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/0047-048/2022

High Court of Kalutara
Case No. HC/729/2006

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

COMPLAINANAT

Vs.

1. Thommiya Hakuruge Regi Marvin
2. Thommiya Hakuruge Gamini Jayalath
3. Thommiya Hakuruge Neel Thushara Jayalath
4. Udumullage Pisil Wasantha Kumara alias Rala

ACCUSED

NOW AND BETWEEN

1. Thommiya Hakuruge Regi Marvin
2. Thommiya Hakuruge Neel Thushara Jayalath

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE	:	**P. Kumararatnam, J.** **Pradeep Hettiarachchi, J.**
COUNSEL	:	**Palitha Fernando, PC with Randunu Heellage for the 1st Appellant.** **Neranjan Jayasinghe with Imangsi Senarath and Randunu Heellage for the 2nd Appellant.** **Wasantha Perera, DSG for the Respondent.**
ARGUED ON	:	**15/09/2025**
DECIDED ON	:	**16/10/2025**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) along with the 2nd, and 4th Accused were indicted by the Attorney General on the following charges:

1. On or about the 5th of June 2001 the Accused committed the murder of Kumudu Ranjith Amaraweera which is an offence punishable under Section 296 read with Section 32 of the Penal Code.
2. In the course of the same transaction the Accused committed simple hurt to Pradeep Manjula which is an offence punishable under Section 314 read with Section 32 of the Penal Code.

As the Appellants and the 2nd and 4th Accused opted for a non-jury trial, the trial commenced before a judge and the prosecution had led eight witnesses and marked production P1-P3 and closed the case.

Before the defence was called, the Learned High Court had acquitted the 2nd Accused acting under Section 200(1) of the Code of Criminal Procedure Act No.15 of 1979.

Thereafter, the Learned High Court Judge being satisfied that the evidence presented by the prosecution warrants a case to answer, called for the defence and explained the rights of the accused to the 1st, 3rd and 4th Accused. 1st Appellant and 4th Accused had made statements from the dock and the 3rd Accused had given evidence from the witness box and called three witnesses on his behalf and closed their case.

After considering the evidence presented by both the prosecution and the defence, the Learned High Court Judge had convicted the Appellants as charged and they were each sentenced to death under the first count.

The 4th Accused was acquitted from the first and second counts.

Being aggrieved by the aforesaid conviction and sentence, the Appellants had preferred this appeal to this court.

The Learned Counsel for the Appellants informed this court that the Appellants have given consent for this matter to be argued in their absence. At the hearing, the Appellants were connected via Zoom platform from prison.

The following Grounds of Appeal were raised on behalf of the 1st Appellant.

1. The Learned High Court Judge has failed to appreciate the fact that the case for the prosecution was dependent on the evidence of one witness who failed to complete his evidence at the trial.
2. The Learned High Court Judge has failed to consider the infirmities in the evidence of witnesses who testified on behalf of the prosecution and the impact it would have on the credibility of the case for the prosecution.
3. The Learned High Court Judge has failed to take into consideration the large volume of evidence led to support the alibi taken up by the 2nd Appellant and the impact it would have on the case for the prosecution.
4. The cardinal principle that all matters in favour of an accused charged with an offence punishable with death should be given due consideration before the accused is convicted was not adhered by the learned trial judge.

The following Grounds of Appeal were raised on behalf of the 2nd Appellant

1. The Learned High Court Judge has failed to take into consideration the vital inter se and per se contradictions of the evidence provided by the Prosecution which go the root of the case.
2. The Learned High Court Judge has failed to take into consideration the principle regarding common intention.
3. The Learned High Court Judge has wrongly rejected the evidence of the 2nd Appellant and the evidence of the defence witnesses who were called to establish the defence of alibi in respect of the 2nd Appellant.
4. The Learned High Court Judge has failed to take into consideration the exceptions to Section 294 of the Penal Code.

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

PW1, Ranganath, had died before the conclusion of his evidence given before the High Court. As such, his evidence recorded at the non-summary inquiry was adopted under Section 33 of the Evidence Ordnance.

According to his evidence, on the day of the incident, which was a Poya Day, he had gone to the village temple with two of his friends namely Chutta and Manjula. When they were returning, they had met the 2nd Appellant near a place called Pole Goda Junction. At that time the deceased had said something to the 2nd Appellant and in return the 2nd Appellant had hit the deceased across his face. When the 2nd Appellant had tried to leave in a hurry, the deceased had given a chase and tried to assault the 2nd Appellant, and the 1st Appellant had then stabbed the deceased with a knife. After the stab injury, when the deceased was walking towards Pole Goda Junction, he had collapsed on the road. As the incident happened during night time, PW1 had witnessed the incident only with the aid of a tube light which was on the Pole Goda Junction lamp post. When the witness raised his voice and called

for help, power had gone off and the 2nd Appellant had chased him for about 50 meters. When he was proceeding towards Agalawatta, he had met the 2nd witness, Manjula. Thereafter, both had gone to the deceased's sister's house, and had informed them of the incident and had then gone to the police.

According to PW2, he had walked 10 to 15 feet behind the deceased and there had been no light. Suddenly, he had seen the deceased fall on the ground. Seeing this, he had run away from the scene with others. At the place where the deceased fell down, he had seen the presence of the 1st Appellant and the 4th Accused. The 4th Accused was acquitted from the case by the Court. PW2 had identified the 1st Appellant and the 4th Accused by moon light. He had not seen as to who had stabbed the deceased.

According to the JMO who held the post mortem, the death had occurred due to haemorrhagic shock due to heavy bleeding from the heart following a stab injury.

During his dock statement, the 1st Appellant had denied the charge.

The 2nd Appellant who gave evidence from the witness box, took up the defence of alibi that he was on duty at Govinna Library as a watcher on the day of the incident. To substantiate his claim, he had called two witnesses from the Bulathsinhala Pradeshiya Sabha.

As the grounds of appeal raised by the Learned Counsel for the Appellant are interconnected, I decided to consider all the grounds collectively.

In this matter, the entire case rests on the evidence given by PW1, who had died before he could complete his evidence before the High Court. As such, the prosecution sought the permission of the court to mark his deposition under Section 33 of the Evidence Ordinance.

The Learned President's Counsel for the 1st Appellant and the Counsel for the 2nd Appellant strenuously argued that the incident had happened due to a sudden fight. PW1 in his evidence admitted that a fight started between

the 2nd Appellant and the deceased first. When the deceased had given chase behind the 2nd Appellant, the 1st Appellant had stabbed the deceased once. Although PW1 said that he witnessed the incident, PW2 who had come with the deceased had said that he saw only the deceased falling to the ground.

The JMO who held the post mortem examination, noted a single stab injury on the deceased.

The essence of criminal law said to lie in the maxim "actus non facit reum nisi mens sit rea". The essence of an offence is the wrongful intent, without which it cannot exist. In this case it is very clear from the evidence given by the JMO that the deceased had sustained only a single stab injury.

In **Alo Singho v. Attorney General** [1984] 1 SLR 30 the court held that:

> *"It is important to note that, in the instant case, the appellant had inflicted only a single stab injury in circumstances indicative of the fact that he had acted on the spur of the moment, without pre-meditation. No motive was alleged by the prosecution against the appellant. Having regard to the above facts, it seems to me that the misdirection complained of, could well have caused prejudice to the appellant. In my view, it is unsafe to assume that the jury would have found a murderous intention to have been proved beyond reasonable doubt, had they been told that the presumption was one of fact which could be rebutted on a consideration of all the circumstances of the case. However, there could be no doubt that the appellant had the knowledge that the injury was likely to cause death, and was, therefore, guilty of the lesser offence of culpable homicide, not amounting to murder".*

The Learned High Court Judge after analysing the evidence given by both parties had come to a conclusion that both actus reus and mens rea have been proved by the prosecution and therefore, the Appellants are guilty to the charge of murder.

The Evidence led at the trial clearly shows that there is evidence of a sudden fight. The incident had taken place when the deceased's party was returning from the temple. Before the incident, there was a verbal exchange between the deceased and the 2nd Appellant, and which was followed by an exchange of blows. Thereafter, when the deceased had given chase behind the 2nd Appellant, the 1st Appellant had stabbed the deceased.

According to the medical evidence, the deceased had sustained one stab injury in his chest.

In this case although the evidence presented by the prosecution and the defence manifested the availability of a plea on the basis of a sudden fight, the Trial Court had failed to consider the same.

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.

In the event where the defence of sudden fight has not been taken up on behalf of the Appellants, the Learned High Court Judge should have considered the evidence which favours the Appellants 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 **King v. Lewis Singho** 43 NLR 491 the court held that:

> *"Where in a charge of murder the evidence discloses that the accused may have committed the offence 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, it is the duty of the Judge to direct the Jury to bring in the lesser verdict. …….In such a case it is immaterial which party offers the provocation or commits the first assault".*

In this case, the Learned High Court Judge must have directed his mind to ascertain whether there are extenuating circumstances which would bring the case against the Appellants within a general or special exception available under Section 294 of Penal Code.

Although the prosecution on their own motion had obtained three dates to consider whether this case could be considered under a charge of lesser culpability, however had not concluded on the matter before the trial commenced. This is a very serious lapse on the part of the prosecution. (Pages 45-47 of the brief)

Considering all the circumstances stressed before this court, I conclude that this is an appropriate case to consider for the Appellants benefit, their entitlement for a plea of sudden fight under Exception-4 to Section 294 of the Penal Code.

Hence, I set aside the death sentence imposed on the Appellants under count 01 and convict them for culpable homicide not amounting to murder under Section 297 of the Penal Code. I sentence the Appellants for 07 years rigorous imprisonment with a fine of Rs.10,000/ each with a default sentence of 06 months simple imprisonment. Additionally, each Appellant is directed to pay a compensation of Rs.250,000/- each to the deceased's family. In default, one-year simple imprisonment is imposed against each Appellant. Further, the sentence is back dated from the date of judgment, namely 13/12/2021.

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 Kalutara along with the original case record.

JUDGE OF THE COURT OF APPEAL

Pradeep Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL