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

In the matter of an appeal from the Judgment of the Civil Appellate High Court of Colombo in the Western Province dated 20.11.2013.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant

Vs.

S.C. Appeal No. 168/2018
S.C./SPL/LA No.192/2017
C.A. Case No. 71-71/2016
HC Case No.93/2010

1. Punchi Hewage Jagath Roshan alias Jagath.
2. Punchi Hewage Rasika Hasan alias Babu.
3. Sudirukku Hannadige Anil Prasanna aliasTikira
4. Punchi Hewage Samantha alias Mahathun.

Accused

AND

Punchi Hewage Jagath Roshan alias Jagath.

1st Accused-Appellant

Punchi Hewage Samantha alias Mahathun.
4th Accused-Appellant

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Complainant-Respondent

AND NOW BETWEEN

Punchi Hewage Samantha alias Mahathun.
4th Accused-Appellant-Appellant

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Complainant-Respondent-Respondent

BEFORE : **MURDU N.B. FERNANDO, PC, CJ.**
YASANTHA KODAGODA, PC,J.
ACHALA WENGAPPULI, J.

COUNSEL : Darshana Kuruppu with Buddhika Thilakaratne and Sahan S. Weerasinghe for the 4th Accused-Appellant-Appellant
Hiranjan Peiris SDSG for the Complainant-Respondent-Respondent

ARGUED ON : 06th June, 2023

DECIDED ON : 25th July, 2025

ACHALA WENGAPPULI, J.

The Attorney General presented an indictment to the High Court holden at *Matara,* alleging that the four accused named therein have committed the murder of one *Punam Chiristombuge Chandralal* on or about 05.07.2007 at *Polathumodara.* The accused appellant- appellant in the instant appeal was the 4th accused named in the said indictment and shall accordingly be referred to hereinafter in this judgment as the "4th accused". The trial of the four accused, upon their own selection proceeded without a jury. At its conclusion, the High Court found the 1st and 4th accused guilty for the offence of murder, while entering verdicts of acquittals in respect of the 2nd and 3rd accused. The reason for the trial Court's decision to acquit the 2nd and 3rd accused was that it entertained reasonable doubt whether these two accused have shared the common murderous intention with which the 1st and 4th accused acted on. The trial Court concluded that the 1st and 4th accused committed the murder, when they attacked the deceased with that intention.

The 1st and 4th accused have preferred appeals to the Court of Appeal (CA 71-72/2016), against their conviction for murder and the consequential imposition of death sentence. The Court of Appeal, in delivering its judgment, now being impugned by these proceedings, had partly allowed the appeal of the 1st accused. The Court of Appeal set aside the conviction for murder and substituted same with a conviction for

culpable homicide not amounting to murder. The appellate Court has thereupon proceeded to impose a ten-year term of imprisonment on the 1st accused for his complicity in the death of the deceased.

The appeal of the 4th accused however was dismissed after affirming the conviction for murder entered against him. On 29.07.2020, the judgment of the Court of Appeal was corrected with the insertion of "*[T]he 4th Accused-Appellant's conviction under [Section] 296 is affirmed*".

The 4th accused thereupon moved this Court, seeking special leave to appeal against the said judgment and invited this Court to have it set aside. This Court, by its order dated 26.10.2018, granted special leave to appeal on the following questions of law:

a. has the Court of Appeal erred in failing to evaluate the evidence in the case in its totality and the failure to appreciate the same and on an impartial and objective evaluation of the evidence, there was clearly, at the very least, a reasonable doubt as to the guilt of the 4th accused ?
b. has the Court of Appeal erred in law by affirming the conviction of the 4th accused for murder while convicting the 1st accused for culpable homicide not amounting to murder on the basis of a sudden fight?
c. has the Court of Appeal failed to consider that the 4th accused also can be convicted for culpable homicide not amounting to murder on the basis of a sudden fight as facts and circumstances of the case is similar to the 1st accused?

d. has the Court of Appeal failed to consider that the facts and the circumstances of the case show that attack was not premeditated one nor was there a prior concert?

During the hearing of the instant appeal, learned Counsel for the 4th accused strongly urged before this Court that the evidence presented by the prosecution in itself indicative of a sudden fight, that had erupted between the deceased and the four accused, but the Courts below have fallen into a common but a serious error, in failing to consider that vital factor in favour of his client. He further submitted that if those Courts did consider the relevant evidence in its proper perspective, the 4th accused should have been afforded with the benefit of sudden fight, as it would clearly have satisfied the requisites of *Exception 4* of Section 294 of the Penal Code, which makes him guilty not to the offence of murder but to the offence of culpable homicide not amounting to murder.

In order to make an assessment of the extent to which the adverse impact created by the said error attributed to the appellate Court by the learned Counsel on the question of applicable criminal liability of the 4th accused, it is imperative that this Court considers the several questions of law in light of the body of evidence that had been presented before the trial Court by the prosecution, the factual positions that were suggested by the 4th accused during his cross-examination of the prosecution witnesses along with his evidence presented to trial Court, in the form of a statement made from the dock and to have them tested against the applicable principles of law.

The only eyewitness to the incident, *Shanika Amali* is the sister-in-law of the deceased. Her husband and his brother (the deceased) were engaged in the fish trade. They used to buy stocks of fish from businessmen, who brought their stocks of fish collected from fishermen in *Kalpitiya, Mannar* and *Uda Walave* areas. These trade transactions were conducted in an open area that lies adjacent to the deceased's house, which the witness described as "මාළු පොල".

Describing the incident during which the deceased lost his life, *Amali* said in her evidence that, in the afternoon of the day of the incident, one such businessmen, who delivered a stock of fish that morning, came to meet her husband, in order to collect his dues. He complained to her husband that a group of drunkards have demanded fish from him. The businessman was loading his empty crates back into his vehicle, when this demand was made. Upon being told that he had no fish to offer, one of the drunkards, had forcibly taken the ignition key of the vehicle.

Upon hearing the complaint, *Amali's* husband went out to enquire what was happening and found the four accused have gathered near the lorry parked in " මාළු පොල". The 1st and 2nd accused, who are siblings and were living in a house situated on the other side of the " මාළු පොල". The 3rd accused is a resident of *Mirissa* area while the 4th accused is from the adjoining village. The witness, who knew all four of them prior to the incident identified all of them. She then added that, all four were singing while consuming alcohol since morning of that day.

Amali's husband requested them to return the key to its owner. One of the four accused threw away the key to the ground. They questioned

Amali's husband whether he too is a thug (උඹත් වන්ඩියෙක්ද). Thereupon, the group proceeded in the direction of the 1st accused's house and the witness's husband walked back towards his house. The witness and her husband however, were standing on the road in front of their house.

The deceased, who apparently heard the shouting at "මාළු පොල", came out of his house only at that point. Having crossed over the main road, the deceased had walked in the direction of the 1st accused's house. The four accused, who by then were gathered in front of the 1st accused's house, had surrounded the deceased who walked up to them. There was no exchange of words between any of them. In a flash, all of them have attacked the deceased with their fists. While the attack on the deceased was continuing, the 1st accused suddenly ran into his house and brought back a rice pounder.

The 4th accused, without making any utterance, had snatched the rice pounder from the 1st accused and hit the deceased on the crown of his head twice. The deceased, after receiving blows on his head, collapsed on the ground. The 4th accused thereafter ran away carrying the rice pounder along with him. The other three accused too had dispersed after the deceased has fallen down.

The deceased was bleeding from his head injuries and could not speak. He only made a gargling sound. He was immediately rushed to hospital where he was pronounced dead on admission. It was the witness who provided the first information of the incident to the police, after accompanying the deceased's wife there. The witness has implicated all

four accused as the persons who are responsible for causing the death of the deceased.

Chief Inspector *Ranjith* of *Weligama* police station investigated into this incident. Upon visiting the scene, he observed a clotted blood patch, which spread over an area of three feet, and several small blood patches scattered on the *Galle-Matara* main road. He also noted several small fragments of wood (කුඩා කැබලි), which he presumed to have broken off from a stick. This was observed in front of the house in which the 1st and 2nd accused lived and also of the deceased's own house on the opposite side. He did not search for the rice pounder, since his investigations revealed that the accused had taken it along with him when he fled the scene. None of the accused were arrested by the police. They evaded arrest after fleeing from the area. The 1st and 2nd accused have surrendered to police after four days since the incident *i.e.*, on 09.07.2007, whereas the 3rd and 4th accused have surrendered directly to Court, through their Attorney-at-Law.

The above, being a brief examination of the narrative presented by the prosecution before the High Court, however does not lend any support to the 4th accused's claim that the deceased had attempted to stab him or any of the other accused. It is of relevance to note that it does not support even an inference that the deceased had at least started a verbal altercation with the 4th accused or any of the other three accused, over their demand of fish.

The High Court, after having considered the evidence presented before it by the parties, decided to reject the evidence of the 4th accused

and proceeded to hold that the charge of murder against him was established beyond reasonable doubt. The trial Court particularly considered the contention advanced by the 4th accused, before this Court as well as the trial Court, that he was stabbed by the deceased. The trial Court was of the view that if the 4th accused had suffered any serious stab injury as he claims, there was no reason for that fact not to be revealed during the investigations. The impartiality of the officers who investigated the incident was never questioned or challenged by any of the accused.

In challenging the validity of his conviction for murder, the 4th accused complained to the Court of Appeal in the petition of appeal, the High Court failed to consider the prosecution evidence that the deceased and the accused were engaged in a sudden fight and it failed to afford the benefit of being convicted for the lessor offence of culpable homicide not amounting to murder on account of that evidence.

The Court of Appeal accepted the contention presented by the 1st accused before that Court of not sharing a common murderous intention with the others. It then proceeded to alter his conviction by setting aside the conviction for murder and substituting same with a conviction for lessor offence. The Court of Appeal however decided to affirm the conviction of the 4th accused to the offence of murder entered by the High Court on the premise that there was no evidence of sudden fight during which any of the accused sustained any injury and it was the 4th accused, who dealt the fatal blow on the head of the deceased.

In order to test the legal validity of the conclusions reached by that Court to impose criminal liability on the 4th accused for the offence of

murder, and to test the validity of the impugned decision of the Court of Appeal in affirming that conviction, it is necessary for this Court to consider the respective lines of reasoning adopted by the trial Court as well as the appellate Court, and to test them in the light of applicable principles of law relating to sudden fight.

With that intention in mind, I shall first refer to the relevant principles of law.

Section 294 of the Penal Code, whilst defining the offence of murder, also states that "*except in the cases hereinafter excepted, culpable homicide is murder*" and lists out five such exceptions in that Section. *Exception 4* of Section 294, application of which is the primary issue in the instant appeal, reads thus; " *[C]ulpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and the offender having taken undue advantage or acted in a cruel or unusual manner.*" The "*Explanation"* that follows the said exception also reads that " *[I]t is immaterial, in such cases, which party offers the provocation or commits the first assault*."

This Court, in the course of its judgment in ***Bandara v The Attorney General*** (2011) 2 Sri L.R. 55, reproduced a section from the text of ***Law of Crimes***, by *Ratanlal and Dhirajlal* (24th Edition, 1998, page 1339), which describes the requisites to be established before Court in relation to Indian Penal Code, in order to derive the benefit of *Exception 4*. Section 300 and its *Exceptions* of Indian Penal Code are identical to that of Section 294 of our Penal Code.

The several requisites that are listed therein are as follows:

1. it was a sudden fight

2. there was no premeditation

3. the act was committed in a heat of passion and

4. the assailant had not taken any undue advantage or acted in a cruel manner.

Since the contention presented by the 4th accused is premised on the failure of the lower Courts to impute lessor culpability on him, in terms of exception 4 of Section 294 of the Penal Code, I intend to make a brief reference to the law applicable as to the question on whom the burden of bringing a case into the said exception lies.

In the judgment of ***Woolmington v Director of Public Prosecutions*** (1935) A. C. 462, pronounced on 23rd May 1935, Viscount Sanky L.C. famously stated (at p. 481):

> *"[T]hroughout the web of English Criminal Law one golden thread is always to be seen, that is the prosecution to prove the prisoner's guilt … If, at the end and whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge, or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained."*

After a lapse of about seven years since the pronouncement of the said judgment in *England*, in the case of ***The King v James Chandrasekera*** (1942) 44 NLR 97, a divisional bench of the Court of Criminal Appeal consisting of seven Judges, was called upon to determine the question, in a case in which any general or special exception in the Penal Code is pleaded by an accused person and the evidence relied on by such accused fails to satisfy the Jury affirmatively of the existence of circumstances bringing the case within the exception so pleaded, whether that accused is entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the Jury as to whether he is entitled to the benefit of the exception so pleaded, particularly in view of the pronouncements already made in ***Woolmington v Director of Public Prosecutions*** (supra) and, having regard to Section 105 of the Evidence Ordinance and also to the definition of 'proved' in Section 3 thereof.

Howard CJ, with the concurrence of the majority of Justices (*De Kretser* J dissented), held (at p. 117) "*…that the Jury shall regard the fact as proved that the accused did not exercise the right of private defence till it is satisfied that he did so or that it is so probable that he did so that a prudent man should act on that supposition*". This Court, in the course of its judgment of ***Bandara v The Attorney General*** (supra), has re-emphasised that it is for an accused, who wishes to avail himself of the benefit of the imposition of lessor culpability on the basis of sudden fight in terms of *Exception 4*, to satisfy Court of the several requisites to bring in his case into that exception. Hence, in relation to the appeal before this Court, it is the 4th accused who is expected to establish that there was a sudden fight in terms

of *Exception 4* of Section 294 on a balance of probability, if he were to receive the expected benefit of the imposition of lessor culpability.

The question whether the 4th appellant has sufficiently discharged his evidentiary burden before the trial Court in respect of all of these requisites must be answered only upon a consideration of the evidence presented before that Court.

The narrative of the prosecution witnesses, particularly of the only eye witness to the incident clearly does not favour a finding that there was a sudden fight in terms of *Exception 4.* The evidence of the 4th accused, presented in the form of a statement from the dock also failed to provide such evidence. This is because the 4th accused has stated in his statement from the dock that **"මේ සාක්ෂිකාරිය කියන්නේ බොරු. සිද්ධිය හරියට එයා දැක්කේ නැහැ. මේ සිද්ධියෙන් පසුව මට ලාල් පිහි පහරවල් තුනක්ම ඇන්නා. මට බේරෙන්න බැරිම තැන මම බිම වැටුනා. ඊට මම නැගිටලා දිව්වා. මට කියන්න තිබෙන්නේ එපමනයි".***(Sic)* The 4th accused, therefore did not admit that he dealt the fatal blows on the deceased and that too was during a sudden fight. Instead, he speaks of a situation where the deceased had stabbed him after "*this incident*" (**"මේ සිද්ධියෙන් පසුව"**).

In view of the factual assertions contained in the dock statement, it is reasonable to assume that when the 4th accused said " *this incident*", he was in fact referring to the incident in which the deceased has suffered his fatal injuries. The 4th accused, by stating that the alleged act of stabbing by the deceased has happened after "*this incident*", is clearly indicative of the fact that, the act of stabbing has happened at a subsequent stage to the attack on the deceased. Therefore, in effect, the 4th accused made no attempt during his evidence to bring his case within time frame of the attack on the

deceased as the *Exception 4* speaks of " … *in a sudden fight in the heat of passion upon a sudden quarrel*" indicative of a specific time frame within which he had caused the death, although he now seeks to claim its benefit by placing reliance on the evidence of the prosecution.

In such a situation, the function of the trial Court was examined by the Court of Criminal Appeal in ***Luvis v The Queen*** (1954) 56 NLR 442. In view of several judicial precedents on the point, it was held by that Court (at p. 444):

> *" … although it was an integral part of the appellant's defence at the trial that the deceased came by his death in the course of a sudden fight, it was not specifically raised as a defence that the appellant was the person who inflicted the fatal injury in the course of that fight, but having regard to the evidence we were satisfied that the fact that such a defence was not specifically raised did not relieve the learned trial Judge of the duty of placing before the Jury that aspect of the case."*

This underlying principle recognised by a series of judicial precedents places a duty on the Courts to consider the entirety of the evidence in which there may be some that might have a bearing on the issue of sudden fight. Accordingly, the evidence of the only eye witness as well as the evidence of other prosecution witnesses will have to be examined at this juncture in a more descriptive manner. This is necessitated in view of the contention advanced by the learned Counsel on behalf of the 4th accused.

