IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

The Democratic Socialist Republic of Sri Lanka.

Complainant.

Kattadige Amarasena

Accused.

Court of Appeal
Case No. CA 33/2008.
H.C. Hambantota
Case No. HC 363/2006.

And Now Between.

Kattadige Amarasena

Accused-Appellant.

Vs.

The Democratic Socialist Republic of Sri Lanka – (The Attorney-General).

Respondent.

Before: Sarath De Abrew, J &
H.N.J. Perera, J.

Counsel: Saliya Peiris for the Accused-Appellant

Yasantha Kodagoda, D.S.G., for the Attorney-General.

Argued on: 15.05.2012.

Written Submissions
Tendered on: 24.05.2012, 26.06.2012 and 13.11.2013.

Decided on: 10.03.2014.

Sarath De Abrew, J.

The Accused-Appellant was indicted in the High Court of Hambantota for committing the murder of his wife Sandya Kanthi Ekanayake on 20.11.2005 at Tangalle punishable under Section 296 of the Penal Code. After trial without a jury the learned trial judge had convicted the appellant under Section 296 of the Penal Code and imposed the death sentence on 27.03.2008. Being aggrieved of the aforesaid conviction and sentence, the appellant had preferred this appeal to this Court.

At the hearing of the appeal the learned Counsel for the appellant confined his argument to the main ground of appeal as to the availability, on the facts of the case, to the mitigatory plea of cumulative provocation which would have reduced the conviction to that of Section 297 of the Penal Code, culpable homicide not amounting to murder.

The facts briefly are as follows: The accused-appellant was an Attorney-at-Law who once practiced at the Magistratae Court of Walesmulla. The appellant had married the deceased on 09.11.2001 and had a son by that marriage. They were residing at the parental house of the deceased at Halmilla Ketiya up to May 2003 whereupon the appellant purchased a land at Middeniya

town in his wife's name and built a two storey house and went to reside there. One Upul Shantha Wijesinghe alias Suddha, a relation of the deceased, was employed as the driver of the motor car of the appellant. The appellant claimed that this driver had developed an illicit intimacy with his wife the deceased. Around the year 2004, the appellant had given up his profession as an Attorney-at-Law and taken up employment in an estate in Hiniduma as an Assistant Superintendent, leaving his wife and son at the parental house of the wife at Halmilla Ketiya. In May 2005, when the appellant returned home from his workplace, he had discovered that his wife and child had disappeared from the parental house for a few days and a brother of the wife of the appellant had made a complaint on this matter to the Middeniya Police. The appellant had been informed that his wife had gone to reside at a house at Urubokka along with his driver Wijesinghe, continuing their adulterous relationship. The wife had later returned to the parental house, and after a severe altercation, they had made peace and continued to live at the parental house.

According to the appellant, there had been continued conflict and friction thereafter between the deceased and the appellant. The deceased had continued her illicit relationship with the former driver Wijesinghe. The appellant had transferred the Middeniya

house in his mother's name and asked his wife to remove her belongings from that house. When the appellant returned to that house later he had found the household items dragged out and burnt on which incident there had been an inquiry held by the Middeniya Police. While returning from the Middeniya Police Station, the appellant had been forcibly abducted in a three-wheeler and rescued thereafter by the Middeniya Police, regarding which incident the deceased and the driver Wijesinghe had been remanded by the Walasmulla Magistrate and a criminal case was pending. The deceased meanwhile had filed a maintenance case against the accused. Such was the vitriolic relationship between the accused and the deceased leading upto the fateful day of 20.11.2005.

According to the appellant, he had been informed that his wife the deceased was planning to make a complaint to the police against the accused on 20.11.2005 regarding the transferring of the Middeniya house in the name of the mother of the accused. The appellant had contacted his wife the deceased and requested her not to make the complaint but to allow him to live in peace but to no avail. On 20.11.2005, the appellant had come to Middeniya town and borrowed a motorcycle from a friend (Witness No.8 Jayawickrema) and gone to Middeniya Police Station under the

expectation of meeting his wife there. There he had been directed to go to Tangalle Police Station. According to the appellant he had gone to the Tangalle Police Station in the motor cycle and met his wife there who had come with her child to make a complaint against the accused appellant. According to the appellant he had begged his wife not to make the complaint and he will give her what she wanted. However the wife had replied "උඹ කොහොම හරි හිරේට යවලා පස්ස බලන්නේ." According to the appellant he had lost control of himself at that point due to the continued harassment from his wife. He had noticed a knife vendor by the road side while coming to the Tangalle Police Station. The appellant had gone back in his motorcycle and purchased a manna knife for Rs. 250/- from the knife vendor, gone back towards the Tangalle Police Station and waited in ambush for his wife to come out, and dealt repeated blows on her neck with the knife and killed her.

The main witness for the prosecution was eyewitness one Pradeep Priyantha, a three wheel driver who had his three wheeler parked before the Tangalle Hospital about 300 meters away from the place where the incident took place. On hearing the shouts of the deceased woman, he had run towards the Tangalle Police Station followed by others present at the three wheel park. He

had described the incident as follows "දුවන කොට ඒ ගෑනු කෙනා ඉස්සරහට එනකොට පිරීම් කෙනෙක් අතින් අල්ලලා හැරෙව්වා. බෙල්ලට කන පැත්තට පිහිපාරක් ගැහුවා. එතකොට ගෑනුකෙනා වැටුනා. වැටෙන කොටම පිහිපාරවල් 2 ක් ගැහුවා. දරුවා බිම වැටුනා. ගෑනුකෙනාට යටවුනා. This witness has further testified "මෙයා දිව්වා පොලිසිය පැත්තට. දුවලා ගේට්ටුව ලඟදී පිහිය විසි කලා කානුවට. අත්දෙක උස්සගෙන පොලිසිය ඇතුලට ගියා."

Witness Sumanasena, a knife vendor, had testified that he sold a knife shaped like a fish to the accused who came in a blue coloured motorcycle shortly before the incident that morning. Witness Jayawickrama a businessman of Middeniya, had testified as to his lending his blue coloured motorcycle to the accused that morning to go to the Middeniya Police Station. The accused had borrowed his motorcycle on two previous occasions. Father of the deceased, Hemaplala Ekanayake had testified for the prosecution, followed by the doctor who performed the post-mortem examination on the dead body and Police Officers of the Tangalle Police Station. Saman Keerthi Muthumala, another three wheel driver, who rushed to the scene on hearing shouts, had testified that the deceased woman was already fallen in a pool of blood when he reached the scene and they chased after the suspect who was running towards the police station with the knife.

At the end of the prosecution case, the accused appellant had given a lengthy dock statement tracing the various conflicts and upheavals in his married life with the deceased. He had met his wife the deceased that morning at the Tangalle Police Station and pleaded with her not to make a complaint against him but she had retorted "උඹ හිරේ යවලා තමයි පස්ස බලන්නේ." The appellant had taken up the position that, in the backdrop of the previous incidents of harassment caused to him by his wife, he had lost control of himself at that point, went back in his motor cycle and purchased the weapon in order to frighten her. He had stated " මම උත්සාහ කලේ මාව අපහසුතාවයට පත්කරන එක මාව විනාශකරන එක වලක්වා ගන්න. ඇය ඒ කිසිම දෙයක් ඇහුවේ නැහැ. මට මාව පාලනය කරගන්න බැරිනිසා මම ඇයට පිහියෙන් පහර දුන්නා." Therefore the accused had admitted the killing but had taken up the mitigatory plea of grave and sudden provocation or cumulative provocation on the basis that he had lost control of himself due to the actions of the deceased wife.

The Registrar of the Wallesmulla Magistrate Court had been called as a defence witness and had testified as to the criminal case pending against the deceased as to the abduction of the accused. The former Officer-in-charge of Middeniya Police had also

given evidence for the defence and testified with regard to the complaints made in May 2005 by the brother of the deceased and the accused as to the disappearance of the deceased where the allegation was that she had eloped with the driver Wijesinghe alias Suddha.

The learned trial judge in a lengthy judgment had rejected the defence plea of grave and sudden provocation or cumulative provocation and convicted the appellant under Section 296 of the Penal Code for murder and imposed the death sentence.

It is paramount duty of this court in the exercise of its appellate powers to be mindful of Article 137 of the constitution in determining whether the substantial rights of the parties had been prejudiced or a failure of justice had been occasioned in contemplating the reversing or varying of a judgment. With this guideline in mind, I have perused the entirety of the proceedings, the judgment, the written submissions and the case law authorities submitted by both parties.

A perusal of the judgment indicates that the learned trial judge had arrived at the following inferences and determinations in coming to a finding that the accused appellant had failed to

establish that he had been deprived of self-control due to grave and sudden provocation at the time of commission of the offence, on a balance of probability under Section 105 of the Evidence Ordinance, in view of the rationale in The King Vs. James Chandrasekere (44 NLR 97).

(a) In the backdrop of the social strata of the appellant as an Attorney-at-Law, and in the background of a shattered marriage, the fact that the deceased went to the police station to make a complaint against the accused could not be construed by itself as generating grave and sudden provocation.

(b) Similarly, the alleged utterance of the deceased at the Tangalle police station "උඹ තිරේ යවලා තමයි පස්ස බලන්නේ." too could not be construed a provocation of such gravity, in the given background, sufficient to deprive the accused of his self control.

(c) The fact that the appellant proceeded to the police station in a borrowed motorcycle rather than his own vehicle and the fact he deliberately purchased a knife used for the killing tilts the probability more towards a pre-planned killing on the basis of hatred

than due to a spontaneous act generated by grave and sudden provocation.

(d) The evidence of recalled witness Pradeep Priyantha that as the deceased was leaving the Tangalle police station, the accused came from behind and turned her around before dealing blows with the knife, indicate that the accused was waiting in ambush for her arrival which is more suggestive of a planned attack than that of a spontaneous attack on the spur of the moment generated by loss of self control due to grave and sudden provocation.

Bearing in mind the above inferences and conclusions of the learned trial judge I now proceed to examine the legal situation as to the application of the mitigatory plea of grave and sudden provocation and cumulative provocation and explore the extent of their applicability to the facts of this case. In relation to the above, it is opportune to reiterate the following accepted principles in the application of the aforesaid mitigatory plea.

(1) The accused, in order to succeed in the mitigatory defence, must prove (by way of an objective test) that such provocation was likely to destroy the self control of

an average man of the class of society to which the accused belonged. (Vide Gration J. in Jamis (1952) 53 NLR 401 at 403).

(2) The word "sudden" implies that the reaction of the accused should be almost instinctive, without any element of scheming or contriving.

(3) Where there was sufficient time for the accused to cool off or control his emotions, provocation cannot be considered as sudden. The length of the intervening period is a question of fact which has to be determined in the light of the circumstances of each case.

(4) If the accused retained his self control, the basis of the plea of grave and sudden provocation is inapplicable, where on the basis of venom or malignity the accused killed his victim while being in complete control of himself.

(5) The test of "grave" provocation contains a subjective, as well as an objective element. The accused must show not only that the provocation was sufficient to result in a reasonable man losing his power of self-control, but that the accused lost his own power of self-control in consequence of the provocation.

(Vide: Rose C.J. in Muthubanda (1954) 56 NLR 217)

(6) The words "grave" and "sudden" are both of them relative terms and must, at least to a great extent, be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation. (Vide: Lord Goddard (Privy Council) in K.D.J Peera (1952) 54 NLR at page 266)

(7) The doctrine of continuing provocation or cumulative provocation, which has received judicial acceptance in our jurisdiction, introduces a qualification to the basically objective character of the test of provocation. The doctrine requires that a particular act of provocation should be regarded not as an isolated event, but the ultimate step in a chain of provocative events bestowing increasing strain on the accused upto a breaking point in a strained relationship.

On a corollary and analysis of the above principles governing the mitigatory plea of grave and sudden provocation, it is quite evident that this is a concession offered by law to human frailty in the distinctive offence of murder under Section 296 of the Penal Code. The essential elements that emerge from the

above principles are that the accused acted in the heat of provocation on the spur of the moment without deliberation, premeditation or calm and detached reflection. Equally, the accused should have acted in the heat of the moment almost instinctively, without any element of scheming or contriving. Where the interval of time between the causation of the provocation and the actual causation of the crime in retaliation is considerable , providing sufficient opportunity to cool off and control his emotions, provocation cannot be considered as sudden. In this context, the actions of the accused during this supervening interval of time must be judicially and minutely gauged and assessed to derive an insight as to whether the accused regained his self-control and acted out of venom, or still retained the rage or passion generated by the act of provocation, at the point of killing.

In cases where there is an interval of time between the act of provocation and the act of retaliatory killing, the burden is on the accused to establish on a balance of probability, that all the time during the supervening interval right upto the point of killing, the accused suffered deprivation of self-control to receive the benefit of the concession under Exception 1 to Section 294 of the Penal Code.

(Vide: H.N.G. Fernando, C.J. in Samithamby Vs. the Queen, 75 NLR 49)

In the instant case, to succeed in the plea, the appellant has to establish the following.

a) The last act of provocation by the wife at the Tangalle police station (උඹ හිරේ යවලා පස්ස බලන්නේ) was sufficiently grave (objectively) and that as a result the appellant was sufficiently provoked (subjectively) so as to be deprived of his self-control.

b) During the supervening interval (of about one hour) the subsequent conduct of the appellant right upto the killing was all performed while the accused appellant suffered under a loss of self control.

In the light of the above the following salient features spring to the eye. The chain of stressful events in the troubled matrimonial relationship of the accused and the deceased culminating with the deceased uttering "උඹ හිරේ යවලා පස්ස බලන්නේ." at the Tangalle police station are probably reasonably sufficient to entertain a plea of continuing or cumulative provocation had the accused

retaliated on the spur of the moment if he could reasonably show he was deprived of his self control. However, a close perusal of the evidence on the actions of the accused appellant thereafter shedding light on his mental situation gives rise to a different scenario. The actions of the accused from the point of receiving the provocation and up to the point of retaliation, when closely analyzed, distance the accused from entitlement to the mitigatory plea on a balance of probability but thrust him more towards a deliberate and calculated attack on the deceased.

The following actions of the accused based on the evidence illustrate the above situation vividly.

a) The very fact that the accused went back in his motor cycle to the Tangalle town to purchase a weapon. He had bserved the knife vendor on his way to the police station. The probable inference is that dark thoughts of murder had entered his mind and he was calmly planning its execution whatever the consequences.

b) According to the knife vendor Sumanasena (page 142 of the record) he had small knives and large fish knives for sale. The accused selected a large fish

knife, the heavier more dangerous weapon, manifesting the calculated intention to kill.

c) According to witness Sumanasena (Page 133 of the record) he offered the larger fish knife for Rs. 275/- to the accused who bargained and bought it for Rs.250/-. "රුපියල් 250 ක් 260 ක් කියලා විකුණන්නේ. මම 275 ක් කිව්වාම අඩු කරලා දෙන්න කිව්වම 250 ක් දෙන්න කිවා. "If the accused was still suffering from loss of self control, it is most unlikely that he would bargain for a few rupees.

d) According the evidence of eyewitness Pradeep Priyantha, while the deceased was walking away from the Tangalle police station, the accused had come from behind, turned her around, and dealt a blow with the knife on her neck, followed up with two more blows as she fell down. The inference is that the accused had the presence of mind to waylay and ambush her to prevent her from escaping. (page 421 of the record).

e) The subsequent conduct of the accused too was illuminating. After dealing repeated fatal knife blows on the deceased he had rushed inside the Tangalle police station with his hands raised in surrender after throwing away the knife shouting "මම ඒකි මැරුවා

එල්ලුම් ගස් ගියත් කමක් නැහැ " (page 301 of the record) apparently fully realizing the implications of his criminal act and accepting its dire consequences.

In view of the above, I am of the view that the appellant has failed to establish that he was deprived of self-control at the time of the killing.

The facts of this case are rather unfortunate. Apparently the accused did not intend to kill his wife when he first went to accost her at the police station. He had not taken any weapon. The final act of provocation at the police station probably catalyzed his mind to entertain an instantaneous murderous intention. A person of a lesser social strata with a more violent disposition may have reacted differently by losing his self-control and retaliated immediately and probably succeeded in the mitigatory plea. On the contrary, it is unfortunate that the accused, an Attorney-at-Law with a legally trained mind, retained is self-control to a certain extent and gave effect to the murderous intention thus generated in a more scheming and calculated manner. The law does not afford concessions to the conduct of such persons, who are nevertheless the direct fallout from grave and continuing cumulative provocation.

In view of the circumstances enumerated above, I am firmly of the view that the accused appellant had failed to prove on a preponderance of evidence that the *actus reus* was committed by him in the heat of passion whilst being deprived of his self-control due to grave and sudden provocation or cumulative provocation. In the event, the refusal of the learned trial judge to entertain this mitigatory plea to accrue to the benefit of the accused could not have caused a failure of justice under Article 137 of the constitution. In the premise there are no valid reasons to exercise the appellate powers of this Court on behalf of the appellant by setting aside or varying the conviction and sentence.

In view of the above I affirm the conviction and sentence dated 27.03.2008 imposed by the learned trial judge and dismiss this appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

I agree.

H.N.J. PERERA, J.

JUDGE OF THE COURT OF APPEAL

Mm/-.