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

In the matter of an application for Special leave to appeal in The Supreme Court under Article 128 of the Constitution.

Batagala Dona Dharmaratne Manike

Accused-Appellant- Appellant

SC Appeal 13/2016
Supreme Court (SPL) LA 57/2015
CA/15/2012
HC/ Kegalle 2577/2007

Vs,

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

Respondent-Respondent

Before: **Priyasath Dep PC CJ**
Anil Goonaratne J
Vijith K. Malalgoda PC J

Counsel: Dr. Ranjith Fernando for Accused -Appellant- Appellant

Shanaka Wijesinghe DSG for the Attorney General

Argued on: 29.08.2017
Decided on: 15.12.2017

Vijith K. Malalgoda PC J

Accused Appellant Appellant Batagala Dona Dharmarathne Menike (herein after referred to as the Appellant) was Indicted before the High Court of Kegalle for committing the murder of one Prasanna Rajapakse by throwing Acid at him on 7th February 2006. After trial before the High Court Judge without a Jury, the Appellant was convicted of the Indictment and was sentenced to death. The Appellant appealed against the said conviction and sentence to the Court of Appeal, and the Court of Appeal by its order dated 12.03.2015 set aside the conviction for murder and the sentence imposed by the High Court and convicted the Appellant for Culpable Homicide not amounting to murder under section 297 of the Penal Code. Based on the above conviction the Appellant was imposed a sentence of 15 years Rigorous Imprisonment with a fine of Rs. 10,000/- and a default term of six months simple imprisonment.

Being dissatisfied with the above conviction and sentence the Appellant had come before the Supreme Court by way of Special Leave to Appeal. When this matter was supported for special leave, after considering the material placed before court, this court had granted special leave on the following questions of law,

a) Did the Court of Appeal err by sentencing Accused-Appellant-Appellant to 15 years Rigorous Imprisonment when in fact, on the basis of the judgment of the Court of Appeal the culpability would have been under the 2nd limb of section 297 of the Penal Code which relates to “knowledge” carrying a maximum term of 10 years Rigorous Imprisonment
b) Did the Court of Appeal err by failing to address its mind to section 333 (5) of the CCP Act No 15 of 1979 as to whether a direction should be given considering the period of incarceration of the Accused-Appellant- Appellant after conviction till the judgment of the Court of Appeal …… which aspect had in fact being brought to the Notice of the Court of Appeal

As submitted above the Appellant was convicted of murder by the Learned High Court Judge and when the Court of Appeal decided to set aside the said conviction and sentence, the Court of

Appeal concluded that, "when there is an intention to cause bodily injury likely to cause death which is in the 2nd clause of section 293 and the injury caused is not necessarily results in death in the ordinary cause of nature such an act comes within the first part of section 297 of the Penal Code" and convicted the Appellant for Culpable Homicide not amounting to murder under section 297 of the Penal Code.

When considering the above observation made by the Court of Appeal, in convicting the Appellant for Culpable Homicide not amounting to murder under the 1st part of section 297 of the Penal Code it is clear that the Court of Appeal was mindful of the 2nd and 3rd clauses of section 293 and decided that the circumstances of the case in hand, fit in to clause 2 but not the clause 3.

However our attention was drawn to the following passage of the Court of Appeal Judgment by the Learned Counsel, who represented the Appellant,

> "In answering these questions what this court could apply is the evidence available with regard to the previous conduct and the subsequent conduct of the Accused-Appellant. The Accused-Appellant may not have come out with the whole truth in her evidence, but she has accepted the fact that she threw acid at the deceased. She too had received injuries as she had not taken any precautions for her protection. Wasantha says that the Accused-Appellant called him while he was sleeping in his house and said she threw acid at the deceased and he was lying there, go and see. Any prudent man would not accept that this series of her acts are acts performed by a person having the intention of killing another. She may have acted on cumulative provocation, still for all, it cannot be counted as sudden provocation. But the question here is that whether the Accused-Appellant had the knowledge that her act would definitely lead to the death of this person. It is evident that the Accused-Appellant who was a mother of a teenage girl, had been under outrage due to the feeling that the act of the deceased detrimanted herself respect. Therefore under those circumstances, the answer of this court to the 3rd question raised above is that the Accused-Appellant had no knowledge that her act would result definitely in the death of the deceased."

and submitted that according to the above observation by the Court of Appeal, the culpability of the Appellant cannot be under the 1st part but it has to be under the 2nd part to

section 297 of the Penal Code which refers to an act done with the knowledge that it is likely to cause death.

However I cannot agree with the above position taken up on behalf of the Appellant before this court. As observed by me the position taken up by the Court of Appeal was that the act committed by the Appellant will not come under clause 1 of section 293 but it does not mean that the said act will not come under clause 2 of section 293.

When deciding whether the said conclusion by the Court of Appeal had reached correctly, it is important to consider the circumstances under which the alleged offence took place and the extent to which the above evidence was considered by the Court of Appeal.

As revealed from the evidence placed before the trial court the Appellant was a married woman with two children and residing at Gurudeniya in Kegalle. The deceased who had an illicit affair with the Accused, when her husband, who was a mason, was away from their house, had stopped the said affair on advice of the others about eight months ago, but had visited the house of the Accused on the day in question.

According to the evidence of the mother of the deceased, her son had left the house around 8.30 pm informing that he is going to the boutique. The next important item of evidence comes from the evidence of Chandana who is a neighbor of the Appellant. According to his evidence, on the day in questioned around 9.00 pm while he was asleep at his house, he heard the Accused calling for help. When he went towards her house, the Accused told her "මම අරකට ඇසිඩ් ගැහුවා එහා පැත්තේ වැටිලා ඉන්නවා ගිහිල්ලා බලන්න"

The witness got frightened to see what is was and therefore called another neighbor who works in the police.

However later he got to know that his friend Wasantha's brother had received injuries and helped Wasantha to remove the injured to the hospital. This witness along with Wasantha and Tharanga took the injured to the hospital in a three-wheeler and on their way to the hospital the injured told them that he went to the house of the Appellant on her request but when he went she scolded her for spreading some rumours and later threw acid at him.

As further observed by this court, the dying deposition made by the deceased, was corroborated by several other witnesses including the mother of the deceased. According to the evidence of witness Gunawathy Jayalath who is the mother of the deceased, her son who went to the boutique around 8.30 pm had returned home around 9.30 pm and told her that, he went to the Accused's house since she wanted him to come there, but when he went she scolded him and threw acid at him. Witness had observed burnt injuries on the body of the deceased and steps were taken to take the injured to the hospital.

Prosecution in this case had relied on five dying depositions made by the deceased including one made to the police. As revealed above, the deceased's version with regard to the incident where he received injuries is uncontradicted and according to him, the reason for him to visit the Appellant during that night was due to her invitation, but when he went, the Appellant scolded him for spreading rumours and threw acid at him.

However as correctly analyzed in the judgment of the Court of Appeal, the Accused was not ready with the acid in order to throw at the deceased, but had taken it from the adjoining house. After throwing acid, she had gone to the neighbor, and informed him as to what happened and requested the neighbor to see what has happened to the injured. In the teeth of the said evidence, the Court of Appeal had ruled out the possibility of identifying the offence under clause 1 of section 293 of the Penal Code.

When considering whether the act committed by the Appellant comes within clause 2 or 3 of section 293 and to rule out any possibility under limbs 2, 3 or 4 of section 294 of the Penal Code, the Court of Appeal was guided by a decision by H.N.G. Fernando CJ in the case of ***Somapala V. The Queen 72 New Law Reports 121***. As observed by us, the decision in the case of Somapala V. The Queen had been correctly considered in the present case and the Court of Appeal had sighted with approval the following passages of the said judgment in their decision;

> "The 3rd limb of section 294 postulates one element which is also present in the second clause of section 293, namely, the element of the intention to cause bodily injury; but whereas the offence of culpable homicide is committed, as stated in the second clause of section 293, when there is intention to cause bodily injury likely to cause death, the offence is one of murder under 3rd limb of section 294 only when the intended injury is

> sufficient in the ordinary course of nature to cause death. In our opinion, it is this 3rd limb of section 294 which principally corresponds to the second clause of section 293; and (as is to be expected) every intention contemplated in the latter second clause is not also contemplated in the former 3rd limb. An injury which is only likely to cause death is one in respect of which there is no certainty that death will ensure, whereas the injury referred to in the 3rd limb of section 294 is one which is certain or nearly certain to result in death if there is no medical or surgical intervention. This comparison satisfies us that the object of the Legislature was to distinguish between the cases of culpable homicide defined in the second clause of section 293, and to provide in the 3rd limb of section 294 that only the graver cases (as just explained) will be cause of murder. If this was not the object of the Legislature, then there would be no substantial difference between culpable homicide as defined in the second clause of section 293 and murder as defined in the 3rd limb of section 294. It will be seen also that if the object of the 2nd limb of section 294 was to adopt more or less completely the second clause of section 293, then the 3rd limb of section 294 would be very nearly superfluous."

His Lordship has further stated in the said judgment that

> "There is evidence also of a similar design in the 4th limb of section 294; knowledge, that an act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, is knowledge, not merely of the likelihood of causing death, but of the high probability of causing death or injury likely to cause death; so that many cases which fall within the third clause of section 293 will not be under within the meaning of the 4th limb of section 294."

In the said case of Somapala V. The Queen, it is not only clause 2 of section 293 of the Penal Code, but also clause 3 of section 293 with its corresponding limb in section 294 had been considered and it is clear that the Court of Appeal was properly guided by the said decision and therefore I see no reason to interfere with the decision of the Court of Appeal when the Court of Appeal concluded,

> "That the framework of this case is the remainder when the section 294 is taken off the section 293. It is further clarified, when the facts of this case are substituted for the

> explanation 2 of section 293, since any one of the 4 limbs in section 294 are not found among those facts, what we find here is not a murder, but a culpable homicide not amounting to murder. When there is an intention to cause bodily injury likely to cause death, which is in the 2nd clause of section 293 and the injury caused is not necessarily results in death in the ordinary cause of nature such an act comes within the first part of section 297 of the Penal Code."

The second ground of Appeal of the Appellant was based on section 333 (5) of the Code of Criminal Procedure Act No 15 of 1979.

The said sub section 5 of section 333 reads as follows;

> "The time during which an Appellant, pending the determination of his appeal is admitted to bail and (subject to any directions which the Court of Appeal may give to the contrary on any appeal) the time during which the Appellant if in custody is specially treated as an Appellant under this section, shall not count as part of any term of imprisonment under his sentence; and any imprisonment of the Appellant whether it is under the sentence imposed by the High Court or Court of Appeal shall subject to the directions or order of the Court of Appeal be deemed to be resumed or to being to run, as the case requires, if the Appellant is in custody, as from the day on which the appeal is determined and, if he is not in custody, as from the day on which he is received into prison under the sentence."

When going through the above provisions, it is clear, that the time spent in custody pending the decision of the appeal from the Court of Appeal, shall not counts as part of any term of imprisonment subject to one exception to the effect that "subject to any direction which the Court of Appeal may give to the contrary on any Appeal" and as observed by me, the said direction the Court of Appeal may give is the discretion of the Court considering the circumstances under which the court decides the Appeal which is before them.

As observed by me, the appellant was convicted for the indictment and sentenced to death by the High Court. In Appeal, the Court of Appeal had correctly analyzed the evidence available in the said case and set-aside the above convictions and sentence and replaced it with a conviction for culpable homicide not amounting murder under part one of the section 297 of the Penal Code. As

further observed by me, part one of section 297 of the Penal Code had provided a sentence which may extend to twenty years and shall also liable to a fine.

When imposing the sentence, the Court of Appeal had decided to impose a jail sentence of 15 years with a fine as referred to in this judgment. When deciding the said term, the court was mindful of the circumstances under which the offence committed, the allocutus made by the Appellant and all other matters relevant and should have been considered when imposing a sentence. The Appellant had not complained against the jail term imposed but the complaint before this court, is the failure by the Court of Appeal to use its discretion under 333 (5) and make order to begin the sentence from the date of conviction by the High Court. In this regard the Appellant had submitted that she had to serve a jail term of 18 years, but as observed in sub section 5 of section 333, the period the Appellant was in remand pending the disposal of the Appeal cannot be considered as a part of the sentence.

As discussed above, the Court of Appeal when imposing the sentence, was mindful of all these aspects and had decided to impose a sentence 5 years less than the maximum sentence the court could impose for the offence the Appellant was convicted. The Court of Appeal had arrived at the said decision, giving due consideration to the matters placed before the Court of Appeal and therefore I see no reason to interfere with the sentence imposed on the Appellant.

For the reasons setout above I am not inclined to interfere with the findings of the Court of Appeal I therefore make order dismissing this Appeal.

Appeal dismissed. Conviction and Sentence affirmed.

Judge of the Supreme Court

Priyasath Dep PC CJ

I agree,

Chief Justice

Anil Goonaratne J

I agree,

Judge of the Supreme Court