Since the statement made by the 4th accused failed to provide any material to justify a conclusion that the deceased sustained his fatal injuries during a sudden fight, the evidence placed before the trial Court should be scrutinised in its entirety to determine whether he should be given the benefit of *Exception 4.* In this regard, and in the absence of the evidence of the eyewitness to support such a position, it is important to consider the nature of the suggestions that were put to her by the 4th accused, during his cross- examination of her. The suggestions that were put to the witness that have a bearing on the question of sudden fight shall be considered in this regard.

It is already noted earlier on that the prosecution's narrative does not support a factual position there was a sudden fight between the deceased and the 4th accused. In fact, the eyewitness has effectively denied of such an incident. In this regard, it is therefore very relevant to consider the positions suggested by the 4th accused during his cross-examination to the eyewitness *Amali.* In order to retain the originality of the exact positions that were suggested to her during cross-examination, I have reproduced below the most relevant sections from the proceedings conducted before the trial Court (at page 121 of the appeal brief):

ප්‍ර. මම තමුන්ට යෝජනා කරනවා මහතුන්ට පිහියෙන් අනින්න මේ තැනත්තා පිහි පාරවල් පැන පැන අනින කොට ඒ අවට හිටි අය ඉන් එහාට මේ සිද්ධිය වෙන්න නොවෙන්න කෑගලා මේක බේරන්න උත්සාහ ගත්තා කියලා මම තමුන්ට යෝජනා කරනවා?

උ. නැහැ මම එහෙම දෙයක් දුටුවේ නැහැ.

ප්‍ර. කිසිම කෙනෙකුට වැඩිහිටියෙකුටවත් කවරෙකුටවත් මරණකරු සවන් නොදුන් නිසා සහ ඔහු තව දුරටත් මහතුන්ට පිහියෙන් ඇනීමට උත්සාහ කිරීම නිසා

එයින් මිදීම සඳහා අසල තිබිච්ච ඒ ආසන්නයේ තිබිච්ච වැටක තිබිච්ච පොලු කෑල්ලක් අර ගෙන තමන්ගේ ජීවිත ආරක්ෂාව සඳහා පහරක් ගැහුවා කියන එක තමුන්ට යෝජනා කරනවා?

උ. නැහැ. එහෙම දෙයක් නෙවෙයි සිදු වුනේ ස්වාමීනි.

ප්‍ර. මහතුන් විසින් ලාල්ට මහතුන්ගේ ජීවිත ආරක්ෂාව සඳහා ඔහු ලේ බේරීමින් ඉන්න අවස්ථාවේ පිහි පාරවල් ගහලා එල්ල කලාය තමුන් ඒක දැක්කේ නැහැ කියල එක බොරුවක්ක කියලා මම තමුන්ට යෝජනා කරනවා?

උ. නැහැ මම එහෙම ලේ පෙරීමින් තියෙන තුවාල මහතුන්ගෙන් දුටුවේ නැහැ ස්වාමීනි.

It is clear from these multiple suggestions that were put to the prosecution witness, that they indicate the alternative factual positions the 4th accused intends to rely on by providing his own narrative of the incident. These suggestions include that it was the deceased who instigated the incident by walking up to the group of men, and after creating *"this incident"* had repeatedly stabbed the 4th accused. The 4th accused's position, as these suggestions reveal, he had picked up a wooden pole from a nearby fence and used it to hit the deceased only at that critical moment. He further claims that he struck a blow on the deceased and, that too only once, in order to protect his own life. He also suggested that there were efforts made by the others, who have gathered around at that point of time, to prevent the deceased from attacking the 4th accused, but the deceased had repeatedly stabbed the 4th accused, which made him bled from those injuries.

It is evident from these suggestions as to the nature of the factual position that the 4th accused had intended to present before Court in his evidence in order to establish a sudden fight. The suggestions made to the

prosecution witness will remain mere suggestions if the witness denies them. In such circumstances, the fact that such suggestions that were made during cross examination would only assist the accused to show the consistency of his version of events presented through his evidence. However, if a prosecution witness makes an admission of a particular position suggested to him by an accused, that admission becomes evidence, in support of that accused. But in this instance, as her answers would reveal, that the prosecution witness maintained a consistent position of denial of not only a sudden fight, but a fight at all between the two of them. She asserted that it was the four accused who launched a surprise attack on the unarmed deceased, when he walked towards them. In addition, there was an emphatic denial by the witness of an act of stabbing on the part of the deceased.

This is evident from the examination of the answers given by the eyewitness during her cross-examination, when she was questioned over the very commencement of the incident. The witness stated thus (at p. 143 of the appeal brief):

> උ. පාර පැනල එතනට ලාල් අයියා ඒ දොරකඩට ඒ පැත්තට එනව දැක්ක ඊට පස්සෙ කට්ටිය වට වෙනව දැක්කා. වටවෙල ඊට පස්සෙ ලාල් අයියට අතින් ගහනව දැක්කා.
>
> ප්‍ර. ඒ කියන්නේ මේ මුල සිද්ධියට කිසිම සම්බන්ධයක් නැති පුද්ගලයෙක්
>
> මීට කලින් මේ 1,2 විත්තිකරුවන් සමගවත් කිසිම අමනාපයක් නැති පුද්ගලයෙක් බොහොම නිවි හැනහිල්ලේ පාර පැනල මේ 1,2 විත්තිකරුවන්ගේ ගේ ඉස්සරහට යනව දැක්ක. ගියපු ගමන් මේ පුද්ගලයාට ගහනව දැක්කා? ඒක නේද තමන්ගේ ස්ථාවරය?
>
> උ. එහෙමයි දැක්ක ස්වාමීනි.

Continuing cross-examination on these lines and when the witness was further suggested that it was the deceased who stabbed the 4th accused, her clear and unambiguous answer is as follows (at p. 144 of the appeal brief):

ප්‍ර. මොකද තමුන් හොඳාකාරවම දන්නවා මේ නඩුවේ සිද්ධිය ආරම්භ වෙන්නේ මේ ලාල් කියන පුද්ගලයා ආයුධයක් සන්නද්ධව පාර හරහා පැනල මෙන්න මේ මහතුන් කියන පුද්ගලයාට පිහියෙන් ඇනීම තුළින් කියන කාරණාව දැක්ක තත්වය, මතෙයි කියල?

උ. නැහැ ස්වාමීනි මම එහෙම එකක් දුටුවෙ නැහැ ස්වාමීනි.

ප්‍ර. මේ ඔක්කෝම ටික දැක්කා මේ ලාල්ට පහර දීම සිදු වෙන. නමුත් මේ මහතුන් කියන පුද්ගලයෙකුට පිහියෙන් ඇනීමක් වෙනවා තමන් දැක්කේ නැහැ?

උ. නැහැ ස්වාමීනි මම දුටුවේ නැහැ.

Thus, as indicative from the evidence referred to in the preceding paragraphs and the reproduction of the segments of cross-examination, it is clear that the narrative presented by the prosecution does not speak of a sudden fight between the deceased and the 4th accused.

The suggestion that " මහතුන්ට පිහියෙන් ඇනීමට උත්සාහ කිරීම නිසා එයින් මිදීම සඳහා අසල තිබිච්ච ඒ ආසන්නයේ තිබිච්ච වැටක තිබිච්ච පොලු කෑල්ලක් අර ගෙන තමන්ගේ ජීවිත ආරක්ෂාව සඳහා පහරක් ගැහුවා" was denied by the eyewitness and thus remains a mere suggestion until and unless the 4th accused presents evidence in support of that factual position. Instead, the 4th accused stated in his statement from the dock that " මේ සිද්ධියෙන් පසුව මට ලාල් පිහි පහරවල් තුනක්ම ඇන්නා. මට බේරෙන්න බැරීම තැන මම බිම වැටුනා. ඊට මම නැගිටලා දිව්වා".*(Sic)*

With these suggestions put to the prosecution witness, the 4th accused had effectively denied any involvement of him in causing injuries to the deceased in the exercise of his right to private defence because the deceased tried to stab him. The specific suggestion put to the witness and the evidence of the 4th accused on that particular point runs contrary to each other. Therefore, the factual positions placed before the trial Court by the 4th accused in support of a sudden fight is not at all a consistent one. No item of evidence, other than the suggestion on stabbing, that had been placed before the trial Court, by consideration of which it could arrive at a conclusion that a sudden fight has probably taken place between the deceased and the 4th accused. In my view, the effect of the said suggestion, namely that he was stabbed by the deceased and that he ran away from the scene to save himself from receiving any injury, clearly disqualified him to the benefit of *Exception 4.* When the prosecution alleged that it was, he who inflicted the fatal blow, the 4th accused, by making a counter factual allegation that he was the victim of the attack, makes no impact on any of the requirements that he ought to establish on the applicability of *Exception 4.* If the 4th accused were to receive any benefit from that exception, he needed to accept that it was he who inflicted the fatal blow, but he only did so during a sudden fight and "*in the heat of passion*" in inflicting that injury. The 4th accused cannot derive any benefit by denying the attack on the deceased and making a counter claim of being attacked by the deceased. It also appears from making the said suggestion, the 4th accused had relied on the exercise of his right of private defence rather than on a sudden fight, in an attempt in diminishing culpability.

