SARANELIS SILVA
v.
ATTORNEY-GENERAL

COURT OF APPEAL.
GUNASEKERA, J. (P/CA)
DE SILVA, J.
C.A. NO. 158/95.
H.C. NEGOMBO 49/94.
M.C. MINUWANGODA 38536.
MAY 29, JUNE 03, 1997.

Murder – Section 296 Penal Code – Proper Directions to be given by a Judge to a Jury at a Trial for Murder.

The appellant was indicted with having committed murder by causing the death of one C. The Prosecution relied on two main witnesses, the wife of the deceased and the evidence of an eye witness. The accused was found guilty by a divided verdict of five to two. The conviction was challenged on the grounds of –

(i) that the Trial Judge withdrew from the consideration by the Jury of the possible defence of the right of Private defence.

(ii) failure to apply to the facts the law relating to the exception of a sudden fight.

(iii) misdirections.

Held:

(1) It is to be noted that there is no prescribed form of a summing up in a trial for murder. The adequacy of a summing up will depend on the evidence in a particular case. If there is evidence which the jury can reasonably take into consideration as reducing the offence of murder to one of culpable Homicide, then it is the duty of the Judge to include in his summing up directions relating to culpable homicide not amounting to murder.

(2) Where there is evidence of provocation the entirety of the evidence bearing on the question of provocation should be put to the jury even though the accused expressly says that he was not provoked. It is undoubtedly the duty of the Judge in summing up to the Jury to deal adequately with any defence which might reasonably arise on the evidence given and which would reduce the offence from Murder to culpable homicide.

(3) If there is no evidence before court to reduce Murder to culpable homicide then the Judge cannot be faulted for not inviting the Jury to consider a lesser offence.

***Per* De Silva, J.**

"If the prosecution case is that the accused has committed murder by secretly administering poison, this does not give room for the defence to complain that Judge should invite the jury to consider provocation."

APPEAL from the High Court of Negombo.

Case referred to:

1. *R. v. Mohideen Meera Saibo* – 19 CLW 129.

Dr. Ranjith Fernando with *Ms. Kishali Pinto – Jayawardena* and *Ms. Premali de Silva.*

Kapila Waidyaratne, S.S.C. for Attorney-General.

Cur. adv. vult.

June 18, 1997.
J. A. N. DE SILVA, J.

The appellant in this case was indicted before the High Court of the Western Province holden in Negombo with having committed murder by causing the death of Kadupitiya Chandrasena on the 17th of December 1983 at Heenatiya, an offence punishable under section 296 of the Penal Code.

The trial was in November 1995 and after the conclusion of the case by a divided verdict of five to two (5:2) the accused-appellant was found guilty of the said charge and was sentenced to death.

The prosecution relied on two main witnesses to establish the case viz. Mallika Jayawathie, the wife of the deceased, who described the events that took place prior to the incident and the evidence of eye witness Somadasa who spoke about the incident proper. The other witnesses for the prosecution were the Doctor who conducted the Post-Mortem examination and Police Inspectors Dassanayake and Sunil Perera who conducted the investigations.

According to witness Mallika on the day of the incident around 8.30 a.m. she left the house with her husband to visit the mother of the husband who was living a short distance away from their house.

When they came on to the road they met one Somadasa, a friend and a co-villager who was also going in the same direction and they proceeded together talking to each other. As they approached the residence of the accused's father-in-law, the accused who was living with him spoke to the deceased and invited them to his house saying that he has nothing against the deceased and to settle any misunderstanding the accused had with the deceased, Mallika had not agreed to this but the deceased had gone to the house with Somadasa.

Mallika recounted that a person by the name of Martin had died a few days back by drowning in the river. When the corpse was retrieved it was in a state of putrification and was emanating a foul smell. The villagers had taken the body to a cemetery and buried it. Apparently Martin's body had been carried over the land of the accused causing much annoyance to the accused. The deceased had taken a prominent part of Martin's funeral and over this there had been some displeasure between the accused and the deceased.

Mallika had refused to go with the husband but had proceeded to her mother-in-law's house which was close by. Shortly thereafter she had heard a report of a gun from the house of the accused-appellant and she had run back in that direction. On the way she had met Somadasa who was running towards her and he had said Chandare, the deceased was shot at by Balamahattaya, the accused-appellant and he is dead. On hearing this information she had not gone to the house but had run to the Police Station which was about 4-5 miles away.

Eye witness Somadasa testified to the fact that he went to the accused-appellant's house with the deceased which was about 25-30 yards from the road. There they had been asked to sit and accused-appellant had spoken to the deceased for about 2 or 3 minutes and as they were about to leave the accused had taken a gun from behind a door which was ajar and shot the deceased on the head. He left the house and had seen Mallika come running towards him and he had informed her what happened and had gone to his house which was about 1/4 mile away from the scene. A few minutes after he reached his home he had heard sounds of several gun shots from the direction of the accused's house.

Dr. Gamini Jayasekera, who conducted the Post-Mortem examination has stated in his evidence that there were six penetrating injuries on the scalp over the left and right frontal bone of the deceased. According to him all six wounds could have been caused by a single shot fired from gun at a close range. He has also found five irregular shaped lead pieces in the brain matter.

Inspector Dassanayake of the Minuwangoda Police had given evidence to the effect that on receipt of information about the murder from the wife of the deceased Mallika, he visited the scene at 11.30 in the morning. When he approached the place of incident he heard the firing of 7-8 gun shots. The doors were closed. He had ordered the people in the house to come out having identified himself. After a short while the accused had come out with another person. That other person had received a gun shot injury on his leg. The Inspector had found the body of the deceased in the verandah and the dead body of the father-in-law of the accused inside the house. He had taken three guns into his custody. There had been several pellet marks on the outer wall and inside the house.

Officer-In-Charge Sunil Perera who visited the scene subsequently had observed the body of the deceased on the verandah. There had been two live cartridges wrapped in a cellophane bag between the fingers of the deceased and another tin foil containing some substance. He also stated that there was a pistol underneath the body of the deceased and a opened clasp knife near him. Twenty-eight waddings also had been recovered by him from the scene.

When the prosecution case was closed no evidence for the defence had been led. The accused-appellant had remained silent.

The learned Counsel for the appellant sought to challenge the conviction and sentence on the following grounds.

1. that the learned Trial Judge withdrew from the consideration by the Jury of the possible defence of the right of private defence arising out of the prosecution evidence.

2. The learned Trial Judge erred in law by failing to apply to the facts of the case the law relating to the exception of a sudden fight.

3. The learned Trial Judge erred by misdirecting the Jury on the following matters.

   (a) Evidence militating against premeditation.

   (b) The significance of the discovery of items such as another dead body – recently used fire arms-marks of gun shots on the walls outside the house as well as inside – finding of a pistol under the body of the deceased and a opened clasp knife near the body.

The above three grounds raised the question as to what are the proper directions to be given by a Judge to a Jury at a trial for murder. It is to be noted that there is no prescribed form of a summing up in a trial for murder. The adequacy of a summing up will depend on the evidence in a particular case. If there is evidence which the jury can reasonably take into consideration as reducing the offence of murder to one of culpable homicide, then it is the duty of the Judge to include in his summing up directions relating to culpable homicide not amounting to murder. In the case of *Rex v. Mohideen Meera Saibo*[1], it was held that in a charge for murder where there is evidence of provocation the entirety of the evidence bearing on the question of provocation should be put to the Jury even though the accused expressly says that he was not provoked. The rationale in this case is that it was undoubtedly the duty of the Judge in summing up to the Jury, to deal adequately with any defence which might reasonably arise on the evidence given and which would reduce the offence from murder to culpable homicide. If there is no evidence before the Court to reduce murder to culpable homicide then the Judge cannot be faulted for not inviting the Jury to consider a lesser offence. For example if the prosecution case is that the accused has committed murder by secretly administering poison, this does not give room for the defence to complain that Judge should invite the Jury to consider provocation.

In the present case the appellant's Counsel contended that the Judge should have directed the Jury on the right of private defence and sudden fight.

The entire evidence in this case as narrated by the wife of the deceased and eye witness Somadasa is that when they were walking on the road the accused-appellant beckoned the deceased into his house on the pretext of settling an old misunderstanding and after a short conversation when they were about to leave suddenly shot the deceased on the head having taken a gun from behind a door. Witness Somadasa further stated that after this incident he informed the wife of the deceased who was running towards him and went home. When he was in his house he heard several gun shots from the direction of the accused's house. He had been questioned as to whether the deceased was armed, to which the witness had answered in the negative. Further according to this witness the conversation was very cordial. In these circumstances, it is our view that the question of a sudden fight and or private defence does not arise. It is also relevant to note that the Senior Defence Counsel had suggested to witness Somadasa that when they were having a conversation on the verandah the deceased received a shot fired from outside by a 3rd party and he died. This suggestion too was denied by witness Somadasa. In the light of this suggestion the contention of the Appellant's Counsel bears no merit. There are two things implicit in this suggestion by the defence. Firstly that the deceased and accused were present at the scene of the crime and secondly that the deceased had not done any aggressive act at the time he was shot.

The evidence of Somadasa reveals that shortly after the deceased was shot there had been several incidents. According to him when he was at home he heard several gun shots from the direction of the accused-appellant's house. When the defence counsel suggested to him that there were 50-60 such shots he accepted that. Even the Police Officer Dassanayake says that when he went to the scene at 11.30 a.m. i.e. three hours after the incident he had heard 7-8 gun shots from the direction of the house of the accused.

Learned Counsel for the appellant contended that witness Somadasa is not a truthful witness for the reason that he did not report the incident to the Police immediately and because he did not run from the scene soon after the incident but had casually left the scene. The Jury at page 70 had questioned the witness on this

aspect and it was his answer that he did not know what to do when suddenly accused shot the deceased on the head. Somadasa's evidence that the deceased was shot on the head is corroborated by medical evidence. It was Somadasa's evidence that he saw the wife of the deceased come running towards him on the road and told her that Chandare was shot by the accused and went home. As far as Somadasa was concerned he had given the information to the party concerned and there was no further duty on him. When the Police questioned him he gave a statement later in the day. It is to be observed that on receipt of the information from Somadasa, the wife of the deceased had run to the Police Station which was 4-5 miles away. In the circumstances, we are unable to accept the contention that Somadasa is not a truthful witness.

It is relevant to observe that two dead bodies were found in the accused house. The accused was present in Court when witness Somadasa said it was the accused who shot the deceased. However, accused chose to remain silent at the trial and expected the prosecution to establish as to what happened in his house which the prosecution did through the evidence of Somadasa. From the Police observations one gets the impression that the scene of crime had been dressed up to a certain extent after the main event for reasons best known to the accused-appellant.

In this case the Jury has convicted the accused by a S:2 verdict which is an acceptable verdict. The conclusion on the facts is for the Jury. We are unable to accept that there are errors in the summing up having considered the evidence in this case. We, therefore, affirm the conviction and sentence imposed on the accused-appellant and dismiss the appeal.

D. P. S. GUNASEKERA, J. (P/CA) – I agree.

Appeal dismissed