

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

In the matter of an Appeal made under  
Section 331(1) of the Code of Criminal  
Procedure Act No.15 of 1979, read with  
Article 138 of the Constitution of the  
Democratic Socialist Republic of Sri  
Lanka.

**Court of Appeal No:**  
**CA/HCC/0260/2020**

**High Court of Balapitiya**  
**Case No. HCB/1024/2007**

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

**COMPLAINANT**

**Vs.**

1. Ilandaridevage Dinesh Chandana alias  
Chamila
2. Ilandaridevage Thilakaratne alias Samel  
Patti
3. Belandadeva Saman Kumara alias  
Saman
4. Ilandaridevage Roshan Chaminda

**ACCUSED**

**NOW AND BETWEEN**

1. Ilandaridevage Thilakaratne alias  
Samel Patti
2. Belandadeva Saman Kumara alias  
Saman

**ACCUSED-APPELLANTS**

**vs.**

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

**COMPLAINANT-RESPONDENT**

<b><u>BEFORE</u></b>	:	<b>Sampath B. Abayakoon, J. P. Kumararatnam, J.</b>
<b><u>COUNSEL</u></b>	:	<b>Neranjana Jayasinghe with Harshana Ananda, Imansi Senaratne and Randunu Heellage for the 1<sup>st</sup> Appellant. Palitha Fernando, PC with Harshana Ananda for the 2<sup>nd</sup> Appellant. Wasantha Perera, DSG for the Respondent.</b>
<b><u>ARGUED ON</u></b>	:	<b>20/06/2024</b>
<b><u>DECIDED ON</u></b>	:	<b>01/10/2024</b>

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### **JUDGMENT**

**P. Kumararatnam, J.**

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted by the Attorney General on following charges:

1. On or about 23<sup>rd</sup> May 2005 the accused committed the murder of Pelawatte Hettige Dilshan Pushpakumara which is an offence punishable under Section 296 read with Section 32 of the Penal Code.
2. In the course of the same transaction committed attempted murder of Hewahelage Rosalin which is an offence punishable under Section 300 read with 32 of the Penal Code.
3. In the course of the same transaction committed attempted murder of Pelawatte Hettige Sirimal which is an offence punishable under Section 300 read with 32 of the Penal Code.
4. In the course of the same transaction caused grievous hurt to Ilandaridevage Wimalasiri which is an offence punishable under Section 315 read with 32 of the Penal Code.

As the Accused had opted for a non-jury trial, the trial commenced before a judge and the prosecution had led ten witnesses and marked productions P1 to P3 and closed the case. The learned High Court Judge being satisfied that the evidence presented by the prosecution warrants a case to be answered, called for the defence and explained the rights of the accused.

The 1<sup>st</sup> and 3<sup>rd</sup> Accused had made statements from the dock, the 2<sup>nd</sup> Accused had given evidence from the witness box and the 4<sup>th</sup> Accused had remained silent. The defence further adduced evidence of four witnesses on their behalf.

After considering the evidence presented by both sides, the learned High Court Judge had acquitted the 4<sup>th</sup> Accused from all the charges and found the 1<sup>st</sup> Accused guilty under 3<sup>rd</sup> and 4<sup>th</sup> charges. The 2<sup>nd</sup> Accused (1<sup>st</sup> Appellant) was found guilty under 1<sup>st</sup> and 2<sup>nd</sup> charges and the 3<sup>rd</sup> Accused (2<sup>nd</sup> Appellant) was found guilty under 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> charges and sentenced them as follows:

- 1<sup>st</sup> Accused- 3<sup>rd</sup> count-1-year rigorous imprisonment suspended for 15 years with a fine of Rs.10,000/ and with a default sentence of 12 months. Rs.50,000/- compensation with a default sentence of 12 months simple imprisonment.  
4<sup>th</sup> count-1-year rigorous imprisonment suspended for 15 years with a fine of Rs.5000/ with a default sentence of 03 months simple imprisonment. Rs.25,000/- compensation with a default sentence of 9 months simple imprisonment.
- 1<sup>st</sup> Appellant (2<sup>nd</sup> Accused)- 1<sup>st</sup> count- death sentence.  
2<sup>nd</sup> count- 1- year rigorous imprisonment with a fine of Rs.10,000/- default sentence and with a default sentence of 03 months simple imprisonment.  
Rs.50,000/- compensation with a default Sentence of 12 months simple imprisonment.

- 2<sup>nd</sup> Appellant (3<sup>rd</sup> Accused)- 1<sup>st</sup> count- death sentence.

3<sup>rd</sup> count- 1- year rigorous imprisonment with a fine of Rs.10,000/- and with a default sentence of 03 months simple imprisonment.

Rs.100,000/- compensation with a default sentence of 12 months simple imprisonment.

4<sup>th</sup> count- 2- years rigorous imprisonment with a fine of Rs.10,000/ and with a default sentence of 03 months simple imprisonment.

Rs.50,000/- compensation with a default sentence of 09 months simple imprisonment.

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

The learned Counsel for the Appellant informed this court that the Appellants have given consent to argue this matter in their absence. At the time of argument, the Appellants were connected via zoom from prison.

