IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an appeal made in terms of Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:
CA/HCC/0047/2023

High Court of Badulla Case No:
70/2014

Gamage Dharmasiri Gamage

Accused – Appellant

Vs

Hon. Attorney General

Respondent

Before	:	**P. Kumararatnam, J.**
		Pradeep Hettiarachchi, J.
Counsel	:	Ershan Ariaratnam for the Accused – Appellant.
		Anupa De Silva, DSG for the Respondent.
Inquiry on	:	04.09.2025
Decided on	:	14.11.2025

Pradeep Hettiarachchi, J

Judgment

1. The Accused-Appellant (hereinafter referred to as the Appellant) was indicted before the High Court of Badulla for having committed the murder of Konara Mudiyanselage Sagara Wasantha Konara on 04.04.2010 which is an offence punishable under section 296 of the Penal Code. After a trial without a jury, the learned High Court Judge convicted the appellant of the offence of murder under section 296 of the Penal Code and sentenced him to death.

2. It is against the said conviction and sentence the appellant has preferred the instant appeal. For the prosecution, 12 witnesses testified including the interpreter of the High Court of Badulla. The appellant made a Dock Statement.

The facts germane to this case are as follows:

3. On the day of the incident, the deceased attended a musical show with PW1 and PW2. Prior to going to the show, they had consumed liquor. They travelled in a three-wheeler driven by the deceased. After the musical show, they set off in the same vehicle, and on their way, they met the appellant. Upon meeting the appellant, the deceased requested liquor, but the appellant informed them that he did not have any.

4. Thereafter, the appellant too got into the three-wheeler, and they proceeded to an eating house run by him. At that place, the deceased gave the appellant Rs. 100 and asked him to bring liquor. The appellant went to the back of the eating house, and as he was getting delayed, the deceased called out to him and again asked him to bring liquor.

5. The appellant once again informed the deceased that he did not have any liquor, but the deceased was dissatisfied with this response. Upon alighting from the vehicle, a verbal altercation ensued between them, during which the deceased abused the appellant in filthy language. Thereafter, the deceased returned to the three-wheeler

and attempted to start it, and it was at that moment that the appellant stabbed the deceased.

6. Later, the deceased was admitted to the hospital, where he succumbed to his injuries. There were two eyewitnesses to the incident, namely Samitha Rukshana (PW1) and M. Pathirana (PW2). The trial commenced with the evidence of PW1. Since PW2 had gone abroad, his evidence was taken after the other prosecution witnesses had testified, namely PW5, PW7, PW8, PW9, PW12, PW10, PW13, and PW6. The appellant primarily relied on two grounds of appeal.

    a. The learned trial Judge failed to evaluate properly the credibility of PW1 and PW2.
    b. The defence version was not considered adequately

The prosecution version:

7. As can be seen from the evidence of PW1 and PW2, they, along with the deceased, were under the influence of alcohol at the time of the incident. PW1's testimony reveals that before they approached the appellant's eating house, they had already consumed liquor. However, the deceased, desiring to drink more, insisted that the appellant provide him with liquor, despite the appellant's repeated statements that he did not have any. It is also evident that an altercation arose between the appellant and the deceased when the appellant was unable to comply with the deceased's demand.

8. The evidence of PW1 and PW2 further indicates that the deceased was well known to them and that there was no animosity among them. In fact, it was the deceased who invited the appellant to join him in his three-wheeler when they met on their way. It is also in evidence that they had consumed liquor prior to attending the musical show.

The defense version:

9. The appellant, in his dock statement, admitted that when the deceased kicked him in the stomach and attempted to attack him with a knife, he grabbed the knife from the deceased and stabbed him once, but the stab missed, following which he ran to his house and closed the door. Throughout the trial, the defence maintained that when the deceased assaulted the appellant, a fight ensued between them, during which PW1 and

PW2 also became involved, and in the course of that fight, the deceased may have sustained the fatal injuries.

10. In the written submissions filed on behalf of the respondent, the learned Deputy Solicitor General (DSG) summarized the evidence of each prosecution witness and cited several authorities in support of the conviction. It was the position of the learned DSG that there is absolutely no merit in the grounds of appeal, as the learned High Court Judge had duly taken into consideration the dock statement of the appellant. Furthermore, it was submitted that the learned High Court Judge had provided sufficient reasons for his conclusions, and that there was strong and cogent evidence establishing the prosecution case beyond reasonable doubt.

11. Hence, the question that needs to be determined by this Court is that whether the incident amounts to murder, punishable in terms of Section 296 of the Penal Code as determined by the learned High Court Judge and supported by the learned DSG, or whether the incident amounts to culpable homicide not amounting to murder in terms of Section 294 exception 4 of the Penal Code, punishable in terms of section 297 of the Penal Code.

12. In other words, the point falling for consideration is whether the conviction of the appellants under Section 294 of the Penal Code is sustainable. As discussed earlier, the evidence clearly establishes that when the deceased asked liquor from the appellant there was an exchange of words which resulted in altercation and during the said altercation, the appellants attacked the deceased.

    Exception 4 of Section 294 of the Penal Code reads 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 and unusual manner. Explanation: It is immaterial in such cases which party offers the provocation or commit the first assault."

13. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of

Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'."

14. In the appeal under consideration, the evidence led by the prosecution itself clearly demonstrates that there was no element of premeditation and that the incident occurred as a result of a sudden fight in the heat of passion upon a sudden quarrel. The evidence reveals that the deceased and the other eyewitnesses had consumed liquor during the daytime, and that the incident occurred unexpectedly when they came near the appellant's eating house.

15. Evidently, the appellant was also known to them and maintained cordial relations with them. In fact, the deceased, together with PW1 and PW2, had consumed liquor purchased from the appellant earlier during the day. This circumstance clearly demonstrates that there was no prior animosity or motive on the part of the appellant to cause harm to the deceased. The incident, therefore, appears to have occurred in the heat of the moment, during a sudden quarrel that ensued after the deceased insisted on obtaining liquor and verbally abused the appellant. The surrounding circumstances, taken as a whole, strongly support the defence position that the act was committed in the course of a sudden fight, without premeditation or malice aforethought.

16. Furthermore, there is no evidence whatsoever to suggest that the appellant had acted with premeditation or that he had gone in search of a weapon following the quarrel. On the contrary, the evidence indicates that the appellant attacked the deceased with a sharp cutting weapon that was readily available within his reach. This, in my view, shows that the appellant did not take any undue advantage of the situation. It is also evident that all persons present at the time of the incident were under the influence of liquor.

17. The Indian Supreme Court has laid down in ***Prabhakar Vithal Gholve v/s The State of Maharashtra*** ***reported in AIR 2016 SC 2292*** that if the assault on the deceased could be said to be on account of the sudden fight without pre-meditation, in heat of passion and upon a sudden quarrel, conviction of the appellant cannot be sustained

under Section 302 and altered to under Section 304 Part-I of IPC. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found.(Sections 302 and 304 of the Indian Penal Code are in terms similar if not identical to Sections 296 and 293 of the Ceylon Penal Code.)

18. In these circumstances, it is evident that the act of the appellant was committed in the heat of passion, upon a sudden quarrel, without any premeditation, and without the appellant taking undue advantage or acting in a cruel or unusual manner. Therefore, the essential ingredients necessary to constitute the offence of murder under Section 296 of the Penal Code are not satisfied. The facts and circumstances of this case, however, would clearly fall within the ambit of Exception 4 to Section 294, thereby rendering the act of the appellant punishable under Section 297 of the Penal Code for culpable homicide not amounting to murder. The only conclusion that can be reached under the circumstances is that the incident was a result of a sudden quarrel and the attack has been a result of the heat of passion. Thus, the incident occurred due to a sudden fight which, in my view, falls under exception (4) of Section 297 of the Penal Code.

19. Evidently, the appellant was also known to them and maintained cordial relations with them. In fact, the deceased, together with PW1 and PW2, had consumed liquor purchased from the appellant earlier during the day. This circumstance clearly demonstrates that there was no prior animosity or motive on the part of the appellant to cause harm to the deceased. The incident, therefore, appears to have occurred in the heat of the moment, during a sudden quarrel that ensued after the deceased insisted on obtaining liquor and verbally abused the appellant. The surrounding circumstances, taken as a whole, strongly support the defence position that the act was committed in the course of a sudden fight, without premeditation or malice aforethought.

