

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.

Democratic Socialist Republic of Sri Lanka

Complainant

CA Case No: CA HCCC / 67/2019

HC of Batticaloa Case No:

HCB /26533/2010

Vs.

Mohamed Usanar Nazeer

Accused

AND NOW BETWEEN

Mohamed Usanar Nazeer

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: B. Sasi Mahendran, J.
Amal Ranaraja, J

Counsel : Harshana Ananda for the Accused- Appellant
Disna Warnakula, DSG for the Respondent

Written 12.07.2021 and 20.02.2025 (by the Accused-Appellant)

Submissions: 12.07.2021 (by the Respondent)

On

Argued On : 03.02.2026

Judgment On: 30.04.2026

JUDGEMNT

B. Sasi Mahendran, J.

The Accused- Appellant (hereinafter referred to as the Appellant) was indicted before the High Court of Batticaloa on the charge of committing the offence of murder of one Mohamed Thanby Majeed alias Ashraff, on 06.04.2008, punishable under Section 296 read with Section 32 of the Penal Code.

At the trial, the prosecution presented evidence through ten witnesses and marking productions P1-P8 and thereafter closed its case. The Appellant, in his defence, made a dock statement.

Upon conclusion of the trial, the Learned High Court Judge, by judgment dated 29.01.2019, found the Appellant guilty of murder and convicted.

Being dissatisfied with both the conviction and the sentence imposed by the Learned High Court Judge, the Appellant preferred an appeal before this Court, articulating the following grounds in support of his challenge.

1. The learned High Court Judge has failed to consider an incident with related to the existence of a sudden fight.
2. Rejection of the Defense version of the case upon unreasonable grounds and shifting the burden towards the Defense.

During the course of arguments, the Learned Counsel for the Appellant brought to the notice that the Appellant had attacked the deceased as a result of a sudden fight. Before considering the grounds of appeal raised by the learned Counsel for the Appellant referred to above, this court will now proceed to analyse the case for the prosecution.

I am mindful of the order dated 16.10.2015 in case No CA 268/2012, a retrial was ordered by the Court of Appeal on the ground that the learned High Court Judge had considered the inadmissible evidence which had been led by the prosecution.

The facts and circumstances of this case are as follows,

According to the testimony of PW6, Mohamed Cassim Rafeek, who was an eyewitness to the incident, the murder occurred on 06.04.2008 while he was engaged in work with PW5. They received a message that there was a fight between the deceased and the Appellant, and thereafter proceeded by motorcycle along the Asgar Maha Vidyalaya Road. At that location, they observed a confrontation between the Appellant and the deceased, during which the Appellant stabbed the deceased on the hand and neck. Following the stabbing, the Appellant left the scene on a bicycle. The deceased was thereafter taken to the hospital.”

It should be noted that during the cross-examination of this witness, the defence did not put forward any suggestion regarding a fight between the Appellant and the deceased.

PW1, Nagoor Ahamed Mohideen, testified that he was operating a boutique at Asgar Vidyalaya on 06.08.2008. While conducting business, he heard a noise and observed the deceased lying on the ground. At that time, the Appellant was standing beside the deceased, bleeding from his neck. The appellant was further observed holding a knife in his hand. Thereafter, the appellant took a bicycle and left the scene when the witness shouted. The witness stated that he raised cries seeking assistance. The witness identified the knife marked as "P-1," which had been recovered and produced in this case.

According to the testimony of PW10, Judicial Medical Officer Dr. Mohamed Musthaffa Abdul Rahuman, he conducted the post-mortem examination of the deceased. JMO stated that he observed two injuries on the body of the deceased one located on the front of the left elbow and the other on the rear of the neck. Based on the nature of these injuries, he opined that the weapon used must have been sharp-edged on both sides. Having examined the knife marked 'P2,' he further stated that it could have been the weapon that caused the second injury. He concluded that the second injury was a fatal one, which in the ordinary course of nature was sufficient to cause death."

PW 9, Chief Inspector Jagath Kodisinghe testified that on 06.04.2008 at 17:40 hours, he received a telephone call informing him of the incident. Thereafter, he proceeded to the Valaichchenai Hospital along with other police officers, where he observed the deceased's body. The deceased's father, Isma Lebbe Mohamed Thamby, formally identified the body. Following this, the witness went to the crime scene located on Asgar Vidyalaya Road.

According to his testimony, the offence had occurred near Sheefa Multi-Shop, and it was revealed that Mohamed Usanar Nazeer, the appellant, had committed the crime and fled the scene on his bicycle. Two police officers were dispatched to search for the suspect, and upon visiting his residence, they found the house closed and the suspect absent.

Later that same day, at 22:20 hours, the appellant voluntarily appeared at the police station, admitted to committing the crime, and surrendered. The witness arrested him and arranged for his statement to be recorded by Police Sergeant Mahutheer. The weapon used, a knife, was subsequently recovered from Aslam Road and marked as "P-2."

During cross-examination, when questioned by the defence about whether there were signs of a fight between the deceased and the appellant, the witness confirmed that inquiries revealed such indications. He explained that, according to the officers who recorded statements, the deceased and the appellant belonged to two different groups,

and a dispute had arisen that day after they exchanged jokes. Furthermore, he stated that since the appellant had no injuries on his body, he was not subjected to medical examination.

Upon the conclusion of the prosecution's case, the Appellant, in his dock statement, asserted that he bore no connection to the offence in question. He stated that, having gone out to sea for fishing, he was ambushed and attacked by the deceased upon his return. While he acknowledged that an altercation ensued between them, he denied having stabbed the deceased. He further stated that, following his arrest, he was asked by the police to sign documents.

The Learned High Court Judge, upon evaluating the evidence, has arrived at the following conclusions.

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“On considering the dock statement made by the accused from the dock, the accused has stated that it was true that on the day of the incident, at the same time and place there had been a fight between the deceased and him. It can be decided that this did not rebut the evidence of the witnesses for the prosecution. On this basis, the court can come to the conclusion that the prosecution has proved beyond reasonable doubt the charges brought against the accused.”

The Exception 4 to 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 or unusual manner.”

Accordingly, the particular exception will apply where the injury which caused the death has been inflicted by the Accused on the deceased without premeditation in a sudden fight.

This Section was considered by His Lordship Moseley S.P.J in The *King v. Vidanalage Lanty*, 42 NLR 317 at page 319, held that:

“Is there then in the present case any basis for a finding that the injury which the jury have found to have been inflicted by the appellant on the deceased, was

inflicted without premeditation in a sudden fight within the meaning of exception 4 to section 294 of the Penal Code? There is the evidence of the appellant to the effect that he was seized by the deceased and that he held the deceased by the waist, and that, when he asked the deceased for an explanation, the latter replied " Wait, and I'll tell you the reason " and called upon Kanagan to stab. This is to some extent corroborated by William Silva. There is, as well, the evidence of Martin to the effect that the appellant ran into his house saying: " Sinhalese people are coming to assault me", and that the appellant said he was afraid to go back to the road. Some of these matters were referred to by the learned Judge, but only in setting out the defence story and not as evidence upon which a lesser verdict might possibly be based."

The plea of sudden fight was discussed by Prof. G.L. Peiris, Offences under the Penal Code of Sri Lanka, 1998, 2nd edn., page 129:

"The word "premeditation" in the context of this Exception, does not have the same meaning as "intention". The accused is entitled to the benefit of the Exception of sudden fight, although he intended to cause death, so long as he acted in anger during the quarrel and the other elements of the Exception are capable of being established. In N. A. Fernand Soertsz S.P.J., delivering the judgment of the court of Criminal Appeal, made the following criticism of the summing-up in the case: "The trial judge explained 'premeditation' as if it was synonymous with 'intention'. There was, then, misdirection in that respect. The jury, in view of that misdirection and also in view of the observation made by the judge that if they were not satisfied that the condition 'without premeditation' was present on the evidence, they need not consider that exception any further, probably refrained from such further consideration. A conviction of murder was therefore set aside and one of culpable homicide not amounting to murder substituted."

To invoke the benefit of this exception, it must be established that death was caused in the course of a sudden fight, arising out of a sudden altercation, and in the heat of passion without premeditation. It must further be shown that the offender did not take undue advantage, nor act in a cruel or unusual manner, and that the fight was with the person who was ultimately killed.

It should be noted that the Appellant, in his dock statement, categorically denied any involvement in the commission of the offence. His defence, therefore, amounted to a bare denial of the charge. The Appellant did not seek to rely upon any general or special exception provided under the Penal Code, nor did he advance any affirmative defence in law. Accordingly, the position taken by the Appellant was confined solely to a denial of the offence alleged against him.”

It should consider the judicial decision in the case of *Martin Singho Vs Queen* 69 CLW 21 at page 22, wherein His Lordship Justice T S Fernando held as follows;

"As this Court has pointed out on many occasions in the past, where an accused person is not relying on a general or special exception contained in the Penal Code, there is no burden on him to establish any fact."

As I pointed out earlier, the Appellant in this case has not relied on a general or special exception contained in the Penal Code. His defence was a denial of the offence. Hence, there is no evidence for us to consider Exception 4 to Section 294 of the Penal Code, the plea of sudden fight as pleaded by the Counsel for the Defence before this Court.

This Court is also mindful that, as substantiated by the evidence, the deceased was unarmed when the Accused stabbed him. The PW 6 testified that he directly observed the appellant stabbing the deceased on the neck and elbow. This version of the witness was further corroborated by the JMO, whose findings were consistent with the injuries described. Additionally, PW 1 that he saw the appellant holding the knife at the time of the incident. Importantly, none of the witnesses reported any form of physical altercation or fight preceding or accompanying the stabbing, thereby reinforcing the conclusion that the attack was unilateral and unprovoked. The defence has therefore failed to prove the elements of a ‘sudden fight’ in order to avail of the exception.

Considering all the facts and the reasoning above, we see no reason to interfere with the judgment of the Learned High Court Judge.

I further hold that the prosecution has established beyond reasonable doubt that the Appellant is guilty of the murder of the deceased.

In this context, I affirm the conviction and the sentence imposed upon the Appellant.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja J,

I AGREE

JUDGE OF THE COURT OF APPEAL