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

In the matter of an Appeal 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.

Court of Appeal No:

CA/HCC/0129/18

High Court of Kurunegala

Case No: HC/173/03

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Hettiarachchige Nimal Seneviratne,

Nikadalupotha,

Aluthgama.

ACCUSED

AND NOW BETWEEN

Hettiarachchige Nimal Seneviratne,

Nikadalupotha,

Aluthgama.

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Indica Mallawaratchy for the Accused Appellant
	: Sudarshana de Silva, D.S.G. for the Respondent
Argued on	: 04-09-2023
Written Submissions	: 08-03-2019 (By the Accused-Appellant)
	: 29-03-2019 (By the Respondent)
Decided on	: 13-12-2023

Sampath B. Abayakoon, J.

This is an appeal preferred by the accused-appellant (hereinafter referred to as the appellant) being aggrieved of the conviction and the sentence of him by the learned High Court Judge of Kurunegala.

The appellant was indicted before the High Court of Kurunegala for causing the death of one Munasinghe Arachchilage Indunil Chamara on 09-11-2001 at a place called Uyangalla, Nikadalupotha, and thereby committing the offence of murder punishable in terms of section 296 of the Penal Code.

After trial without a jury, the appellant was found guilty as charged of the judgement dated 03-04-2018 by the learned High Court Judge of Kurunegala, and the appellant was sentenced to death accordingly.

The facts that led to the indictment against the appellant can be summarized as follows.

Facts in Brief

The deceased Indunil Chamara was the appellant's elder sister's son. He was around 9 years old at that time and was living with the appellant while attending school.

On the day of the incident, namely, 09-11-2001, PW-04 who was a neighbour living on the land next to the appellant's house was working in his garden. The deceased was well known to him as he used to attend the same school with his two children, and used to come to his house often to study with his children.

The witness has first observed the appellant assaulting the victim child, initially, using his bare hands, urging him to study. The child has started to cry as a result, and the appellant has then taken a club and had started to assault the child all over his body. Being unable to observe what was happening any longer, the witness has called another person who was a close relative of the appellant to come and witness what was happening. Although he wanted to intervene and attempt to rescue the child, both of them have decided against it and had left.

Subsequently, he has heard that the child has succumbed to the injuries received as a result of the assault. He has stated that he observed the assault from a distance about 40 – 45 meters.

In cross-examination of the witness, the appellant has not taken up any particular defence, but has questioned the witness as to the place where he gave the statement to the police, and about an alleged contradiction as to the time where he saw this incident. The said contradiction has been marked as V-1. In his evidence, he has stated that he observed this incident around 12.30 in the afternoon. However, in his statement to the police, he has stated that he came home around 2.30 in the afternoon.

The only suggestion made to the witness has been that due to a previous enmity he had with the appellant, he has made a false statement to the police, which the witness has denied. The other eyewitness called on behalf of the prosecution had been PW-06 Roseline Nona. She is also a neighbour of the appellant. After hearing a loud voice from the direction of the appellant's house, she has come out of her house and looked at that direction. She has seen the deceased child being dragged by the appellant while assaulting him. As a result, the child has fallen on the ground. The appellant has dragged him again, and while being dragged, she has observed the deceased child's head being struck on the wall nearby. She has seen this incident around 2.00 in the afternoon. Subsequently, she has heard that the child died at the hospital.

The police officer who conducted the investigations as to the incident has given evidence at the trial, and he has observed that from the places where the witnesses have claimed that they saw the incident, it was possible for them to observe what was happening in the land of the appellant.

The Judicial Medical Officer (JMO) who conducted the postmortem of the deceased child has produced his Post-Mortem Report marked as P-01. The JMO has observed 18 visible injuries on the body of the child, most of them being contusions. In injury number 08, he has observed a fracture of the collarbone of the child and corresponding lacerations in the lungs. The injury number 10 had been to the head and the JMO has opined that the death has resulted due to the blunt trauma caused to the head. He has opined that the injury to the head was an injury that was essentially fatal. He has observed that most of the injuries can be caused due to an assault by a club or a similar instrument.

When the appellant was required to take up his defence at the conclusion of the prosecution case, he has made a statement from the dock. He has stated that when he came home, the deceased was not at home and had gone for a bath, he came home after about one and a half hours later, and fell on the ground unconscious. Thereafter, he took steps to take the child to the hospital. He has

neither denied nor challenged the evidence of the witnesses that he is the person who caused the injuries to the deceased child.

The learned High Court Judge of Kurunegala after considering the essential ingredients of culpable homicide in terms of section 293 of the Penal Code, has considered the evidence placed before the Court and had come to a firm finding that the evidence establishes the fact that it was the appellant who caused the injuries that resulted in the death of the child. The learned High Court Judge has found no basis for the defence taken up by the appellant in his dock statement. The learned High Court Judge has also determined that the appellant has failed to provide a sufficient explanation as to the strong and incriminating evidence against him that came to light during the trial. It has been determined that the appellant has caused injuries to the child with the intention of causing his death, and accordingly he has been convicted for the offence of murder.

The Grounds of Appeal

At the hearing of his appeal, the learned Counsel for the appellant, although she has taken several grounds of appeal in the written submissions filed, confined herself to one ground of appeal for the consideration of the Court.

1. The evidence led at the trial warrants the consideration of a lesser culpability on the basis of knowledge.

It was the contention of the learned Counsel for the appellant that the actions of the appellant, which led to the death of the deceased, would fall within the interpretation of the 3rd limb of section 293 where culpable homicide has been described. It was her view that on that basis there was no material before the Court to come to a finding that his actions fall within the definition of murder as described in section 294, and therefore, the conviction should have been in terms of section 297 on the basis of culpable homicide not amounting to murder.

The submissions of the learned Deputy Solicitor General (DSG) was on the basis that there was no evidence whatsoever placed before the Court to suggest that

this is a death that should be considered in terms of any of the exceptions of section 294 of the Penal Code. He was of the view that this is a clear case of murder in terms of section 294 3rd limb given the facts and the circumstances that led to the death of the child. He brought to the attention of the Court the evidence of the JMO, where he has observed 18 injuries on the body of the child and his opinion that the injury caused to the head was an essentially fatal injury. The learned DSG moved for the dismissal of the appeal on the basis that it has no merit.

Consideration of the Grounds of Appeal

As the only ground of appeal taken up was on the basis that the conviction should have been on the basis of culpable homicide not amounting murder, which means that the appellant is now admitting that it was he who caused injuries to the child, I find it is unnecessary to go into the facts to find out whether there was sufficient evidence before the High Court in that regard.

The culpable homicide has been described under section 293 of the Penal Code, which reads;

> **293. Whoever caused death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.**

The learned Counsel for the appellant argued that the incident where the appellant caused injuries to the deceased falls within the ambit of an action done with the knowledge that he is likely by such act to cause death.

I am of the view that every death that occurs as a result of an action by another person towards a deceased falls within any one of the definitions of culpable homicide as stated in section 293 of the Penal Code.

Culpable homicide becomes murder under following circumstances in terms of section 294 of the Penal Code.

The relevant part of section 294 reads as follows,

> **294. Except in the cases hereinafter excepted, culpable homicide is murder-**
>
> > **Firstly- If the act by which the death is caused is done with the intention of causing death; or**
> >
> > **Secondly- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused ; or**
> >
> > **Thirdly- If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or**
> >
> > **Fourthly- If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.**

There are five exceptions mentioned in section 294 where culpable homicide can be termed as culpable homicide not amounting to murder.

If the Court finds in a case of murder, the evidence led only leads to culpable homicide not amounting to murder, the conviction should be on the basis of any one or more of the exceptions as mentioned in section 294 and in terms of section 297 of the Penal Code.

During the trial, the appellant has not taken up any defence on the basis that his actions amount to culpable homicide not amounting to murder. His defence had been a total denial. The learned High Court Judge has considered the evidence placed before the Court and has determined that the actions of the appellant falls within the 2nd limb of section 294, which is causing the bodily

injury knowing very well that it is likely to cause death of the person to whom the harm is caused.

It is my considered view, arguing that the actions of the appellant should fall within the definition of section 293 would itself not be sufficient to determine that the conviction should be in terms of section 297 on the basis of culpable homicide not amounting to murder.

For this Court to determine that the conviction of murder by the learned High Court Judge was wrong, there must be reasons adduced by the appellant in that regard. The appellant must convince the Court that his actions fall within one of the exceptions of section 294, so that the conviction should have been in terms of section of the 297 Penal Code.

I find no basis to conclude, given the facts and the circumstances that led to the death of the child, would fall within any of the exceptions to murder in terms of the section of the 294 Penal Code.

It is clear from the evidence that the appellant has not taken up any position before the trial Court other than denying that he was responsible for the death.

It is trite law that even in a situation where an accused person does not take up the position that his actions amount to culpable homicide not amounting murder, it is the duty of the trial judge to consider whether there is evidence placed before the Court that can be concluded that the conviction should be in terms of section of the 297.

In the case of **King Vs. Bellana Withanage Eddin 41 NLR 345,** a Court of Criminal Appeal held thus;

> *"In a charge of murder, it is the duty of the judge to put to the jury, the alternative of finding the accused guilty of culpable homicide not amounting to murder when there is any basis for such a finding in the evidence of record, although such defence was not raised nor relied upon by the accused."*

In **King Vs. Albert Appuhamy 41 NLR 505,** it was held,

> *"Failure on the part of a prisoner or his counsel to take up a certain line of defence does not relieve the judge of the responsibility of putting the jury such defence if it arises on the evidence."*

I do not find any evidence in the case record to come to such a conclusion by the learned trial Judge. Besides that, the JMO's evidence is very much clear that the injuries caused to the deceased child who was 9 years at that time were essentially fatal under the given context.

I find that the learned High Court Judge has correctly analyzed the evidence placed before the Court and had come to a correct finding in that regard when the appellant was convicted for murder in terms of section 296 of the Penal Code.

For the reasons as considered above, I find no merit in the ground of appeal urged on behalf of the appellant.

Accordingly, the appeal is dismissed for want of merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal