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

In the matter of an Appeal
Against an order of the High
Court under Sec. 331 of the
Code of Criminal Procedure
Act No. 15 of 1979.

Rathnayake Mudiyanselage
Punchibanda
Anguruwatuwe Gedara,
Pussellaakanda,
Badulla,

Accused-Appellant

C. A. Case No. : 98/2007

H. C. Badulla Case No. : 64/2005

V.

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent

BEFORE : M. M. A. Gaffoor, J &

K. K. Wickramasinghe, J

COUNSEL : Sheron Serasinghe for the Accused-Appellant.

Sudharshana de Silva SSC. for the Attorney General.

ARGUED ON : 26th July 2016

DECIDED ON : 21th September 2016

K. K. WICKRAMASINGHE, J.

The accused-appellant (here in after referred to as "appellant") in this case was indicted in the High Court of Badulla on two counts punishable under sec. 296 and sec. 317 of the Penal Code. The appellant opted to have the case before the learned High Court Judge without a jury. At the conclusion of the trial on 14th of March 2007 the learned High Court Judge convicted the appellant for committing murder and for committing grievous hurt punishable under sec. 296 and sec. 317 of the Penal Code. Thereafter imposed death sentence on the first count and 3 years rigorous imprisonment on the second count.

The counsel for the appellant submitted that the available evidence is sufficient to bring down the charge to culpable homicide, on the basis of grave and sudden provocation or sudden fight. The second charge was not challenged.

The prosecution relied on the evidence of Kalubanda (the husband of the deceased) who was the injured and the son of the deceased (Anura Prasad).

According to the evidence of the prosecution the appellant and the injured Kalubanda were brothers and they were residing in adjoining lands with their families.

On the day of the incident, when Kalubanda came home he had seen his both children were playing with a ball and thereafter it had gone to the garden of the appellant over the stone fence. When the children started to cry, the deceased (wife of Kalubanda) had advised not to cry. Then the appellant was alleged to have raised his sarong and had showed to the deceased. Thereafter the deceased had scolded the appellant and there was an exchange of words by both parties.

Counsel for the appellant had submitted that at the time of the incident injured Kalubanda was making a sambol in the kitchen and he had come out of the kitchen only after when he was informed by his daughter, that his wife (the deceased) was cut by the appellant. When he went

out of the house appellant had threatened him that he too would be cut. Counsel for the appellant submitted that the appellant had first cut the deceased, then Kalubanda, thereafter gone back to the deceased and cut her again. After receiving injuries the deceased had gone under a breadfruit tree. According to Kalubanda's evidence he had requested Grama Niladhari to come. Grama Niladhari had asked to cover the body of the deceased. Then Kalubanda had become unconscious and when he regained consciousness he was in the Badulla hospital.

According to medical evidence cause of the death was due to excessive bleeding. Counsel for the appellant further submitted that according to the evidence of the JMO there were no necessary fatal injuries. It is also observed by the JMO that the deceased was suffering with a deformity of the lungs and the two lungs were pasted together (Page 60 of the brief) but the PMR of the deceased is not available in the file of record.

According to evidence it is revealed that both parties used to fight due to a long standing land dispute. The MLR marked "P8" reveals that the appellant was smelling of liquor at the time he was examined. The first information was given to the police by the appellant himself.

It is pertinent to note that though there was a land dispute he had not just come to the deceased's compound and attacked with a motive intending to commit murder of the deceased. Even according to the evidence of the prosecution it proves beyond reasonable doubt that the appellant had scolded the children first over the "ball" fallen to his land. Thereafter under aggrevatory circumstances this incident had taken place. Three contradictions were marked in the evidence of the injured. It was suggested to the witness that he inflicted injuries to the appellant with his knife and also he and the deceased abused the appellant in filth and that the appellant acted in self-defence. The appellant in his dock statement had not denied the fact that he inflicted injuries to the deceased with Kalubanda's knife. He had further stated that when Kalubanda attacked him he attacked both of them as self-defence. The knife was recovered and marked under sec. 27 of the Evidence Ordinance which was taken out from a flower bed of the appellant's garden.

In the case of **Murugesu v. The King (1951) 53 NLR** at page 471 and page 472 the learned Judge summarized for the benefit of the Jury the various issues on which the verdict must ultimately depend:

".... If he was not attacked, then you will ask yourselves was it his hand that caused the fatal injury? When he dealt that blow, did he have a murderous intention? If you have no doubt that it was his hand that caused the fatal injury then proceed to ask yourselves whether you can hold that he had a murderous intention. If you come to the conclusion that he had a murderous intention then his offence would be murder; ***but if you think that he had no murderous***

intention, then proceed to consider if he had the knowledge that his act was likely to cause death or bodily injury sufficient in the ordinary course of nature to cause death. *If he had the knowledge then his offence would be culpable homicide not amounting to murder. If, however, even that knowledge has not been established by the evidence, he would be guilty of voluntarily causing grievous hurt.*

Having regard to the specific issues which were so prominently placed before the jury at this stage of the trial, it is in our opinion impossible to state with certainty that when considering their verdict, they had also reminded themselves of the very brief and inadequate direction that they should also consider the issue of "provocation" or of "sudden fight"."

