

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

In the matter of an appeal in terms of section 331 (3) of the Code of Criminal Procedure Act.15 of 1979 read with Article 139 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka.

Complainant

Vs

Periaiya Sivakumar

Accused

And now between

Periaiya Sivakumar

Accused-Appellant

Vs

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

Complainant-Respondent

Before : **P. Kumararatnam, J.**

Pradeep Hettiarachchi, J.

Counsel : Migara Kodituwakku for the Accused-Appellant

Maheshika Silva DSG for the Respondents.

Argued on : 07.10.2005

Decided on : 18.12.2025

Pradeep Hettiarachchi, J

Judgment

1. The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Kandy for committing the murder of Majeed Anzar (deceased) on 24.04.2009, which is an offence punishable under Section 296 of the Penal Code. The trial was initially commenced before the Judge of the High Court of Kandy without a jury, but later it was transferred to the High Court of Matale.
2. At the conclusion of the trial, the learned High Court Judge of Matale found the appellant guilty of the charge and convicted him. Accordingly, the learned High Court Judge sentenced the appellant to death. Being aggrieved by the said conviction and sentence, the appellant has preferred the present appeal.
3. The appellant urged only two grounds of appeal namely,
 - a. *The prosecution has failed to prove that the appellant has caused the death of the deceased; and*
 - b. *Without prejudice to the above ground, whether the learned trial Judge has failed to consider the evidence that has transpired lead to a mitigating defense.*
4. Accordingly, having regard to the grounds of appeal, the sole question that arises for determination in this appeal is whether the appellant acted in the exercise of the right of private defence and, if so, whether his act falls within Exception 2 to Section 294 of the Penal Code, thereby warranting a conviction for culpable homicide not amounting to murder rather than for murder.

Exception 2 to section 294:

Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising

such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

5. The above exception was dealt with by Keuneman S. P. J. in ***The King v. Kirinelis* 47 NLR 443**, as follows:

The intention which is referred to in section 294, Exception 2, of the Penal Code is a special kind of intention and should be explained to the Jury. In order to earn the clemency of the exception, the harm caused must have been caused solely with the intention of private defence.

6. In ***Anura Shantha alias Priyantha and Another v. Attorney-General [1999] 1 Sri LR. 299 at 303***, De Silva J. explained the applicability of Section 294 Exception 2 as follows:

The positions arising from this exception and from other relevant provisions of law, may be stated as follows:

- (1) *Where the accused acts in the exercise of his right of private defence, whether of persons or of property, and restricts himself to the legitimate limits of that right, any harm caused to the aggressor, including infliction of death, does not involve the accused in criminal liability at all. He is entitled to a complete exculpatory plea.*
 - (2) *Where the right of private defence could properly have been availed of, but the accused, in killing the deceased, exceeds that right in good faith, without premeditation and without any intention of doing more harm than necessary for the purpose of self-defence, the accused is neither convicted of murder nor released from liability altogether. In such a case the appropriate verdict is a lesser verdict of culpable homicide not amounting to murder.*
 - (3) *If the accused exceeds the right of private defence, bona fide but with premeditation and with deliberate intention of inflicting more harm than is necessary for the purpose of self-defence, liability for murder may be imposed if the victim's death is brought about.*
7. The question for consideration, therefore, is whether the learned trial Judge's conclusion rejecting the appellant's claim of acting in the exercise of the right of

private defence is legally and factually justifiable. In this regard, following authorities would be of much assistance.

8. In the Indian case of ***Munshi Ram and Others Vs. Delhi Administration (1968) AIR 702***, Hegde, J. held that,

"It is well settled that even if an accused does not plead self defence, it is open for the court to consider such a plea if the same arises from material on record. See In Re- Jogali Bhaige Naiks and Another A.I.R. 1927 Mad.97. The burden of establishing that plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record."

9. In the Indian case of ***Kuduvakuzinyil Sudhakaran Vs. State (1995) Cri. L.J. 721***, the plea of self defence was rejected where the evidence showed that the deceased was unarmed and was not the aggressor.
10. In the Indian Supreme Court case of ***Laxman Vs. State of Orissa (1988) Cr. L.J. 188 SC***, it was held that,

"The right of private defence is available only to one who is suddenly confronted with immediate necessity of averting and impending danger not of his creation."

11. The general principle is that the law allows only reasonable force to be used in the circumstances and, what is reasonable is to be judged in the light of the circumstances as the accused believed them to be (whether reasonably or not).
12. In assessing whether a defendant had used only reasonable force, Lord Morris in ***Palmer v R [1971] AC 814***, felt that a jury should be directed to look at the particular facts and circumstances of the case. His Lordship made the following points:

A person who is being attacked should not be expected to "weigh to a nicety the exact measure of his necessary defensive action".

If the jury thought that in the heat of the moment the defendant did what he honestly and instinctively thought was necessary then that would be strong evidence that only reasonable defensive action had been taken.

A jury will be told that the defence of self-defence will only fail if the prosecution shows beyond reasonable doubt that what the accused did was not by way of self-defence.

13. When the observations of the learned trial Judge are examined in the light of the legal principles set out above, it becomes necessary to carefully analyse and evaluate the evidence of the eyewitnesses, who testified before the High Court, as well as the defence evidence, in particular that of the defence witness Manju.
14. In the present case, although nine witnesses testified for the prosecution, none of them actually witnessed the appellant inflicting the fatal injuries on the deceased. PW1 merely testified that he observed the appellant chasing the deceased and noticed what appeared to be an object resembling a weapon in the deceased's hand, though he was unable to identify it.
15. PW4 testified that he only observed the deceased lying opposite the location where he sold fish. He further stated that he saw the appellant proceeding along a narrow lane adjacent to the Railway Warehouse while carrying a long knife. When the knife marked P1 was shown to him, PW4 identified it as the knife allegedly carried by the appellant.
16. The evidence of PW5 was not taken into consideration by the learned trial Judge, as he was treated as a witness adverse to the prosecution during the course of the trial. Hence, PW5's evidence is of no relevance to the present appeal.
17. PW11, a police officer, testified that on the day of the incident he was travelling to the Matale Police Station on his motorcycle. While riding towards the railway station, he observed a person who was bleeding profusely running towards him, with another person chasing him while holding a knife. PW11 stopped his motorcycle as the injured person approached him. Upon seeing PW11, the person who was chasing the injured individual ran between vegetable stalls towards the railway track. PW11 thereafter made arrangements to send the injured person to hospital. PW11 identified the appellant in open court and also identified the knife marked P1. In addition, PW11

identified the blue shorts and white banian worn by the deceased at the time of the incident.

18. PW8 visited the scene of crime, made the necessary observations, and recorded statements from witnesses. He further testified that the appellant was subsequently arrested while hiding in an abandoned railway quarter, and that a knife was recovered from him at the time of arrest. PW6 also visited the scene and thereafter proceeded to the hospital, where he participated in the inquest and obtained an order for the post-mortem examination.
19. PW10, the Judicial Medical Officer, conducted the autopsy on the body of the deceased and prepared the post-mortem report. According to his evidence, eleven injuries were observed on the body of the deceased. The knife marked P1 was, in his opinion, compatible with the injuries sustained. The JMO further opined that some of the injuries were sufficient in the ordinary course of nature to cause death.
20. At the conclusion of the prosecution case, the appellant gave evidence. According to the appellant, the deceased was engaged in the sale of illegal drugs and illicit liquor. He further testified that approximately eleven years prior to the incident, the deceased had inflicted a grievous injury on him, as a result of which he was hospitalized for over one month.
21. The appellant stated that on the day of the incident, while he was about to sell vegetables, the deceased approached him pushing a cart and uttered threatening words. After passing the appellant, the deceased turned back and advanced towards him. The appellant further stated that, while approaching, the deceased took a knife from a nearby fish vendor named Manju, although the knife was retrieved by Manju. It was at this moment that the appellant attacked the deceased with a knife.
22. Manju was also called as a defence witness. While his evidence did not corroborate the appellant's assertion that the deceased took a knife from him at that moment, he nevertheless testified that the deceased habitually carried a knife, which he used for cutting jackfruit, as the deceased was engaged in selling jack.
23. It is in evidence that the appellant had also sustained grievous injuries as a result of a cut inflicted by the deceased approximately eleven years prior to this incident. It is

also in evidence, and not disputed by the prosecution, that the deceased was engaged in the sale of illegal drugs and illicit liquor and was a person of notorious character. Further, the evidence discloses that shortly before the incident the deceased was uttering threatening words, which were overheard by the appellant.

24. There is no evidence to suggest that the appellant harboured any animosity towards the deceased despite the earlier attack, nor is there any material to indicate that the appellant had premeditated the present incident. Equally, there is no evidence of any recent quarrel, argument, or scuffle between the appellant and the deceased prior to the occurrence.
25. The appellant's evidence, though containing certain omissions, adequately explained the circumstances under which he came into possession of a knife. Moreover, the appellant sufficiently explained the circumstances that prompted him to attack the deceased. Having regard to the past conduct of the deceased, and in particular the nature and extent of the injuries sustained by the appellant at the hands of the deceased, it may reasonably be inferred that the appellant acted out of sudden fear triggered by the utterances made by the deceased.
26. It is not absolutely necessary that the defendant be attacked first. As Lord Griffith said in *Beckford v R [1988] AC 130*:

"A man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike."
27. It is also significant to note that the subsequent conduct of the appellant is indicative of an absence of premeditation and is consistent with an act committed in a state of sudden fear. The appellant had sufficient opportunity to flee the area had he intended to evade arrest. Instead, he was apprehended while hiding in an abandoned building, and at the time of arrest he appeared fearful, offered no resistance, and made no attempt to escape. Such conduct is inconsistent with a premeditated or calculated act.
28. When the totality of the evidence is considered, including the absence of direct eyewitness testimony to the fatal act, the prior conduct of the deceased, the threatening utterances made immediately before the incident, the appellant's past victimisation at the hands of the deceased, and the appellant's subsequent conduct, it

is evident that the appellant acted without any premeditation and was driven by sudden fear and apprehension rather than by a calculated intention to cause death.