**Background of the case *albeit* briefly is as follows:**

In this case, it is quite significant that the incident had transpired between two families. PW1 is the sister and PW5 is the brother-in-law of the deceased. PW3 and PW4 are the parents of the deceased.

The 1<sup>st</sup> Appellant is the father of the 1<sup>st</sup> and 4<sup>th</sup> Accused. The 2<sup>nd</sup> Appellant is the son-in-law of the 1<sup>st</sup> Appellant who had married the daughter of 1<sup>st</sup> Appellant.

The evidence revealed that a dispute had subsisted between the deceased and the 1<sup>st</sup> Accused for a long time beginning from their young ages and the same prolonged dispute had been the cause of the incident which culminated in the murder of the deceased.

According to PW1, the deceased is her brother who was a soldier in the Sri Lankan Army at the time of his demise. During the time of the incident the deceased had returned home on holiday.

According to PW1, she was at home when she heard a man screaming. When she rushed to the place, she had seen the deceased standing on the road in front of the house of the 1<sup>st</sup> Appellant's daughter. At that time, she had seen the 1<sup>st</sup> and 2<sup>nd</sup> Appellants attacking the deceased with a sword and a knife. When her father PW4 came to the place of incident to rescue his son, the 2<sup>nd</sup> Appellant had attacked him with sword. At that moment, the 1<sup>st</sup> Accused had hit her on the head with a pole.

According to PW4, his wife PW6 was cut by the 1<sup>st</sup> Appellant and his son-in-law PW5 was attacked by the 2<sup>nd</sup> Appellant with a sword. PW6 had died before she could give evidence in the High Court. Hence, her evidence was marked under Section 33 of the Evidence Ordinance by the prosecution.

According to the 1<sup>st</sup> Appellant who gave evidence from the witness box, , the deceased, along with PW1, PW4, PW6 and PW5 had arrived at his daughter's house and attacked the 1<sup>st</sup> Appellant, his daughter and his granddaughter prior to the incident. The 1<sup>st</sup> Appellant's daughter Palika, DW3 had given evidence and the Medico Legal Reports of the 1<sup>st</sup> Appellant and DW3 were marked as V16 and V17. The B/Report filed by the police confirmed that the 1<sup>st</sup> Appellant had received injuries from the incident.

The Appellants adduced following grounds of appeal.

1. There is no adequate consideration of the facts of the case.
2. The Common Intention was not considered in the judgment of the learned trial judge.
3. According to the facts of the case, evidence transpired of provocation but no consideration given in the judgment. Thereby the Appellants were deprived of a fair trial.

The learned President's Counsel who appeared for the 2<sup>nd</sup> Appellant strenuously argued that this is a fit and proper case to be considered under Section 297 of the Penal Code on the basis of provocation and sudden fight. This was endorsed by the Counsel for the 1<sup>st</sup> Appellant as well.

Before the commencement of the trial, the Counsel for all the Accused informed the Court that his clients were willing to tender a plea under 297 of the Penal Code on the basis of a sudden fight but this was not agreed to by the prosecution.

Hence, I consider it is pertinent to consider the 3<sup>rd</sup> ground of appeal first before considering the 1<sup>st</sup> and 2<sup>nd</sup> grounds of appeal.

**The exception 4 to Section 294 (Murder) of the Penal Code states as follows:**

“Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner”.

**Explanation:** - It is immaterial in such cases which party offers the provocation or commits the first assault.

As stated above, the involved parties are two families. A long-standing dispute had existed between the deceased and the 1<sup>st</sup> Accused who is the son of the 1<sup>st</sup> Appellant.

It is not disputed that the incident had happened in very close proximity to the house of DW3, Palika the daughter of the 1<sup>st</sup> Appellant. Although during her statement as a witness, PW1 had stated that the 1<sup>st</sup> Appellant had turned the deceased who was lying fallen upwards, pulled a knife from his waist and stabbed the deceased in the chest area, this was not mentioned to police when she gave her statement. Further, she admitted that she did not mention that the 1<sup>st</sup> Appellant used a knife to stab the deceased. This was highlighted as an omission.

Further, a vital contradiction was marked in the evidence given by PW3. In her statement, she had stated that they had a fight prior to the incident pertaining to this case. But she had denied this when she was cross examined. This contradiction was marked as V6.

PW4 the father of PW1 had stated to the police that when he came to the place of incident, his son had fallen down and his daughter was at home, but during the trial, he had stated that the deceased was standing. This contradiction was marked as V11.

PW5, the husband of PW1 stated about a fight when he was suggested that the incident had happened inside the house of the 1<sup>st</sup> Appellant's daughter.

