

**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/0068/2023**

**High Court of Colombo
Case No. HC/1321/2019**

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

COMPLAINANT

Vs.

Dompag Don Rasika Madan alias
Rasika Madush alias Rasika Madu
alias Banju alias Manju

ACCUSED

NOW AND BETWEEN

Dompag Don Rasika Madan alias
Rasika Madush alias Rasika Madu
alias Banju alias Manju

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Rahul Jayathilaka for the Appellant.**
Janaka Bandara, DSG for the
Respondent.

ARGUED ON : **26/06/2024**

DECIDED ON : **04/10/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General on following charge:

On or about the 12th March 2018 the accused committed the murder of Herath Mudiyanseelage Sandun Prasad alias Ashan which is an offence punishable under Section 296 of the Penal Code.

As the Appellant opted for a non-jury trial, the trial commenced before a judge and the prosecution had led seven witnesses and marked production P1-3 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 closed his case.

After considering the evidence presented by both the prosecution and the defence, the Learned High Court after coming to the conclusion that the prosecution had proved the case beyond reasonable doubt, convicted the Appellant as charged and sentence him to death on 07.02.2023. Aggrieved by the conviction and sentence the Appellant had preferred this appeal in this Court.

The Learned 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 Counsel for the Appellant preferred following grounds appeal in support his argument.

1. The Learned High Court Judge has erred in law by deciding that the prosecution has proved the case beyond reasonable doubt.
2. The Learned High Court Judge erred in law by disbelieving the dock statement of the Appellant in toto.
3. The Appellant was not afforded a fair trial.

Without prejudice to the above grounds of appeal;

4. Has the Learned High Court Judge erred in law by deciding that the alleged act committed by the Appellant falls under murder when there is evidence suggesting that the act committed falls under culpable homicide not amounting to murder.

The background of the case *albeit* briefly is as follows:

According to PW1, Maheswari she is the mother-in-law of the Appellant. The Appellant got married to her daughter and blessed with two children. Three months prior to the incident, the Appellant's wife had eloped with the deceased and stayed with the deceased about three months in Elakanda area. The Appellant somehow brought her back on the day of the incident. In the evening, the Appellant's wife again had eloped with the deceased. The Appellant had gone in search of his wife and found her going in a three-wheeler with the deceased and one of her children. At about 8.30pm the

Appellant had come to her house and informed that he caught his wife. When she ran to the road had seen a green coloured three-wheeler and some people standing there. She had not seen the Appellant once she came to the place of the incident. When she tried to held her daughter, somebody had pulled her by her hair. She had seen her daughter taking the deceased to the hospital. She had seen the deceased was lying fallen near the three-wheeler. She had not seen how the deceased sustained injuries.

PW5, Surendran, a three-wheeler driver by profession had gone a hire with the deceased to the Randiya Uyana Housing Scheme. The deceased had gone into the housing scheme and brought the wife of the Appellant and a child. As soon as the deceased and the Appellant's wife got into the three-wheeler the Appellant had come in another three-wheeler and stopped his three-wheeler and started to fight with his wife. Thereafter, both the Appellant and the deceased also engaged in a fight. Though this witness tried to separate them, but he could not. Thereafter he had left the place and came to know about the death of the deceased on the following day.

PW8, IP/Kadiranga had conducted the investigation, visited the scene, and visited the Colombo General Hospital. He was informed by the hospital authority that the deceased had passed away at 22.15 hours on the same day. As the investigation revealed that the Appellant is the perpetrator, continued his investigation along with PW9 SI/Udayanga and arrested the Appellant on 14.03.2018, two days after the incident at Colombo-14.

PW9 had recorded his statement and recovered the blood-stained shirt of the Appellant upon his statement under Section 27(1) of the Evidence Ordinance. Although the Government Analyst discovered blood stains on the shirt, but unable to express an opinion as to the origin due to contamination.

The JMO who held the post mortem examination, had stated that the death had occurred due to two stab injuries to heart and lungs due to multiple stab

injuries to the chest. The doctor had noted 16 stab wounds on the deceased's body.

The investigating team unable to trace the murder weapon in this case.

The Appellant in his dock statement stated that when came home after work his wife was not at home. On inquiry his mother in-in-law had informed that her daughter had gone to a nearby boutique. Although he had waited about 45 minutes, he could not find his wife. When he went in search of her, had seen his wife going in a three-wheeler. Immediately he had stopped the three-wheeler and pleaded his wife to come with him. When his wife decided to come with him, the deceased had started to fight with the Appellant. Both had a fight and when the deceased held the by his collar and assaulted him, he had pulled deceased's hand and ran away from the scene.

At the hearing, Learned Counsel appearing on behalf of the Appellant had submitted to this court that he will be making submissions only with regard to the conviction as the conviction under Section 296 of the Penal Code cannot stand, whereas it should have been considered under Section 297 of Penal Code on the basis of a sudden fight. Hence, he invited this Court only to consider his 4th ground of appeal only.

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.

In this case the evidence presented by the prosecution and the defence jointly revealed that the wife of the Appellant had eloped with the deceased and lived with him for three months. This incident had happened on the day when the Appellant brought his wife to his house. Further, a fight started between the Appellant and the deceased, when the deceased tried to take the wife of the Appellant second time, particularly the day she returned to the Appellant. The incident happened when the Appellant prevented his wife going with the deceased.

The Learned Deputy Solicitor General submitted that the consideration of lesser culpability would not arise as the defence in this case has not accepted responsibility in any manner whatsoever for the injuries inflicted on the deceased.

As there was a fight erupted between the parties over this incident which had been endorsed by the Learned High Court Judge in his judgment, the Learned Counsel made his application under Exception 4 to Section 294 of the Penal Code.

The above-mentioned 4th Exception provides as follows:

“Culpable homicide is not murder 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.

In the event where the defence of sudden fight has not been taken up on behalf of the Appellant, and also the injury alleged to have been inflicted on the Appellant, the Learned High Court Judge should have considered the evidence which favours the Appellant more meticulously.

In **The King v Bellana Vitanage Eddin** 41 NLR 345 the court held that:

"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 on record, although such defence was not raised nor relied upon by the accused".

In **Luvis v. The Queen** 56 NLR 442 the court held that:

"Having regard to the evidence, the fact that sudden fight was not specifically raised as a defence did not relieve the trial judge of the duty of placing before the jury that aspect of the case."

In this case although Learned High Court Judge had come to the conclusion that the incident had taken place due to a sudden fight, but not awarded the benefit to the Appellant under exception 4 of the Section 294 of the Penal Code. This is a clear misdirection which certainly vitiate the conviction for murder. The failure by the Learned High Court Judge to consider diminishing responsibility as required by the law has caused great prejudice to the Appellant.

Considering all the circumstances stressed before this court I conclude that this is an appropriate case to consider for the Appellant's benefit, his

entitlement for a plea of sudden fight under Exception-4 to Section 294 of the Penal Code.

Therefore, I set aside the sentence imposed on the Appellant and substitute with a term of 10 years rigorous imprisonment. A fine of Rs.5000/- with 06 months default sentence also imposed on the Appellant. 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 07/02/2023.

Subject to the above variation the appeal is partly allowed.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL