ANURA SHANTHA *ALIAS* PRIYANTHA AND ANOTHER
v.
ATTORNEY-GENERAL

COURT OF APPEAL
ISMAIL, J. (P/CA),
DE SILVA, J.,
C.A. NO. 105–106/96
H.C. COLOMBO NO. 7559/95
MARCH 10 AND 11, 1998

Criminal Law – Murder – Culpable Homicide not amounting to murder – Exceeding the right of private defence – Requirement of delivery of verdict forthwith – Section 203 of Code of Criminal Procedure Act.

If the accused exceeds the right of private defence, not *bona fide but with* premeditation and with deliberate intention of inflicting more harm than is necessary for the purpose of self-defence, liability for murder may be imposed if the victim's death is brought about. If the accused is to be allowed the benefit of the mitigatory plea their action should not have been "maliciously excessive or vindictively unnecessary".

The provisions of s. 203 of the Code are directory and not mandatory. This is a procedural obligation that has been imposed upon the Court and its non-compliance would not affect the individual's rights unless such non-compliance occasions a failure of justice.

Cases referred to:

1. *R. v. G. L. Kirinelis* – (1948) 34 CLW 13, 15.
2. *Venacy v. Velam et el* – I NLR 124.
3. *Rodrigo v. Fernando* – 4 NLR 170.
4. (1909) *P.C. Panadura* – 5 NLR 140.
5. *A. G. A., Kegalle v. Podi Sinno* – 18 NLR 28.
6. *R. v. Fernando* – (1906) 2 Bal 46.
7. *Samsudeen v. Suthoris* – 29 NLR 101.
8. *Vethanayagam v. I. P. Kankasanthurai* – 50 NLR 185.
9. *Dharmasena v. State* – 79 (1) NLR 320.
10. *Nikulas v. Linus* – (1978-79) 2 Sri LR. 63
11. *Visvalingam v. Liyanage* – (1983) 1 Sri LR 203.

APPEAL from judgment of the High Court of Colombo.

U. D. M. Abeysekera with *U. L. S. Marikkar* for 1st accused-appellant.

A. A. de Silva, PC with *U. L. S. Marikkar* for 2nd accused-appellant.

Jayantha Jayasuriya, SSC for Attorney-General.

Cur. adv. vult.

April 02, 1998.

DE SILVA, J.

The two accused-appellants (hereinafter referred to as the accused) were indicted in the High Court of Colombo that they on or about the 10th of September, 1993, committed murder by causing the death of Kaluarachchige Quintus Perera, an offence punishable under section 296 of the Penal Code.

After a trial before a Judge of the High Court sitting without a Jury the accused were acquitted of murder but the trial judge found each of them guilty of culpable homicide not amounting to murder and sentenced each of the accused to a term of 12 years, rigorous imprisonment.

The case for the prosecution was largely based on the evidence of two eyewitnesses, namely Kaluarachchige Buddika Perera and Bulathsinghalage Premawathie Perera, the son and the mother of the deceased.

Quintus Perera was a three wheel driver who was living with his mistress Chandrawathie at Dematagoda. His wife died after an operation and Buddika was his son from that marriage. Buddika was a boy of 12 years at the time of the incident and was living in the same house with his father and the stepmother.

According to Buddika on the day of the incident his father came home around 9.30 pm and there was an argument between the father and the stepmother. After some time the stepmother went to his grandmother, Premawathie Perera's house which was in close proximity. A few minutes later the grandmother came to their house and scolded the father. His father in turn had scolded the grandmother and gone to the grandmother's house looking for the stepmother. Quintus was armed with an iron rod. There was also a long knife in his waist. Buddika stated that as his father was a three wheel driver

he used to always carry this knife for protection specially in the night. Premawathie had stated that at the time of the incident Chandrawathie was pregnant.

When Quintus went to Premawathie's house his mistress Chandrawathie who had been hiding inside had run away. Having come out of the house Quintus was leaning against a coconut tree, which was 10 feet away from the house. At that stage the 2nd accused Indu came from behind and stabbed Quintus on the chest several times with a knife. Thereafter when he was holding the hands of the deceased the 1st accused came running and having taken the knife which was in the waist of Quintus and cut him with that. After inflicting the injuries both the accused had left the scene. The deceased after receiving injuries ran a few yards and fell near a CWE stores. Buddika followed him and the deceased requested Buddika to go to the Police Station which was close by. On Buddika's complaint Police removed the injured to the hospital where he succumbed to his injuries in the morning.

The version of Buddika was corroborated by the grandmother who was also present at the scene. The two accused had exercised their right to remain silent and did not give evidence or made statements from the dock.

The nature of the injuries described by Dr. Peiris who carried out the post-mortem examination made it clear that this unfortunate man had 17 injuries out of which 6 were stab injuries, 1 cut injury and 10 abrasions. The doctor has described the 6 stab injuries, viz injuries 1, 2, 5, 7, 12, and 13 as follows :

(1) Injury No. 1 situated on the left side of the chest length 1" width 1/4". The direction of the blow was downwards. The cartilages of 7th, 8th and 9th ribs of the left side were cut.

(2) Injury No. 2 stab injury on the upper abdominal wall length 1" width 1/4" the direction of the blow was upwards. It had pierced the diaphragm on its right side length 1 3/4" and right side of the left lobe of the liver length 1 3/4".

(3) Injury No. 5 was a stab injury lateral side of the left upper arm situated 5" above the elbow joint. Length 1" width 1/4".

(4) Injury No. 7 stab injury medial side of the upper arm 1/2" + 1/4".

(5) Injury No. 12 stab injury on the back of the chest just below the tip of the right shoulder blade length 1 1/4".

(6) Injury No. 13 is a stab injury over the left shoulder blade. Length 1" tailing abrasion length 2" towards the left shoulder joint.

The cause of death has been given as shock and hemorrhage following injury to the chest. According to the doctor two knives had been used to cause the stab injuries and the cut injuries. This corroborates witness Buddika when he says he saw a knife in the hands of the 2nd accused and the 1st accused used the knife of his father which he had in his waist.

At the hearing of this appeal counsel for the 1st and the 2nd appellants brought to the notice of this court that the learned trial judge in her judgment at page 215 in the brief has made the following observations :

The learned trial judge in the course of the judgment has stated that –

(1) it is natural in a civilized society for anybody to come to the assistance of a pregnant woman who is in imminent danger of assault.

(2) the deceased had several abrasions on his body therefore there arise a doubt as to whether the deceased came by his death in the course of sudden fight.

(3) when considering all the facts and circumstances there arises a doubt as to whether the two accused acted in this manner under grave and sudden provocation.

Having made the above observations the learned trial Judge convicted the accused-appellants for culpable homicide not amounting to murder on the basis that the accused-appellants had acted not with "common intention to commit murder" but with "common intention to cause culpable homicide not amounting to murder".

Both counsel submitted that having expressed the above sentiments the learned trial judge was in error when she convicted the accused and stated that if the trial judge accepted the fact that the accused had acted in the exercise of their right of private defence both the appellants are entitled to an acquittal.

It is to be noted that with regard to the second and third observations the question of acquittal does not arise as those are circumstances where the trial judge can hold that the accused are guilty of culpable homicide not amounting to murder if there is evidence.

The question that needs consideration is whether the trial judge's observations regarding the exercise of the right of private defence is justifiable.

As set out earlier there are two eyewitnesses in this case. Both the witnesses say that the attack on the deceased took place when he was leaning against a coconut tree which was about 10 feet away from Premawathie's house. The mistress of the deceased was nowhere to be seen. There was no evidence in the case that the deceased was about to attack his mistress and in order to prevent that the accused intervened.

Exception 2 to section 294 of the Penal Code provides that : "culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and cause the death of the persons against whom he is exercising said right of private defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence".

The positions arising from this exception and from other relevant provisions of law, may be stated as follows :

(1) Where the accused acts in the exercise of his right of private defence, whether of persons or of property, and restricts himself to the legitimate limits of that right, any harm caused to the aggressor, including infliction of death, does not involve the accused in criminal liability at all. He is entitled to a complete exculpatory plea.

(2) Where the right of private defence could properly have been availed of, but the accused, in killing the deceased, exceeds that right in good faith, without premeditation and without any intention of doing more harm than necessary for the purpose of self-defence, the accused is neither convicted of murder nor released from liability altogether. In such a case the appropriate verdict is a lesser verdict of culpable homicide not amounting to murder.

(3) If the accused exceeds the right of private defence, not *bona fide* but with premeditation and with deliberate intention of inflicting more harm than is necessary for the purpose of self-defence, liability for murder may be imposed if the victim's death is brought about (see Peiris on Offences under the Penal Code of Ceylon.).

When considering the trial judge's observation in the light of the principles set out above it is relevant to note the evidence of the two eyewitnesses. As stated earlier both these witnesses say that the attack on the deceased took place when he was leaning against a coconut tree which was about 10 feet away from Premawathies house. The mistress of the deceased was nowhere to be seen.

The concept of "intention" in the phrase "without any intention of doing more harm than is necessary" was considered by Justice Keuneman in *Kirinelis* case[1] at 15 and stated that this "intention" is a special intention which connote some element of ill will or vindictiveness. If the accused are to be allowed the benefit of the mitigatory plea, their action should not have been "maliciously excessive or vindictively unnecessary.

It is the evidence of Premawathie that the 2nd accused-appellant came from adjoining houses and stabbed the deceased from behind stating මොකද දර්ශනේ දානවද? (page 92) and held him whilst the 1st accused took the knife which the accused had in his waist and cut him. This utterance on the part of the 2nd accused show that their action was "maliciously excessive and vindictively unnecessary".

In the light of this evidence the learned trial judge could have convicted the accused for murder. In the absence of any evidence either from the prosecution or from the defence with regard to the

exercise of the right of private defence the learned trial judge had given a concession to the defence by convicting them for culpable homicide not amounting to murder of which they are now trying to take an undue advantage.

In convicting the accused the learned trial judge has stated that they had not acted with common intention to murder but with common intention to commit culpable homicide. In our view this is an erroneous statement. Having come to the conclusion that there was no common murderous intention the trial judge should have considered individual liabilities of the accused.

We uphold the conviction for culpable homicide not amounting to murder on the basis of knowledge.

It was also submitted that the learned trial judge failed to comply with the Mandatory Provisions of section 203 of the Criminal Procedure Code in that she did not record the verdict forthwith or within ten days of the conclusion of the trial and therefore the conviction is bad in law.

S. 203 of the code provides that at the conclusion of the trial the judge shall "forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving his reasons therefor . . . "

This matter has been discussed earlier in a number of cases going back to *One New Law Report* where Bonser, CJ. observed that : "it is most desirable that Magistrates and District Judges should state their findings as to guilt or innocence of the accused immediately at the conclusion of the trial, and that the impression left upon their minds by the prosecution after hearing all the evidence, is so weak and unsatisfactory that they are unable to say whether they consider the accused to be guilty or not, they should give the accused the benefit of the doubt and acquit." *Venacy v. Velan et al*[2].

So also in *Rodrigo v. Fernando*[3] at 170 Withers, J. held that it is important that a Magistrate "should observe the requirements of S 190 of the Criminal Procedure Code as to the duty of recording his verdict of acquittal or guilty forthwith after hearing the evidence for the prosecution and the defence".

Again in *PC Panadura*[4] Lawrie, ACJ. held that it was "ultra vires to give a verdict a month after the trial. It must be given forthwith." In *AGA, Kegalle v. Podi Sinno*[5] Pereira, J. citing *Venasy, (supra) Rodrigo v. Fernando, (supra) P.C. Panadura*, and *R. v. Fernando*[6] also held that since there had been a delay of six months in delivering the verdict it was an incurable irregularity. But his Lordship appears to have followed *K. v. Fernando* (*supra*) Bal 46 where Wednt, J. had held that " . . . it did not vitiate the proceedings unless it had occasioned a failure of justice." Pereira, J. observed that it would not be fair by the accused to "apply the saving provisions of s. 425 of the Criminal Procedure Code". But as will be observed on a perusal of those cases there was no in depth analysis of the provisions of s. 190 of the Old Criminal Procedure Code. The Courts had very briefly dealt with the section by giving a literal construction to the prescriptive provision.

In *Samsudeen v. Suthoris*[7] Dalton, J. gave a different interpretation to s. 190 which read : "If the Magistrate after taking the evidence for the prosecution and defence finds the accused not guilty he shall forthwith record a verdict of acquittal. If he find the accused guilty he shall forthwith record a verdict of guilty and pass sentence according to law". After considering the above-mentioned cases of *Rodrigo v. Fernando* and *PC Panadura*."I have the greatest difficulty in following those decisions as regards what that section enacts". Dalton, J. analyzed the provisions to mean that the word forthwith operated at the time of arriving at the verdict and not from the time of concluding the evidence. His Lordship's view was that the Magistrate must record the verdict forthwith upon reaching it and it had no reference to the closure of the prosecution or defence. In closing Dalton, J. also commented that in that case "in any case no failure of justice had been occasioned."

Thereafter, in *Vethanayagam v. IP, Kankasanthurai*[8] where the verdict was given five days after the close of the respective cases for the parties, Basnayaka, J. dissented from the decision in *Samsudeen v. Suthoris* (above) on the basis of impracticality. His Lordship observed that "Enactments regulating the procedure in the courts are as a rule imperative". (page 189). That judgment has considered the above decisions and preferred to follow that the provisions were mandatory following Bonser, CJ. Withers, J. and Lawrie, ACJ. In another case, determining the meaning of "forthwith" as appearing in s. 151 (2) of the Criminal Procedure Code.

Where the Magistrate "shall forthwith examine on oath any person who. . . can speak to the facts of the case. . ." Sri Skandarajah, J. held that the word only meant "within reasonable time" or "as soon as practicable".

In *Dharmasena v. State*[9] the Supreme Court considered this matter again-where the Criminal Procedure Code set out that when the cases for the prosecution and defence are concluded. . . the District Judge shall forthwith or within not more than 24 hours record a verdict of acquittal or conviction", it was held that : "the failure to record a verdict of conviction within 24 hours after the conclusion of the defence will not vitiate the conviction unless it has occasioned a failure of justice". Wijeyatilleke, J. observed that non-compliance with the provisions was only an irregularity and not an illegality. Justice Rajaratnam too held the same view.

In *Nikulas v. Linus*[10] Abdul Cader, J. delivering judgment in 1978 held that the provisions of the Criminal Procedure Code that the verdict of the Magistrate must be recorded within 24 hours was mandatory. But the above decisions do not appear to have been considered in that decision.

Therefore, it would appear that the Courts have moved from one end to the other and back again in the analysis of the meaning of "forthwith" or where a time period is prescribed for the recording of a verdict. The current trend appears to favour the view that non-compliance with the provisions will only give rise to a curable irregularity depending on the question of prejudice to the accused as may have been occasioned by the delay.

It would appear that finally the issue rests on whether the provisions in s. 203 of the Code of Criminal Procedure Act are directory or mandatory. In this context I would refer to the decision of a full bench in *Viswalingam v. Liyanage*[11] which was a Fundamental Rights Application. (10) Here it was held that the provisions of Article 126 (5) of the Constitution which provided that the Supreme Court shall hear and finally dispose of the application within 2 months of the filing of such petition is directory only and not mandatory and failure by the Supreme Court to dispose of the application within the prescribed period will not nullify the petition or the order. Samarakoon, CJ. observed that : ". . . it was only an injunction to be obeyed but fell short of punishment if disobeyed". The court went on the basis that

to deprive a person of his fundamental rights due to a lapse on the part of the Court was unacceptable.

I am of the view that the provisions of s. 203 are directory and not mandatory. This is a procedural obligation that has been imposed upon the Court and its non-compliance would not affect-the individual's rights unless such non-compliance occasioned afailure of justice. As such, I am reluctant to hold that such provisions should be blindly adhered to – and indeed where such adherence may cause a mis-carriage of justice in itself. The right of the accused is to a just and fair trial and the returning of a just and fair verdict. To interpret the law as operating to automatically disqualify a verdict and vitiate a full trial merely on the basis of non-compliance with a procedural directive issued to the judge to my mind is unsound. But, I must hasten to add that non-compliance with statutory provisions by Courts themelves is disturbing and should not be encouraged.

In this case the recording of evidence was concluded on the 22nd of January, 1996. Thereafter, on a request made by the defence counsel and the prosecuting counsel the addresses were fixed for the 5th of February, 1996. On that day oral submissions had been concluded but the defence counsel has requested a date to file written submissions and that had been fixed for the 12th of February 1996, on which date the defence filed a short written submission. Thereafter, the judgment had been delivered on the 27th of February, 1996.

The real question is whether such non-compliance occasioned a failure of justice. In this case the delay was only three to four days and in the circumstances we hold that there is no failure of justice that has been occasioned due to the delay. Accordingly, I affirm the conviction. I also note that the conviction is on 27.02.96 and the accused-appellants are on remand from that date. I set aside the sentence of 12 years, rigorous imprisonment imposed on the appellants and sentence each of them to a term of 7 years, rigorous imprisonment from today. Subject to the above variation the appeals are dismissed.

ISMAIL, J. – I agree.

Sentence varied.

Appeal dismissed.