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.

Court of Appeal No:

CA/HCC/0062/22

High Court of Ratnapura

Case No: HCR/25/2014

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Gampalage Anil Nishantha Fonseka *alias* Suranji

ACCUSED

AND NOW BETWEEN

Gampalage Anil Nishantha Fonseka *alias* Suranji

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Hafeel Farisz with Sanjeewa Kodithuwakku, Shannon Thilakaratne and Shermina Bangsjayah for the Accused-Appellant
	: Dileepa Pieris, S.D.S.G. for the Respondent
Argued on	: 25-06-2024
Written Submissions	: 09-12-2022 (By the Respondent)
	: 09-12-2022 (By the Accused-Appellant)
Decided on	: 04-09-2024

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Ratnapura for causing the death of one Ayagama Pitadeniyalage Jayaweera at a place called Pallekada (Ayagama) within the jurisdiction of the High Court of Ratnapura, on or about 29-12-2011, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

After trial without a jury, the learned High Court Judge of Ratnapura, of his judgment dated 10-12-2021 found the appellant guilty for culpable homicide not amounting to murder in terms of section 294 exception 4 of the Penal Code, and convicted him in terms of section 297 of the Penal Code.

After having considered the mitigatory as well as the aggravating circumstances, the learned High Court Judge sentenced the appellant on the basis of the 1st limb of section 297 for a period of 12 years rigorous imprisonment. He was ordered to pay a fine of Rs. 15,000/-, and in default, to serve 6 months simple imprisonment. The appellant was also ordered to pay Rs. 300,000/- as

compensation to the wife of the deceased, namely PW-01, and in default of such payment, he was ordered to serve 1-year simple imprisonment.

On the basis of being aggrieved by the said conviction and the sentence, the appellant preferred this appeal.

At the hearing of this appeal, the learned Counsel for the appellant submitted the following grounds of appeal for consideration of the Court.

1. The learned High Court Judge has caused grave miscarriage of justice to the accused-appellant by failing to give due consideration and importance to the right of private defence exercised by the accused-appellant.
2. The judgment of the learned High Court Judge is contrary and in excess to law.

Before considering the grounds of appeal urged and the submissions made in that regard, I would like to narrate the evidence led at the trial in brief, for the better understanding of the judgment.

Evidence in Brief

According to the evidence of PW-01, who was the wife of the deceased, her husband along with her son had been filling compost fertilizer to plastic bags from their compost pit situated near the boundary that separated the land of theirs from their neighbour in order to grow vegetables. The time was around 2.30 in the afternoon of 29-12-2011. They have been using a mamoty and an iron rod for this purpose. The witness had been seated nearby and was observing what they were doing.

The evidence of PW-01 establishes the fact that there had been a dispute over the common boundary of their neighbour during the relevant period. While they were engaged in this task, the mother of the appellant, namely Punyawathi, has come and informed her husband not to dig at the place they were digging for compost, claiming that portion of land as theirs.

This has led to a verbal altercation between them and as a result, the deceased has stated that "we will be going to the police." At that point, the appellant has come and gotten involved in the dispute and had cut the filled fertilizer packets using the kathy knife (billhook knife) he brought along with him. Thereafter, PW-01 has also gotten involved, and in the ensuing brawl, the earlier mentioned Punyawathi has started assaulting the PW-01. She has fallen onto the ground as a result, and she has heard her husband's sister who was in the house with them shouting, and has seen the appellant jumping towards her husband who was near her, pointing the kathy knife towards him.

She has not seen the appellant attacking her husband, but has seen her husband falling onto the ground while holding his head.

According to her evidence, after the assault on her husband, the appellant has taken his sister Tekla, who had also been there and had left. She has later come to know that her husband has succumbed to his injuries at the hospital.

Under cross-examination, she has stated that she did not know that there was a case against her husband for causing injuries to the earlier mentioned Tekla, but has stated that she saw Tekla been injured after her husband was attacked by the appellant, although she did not see how those injuries occurred to her. The position taken on behalf of the appellant at the cross-examination had been that he came to the scene in order to protect the life of Tekla, which the witness has answered saying she is unaware of that fact.

The PW-02 has been the son, who was working with the deceased at the time the incident occurred. His evidence had been to the effect that, he and his father filled compost fertilizer to bags using the iron rod and the mamoty they had with them. While they were engaged in that task, the earlier mentioned Punyawathi and Tekla had come and scolded the deceased telling him not to get fertilizer from that spot, which has resulted in a verbal altercation between the deceased and the two females.

At that point, the appellant who came there has cut the fertilizer bags, which were already filled, using the kathy knife he was carrying. At that point, the deceased has said that they are going to the police.

While this was going on, he has seen the earlier mentioned Punyawathi and Tekla attacking his mother (PW-01). He has also seen the appellant attacking the deceased using the kathy knife he was carrying. As a result, his father, the deceased, had fallen onto the ground while holding onto his head. He has also stated that while the appellant was attacking his father, the earlier mentioned Tekla also came there and she attempted to restrain on the appellant.

According to his evidence, he has not seen anyone else being injured, but has come to know that his father has died at the hospital as a result of the injuries sustained by him.

It has been suggested to the witness when he was under cross-examination that he was lying when he stated that the earlier mentioned Tekla attempted to prevent the deceased being attacked by the appellant, which the witness has denied. It has also been suggested that it was after his father attacked Tekla, the appellant attacked him in order to rescue Tekla from his father, which has also been denied by the witness.

PW-05 Gamini Wasantha Kumara has seen the appellant with the earlier mentioned Tekla while the appellant was carrying a kathy knife a few minutes after the incident. He has also seen the appellant holding Tekla who had an injury on her head. Both of them have come and had sat near a boutique situated nearby and the witness has seen the appellant going behind the boutique with the kathy knife he was carrying. Later, he has assisted the police to recover the said kathy knife.

According to the evidence of the Judicial Medical Officer (JMO) who conducted the post-mortem, the deceased had received one serious cut injury to his head, which has resulted in his death. After the evidence of the police officers who conducted the relevant investigations, the prosecution has closed its case and

the learned High Court Judge, based on the evidence led before the Court, has called for a defence from the appellant. The appellant has decided to make a dock statement. He has called the earlier mentioned Tekla, who was his sister as a witness, and has also called the JMO who examined the earlier mentioned Tekla after she was admitted to the hospital to testify on his behalf.

The appellant in his dock statement has stated that while he was at home, he heard a quarrel near the common boundary between their land and the land of the deceased. When he ran towards the place where the quarrel was taking place, he has seen the deceased with a mamoty in his hand and his son having an iron rod with him. He has also seen the wife of the deceased (PW-01) with a kathy knife in her hand. While he was approaching the scene, the deceased has attacked his sister Tekla, who was also there, using the mamoty he was holding. After receiving a blow to her head, she has fallen and the appellant has attempted to prevent the deceased from attacking his sister by trying to get hold of the mamoty the deceased had in his hand.

He has claimed that at that point, the wife of the deceased came with a kathy knife shouting 'I will kill you' and as he had no option, he grabbed hold of the kathy knife and attacked the deceased.

After that, he has taken his sister away and had taken steps to admit her to the hospital. He has surrendered to the Court after coming to know that Jayaweera, who was the deceased, has passed away. He has claimed that he only acted in order to rescue his mother and sister, since he had no other option and he also feared that he would be killed.

The evidence of Tekla Nishanthi Fonseka, who was the sister of the appellant, had been to the same effect, and her position had been that when she and her mother protested the actions of the deceased and his son, the deceased attacked her using the mamoty he was holding. She has claimed that the wife of the deceased attacked her mother at the same time. Her evidence had been that it was she who had a kathy knife at that time and she swung the kathy knife when

the deceased attempted to attack her for the 2nd time. At that time, she has received another blow towards her back, and after that, because of the blood on her face, she could not see anything and had fallen unconscious, and regained consciousness only at the hospital.

She has claimed that her brother has come to her rescue after seeing her and her mother being attacked, and if not for her brother, she would have been killed.

On behalf of the defence, the JMO who examined the defence witness Tekla has been called to give evidence. The said JMO has confirmed that the witness Tekla has received head injuries. The defence has also called an official from the Magistrate's Court of Ratnapura to confirm that the police have filed a B-Report informing of the incident where Tekla had also received injuries.

The Consideration of the Grounds of Appeal

Although two grounds of appeal were raised by the learned Counsel for the appellant, I will now proceed to consider them together as they are interrelated.

The main contention of the learned Counsel in arguing this appeal was that the appellant had acted exercising his right of private defence in order to save his sister from being attacked by the deceased. It was his view that the learned High Court Judge has failed to give consideration to his defence, and the judgment of the learned High Court Judge was contrary to law in that regard.

It is settled law that if a person can establish that he acted in exercising his right of private defence, such an action cannot be considered as an action that constitutes an offence.

The relevant section 89 and 90 of the Penal Code relevant to this incident reads as follows.

> **89. Nothing is an offence which is done in exercise of the right of private defence.**

90. Every person has a right, subject to the restrictions contained in section 92, to defend –

Firstly **– His own body and the body of any other person, against any other offence affecting the human body;**

Secondly **– The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass.**

(Section 92 referred to above describes the acts against which there is no right of private defence)

When an accused takes up the position that he acted in exercising his right of private defence, it falls within the category of taking up the position it falls within the general exceptions in the Penal Code. In such a scenario, proving of such circumstances is upon the accused who takes up such a position. In my view, although no burden of proof lies with an accused person in a criminal case, when such an accused takes up a position as mentioned earlier, that burden shifts to the accused only in relation to his position, and it would not extend beyond establishing that fact.

The relevant section 105 of the Evidence Ordinance reads as follows;

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

In view of the above statutory provisions, I find no basis for the learned Counsel's contention that the learned High Court Judge has failed to give due consideration to the appellant's defence taken up at the trial on the basis of exercising the right of private defence.

On the contrary, I find that the learned High Court Judge was very much mindful of the legal requirements that should be established if the appellant is to succeed in his defence. With that in mind, the learned High Court Judge has well considered the evidence placed before the Court by the prosecution, as well as the dock statement and the evidence given on behalf of the appellant when he was called upon for a defence.

The evidence placed before the Court clearly suggests that this was a dispute that arose as a result of the deceased and his son collecting compost fertilizer near the common boundary between the houses of the deceased and the appellant. It is clear that due to the dispute, inmates of the appellant's house have come and protested against the actions of the deceased and his son, which has resulted in a brawl.

The appellant's position had been that when he heard the commotion, he came to the place of the incident and saw his sister being attacked by the deceased using a mamoty. He has claimed in his dock statement that it was the wife of the deceased who carried a kathy knife. His position had been that he was forced to attack the deceased in order to rescue her when the deceased attempted to attack his sister for the 2nd time.

On behalf of the appellant, his sister who has also sustained injuries in the incident has given evidence. According to her version of events, it was she who had brought the kathy knife. She has claimed that when the deceased was attempting to attack her with the mamoty, she swung the kathy knife she had in order to escape him, which appears to be a suggestion of claiming that the injuries caused to the deceased may have been a result of her actions.

At the same time, when PW-02, the son of the deceased was giving evidence, the suggestion made on behalf of the appellant had been that the kathy knife was a one that was in the house of the deceased. The learned High Court Judge has considered all these pieces of evidence in much more detail in his judgment in order to determine whether it has been established that the death of the deceased was a result of exercising the right of private defence by the appellant.

In that process, the learned High Court Judge has brought to his attention several decided cases cited before the High Court as well. The learned High Court Judge has determined that this is an incident where the appellant has clearly exceeded his right of private defence and he is not entitled to rely on such a defence, and had rejected his contention.

At the hearing of this appeal, the learned Counsel for the appellant submitted that although the prosecution witnesses claimed that the appellant cut and destroyed the fertilizer bags filled by the deceased before he attacked him, the police officers who conducted investigations has not seen such a destruction.

I am of the view that although no evidence has been given by the investigating police officer as to such an observation, it is clear that when PW-01 and 02 gave evidence and stated that fact, it has not been challenged or contradicted in any manner. Therefore, that piece of evidence has to be considered as unchallenged evidence. As considered aforesaid, I find no reason to disagree with the findings of the learned High Court Judge, which I find to be determinations reached after well considering the evidence and the relevant law in that regard.

After determining as to the defence taken up by the appellant, the learned High Court Judge has very correctly considered that although no such position had been taken up at the trial, whether the evidence establishes a sufficient basis to determine the incident, and the actions of the appellant, constitutes culpable homicide not amounting to murder.

It is trite law that when an accused person is charged for the offence of murder punishable in terms of section 296 of the Penal Code, even in a situation where

no such position has been taken up by the defence, it is the duty of the trial Judge to consider whether the incident where the accused person has caused the death of the deceased amounts to culpable homicide not amounting to murder in terms of section 297 of the Penal Code.

I find that the learned High Court Judge has well considered all the facts and circumstances placed before him and had determined that this is a matter where the appellant should be convicted in terms of section 297 of the Penal Code under exception 4 of the section 294.

The relevant exception 4 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 commits the first assault.**

I am of the view that this was the determination that could have been reached under the given facts and the circumstances, and hence, I find no reason to interfere with the determination of the learned High Court Judge in that regard.

It needs to be emphasized that this is a matter where the same learned High Court Judge who pronounced the judgment has heard the evidence of the case in its entirety. As a result, the learned High Court Judge has had the full benefit of observing the demeanour and deportment of the witnesses, which is an invaluable advantage he has had in determining the case before him.

It is settled law that under such circumstances, the appellate Courts would be hesitant to interfere with such a judgment unless the determinations of the learned High Court Judge were contrary to the evidence placed before the Court and against the law.

In the case of **De Silva and Others Vs. The Attorney General (2010) 2 SLR 169**, it was held that;

> *"Credibility is a question of fact, not law. Appeal Court Judges repeatedly stress the importance of trial Judge's observation of demeanor of witnesses in deciding questions of fact. The acceptance or rejection of evidence is therefore is a question of fact for the trial Judge, since he or she is in the best position to hear and observe witnesses. In such a situation the appellate Courts will be slow to interfere with the findings of a trial Judge unless such evidence could be shown to be totally inconsistent or perverse and lacking credibility. Evidence must be weighed and not counted."*

In the case of **Chaminda Vs. The Republic (2009) 1 SLR 144**, it was held:

> *"An appellate Court will not lightly disturb the findings of a trial Judge who has come to a favourable finding with regard to the testimonial trustworthiness of a witness whose demeanor and deportment had been observed by a trial Judge. Findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."*

For the reasons as considered above, I find no basis to interfere with the judgment dated 10-12-2021 by the learned High Court Judge of Ratnapura.

Accordingly, the appeal against the conviction is dismissed for want of merit.

However, when it comes to the sentencing of the appellant under section 297 of the Penal Code on the basis of culpable homicide not amounting to murder, it appears that the learned High Court Judge has acted in terms of the 1st limb of section 297.

When a person is convicted in terms of section 297, the punishment that can be imposed on such a person has to be determined under the two limbs mentioned in the section.

For better understanding, I would now reproduce section 297 of the Penal Code, which reads as follows:

> **297. 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.**

I find that in the judgment, the learned High Court Judge has clearly determined the fact when the appellant attacked the deceased with a kathy knife, he has had no murderous intention or has not acted in a cruel or unusual manner, but this was an incident that happened due to the sudden fight or a quarrel. He has also determined that the appellant has acted exceeding his right of private defence.

It is my considered view that under such circumstances, the sentence imposed upon the appellant should have been in terms of the 2nd limb of section 297 where the period of imprisonment can only be extended for a period of 10 years.

Therefore, I set aside the period of 12 years rigorous imprisonment imposed upon the appellant, and replace it with a period of 9 years rigorous imprisonment. However, the fine imposed, the compensation ordered, and the default sentences imposed shall remain the same.

The appeal against the sentence is partially allowed subjected to the above variation as to the period of rigorous imprisonment.

Since the appellant is on bail pending appeal, it is directed that his sentence shall commence from the day where the learned High Court Judge of Ratnapura pronounces this judgment to him before the High Court of Ratnapura.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal