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

In the matter of an Appeal under and in terms of 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.

Democratic Socialist Republic of Sri Lanka.

**Complainant**

Court of Appeal Case No:
**CA 249/2016**

**Vs.**

HC Chillaw Case No:
**167/2006**

Karunapendige Janaka alias Karunapendi Dorelage Nihal

**Accused**

**AND NOW BETWEEN**

Karunapendige Janaka alias Karunapendi Dorelage Nihal

**Accused-Appellant**

**Vs.**

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

**Complainant-Respondent**

| | | |
|---|---|---|
| BEFORE | : | K. K. Wickremasinghe, J.<br>K. Priyantha Fernando, J. |
| COUNSEL | : | Gayan Perera, AAL with Prabha Perera, AAL and Panchali Ekanayake, AAL for the Accused-Appellant<br><br>Harippriya Jayasundara, DSG for the Attorney General. |
| ARGUED ON | : | 14.02.2020 |
| WRITTEN SUBMISSIONS | : | The Accused-Appellant - On 4.08.2017<br>The Respondent - On 28.08.2017 |
| DECIDED ON | : | 04.09.2020 |

**K.K.WICKREMASINGHE, J.**

The Accused Appellant (hereinafter referred to as the appellant) filed this appeal seeking to set aside the conviction and sentence imposed by the Learned High Court Judge of Chillaw dated 17.11.2016 in Case No. HC Chillaw 167/2006.

**Grounds of Appeal**

At the stage of the argument, the Learned Counsel for the appellant confined himself to the following two grounds of appeal:

I. The Learned High Court Judge has failed to consider whether the alleged incident was a result of a sudden fight.

II. The Learned High Court Judge has failed to consider the defence of voluntary intoxication.

The contention of the counsel for the appellant (1st Accused) was that, the grounds of appeal which were set above had not been considered in the Judgment delivered by the Learned High Court Judge of Chillaw.

**Facts of the Case**

The appellant was indicted in the High Court of Chillaw with the 2nd accused on two charges as follows;

i) The Accused committed the murder of one Wijenayake Mudalige Anura Wijeratne on or about 20th June 2004 at Sethsirigama and thereby committing an offence punishable under section 296 of the Penal Code read with section 32 of the Penal Code.

ii) In the same course of transaction, voluntarily caused grievous hurt to one Chandrappulige Sujith Nishantha Sanjeewa, thereby committing an offence punishable under section 315 of the Penal Code read with section 32 of the Penal Code.

Both accused (1st accused and 2nd accused) separately pleaded not guilty to the said indictment and the case proceeded to trial. Thereafter the prosecution led 08 witnesses for the case for prosecution and the appellant gave evidence before Court where the 2nd accused made a dock statement. Thereafter evidence of defence witness No.03 was led before the Court and the defence case was closed.

According to the evidence of the prosecution, the deceased had come to the shop with Dinesh Sandaruwan to buy petrol. Achala Dinesh (Prosecution Witness 09) had been talking with Sujith Nishantha Sanjeewa (injured) near the said shop at that time. The two accused had come with one Saman along the nearby foot path and the 2nd accused had stated that they were drunk and would hit anyone who passes that place. Thereafter the appellant had pulled out a foldable knife and had tried to stab Achala Dinesh (Prosecution Witness No.09) on his head. Sujith Nishantha Sanjeewa had tried to prevent the attack and as a result he got injured (cut his hand). Thereafter Achala Dinesh (Prosecution Witness No. 09) had run away and hid

himself inside the shop. Then the deceased had come out of the shop and had started his bike and the appellant had chased behind the deceased and stabbed him.

The Learned High Court Judge of Chillaw, convicted the appellant (1st Accused) for both charges and sentenced the appellant (1st Accused) as follows;

1) Imposed the death sentence for the 1st charge of Murder.
2) Imposed 01 year rigorous imprisonment and Rs.7500/= fine with a default sentence of 06 months simple imprisonment for the 2nd charge of Voluntarily causing hurt by dangerous weapons or means.

The 2nd accused was acquitted from both the charges. Being aggrieved by the said conviction and the sentence, the appellant (1st Accused) preferred an appeal in this court.

