

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

*In the matter of an Appeal in terms of  
Section 331 of the Code of Criminal  
Procedure Act No 15 of 1979.*

**Court of Appeal No:**

Democratic Socialist Republic of Sri Lanka

**CA/HCC/0008/22**

**COMPLAINANT**

**Vs.**

**High Court of Kuliyaipitiya**

Amarasinghage Benedict Fonseka

**Case No: HC/055/2016**

**ACCUSED**

**AND NOW BETWEEN**

Amarasinghage Benedict Fonseka

**ACCUSED-APPELLANT**

**Vs.**

The Attorney General,

Attorney General's Department,

Colombo 12.

**COMPLAINANT-RESPONDENT**

Before : Sampath B. Abayakoon, J.  
: P. Kumararatnam, J.  
Counsel : Ershan Ariaratnam for the Appellant  
: Anoop De Silva, D.S.G. for the State  
Argued on : 20-10-2023  
Written Submissions : 02-09-2022 (By the Accused-Appellant)  
: 13-01-2023 (By the Respondent)  
Decided on : 21-02-2024

**Sampath B. Abayakoon, J.**

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by his conviction and the sentence by the learned High Court Judge of Kuliyaipitiya.

The appellant was indicted before the High Court of Kuliyaipitiya for causing the death of one Amarasinghage Pual Fonseka on 19-02-2012, at a place called Puhulketiya, Weerapokuna, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

After trial, the learned High Court Judge of Kuliyaipitiya found the appellant guilty as charged, and accordingly, he was sentenced to death.

**The Grounds of Appeal**

At the hearing of this appeal, the learned Counsel for the appellant urged the following grounds of appeal for consideration of the Court.

- (1) Whether the learned High Court Judge failed to consider the provocation or cumulative provocation aspect in his judgment.
- (2) Whether the learned High Court Judge has considered the defence version of events that led to the death in its correct perspective.

(3) Whether the learned High Court Judge has considered inadmissible evidence in the judgment.

(4) Whether the learned High Court Judge has failed to consider the fact that, the appellant had no intention.

### **Facts in Brief**

The facts that led to the death of the deceased as revealed in evidence led before the High Court can be summarized as follows.

The deceased was the father of the appellant and was about 80 years of age at the time of his death. The appellant, his family and the deceased lived in the same house, and it was the appellant who provided for the deceased. The land they were living was about one acre in extent. The deceased and the appellant both used to habitually consume illicit liquor and there were frequent quarrels between them.

PW-01 who was a young boy at the time relevant to this incident was watching TV at his home situated on the land in front of the appellant's house when he heard the sound of a quarrel from the direction of the house of the appellant. He has come out of the house to inquire, and has seen a verbal altercation between the deceased and the appellant over a deed of a land. Thereafter, he has seen the appellant assaulting the deceased using his hands as well as feet. He has also seen the deceased being assaulted using something similar to a wooden plank used in beds and has seen the deceased pleading for help.

He has then seen the deceased being dragged inside the house by the appellant and putting him on a bed and being assaulted further. After the assault, the appellant has left the house in his foot bicycle. At the time of the assault, only the appellant and the deceased had been at their house, and the witness has later come to know that the deceased had died.

The evidence of PW-04 and PW-06 who are the other eyewitnesses to the incident and neighbours of the appellant had been very much similar.

The common feature of the evidence of all the witnesses had been to the effect that the fighting between the deceased and the appellant was a common occurrence when both of them got drunk. The witnesses have stated that they were in the habit of not interfering and settling their quarrels because when they attempt to intervene, both the father and the son used to get together and set upon them for intervening into their matters.

The Judicial Medical Officer (JMO) who conducted the post-mortem had observed 13 injuries on the body of the deceased, and all of them had been contusions at various levels. He had observed three fractured ribs in the 1<sup>st</sup> injury, and the other contusions had been all over the body, which shows that the deceased had been subjected to a severe beating. The doctor has opined that the death had been due to the injuries sustained by the deceased.

When the appellant was called upon for his defence, he has given evidence under oath. It has been his position that it is he who looked after the father, and he and his father used to consume liquor on frequent basis. It has been stated that although it was he who brought liquor for his father, after consuming it, his father was in the habit of scolding him frequently using filthy language.

It was also his evidence that the father was in the habit of pawning the land they were living using the deed of the land, and on two previous occasions, it was he who redeemed the land. The father has used the money obtained by pawning the land to spend on liquor. According to him, on the day of the incident too, after consuming liquor, the father wanted him to give the deed of the land to him, which he resisted, and because he refused to adhere to the

father's request, the father started to scold him using foul language, which resulted him losing his temper and assaulting the father.

It has been his claim that he has not assaulted his father previously, but on the day of the incident, because of the language used by his father towards him, the assaulting took place. He has stated that it was not his intention to kill his father.

In the judgement, the learned High Court Judge has considered the evidence of the eyewitnesses and that of the JMO, and has concluded that the evidence had been cogent and trustworthy. It had been determined that it was the appellant who assaulted the deceased, which resulted in his death. The learned High Court Judge has also correctly determined that prior to the incident, there had been a verbal altercation between the appellant and the deceased over a deed.

Having considered the evidence of the appellant where he has admitted that the incident took place, but claimed he had no intention to kill his father, and his claim that the incident occurred as a result of provocation and a sudden fight, it has been determined that the appellant has lied in his evidence and his evidence cannot be relied upon. On the basis that the appellant had the intention to kill the deceased, and his failure to provide medical attention to him after the assault, it had been determined that the prosecution has proved that the appellant has committed the offence of murder, and he has been convicted as charged.

### **Consideration of The Grounds of Appeal**

As the grounds of appeal are interrelated, I will now proceed to consider them together.

Based on the admission of the appellant that it was he who attacked the deceased, which resulted in his death, the learned Counsel for the appellant submitted that this was a situation where the learned High Court Judge should

have drawn his attention to exceptions to the offence of murder in terms of section 294 of the Penal Code.

It was his view that the learned High Court Judge has failed to consider that aspect, although the learned High Court Judge has stated that there was a verbal altercation between the appellant and the deceased over a deed. The learned Counsel argued that the learned High Court Judge was misdirected when it was decided that the evidence of the appellant could not be relied upon, and the basis upon which the appellant was convicted for the offence of murder.

It was his position that the conviction should have been in terms of exception 4 of section 294 of the Penal Code on the basis of an act committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel.

It was the submission of the learned DSG that the test should have been whether a reasonably prudent man could have committed this type of an act if he had no intention or knowledge of the fact that his actions could lead to death of a person.

However, the learned DSG agreed that the learned High Court Judge has failed to draw his attention to the evidence available on continuous provocation between the parties and the sudden fight that has occasioned as a result, on the day of the incident. The learned DSG agreed that if the evidence was considered in its correct perspective, the conviction should have been in terms of section 297 of the Penal Code on the basis of culpable homicide not amounting to murder.

Having considered the evidence in its totality, I find that this is a matter where the deceased who was the father of the appellant had been in the habit of getting into quarrels after both of them consumed liquor. According to the evidence of the eyewitnesses, they have not even attempted to intervene to prevent the incident that occurred, as it appeared that such incidents had been

common occurrences. The evidence of PW-04 shows that on the day of the incident, the reason for the verbal altercation had been about a deed.

The evidence of the appellant had been that his father wanted the deed to pawn the land and obtain money, which he resisted. According to him, on two previous occasions also the father had done the same, where he had to intervene and get the land released by paying money and this was the reason for the provocation occurred to him on that day.

The learned High Court Judge too has considered this aspect but it appears that based on the discrepancies marked as X-1, X-2, and X-3 in the statement made by the appellant to the police, it has been decided that his evidence cannot be relied upon.

As agreed correctly by the learned DSG, and pointed out by the learned Counsel for the appellant, two of the discrepancies marked had been statements, which are confessionary in nature, that cannot be used at the trial against the appellant. The 3<sup>rd</sup> one had been about the intention, where the appellant has stated that he had no intention to kill his father, which the learned High Court Judge has considered relevant in convicting the appellant.

It is trite law that evidence of a case has to be considered in its totality and a trial Judge should come to his or her findings based on the totality of the evidence after having analyzed and evaluated such evidence.

It is also trite law that a trial Judge has to consider whether there was evidence placed before the Court, which falls within the ambit of section 297 of the Penal Code where culpable homicide would not amount to murder, even if it was not a defence taken by the accused person.

In the case of **Rathnayake Mudiyanseelage Karunarathne Vs. The Attorney General C.A. 181/2009 decided on 21-11-2011**, it was held,

*“If a plea of sudden and grave provocation is available from the evidence of the prosecution itself, Court has a duty to consider such a plea even if the accused did not raise it.”*

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 relieve a Judge of the responsibility of putting to the jury such defence if it arises on the evidence.”*

I find that this was not a case where the line of defence had been a denial that this incident took place. It is clear that the line of defence had been cumulative provocation, which led to a sudden fight on the day of the incident.

The appellant had taken up the stand that although he assaulted the father, he had no intention of killing him. This line of defence clearly shows that the contention of the appellant had been that this was not murder, but culpable homicide.

As agreed correctly by the learned DSG, other than rejecting the appellant's evidence on a wrong premise, the learned High Court Judge has failed to consider whether there was evidence to substantiate a conviction in terms of section 297.



The evidence clearly shows that there had been provocation as a result of the previous actions of the deceased. Although the deceased has been cared for by the appellant, he had been a person used to consume liquor habitually. Under the circumstances, it is quite possible that being a person of no income due to his old age, he has pawned the deed relating to the land he and his son was living.

According to the appellant's evidence, it is he who redeemed the land previously. This may have resulted in a friction between them.

However, the evidence of the neighbours clearly shows that the quarrels between the father and the son were clear results of both of them being drunk. The witnesses have stated that when they tried to intervene, both of them used to get together and blame the neighbours.

This establishes the fact that although there had been previous provocations, the incident, which led to the death of the deceased, was a result of a sudden fight between the appellant and the deceased. PW-04's evidence clearly establishes the fact that the argument that took place between the appellant and the deceased had been over a deed, which substantiates the evidence of the appellant in that regard.

The evidence of the witnesses also establishes the fact that the deceased was a person who was in the habit of using foul language, which may have been the reason for the appellant to attack the deceased, although that cannot be justified. The material used by the appellant in the assault appears to be what he could get his hands on at the time of the incident, and not something that he purposely went looking for to attack the deceased. This also clearly shows that the attack had been a result of an action without premeditation and due the heat of passion.

The relevant section 294 exception 4 of the Penal Code reads as follows.

**Exception 4. 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.**

Having considered the facts and the circumstances of this matter and the relevant law, I am of the view that this is a matter where the conviction should have been for culpable homicide not amounting to murder in terms of section 297 of the Penal Code, on the basis of a sudden fight as stipulated in exception 4 of section 294 of the Penal Code.

Accordingly, I set aside the conviction and the sentence of the appellant for the offence of murder, as it cannot be allowed to stand, and convict the appellant in terms of section 297 of the Penal Code on the basis of culpable homicide not amounting to murder.

It is clear from the evidence of the JMO that the deceased had 13 contusions on his body. Some of them were serious in nature, which had led to serious internal injuries to the deceased. The deceased being a man of old age, it should be well within the knowledge of the appellant that causing such bodily injury would likely cause the death.

Therefore, acting in terms of the punishment set out in the 1<sup>st</sup> paragraph of section 297, the appellant is sentenced to a term of 12 years rigorous imprisonment. He is also ordered to pay a fine of Rs. 25,000/=, and in default he shall serve a default sentence of 1-year simple imprisonment.

Having considered the fact that the appellant had been in incarceration from his date of conviction on 19-11-2021, it is ordered that the 12-year rigorous imprisonment period shall deem to have commenced from 19-11-2021.

The appeal is partially allowed to the above extent.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal