IN THE SUPREME COURT OF THE

DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka, against a judgment of the Court of Appeal.

S C Appeal 86 / 2010

S C Spl/LA 106 / 2010

High Court of Galle

Case No. 2361

1. Ramasamy Mayalagu,

   Nagoda Watta,

   Nagoda,

   Galle.

   1ST ACCUSED - APPELLANT - APPELLANT

2. Mayalagu Tangaraja,

   Nagoda Watta,

   Nagoda,

Galle.

3RD ACCUSED - APPELLANT - APPELLANT

-Vs-

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT - RESPONDENT - RESPONDENT

Before: **VIJITH K. MALALGODA PC J**

P. PADMAN SURASENA J

E. A. G. R. AMARASEKARA J

Counsel:

Saliya Pieris PC with Varuna de Seram for the Accused - Appellant - Appellant.

Dilan Rathnayaka DSG for the Attorney General.

Argued on : 2019 - 02 - 11

Decided on : 2019 - 06 - 07

P Padman Surasena J

In this case, Hon. Attorney General had indicted the 1st Accused - Appellant - Appellant who was named as the 1st Accused in the indictment (hereinafter sometimes referred to as the 1st Accused), the 3rd Accused - Appellant - Appellant who was named as the 3rd Accused in the indictment (hereinafter sometimes referred to as the 3rd Accused), along with another who was named as the 2nd Accused in the indictment (hereinafter sometimes referred to as the 2nd Accused) in the High Court of Galle under two counts.

The first count has alleged that the said accused, on or about 9th September 1998, at Gulugahakanda, had committed the murder of one Govindan Sevanu, an offence punishable under section 296 read with section 32 of the Penal Code.

The 2nd count has alleged that the said accused, at the same time and in the course of the same transaction, had caused injuries to one Sevanu Nagaiya, an offence punishable under section 315 of the Penal Code.

The said Accused, upon the charges in the indictment being read over and explained to them, had pleaded not guilty to the said charges.

Learned High Court Judge thereafter having conducted the trial against them, by his judgment dated 30th June 2008 had convicted the 1st and 3rd Accused for both counts in the indictment and had proceeded to acquit the 2nd Accused from both counts in the indictment.

Learned High Court Judge having pronounced his judgment, has accordingly sentenced the 1st and 3rd Accused. Since the 1st and 3rd

Accused were convicted for the 1st count, which is a charge of murder, the learned High Court Judge has imposed the death sentence on both of them.

Being aggrieved by this conviction, 1st and 3rd Accused had appealed to the Court of Appeal. The Court of Appeal after the argument of the case, by its judgment dated 16th December 2009 has held that there is no merit in that appeal and had proceeded to affirm the conviction and the sentence imposed on the said accused by the High Court. Accordingly, the Court of Appeal had dismissed that appeal.

It is the said conviction that the 1st and 3rd Accused are seeking to canvass before this Court in this appeal.

Upon supporting the special leave to appeal application relevant to this appeal, this Court by its order on 30th August 2010 had granted special leave to appeal on the following question.

"Did not the nature of the evidence relating to the manner in which the incident commenced, make it unrealistic to have merited a finding of murder as the alleged killing had taken place on the spur of the moment, devoid of any trace of deliberation?"

Learned President's Counsel for the 1st and 3rd Accused submitted before this Court that the incident relevant to this case is an incident occurred in the course of a sudden fight between two neighbors. It is therefore his contention that the dismissal of the appeal by the Court of Appeal and affirming the conviction for the offence of murder is not justifiable. He further submitted that the Court of Appeal should have substituted a verdict of culpable homicide not amounting to murder punishable under

section 297 of the Penal Code against the 1st and 3rd accused on the basis that the relevant incident had occurred in the course of a sudden fight. It would be necessary for this Court to briefly refer to the evidence led at the trial in order to evaluate the above argument.

Evidence of witness Sevenu Nagaiyya

Sevenu Nagaiyya who is an eyewitness to the incident giving evidence before the High Court has narrated the sequence of events relevant to this incident. Some of the facts revealed from his evidence, which would be of some use for the disposal of this appeal, could be encapsulated as follows.

i. the 2nd and the 3rd Accused are husband and wife;

ii. the 1st Accused is the son of the 2nd and the 3rd Accused;

iii. the incident occurred at about 6.30 PM on 1998-09-09;

iv. the Accused had built a kitchen adjoining their line room about a week before this incident obstructing the pathway used by the family of the deceased to access their line room;

v. at about 6.30 PM on the relevant day this witness went to the boutique to purchase sugar;

vi. the 2nd accused had assaulted this witness with a hard broom;

vii. when he raised cries at that time his elder sister (Sevanu Muni Amma) had come and prevented the said assault, and his father (deceased) too had followed his sister;

viii. at that time the 1st accused had stabbed this witness twice with a rubber tapping knife.

This witness has only seen his father (deceased) coming as he had become unconscious because he had sustained stab injuries.

Evidence of witness Sevanu Muni Amma

Sevanu Muni Amma is the elder sister of the previously mentioned witness (Sevenu Nagaiyya) who came to his rescue when he raised cries. She has stated in her evidence;

1) that they have to pass the courtyard of the line room of the accused to gain access to their line room;

2) that the accused had built a kitchen in their courtyard;

3) that a dispute had arisen when the deceased had knocked his head on a rafter fixed to the newly built kitchen presumably when he was walking pass the courtyard of the accused (not on the day of the incident of murder occurred);

4) that this incident had occurred at a later stage;

5) that in the morning of 1998-09-09 also the 2nd and the 3rd accused had abused the deceased;

6) that she and her father (deceased) had rushed when they had heard his brother (Sevanu Nagaiya) raising cries;

7) that she had seen the 1st accused armed with a rubber-tapping knife and the 3rd accused armed with a club;

8) that she had seen the 1st accused stabbing her brother's back (Sevanu Nagaiya's back) with a rubber-tapping knife;

9) that her deceased father who was 62 years of age came there at that time; and

10) that she had also seen the 1st accused stabbing the deceased with a rubber-tapping knife and the 3rd accused assaulting the deceased with a club.

According to the evidence of the Judicial Medical Officer, there had been ten external injuries on the body of the deceased. For the purpose of easy comparison, the said injuries described in the post mortem report could be arranged into a table in the following manner.

Injury No.	Description	Categorization by JMO
01	Cut injury of 7 cm long on the right side of forehead 5 cm above the eyebrow longitudinally placed cutting into the skull cavity	Grievous injury
02	Contusion of 3 cm x 2 cm on the right frontal area	Grievous injury
03	Abrasion of 1 cm x 2 cm on the left temporal region	Non Grievous injury
04	Stab injury of 2 ½ cm long on the right side of chest 5 cm below and 6 cm right to the nipple which	An injury sufficient in the ordinary course of nature to cause death

	enters the chest cavity between 6th and 7th ribs	
05	Stab injury of 2 ½ cm long on the back of left side of chest 3 cm below the shoulder and 7 1/2 cm left to the midline cutting the 3rd and 4th ribs,	An injury sufficient in the ordinary course of nature to cause death
06	Stab injury of 3 cm long, 4 cm right to the midline and 15 cm below the injury No. 05	Grievous injury
07	Stab injury of 3 cm long, 2 cm below and 3 cm right to the midline	Grievous injury
08	Stab injury of 3 cm long on the back of left side of chest 11 cm right to the midline 10 cm below the injury No. 07	Non Grievous injury
09	Stab injury of 3 cm long, 10 cm right to the midline and 5 cm below the injury No. 08	Grievous injury
10	Contusion of 3 cm x 4 cm on the back of right side of lower chest	Non Grievous injury

It would be of paramount importance to observe that the cause of death of the deceased according to the Post Mortem Report is 'haemorrhage and shock following stab injuries to the chest.

In the light of the above question of law to which this Court has granted special leave to appeal and in the light of the submissions made by the learned counsel for the accused, the issue that this Court needs to address in this case is whether the learned High Court Judge should have convicted the accused for an offence of culpable homicide not amounting to murder on the basis that the incident relevant to this case falls under the exception 4 to section 294 of the Penal Code. The said exception is as follows.

Exception 04;

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 above provision clearly indicates that primarily two requirements must be satisfied for an incident to fall under the above exception. It would not be difficult to draw this inference due to the presence of the word 'and' which has clearly conjoined the phrases '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'.

Thus, it is clear that the followings must be proved if the conviction of the instant case is to be brought under the above exception,

i. that the accused had acted without premeditation,

ii. that the injuries were inflicted in the course of a sudden fight,

iii. that it happened in the heat of passion upon a sudden quarrel,

iv. that the accused did not take any undue advantage or acted in a cruel or unusual manner.

In the instant case the prosecution evidence does not shed even a semblance of light on any fight. The evidence led by the prosecution and the material elicited by the learned counsel for the accused through the cross examination of the witnesses do not justify any inference as to the presence of any sudden fight.

It would be in order at this stage to turn to section 105 of the Evidence Ordinance, which reads as follows;

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances."

The legislature has proceeded to provide some examples of the instances where the above provision comes into play. This is by setting out several illustrations under the said provision. Thus, for the purposes of the instant case, it would be relevant to reproduce below, the illustrations (a) and (b) of section 105.

Illustrations

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A

Since section 105 of the Evidence Ordinance is specifically referring to the special exceptions set out in the Penal Code and casting the above burden of proof on the accused, it would not be legal for Courts to ignore the above provisions. Further, one must bear in mind that the Courts must presume the absence of such circumstances until and unless the accused discharges that burden to the satisfaction of Court according to law.

In the instant case, the accused neither gave evidence no made a dock statement. They also did not call any other witness on their behalf. Moreover, there is not even iota of evidence elicited from the witnesses although the said witnesses had been subjected to lengthy cross examination by the learned Counsel who had appeared for the accused.

When two of the accused attacked the unarmed deceased who was sixty two years of age, with a knife and a club, it stands to reason to hold that the accused have taken an undue advantage or have acted in a cruel or unusual manner. Thus, it is not difficult for this Court to hold that this incident where two accused persons had attacked the unarmed deceased person using dangerous weapons at an instance where there is no

evidence of any sudden fight, would not be within the limits of exception 4 above mentioned.

It is the evidence of the Judicial Medical Officer that the haemorrhage and shock following the stab injuries inflicted on the chest area had caused the death of the deceased. This Court observes that there are six stab injuries on the chest area of the deceased. Two of those stab injuries (injuries No. 04 and 05) are injuries, which are sufficient in the ordinary course of nature to cause the death of the deceased.

Further, the medical evidence as a whole too suggests that the accused had taken an undue advantage and had acted in a cruel manner. This is particularly so because there is not even an iota of evidence that any of the accused had sustained any injury; not even a single superficial abrasion.

Perusal of the judgment of the High Court shows to the satisfaction of this Court that the learned High Court Judge had carefully considered all aspects he ought to have considered before concluding that the 1st Accused and the 3rd Accused should be convicted for the offence of murder punishable under section 296 of the Penal Code. Thus, this Court cannot find any basis to deviate from the course of action that was adopted by the Court of Appeal when it decided to affirm the judgment of the High Court and dismiss the appeal filed before it by the said accused.

In these circumstances, this Court is of the view that it has no basis to interfere with either the judgment of the Court of Appeal or that of the High Court.

This Court answers the question of law mentioned above in the negative.

Thus, for the foregoing reasons, this Court decides to affirm the judgment of the High Court dated 30th June 2008 and the judgment of the Court of Appeal dated 16th December 2009. This appeal should therefore stand dismissed.

This Court makes no order for costs.

Appeal is dismissed.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda PC J

I agree,

JUDGE OF THE SUPREME COURT

E. A. G. R. Amarasekara J

I agree,

JUDGE OF THE SUPREME COURT