And also in **The King v. Jinasekere 46 NLR** at page 246 the learned Judge stated:
"*....the case for the first accused, based on the injuries found on the second and third accused which were to a certain extent unexplained, was that the deceased received her fatal injuries in the course of a sudden fight and therefore the circumstances were such as to bring the case within exception 4 of section 294 of the Penal Code. Moreover, if the evidence of the second accused is accepted there was evidence to support the argument that the injuries found on the deceased were received in the course of a sudden fight without premeditation in the heat of passion upon a sudden quarrel. In these circumstances we think that the jury should have been asked by the learned Judge to say whether the case came within this exception.*"

The learned Senior State Counsel was of the view that the learned High Court Judge had correctly analysed the evidence and had rejected the evidence of the appellant. Further he submitted that the testimonial trustworthiness of a witness is a matter for a trial Judge will not be disturbed by an appellant court lightly.

Before coming to a conclusion we should be mindful of the evidence of the medical expert as well. The doctor who conducted the post mortem had stated that the deceased was suffering with a deformity of the lungs. The appellant had inflicted injuries to the deceased and further had inflicted injuries to witness (injured) as well. The witness in his evidence mentioned that the appellant said "කෝන් මරණවා". In the cross examination it was suggested to the witness by the defence counsel, that witness had not stated that fact to the police and only stated that the accused said "කෝන් ආවද?". Then the witness had said that he could not remember. At this junction it creates reasonable doubt whether in fact the appellant had an intention, since there is a contradictory position of an ingredient of the charge of murder.

Senior State Counsel who appeared for the respondent has sighted following judgments to show that there is no ground for a plea of culpable homicide not amounting to murder, but

considering the available evidence it seems that the appellant was unable to control his anger due to the aggravatory factors, specially the conduct of the deceased.

In the case of ***James Silva v. Republic of Sri Lanka 1980 2 SLR 167*** it was held that *'A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty- See the Privy Council judgment in Jayasena vs. Queen 72 NLR 313."*

One person's self-control defers from another. It depends on circumstances and the back ground of that particular individual. According to page 37 witness Prasad (son of the deceased) has given evidence as follows:-

"අම්මා බලා ඉද්දී සරම උස්සලා බාප්පා පෙන්නුවා. අම්මා ඊට පස්සේ කිව්වා "අපේ ගෙදර එක කෙල්ලයි ඉන්නෙ, උඹලගෙ ගෙදර හතර දෙනෙක් ඉන්නව, **පෙන්නන්න**" කියලා කිව්වා. ඒ පාර බාප්පා හිටපන් උඹට කියලා ගේ ඇතුලට ගියා.

.....

Question:- විත්තිකරු අම්මාව අල්ලාගත්තා කියලා කිව්වා?

Answer:- ඔව්.

Question:- ඒ වෙලාවේ තමන් කොච්චර දුරකින්ද සිටියේ?

Answer:- අඩි 29ක් දුර පෙන්වා සිටී.

Question:- අම්මාගේ කොයි හරියෙන්ද අල්ලා ගත්තේ?

Answer:- පපුව හරියෙන් අල්ලා ගත්තා."

Though the above mentioned act is not an act accepted by the civil society appellant who was under the influence of liquor with such a background would have amount him to have such a behaviour. After hearing the words of the deceased he would have suddenly got provoked. When considering the evidence of the prosecution it is apparent that murderous intention was not proved beyond reasonable doubt by the prosecution.

In the case of **Ratnaweera Liyanapatabendige Raja Gemunutileka CA NO. 131/2000 HC Ampara No. 303/99 decided on 10.09.2008 (Appellate Court Judgment (Unreported) 2008 Volume ii Page 26 at 34)** it was held by Justice Sarath de Abrew that *"Exception iv to the Section 294 of the Penal Code reads as follows:- Culpable homicide is not murder if it is committed* ***without premeditation*** *in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner."*

In the judgement of Sisira de Abrew J in **CA No 189/2003 HC Ampara No. 758/2003 decided on 07.09.2007 (Appellate Court Judgments (Unreported) 2007 Volume ii Page 169 at 179** stated

that "*to get the benefit of the defence of grave and sudden provocation the following matters must be proved.*

(1) That the appellant was given the provocation

(2) That the provocation was sudden

(3) That the prosecution was grave

(4) That as a result of the provocation, the accused-appellant lost his power of self-control

(5) *That whilst deprived of the power of self-control he committed the act that resulted in the death of the victim.*"

Furthermore it is evident that in the instant case the appellant had no premeditation and his act was not at all a pre-planned act with a motive (though it was said to have been a land dispute).

After careful consideration of the evidence, revealing that the appellant was provoked by the words uttered by the deceased, the appellant had acted under grave and sudden provocation.

Considering the above facts, we quash the committal of the death sentence imposed by the learned High Court Judge and convict the appellant for culpable homicide not amounting to murder punishable under sec. 297 of the Penal Code. We impose a sentence of 20 years rigorous imprisonment for charge no.1 and affirm the conviction and sentence of charge no. 2. We further order both sentences to run consecutively.

Subject to the above mentioned variation, the appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor, J.

I Agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

1) Murugesu v. The King (1951) 53 NLR
2) The King v. Jinasekere 46 NLR
3) James Silva v. Republic of Sri Lanka 1980 2 SLR 167
4) Jayasena vs. Queen 72 NLR 313
5) Ratnaweera Liyanapatabendige Raja Gemunutileka CA NO. 131/2000 HC Ampara No. 303/99 decided on 10.09.2008 (Appellate Court Judgement (Unreported) 2008 Volume ii Page 26 at 34)
6) CA No 189/2003 HC Ampara No. 758/2003 decided on 07.09.2007 (Appellate Court Judgements (Unreported) 2007 Volume ii Page 169 at 179