IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

In the matter of an Appeal under and in terms of Section 331(1) of the Code of Criminal Procedure Act No.15/1979

C.A.No.193/2017
H.C. Matara No.134/2014

Ponnamperumage Joseph Fernando

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**

ACHALA WENGAPPULI, J.

COUNSEL : Asanka Dissanayake with Menaka Kudarathne and Dushanthika Dissanayake for the Accused-Appellant.

Suharshi Herath S.S.C. for the respondent

ARGUED ON : 25th February, 2019

DECIDED ON : 24th May, 2019

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ACHALA WENGAPPULI, J.

The appellant was indicted before the High Court of *Matara* by the Hon. Attorney General alleging that he committed the murder of *Abeyratne Weerasekara Patabendige Nuwan Sujith* on or about 20.07.2008 at *Kulatilaka Watta* of *Maliyadda.* After trial without a jury, the appellant was found guilty to the said charge by the trial Court and was accordingly sentenced to death.

Being aggrieved by the said conviction and sentence, the appellant sought to set them aside on the basis that the trial Court has failed to

consider his lesser culpability on the basis of either grave and sudden provocation or sudden fight.

Learned Counsel for the appellant, in her submissions highlighted an item of prosecution evidence where an eye witness to the incident speaks about an argument between the appellant and the deceased and the evidence of a continued family dispute.

The prosecution case is that the appellant is the father of the 16 year old deceased who had lived with another woman after his marriage to the mother of the deceased had broken down. When that marriage was subsisting the appellant used to come home in the evening in a heavily intoxicated state and used to physically assault all members of his family. He moved out their home sometimes back to live with another woman. The deceased had three other sisters elder to him and another one younger to him (*Sandya Kumari),* who was about 7 years at the time of the incident. She is the eye witness to the incident, and on whom the prosecution relied on primarily to prove the allegation of murder.

On the day of the incident, the appellant had come to the house where the deceased lived with other members of his family at about 6.30 in the morning. Only the mother and *Sandya* were at home. The deceased was not at home at that time as he had left to attend to some other matter. The appellant had then grabbed *Sandya* by her hand and took her along with

him. The appellant had a knife with a blade of about 2 ½ feet, tucked to his waist at that time. The deceased returned home at that point of time and enquired from his mother as to where the appellant is taking his sister. Mother replied that only through Police it could be found out. The appellant had, by then taken the witness about 11 meters away from her house and was near the fence. The deceased came up to the place where his sister was, and took her hand. He protested to the appellant that the latter cannot take custody of the sister and that he (the appellant) should have done that when she was small. The exact words used by the witness are as follows; "තාත්තේ නංගි ගෙනියන්න දෙන්න බැහැ. පොඩිකාලේ දෙන්න තිබුනනේ කියලා කිව්වා" Then the deceased pulled the witness towards him and the appellant, having assaulted their mother had struck a single knife blow on the neck of the deceased. Having suffered this injury, the deceased had run away from the scene. The witness and her mother took refuge in their house, having bolted its door.

Later the witness learnt that the deceased was found fallen near a cemetery and had succumbed to his injury in transit to a hospital.

The appellant was apprehended by the villagers after the incident and handed over to the Police with his long bladed knife.

The medical officer, who performed the post mortem examination on the body of the deceased, had noted 11 X 4 cm deep cut injury on the

neck of the deceased. This deep cut injury had severed several neck muscles, carotid vein and artery, resulting in severe blood loss in a short interval of time culminating in his death. The medical officer expressed his opinion of the injury by naming it as a necessarily fatal injury. He adduced his reasons for this opinion. He stated that, if the deceased was immediately treated with a team of awaiting surgeons who could fuse the severed blood vessels soon after the injury, then only there existed a slight chance of preventing his death by medical intervention.

In its judgment, the trial Court had considered the issue of the applicability of lesser culpability. The position that had been advanced by the appellant in his dock statement is that he was surrounded and assaulted by a crowd of persons and then the knife cut happened automatically due to this situation. The trial Court noted that the position suggested to the prosecution witness by the appellant was that he was provoked by the deceased with his verbal abuse. The word used by the eye witness to describe what took place prior to the incident is an verble altercation ("බැනගැනීමක්"). This item of evidence was also considered by the trial Court in determining the issue of lesser culpability on the basis of sudden fight or grave and sudden provocation.

We are in agreement with the conclusion reached by the trial Court that the evidence does not reveal that the appellant was guilty to culpable homicide not amounting to murder on the basis of sudden fight or grave and sudden provocation.

Section 294 of the Penal Code has identified several provisos under the Exception 1 to the said Section and the relevant ones are reproduced below;

> "Firstly- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.
>
> Secondly- .....
>
> Thirdly- That the provocation is not given by anything done in the lawful exercise of the right of private defence."

Contrary to the claim of the appellant, the evidence of the eye witness clearly points to a case where the appellant voluntarily provoked the resistance that had been offered to him by the deceased, with the appellant's own act of taking the young girl away from her mother forcibly, whilst having a long bladed knife tucked to his hip. There is no legitimate reason for the appellant to walk into the house, where only his former wife and her young children are living, with a long bladed knife unless he intends to use it if and when an opportunity arose. That opportunity had arisen for the appellant when the deceased, an unarmed 16 year old juvenile, resisted his action in forcibly removing his younger sibling. Then it appears that the deceased had acted in self-defence on behalf of his sister in order to rescue her from the clutches of his ferocious

father. The evidence led by the prosecution clearly satisfy both these provisos.

In the circumstances, the trial Court has correctly refused to apply lesser culpability under the exception of grave and sudden provocation.

The exception of sudden fight also has no application to this situation.

The Supreme Court, in its judgment of ***Bandara v Attoney General*** (2011) 2 Sri L.R. 55, stated that;

> *"... the lapse of time may grant the opportunity for an accused to premeditate and make arguments for a fight. Such a fight is not spontaneous and therefore cannot be regarded as one that could be described as sudden. If there was a lapse of time between incidents prior to the final assault, it is quite clear that the heat of passion upon the quarrel would have subsided and the death on such an instance would be regarded as a murder."*

In view of the fact that the deceased was unarmed and did not cause any injury to the appellant, the appellant following a sudden quarrel had inflicted fatal blows to the deceased, their Lordships were of the view that the Exception 4 to Section 294 would not apply in such situations.

This Court, in an unreported judgment of ***Gemunutileka v Hon Attorney General,*** CA No. 131/2000 - decided on 10.09.2008 - adopted the same approach as it observed that the witness's;

> *"... testimony neither bears out there was an exchange of words between the appellant and the deceased nor that the deceased attacked or attempted to attack the deceased. The balance of probability tilts in favour of prosecution that it was more likely that the appellant took advantage of the situation and with deliberate design attacked the deceased with a deadly weapon."*

In these circumstances, their Lordships, in the said appeal, have held that ;

> *"there is no evidence to suggest that the appellant acted in a heat of passion generated by the alleged sudden fight."*

Therefore, we are of the firm view that the appellant was rightly convicted for the offence of murder by the trial Court since the two general exceptions he had relied on to claim the benefit of lesser culpability have no application to the evidence presented before the trial Court.

We accordingly affirm the conviction and sentence imposed on the appellant by the trial Court. The appeal of the appellant is dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL