

**IN THE SUPREME COURT OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

S.C. Appeal No.62/2008

Gurudeniya Lekamgedara Nishantha
Bandara
Presently at Bogambara Prison,
Kandy.

Appellant

Accused-Appellant-

Vs.

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

**Complainant-Respondent-
Respondent**

BEFORE : Dr. Shirani A. Bandaranayake, CJ.
N.G. Amaratunga, J. &
S.I. Imam, J.

COUNSEL : Shanaka Ranasinghe with Suraj Rajapakshe for
Accused-Appellant-Appellant.

A.Jinasena, SSC, for Complainant-Respondent
Respondent.

ARGUED ON : 27.09.2010.

WRITTEN SUBMISSIONS

TENDERED ON : Appellant : 02.11.2010.

Respondent : 18.10.2010 & 02.11.2010.

DECIDED ON : 12.10.2011.

Dr. Shirani A. Bandaranayake, CJ.

This is an appeal from the judgment of the Court of Appeal dated 13.07.2007. By that judgment the Court of Appeal had dismissed the appeal of the Accused-Appellant-Appellant (hereinafter referred to as the appellant) and affirmed the judgment of the High Court of Ampara dated 07.07.2004 by which the appellant was convicted of the charge of murder imposing the death sentence.

The appellant preferred an application before this Court for special leave to appeal on which such leave was granted. At the stage of hearing it was agreed that the consideration of the second question on which Special Leave to Appeal was granted, could conclude this appeal and accordingly both parties were so heard on the following question.

Did the Court of Appeal misdirect itself by failing to evaluate the possibility of a sudden fight that spontaneously occurred between the parties?

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:-

The appellant was charged with the murder of one Wilson Anasley Peters at Ampara on or about 25.09.1999 and causing hurt to one Bony Ignatius Peters in the course of that transaction. The indictment was originally preferred against the appellant and his brother, but was amended later consequent to the death of the appellant's brother. At the trial, the prosecution had led the evidence of 8 witnesses including the depositions of Bony Ignatius Peters. The appellant had given evidence on oath and had called 3 witnesses on his behalf. The High Court, whilst convicting him for the charge of murder, had acquitted him of the second count of causing hurt and the Death Sentence was imposed on him. The appellant had preferred an appeal to the Court of Appeal and by its judgment dated 13.07.2007, the Court of Appeal had affirmed the judgment of the High Court dismissing the appeal preferred by the appellant.

It is not disputed that the appellant was convicted on a count of murder before the High Court of Ampara. Section 294 of the Penal code refers to the offence of murder and the definition of murder is given as follows:-

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.”

The said offence of murder in terms of Section 294 of the Penal Code is reduced to culpable homicide not amounting to murder under Section 293 of the Penal Code, if any of the five exceptions to Section 294 could be shown to apply. The exceptions are as follows:-

1. grave and sudden provocation;
2. exceeding in good faith the right of private defence;
3. bona fide overstepping of the limits of his authority by a public servant;
4. the plea of sudden fight and

5. the case of a mother who causes the death of her child under the age of twelve months when the balance of her mind is disturbed by reason of her not having fully recovered from the effect of giving birth to a child or by reason of the effect of lactation consequent to the birth of the child.

Learned Counsel for the appellant relied on the Exception 4 to Section 294 and submitted that the Court of Appeal had not evaluated the said possibility of a sudden fight. Learned Counsel submitted that the evidence before the High Court clearly established that the incident which resulted in the deceased being injured, fell into Exception 4 to Section 294 of the Penal code and throughout the case that it was the position taken by the appellant.

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.”

A careful consideration of the said exception indicates that the basis for the mitigation is purely depended on the fact that the murder had taken place in a sudden fight, which had occurred in the heat of passion upon a sudden quarrel. An important ingredient which is necessary in such instance would be that there was no malice or vindictiveness.

The necessary requisites that should be satisfied by a person who intends to come within the Exception 4 were clearly discussed with reference to several decided cases (**Surinder Kumar v Union Territory Chandigarh** (AIR (1989) SC 1094), **Kikar Singh v State of Rajasthan** (AIR (1993) SC 2426) by **Ratanlal and Dhirajlal**, (Law of Crimes, 24th Edition, 1998,

page 1339) on the basis of Section 300 of the Indian Penal Code, which section and the Exceptions are identical to section 294 of our Penal Code. Accordingly in terms of the said section of the Indian Penal Code, the following requisites must be satisfied:

1. it was a sudden fight;
2. there was no premeditation;
3. the act was committed in a heat of passion; and
4. the assailant had not taken any undue advantage or acted in a cruel manner.

However as clearly held in **Bhagwan Munjaji Pawade** (AIR (1979) SC 133) and **State of Himachal Pradesh v Wazir Chend and Others** (AIR (1978) SC 315), all the above conditions must exist in order to invoke this exception.

In order to ascertain the possibility of a sudden fight, it would therefore be necessary to consider the events that had taken place on the day in question.

The prosecution in this regard had referred to three (3) incidents that had occurred between 10.30 pm and 11.45 pm on the night in question.

The first incident had taken place at around 10.15 pm inside the deceased's house.

That morning there had been an almsgiving at the residence of the deceased, in memory of his late father. The villagers who were unable to attend the said almsgiving during the day time had been invited for dinner that night. The appellant, commonly known as "Choota", had stated that the deceased himself had invited him to join with him for dinner. At that

time one "Sudu" had been present at the deceased's home with whom the appellant had an issue and the appellant had tried to have an argument with the said Sudu. The sister of the deceased had referred to this incident in her evidence (page 43 of the brief).

"W. m<uqfjkau u,a,shs iyqhs wjd. ta;a tialu ,shkf.a pqgd wjd. ta weú;a ;uhs iqÿ;a tial pqgd Isōjd WU;a tial l:djla l:dlr .kak ;sfhkjd lshd.

.....

m%. Bg miqj iqoaod iy pqgd rKavq jqkd?

W. Tō.

m%. .y .;a;do neK .;a;do?

W. .y.kak .shd. u,a,s thg bv ÿkafka kE. pŒEgdj u.yer hkak .shd."

The witnesses of the prosecution had referred to the said incident where the appellant had hit a glass on a teapoy which had resulted that being broken injuring the appellant's hand. At that time the deceased had gone inside the house to bring a piece of cloth to bandage the wound. Thereafter the appellant had poured blood in to the dishes where food was served on the table stating that he will not allow anyone to consume the food. Witness Fareeda had clearly stated this position in her evidence.

"m%. Bg miqj pqgd fudlo lf,a?

W. wms f.a we;+<g .shd. tys odkh Whd ;snqkd. pqgd f.dia WU,dg odkh lkak bv ;shkafka keye lsh,d tys ;snqk f,a jlal,d odkhg."

The observations of Chief Inspector Wegapitiya, who had visited the house after the incident, clearly corroborates Fareeda's version.

"m%. urKlref.a ksji kssrslalKhg ,la l<do?

W. Tõ.

**m%. ta ksrslalK igyka j,os oek.kakg ,enqKdo
úfYal foaj,a?**

**W. urKlref.a ksafia idf,a àfmdajla u; f,a jeks
me,a,i ;snqKd. ùyre ;snqKd. msÕka
;snqkd. tajdfha f,a me,a,i ;ejrS ;snqKd.**

m%. f,a muKo ;ud oelafla?

W. tmuKhs.

m%. úfYal fohlg oelafla tajd

W. Tõ.

**m%. f,a jeks me,a,i tf;kag wdfõ fldfyduo lshd
mrslalKfhaoS wkdjrKh lr .;a;do?**

W. tfyuh.

m%. fldfyduo ta me,a,i wdfõ lshd oek.;a;do?

**W. 24 fjks osk rd;S% 10.30 g muK 02 fjks
iellre ksYdka; nKavdr tu ia:dkhg meñK
;sfhkjd. meñK wrlal+ b,a,d th fkdÿka ksid
ùyrejla àfmda tfla .y,d levqkq ksid 02
ú;a;slref.a w; lemqkd lshd ;uhs
oek.kak ,enqfka."**

After the said incident the appellant had walked into the compound, had dashed the chair on the ground and had assaulted the said Sudu. At that

moment, the deceased had hit on the back of the appellant, once. The appellant was then taken away by one Samantha, who is the brother of the appellant.

The second incident had occurred a few minutes thereafter. Champa Kumari and Bridget Florida, who were witnesses in this case, had seen a person squatting in the adjoining land. The deceased had spoken to that person and had identified him to be the appellant who had been armed with a club. When questioned by the deceased as to the reason for hiding holding a club, the appellant had said that he had just brought the club and had no quarrels with the family of the deceased. Thereafter the appellant had invited the deceased to visit his house.

The 3rd incident had taken place in front of the house of the appellant. According to the learned Senior State Counsel for the respondent, the deceased with some of his family members had walked upto the gate of the appellant's house and the elder brother of the appellant had shouted at them stating that they were ungrateful people. The appellant had then dealt a blow on the head of the deceased with the club, which resulted in the death of the deceased.

In the light of the aforementioned three incidents, it is necessary to examine as to whether there was a sudden fight as contended by the appellant. As stated earlier in terms of Exception 4 to Section 294 of the Penal Code, all the pre-requisites referred to in the said Exception have to be satisfied in order to obtain the benefits of the said Exception.

Exception 4 to Section 300 of the Indian Penal Code, which deals with the offence of murder is identical to Exception 4 to Section 294 of our Penal Code. The said Exception 4 is 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.”

The said Exception 4 to Section 300 of the Indian Penal Code was considered extensively by the Indian Supreme Court in **Bhagwan Munjaji Pawade V. State of Maharashtra** (AIR (1979) SC 133) where the learned counsel for the appellant had contended that a quarrel had erupted suddenly and that the injuries were inflicted by the appellant in the heat of passion without premeditation during a sudden fight and as such the appellant was entitled to the benefit of Exception 4 to Section 300 of the Indian Penal Code.

In that case accused 1, 2 and 5 were the sons of accused 4. Accused 3 was the wife of one Munjaji. The deceased Devidas had three (3) brothers and Baijabai was their mother. All of them resided in the same village and lived quite close by to each other. According to the prosecution, there had been long-standing dispute between the accused on the one hand and Baijabai and her sons on the other hand, with regard to the open land in front of their houses.

On the day of the incident after Baijabai returned from the field, the 3rd accused had shouted and quarrelled with her in which sharp words were exchanged between the two women. The 2nd accused had told Baijabai to hold her tongue. At that time the 2nd and 4th accused were carrying sticks, whilst the appellant was armed with an axe. The deceased had just returned home and he had questioned the 2nd accused as to why he was quarrelling with his mother. Suddenly the appellant had given three blows to the deceased; two with the blunt side and one with the sharp side of the weapon on the head. 2nd and 4th accused had used their sticks against the deceased.

Due to the blows dealt with by the appellant, Devidas (the deceased) had passed away on the spot.

Considering the circumstances of this case and the submissions made to come within Exception 4 to Section 300 of the Indian Penal Code, Sarkaria, J held that,

“It is true that some of the conditions for the applicability of Exception 4 to Section 300 exist here, but not all. The quarrel had broken out suddenly, but there was no sudden fight between the deceased and the appellant. ‘Fight’ postulates a bilateral transaction in which blows are exchanged. The deceased was unarmed. He did not cause any injury to the appellant or his companions. Furthermore, no less than three fatal injuries were inflicted by the appellant with an axe, which is a formidable weapon on the unarmed victim. Appellant is therefore, not entitled to the benefit of Exception 4”

In **Pandurang Narayana Jawalekar v State of Maharashtra** (AIR (1978) SC 1082) the appellant had given a blow on the head of the deceased old man who had been advising him not to fight. The injury that was caused to the brain from one end to the other, resulted in fracture. The evidence led, disclosed that the accused must have struck the blow on the head of the deceased with an iron bar with great force. The Indian Supreme Court had held that , although there was a sudden quarrel and that the fight was not premeditated to cause death, that Exception 4 to Section 300 of the Indian Penal Code would not apply.

It is therefore quite clear that Exception 4 does not apply simply because there had been a sudden quarrel. As Exception 4 to Section 294 of our Penal Code clearly stipulates, the relevant incident should have been 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.”

Even if there had been a sudden quarrel, if the assailant had acted in a cruel or in an unusual manner, such an act would not come within Exception 4. In **Pandurang Narayan Jawalekar** (Supra), the Supreme Court, whilst stating that there was a sudden quarrel and that the fight was not premeditated to cause death, it was held that it would be necessary to show that the injury caused is not a cruel one. Accordingly, in order to come within Exception 4 of Section 294 of our Penal Code, it is necessary to satisfy the specific requisites referred to in Section 294 of the Penal Code, Viz;

1. it was a sudden fight;
2. there was no premeditation;
3. the act was committed in a heat of passion; and
4. the assailant had not taken any undue advantage or acted in a cruel manner.

As clearly stated in **Jumman and Others v State of Punjab** (AIR (1957) SC 469) and **Amrithalinga Nadar v State of Tamil Nadu** (AIR (1976) SC

1133) the question of applicability of Exception 4 would be decided only after examining the facts of the case and thereafter if it is found that there has been a sudden fight.

In the present Appeal learned Counsel for the appellant strenuously contended that there had been a sudden fight in which the fatal blow was directed at the deceased. The three incidents explained at the outset clearly show that there had been a lapse of time between the first incident and the third. In the first incident the appellant had made several efforts to get the deceased to start up a fight. His actions were substantiated by direct and circumstantial evidence of Bonny Peters, Champa Kumari and Fareeda. Considering the said evidence, it is quite clear that at the time the appellant had started a fight with one 'Sudu' and later got himself injured by breaking a glass, the deceased had bandaged the injury of the accused. The third incident thereafter had occurred well after the first incident, at a time where the deceased was unarmed. In several Indian Cases (**Ahmed Sher and Others v Emperor** (AIR (1931) Lahore 513), **Gajanand and Others v State of Uttar Pradesh** (AIR (1954) SC 695), **Dharman v State of Punjab** (AIR (1957) SC 324), it had been clearly held that when the accused was unarmed and did not cause any injury to the appellant, the appellant following a sudden quarrel had inflicted fatal blows to the deceased, that the Exception 4 to Section 300 of the Indian Penal Code would not apply.

A sudden fight cannot be premeditated as the word 'sudden' clearly means that there cannot be any such pre-arrangements. It should also be noted that the lapse of time between the initial argument and the final fight is material for an accused to come within Exception 4, since 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 is 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 murder.

The Judicial Medical Officer, who performed the Post Mortem of the deceased had stated that the assault had been with a blunt weapon. The nature of the injury shows that extensive damage was caused to the brain which indicates that the appellant must have struck the blow on the head of the deceased with the club with very great force. It was undisputed that the deceased was unarmed and had been at the place of the incident on the invitation of the appellant. This also indicates that the appellant had acted in a cruel manner.

Considering all the aforesaid it is quite clear that the appellant cannot come within Exception 4 to Section 294 of our Penal Code. Accordingly the question on which Special Leave to Appeal was granted is answered as follows:

“The Court of Appeal has not misdirected itself in evaluating the possibility of a sudden fight that spontaneously occurred between the parties.”

The judgment of the Court of Appeal dated 13.07.2007 is affirmed. This appeal is accordingly dismissed.

I make no order as to costs.

Chief Justice

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

S.I. Imam, J.

I agree.

Judge of the Supreme Court