

**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/0093/2020**

**High Court of Trincomalee
Case No. HCT/855/2018**

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

COMPLAINANT

Vs.

1. Noor Mohamed Niyas
2. Sadurdeen Ashroff

ACCUSED

NOW AND BETWEEN

Noor Mohamed Niyas

1st-ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **P. Kumararatnam, J.**
K.M.G.H. Kulatunga, J.

COUNSEL : **Anil Silva, PC with Sarith Wadugedera for**
for the Appellant.
Hiranjana Peiris, SDSG for the
Respondent.

ARGUED ON : **07/02/2025**

DECIDED ON : **07/03/2025**

JUDGMENT

P. Kumararatnam, J.

The above-named 1st Accused-Appellant (hereinafter referred to as the Appellant) was indicted along with 2nd Accused by the Attorney General on following charge:

On or about the 08th February 2010 the accused committed the murder of Abdul Wahab Saheed which is an offence punishable under Section 296 read along with Section 32 of the Penal Code.

As the Appellant opted for a non-jury trial, the trial commenced before a judge and the prosecution had led eight witnesses and marked production P1-4 and closed the case. Learned High Court Judge having satisfied that the evidence presented by the prosecution warrants a case to answer, called for the defence and explained the rights of the accused.

The Appellant made a Dock Statement and called a witness on his behalf.

The learned High Court Judge having considered the evidence led by both parties convicted the Appellant under Section 297 of Penal Code and sentence him to 15 years rigorous imprisonment with a fine of Rs. 25000/-. The fine is subjected to a default sentence of 06-month rigorous imprisonment. Additionally, a compensation of Rs.100,000/- was ordered to pay with a default sentence of 2 years rigorous imprisonment.

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

The 2nd Accused was acquitted from the charge.

The Learned President's Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence. At the hearing the Appellant was connected via Zoom platform from prison.

The Learned President's Counsel extended his argument on the basis that the facts and circumstances of this case only warrants a sentence under the second limb of Section 297 of the Penal Code.

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.

Section 297 of the Penal Code states as follows:

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

The background of the case is briefly as follows:

The deceased was working in a fish hut with several others. The Appellant had come with the 2nd Accused and a problem arose with the deceased about a line rope. Afterwards, the deceased had left for home on foot, and the Appellant and the 2nd Accused left the place in an hour later. At about 12 in the night the deceased was found lying face downward near the Air Force camp.

Air Force personnel had seen the Appellant carrying a pole and the deceased lying fallen next to him. The evidence transpired that the Appellant was drunk at that time.

According to the JMO who held the post mortem examination, had stated that the death had occurred due injuries to the brain and the spleen. The doctor had noted 09 external injuries on the deceased's body.

The doctor who had examined the Appellant on that day at the hospital had given evidence on behalf of the Appellant and confirmed that the Appellant was under influence of liquor at that time.

In **Don Shamantha Jude Anthony Jayamaha v. The Attorney General CA/303/2006 and C.A.L.A. 321/2006** decided on 11/07/2012 the Court held that:

“It is trite law that even if the accused does not specifically take up the defence of a general or special exception to criminal liability, if the facts and circumstances before the court disclose that there were such materials to sustain such a plea then the court must consider whether the accused should be convicted for a lesser offence”.

In this case evidence transpired that there is some degree of voluntary intoxication on the part of the Appellant. Even the State Counsel did not cross examine the defence witness with regard to the intoxication of the Appellant.

In **Jayathilaka v. The Attorney General [2003] 1 SLR 107** the court held that:

“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”.

In this case the Learned High Court Judge had considered the intoxication when the Appellant was sentenced but failed to consider the sentence under second limb of the Section 297 of Penal Code.

Hence, considering all the circumstances of this case, I set aside the sentence imposed on the Appellant and substitute with a term of 10 years rigorous imprisonment. A fine of Rs.10000/- with 06 months default sentence also imposed on the Appellant. Payment of compensation with default sentence will remain the same.

As the Appellant is in prison since the date of conviction by the Learned High Court Judge, I order the sentence imposed by this Court be operative from 20/10/2020.

Subject to the above variation the appeal is dismissed.

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

JUDGE OF THE COURT OF APPEAL

K.M.G. H. KULATUNGA, J.

I agree.

JUDGE OF THE COURT OF APPEAL