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

In the matter of an Appeal under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No. HCC/0186/2019

High Court of Rathnapura Case No. HC/21/2015

Democratic Socialist Republic of Sri Lanka

Complainant

V.

1. Bellana Vidanalage Surasena
2. Bellana Vidanalage Somasiri

Accused

AND NOW

Bellana Vidanalage Surasena

1st Accused – Appellant

V.

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

Complainant - Respondent

BEFORE	:	**K. PRIYANTHA FERNANDO, J. (P/CA)** **WICKUM A. KALUARACHCHI, J.**
COUNSEL	:	Anil Silva, PC with Mark Anton for the Accused – Appellant. Harippriya Jayasundera, PC, ASG for the Respondent.
ARGUED ON	:	18.01.2022
WRITTEN SUBMISSIONS FILED ON	:	02.03.2020 by the Accused – Appellant. 12.05.2020 by the Respondent.
ORDER/JUDGMENT ON	:	25.02.2022

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K. PRIYANTHA FERNANDO, J. (P/CA)

1. The first accused appellant (hereinafter referred to as appellant) was charged with the second accused in the High Court of Rathnapura for one count of murder punishable in terms of Section 296 of the penal Code to be read with section 32. After trial, the appellant was convicted of murder and sentenced to death. The second accused was acquitted of the charge. Being aggrieved by the above conviction and sentence the appellant preferred the instant appeal.

2. At the argument stage, the learned President's Counsel for the appellant urged the following grounds of appeal:
   I. Prosecution has failed to prove the charge beyond reasonable doubt against the appellant.
   II. In view of the acquittal of the second accused, has the trial Judge correctly analyzed the evidence against the first accused appellant?
   III. Whether the learned trial Judge has failed to consider lesser culpability of murder?

3. Facts in brief:
   As per the evidence of the main witness for the prosecution Sunil Wijeykumara (PW1), on the day of the incident, after coming home from work and having dinner,

he had been in the bedroom. By about 8 pm he has heard his brother the deceased shouting. However, as it was usual for his brother to shout after consuming alcohol, he had not paid any heed to it. Then he had heard the noise of a gunshot from the front side of his house. The light that was in the compound had been on. After switching the light on in the sitting room, he had come out of the house. Then he had seen the first accused who was known to him holding a gun with another person. The other person also had been holding a gun. At the identification parade that was held, he has identified the other person who was with the appellant as the second accused. Upon seeing them, PW1 has asked "මොකද මාමේ" (page 73 of the brief). Then the first accused has said "මූ අපේ මල්ලිට ගහලා. මූව මරණවා". According to PW1, the first accused has referred to as "මූ" to his brother, the deceased in the case.

Then he had seen his brother, the deceased, coming from the rear of his house. It was his evidence that there is an entrance to the deceased's house from the rear of his house. When the deceased came, PW1 had held on to the deceased to prevent him from coming. However, the deceased has gone further towards the appellant. Then the appellant had fired a shot at the deceased's leg with the gun he was holding. Upon receiving the gunshot, the deceased had fallen. Then the appellant has said "එකක් වැදුණා. ඉතුරුකරලා වැඩක් නැහැ. ඕකා මරන්න ඕනි" (page 86 of the brief) and he has fired in close range another shot at the stomach area of the deceased who was fallen. Thereafter both the appellant and the second accused had left the place together. PW1 had taken the injured (deceased) to the hospital, however the deceased had succumbed to his injuries.

PW2, the wife of the PW1, has also given evidence. The medical officer who conducted the autopsy on the body of the deceased has confirmed that the second shot fired on the chest and abdominal area of the deceased had been at close range.

When the defence was called, the appellant making a short dock statement has said that he did not kill the deceased.

4. The learned President's Counsel for the appellant submitted that the person who shot at the deceased was not properly identified. The learned ASG contended that there was sufficient light for the PW1 to identify the appellant as the person who shot at the deceased.

5. The appellant had uttered certain words as he saw the PW1 and also after he fired the 1st shot at the deceased on his knee. Initially, the appellant has said that he wanted to kill the deceased as the deceased has assaulted his brother (page 73). The second utterance was after he fired the first shot where he has said that the deceased received one shot and that there is no point in leaving the deceased alive and they should kill him (page 86). The evidence of the PW1 that the appellant made such utterances before shooting was not challenged by the defence at the trial. The appellant is a neighbor of the PW1. It is also evident that there has been sufficient light emanating

from the lights which were lit inside the house as well as outside, when the deceased was shot. Further, medical evidence corroborates the position of the PW1 that the deceased was shot at close range. The medical officer who conducted the autopsy on the body of the deceased has confirmed that the gunshot that has caused the injury on the stomach area of the deceased has been fired at a close range. On the above evidence, I find that the prosecution has established beyond reasonable doubt that it was the appellant who fired both gunshots on the deceased causing him the fatal injuries.

6. The learned President's Counsel for the appellant submitted that, when the appellant uttered the words stating that the deceased has assaulted the appellant's brother, it appears that there had been sudden provocation. The appellant would have got provoked by the reason that his brother was assaulted by the deceased. It is the submission of the learned President's Counsel that the learned High Court Judge should have given the benefit of the lesser culpability on the basis of exception 1 of section 294 of the Penal Code.

7. The learned DSG submitted that there is no evidence of grave and sudden provocation for the appellant to get the benefit of the exception 1 of section 294 of the Penal Code.

8. In terms of section 105 of the Evidence Ordinance, if the appellant alleges that by grave and sudden provocation, he was deprived of the power of self-control, the burden of proving the same is on the appellant. In this instance, the appellant did not take up the partial defence of grave and sudden provocation at the trial. In his short, unsworn statement from the dock, he denied any involvement of the killing of the deceased.

9. However, it is incumbent upon the trial Judge to consider any evidence revealed at the trial on the existence of a general or special exception, even though the defence has not taken it up at the trial.

   In case of ***King V. Bellana Vitanage Eddin 41 NLR 345*** Court of Criminal Appeal held;

   '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.'

10. In the instant case, no such evidence was adduced or revealed at the trial before the High Court of the existence of grave and sudden provocation for the appellant to get the benefit the exception to lessen the offence of murder to that of culpable homicide not amounting to murder. There is no evidence of any assault by the deceased on the

appellant's brother, other than the utterances made by the appellant on that, to PW1. Even if one assumes that there had been such an assault on the brother of the appellant as uttered by the appellant, there is no evidence as to when such assault has taken place to prove that the provocation was so sudden that the appellant did not have time for the sudden heat of passion to cool. Hence, there is no evidence for the appellant to get the benefit of exception 1 of section 294 of the Penal Code to lessen the offence of murder to culpable homicide not amounting to murder. On the above premise, I find that the grounds of appeal urged on behalf of the appellant are devoid of merit. Hence, the conviction and the sentence imposed on the appellant by the learned High Court Judge is affirmed.

Appeal dismissed.

PRESIDENT OF THE COURT OF APPEAL

WICKUM A. KALUARACHCHI, J.

I agree.

JUDGE OF THE COURT OF APPEAL