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 Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No:
CA 275/2013

Gamage Nishantha Lionel

Accused-Appellant

High Court of Kalutara
Case No: 582/2005

-Vs-

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

Respondent

Before : **S. Thurairaja PC, J**

&

A.L. Shiran Gooneratne J.

Counsel : Indica Mallawarachchy with K. Kugaraja for the Accused-Appellant.

Sudharshana De Silva, SSC for the Respondent.

Written Submissions of the Accused Appellant filed on: 21/05/2018

Written Submissions of the Respondent filed on: 11/06/2018

Argued on : 10/10/2018 and 11/10/2018

Judgment on : **15/11/2018**

A.L. Shiran Gooneratne J.

The Accused-Appellant (hereinafter sometimes referred to as the Appellant) was charged for causing the death of Kande Jayasinghege Piyadasa, (hereinafter referred to as the deceased in the 1st count) and causing the death of Magala Thottahachchige Kusumawathie, (hereinafter referred to as the deceased in the 2nd count) offences punishable under Section 296 of the Penal Code. The Appellant was also charged for voluntarily causing hurt to Kande Ranasinghe Jagath, thereby committing an offence under Section 314 of the Penal Code.

At the conclusion of the trial, the learned High Court Judge sentenced the Appellant to death on count 1 and 2 and was sentenced to 1 year's Rigorous Imprisonment and to a fine of Rupees 2,000, having a default term of 1 year's Simple Imprisonment on count 3.

Whilst admitting liability to the commission of the said crime, the Appellant takes up the defence of grave and sudden provocation and seeks lesser culpability against the conviction for murder on the strength of the defence evidence. The Senior State Counsel appearing for the Respondent supports the

findings of the trial Court and seeks to uphold the conviction and sentence for murder.

We enumerate the following items of evidence given on oath by the Appellant;

(a) The father of the Appellant was a paralytic since the Appellant was 15 years of age and, therefore was compelled to shoulder the economic burden of the family by helping his mother.

(b) Letters addressed to the Appellant was left at the deceased house since the Appellant's dilapidated house was demolished and a new house being constructed.

(c) The Appellant was awaiting a successful outcome of an interview which would have secured him employment as a Police driver.

(d) The Appellant had gone to the deceased house to inquire as to whether there were any letters addressed to him, at which point the deceased had ridiculed the Appellant and had made insulting and derogatory remarks. Certain remarks were in the nature of ridiculing and threatening his parents.

(e) The deceased in the 1st count had approached the accused armed with an iron crowbar in an abusive manner and had assaulted the accused.

(f) The accused had grabbed the crowbar and had inflicted serious injuries which had resulted in his death.

(g) A few moments later, the deceased in the 2nd count had approached the Appellant armed with a Katty at which point the Appellant had used the same crowbar to inflict fatal injuries on her.

According to evidence of IP Kumara Jayasekara Kulatunga, the investigating officer, a report of a crime was received on 01/02/2002, at 18.30 hrs. and the witness had arrived at the scene at 18.45. On arrival he had observed the deceased in the 2nd count lying with serious injuries. According to the Appellant he gave himself up to the law enforcement officer together with the iron crowbar at the time of arrest. It is important to note that, the Appellant had arrived at the place of incident at 17.00 hrs. the police on notice arrived at 18.45 hrs. and a statement of the Appellant was recorded at 19.20 hrs. at the scene of the crime. It is also to be noted that the deceased in the 1st and 2nd counts were found 10 meters apart from each other.

The Appellant's evidence on oath pertaining to the factual content, material to the date in question, as noted above, consists of 146 pages and also had led evidence of 7 witnesses, on his behalf.

In the circumstances, this Court is called upon to determine whether there was a misdirection on the part of the learned trial judge when evaluating the evidence pertaining to the defence of grave and sudden provocation.

According to evidence, the prelude to this incident is, that a letter of employment as a police driver which was eagerly awaited by the Appellant was held back by the deceased in the 1st count. Document marked V7 produced in

evidence by the defence, at the least would suggest that the Appellant was awaiting an out come to his application to enlist as a police driver attached to the Special Task Force. When the Appellant inquired about the letter, the deceased in the 1st count had retorted in a sarcastic manner virtually indicating that the Appellant was not suitable to this appointment and would be better off doing something else. It is observed that the language used by the said deceased at that moment was clearly derogatory. The language used by the deceased was not confined to the Appellant alone, but also towards his father who was physically invalid at the time and the mother who was shouldering the economic burden of the family. The remarks made were not only detracting but also had the effect of infusing fear of continued economic and social hardship on the Appellant.

The Appellant giving evidence stated that due to sudden anger which befell him, he had taken the iron crowbar which was in the possession of the deceased in the 1st count to attack him. A few minutes later he had attacked the deceased in the 2nd count. The Appellant also states that he was mentally disturbed and had no control of himself at the time and further states that he had no alternative response other than to assault the deceased.

The trial judge evaluating the evidence of the defence, has confined himself to 2 or 3 sentences at the most, where he has rejected the defence of grave and sudden provocation on the basis that the Appellant has lied in order to escape culpability. The trial judge has considered that the Appellant has failed to take up

the said defence in the statement given to the police at the time of arrest, as a material omission.

In the circumstances, the following issue can be identified arising out of the said reasoning, that is,

- has the trial judge failed to appreciate the defence of grave and sudden provocation more so borne out by the defence case.

The trial judge considering the evidence of the Appellant concludes that, if the Appellant is to be believed that he acted in self defence or out of provocation, he should have stated that in his statement to the police. The judge further states that taking a defence of provocation at the trial stage is a deliberate act on the part of the Appellant to misdirect Court and conceal the truth from been revealed in order to gain his freedom.

At this moment, it is to be noted again that the police recorded the statement of the Appellant less than an hour after arriving at the scene of the crime. In his evidence, the Appellant clearly describes his mental condition as not normal, as one could expect, in the given circumstances. Accordingly, the trial judge has totally failed to evaluate the evidence put forward by the Appellant and gives no reason for rejecting such evidence, which is compatible with the defence of grave and sudden provocation. It is interesting to note that the omission which the trial judge considers as an important omission arises out of the statement made by the Appellant to the police officer, which by itself cannot form part of the

evidence at a trial. However, based on this omission the judge completely rejects the defence put forward by the Appellant.

It is incumbent upon a trial judge to evaluate the defence evidence in its entirety and in its exact standpoint without shielding himself on extraneous considerations which can shut out material facts led in evidence. To the expance that the law provides, an accused should be free to exercise his legitimate right to put forward his defence without any hindrance or restriction. The defence put forward by the Appellant, which is vividly narrated in evidence on oath by the Appellant and 7 witness testimonies consisting of 191 pages, is shut out completely with the only finding that the omission as described above, is an important consideration to reject the defence of grave and sudden provocation. Consideration of extraneous material to shut out a defence taken up at a trial is wholly unacceptable.

In the case of ***Uduma Lebbe Sailathumma alias Aish Umma and others Vs. The Attorney General, CA 95/2010 decided on 25/09/2014,*** the Court held that,

> *"the evidence in Court is only the evidence led at the trial and contradictions and omissions are not evidence, and used only to diminish and or enhance the version of a particular witness or party and to test the testimonial trustworthiness".*

As noted earlier, the Appellant has admitted liability and confines his submission to seek a lesser culpability against the conviction for murder.

The offence of murder is reduced to culpable homicide not amounting to murder, if the exception of grave and sudden provocation can be shown.

In the case of ***Kattadige Amarasena vs. The Democratic Socialist Republic of Sri Lanka SC. Appeal 34/2001***, the Court held that,

> *"The question is whether words uttered by the deceased (as in the dock statement) provoked the accused gravely and suddenly and the accused lost his self-control. Can a reasonable man in the same class likely to lose his self control as a result of provocation?"*

We observe from evidence that the accused was annoyed and/ or irritated by the provocative and threatening utterances of the deceased in the 1st count. The said abusive utterances were directed at the accused, his parents, livelihood, credibility, esteem and standing in society, all of which a reasonable man stands for. The Appellant states that, he lost his sense of reasoning and had no alternative other than to retaliate. After having attacked the deceased, the Appellant remained at the scene of the crime until he was arrested. It is in evidence that the Appellant temporarily lost his power of self-control, as a result he committed the unlawful act.

Bertram C.J. said, in ***Punchirala (1924) 25 NLR 458***;

> *"Provocation is, in my opinion, something which a reasonable man is entitled to resent."*

In the circumstances, we are of the view that the evidence led in this case clearly establish grave and sudden provocation which is an exception to Section 294 of the Penal Code.

Accordingly, we find that the evidence led in this trial clearly manifest grave and sudden provocation which the trial judge has failed to consider in arriving at the impugned judgment.

Accordingly, we set aside the conviction dated 31/10/2013, and the corresponding sentence on count 1 and 2 and replace the conviction for murder to one of culpable homicide not amounting to murder on the basis of grave and sudden provocation and impose a sentence of 10 years rigorous imprisonment on each count which is to be operative from the date of sentence namely, 31/10/2013.

We also impose a fine of Rupees 10,000/- on each count with a default sentence of 1 year's simple imprisonment. The sentence passed on count 3 will remain. All sentences of imprisonment are ordered to run concurrently.

Appeal partly allowed.

JUDGE OF THE COURT OF APPEAL

S.Thurairaja PC, J

I agree.

JUDGE OF THE COURT OF APPEAL