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/0082/084/23

High Court of Tangalle

Case No: THC/72/2006

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Ulpagoda Pathiraarachchige Prince Neranjan Karunanayake
2. Netolpitiya Gamage Wijaya Kumarathunga
3. Netolpitiya Gamage Anura
4. Bukanda Kankanamge Jagath *alias* Gamini
5. Kirinda Kandambige Ruwan Priyantha

ACCUSED

AND NOW BETWEEN

1. Ulpagoda Pathiraarachchige Prince Neranjan Karunanayake

2. Notolpitiya Gamage Wijaya Kumarathunga

3. Notolpitiya Gamage Anura

ACCUSED-APPELLANTS

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Anuja Premaratna, P.C. with Imasha Senadeera for the Accused-Appellants
	: Dishna Warnakula, D.S.G. for the Respondent
Argued on	: 22-07-2024
Written Submissions	: 04-03-2024 (By the Accused-Appellants)
	: 02-07-2021 (By the Respondent)
Decided on	: 07-10-2024

Sampath B. Abayakoon, J.

This is an appeal by the accused-appellants (hereinafter referred as the appellants) on the basis of being aggrieved of their conviction and sentence by the learned High Court Judge of Tangalle. The three appellants were the 1st, 2nd and the 3rd accused in the High Court case where they were indicted along with 2 others for committing the following offences.

1. Being members of an unlawful assembly with the intention of causing injuries to one Jasin Arachchige Karunasena on or about 28-08-1996, at a place called Buwaliara within the jurisdiction of the High Court of Tangalle, and thereby committed an offence punishable in terms of section 140 of the Penal Code.
2. At the same time and at the same transaction, they caused the death of the earlier mentioned Karunasena, while being members of the said unlawful assembly, and thereby committed the offence of murder, punishable in terms of section 296 read with section 146 of the Penal Code.
3. At the same time and at the same transaction, they caused the death of the earlier mentioned Karunasena, and thereby committed the offence of murder punishable in terms of section 296 read with section 32 of the Penal Code.

After a lengthy trial which has taken 28 years to conclude from the date of the offence, the learned High Court Judge of Tangalle of his judgment dated 16-12-2022 found the appellants as well as the 4th and the 5th accused indicted not guilty for the 1st and 2nd counts preferred against them, which were the counts relating to unlawful assembly and causing death while being members of the said unlawful assembly. The 4th and the 5th accused indicted were also acquitted of the 3rd count preferred against them, as there was no evidence against the said accused in relation to the charges.

Having considered the evidence placed before the Court, the learned High Court Judge convicted the appellants for the offence of culpable homicide not amounting to murder in terms of section 297 of the Penal Code.

After having considered the aggravating and the mitigatory circumstances, the learned High Court Judge, of his sentencing order dated 18-01-2023, sentenced the appellants in terms of the 1st limb of section 297 of the Penal Code for a term of 15 years rigorous imprisonment each. The appellants were ordered to pay a fine of Rs. 100,000/- each, and in default, to serve a sentence of 6 months each simple imprisonment.

At the hearing of this appeal, the learned President's Counsel who represented the appellants intimated to the Court that he will no longer challenge the conviction of the appellants, but only the sentence imposed upon them on the basis that the sentence should have been in terms of the 2nd limb of section 297 of the Penal Code.

Accordingly, upon the withdrawal, the appeal against the conviction is hereby dismissed.

The Court heard the views expressed by the learned President's Counsel to substantiate his argument that the sentence should have been in terms of the 2nd limb of section 297 of the Penal Code. This Court also heard the views expressed by the learned Deputy Solicitor General (DSG) who represented the complainant-respondent in this regard.

For better understanding of this judgment, I think it is appropriate to reproduce the relevant part of the judgment of the learned High Court Judge where it has been determined that the conviction should be in terms of section 297 of the Penal Code (at page 397 of the appeal brief).

> "විත්තිකරුවන් විසින් සිදු කරනු ලැබූ ක්‍රියාව මගින් තුවාලකරුට මරණය සිදුවිය හැකි බව දැන දැනම හෝ එසේ චේතනා කර අදාළ පහරදීම සිදු කර ඇති බව පෙනී යයි. මෙම අපරාධය සිදුව

ඇත්තේ හම්බන්තොට දිස්ත්‍රික්කයේ අතිශය දුෂ්කර ග්‍රාමීය ප්‍රදේශයකදීය. තුවාලකරුට අප්‍රමාධිව නිසි වෛද්‍ය ප්‍රතිකාර ලබා ගැනීමට අවස්තාවක් නොලැබෙන බවට සාධාරණ දැනුමක් හා අවබෝධයක් විත්තිකරුවන්ට තිබූ බව සැලකිය හැක. ඔවුන් තුවාලකරුගේ මරණය චේතනා කර ඇති බව සැලකිය හැක.

කෙසේ නමුදු මියගිය තැනැත්තාට සිදුවිය ඇති තුවාල අනිවාර්යයෙන්ම මරණය ගෙනදීමට සමත් තුවාල නොවේ. ඒ අනුව වාර්තා කර ඇති සාක්ෂි මගින් වඩාත් හොඳින් සනාත වනුයේ මිනීමැරීම නමැති අපරාධය සිදු කිරීම නොව දණ්ඩ නීති සංග්‍රහයේ 297 වගන්තිය යටතේ දඬුවම් ලැබිය හැකි මිනිමැරීමක් නොවන සාවද්‍ය මනුෂ්‍ය ඝාතනය සිදු කිරීම නැමැති වරද බවට තීරණය කරමි."

It was the submission of the learned President's Counsel that, the learned High Court Judge has determined the matter not on the basis of knowledge or intention, but under the 2nd limb of section 293 of the Penal Code where culpable homicide has been defined. The relevant section reads as follows.

> **293. Whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely to by such act to cause death, commits the offence of culpable homicide.**

He was of the view that in fact, the consideration should have been in terms of the 3rd limb of section 293, given the facts and the circumstances and the reasoning considered by the learned High Court Judge in his judgment. The learned President's Counsel contended that the three appellants were young persons when this incident occurred, and the evidence clearly shows that the incident occurred as a result of a sudden fight without the offender having taken undue advantage or has acted in a cruel or unusual manner. He also drew the attention of Court to the medical evidence where the Judicial Medical Officer (JMO) who conducted the post-mortem has expressed the opinion that the injuries suffered by the deceased were not fatal in the ordinary course of nature and the death has occurred due to the delay or not taking the deceased to a hospital where he could have been given necessary medical attention.

The submission of the learned DSG was to the effect that the learned High Court Judge was correct when it was decided to sentence the appellants in terms of the 1st limb of 297 of the Penal Code.

However, the learned DSG agreed that the learned High Court Judge has not stated under what exception of section 294 of the Penal Code he is determining that the offence committed by the appellants would amount to culpable homicide not amounting to murder. It was her view that the evidence of PW-03 and 04, the main eyewitnesses to the incident, clearly showed that the appellants had the intention of causing death or of causing such bodily injury as is likely to cause death. She was of the view that there was no basis before this Court to reconsider the sentence imposed upon the appellants as the learned High Court Judge has pronounced a considered sentencing order when sentencing the appellants.

Having considered the relevant facts and the circumstances that led to the death of the deceased person and the conviction of the appellants in terms of section 297 of the Penal Code, although I find no reason to disagree with the learned High Court Judge's determination that the conviction should be in terms of section 297 on the basis of culpable homicide not amounting to murder, I find that the learned High Court Judge has failed to properly reason out his determination in that regard.

It is my considered view that every causing of death of a person by another person with criminal intent would amount to culpable homicide in terms of section 293 of the Penal Code unless such causing of death falls within the special or general exceptions as provided for in the Penal Code.

Culpable homicide is murder in terms of section 294 of the Penal Code under the following circumstances.

294. Except in the cases hereinafter excepted, culpable homicide is murder-

Firstly- if the act by which the death is caused is done with the intention of causing death; or

Secondly- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused ; or

Thirdly- If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

Fourthly- If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

For a trial Court to determine culpable homicide is not murder, but falls under the category of culpable homicide not amounting to murder in terms of section 297 of the Penal Code, there must be a determination under any one or more of the five exceptions stated in section 294.

I find that the learned High Court Judge has failed to state in the judgment under which exception he is determining that the offence committed by the appellants amounts to culpable homicide not amounting to murder in terms of section 297 of the Penal Code. However, having considered the relevant evidence placed before the Court, I am of the view that the determination should have been under exception 4 of section 294 of the Penal Code, which reads thus;

Explanation 4.-

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.

The way the learned High Court Judge has considered evidence shows that there had been a quarrel between the deceased, the appellants and some others. This has resulted in the deceased being attacked after the appellants got hold of the knife the deceased was carrying at the time of the incident. The injuries caused to the deceased shows that the said injuries have not been caused in a cruel or unusual manner, but as a result of a sudden fight in the heat of passion. Therefore, it is my view that when sentencing the appellants, the relevant facts and the circumstances should have been considered in order to determine whether sentencing of the appellants should be in terms of limb 1 or limb 2 of section 297.

In this regard, I would like to cite the judgment pronounced by the Indian Supreme Court, which considered the applicability of exceptions stated in section 300 of the Indian Penal Code, which is the corresponding provision to section 294 of our Penal Code. In the case of **Jai Prakash Vs. State (Delhi Administration) 1991 SCR (1) 202**.

Held;

" 'Intention' is different from 'motive' or 'ignorance' or 'negligence.' It is the 'knowledge' or 'intention' with which that act is done that makes difference,

in arrival at a conclusion whether the offence is culpable homicide or murder. [208-E]

The language of Clause Thirdly of Section 300 speaks of intention at two places and in each the sequence is to be established by the prosecution before the Court that it can fall in that Clause. The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances. The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue. Firstly, when an act is done by a person, it is presumed that he, must have been aware that certain specified harmful consequences would or could follow. But the knowledge is bare awareness and not the same thing as 'intention' that such consequences should ensue. As compared to 'knowledge,' 'intention' requires something more than the mere foresight of the consequences, namely the purposely doing of a thing to achieve a particular end. [211H-212C]

'Knowledge' as contrasted with 'intention' signify a state of mental realization with the bare state of conscious awareness of certain facts in which human mind remains supine or inactive. On the other hand, 'intension' is a conscious state in which mental faculties are aroused into actively and summoned into action for the purpose of achieving a conceived end. [213B-C]"

In the case of **The King Vs. Aldon (1943) 44 NLR 575**, it was held;

"*Where, in a charge of murder, the Court of criminal appeal is satisfied that there was some doubt as to whether the jury were of opinion that the*

accused had a murderous intention or merely the knowledge that what he did was likely to cause death,-

Held, that the accused should be given the benefit of the doubt and sentenced under the latter part of section 297 of the Penal Code."

It is clear from the evidence placed before the trial Court that the appellants had the knowledge that their actions would be likely to cause death, but there was no evidence before the Court that they actually intended to cause death. Although the deceased had died as a result of the injuries caused to him, the opinion of the JMO had been to the effect that they were not injuries that would have caused the death in the ordinary course of nature. His death has occurred because of the fact that he has not been given proper medical attention.

The evidence placed before the trial Court establishes the fact that it was not only the appellants, but there had been several other persons present, including the relatives of the deceased, when this incident occurred. However, the deceased had not been taken to a hospital, which has resulted in his death as a result of the excessive bleeding from the injuries. It is my considered view, that fact cannot be held against the appellants to conclude that they intended to cause the death of the deceased.

It is my view that, the sentence in terms of section 297 should have been in terms of the 2nd limb of the said section as the act had been done with the knowledge that it is likely to cause death, but without the intention of causing death.

For the reasons as set out above, I am in no position to agree with the contention of the learned DSG that a sentence of 15 years rigorous imprisonment can be justified.

Accordingly, I vary the sentencing order dated 18-01-2023 by the learned High Court Judge of Tangalle where each of the appellants were sentenced for a period of 15 years each rigorous imprisonment to read that their period of rigorous

imprisonment should be 10 years each in terms of the 2nd limb of section 297 of the Penal Code.

I order that, the fines ordered and the default sentences imposed shall remain the same.

Having considered the fact that the appellants had been in incarceration from their date of conviction on 18-01-2023, I order that their period of 10 years rigorous imprisonment shall deem to have commenced on 18-01-2023.

The appeal against the sentence is partly allowed up to the above extent.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal