

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

*In the matter of an Appeal against a Judgment  
of the Court of Appeal under Article 128 (2) of  
the Constitution.*

**Yogarasa Sathees alias Jegan,**  
Kondavil Road,  
Annaithiresa Lane, Irupalai,  
Jaffna.  
(Presently detained at the Bogambara  
Prison.)

**ACCUSED – APPELLANT**  
**- PETITIONER**

**SC Appeal No. 34/2020**  
SC SPL LA No. 437/2018  
CA Appeal No. CA 26/2016  
HC Jaffna Case No. HCJ/1622/2013

**Vs.**

**Honourable Attorney General,**  
Attorney General's Department,  
Colombo 12.

**COMPLAINANT - RESPONDENT**  
**- RESPONDENT**

**BEFORE** : **YASANTHA KODAGODA, PC, J.**  
**ACHALA WENGAPPULI, J. &**  
**MAHINDA SAMAYAWARDHENA, J.**

**COUNSEL** : Mr. Darshana Kuruppu with Ms. Tharushi Gamage  
and Adhikaramge Anjana instructed by Aruna  
Gamage for the Accused-Appellant-Appellant.  
Mr. Azard Navavi, Snr. DSG, for the Complainant-  
Respondent-Respondent.

**ARGUED & DECIDED ON**

: 12<sup>th</sup> November 2024

**YASANTHA KODAGODA, PC, J.**

**Background**

1. In this matter, the Appellant seeks to impugn Judgment of the Court of Appeal dated 9<sup>th</sup> November 2018 founded upon the following question of law in respect of which this Court had been pleased previously to grant Special Leave to Appeal.

*“Have their Lordships of the Court of Appeal misdirected themselves in fact and/or in law in not evaluating the evidence to check whether there had been a sudden fight between the Petitioner and the Deceased even when there was reference to a previous fight between them?”*

It is noted that this question of law had been raised in addition to sixteen (16) other questions of law contained in the Accused – Appellant – Petitioner’s (the present Appellant’s) Petition to this Court dated 18<sup>th</sup> December 2018. Special Leave to Appeal had not been granted in respect of those questions of law, as those questions of law were totally irrelevant and unnecessary, as they did not genuinely arise out of the impugned judgment of the Court of Appeal.

2. Court notes that, legal counsel who draft and settle Petitions to this Court seeking Special Leave to Appeal should desist from formulating questions of law, merely for the purpose of doing so. Questions of law must be drafted in good faith, diligently, upon an objective consideration of matters genuinely arising out of the judgment of the Court of Appeal and supported by the evidence presented at the trial (where relevant), and only if raising such questions are in the genuine interests of justice. Petitions seeking Special Leave to Appeal should not be presented merely for the purpose of satisfying the client or for the purpose of delaying the unavoidable final outcome of the judicial process.
3. Clouding this Court with unnecessary and unwarranted Petitions seeking Special Leave to Appeal against judgments of the Court of Appeal is unprofessional, unethical and contrary to the interests of the administration of justice. Protecting the interests of the administration of justice and public interests, is far more paramount and important than the immediate interests of the respective clients of Attorneys-at-Law. If this advice to Attorneys-at-

Law is not adhered to in good faith, this Court will have to in the near future consider imposing appropriate sanctions that may even affect the interests of the relevant Attorneys-at-Law.

4. In this matter, the Honourable Attorney General had indicted the Accused - Appellant – Appellant (hereinafter referred to as the ‘Appellant’) for having on 5<sup>th</sup> January 2011 committed the murder of one Kandasamy Ithayan in Thirunelveli, situated in the District of Jaffna. The trial was conducted before a Judge of the High Court sitting without a jury, and following trial, the Appellant was found ‘*guilty*’ of the charge against him, and therefor was convicted and sentenced to ‘*death*’.
5. The Appellant appealed against his conviction and sentence to the Court of Appeal. Following hearing of the Appeal, the Court of Appeal affirmed the conviction and the sentence imposed by the High Court and dismissed the Appeal. This Appeal stems from that Judgment of the Court of Appeal.

#### **Evidence for the Prosecution**

6. The Appellant is the brother-in-law of the deceased. A certain degree of animosity had existed between the two, since the Appellant believed that his sister (who had been married to the deceased) had been murdered by the deceased in 2007. This was notwithstanding the cause of her death declared by the authorities being ‘suicide’.
7. The prosecution did not present the testimony of any witness who had directly seen the Appellant attacking the deceased. Nevertheless, two witnesses provided testimony on behalf of the prosecution regarding two key attendant circumstances relating to the incident.
8. The main witness who testified for the prosecution was Easwary Somasundaram, a tenant of a house located in the compound inside which the house the deceased lived in was situated. Her testimony was that, on the day of the incident around 1.30 p.m., while she was sleeping inside the house, she had heard someone shouting. That noise had emanated from the neighbouring house, in which the deceased lived. Few minutes afterwards, she had gone to the washroom which was situated outside the house. While returning from the washroom she once again heard someone shouting and soon afterwards saw the Appellant (who was known to her) wearing a black colour jacket rushing out of the house armed with a knife. She went inside her house and saw the deceased lying inside the house on a pool of blood with bleeding injuries. She inquired from the deceased what happened, and

he replied "*Ayyo, Jegan stabbed me.*" The Appellant was known in the village as '*Jegan*'. It is in evidence that afterwards, some others had rushed the deceased to the hospital, where he succumbed to his injuries.

9. The other lay witness who testified for the prosecution was Thangarasa Nilan - the son of Easwary Somasunderam. According to him, on the day of the incident, when he was washing his face, he heard a noise from within the house in which he and his mother lived. He rushed into the house and saw the deceased lying in the hall in a pool of blood. When he looked around, he saw a person wearing a black colour jacket leaving the compound in which the two houses were situated. In several respects, his testimony corroborates the testimony of his mother Easwary Somasunderam.
10. Thangarasa Nilan has provided hearsay evidence relating to some information given to him by one Jacintha, who had arrived at the scene soon afterwards. [Iaiyarajah Jacintha is a witness listed on the back of the indictment, whose testimony was not presented at the trial by the prosecution. According to the record, she had been overseas at the time of the trial.] Apparently, Jacintha had told Nilan that the deceased and the Appellant were seen by her fighting inside the Appellant's house, Jegan (the Appellant) took a knife and the deceased had come out of that house and run into the house of the witness. The 'incident' (ostensibly a reference to the stabbing) had occurred inside the house of Easwary Somasunderam and Thangarasa Nilan (mother and son).
11. Based on the findings arising out of the post mortem examination conducted on the body of the deceased by Judicial Medical Officer Dr. Sinniah Sivaruban, he has expressed expert opinion that as a result of the attack on the deceased by a sharp cutting instrument, the deceased had sustained two cut injuries in the region of the right elbow, a cut injury on the shoulder, and another cut injury on the left side of the chest. There had been a stab injury near the left nipple which had penetrated between the 5<sup>th</sup> and 6<sup>th</sup> intercostal space. Internally, the heart of the deceased had been pierced. According to Dr. Sivaruban, it is that injury in the heart of the deceased which was sufficient in the ordinary course of nature to cause the death of the deceased, and which in fact resulted in the death of the deceased. The Post Mortem Report had been produced at the trial marked "P1". The doctor has expressed the view that the knife marked "P2" referred to in the following paragraph was capable of causing the injuries found on the body of the deceased.

12. According to the testimony given by Inspector of Police Priyantha Ajith, on the night of the incident around 7.10 pm, the Appellant had been arrested with regard to his alleged complicity in the murder of the deceased. He had been questioned and his statement recorded. Based on information contained in a portion of the statement of the Appellant (marked as “P3” and produced at the trial) coupled with his having guided the investigator to the relevant location, this police officer had recovered a knife (the blade of which was four and a half inches, and a foldable wooden handle – marked as “P2” and produced at the trial) from inside a box kept in a room of the Appellant’s house. From another room of the same house, the investigator had recovered some blood soiled clothes (a black colour jacket and a pair of trousers – marked as “P4” and “P5” and produced at the trial), presumably of the Appellant. These items were produced at the trial and were identified by the investigator.

#### **Evidence for the Defence**

13. At the trial, the Appellant gave evidence under oath and provided details of the animosity he had with the deceased. He denied any involvement in the stabbing of the deceased, and pleaded an *alibi* defence.

#### **Submissions of learned counsel for the Appellant and the Respondent**

14. Learned counsel for the Appellant submitted that, he was not challenging the assessment of credibility and testimonial trustworthiness of prosecution witnesses by the learned Judge of the High Court. He also submitted that he was not contesting the validity of the rejection of the Appellant’s evidence and the *alibi* defence (that the Appellant was elsewhere at the time of the incident).
15. Referring to the judgment of the Court of Appeal, learned counsel for the Appellant submitted that he was not contesting the findings reached by the learned Justice of the Court of Appeal with regard to the several questions of law which he raised during the appellate stage in the Court of Appeal. If that be the case, one would naturally wonder why this Appeal was filed.
16. Learned counsel for the Appellant submitted that, even if the case for the prosecution was taken at its best, the evidence presented by the prosecution revealed that short while prior to the stabbing incident, there had been a fight between the Appellant and the deceased. In that regard he referred to the hearsay testimony provided by Thangarasa Nilan as to what Jacintha is said to have told him. Learned counsel submitted that there had been a sudden fight preceding the attack on the deceased, and that in the circumstances the

Court of Appeal should have considered whether the culpability of the Appellant should be viewed from the perspective of the 4<sup>th</sup> exception to the offence of murder contained in section 294 of the Penal Code. Learned counsel submitted that in the circumstances, the culpability of the Appellant should be for the offence of '*Culpable homicide not amounting to murder*' and not for the offence of '*Murder*'. In the circumstances, learned counsel moved this Court to be pleased to mitigate the culpability of the Appellant to the offence of '*Culpable homicide not amounting to murder*', quash the conviction and sentence for '*murder*' and therefor impose a lawful sentence which corresponds to the lesser offence.

17. Learned Senior Deputy Solicitor General who appeared for the Respondent submitted that, in view of the evidence of this case, both the Judge of the High Court and the learned Justice of the Court of Appeal had acted quite correctly in having found the Appellant '*guilty*' of having committed '*Murder*' and accordingly sentenced him to '*death*'. He submitted that, the evidence did not disclose that there had been a sudden fight between the Appellant and the deceased as provided for in explanation 4 of section 294 of the Penal Code. He further submitted that the defence had not discharged its burden of proving on a balance of probability that the Appellant had acted without premeditation in the course of 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*. He submitted that in the circumstances, the Appellant was not entitled in law to seek a reduction of culpability from the offence of '*Murder*' to the offence of '*Culpable homicide not amounting to murder*'.

### **Observations, analysis and findings**

18. This Court observes that, as evident from the impugned Judgment of the Court of Appeal, during the proceedings before that court, on behalf of the Accused-Appellant, seven (7) grounds of appeal had been raised. While it is unnecessary to reproduce those grounds in this judgment, it would suffice to state that none of those grounds even remotely relate to the ground of appeal advanced before this Court by learned counsel for the Appellant. The impugned judgment of the Court of Appeal reveals that the said court had diligently and quite correctly considered the evidence and the applicable law and answered all seven grounds of Appeal. In fact, that was all the Court of Appeal was required to do.
19. At the trial (before the High Court) as well as at the first appellate stage (before the Court of Appeal), the position of the Appellant was a complete

denial coupled with an *alibi* defence. Therefore, it is evident that the ground of Appeal urged before this Court has been raised for the very first time. What aggravates the situation is that, in proceedings before this Court, the judgment of the Court of Appeal was sought to be impugned on a question of law which does not arise from the impugned Judgment of that court. That in my view is a fundamental error, which should be avoided by counsel who appeared before this Court. In an Appeal to this Court against a judgment of the Court of Appeal where that court has exercised appellate jurisdiction, the purpose of the Appeal should be to canvass a question of law that arises from such judgment of the Court of Appeal. That is evident when one examines provisions of Articles 127 and 128 of the Constitution together with the applicable Rules of the Supreme Court.

20. In matters of this nature, appellate proceedings before this Court should not be made use of to challenge for a second time the findings of the learned trial Judge. Doing so would amount to reducing the proceedings before the Supreme Court to a first instance appellate hearing. The matter before the Supreme Court is an Appeal against the judgment of the Court of Appeal and not an Appeal against the judgment of the High Court. Therefore, the Appellant has to raise before this Court an error which arises from the judgement of the Court of Appeal. In these circumstances, regrettably though it is necessary to point out that what was attempted by the Appellant amounted to an abuse of judicial process and a waste of the precious time of this Court. Such abuse must be avoided at least in the future.
21. Be that as it may, since this Court had on a previous occasion granted *Special Leave to Appeal* it was decided to proceed to consider the merits if any, of the argument presented by learned counsel for the Appellant.
22. As referred to in the summation of the submissions of learned counsel for the Appellant, the sole ground of Appeal urged before this Court is that the case for the prosecution was of such nature that it would necessarily invoke exception 4 of section 294 of the Penal Code. Thereby, if at all, the culpability of the Accused-Appellant would be for the offence of '*Culpable homicide not amount into murder*' on the premise of a sudden fight, and certainly not for the offence of '*Murder*'.
23. It is settled law that not all forms and manifestations of homicide are prohibited by the substantive criminal law of this country. What is prohibited (and therefore the offender becomes criminally culpable) is homicide that comes within the scope of section 293 of the Penal Code. In



terms of the Penal Code, such forms of homicide are referred to as *culpable homicide*. That is a reference to homicide that is culpable in law as opposed to homicide that is not culpable, which is referred to *justifiable homicide* and *homicide authorised by law*. It is necessary to note that culpable homicide *per se* is not punishable. What is punishable is what amounts to the offence of ‘Murder’ (also referred to as *Culpable homicide amounting to Murder*) and ‘Culpable homicide not amounting to Murder’. While the offence of Murder is defined in section 294 of the Penal Code, the same section contains certain exceptions to culpability for the offence of ‘Murder’, which are contained in the several exceptions contained in section 294. Thus, if the facts and circumstances of a case initially fall within the ambit of section 294, and it also comes within one of the exceptions contained in section 294, culpability of the offender is not for the offence of ‘Murder’, but for the offence of ‘Culpable homicide not amounting to Murder’. [There are other ways too in which the offender may become culpable for the offence of ‘Culpable homicide not amounting to Murder’. However, a discussion of such ways would not be necessary for the determination of this Appeal.]

24. Exception 4 of section 294 of the Penal Code provides 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.*

25. It would thus be seen that, for culpability of the offender who had committed ‘Murder’ to be mitigated to culpability for the offence of ‘Culpable homicide not amounting to Murder’ (under exception 4), the conduct of the offender should come within the following ingredients:

- a. The offender should have acted without premeditation.
- b. The attack on the deceased should have occurred in the course of a sudden fight.
- c. The conduct of the offender should have been in the heat of passion upon such sudden quarrel.
- d. When attacking the deceased, the offender should not have taken undue advantage or acted in a cruel or unusual manner.

26. That the case for the Appellant comes within the afore-stated exception should either arise from the case for the prosecution itself, or in the alternative, the defence should establish it on a balance of probability.

27. With regard to the application of the law relating to the 4<sup>th</sup> exception to section 296 of the Penal Code, this Court sees no reason to deviate from the



principles contained in the Judgment of then Chief Justice, Hon. Dr. Shirani Bandaranayake, in *Gurudeniya Lekamgedara Nishantha Bandara Vs. the Hon. Attorney General* [(2011) 2 Sri L.R. 55], and therefore shall be guided by such principles.

28. It is now necessary to revert to the facts of the case, with special reference to the mitigatory plea of sudden fight. As stated above, what Easwary Somasundaram had heard a few minutes prior to the incident was 'someone' shouting. She has not testified regarding a fight between the deceased and the Appellant. Thangarasa Nilan had also only heard 'someone' shouting. That sound had emanated from the house in which shortly afterwards the deceased was found with injuries. There is also the hearsay evidence elicited from Thangarasa Nilan, that Jacintha had purportedly told him that while the deceased and the Appellant were fighting inside the Appellant's house, Jegan (the Appellant) took a knife and the deceased had come running into the house of the witness. Thus, there is some material in the case record of the possible existence of a fight between the deceased and the Appellant at a time before the Appellant stabbed the deceased. The nature of the fight, the circumstances under which the fight commenced and occurred and whether the fighting continued till the Appellant having finally attacked the deceased inside Easwary Somasundaram's house, is not in evidence. The issue to be determined is whether the hearsay evidence of Jacintha is sufficient to attract the mitigatory plea of a sudden fight.
29. I have considered this matter. I refrain from acting upon the afore-stated evidence due to the following reasons: First, the information said to have been passed on to Thangarasa Nilan by Jacintha amounts to hearsay evidence. Unless it come within the several exceptions to the rule against the admissibility of hearsay evidence, hearsay evidence is inadmissible. Even otherwise, very little evidence can be attached to hearsay evidence. Secondly, even that hearsay evidence does not reveal the exact nature of the fight and the circumstances under which the Appellant had attacked the deceased. In the circumstances, it is not possible to determine whether the alleged occurrence of the fight between the deceased and the Appellant come within the ambit of the 4<sup>th</sup> exception to section 294 of the Penal Code. Furthermore, the Appellant who was ideally placed to provide testimony regarding the circumstances relating to the purported fight between him and the deceased, chose not to provide that testimony and instead denied even being present at the scene of the crime. Due to all these reasons, I am unable to accept the submission of learned counsel for the Appellant that the evidence relating to this case should attract the imposition of culpability only

for *Culpable Homicide not amounting to Murder* on the footing of the occurrence of a sudden fight.

30. In the circumstances, the question of law in respect of which Special Leave to Appeal has been granted is answered in the negative.
31. This Court wishes note that learned counsel for the Appellant Mr. Dharshana Kuruppu in the course of presenting his case, provided an opportunity to his junior counsel Ms. Tharushi Gamage to make a portion of the submissions. First, this Court wishes to place on record its appreciation for the gesture extended by Mr. Kuruppu towards his junior. Second, this Court wishes to place on record its view that Ms. Gamage made good submissions displaying a thorough knowledge of the evidence, an appreciable understanding of the applicable law and effective skills of advocacy.
32. Due to the reasons stated above, this Appeal is dismissed. Proceedings are terminated.
33. The Registrar of this Court is directed to forward copies of this Judgment to both Court of Appeal and to the High Court.

**JUDGE OF THE SUPREME COURT**

**ACHALA WENGAPPULI, J**

I agree.

**JUDGE OF THE SUPREME COURT**

**MAHINDA SAMAYAWARDHENA, J**

I agree.

**JUDGE OF THE SUPREME COURT**