal intent is the conscious desire to commit a crime or cause harm. It is an essential element of many crimes, and it must be proven beyond reasonable doubt for a person to be held liable for their actions. if there is no evidence suggesting that an accused person had any intention to commit the alleged crime, they cannot be held responsible under the law

regardless of what happened due to their actions. Furthermore, judges serve an essential function in assessing intent since it is ultimately up to them to decide whether an accused person acted intentionally based on all available facts and evidence presented during trial proceedings.

According to PW1, as they had received instructions to arrest suspicious persons and vehicles, he had gone to Karamatiara, the place of incident in the night with the Appellant. While they were on duty, noticed a motorbike coming on their way and heard one of the riders telling the other, to turn back the bike after seen them. At that time the witness and the Appellant had seen the riders holding a weapon like item on the motorbike. When they ordered to stop the bike by flashing the torch, the bike proceeded defying their command. Which formed a serious suspicious against the deceased and the other person. Hence, the Appellant had opened fire to stop the bike. This situation has to be considered very carefully.

According to investigating officer PW09, the road where the shooting had occurred is not a level road. It was a muddy road with lots of pot holes.

According to Section 56 of the Police Ordinance 16 of 1865 it states that:

“Every police officer shall for all purpose in this Ordinance contained be considered to be always on duty, and shall have the powers of a police officer in every part of Sri Lanka, it shall be his duty;

- a) To use his best endeavours and ability to prevent all crimes, offences and public nuisances;
- b) To preserve the peace;
- c) To apprehend disorderly and suspicious characters;
- d) To detect and bring offenders to justice;
- e) To collect and communicate intelligence affecting the public peace; and
- f) promptly to obey and execute all orders and warrants lawfully issued and directed to him by any competent authority.”

When a police officer encounters a situation of this nature, he is often required to make quick decisions in maintaining the law and order. Further he is only be protected if he discharges his duties in 'good faith' that is with due care and protection.

**Wing-Cheong Chan|Michael Hor| |Neil Morgan| Jeeva Niriella|Stantly Yeo** in their book titled "Criminal Law in Sri Lanka" at page 255 state that:

"Some public servants such as the police and military personnel have an important role to play in maintaining law and order or pursuing justice in a civil society. The law imposes certain duties on these public servants which, along with the powers which go with them, are not normally accorded to ordinary civilians. There will invariably be occasions when, in the discharge of these duties, the public servant causes harm which constitute an offence. There will also be circumstances when public servants meet physical resistance when performing their duties, and the Penal Code gives them a number of protections. Generally speaking, the special protections afforded to public servants are the result of the 'Law and Order' objectives of 19<sup>th</sup> century British interests in India and outlying colonies".

In **Tennessee v Garner**, 471 U.S. 1(1985) U.S Supreme Court held that:

*" It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect posses a threat of serious physical harm, either to the officer or to the others, it is not unconstitutionally unreasonable to prevent escape by using deadly force".*

In this case the Appellant after receiving orders when they were at the place of incident and tried to stop a motorbike in good faith. As PW1 and the

Appellant ordered to stop the bike which defy their orders the Appellant with best of his ability tried to stop the motorbike but unfortunately bullets struck the deceased. It is pertinent to note that when the Appellant signalled the rider to stop the bike, rider had driven the bike forward non-stop. Both PW1 and the Appellant had seen an object resembled to a gun was on the motorbike. At this point the intense suspicion led the Appellant to shoot at the bike to stop it. Further the road is in a declining angle and according to the investigating officer it is very difficult to take aim at that place.

PW2 admitted that a large umbrella was on the lap of the deceased at the time of the incident. According to PW1 and the Appellant they had seen an object similar to a gun was carried on the motor bike.

Under these circumstances, evaluating the evidence under the 4<sup>th</sup> limb of the Section 294 of the Penal Code, I consider, is not appropriate.

The Appellant, being a police officer carried out his duties as directed, and that he did not have any intention of shooting the deceased. The Appellant in his dock statement clearly stated under what circumstances he had opened fire at the motorbike.

Considering the appeal ground advanced by the Appellant and all the circumstances of this case, it is quite appropriate that this matter should have been considered under section 69 of the Penal Code. The Appellant should have been awarded the benefit under the said section. The Learned High Court Judge ought not have come to a finding of guilt against the Appellant.

Considering all the circumstances stressed before this court I conclude that this is an appropriate case to consider for the Appellant's benefit, his entitlement under Section 69 of Penal Code;

“Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of mistake of law in good faith believes himself to be, bound by law to do it”.

Due to aforesaid reasons, we set aside the conviction and sentence imposed by Learned High Court Judge of Embilipitiya dated 20/05/2022 on the Appellant. Therefore, he is acquitted from the charge.

Accordingly, the appeal is allowed.

The Registrar of this Court is directed to send this judgment to the High Court of Embilipitiya along with the original case record.

**JUDGE OF THE COURT OF APPEAL**

**Sampath B.Abayakoon, J**

I agree

**JUDGE OF THE COURT OF APPEAL**