The 1<sup>st</sup> Appellant who gave evidence from the witness box stated that he had no alternative but to attack the deceased and his party at his daughter's house to save his life and the life of his daughter DW3 Palika. They had entered the house of DW3 with a katty and an axe and behaved in an abusive manner. After hitting the 1<sup>st</sup> Appellant on his head, the deceased and his crowd had damaged the television and cabinet. Thereafter, his daughter was attacked. Initially, the 1<sup>st</sup> Appellant had used a knife which he used to cut



arecanut in order to save his and his daughter's life. Having told the daughter to run away with her child, the 1<sup>st</sup> Appellant had left through the rear door and had come back with a mamoty at which time the deceased had attacked him with a sword. In order to save himself, first he had dealt a blow on the hand of the deceased. As a result, the sword had fallen on to the ground. Quickly, he had picked up the sword and attacked the mob around him. At that point somebody had dealt him a blow on his hand and sword had fallen down again. Thereafter, he had picked up a pole from the fence and attacked the mob to disperse them. The B/Report filed by the police confirmed that the 1<sup>st</sup> Appellant has sustained injuries in the incident.

It is very pertinent to note that the prosecution had failed to produce recovered productions during the trial.

DW3, Palika also corroborated his evidence and she had added that in the morning of the incident the deceased walking past her house repeatedly for three times had shouted that he would kill her father that day. Further when she was at the public well, the deceased had come there and reiterated that he would kill her father.

The Defence called a lawyer who had visited the scene of crime as an Acting Magistrate who had visited the crime scene noted the damage caused to the television and the cabinet in the house of DW3. He? had also noted several blood marks in the house of DW3.

Both the Counsels of the Appellants contended that the learned High Court Judge had relied on the opinion given by the investigating officer regarding the happening of the incident inside the house citing it was a rainy day and could reasonably expect mud patches to be there inside the house. But the B/Report filed by the police had stated that there was no rain. They further contended that it has caused great prejudice as the learned High Court Judge believing the opinion of the police officer had come to the conclusion that there had not been a struggle inside DW3's residence.

According to PW1 the distance between their ancestral house and the place of incident is about 1.5 Km. The prosecution had not elicited any evidence as to why the deceased and the prosecution witnesses had gone to such a distance and sustained injuries.

In this case the learned High Court Judge had failed to take into consideration the fact that the prosecution witnesses had failed to explain the injuries caused to the 1<sup>st</sup> Appellant and the defence witness DW3.

**Lakshmi Singh And Other v State of Bihar** 1976 AIR SC 2263 the Indian Supreme Court held that:

*“The facts of the present case clearly fall within the four corners of either of the first two principles laid down by this judgment. In the instant case, either the accused were fully justified in causing the death of the deceased and were protected by the right of private defence or that if the prosecution does not explain the injuries on the person of the deceased the entire prosecution case is doubtful and the genesis of the occurrence is shrouded in deep mystery, which is sufficient to demolish the entire prosecution case. It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:*

*(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version:*

*(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;*

*(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.*

*The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution case.”*

During the trial the Medico Legal Report of the 1<sup>st</sup> Appellant and the DW3 were marked as V16 and V17 and the prosecution had admitted the said reports.

Considering the evidence presented by both parties, ample evidence surfaced about a sudden fight, provocation and exceeding the right of self-defence. But this had completely escaped the consideration of the learned High Court Judge.

As pointed out above, the incident had happened close to the house of DW3 and the 1<sup>st</sup> Appellant. According to PW1, the place of incident is about 1.5 Km from their house. Hence, the reason for going to the place of incident by the deceased and prosecution witnesses were not explained. Although the prosecution witnesses stated that the 1<sup>st</sup> Appellant sat on the deceased's body and stabbed him, this was marked as an omission at the trial. The 1<sup>st</sup> Appellant admitted that he attacked the deceased using a small knife and a sword brought by the deceased to attack him and his daughter DW3. The injuries sustained by the deceased, the prosecution witnesses and the 1<sup>st</sup> Appellant and his daughter had been placed before the trial.

Section 105 of the Evidence Ordinance states;

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

The evidence clearly shows that the deceased's party had inflicted injuries on the 1<sup>st</sup> Appellant and his daughter which had resulted in provoking him. Being provoked he had exercised his right to private defence but exceeded the limits when he inflicted injuries. Therefore, this case should have been considered under Section 297 of the Penal Code instead of 296 of the Penal Code. Thus, the third ground jointly raised by the Appellants has merit.

As the third ground of appeal substantially affects the outcome of the case, the first and second grounds of appeal will not be considered in this appeal.

Hence, considering all the circumstances of this case, I set aside the conviction and the sentence imposed on the Appellants in terms of Section 296 of the Penal Code under count one. I find the Appellants guilty for culpable homicide not amounting to murder under 1<sup>st</sup> limb of Section 297 of the Penal Code and sentence them to 12 years rigorous imprisonment on the first count.

Further, the conviction and the sentence imposed on count two against the 1<sup>st</sup> Appellant and count three and count four against the 2<sup>nd</sup> Appellant to are to remain the same.

I further order that the sentences imposed on count one and count two against the 1<sup>st</sup> Appellant to run concurrent to each other. Similarly, I order

the sentences imposed on count one, count three and count four against the 2<sup>nd</sup> Appellant to run concurrent to each other.

As the Appellants are in prison since the date of conviction by the learned High Court Judge, I order the sentence imposed be operative from the date of conviction namely, 29/09/2020.

Subject to the above variation the appeal is partly allowed.

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

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**