During cross-examination of the solitary eyewitness by the 3rd and 4th accused, she emphatically denied the suggestion of an altercation that erupted between the deceased and the accused. If at all, it could have been probable if the 4th accused has taken up the position that an altercation had occurred between the witness's husband and the four accused over the issue of demanding fish and it was only when the deceased tried to intervene in support of his brother, he suffered the fatal injuries. Even to infer that there may have been such a situation, the eyewitness has clearly stated that there was no exchange of words between her husband and the accused despite the demand of fish and the act of forcibly taking the key to the lorry. That brief interaction has ended with issuance of a terse statement "උඹත් වන්ඩියෙක්ද", which came from the accused. With that the parties had dispersed.

It was only after that incident that the deceased had emerged out of his house and walked across the road and came up to the place where the four accused stood. According to eye witness testimony, no sooner the deceased came near the group of accused, the attack has begun without any form of a warning. There were no words that were exchanged between the deceased or any of the four accused. It is during this session of cross-examination; the eyewitness used the word that the 4th accused has "*snatched*" the rice pounder from the 1st accused and used same to hit the deceased on his head. She repeatedly denied the suggestions that the 4th accused has sustained three stab injuries during this incident and was specific that nothing of that sort has ever happened. She further specifically denied that the 4th accused had any bleeding injuries on him.

The witness candidly admitted that the father of the 1st accused too came to the place of attack in order to make a failed attempt to intervene. The witness however denied that the others who gathered around have tried to prevent the deceased from stabbing the 4th accused. Thereupon, the 4th accused suggested to *Amali* that the deceased, after disregarding the intervention by an elderly person, has made an attempt to stab him and, in order to protect himself from stabbing, he has picked up a wooden fence post from a nearby fence and hit the deceased once with it. The 4th accused suggested that, in doing so, he exercised his right of private defence. The reply of the witness to the said suggestion, which was founded on the premise that there was a sudden fight, was to deny the same. She further added that nothing of that sort ever happened.

During the cross-examination by the 1st and 2nd accused, the witness admitted that no sooner the attack on the deceased has commenced, someone shouted "ගහනවෝ", prompting her to run towards the place of the incident. Referring to the first incident involving the demand of fish, the witness has added on to her narrative by stating that when the driver of the lorry complained that the key is kept until the demand made by the accused for fish is met, her husband made an attempt to explain to the accused that there are only empty crates loaded in the vehicle. When suggested that the said incident has ended without any violence, she readily agreed.

When the 1st and 2nd accused suggested that the 2nd incident started only when the deceased has crossed over to the other side with a knife in hand, *Amali* strongly denied same and stated she has not seen the deceased carrying any weapon. The 1st and 2nd accused too have suggested to the

witness that it was the deceased who came up to the accused with a knife in his hand. They also suggested that only then a fight between the 4th accused and the deceased broke out. *Amali* consistently denied all these suggestions, as she has already denied them when suggested for the 3rd and 4th accused.

There were no contradictions or omissions marked off the testimony of the eyewitness during the trial to the effect that either she has stated elsewhere that the 4th accused has sustained injuries during the incident. Nor did any of the accused elicited through cross-examination that she has stated that the deceased has attacked the 4th accused with a knife. In the context of a sudden fight, the fact that no contradictions or omissions on this vital aspect of the case for the 4th accused assumes greater significance. This is because the absence of a contradiction or an omission in this particular aspect of the narrative of the witness indicates that she was consistent with her stance taken before the trial Court.

What remains to be considered in this regard is the evidence elicited through the investigating officer, in relation to his observation of broken pieces of a wooden stick at the crime scene, and his admission that there was evidence of a 'fight' and the claim made by the 4th accused to the Magistrate that he was stabbed.

In addition to the positions taken up by the 4th accused in his statement from the dock, suggesting that he exercised of his right of private defence upon being stabbed by the deceased, he also relied on these three items of evidence, in an attempt to establish the said four requisites of a sudden fight. Of these three, two items of evidence were

elicited through the investigating officer, who visited the crime scene and made his observations. Upon being cross-examined by the 4th accused, CI *Ranjith* stated that he observed several small pieces of wood, which he termed as broken pieces of a pole or a stick, were seen scattered near the area of blood patches (" **යම්කිසි පොල්ලක කැඩී ගිය පොඩි කොටස් පාරේ තැන තැන වැටිල කිබුනා**"). During cross- examination by the 1st and 2nd accused, the witness clarified that he did not take these pieces of wood into his charge as items of production due to the fact that his investigations revealed that the attacker used only a rice pounder to attack the deceased and walked away with it.

The observation of the police officer of a broken pieces of a pole or a stick at the crime scene adds nothing to the question of a sudden fight, in the absence of any evidence explaining its relevance to the case. The prosecution version makes no reference to such a pole or a stick, other than the rice pounder used by the 4th accused of hitting the deceased on his head.

The only reference made to a piece of a club in the proceedings before the trial Court could be found in the suggestion made by the 4th accused. It was suggested to the witness that the 4th accused, upon being stabbed by the deceased, had picked up a piece of wood from a fence (**පොලු කැල්ල**) and used it on the deceased, in the exercise of his right of private defence. However, in his statement made from the dock, the 4th accused made no reference to such an act on his part and thereby effectively restricted his activity to fleeing from the scene for his safety, when the deceased stabbed him thrice and that too after the 'incident'.

Furthermore, the investigating officer was satisfied that these pieces of wood have no relevance to the investigation he conducted as it was revealed that the only weapon used in the incident was a rice pounder. The 4th accused also does not state in his evidence that the pieces of wood found at the crime scene were probably from the "පොලු කැල්ල" which he used to attack the deceased. In the absence of any evidence which brings in the said observation of the investigator as a fact in issue, in terms of the Evidence Ordinance, that item remains to be a mere item of evidence, devoid of any relevance to the trial against the 4th accused.

It is at this stage, learned Counsel for the 1st and 2nd accused questioned the witness whether he observed the crime scene as a place where a 'fight' has taken place. The witness answered this question in the affirmative. The question put to the witness by the Counsel for the accused was " පුද්ගලයො කීප දෙනෙක් විසින් කෝලහලයක් ඇතිකර ගැනීමේදී ඇතිවන ලකුණු කරන එ ස්ථානයේ තිබුනද?. It is in the process of answering this question, the witness said "yes". Importantly, during the same cross-examination, the witness also stated that his investigation revealed that only one person sustained injuries in the attack.

Learned Counsel for the 4th accused did not examine the witness any further on this important and vital aspect of his defence. The prosecutor, in his re-examination of the witness, clarified that the statements of two of the accused were recorded by an officer, after visiting them in the prisons, who made no mention of the fact that there were injuries noted on any of them. The 4th accused is one of the two whose statement was recorded whilst being in remand custody.

The third item of evidence relied on by the 4th accused was, the fact that he too was injured that was borne out by the proceedings before the Magistrate's Court.

This evidence was elicited by the 4th accused during cross-examination of the Registrar of the Court, who was called by the prosecution to produce the statutory statements of the four accused. The non-summary proceedings conducted before the Magistrate's Court of *Matara* in case No. 65932 contained an entry made on 09.07.2007 that the 4th accused, after surrendering to Court through his Attorney, informed that he sustained injuries during 'this incident' and did not receive any medical treatment. Later in the same day, another application was made on behalf of the 4th accused, seeking an order of Court to produce him before a JMO. The Court only made an order directing the prison authorities to provide the necessary medical treatment to the accused through its hospital.

The motion filed by the 4th accused in this regard on 09.07.2007 made no reference at least to the fact that he has suffered any injury. It only stated that he was wanted by the police in connection with the murder of the deceased and he wishes to surrender himself to Court.

This is evident from the cross examination of the Registrar, who read out a journal of the Magistrate's Court case record containing the non-summary proceedings. Although it was recorded in that journal entry that the 4th accused sustained injuries during the incident, no description of the nature of the injuries, the number of such injuries, the weapon used to inflict them or the person who inflicted them were disclosed. This is an important factor, and it was the first available opportunity for the 4th

accused to place that position clearly on record through his Counsel. It is relevant to note in this context that the 4th accused has surrendered to Court through his Counsel, who had the case called in open Court through a motion. No application was made on behalf of the 4th accused to produce him before a JMO at this initial stage and for a report as to the nature of any injuries alleged to have sustained by him.

Apparently, the Court has decided to limit its intervention at that stage merely to make note of said claim of the 4th accused. The Court decided to adopt that approach, upon after enquiry of the 4th accused, who admitted that for the past four days, he has not taken any steps to have his injuries treated. The Court probably have decided not to make an order for it had the benefit of visually verifying the claim made by the 4th accused. The record does not bear of an indication that the 4th accused has offered any reason for his inaction. When the case was called once more in open Court in the same day on the request of the Counsel for the 4th accused, who moved Court that his client be produced before the JMO, the Court was not impressed and only directed the prison authorities to provide the necessary medical treatment.

The approach adopted by the Magistrate's Court in this particular case seemed justified as the 4th accused did not have any visible injuries on him. This is supported by the observations made by the officer when he visited the Prisons, in order to record his statement. In the absence of any suggestion put to the official witness, that it could reasonably be inferred from the evidence adduced through that witness that, during his visit to interview the 4th accused, the latter did not show any injuries nor made any reference to them in his statement.

Although this is not the position taken up by the 4th accused during his cross examination of the prosecution witnesses, even if one were to take the evidence of the 4th accused, that the deceased stabbed him after the 'incident', and it is a position that he maintained consistently, still it would not make any difference in terms of his liability. The claim that the deceased was armed with a knife and used same to stab the 4th accused after he was hit on the head, is clearly an improbable version, in view of the expert opinion of the Consultant JMO, who confirmed that the deceased could not have been able even to speak after the injury No. 1 that was observed on the front left of his head.

The description of the said injury, as given by the Consultant JMO, indicate that as a deep laceration measuring 7 X 6 X 4 centimetres in size. Corresponding to the said external injury, the Consultant JMO has observed an underlying comminute depressed fracture measuring 17 X 8 centimetres in size, situated over the left frontal-temporal and parietal area of the skull, in addition to another fissure fracture (corresponding to injury No. 2), extending to the occipital area, extending to the base of the skull through the anterior *cranial fossa.* He also noted that the membranes of the brain too were lacerated, along with the brain matter. Parts of brain tissue, which came out through the fractured skull, was also observed by the medical expert.

It is his opinion that a heavy blunt weapon, similar to that of a rice pounder, may have been used in causing these injuries, causing necessarily fatal injuries to the deceased. The Consultant JMO further observed that the left upper arm of the deceased too was fractured due to application of blunt force, which he attributed to a defensive injury. Accordingly, the

claim made by the 4th accused that the deceased has stabbed him "*after the incident*" could clearly be equated to a near impossibility.

If one were to consider the position that the alleged act of stabbing of the 4th accused has taken place prior to the incident by which the deceased has suffered fatal injuries, which the only eyewitness has consistently denied of, it is reasonable to expect that the knife used in the stabbing should have been lying at the scene after the act of stabbing. The deceased was rushed to hospital soon after the incident. All four accused fled the scene immediately afterwards and surrendered to authorities at a later point of time. The eyewitness and the wife of the deceased proceeded to the police to make complaints. Neither the prosecution nor the accused thought it fit to clarify from the investigator that whether it was revealed during investigations that there was a knife, which may have used in the incident, or whether such a weapon was lying among the small pieces of club, or whether any other person removed the same from the scene.

Thus, in effect there was no 'evidence' placed before the trial Court to indicate that the 4th accused sustained any stab injury during the 'incident' he speaks of. The 'evidence' referred by the 4th accused, points only to the fact that he made such a claim to the Magistrate's Court, at the time of surrendering to it through his legal Counsel. Therefore, the assertions of the 4th accused taking up the positions that the injuries he has sustained are stab injuries, a knife was used in that attack, and it was the deceased who inflicted these injuries, were presented for the first time before the High Court, and that too after eight years since the incident by which the deceased suffered his injuries.

Reverting back to the primary issue that whether the conclusions reached by the Court of Appeal and as well as the High Court could be considered erroneous when those Courts rejected the 4th accused's claim for the concession in terms of *exception 4* of Section 294, it is necessary in that respect to refer back to the judgment of this Court in ***Bandara v The Attorney General*** (supra) once more. This is in order to highlight another important aspect which requires consideration in relation to the instant appeal. That judgment considered an instance where the appellant has dealt a blow on the head of the deceased and thereby causing his death. The appellant made an attempt to have his case brought within the *Exception 4* of Section 294. However, the Court was not impressed with the contention advanced by the appellant as the evidence clearly indicate that the "fight" referred to by the appellant "… *is not spontaneous and therefore cannot be regarded as one that could be described as sudden*" and proceeded to dismiss his appeal.

Since strong emphasis was laid by the 4th accused in his contention of the existence of a sudden fight, it is prudent to examine the *Exception* 4 as the first step in order to understand the context in which the term "*sudden fight*" was used by the Legislature in *Exception 4* by consideration of the wording used in that exception. The most relevant part in relation to the instant appeal of the said *Exception* is the section that reads "… *in a sudden fight in the heat of passion upon a sudden quarrel".* The said exception speaks of sudden fight which results upon a sudden quarrel. These phrases were used by the Legislature to denote a position that reflects a transformation of a quarrel to a fight within a very short duration of time. It is important to note in this context that the word "*sudden*" appears twice

in the text of the said *Exception* and that too, after the phrase "*without premeditation*". The emphasis laid in the text of the section on the spontaneity of the act which resulted in the death of a person is therefore clearly recognisable.

In the absence of any definition provided in the Penal Code either to a "*fight*" or to a "*quarrel"*, in the context of the contentions that were placed before this Court, it is helpful to consider the words "*fight*" and "*quarrel*" for its general meaning in the English language, in order to understand the purpose of inserting these two words by the Legislature in the said *Exception.*

The general dictionary meaning of a "*quarrel*" is given as "*a heated argument or disagreement, typically about a trivial issue and between people who are usually on good terms*" whereas the meaning of "*fight*" is given as to "*take part in a violent struggle involving the exchange of physical blows or the use of weapons*". The meaning attributed to the word *"quarrel"* by Black's Law Dictionary (5th ED), is "*an altercation, an angry dispute, an exchange of recriminations, taunts, threats or accusations between two persons*" whereas the meaning to the word *"fight"* is described as a hostile encounter or engagement between opposing forces suggesting primarily the notion of brawl or unpremeditated encounter following a judicial pronouncement in ***Gitlow v Kiely,*** D.C.N.Y. 44 F.2d 227, 232.

The dictionary meaning of these two words might not necessarily convey the entire scope of the words 'quarrel' and 'fight', as found in the *Exception 4.* The mere absence of a statutory definition in the Penal Code provided to these two words and for this Court to make an attempt to

provide a judicial definition to them, in order to fill that void, might not be the best approach as such an interpretation carried the potential of unduly restricting the multitude of circumstances the Legislature may have envisaged to cater by refraining from providing any. This is evident when one examines the Chapter II of the Penal Code under the heading "*General Explanations"* where the Code, in Section 5 to 51 denotes each of the words and phrases used therein. When confronted with similar situations, on many instances, Courts have consciously refrained from providing one.

In ***Fernando v Nesadurai*** (1948) 49 NLR 263, upon being presented with a contention that the Court is required to provide a definition to the word "*building*", that appear in the text of the Housing and Town Improvement Ordinance , *Basnayake* J (as he then was) has taken the view (at p. 264) that *"[I]t will be unsafe to make this case the occasion for attempting to define on an expression which even the Legislature has left alone."* His lordship, in forming that view, has noted that "*… a dictionary is not always a safe guide in the construction of a statute …"* and quoted the *dicta* of an English judgment in ***Stevens v Gourley*** (1859) 7 CBNS 99, where *Byles* J stated that "*[T]he imperfections of human language renders it not only difficult, but also impossible to define the word 'building'*. *Shaw* J, also adopted a similar view in ***Attorney General v Rodriguesz*** (1966) 19 NLR 65, when the Court was to determine the effect of the word "*concerned*" in Section 104 of Customs Ordinance. In that context, his Lordship has stated that in the matter before that Court (at p. 78) "*[V]ery little assistance can be obtained from the dictionary meaning …"* of that word.

This cautious approach, which has consistently been adopted by the Courts in situations such as this, infuses a certain degree of

pragmatism into the task of providing a meaning to a particular word used in a Section, as it endeavour to do so without imposing any undue restrictions to the scope of the statutory provisions contained in that Section, in order to cover a wider spectrum of situations, which the Legislature would have envisaged to cater in the first place by enacting that Section, as indicative from its act of making an insertion of that particular word into the text of the statute, but refrained itself from providing a specific meaning to that particular word. In forming that view, I derive support from a statement of ***Bindra*** on *Interpretation of Statutes* (9th Ed, at p. 59) *"[W]hen an expression is not defined in the statute and such expression happens to be one of everyday use, it must be construed in popular sense, as understood in common parlance, and not in any technical sense."*

The case of ***Mahinda Rajapaksa v Kudahetti and Others*** (1992) 2 Sri L.R. 223 is an instance where it was alleged that the respondents have acted in violation of the Article 13(1) of the Constitution, where it guarantees that to no person shall be arrested except according to procedure established by law and what constituted an arrest in terms of that Article. I need not add any to what was stated so succinctly by *Amerasinghe J,* (at p. 243): *I do not intend this to be a definition of "arrest". A definition, I suppose, must await the wisdom of the future. Nor is it an attempt to lay down general guidelines concerning other situations not involved here. I do not even suggest that a bright line can be easily drawn that separates the type of deprivation of liberty within the reach of Article 13 (1) from the type without. Close questions undoubtedly will sometimes arise in the grey area that necessarily exists in between. Whether an act amounts to an arrest will depend on the circumstances of each case".*

But that does not mean, that the essential attributes of words, 'quarrel' and 'fight', could not be identified in the sense that they were used in that exception. In ***Bandara v The Attorney General*** (supra) this Court held that the available evidence did not satisfy the spontaneity of the attack on the deceased and therefore the appellant is not entitled to relief under *Exception 4.*

In my view, the phrase "… *in a sudden fight in the heat of passion upon a sudden quarrel",* of the *Exception 4* of Section 294 clearly envisages a situation, which started off perhaps with a mere verbal disagreement or an argument between rival parties which then takes a violent turn with sudden escalation of that 'quarrel' into a 'fight' during which exchange of physical blows or use of weapons occurs between them, resulting in the fatality in question. The start of the quarrel and its escalation into a fight must happen within a short duration of time. The emphasis placed by the Section on the progressive but sudden escalation of the intensity of the degree of passion with which the opposing parties acts in a quarrel culminating with the act or acts that results in the fatality could easily be discerned from the phrase "… *in a sudden fight in the heat of passion upon a sudden quarrel"*. That seems to be the sequence events that envisaged by the Legislature in enacting *Exception 4* in that form.

It must however be stressed at this point that is not possible to lay down a general rule as to what shall be deemed to be a sudden fight in terms of *Exception 4,* since it essentially is a question of fact which in turn depends upon the established facts of each individual case. The dictionary meaning of the words "quarrel" and "fight" were inserted in the preceding paragraph not as an attempt to provide binding definitions to these words,

but only to highlight the emphasis on the gradual escalation of the intensity of passion with which the parties engage in the act of physical combat, as suggested by ***Bindra***, by stating that " *it must be construed in popular sense, as understood in common parlance, and not in any technical sense.*"

It could therefore be reasonably deduced from this reasoning that the *Exception 4* applies only to such situations and the act which results in a death of a person was committed "*in the heat of passion*", during the existence of 'sudden fight' commencing from the point of the start of the quarrel and escalating it into a fight, culminating with a spontaneous act, on the part of the accused, without allowing any cooling time in between.

The Supreme Court of India, in its judgment of ***Bhagwan Munjaji Pawade v State of Maharastra*** AIR 1979 SC 133, dealt with a situation where the deceased, who had just returned home and, upon seeing that his mother was engaged in a heated argument with the appellant, enquired from him as to the reason for such an altercation. Thereupon, the appellant has attacked the deceased thrice on his head with an axe, twice with the blunt side and once with its sharp side.

In such circumstances, the Court held that a " *'[F]ight' postulates a bilateral transaction in which blows are exchanged. The deceased was unarmed. He did not cause any injury to the appellant or his companions. Furthermore, not less than three fatal injuries were inflicted by the appellant with an axe, which is a formidable weapon on the unarmed victim. Appellant, is therefore, not entitled to the benefit of Exception 4, either*".

Similar process of reasoning was adopted by that Court in its judgment of ***State Of Orissa vs Khageswar Naik & Others*** (2013) SCC 649, in order to set aside the conviction already entered against the accused for the offence of culpable homicide not amounting to murder on the basis of a sudden fight, and in order to alter the same into a conviction for murder. The Court considered the evidence and decided to interfere with the conviction entered erroneously by the lower Court for the lessor offence on the footing that there was no 'fight' between the accused and the deceased, since the evidence indicated that it was only a one-sided attack. The Court stated "*[I]n the case in hand, the convicts had entered the room of the daughter of the deceased in midnight, molested her and the poor father, perhaps because of his age, could not do anything other than to abuse the convicts. He gave choicest abuses but did not fight with the convicts. Verbal abuses are not 'fight' as it is well settled that at least two persons are needed to fight. Therefore, this ingredient is not satisfied.*

I am strongly persuaded to accept the validity of the reasoning adopted by the Indian Supreme Court in these judgments in relation to the instant appeal, as the underlying principle that had been enunciated upon the factual considerations contained therein are very similar, if not, almost identical, with the evidence presented before the trial Court on this particular aspect. In view of the reasoning contained in the preceding paragraphs, I am of the firm view that there was no sudden fight, in terms of *Exception 4* of Section 294 of the Penal Code, between any of the four accused and the deceased. The several judgments that were cited by the learned Counsel for the 4th accused from the same jurisdiction, are in relation to instances where there has in fact been a sudden fight between

the deceased and his assailants and thereby offers no assistance to determine the issues presented for determination in the instant appeal.

However, in ***Ghapoo Yadave and Others v State of Orissa*** AIR 2003 SC 1620, a judgment relied upon by the learned Counsel for the 4th accused, the apex Court India has stated that "*[A] fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter.*"

It is in the light of these principles I now proceed to consider the contention of the 4th accused that he was denied the concession of lessor culpability in terms of *Exception 4*.

Amali speaks of two incidents. First, she speaks of the incident over the demand of fish made by the four accused. Second, she speaks of an incident by which the deceased has suffered several fatal injuries on his head. It is clear from the evidence of the prosecution that the first incident ended without any form of violence, although the accused have indicated their strong displeasure of *Amali's* husband's intervention into their interaction with the particular fish dealer, by throwing the key on the ground and uttering what seemed a veiled threat.

The deceased has never featured any time during the entirety of the first incident, although he lived adjacent to the open space, where the lorry was parked at. It is highly probable that the deceased was privy to the circumstances which has taken place during the first incident. That

incident involved his own bother, his partner of business in the fish trade, with the four accused, who are his neighbours. Nonetheless, the deceased did not come out of his house even to enquire as to what was happening. He waited in his house until the incident had peacefully ended and his brother returned to his house. The deceased, after emerging out of his house and before crossing over to the other side where the four accused have stood, did not speak to his brother or to any of the accused.

Amali stated in her evidence that after the first incident, she and her husband have returned from the open area and remained in front of their house, which was about 60 feet further up from the deceased's house. This evidence is indicative of a significant time gap between the end of the first incident and the commencement of the second incident. The four accused, who have gathered in front of the 1st accused's house, did nothing to provoke any person since the first incident. They made no reference to the deceased. It is at this point only the deceased emerged from his house. He calmly walked up to the group of men, who remained on the other side of the road motionless. The deceased did not carry any weapon with him and did not make any accusation or any derogatory remark on any of the accused.

Similarly, none of the accused carried any weapon or something which could have been used to an attack on another. Clearly, the deceased had no reason whatsoever, even to suspect a hint of animosity harboured against him by any of the four accused or of an imminent violent attack.

The deceased, the 1st and 2nd accused have lived in houses, which are located on either side of the *Galle-Matara* highway and were facing each

other. During cross-examination of *Amali,* it was suggested that there was no prior enmity that existed between the accused and the deceased, and the witness readily conceded that point. It was also elicited from the eyewitness that the deceased is a person with a quiet disposition and not a quick-tempered individual.

Prosecution version is that the moment the deceased came near the four accused, he was surrounded by all four of them, and without issuing any prior indication of any violence, they collectively mounted a surprise and sustained attack on him. The four accused have repeatedly punched the deceased with their fists. In order to counter this version, as to the commencement of the attack on the deceased, the 4th accused suggested that the deceased came near them, and he was armed with a knife. The position sought to be advanced by the 4th accused from that suggestion is that the deceased, without any provocation by any of them, has suddenly stabbed him which act compelled him to strike back at the attacker with a fence post, in order to protect himself.

The 4th accused, who cross examined the official witness, through the same Counsel who surrendered him to the Magistrate's Court, did not clarify whether it was revealed during investigations a knife was used in the attack or of the discovery of the information indicating that he too has been stabbed by the deceased.

It could easily be understood as to why the 4th accused now cling on to the position that there was a sudden fight during which he too was stabbed by the deceased. Even if the 4th accused could establish that he was stabbed by the deceased 'after the incident', the evidence failed to

establish that there was a sudden fight, in terms of the *Exception 4* of Section 294 of the Penal Code. I shall explain the reasons for the said conclusion in the following paragraphs.

The evidence of the prosecution, which the trial Court has found to be credible and reliable, indicate that no sooner the deceased came near the four men, he was surrounded by them and was repeatedly attacked with their arms. The injury No. 3, that was observed by the Consultant JMO during post mortem examination is a contusion, measured 9 X 8 centimetres and situated over the right parotid area of the face. It was his opinion that the said injury could have been caused by a clenched fist. However, injury No. 2, a laceration measuring 3 X 1 centimetres was observed over the right mandibular area, had caused a fracture of the mandible with subcutaneous haemorrhage, which could also have been caused if attacked with a clenched fist. He was further of the opinion that it could well be an attack by hand with a knuckleduster on, in view of the force required to cause a fracture to the mandible.

The evidence presented by the prosecution with regard to the commencement and continuation of the attack on the deceased revealed that he did not even attempt to attack any of the four men, who launched a surprise attack on him when he came near them. It was clearly a one side attack, which left no room at all for the unsuspecting and unarmed deceased, even to run away from his attackers. Then the 1st accused ran into his house, returned with a rice pounder, which the 4th accused has grabbed and used to hit the deceased on his head. The fracture that was observed by the Consultant JMO on the left humorous associated with hematoma in muscles is the only defensive injury seen on the body of the

deceased. It is an indication of the swift and surprise attack unleashed by the four accused on the deceased, before the latter being clubbed to death by the 4th accused.

What is important to note from the above description and analysis of the evidence is the fact that there was no 'fight' between the deceased and the four accused, though the assault on him seemed to be a sudden one. Of course, the prosecution did not present any evidence pointing in the direction that the attack on the deceased is a premeditated one where the four accused have planned out the details or have acted in prior concert. No one could have predicted that the deceased to come out of his house and walk up to the group of men, who were standing on the other side of the road. The stomach contents of 500 grams of rice, noted by the consultant JMO, indicate that the deceased was just after his lunch and, as the eye witness opined during cross examination, that he may have walked up to the accused perhaps to mediate the dispute or to pacify the obviously agitated men.

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One more factor that could not be ignored from the medical evidence is that the severity of the attack on the head of the deceased, who had no weapon with him or made no attempt to act in a violent manner. Certainly, the 4th accused has taken an undue advantage over an unarmed person, who did not even utter a single word to attract the overtly disproportionate response from the 4th accused who acted cruelly or in an unusual manner. Even if all the other attributes of a sudden fight are satisfied, the 4th accused, by his attack on the deceased had clearly disqualified himself on this factor from receiving the concession of lessor culpability in terms of *Exception 4.*

I have already reached the conclusion that the 4th accused failed to establish the death of the deceased was due to a sudden fight that erupted between the two to the required degree of proof. In view of that conclusion, one of the questions of law on which this appeal was argued requires consideration at this stage. That question of law reads as follows :

> "*Has the Court of Appeal erred in failing to evaluate the evidence in the case in its totality and the failure to appreciate the same and on an impartial and objective evaluation of the evidence, there was clearly, at the very least, a reasonable doubt as to the guilt of the 4th accused ?*".

In terms of the said question of law, particularly the words that " … *at the very least, a reasonable doubt as to the guilt of the 4th accused*", requires that it should be taken into consideration in conjunction with other questions of law as all the questions of law are primarily concerned with the application of relevant legal principles that are involved with the *Exception 4* of Section 294. Whether the reasonable doubt of which the said question of law speaks of has arisen in relation to the prosecution case taken in its entirety or whether in relation to the question of sudden fight could not clearly distinguished from the manner in which the said question was presented. Hence, for the purpose of completeness and notwithstanding the apparent contradiction between the said question of law and the pronouncement made by *Howard* CJ in the judgment of ***The King v James Chandrasekera*** (supra) in relation to the *Exception 4* of Section 294, it was decided that both these aspects would be addressed at this segment of the judgment.

The pronouncement made by *Howard* CJ in the said judgment stating that "*it shall regard he inflicted the fatal blows on the deceased during a sudden fight till it is satisfied that he did so or that it is so probable that he did so that a prudent man should act on that supposition*" is clear in what it meant. When the said principle of law propounded by his Lordship is applied to the instant appeal, it ought to be read that it was for the 4th accused to

satisfy the trial Court that he did so or that it is so probable that he did so that a prudent man should act on that supposition. Owing to the reasons that I have already set out in the preceding paragraphs and, in view of the conclusion reached on that reasoning that the 4th accused has failed to establish that the death of the deceased was due to a sudden fight to the required degree of proof, there cannot be a residual issue, whether he could still succeed if there is a reasonable doubt as to the death of the deceased had resulted in due to a sudden fight between the two, remaining to be determined, in terms of the pronouncement made by *Howard* CJ.

This residual issue which dealing with the impact of a reasonable doubt would have on the applicability of *Exception 4* to Section 294 has already been considered in length by *Soertsz* J in ***The King v James Chandrasekera*** (supra). In order to present the most relevant part of the *dicta* of *Soertsz* J on which I intend to rely in support of my view and, in order to present same in the exact context in which it was made, it is necessary to quote his Lordship to a greater extent, including the contention that had been presented by the appellant before that Court. *Soertsz* J having considered the legality of the said contention, states (at p. 125) that:

> " *[I]t is often possible to test the validity of an argument by carrying it to what would be its logical conclusion. If we take that course with the main argument submitted to us, the resulting position would be that, although Section 105 requires the existence of circumstances bringing the case within an exception to be proved by the accused, he would satisfy the requirement even though the existence of these*

circumstances is left in doubt by him, that is to say is not proved by him, for section 3 says that 'a fact is not proved when it is neither proved nor disproved'. Such a conclusion appears to me to refute the argument.

The position is however different in cases in which, by involving the fact in issue in sufficient doubt the accused ipso facto involves in such doubt an element of the offence that the prosecution had to prove. That, for instance, would have been the position under our law in the Woolmington case, if on the charge of murder, or all the matters before them, the Jury were in sufficient doubt as to whether the death of the deceased girl was the result of an accident or not, for, in that state of doubt, the Jury are necessarily as much in doubt whether the intention to cause death or to cause an injury sufficient in the ordinary cause of nature to cause death, existed or not. In such a case, the proper view seems to me to be that."

In respect of the questions which I currently dealing with, it would suffice if I confine myself simply by quoting the last sentence of the above quotation as an answer, as it reads thus; " … *the accused succeeds in avoiding the charge of murder, not because he has established his defence, but because, by involving the essential element of intention in doubt, he has produced the result that the prosecution has not established a necessary part of its case*".

Thus, the applicable principle of law is that if there is a reasonable doubt that exists in the mind of the trial Judge in relation to the prosecution case, then that reasonable doubt ought to have existed in relation to an essential element of intention, which the prosecution must establish, in terms of its overall burden as per *dicta* of *Woolmington's* case. It

certainly could not be on the question whether the prosecution has proved beyond reasonable doubt that the 4th accused has inflicted the fatal injuries on the deceased during a sudden fight or not. Of course, the fact that it was the 4th accused who caused the fatal injury on the deceased with a murderous intention, being an essential element of the offence of murder, must be established beyond reasonable doubt by the prosecution, which it did.

But it was for the 4th accused to satisfy the trial Court that there was a sudden fight and it is not for the prosecution to establish there was none. However, there was no contention advanced before us that any one or more of the essential elements which the prosecution is obligated to establish to the required degree of proof, had not been established and on that basis the 4th accused is entitled to be acquitted. The contention before us was that the 4th accused is entitled to be found guilty to the lessor offence on the basis of the *Exception 4* of Section 294 of the Penal Code on the available evidence, as there is a reasonable doubt exists whether there was a sudden fight or not.

In ***The King v James Chandrasekera*** (supra), *Howard* CJ has quoted Dunkley J., from the Full Bench case of ***Emperor v Damapala*** (1937) A. I. R. Rangoon 83, where it was stated that:

> *"[I]n a criminal trial the burden of proving everything essential to the establishment of the charge against the accused lies upon the prosecution, and that burden never changes. But it would clearly impose an impossible task on the prosecution if the prosecution were required to anticipate every possible defence of the accused and to*

> *establish that each such defence could not be made out, and of this task the prosecution is relieved by the provisions of section 105 and its closely allied section, section 106. Section 105 enacts that the burden of proving the existence of circumstances bringing the case within any general or special exception in the Penal Code shall lie upon the accused, and the Court shall presume the absence of such circumstances."*

In this particular context, the pronouncement made by *Howard* CJ in ***The King v James Chandrasekera*** (supra and at p.115) becomes very relevant. His Lordship stated that " *[I]t may be conceded that one of the reasons why the final words of section 105, namely, ' … and the Court shall presume the absence of such circumstances' , may have been inserted was so as to make it clear that the non-existence of such circumstances was not a matter to be established by the prosecution as under the old law. On the other hand, the fact that such words have been inserted seems to manifest only too clearly the burden cast on the accused*."

Hearne J, who associated himself with the reasoning of the majority judgment in ***The King v James Chandrasekera*** (supra), added a further component to the principles they have enunciated in that judgment, in a subsequent pronouncement. In ***The King v Johanis et al*** (1943) 44 NLR 145 (at p. 146) *Hearne* J states thus:

> *"… if the existence of circumstances which would bring 'the case within one of the exceptions' is involved in doubt, the existence of those circumstances cannot be said to have been proved. It does not lay down that if two possible views may be taken of a set of proved circumstances, the Jury is precluded from adopting either or those*

two views. In fact, as-it appears to me, just as inevitably as one cannot have one side of a sheet of paper without the other, there cannot be one view of a matter and not the contrary view as well. If, for instance, an accused rests his defence upon exception 1 of section 294 of the Penal Code, the Jury may decide that he has proved, within the meaning of proof in section 3 of the Evidence Ordinance, the circumstances alleged by him and yet may hold or not hold that he lost his self-control in consequence of the provocation to which he was subjected. Similarly, when circumstances are in evidence which the Jury regard as having been proved, they may or may not hold that those circumstances established that there was a sudden fight, upon a sudden quarrel, and that the accused " did not take undue advantage, &c.". It is only if they are in doubt as to whether they should or should not hold that circumstances existed which brought the case within exception 4 of section 294 of the Penal Code, that the existence of such circumstances cannot be said to have been proved. Even if two views are possible, they may have no doubt as to which of these views they prefer to take on the basis of probability."

In view of these multiple considerations, even if the case for the 4th accused is taken at its highest by this Court and proceeds on the basis that it in fact creates a reasonable doubt in the prosecution case as to whether there was a sudden fight, the 4th accused is nonetheless not entitled to any relief under *Exception 4* of Section 294, in terms of ***The King v James Chandrasekera*** (supra). It is relevant to note in this regard that *Prof. G.L. Peiris,* in his book ***Offences under the Penal Code of Ceylon***, after making a reference to principle enunciated in the said judgment, states that (at p. 102), " … *in a case where a general or special exception under the Penal Code is*

pleaded, a reasonable doubt created in the minds of the jury as to the applicability of the exception does not render the accused entitled to its benefit".

In this context, I wish to add another important factor to this consideration. In the consideration of the applicability of general exceptions of Section 294, the trial Courts are, in the absence of evidence in that regard, not expected to speculate. The Court of Criminal Appeal, in the case of ***Fernando et al v The Queen*** (1952) 54 NLR 255, relied on the pronouncements made by English Courts in ***The King v Catherine Thorpe*** (1925) 18 Cr. A. R. 189, and ***Mancini v Director of Public Prosecutions*** (1942) A. C. 1, to reach the conclusion that "*[A] jury should be told to accept or reject evidence that they are entitled to and should draw reasonable inferences from the evidence which they accept, but they should never be directed in a way which opens for them the door to conjecture. This is necessary not only in order that the case for the defence may not, be prejudiced but also in the interests of the prosecution. It has to be remembered that a trial judge by suggesting an unsustainable element of evidence in favour of an accused may by rendering a verdict founded on that element unreasonable make the verdict itself unsustainable*".

Before I conclude this judgment by determining the several questions of law, there is one more contention that was advanced by the 4th accused which merits consideration.

The indictment against the four accused was presented by the prosecution on the basis that all of them were actuated by a common murderous intention to cause the death of the deceased. After trial, the High Court concluded that the 2nd and 3rd accused were not guilty to the

offence of murder on the premise they did not entertain any common murderous intention. Only the 1st and 4th accused were found guilty of murder. When the 1st accused preferred an appeal against his conviction for murder, the Court of Appeal decided to reduce his culpability from murder to culpable homicide not amounting to murder. On that particular finding made by the appellate Court, the 4th accused presented a contention before this Court claiming that, in doing so, the appellate Court has failed to consider that he too could have been convicted for culpable homicide not amounting to murder on the basis of a sudden fight, as facts and circumstances of the case are similar if not identical to that of the 1st accused.

Perusal of the impugned judgment indicates that the appellate Court decided to reduce the culpability of the 1st accused upon placing reliance on the evidence that it was the 4th accused who attacked the deceased. The Court also noted that the role played by the 1st accused is limited to bringing out the rice pounder from his house. It is important to note in this regard that the Court of Appeal made no positive pronouncement over the question whether there was a sudden fight, nor did it find fault with the trial Court for arriving at a negative finding on this particular question of fact, contrary to the evidence presented before that Court. Having noted that the 1st accused did not attack the deceased with the rice pounder and he only brought the same into the scene of the incident, the Court of Appeal has thought it fit to reduce his culpability to culpable homicide not amounting to murder and it did so, after setting aside his conviction for murder.

The 4th accused is clearly not entitled to that concession. It has already been held that there was no sudden fight in terms of the *Exception 4* of Section 294. In addition, the Court of Appeal, in determining, although perfunctorily, that it should reduce the culpability of the 1st accused, appears to have acted on the evidence which points in the direction that the 1st accused, by merely bringing in the rice pounder, had acted only with 'knowledge' rather than on a murderous intention.

In affirming the finding of fact made by the trial Court that the 4th accused attacked the deceased with a rice pounder with a murderous intention on his head and thereby causing a fatal injury, the Court of Appeal decided to dismiss his appeal. The appellate Court was of the view that there was no evidence to impute joint criminal liability under Section 32 of the Penal Code on the 1st and 4th accused and decided to affirm the conviction for the 4th accused to the offence of murder after imposing criminal liability for his induvial action of fatally injuring the deceased and not on the basis that he shared common murderous intention with any of the other three accused. That being the basis on which the Court of Appeal has acted, the 4th accused cannot claim any concession on the basis of a diminished responsibility, merely because of the 1st accused was found to have committed the offence of culpable homicide not amounting to murder on the basis of knowledge.

The questions of law on which the instant appeal was presented and heard are therefore answered in the negative. The conviction entered by the High Court against the 4th accused for murder and the approval of that conclusion by the Court of Appeal are hereby affirmed.

The appeal of the 4th accused is accordingly dismissed.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO, PC, CJ.

I agree.

CHIEF JUSTICE

YASANTHA KODAGODA, PCJ.

I agree.

JUDGE OF THE SUPREME COURT