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 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist
Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/0121/2023

Complainant

High Court of Kandy
Case No. HC/534/2019

Vs.

Jayasinghe Mudiyanselage Lakshman Jayasinghe.

Accused

AND NOW BETWEEN

Jayasinghe Mudiyanselage Lakshman Jayasinghe.

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J

K.M.G.H. KULATUNGA, J

COUNSEL : Indica Mallawaratchy for the Accused-Appellant.
Shanil Kularatna, ASG, PC with Oswald Perera, SC for the Respondent.

ARGUED ON : 27.11.2024

DECIDED ON : 19.12.2024

K.M.G.H. KULATUNGA, J.

1. When this matter was taken up for argument on 27.11.2024, the learned Additional Solicitor General, Mr. Shanil Kularatna, PC., conceded that there is evidence to reduce the conviction to one of culpable homicide not amounting to murder, on the basis of exception 4 to section 294 (sudden fight). Ms. Indika Mallawarachchi, Attorney-at-Law, appearing for the accused-appellant (hereinafter also referred to as the appellant) submitted that if the conviction for murder is reduced, to culpable homicide not amounting to murder, the appellant would mainly make submissions on the sentence. Thus, it is common ground that there is evidence of a sudden fight emanating from the prosecution evidence and the conviction can be reduced. Both parties made submissions on this aspect as well as on the sentence.

2. The accused-appellant was indicted for the murder of one Herath Mudiyanselage Kumara Kiyuldeniya. After the trial before the jury, the jury unanimously returned a verdict of guilty for murder, upon which the

learned trial judge imposed the sentence of death. This appeal is preferred by the accused-appellant against the said conviction and sentence dated 30.11.2022.

3. The Prosecution led the evidence PW-03, Pradeep Kumara an eyewitness who happened to be near a boutique where this incident took place. He is a chance witness. Between 06:30 and 7:00 p.m. of 06.01.2014, he had happened to see the appellant and the deceased engaged in a fight. Despite requesting them to leave, the fisticuffs continued and at one point, the appellant had left at which point the deceased had tilted backwards and fallen. This witness, with the help of another rushed to the hospital, where he was pronounced dead.

4. According to the medical evidence, the deceased had sustained six external injuries, of which three were cut injuries and three were stab injuries. The death is clearly due to excessive haemorrhage, mainly due to the stab injury to the chest (injury no. 3).

5. As for the Defence, the accused had made a statement from the dock, (vide page 73), and admits being at the scene near the boutique, and also concedes that there was an argument with the deceased over of the accused going to work at another place. The sum total of the accused's statement is that it was the deceased who started to assault him, and the deceased was drunk. The accused claims to have blocked these blows using his umbrella and then pushed the deceased and left. He denies stabbing or causing injuries to the deceased. The main submission was that the jury had not been properly directed on the consideration of the mitigatory exception of sudden fight.

6. In an appeal of this nature, this Court is competent to consider the evidence and set aside the conviction and convict for a lesser or different offence. It is the duty of the trial judge to put to the jury alternative

positions which the accused may be convicted for. This is a duty cast upon the judge even if the Defence has not expressly relied upon or taken up any such defence. It was so opined in **King vs. Bellana Withanage Eddin** (41 NLR 345), where the Court of Criminal Appeal held thus; "*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 of record, although such defence was not raised nor relied upon by the accused.*"

7. Further, in **King vs. Albert Appuhamy** (41 NLR 505) also it was opined that; "*Failure on the part of a prisoner or his Counsel to take up a certain line of defence does not relieve a Judge of the responsibility of putting to the jury such defence if it arises on the evidence.*"

8. Then, in **S. Luvis vs. The Queen** (56 NLR 442), the Court in similar vein held that "*having regard to the evidence, the fact that the 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.*"

9. The trial judge, in her summing up, has put to the jury the exceptions of sudden fight as well as grave and sudden provocation (*vide* pages 5 and 6 of the summing up, pages 548 and 549 of the brief). However, the judge has merely appraised of the provisions as to the exceptions and then the told that the burden of proving such an exception is on a balance of probabilities. Upon so charging the jury, the learned trial judge has stopped at that and made no further comment.

10. When a special exception is pleaded, such person pleading the same is endowed with the burden of satisfying the judge or the jury as to the existence of circumstances, bringing the accused within such exception, by 105 of the Evidence Ordinance, which reads as follows:

Burden of proving that case of accused comes within exceptions.

***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.*

11. In view of the proviso to Section 105, a presumption arises as to the absence of such circumstances unless it is so proved. This is a negative presumption. It is this proviso that places the burden on the Defence, to satisfy court to prove of the existence of such circumstances.

12. However, if the evidence of the Prosecution brings in evidence of the circumstances as to the existence of any mitigatory defence, then it is the duty of the trier of fact to consider such evidence and determine if it proves the exception and consider it in favour of the accused. This obligation of the trier of fact had been considered and upheld in **The King vs. Bellana Vithanage Eddin** 41 NLR 345 where Court of Criminal Appeal held thus:

> *"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 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."*

13. The legal burden of proving any such exception is placed on the accused and this burden is required to be discharged on a balance of probabilities. (**King vs. James Chandrasekera** (1942) 44NLR 97 and **Perera vs. Republic of Sri Lanka** [1978-79] 2 Sri LR 84].

14. In my view the placing of this legal burden on the accused is neither inconsistent nor in conflict with the presumption of innocence as it is not a shifting of the burden of proof. Firstly, when an accused seeks exculpation or the mitigation expressly pleading any general or special exception, he *ipso facto* necessarily admits the commission of the offence. This resulting admission displaces the presumption of innocence. No doubt the burden of proving the charges beyond reasonable doubt in a criminal trial, is at all times, with the prosecution. This is one of the necessary concomitants of the presumption of innocence. However, by virtue of section 105 of the Evidence Ordinance the legal burden of proving any special or general exception is placed upon the accused. This in my view, is not a *shifting* of the burden of proof. Secondly, even where an accused does not expressly plead any such defence of exculpation or mitigation or to that matter even be it a total denial, and if, sufficient evidence of such defence or exception is otherwise brought in to the record so as to enable a judge or jury to arrive at a finding on such issue, the it should be considered.

15. In the summing up of the instant Appeal, the trial judge had failed to direct the jury on this issue. As such, the appellant appears to have been denied the benefit of the lesser offence of culpable homicide not amounting to murder being considered in his favour. It is a misdirection that has the propensity to cause prejudice to the accused. As such, I would consider if the evidence entitles the accused to have the benefit of exception 4 to Section 294 of the Penal Code. Said exception reads as follows:

> *Exception 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."*

16. The evidence of the sudden fight emanates mainly from the eyewitness PW-03 Thushara Pradeep Kumara and then from the dock statement to some extent. At this juncture, it necessary to briefly set out the facts of this case. The accused, Lakshman, is a labourer who had been on and off engaged by the deceased Pradeep Kumara. Pradeep Kumara was a mason by profession. On the fateful day, the accused appears to have gone out to work elsewhere, and around 6:00 p.m., gone to a boutique where he happened to meet the accused. The deceased had been annoyed and unhappy about the accused going to work elsewhere. An exchange of words and a crosstalk had led to 'a fight,' which had then led to an exchange of blows between the two. At one point, the accused had pushed the deceased and left the scene. The witness, and others who were there had seen the deceased falling and found him with bleeding injuries. The accused had been apprehended by the Police late that night. A knife had been recovered on Section 27 statement, and the Government Analyst has confirmed the presence of human blood. These, broadly, are the facts emanating from the evidence.

17. As for the Defence's stance, the accused admits getting into some issue, as narrated by the witness, however, denies the stabbing. According to him, the deceased had embarked upon a spree of blows aimed at the accused, which he had attempted to block and wade off with his umbrella. At one point, the accused claims to have left the scene and gone home. Right throughout the trial as well as in his dock statement, and in his *allocutus*, he maintains this denial. In these circumstances, the accused has not taken up or put forward any specific mitigatory defence.

18. However, evidence of an incident in the nature of exchange of blows does emanate from the sole eyewitness of the Prosecution. This witness has not observed as to how this dispute or incident commenced or as to what sparked off the same. However, the fact that a fight had been clearly

observed by him. Therefore, the Prosecution has not led any evidence to explain as to what sparked off this incident. No doubt, in view of the explanation to exception 4, it is immaterial as to which party offers the provocation or commits the first assault. The only evidence on this issue comes from the accused himself by way of his dock statement. According to him, it is the deceased who started this fight. Be that as it may, the sum total of this evidence is that the fact of a fight between the two is in evidence. They have met by chance, and it appears to be a sudden incident. During the course of this fracas, the deceased has sustained six injuries by a sharp cutting weapon. The eyewitness claims to have not seen any stabbing or a knife which he attributes to poor light, as it was somewhat dark at that time of the day. Circumstantially, there is a very strong inference that the said injuries were inflicted by the accused and accused alone, and no other.

19. The next issue for determination is whether, the accused has taken undue advantage or acted in a cruel or unusual manner. Inflicting six injuries is numerically significant and high. However, of these three are stab injuries and three are cut injuries. It is injury No. 03 that appears to be critical, and has caused the death. In the course of a sudden fight, when the passions are high, one cannot expect a person, who is so overwhelmed and involved in the incident to be rationally inflicting calculated number of injuries. Thus, causing multiple injuries is quite natural, and is to be expected. In the circumstances of this incident, the evidence does not show any form of advantage being taken by the accused or of acting in a cruel manner. It is just that he had acted so in the heat of passion.

20. However, as stated above the legal burden of proving any general or special exception is placed on the accused by Section 105 of the Evidence Ordinance. This burden is required to be discharged on a balance of probabilities. (**King v James Chandrasekera** (1942) 44 NLR 97 and **Perera v Republic of Sri Lanka** [1978-79] 2 Sri LR 84].

21. Thus, for the reasons adumbrated above, we are of the view that there is sufficient evidence to satisfy on a balance of probabilities of the existence of a sudden fight within the meaning of exception 4 to Section 294. The members of the jury appear to have failed to appreciate this aspect which can be directly attributed to the aforesaid insufficient direction or non-direction in this regard. In the circumstances, we consider the direction on sudden fight, in the summing-up to be insufficient which amounts to a non-direction that has deprived the accused-appellant of the benefit being found guilty of the lesser offence of culpable homicide not amounting to murder. Accordingly, the verdict as pronounced by the jury, the conviction entered thereon, and the sentence are hereby set aside. However, in view of the evidence and for the reasons adumbrated above, the accused-appellant is found guilty and convicted for the lesser offence of culpable homicide not amounting to murder punishable under Section 297 of the Penal Code on the basis of sudden fight.

22. Now it is left for this Court to consider and impose an appropriate sentence to the lesser offence to which the accused now stands convicted. The starting point would be the sentence prescribed by Section 297. It is a maximum term of twenty years. The maximum sentence prescribed throws some light as to the seriousness of which the legislature has considered this offence. However, as culpable homicide not amounting to murder has a plethora of variations and different facets. The appropriate sentence will vary and depend on such circumstances. As for the present case, on a consideration of a totality of the evidence, the dock statement, as well as the *allocutus*, it is apparent that the accused was pursued by the deceased and the inflicting the fatal injuries was in the heat of passion. The accused appears to have reacted when he was pushed to the wall, so to say. He appears to be an uneducated man. The record also reveals that at that time he was looking after his sick wife, and did not have any previous enmity with the deceased.

23. As at now, the accused is around 48 years of age. The above being the personal circumstances, now it is to consider the other relevant aggravating and mitigating circumstances. As for remorse, the accused had consistently, throughout the trial, maintained his innocence. On that score, he seemed to demonstrate no remorse in that sense. However, it was submitted by both counsel that from the very inception from the service on the indictment on wards, the accused had informed and indicated his willingness to plead guilty and accept liability for a lesser offence. That being so, now at this stage, when this Appeal was taken up, the learned counsel for the appellant informed this court that the appellant would not pursue the appeal against the conviction any further than to reduce his culpability to Section 297. This confirms the original stance taken up by the accused. This clearly is an indication of his willingness to admit his culpability which by itself is an expression of remorse in another form. I think it is a relevant factor to be considered in mitigation. This offence was committed ten years ago, as far back as 2014. Now we are contemplating the sentence ten years hence, which is a significant lapse of time from the point of committing the offence. The fact that a criminal case was hanging over the head of an accused for a long period by itself akin to a punishment by itself. However, a court, in considering the sentence, should also be mindful of the interest of the public and also the victim. In the cases of **A.G v. Mendis** 1995 (1) S.L.R 138 and in **Dhananjoy Chatterjee v. State of W.B.** (1994) 2 SCC 220, it was held that, "*the Courts must not only keep in view the rights of the criminal, but also the rights of the victim of crime and the society at large while considering the imposition of an appropriate punishment.*" The accused has, in this instance, used a knife against the deceased who was apparently unarmed. The accused has not sustained any injuries. The accused himself says that the deceased was drunk at that time. If that be so, the accused being sober ought to have exercised control and restraint in that situation.

24. However, considering the level of education and all other attendant circumstances, and the fact that the accused does not have previous convictions, I hereby impose the following sentence; the accused is sentenced to five years rigorous imprisonment, in addition a fine of Rs. 25,000/- is imposed, and in default of payment of the said fine, a period of six months imprisonment is ordered. Further, it is ordered that this sentence take effect from the date of conviction, 30.11.2022.

25. The convictions and sentences are varied and substituted accordingly. The appeal is thus partially allowed to that extent.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL