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.15/1979.

C.A.No. HCC No.116/2014

H.C. Puttlam No.HC 64/2003

Udawaththage Don Prasanna Saman Krishantha

1st Accused-Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12 .

Complainant- Respondent

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BEFORE : **ACHALA WENGAPPULI, J.**

DEVIKA ABEYRATNE, J.

COUNSEL : Anil Silva P.C. with Dharmaraja Samarakoon for the 1st Accused-Appellant

Disna Warnakula SSC for the respondent

ARGUED ON : 14th February, 2020

DECIDED ON : 08th July, 2020

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ACHALA WENGAPPULI, J.

The 1st accused-appellant (hereinafter referred to as the Appellant) was indicted under three counts, along with four other accused. They were charged with for being members of an unlawful assembly with the common object of causing hurt to *Hameed Hussain Marrikkar Zanoon* on 29.07.1994 at *Kalpitiya,* and whilst being members of that assembly they committed his murder. They were also charged under committing murder with common murderous intention.

At the conclusion of the trial, in delivering its judgment, the trial Court found the Appellant guilty to murder in respect of third count. He was acquitted of counts one and two. The 2nd to 5th accused were acquitted of all counts.

The prosecution case was that the Appellant served in *Kalpitiya* Police Station during the relevant time as the Officer-in-Charge of the Special Investigation Unit while the other accused acted as his subordinates.

The evidence for the prosecution reveal that the deceased, who was a trader by profession was arrested by the officers attached to the SIU of *Kalpitiya* Police on 23.07.1994 at 8.50 p.m. and on 29.07.1994 at 12.05 a.m. he was taken to hospital, where he died after admission.

Witnesses *Hameed Mansil* said he went to *Kalpitiya* Police after the arrest of the deceased and through the approval of the Appellant he was able to see him. The deceased was at that time tied to a mango tree and the Appellant was seen assaulting him with a club on his back. The witness pleaded with the Appellant to release the deceased saying that he might die due to that assault. The Appellant, having refused the request of the witness saying even if the President orders he will not release the deceased, changed his stance at a subsequent point of time demanding Rs. 200,000.00 from the witness for his release. The witness admitted that the deceased was arrested on the charge of supplying fuel to LTTE terrorists.

Anthony Tyrone Mirood too had been arrested on a similar allegation prior to the arrest of the deceased. In order to save himself from torture, the witness implicated the deceased as having a pistol in his possession. The witness admits the deceased received Rs. 50,000.00 to Rs. 75,000.00 on a daily basis for supplying

diesel and petrol to LTTE. After the arrest, the deceased was assaulted by the Appellant using a club, while questioning him about the pistol. The Police have, thereafter taken the deceased, who could not even sit properly due to assault, to an area called *Eluwankulama,* in order to recover the pistol spoken to by the witness. They returned empty handed, without making a recovery. The deceased had unsuccessfully attempted to run away during this trip and had been assaulted. That night the deceased had difficulty in breathing and the Appellant instructed him to be admitted to hospital. He did not see the deceased on the following morning and later learnt that he had died.

Witness *Iftikar Mohammed* is an Attorney-at-Law, who was retained by the deceased's relatives to secure release of the deceased since he was being tortured by Police for several days. He met the deceased for five minutes with permission of the Appellant. The deceased was in a very poor state at that point of time and said that he was harassed (කරදර කළා) by the Police and pleaded with the witness to save him.

Dr.*Pubalasingham* was attached to *Kalpitiya* Hospital as a medical officer during this time and had examined the deceased on 28.07.1994, when he was produced by the Police. The deceased complained about a police assault and had burn injuries caused by lighted cigarettes. The witness had admitted the deceased to his ward, but on the following morning, the Police have removed the deceased from the hospital against medical advice. Following day the deceased was brought back by the Police in a very critical condition. After his admission

the deceased had died in the hospital and thereafter the Director of Health Services of the area had taken over the case.

The post mortem examination of the deceased was performed by Dr. *Ratnayake,* the acting JMO of *Kurunegala* Hospital. He had noted 32 external injuries in total. In addition to 26 abrasions, the deceased had suffered underlying contusions in seven of such abrasions. He noted three injuries, numbered as 30, 31 and 32, located on his thighs, left elbow and rear side of left upper arm respectively, which could have been caused by coming into contact with a blunt object or due to an assault. All the injuries may have been caused within seven days of examination and none of them are, if taken individually, could be considered as fatal.

In relation to the cause of death, the medical witness was of the opinion that the severe pain caused by the multiple injuries could result in the heart failure. Given the condition of the deceased's heart, which had most of its coronary arteries blocked over 65% to 80%, his death could have been accelerated with the infliction of injury Nos. 30, 31 and 32. Dr. *L.B.L de Alwis,* Consultant JMO of *Colombo,* who examined deceased's heart, upon a request for an opinion by Dr. *Ratnayake,* noted pre-existing Ischaemic Heart Decease. He agrees with the opinion of Dr. *Ratnayake* that the death was due to the said *"Ischaemic Heart Decease precipitated by the injuries found on his body"*.

The prosecution led many other witnesses in relation to the investigations conducted by the Police and the public agitation over the death in custody.

At the hearing of this appeal, learned President's Counsel relied upon a solitary ground of appeal on the basis that the trial Court had failed to consider the lesser culpability of the Appellant on knowledge. He invited attention of Court to the evidence that only few injuries that could be attributable to the Appellant since the evidence clearly indicate that he was assaulted by many other officers during his period of detention in the *Kalpitiya* Police and it is due to their cumulative effect that the death of the deceased had resulted by aggravating an already existing heart decease. He also drew the attention of Court to the fact that the prosecution failed to eliminate the possibility of a supervening event which render the conviction for murder unsustainable.

Learned Senior State Counsel, in her reply contended that the Appellant had total control over the deceased during his period of detention and it was due to the cumulative effect of the injuries sustained during that time had resulted in the death of the deceased. Therefore, she contended that the Appellant has had the requisite knowledge of continued assault on the deceased would lead to his death.

The ground of appeal raised by the Appellant requires an examination of the applicable principles of law in the light of decided cases.

Section 293 of the Penal Code defines the offence of culpable homicide not amounting to murder. This section contains three clauses. Third clause of Section 293 of the Penal Code reads as whoever causes death by doing an act ... *"with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide".*

Explanation 1 to Section 293 reads *"A person who causes bodily injury to another who is labouring under a disorder, decease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused death."*

The offence with which the Appellant was convicted is murder. Second and third limbs of Section 294 of the Penal Code states that culpable homicide is murder, if it is done with the intention of causing bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused or 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.

The Court of Criminal Appeal, having compared the nature of knowledge referred to in Section 293 and 294 of the Penal Code, by its judgment of ***Somapala v The Queen*** 72 NLR 121, stated that;

> *" ...it is noteworthy that the element of knowledge is specified only in the third clause of s. 293, and again only in the 2nd and 4th limbs of s. 294. This fact at least prima facie justifies a supposition*

that the 2nd and 4th limbs of s. 294, under which knowledge is an element of the offence of murder, are intended to correspond, not with the second clause of s. 293, but instead with the third clause-of the latter section. This third clause declares to be culpable homicide "an act done with the knowledge that the offender is likely by such act to cause death", and it is obvious that knowledge here comprises both a general knowledge, i.e. held objectively, or a special knowledge held subjectively with respect to the person injured. On the other hand, the language of the 2nd limb of s. 294 prima facie denotes only the subjective knowledge as to the likelihood of the death of the person to whom the harm is caused. There is thus evidence in the 2nd limb of s. 294 of a design to classify as murder some but not all of the offences of culpable homicide defined in the third clause of s. 293."

It appears that the Senior State Counsel is referring to second limb of Section 294 of the Penal Code, in defending the conviction of murder.

In ***Charlis v The Queen*** 74 NLR 73, the Court of Criminal Appeal stated the following on illustration (b) of Section 294 in relation to its second clause;

"The second illustration lettered (b) which follows almost immediately after the statutory provision in s. 294 is clearly intended to explain the meaning of the second limb of s. 294. That illustration contemplates a case where ***A*** *strikes* ***Z*** *with the intention of causing bodily injury, and* ***Z*** *dies in consequence of the*

blow, although the blow is not sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. The illustration thereafter distinguishes between two alternative situations :-

> *(1) If **A** knows that **Z** is labouring under some disease because of which a blow is likely to cause his death, then A is guilty of murder despite the fact that the case is not one covered by the third limb of s. 294.*
>
> *(2) If **A** does not know that **Z** is suffering from such a disease, then he is not guilty of murder.*

Cases to which the second limb of s. 294 is applicable are quite rare and the instance which does sometimes occur is that in which a person having an enlarged spleen dies in consequence of a blow which would not ordinarily result in the death of a healthy person. Such an instance is not covered by the third limb of s. 294 because the blow is not sufficient in the ordinary course of nature to cause death. Nevertheless, the actual knowledge possessed by the giver of the blow that it is likely to cause the death of the particular person attacked converts a case, which otherwise would be only culpable homicide, into one of murder."

Thus, in the instant appeal, if the prosecution were to succeed in sustaining the conviction for murder, then it must satisfy this Court that there was evidence that the Appellant had knowledge of the Ischemic Heart Decease of the deceased

and he knew that the sustained assault on the deceased "*... is likely to cause the death of the particular person attacked*".

When the body of evidence presented by the prosecution is examined carefully it revealed that there was no evidence that the Appellant knew that the deceased had an underlying heart illness, which is likely to accelerate his death if the assault is continued. Although there is evidence that the deceased pleaded with the officers that he had no weapon, there was no mention of any illness. When the deceased met his lawyer, he did not complain of any heart condition. Witness *Mansil* said he asked the Appellant to allow the deceased to be treated at a Hospital seeing the assault and if not he would die, but did not disclose that his brother-in-law had a heart condition.

Witness *Mohammed Uniais*is the brother of the deceased's wife and witnessed the arrest of his brother-in-law by Police. The witness lived with the deceased and his wife. During examination in chief the witness stated that the deceased had no illness prior to his arrest and after few days he learnt that the deceased had died in hospital.

It appears that not only his close relatives, but the deceased himself, was not aware as to his pre-existing heart condition at the time of the assault.

The evidence of the Appellant's personal involvement in the assault of the deceased is limited to the witnesses, who saw the deceased for a brief period

during his detention. The injury Nos. 30, 31 and 32 could well be inflicted by the Appellant as there is clear evidence that he used a club to hit the back side of the deceased. None of these three injuries are fatal or sufficient in the ordinary course of nature to cause death. No evidence to conclude that he only inflicted injuries on the deceased.

The evidence clearly indicate that the physical condition of the deceased had deteriorated with each passing day during his detention. At the time of arrest, the deceased had no visible bodily ailment or discomfort. When he was taken out to recover the pistol after few days in detention, he could not even sit on the seat of the vehicle. When admitted to Hospital for the second time he was dying. This deterioration of the health of the deceased was obvious. The Appellant, being the Officer-in-Charge of SIU, who had control over the deceased in detention, during which there had been a sustained assault on the deceased by his officers and himself, ought to know that *"it is likely by such act to cause death"*. It is thus clear that the evidence clearly points out that the Appellant has committed culpable homicide not amounting to murder since the underlying heart condition is not known to the Appellant for the offence he committed to be upgraded to murder.

It appears that this particular aspect had escaped the attention of the trial Court in consideration of the prosecution case and in convicting the Appellant for the offence of murder.

Therefore, the conviction of murder entered by the trial Court could not be sustained and had to be set aside with the sentence of death. The conviction and sentence imposed by the trial Court is accordingly set aside.

This Court alters the conviction of the Appellant for murder to a conviction for the offence of culpable homicide. On account of his complicity in the assault and in the death of the deceased, he is imposed a five-year term of imprisonment and a fine of Rs. 5000.00 with two-year term of imprisonment in default which will run consecutive to the five-year term.

The appeal of the Appellant is accordingly partly allowed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL