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

In the matter of an Appeal made under
Section 331 of the Code of Criminal
Procedure Act No.15 of 1979

CA 164/2016

HC/ Kuliypitiya/06/2008

Manchanayaka Appuhamilage
Chaminda Ranaweera

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Devika Abeyratne J**
P. Kumararatnam J

COUNSEL : **Ms.Indika Mallawarachchi for the Appellant**
Mr.Sudarshana de Silva DSG for the
Respondent.

ARGUED ON : **03/08/2021**

DECIDED ON : **27/10/2021**

JUDGMENT

P. Kumararatnam J

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted for committing murder of Thammita Arachchilage Chandrasena alias Sunil on 13/08/2006 which is an offence punishable under Section 296 of the Penal Code.

After a non-jury trial, the Learned High Court Judge has found the Appellant guilty of the charge and sentenced him to death on 14/09/2016.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via zoom from prison.

On behalf of the Appellant only one Ground of Appeal is raised. According to the counsel for the Appellant evidence led at the trial warrants the consideration of the plea of cumulative provocation which had not been adequately dealt by the learned High Court Judge in his judgment.

Background of the Case

According to PW01 Somawathi, the wife of the deceased the Appellant is the nephew of the deceased. His father was killed when he was 15 years old and the deceased was charged for the murder of the Appellant's father. The deceased was acquitted from the case after about 10 years of the incident.

As the Appellant and deceased lived opposite to each other's house constant quarrels ensued between them and the Appellant had at each occasion accused that the deceased had murdered his father.

On the day in question around 5.00pm the Appellant had an altercation on the road with the deceased's elder brother Sumanaweera and the deceased had intervened and asked both his brother and the Appellant to go home. At this point an altercation erupted between the Appellant and the deceased. After the altercation was over the elder brother of the deceased had left the place. At about 6.45pm when the deceased was leaving the place of incident on his motor bike the Appellant had attacked the deceased with a club. Thereafter the deceased was taken to the Dambadeniya hospital and he had succumbed to injuries upon admission.

PW2 son of the deceased, Madushanka had corroborated what his mother narrated during the trial.

The counsel for the Appellant takes up the position that the case against the Appellant should have been considered under the plea of cumulative provocation and should have been convicted not for murder but for culpable homicide not amounting to murder under 297 of the Penal Code.

According to exception 1 of Section 294 of the Penal Code “*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 explanation under this exception read as that “*Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact*”.

Although the counsel for the Appellant seeks relief for lesser culpability on the plea of cumulative provocation, on perusal of the evidence led before the High Court no evidence of sudden fight elicited either from the evidence of the prosecution nor was the same suggested in the cross examination. According to Section 105 of the Evidence Ordinance it is the responsibility of the Appellant to prove the existence of a general or special exception during the trial on a balance of probability. In the absence the Learned trial Judge should direct his mind to the circumstances and the fact that the Appellant is entitled to have the benefit of the lesser verdict.

In **The King v Bellana Vithanage Eddin** 41 NLR 345 the court held that:

"In a charge of murder, it is the duty of the judge to put to the jury the alternative of finding the accused guilty of culpable homicide not amounting to murder when there is any basis for such a finding in the evidence on record, although such defence was not raised nor relied upon by the accused”.

It is very important at this stage to discuss the development of law regarding the acceptance of cumulative provocation as a special exception to a murder charge in our jurisdiction.

In **Premalal v Attorney General** [2000] 2 SLR 403 Kulatilaka, J held that:

“Until the judgment of Chief Justice H.N.G Fernando in *Samithamby v Queen* (1) (de Krester, J-dissenting) our court followed a strict view in applying Exception (1) set out in Section 294 of the Penal Code. Our judges following their counterparts in England interpreted the phrase “sudden provocation” to mean that provocation should consist of a single act which occurred immediately before killing so that there was no time for the anger to cool and the act must have been such that it would have made a reasonable man to react in the manner as the accused did. Our Courts were reluctant to take into consideration any special circumstances which manifested in the particular offender’s case”.

Kulatilaka, J. further held that:

“Of late we observe a development in other jurisdictions where Courts and juries have taken a more pragmatic view of the mitigatory plea of provocation. In a series of cases in applying the mitigatory plea of provocation Courts took into consideration the prior course of relationship between the accused and his victim”.

In **W.A. Gamini v Attorney General** CA/142/2009 the court held that:

“the chain of stressful events in the troubled relationship of the accused and the deceased culminating in the aforesaid unfortunate incident, are probable reasonably sufficient to entertain a plea of continuing or cumulative provocation because the accused retaliated at the spur of the moment and that he could reasonably show that he was deprived of his self-control”.

Citing the above two judgments His Lordship Jayantha Jayasuriya C.J. in **R.W.M.Nandana Senarathbandara v Attorney General** SC/Appeal/32/2015 decided on 17/07/2020 has held that:

“Jurisprudence referred to above demonstrate that in considering the plea of grave and sudden provocation an accused is entitled to rely upon a series of prior events that ultimately led to the incident at which the death was caused. A court should not restrict its focus to an isolated incident that resulted in the death, in considering a plea of grave and sudden provocation. The aforementioned jurisprudence has widened the scope of this plea by expanding the limitations recognized in its statutory form. Thereby, the concept of “Continuing or Cumulative” provocation has been recognized as a plea coming within the purview of the plea of grave and sudden provocation recognized under Exception-1, section 294 of the Penal Code. Therefore, the proximity of time between the “actus reus” of the accused and the “provocative act” of the victim should be considered in the context of the nature and circumstances in each case, in deciding whether an accused is entitled to the benefit of the plea of Grave and Sudden Provocation”.

Further His Lordship in **R.W.M.Nandana Senarathbandara v Attorney General** (Supra) has cited an Indian Judgment to explain how the concept of ‘Sustained Provocation’ has been recognised and developed by the Indian superior courts.

In **Poovammal v State** 2012 (2) MLJ (Crl.) 482 the court held:

“30. Under the English Criminal Law, the provocation must be grave and also sudden. But, by way of judicial thinking, the Indian Criminal Law has gone ahead. (K.M. NANAVATHI Vs

STATE OF MAHARASTRA [A.I.R.) 1962 S.C. 605). In our system, there is the concept of “Sustained Provocation”. It is concerned with the duration of the provocation. There may be incidents/occurrences, which are such that they may not make the offender suddenly to make his outburst by his overt act. However, it may be lingering in his mind for quite some time, torment continuously and at one point of time erupt, make him to lose his self-control, make his mind to go astray, the mind may not be under his control/command and results in the offender committing the offence. The sustained provocation/frustration nurtured in the mind of the accused reached the end of breaking point, under that accused causes the murder of the deceased.”

.....

“34. In SUYAMBUKKANI Vs STATE OF TAMIL NADU [1989 LW (CrI.) 86], it is held as under: - “Though there has been here and there attempts in those decisions to bring the sustained provocation under Exception-1 to Section 300, I.P.C., there is a cardinal difference between provocation as defined under Exception-1 and sustained provocation. The only word which is common is ‘provocation’. What Exception-1 contemplates is a grave and sudden provocation, whereas the ingredient of sustained provocation is a series of acts more or less grave spread over a certain period of time, the last of which acting as the last straw breaking the camel’s back may even be a very trifling one. We are, therefore, far from grave and sudden provocation contemplated under Exception-1 to Section 300, I.P.C. Sustained provocation is undoubtedly an addition by Courts, as anticipated by the architects of the Indian Penal Code”.

Considering the above cited judgments and the background of this case I now consider whether this is an appropriate case to consider the plea of cumulative provocation under Exception-1 to Section 294 of Penal Code.

In this case the Appellant was only 15 years old when he lost his father. The deceased was accused of his father's murder but he was exonerated by the court after ten years of lawsuit. Due to this incident the Appellant was deprived of the love and care of his father.

Further even after the death of his father, the two families lived in opposite houses and constant quarrel ensued as a result. Both PW1 and PW2 admitted this position. PW2 in his evidence stated that there had been constant continued quarrels between the deceased's party and the Appellant's party practically every two months. On the day of the incident one hour before the unfortunate incident an altercation erupted between the Appellant and the deceased's brother Sumanaweera who was under the influence of liquor at that time. The deceased had intervened and taken his brother from the place of incident. At that time the Appellant had made an utterance to the effect "waren umba parata". Thereafter both the Appellant and the deceased had a fight. PW1 admitted this position in her evidence.

Further depriving love and care of a father is an unbearable mental agony to the family, especially to the children. The dependants have to undergo untold hardship both financially and mentally as in most families the father is the sole bread winner. Further losing a parent is grief-filled and traumatic and affect children psychologically and may cause them to remain in the denial and anger phases of the loss for extended periods of time.

Ashworth in 1975 Criminal LR 558-559 opines as follows:

"The significance of the deceased's final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add

colour to the final act” The point is that the significance of the deceased’s final act and its effect upon the accused-and indeed the relation of the retaliation to that act-can be neither understood nor evaluated without reference to previous dealings between the parties”.

In **R.W.M.Nandana Senarathbandara v Attorney General** (Supra) His Lordship further held that:

“... In these cases, the accused have undergone through severe mental agony or distress up to the point where the fatal attack takes place, due to such series of events. Courts therefore had held that the accused should receive the benefit of the plea of grave and sudden provocation, even though a time gap exists between the act of provocation and the fatal attack. During the time between these two points there had not been a “cooling off” of the mind, but a state of continued mental stress and trauma due to the nature and the gravity of the provocative conduct of the deceased did exist. Therefore, for an accused to succeed in a plea of Grave and sudden provocation on the basis of continuing or cumulative provocation, the court on a balance of probability should be satisfied that the accused had gone through a state of continued mental stress and agony during the gap between the provocative conduct and the fatal attack”.

Analysing the evidence presented in this case it clearly demonstrates that the stressful events and the strained relationship of the Appellant and the deceased had resulted in the unfortunate incident. Although the Learned High Court Judge had briefly discussed the concept of cumulative provocation, had not awarded the benefit to the Appellant under the said mitigatory plea.

Considering all the circumstances stressed before this court I conclude that this is an appropriate case to consider for the Appellant's benefit, his entitlement for a plea of cumulative provocation under Exception-1 to Section 294 of the Penal Code.

Hence, we set aside the death sentence and convict the Appellant for culpable homicide not amounting to murder under Section 297 of the Penal Code. We sentence the Appellant for 15 years rigorous imprisonment commencing from date of conviction namely 14/09/2016.

Subject to above variation we dismiss the appeal.

The Registrar is directed to send a copy of this judgment to High Court of Kuliyaipitiya along with the original case record.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J

I agree

JUDGE OF THE COURT OF APPEAL