20. It is also desirable to emphasize that there is no evidence to show that the appellant took undue advantage of the situation, as the evidence demonstrates that he used a weapon that was readily available in the vicinity to attack the deceased. Furthermore,

there is no evidence to establish who brought the sharp-cutting weapon into the three-wheeler.

21. It is true that the deceased sustained eight injuries, out of which two were fatal; however, that fact alone is insufficient to conclude that the appellant acted in a cruel or unusual manner. It is quite possible for a person, in the heat of passion or under sudden provocation, to continue attacking another without any premeditated intention, as a result of the emotion or sudden impulse that arises between the attacker and the victim.

22. Section 297 of the Penal Code provides for varying degrees of punishment depending on the intention and knowledge attributed to the offender. I am of the view that the learned High Court Judge's rejection of the appellant's dock statement, on the basis that the defence of a sudden fight was not taken when the prosecution witnesses gave evidence, amounts to a misdirection.

23. As discussed above, the evidence of the prosecution witnesses themselves establishes that the incident amounts to culpable homicide not amounting to murder. Had the learned High Court Judge considered the evidence in its totality, as he was required to do, the proper conviction should have been under Section 297 of the Penal Code.

24. It is also pertinent to mention that, even if the defense failed to raise the defense of a sudden fight during the cross-examination of the prosecution witnesses, the trial Judge ought to consider it if the evidence indicates that the killing occurred in the heat of passion during a sudden quarrel. In the present case, the evidence clearly shows that the deceased and the other eyewitnesses had consumed liquor and that the incident arose unexpectedly when they came near the appellant's eating house. The appellant did not take undue advantage, and the attack appears to have occurred as a spontaneous reaction to the deceased's conduct.

25. Therefore, the totality of the evidence supports the view that the killing occurred in the heat of sudden emotion, and the defense of sudden fight should have been duly considered by the learned High Court Judge. In this regard following authority would be of much relevance.

26. In the case of ***Gamini vs. The Attorney General (2011) 1 SLR 236***, it was held,

> *Though the accused-appellant in his defence did not take up the defence of grave and sudden provocation, the trial Judge must consider such a plea in favour of the accused-appellant if it emanates from the evidence of the prosecution.*

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"*

27. Accordingly, I hold that the conviction and sentence imposed on the appellant cannot be allowed to stand. The conviction and sentence are therefore set aside. I find the appellant guilty of culpable homicide not amounting to murder, within the ambit of Exception 4 to Section 294 of the Penal Code, on the basis of a sudden fight, punishable under Section 297 of the Penal Code.

28. Upon consideration of the evidence for the prosecution, the evidence led for the defence, and the evidence as a whole, there are, in my opinion, items that would affirmatively bring the case against the appellant within Exception 4 to Section 294 of the Penal Code, even though the appellant did not specifically plead this exception.

29. Hence, I hold that in a case of murder heard without a jury, it is imperative for the learned High Court Judge to direct his mind to ascertain whether there are extenuating circumstances that would bring the case against the appellant within a general or special exception, notwithstanding that the act was committed and the imputable intention was murderous.

30. Regrettably none of the above principles had been considered by the Learned High Court Judge when he convicted the appellant for murder and sentenced him to death. Such a failure to take into account the extenuating circumstances amounts to a mis-direction resulting in a miscarriage of justice.

31. In light of the foregoing, the appellant's conviction for murder is hereby altered to culpable homicide not amounting to murder. The appellant is sentenced to 12 years' rigorous imprisonment, to run from the date of conviction, namely 14.11.2022.

Additionally, the appellant is directed to pay Rs. 200,000.00 to the heirs of the deceased, with a default sentence of one year imprisonment in the event of non-payment.

32. Accordingly, the appeal is partly allowed.

Judge of the Court of Appeal

P. Kumararatnam, J

I agree,

Judge of the Court of Appeal