**Legal Analysis**

I. It was contended by the Learned Counsel for the appellant (1st Accused) that the Learned High Court Judge failed to consider the ground of a sudden fight. In order to consider the above, I wish to draw my attention to exception 4 to Section 294 of the Penal Code which reads 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."***

A careful consideration of the said exception indicates that the basis for the mitigation is purely depending on the fact that the murder had taken place in a sudden fight, which had occurred in the heat of passion upon a sudden quarrel. An important ingredient which is necessary in such instance would be that there was no malice (undue advantage or acted in a cruel or unusual manner).

In my view, the word "sudden" implies that the reaction of the accused should be almost instinctive and provocation cannot be considered as sudden when there was time for the accused to cool off or control his emotions. The Evidence-in-Chief of Prosecution Witness

No.01 led by the Learned Counsel for the accused in the High Court trial substantiates the aforementioned stance as follows;

ප්‍ර : මෝටර් සයිකලය පෙට්‍රල් ගන්න නතර කලා කීවා නේද ?

උ : දන්නේ නැහැ

ප්‍ර : ඊට පසු මොකද උනේ ?

උ : ජනක මැරුණ අයට පහරක් ගැහුවා

ප්‍ර : ඒ කොහොම ඉදිද්දීද මරණකරුට ගැහුවේ ?

උ : බයික් එකේ නැගල යන්න යද්දී ගැහුවා

ප්‍ර : මෝටර් සයිකලයේ පුද්ගලයට පාරක් ගැහුවම මොකද උනේ ?

උ : එයා ඇදගෙන වැටුනා

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ප්‍ර : වැටිච්ච අය නැගිටින් නැතුව එහෙම්මම හිටියද?

උ : නැගිට්ටා

ප්‍ර : නැගිටලා යන්න ලැබුනද ?

උ : හම්බ උනේ නැහැ

ප්‍ර : ඇයි ?

උ : වලිය දුරදිග ගියා

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ප්‍ර : ඊට පසුව?

උ : එයා දුවගෙන ගියා. දුවලා යන්න හම්බුනේ නැහැ, ජනක එහෙම්මම එලවාගෙන ගියා

ප්‍ර : මේ සාක්ෂිය වෙනස් කරන්න උවමනාවක් තියෙනවද?

උ : නැහැ ***(At page 75 of the brief)***

Thus, in considering the available evidence and in the background of legal principles, it is well observed that the time gap amongst the quarrel and the back off of the deceased from the appellant had not been utilized by the appellant to cool down his passions.

I may also refer to a decision by the Supreme Court of India which affirms the aforementioned principal in exercising its criminal appellate jurisdiction in the case of ***Ghapoo Yadav and Ors. v. State of M.P.*** **(2003) 3 SCC 528**, the Court held that ;

***"In a heat of passion there must be no time for the passions to cool down and that the parties had in that case before the Court worked themselves into a fury on account of the verbal altercation in the beginning. Apart from the incident being the result of a sudden quarrel without premeditation, the law requires that the offender should not have taken undue advantage or acted in a cruel or unusual manner to be able to claim the benefit of Exception 4 to Section 300 IPC."***

However, one can bring the argument that when the plea of sudden fight is pleaded the party who offers the provocation first is immaterial. The principle is set out explicitly in explanation to exception 4. However, the offender having taken an undue advantage over the deceased in the fight will discredit him in such a plea.

The Judicial Medical Officer, who performed the Post Mortem of the deceased, had described the nature of the weapon which was used for the stab as a knife with a sharp edge (P1). The nature of the injury one was elaborated as a ***"penetrating stab injury of the back of the left side of the chest, 2.2cm, inverted "V" shape"*** shows that an extensive damage was caused and must have struck the deceased with very great force. It was also undisputed that the deceased was unarmed and he had no likelihood of protecting himself from the attack of the appellant. When considering the medical evidence, the deceased sustained three stab injuries where all pierce the left lung and cut a vein which affected a sudden death due to a necessary fatal injury. In my view, this indicates that the appellant had taken an undue advantage over the situation.

ප්‍ර : වෛද්‍යතුමනි මෙම පැ ***01*** දරණ පිහිය යොදා ඔබ නිරීක්ෂණය කරන ලද පළවන තුවාලය සිදුවුවානම් ඒ සඳහා කුමන බලයක් යෙදිය යුතුද ***?***

උ : දැඩි බලයක් යෙදිය යුතුයි

ප්‍ර : දැඩි බලයක් යෙදිය යුතුයි කියා හිතන්නේ ***?***

උ : ගරු මැතිනියනි මෙම ආයුධය සම්පූර්ණයෙන්ම එනම් කැපුම්තලය සම්පූර්ණයෙන්ම ශරීරය ඇතුලට ගමන් කරවීම සඳහා වැර යොදා එල්ල කල පහරක් මෙම ආයුධය මගින් සිදු විය යුතුයි ***(At page 188 of the brief)***

This evidence corroborates with the evidence given by Prosecution Witness No. 08 as follows;

ප්‍ර: මොනවා වෙලාද වැටුනේ කියල දැක්කද?

උ : නැහැ ස්වාමිනි

ප්‍ර: නැගිට්ටට පස්සේ මොකද උනේ?

උ : එයට පිහියෙන් අනිනවා දැක්ක ස්වාමිනි

ප්‍ර : අනුර නැගිට්ට ස්ථානයේදීද ?

උ : නැගිටලා අඩි දෙකක් විතර ඉස්සරහට අවා ස්වාමිනි

ප්‍ර : කවුද පිහියෙන් ඇන්නේ?

උ : ජනක කියන කෙනා ස්වාමිනි

ප්‍ර : කොහෙටද ඇන්නේ ?

උ : පිටට එන්නේ ස්වාමිනි

ප්‍ර : කීපාරක් ඇන්නද?

උ : දෙපාරක් ඇන්නඅ ස්වාමිනි

ප්‍ර : අනුර මොනා කරමින් සිටියාද?

උ : ඉස්සරහට දුවගෙන අවා ස්වාමිනි

ප්‍ර : අනුර අතේ ආයුදයක් තිබුනාද ?

උ : නැහැ ස්වාමිනි

ප්‍ර : අනුර පලවෙනි විත්තිකරුට මොනවා හරි කලාද ?

උ : මොනවත් කලේ නැහැ ස්වාමිනි ***(At page 135 of the brief)***

Even if in a textual interpretation to exception 4 to section 294 makes it immaterial to consider as to which party initiated the fight, a firm observation of evidence placed before the High Court Judge reveals that the accused himself had created a situation of a confront with the deceased and the evidence shows that the deceased deliberately tried to ignore the situation by moving away. It was the accused who attacked him from the back. So my interpretation is that a perpetrator cannot be given with the favour of getting an undue advantage of his own wrong. Therefore, I determine that exception 4 to section 294 does not have an application over the instant case.

Moreover, it may be material to inquire the previous relationship between the disputants to see whether the plea of sudden fight is applicable. If the persons are strangers to each other, until the time of the quarrel and have no previous evidence of contention, the fight will probably be "in the heat of passion upon a sudden quarrel" within this exception. However, the Evidence-in-Chief of Prosecution Witness No.01 led by the Learned Counsel for the prosecution in the High Court trial reveals that there has been a previous enmity between the parties;

ප්‍ර : අවල එක්ක රණ්ඩු ඇති වෙන්න කලින් තරහක් තිබුනද ?

උ : ඔව්

ප්‍ර : මොකක්ද හේතුව ?

උ : මම දන්නේ නැහැ (*At page 73 of the brief)*

However, accused appellant (Defence Witness No. 01) denies the aforementioned position is his testimony;

ප්‍ර : එතකොට ඔය මියගිය අනුර කියන පුද්ගලයාට තමුන් පහර දීමක් කලාද ?

උ : නැහැ, මම එයාව දැක්කෙවත් නැහැ

ප්‍ර : තමුන් එක්ක තරහක් තිබුනද ?

උ : නැහැ (*At page 73 of the brief)*

In furtherance to the above discussed evidence, In the case of ***State of Bihar vs. Rada Krishna- AIR, 1983 SC. 684*** it was held that *"**One of the most difficult tasks of a Judge is to assess and evaluate the evidence of a witness and decide whether to believe or disbelieve it**"*. In ***Bhoj Raj vs. Seetha Ram – AIR 1936 PC. 60,*** it was held that ***real test for either accepting or rejecting evidence are how consistent is the story with itself, how it stands the test of cross examination, how far it fixing with the rest of the evidence and the circumstances of the case***".

Accordingly, my view is that the denial of the accused about him not carrying the weapon and about previous enmity does not fit the rest of the evidence (evidence of PW No.1 and PW No.9) and the circumstances of the case and due to that reason the Court rejects the evidence of defence witness No. 01 that he was not carrying the weapon and about previous enmities.

The Fundamental principle that "***if the circumstances which would bring the case with one of the exceptions is involved in doubt, the existence of these circumstances cannot be said to have proved"*** as established by the judgment of the Court of Criminal Appeal in the case of ***The King v James Chandrasekera* (1942) 44 N.L.R. 97** is applicable to the case in hand. The court is not satisfied about the existence of the circumstances of a sudden fight. Hence, in the entirety, considering the factual scenario of the case in hand, the evidence on record and in the background of legal principles, my conclusion is that the acts of appellant do not fall within the parameters set out in the Exception 4 to Section 294 of the Penal Code.

II. The Counsel for the appellant has argued that the Learned High Court Judge has failed to consider the defence of 'voluntary intoxication'. This position has never been raised by the defence at any stage of the trial. Further, I observe that the Learned High Court Judge had considered the plea of intoxication in the judgment as follows;

***"....01*** වුදිතගේ එම සියළු ක්‍රියාවන් සමස්ථයක් ලෙස සැලකිල්ලට ගත් විට මත්වුවකු විසින් ක්‍රියා කරන ආකාරයට අනුකූල නැත. ***01*** වුදිත මත්වීම හේතුවෙන් ඔහුට ක්‍රියාවේ ස්වභාවය හෝ වැරදි දෙයක් හෝ නීතියට පටහැනි දෙයක් කරන බව දැන ගැනීමට නොහැකි තත්වයක පසු වූ බවට කරුණු පැහැදිලි නොවේ. ***01*** වුදිතට මත්වුවකු ලෙසට විශේෂ චේතනාවක් ඇති කරගෙන කටයුතු කිරීමට නොහැකි තත්වයක පසු වූ බවට කරුණු පැහැදිලි නොවේ." ***(Pg. 26 of the High Court Judgement)***

In ***Jayathilaka v Attorney-General* (2003) 1 Sri L.R 107,** even if the court held that;

> ***"the learned trial judge has not directed the jury that the intoxication necessary to reduce an offence from murder to culpable homicide not amounting to murder on the ground of absence of murderous intention and set aside the conviction for murder entered against the accused-appellant and substitute therefor a conviction for culpable homicide not amounting to murder"***

Thus the *Ratio decidendi* of the above cited case established that;

> ***"i) though the accused has not taken up the defence of intoxication if such defence arises on the evidence it is the duty of the jury to consider the same.***
>
> ***ii) In cases of involuntary intoxication the test is the same as that applicable to insanity, namely the degree of intoxication is such that the accused was totally deprived of capacity to apprehend the nature of the act or its wrongful or illegal character. The section dealing with voluntary intoxication is of wider scope in that the effect of the provision is not confined to intoxication in this degree, but applies to all cases of self-induced intoxication in any degree so long as the offence specifies some definite knowledge or intent as an essential ingredient."***

Further, I would like to appreciate, espouse and quote as to how Edirisuriya, J. in the aforesaid Judgement admire the approach taken by the trial judge to direct the jury in the defence of voluntary intoxication.

> *"ඔහු මත් කරනු ලැබූ දෙය ඔහුගේ කැමැත්තට විරුද්ධව දෙනු ලබන නොවන අවස්ථාවක මෙම මත් වීම හේතු කොට ගෙන, මෙම පුද්ගලයාට මිනීමැරීමේ චේතනාවක් ඇති කර ගන්න බැරි මට්ටමකට බීල කියල තමුන්නාන්සේලාට පෙනී යනවානම් ඒ අවස්ථාවකදී ඔහු නොබීපු අවස්ථාවේදී තිබුන දනුම ඔහුට ආරෝපණය කර දඬුවම් කරන්න ඕනි."*

It was held in ***A.M.P. Ratnayake Vs The Queen* 73 NLR 481** that there was no misdirection on the plea of intoxication in furtherance of;

> ***" For the purposes of section 79 (of the Penal Code) the state of intoxication in which a person should be is one in which he is incapable of forming a murderous intention; and whether he has reached that state of intoxication or not is a question of fact that has to be determined depending on the evidence in each case; and it is for the person who raises the plea of drunkenness to establish on a balance of probability that he had reached that state of intoxication in which he could not have formed a murderous intention."***

In the instance case the Learned High Court has ample of evidence to conclude that the Accused had reached a certain level of voluntary intoxication. Nevertheless he has correctly decided that such degree had not reached to a level for the accused to exculpate from his guilty *mens rea.* In dertermining so the Learned High Court Judge has compared the previous and the subsequent conduct of the accused in order to assess his degree of intoxication and the murderous intention therein.

> *"**01** වුදිත පැමිණිලිකාර පාර්ශ්වයේ සාක්ෂි අංක **09** සමග දබර කර ගත් පසුව එය බෙරීමට පැමිණිලිකාර පාර්ශ්වයේ සාක්ෂි අංක **10** මැදිහත් වී ඇත. මාන බලමින් සිටි **01** වුදිත අනතුරුව පැමිණිලිකාර පාර්ශ්වයේ සාක්ෂි අංක **10** පිටුපස සිටි පැමිණිලිකාර පාර්ශ්වයේ සාක්ෂි අංක **09** ට උඩින් පිහි පාරක් එල්ල කිරීමට උත්සාහ කර ඇත. එම පිහි පහර වැළක්වීමට ගත් උත්සාහය නිසා පැමිණිලිකාර පාර්ශ්වයේ සාක්ෂි අංක **10** ට තුවාල වීමෙන් අනතුරුව පැමිණිලිකාර පාර්ශ්වයේ සාක්ෂි අංක **09** සිටි ස්ථානයෙන් දිව ගොස් ඇත. **01** වුදිත පැමිණිලිකාර පාර්ශ්වයේ සාක්ෂි අංක **09** පිටුපස ලුහුබැඳ ගොස් ඇත. කඩය ළඟදී මරණකරු යතුරු පැදිය මත සිටියදී පහර දී ඇත. මරණකරු ලද පහර නිසා බිම වැටී නැවත නැගිට පලා යන විට මරණකරු පසුපස පන්නා ගෙන ගොස් ඇත. ලුහුබැඳ ගිය මරණකරුට ඇත තිබූ පිහියෙන් ඇන පහර එල්ල කර ඇත. සිද්ධියෙන් අනතුරුව **01** වුදිත ඔලිදළුව **02** වුදිතගේ සහෝදරියගේ නිවසට පැයක පමණ කාලයක් පයින් ගමන් කර ඇත." **(Pg. 26 of the High Court Judgement)***

In the case of ***Abey Mudalali v. Attorney General* (2005) 2 Sri. L.R. 162**, it was held that,

> ***"In a case of murder, if an accused person raises the plea of drunkenness under section 79, the burden is on the Accused to prove on a balance of probability that he had reached the state of intoxication in which he could not have formed a murderous intention at the time of alleged act was done."***

There is no such plea raised or such fact proved on a balance of probability on behalf of the accused (1st Accused) in the instant case. Therefore I am of the view that where an accused is shown to have entertained a particular intention after the imputation of knowledge envisaged under section 79, he should be convicted of the offence notwithstanding his level of intoxication and he is not covered under section 79 of the Penal Code.

For the reasons set out above, I am of the view that the Learned High Court Judge came to the correct conclusion after a careful consideration of all the evidence that was placed before him. Therefore, I do not wish to interfere with the conviction and the sentence imposed on the appellant, by the Learned High Court Judge and I affirm the same.

This appeal is hereby dismissed.

**JUDGE OF THE COURT OF APPEAL**

**K. Priyantha Fernando, J.**

**I agree,**

**JUDGE OF THE COURT OF APPEAL**

**Cases referred to:**

1. *The King v James Chandrasekera* (1942) 44 N.L.R. 97
2. *Jayathilaka v Attorney-General* (2003) 1 Sri L.R 107
3. *A.M.P. Ratnayake Vs The Queen* 73 NLR 481
4. *Abey Mudalali v. Attorney General* (2005) 2 Sri. L.R. 162
5. *Ghapoo Yadav and Ors. v. State of M.P.* (2003) 3 SCC 528
6. *State of Bihar vs. Rada Krishna- AIR, 1983 SC. 684*
7. *Bhoj Raj vs. Seetha Ram – AIR 1936 PC. 60*