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

In the matter of an Appeal in terms of section 331 (1) of the Criminal Procedure Code No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

HCC-0086-2019

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Nuwaraeliya

Case No:

HC/NE/11/2012

Sinnappan Krishnakumar

ACCUSED

AND NOW BETWEEN

Sinnappan Krishnakumar

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: K Priyantha Fernando, J. (P. /C.A.)
	: Sampath B Abayakoon, J.
Counsel	: Indika Mallawarachchi, for Accused-Appellant
	: C. Gunasekara, ASG for the Respondent.
Argued on	: 08-07-2021
Written Submissions	: 03-02-2020 (By the Accused-Appellant)
	: 07-07-2020 (By the Respondent)
Decided on	: 02-08-2021

Sampath B Abayakoon, J.

This is an appeal by the defendant-appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Nuwaraeliya.

The appellant was indicted before the High Court of Nuwaraeliya for committing the offence of murder of one Kandasamy Sellamani, punishable under section 296 of the Penal Code.

After trial without a jury, the appellant was found guilty as charged and was sentenced to death.

Facts that led to the death of the deceased Sellamani as established by way of evidence at the trial are briefly as follows;

The deceased was living with the appellant in an illicit relationship and they had two children by the union. The appellant was a married man whose wife was employed overseas. According to the evidence of PW-01 who was the father of the deceased, his daughter and the appellant lived in matrimony in a house owned by him, which was situated near his house in the tea estate where they lived. According to him, there were constant quarrels between them due to the drunkenness of the appellant. It was his evidence that on the day of the incident where the deceased suffered burn injuries, namely, on the 19th of August 2009, his daughter came to his house in a state of shock at around 11.00 pm with the youngest child of about one year old and informed that the appellant came home drunk and assaulted her. About fifteen minutes later, the appellant Krishnakumar came and wanted him to open the door. Upon his refusal, the appellant forcibly opened the door by breaking the nearby window and after assaulting the deceased, dragged her to the house where they lived, leaving the child with him.

Thereafter, in about another fifteen minutes they returned, with his daughter having burn injuries all over her body and she informed him that Krishnakumar the appellant, poured Kerosine oil on her and set fire to her. It was his evidence that he could not take her to the hospital as he was a sick person and although he asked the appellant to take her to the hospital, he took her back to their house and it was only in the she was taken to the hospital by the appellant where she died seven days later.

Apart from the evidence of PW-01 and the other witnesses, the prosecution has relied on the four dying declarations made by the deceased on four occasions before her death in order to prove the case against the appellant. The four occasions are as follows;

(1) The statement made to her father shortly after the incident.
(2) The statement made to her brother after he visited her at the hospital.
(3) Statement made to the doctor who examined the deceased.
(4) Statement made to the Police officer who recorded her statement while she was receiving treatment at the hospital.

It is noteworthy to mention that the appellant has failed to setup any defence while cross examining the witnesses other than questioning them on the facts. When called for a defence, he has made a statement from the dock and has pretended that the deceased was unknown to him. Further, he has claimed that on the day of the incident, after coming home from Colombo, he went to see his sister who lived in Maanikka estate after receiving a message from her. According to the dock statement, while walking towards his sister's house at about 9.30 pm in the night, he has seen a house on fire and it was he who doused the fire. Upon seeing the deceased whom she described as "ඒ ළමයා" with burn injuries, he claims that he inquired her as to where she wants to go and it was only on her directions that he was able to take her to the house of her father. It was his position that her father refused to take her in and although he attempted to find a vehicle to take her to the hospital, he could not, and thereafter he took her back to the burned house, kept her there and went to his sister's house. He has stated that since he found the deceased still in the burned house on his way back to his home, on the following morning, he took steps to admit her to the hospital and it was he who admitted her to the hospital.

Apart from making a dock statement, the appellant has called his legally married wife to testify that she was legally married to him. Her evidence also reveals that at the time of the incident, she was employed in the Middle East and was completely unaware of her husband's illicit

relationship. The Grama Niladari of the area where the appellant lived has testified as to the appellant's residence and the Doctor who admitted the deceased to Dikoya hospital has also been called to give evidence.

It is clear from the judgment of the learned High Court judge that the appellant was found guilty as charged, based on the circumstantial evidence made available and the dying declarations of the deceased.

At the hearing of the appeal, the learned counsel for the appellant urged following two grounds of appeal to formulate her arguments.

(1) The learned trial judge who delivered the judgment failed to adopt the evidence led before his predecessors under the provisions of section 48 of the Judicature Act as required, hence, the judgment is bad in law.

(2) The learned trial judge has failed to consider the evidence led at the trial, which warrant the consideration of grave and sudden provocation of the appellant which stems from the dying declaration of the victim made to the Police officer.

First Ground of Appeal: -

Section 48 of the Judicature Act relied on by the learned counsel reads as follows;

Section 48: -

> **In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on**

the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh:

Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be resummoned and reheard.

The argument of the learned counsel for the appellant is on the premise that the learned High Court judge who concluded the evidence and pronounced the judgment failed to comply with the requirements of the section by failing to adopt the evidence previously led before his predecessor.

I find that the plain reading of section 48 of the Judicature Act as amended by Act No 27 of 1999 is very much clearer as to the intention of the legislature. The intention has been to provide for the conclusion, as expeditiously as possible, a trial commenced before another judge without causing prejudice to an accused person. The legislature in its wisdom has provided for the trial judge to continue with the trial by acting on the evidence previously recorded by his predecessor, but by the proviso of the section has provided an opportunity for an accused in a criminal prosecution to demand that the witness may be re-summoned and reheard ensuring the right of an accused for a fair trial.

In the instant action the accused has been represented throughout the trial by the same counsel. I find that the evidence has been recorded before several High Court judges and the main witnesses have given evidence and the dying declarations have been marked before the learned High Court judge who commenced hearing of the evidence. The parties

have agreed to adopt the evidence before the succeeding judge on 03-03-2016. Thereafter, the evidence of the Judicial Medical Officer who conducted the post mortem and of a court official has been led. After the conclusion of the evidence for the prosecution it was he who has decided to call for a defence.

When the matter came up for further trial on 04-04-2017 before the learned High Court judge who subsequently concluded the case, and pronounced the judgement, the following minute has been placed on the record by the learned judge, and accordingly had proceeded to hear evidence for the defence.

"ඒ අනුව මෙම නඩුවේ විභාගය මා ඉදිරිපිට පැවැත්වීම සම්බන්දයෙන් විරුද්ඩත්වයත් නොමැති බව විත්තිකරු කියා සිටී. ඒ බවට විත්තිකරුට නඩු වාර්තාව අත්සන් තැබීමට නියම කරමි."

Although the learned Trial judge has not used the words directly indicating the adoption of proceedings, I am of the view that the learned trial judge was very much mindful of the provisions of section 48 of the Judicature Act as it provides only for the continuation of the proceedings before him, when he placed on record the above minute. I am of the view that if it was the intention of the accused to re-summon witnesses, it was up to the accused appellant to make such a demand, which he has failed to do.

In the instant action, the appellant has not demanded the re-summoning of the witnesses before the successor of the original trial judge who heard most of the witnesses including the evidence of PW-01. Without making use of his right to demand before the successor of the original trial judge, and after agreeing for the continuation of the trial, before the judge who ultimatly concluded the trial, the appellant has no

basis to argue that he was denied of a fair trial, hence, the ground of appeal urged has no merit.

Second Ground of Appeal: -

An accused person charged with committing the offence of murder as described in section 294 of the Penal Code can rely on the exceptions provided for in the section to contend that it was not murder but culpable homicide.

The relevant section 294 Exception 1 relied on by the learned counsel to argue that the learned trial judge has failed to consider the evidence available on provocation of the appellant reads thus;

> **Exception 1- culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.**
>
> **The above exception is subject to following provisos: -**
>
> > ***Firstly*- that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.**
> >
> > ***Secondly* -that the provocation is not given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant.**
> >
> > ***Thirdly*- that the provocation was not given by anything done in the lawful exercise of the right of private defence.**

***Explanation*- whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.**

As stated earlier, the appellant has never taken up the defence of grave and sudden provocation before the trial judge and in fact has pretended that the deceased was unknown to him. However, it was the contention of the learned counsel for the appellant that it was the duty of the trial judge to consider the evidence as to the grave and sudden provocation in a judgment, although it was not the defence of an accused person.

Citing several decided cases of our superior courts to formulate her argument, it was the contention of the learned counsel that in the dying declaration the deceased made to her brother, she has stated that because one Bala came, the appellant assaulted and set fire on her. It was further contended that even in the statement the deceased made to the Police, marked P-01 at the trial, she has admitted that because she scolded her husband, he set fire on her.

Relying on the above, it was the contention of the learned counsel that there was sufficient evidence for the learned trial judge to act under section 294 Exception 1 and the learned trial judge has failed to address his mind to the exception of grave and sudden provocation.

Nagalingam S.P.J. in **K.D.J.Perera Vs. The King (1951) 53 NLR 193 at 201** discuses what should be established to claim the benefit of section 294 Exception 1.

> *"Under our law, what has to be established by a prisoner who claims the benefit of exception 1, in section 294 of the Penal Code is:*

(1) that he was given provocation,

(2) that the provocation was sudden,

(3) that the provocation was grave,

(4) that as a result of the provocation given, he lost his powers 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."

It was stated further, at **202,**

"Under our law neither the presence of an intention to kill would preclude the formulation of a successful plea based on grave and sudden provocation nor that words by themselves would not be sufficient to cause provocation."

Hence, for an accused person to succeed in a plea of grave and sudden provocation the above grounds need to be established by evidence led before the trial court.

Accordingly, the next matter to be considered in relation to the facts of the instant action is the mode of proof required of a plea of grave and sudden provocation, as the appellant had not pleaded such an exception nor has led any evidence on such a basis, but has denied any involvement with the setting fire on the deceased, and even has gone on to the extent of denying knowing her before the incident.

In his exhaustive judgment on the question of grave and sudden provocation and the mode of proof of such a plea, **A.H.M.D.Nawaz, J (As he was then)** in the case of **Kulanthaivel Ramesh alias Vishvalingam Sasikumar Vs. The Attorney General, C.A.Appeal Case No-16/2013**

decided on 27-03-2015 at page 07 with reference to several previously decided cases held:

> *"No doubt Section 105 of the Evidence Ordinance places the burden of proving a general or special exception on an accused in the event that he pleads such an exception and the Divisional Bench by a majority of 6 to 1 declared in The King v James Chandrasekera 44 N.L.R 97 that the standard of proof of these exceptions is on a balance of probabilities but there are a number of decisions that lay down the rule that such a burden does not exist where it is manifest from the evidence for the prosecution that the plea must be upheld- vide The King v Sellammai (1931) 32 N.L.R 351; 8 T.L.R 143. Therefore, it follows that the burden of proof of an exception may be discharged not only by the evidence for the prosecution but also by the evidence for the defence or both.*
>
> *Courts have gone to the extent of holding that even if the accused denies the allegation in toto, mitigatory circumstances must be considered by the jury if the evidence unfolds such circumstances. Thus, in The Queen v Sinnathamby (1965) 68 N.L.R 195 the Court of Criminal Appeal held that even though the defence was a total denial of the acts which caused the death, the judge was justified in putting the question of insanity to the jury."*
>
> Held further at page **08** that,
>
> *"Thus, we distil the wisdom in these cases namely no burden of a general or special exception is undertaken by an accused if such an exception arises on the prosecution evidence or evidence led for the defence or both. I hold that this proposition is consistent with the stipulations contained in section 105 of the Evidence Ordinance. That section casts the burden on an accused of proving the existence of circumstances bringing the case within any of the general or*

special exceptions in the Penal Code or within a proviso contained in any other part of the same Code, or in any law defining the law and the Court shall presume the absence of such circumstances. If the existence of the extenuating circumstances stipulated in the exceptions and provisos of the Penal Code or even the elements constituting a defence contained in a law are brought out by the evidence that emerges at the trial, whether it be that of the prosecution or defence, then the Court does not have to presume the absence of those circumstances and Section 105 will have no application in such a situation. In such a situation there will be no burden as required by Section 105 as the extenuating circumstances have already emerged at the trial. When such extenuating circumstances arise, it is the duty of the trial judge to leave the issue of extenuation to the jury."

In the case of **R.M.Karunaratne Vs. The Attorney General C.A.181/2009, H.C.Puttlam 84/05 decided on 21.11.2011,** held:

"If the plea of grave and sudden provocation is available from the evidence of the prosecution itself, court has a duty to consider such a plea even if the accused did not raise it."

The above line of authorities clearly establishes that for a trial judge to consider whether there was grave and sudden provocation, there must be evidence, either by the prosecution or the defence. It is quite apparent from the evidence made available to the learned trial judge there were no evidence as such, and hence, there was no basis for him to consider the evidence under section 294 Exception 1.

I do not find any basis to consider the statement the deceased made to her brother as to the reason for the setting fire on her by the appellant and the statement she made to the Police about her scolding the appellant as sufficient evidence to establish the Exception1, as envisaged

by section 294. The evidence establishes that the appellant was in the habit of assaulting and illtreating the deceased after consuming liquor. On the day in question, she has come to her father's house seeking shelter after being assaulted by the appellant. The appellant who came after her, has forced open the door of the house and had dragged the deceased away and had set fire on her.

Even after setting her on fire, the appellant has failed to take her to a hospital and had only done so in the following morning, which goes on to establish his intention beyond reasonable doubt. The statement made by the deceased to the Police while in hospital (P-01), if read as a whole, clearly shows the reason why she scolded the appellant which cannot be considered a provocation that warrants setting fire on the deceased, if it can be even remotely considered a provocation.

For the reasons stated as above, I am unable to find any merit in the second ground of appeal either.

The appeal therefore is dismissed, as I find no reasons to interfere with the conviction and the sentence imposed on the appellant.

Judge of the Court of Appeal

K. Priyantha Ferando, J. (P/C.A.)

I agree.

President of the Court of Appeal