29. The appellant's conduct after the incident, remaining within the vicinity, offering no resistance at the time of arrest, and exhibiting signs of fear, further reinforces the inference that the act was impulsive and unpremeditated.
30. Considering the evidence in its totality, it is evident that the appellant acted in the exercise of his right of private defence under Exception 2 to Section 294. The act was not premeditated, although was not proportionate to the threat faced, and was prompted by sudden fear. Therefore, the conviction for murder cannot be sustained, and if any criminal liability is to be imposed, it would properly fall under culpable homicide not amounting to murder.
31. In *Bhikari v. State of Uttar Pradesh* [2 (1965) 3 S. C. R. 194.] Mudholkar J. said at 198,
" If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to be acquitted.
32. In *R.P.D. Jayasena vs Queen* 72 NLR 313 it was held:

Where an accused who is charged with murder admits at the trial that the deceased died of wounds deliberately inflicted by him with intention to kill and his defence entirely is that he was acting in self-defence, section 105, read with section 3, of the Evidence Ordinance imposes upon the accused the burden of proof on the issue of private defence. In such a case it cannot be contended on behalf of the accused that he has not got to provide any sort of proof that he was acting in private defence. It is not sufficient for the accused to raise a doubt as to whether he is entitled to the benefit of the right of private defence, the use of which is permitted not only as a general exception by section 93 of the Penal Code but also as a special exception in section 294 of that Code.

However, their Lordships conceded that the position is materially different when the accused denied the intention to kill. It is further stated that:

The position however is different when the accused denies intention to kill and says that he did not intend to kill or cause serious bodily injury but that anyway he was acting in self-defence. In such a case it is not only proper, but may be necessary, for the judge to remind the jury that the burden of establishing intention beyond a reasonable doubt rests always on the prosecution.

33. In the present case, the threatening words uttered by the deceased, viewed in the context of his prior conduct and the fact that the appellant had earlier sustained cut injuries at the hands of the deceased, would reasonably have prompted the appellant to act with immediacy. Given the deceased's notorious behaviour, it would be unrealistic to expect a person of the appellant's background and circumstances to calmly assess or precisely measure the degree of force necessary to avert the imminent threat. Where a person has reasonable grounds to apprehend that an advancing aggressor is likely to cause harm, the law does not require him to act with detached caution or mathematical precision in the exercise of the right of private defence.
34. Moreover, the evidence of the defence witness Manju, to the effect that the deceased habitually carried a knife and was armed with one at the relevant time, when considered in conjunction with the threatening words uttered by the deceased, lends further credence to the appellant's version. Taken together, these circumstances substantiate the appellant's contention that he acted under a genuine and reasonable apprehension of imminent bodily harm at the hands of the deceased.
35. However, this Court cannot lose sight of the extent of the force employed by the appellant against the deceased, which, in the circumstances of the case, appears to be excessive and disproportionate to the threat apprehended. Consequently, this Court is not persuaded to grant the appellant a complete exoneration from criminal liability.
36. In the light of the foregoing analysis, this Court is of the view that the learned trial Judge erred in wholly rejecting the appellant's plea of private defence. The evidence establishes that the appellant acted under a genuine apprehension of imminent bodily harm and that the incident occurred suddenly, without premeditation. Nevertheless, having regard to the number and nature of the injuries inflicted, the force used by the

appellant clearly exceeded what was reasonably necessary to avert the perceived threat.

37. Accordingly, while the appellant is not entitled to a complete acquittal, the facts of the case bring his conduct within the ambit of Exception 2 to Section 294 of the Penal Code. The offence committed is therefore culpable homicide not amounting to murder, and the conviction for murder cannot be sustained.
38. The conviction entered by the learned High Court Judge is hereby varied and substituted with a conviction for culpable homicide not amounting to murder under Exception 2 to Section 294 of the Penal Code.
39. Accordingly, I sentenced the appellant to 10 years rigorous imprisonment and also imposed a fine of Rs 10000.00 carrying a default sentence of one-year light imprisonment.
40. Furthermore, the appellant is ordered to pay compensation to the family of the deceased in the sum of Rs. 200,000.00, with a default sentence of one year of simple imprisonment.
41. In the circumstance, the appeal is partly allowed.

Judge of the Court of Appeal

P. Kumararatnam, J

I agree,

Judge of the Court of Appeal