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

In the matter of an Appeal made under
Section 331(1) 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.
CA/HCC/ 0234/2018**

Wedagedera Saman Rajapaksha

**High Court of Kandy
Case No. HC/ 108/2011**

Accused-Appellant

vs.

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

Complainant-Respondent

BEFORE : **Sampath B. Abayakoon, J.
P. Kumararatnam, J.**

COUNSEL : **Indica Mallawarachchi for the Appellant.
Riyaz Bary, DSG for the Respondent.**

ARGUED ON : **23/05/2022**

DECIDED ON : **18/07/2022**

JUDGMENT

P. Kumararatnam. J,

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted for committing the murder of Gamagedera Yasomenike on 15/04/2009 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 had sentenced him to death on 10/05/2018.

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 platform from prison.

On behalf of the Appellant four Grounds of Appeal are raised.

1. The Learned High Court Judge has cast an additional burden of proof on the Appellant thereby denying him a fair trial.
2. The Learned High Court Judge has erroneously rejected the defence evidence.
3. Evidence led at the trial warrants the consideration of the exception of cumulative provocation.

Background of the Case

According to PW1, the Appellant was his brother-in-law, who had been married to his elder sister. As their married life has become miserable, his sister had estranged the Appellant and was living with her parents in their house. As such, the Appellant had lived with his mother. On the day of the incident, which was the day following the day of the Sinhala and Tamil New Year, around 6.00 a.m. the deceased had gone to the rear side of her house for excretion purposes, as they did not have properly built washroom facilities. PW1 had gone with the deceased and had stood near the well. The reason why he accompanied the deceased was because the Appellant had extended death threats to the deceased's family on previous occasions. When he was standing near the well, the Appellant had arrived with a gun and the deceased had come out to the well area. At that point the deceased had called out to her husband who had hurried to the spot. When the Appellant had inquired about the whereabouts of his wife from the deceased, the deceased had told him that his wife was not at home.

At that time the deceased's husband too had arrived at the scene and had had a verbal exchange with the Appellant. When the Appellant had made a death threat to the deceased, she had challenged him to carry out what he says as the Appellant had issued death threats to the deceased on several previous occasions. When the deceased had challenged the Appellant, he had opened fire at the deceased. Although the deceased was taken to the Dambulla Hospital, she had been pronounced dead on admission.

On the previous night, i.e., 14/04/2009 the Appellant had come to the deceased's house armed with a knife and inquired about his wife from the deceased. As the deceased intimated to him that his wife was not at home, the Appellant had issued death threats to the deceased.

According to medical evidence the firing had taken place from a distance of about one meter and the deceased had suffered three entry wounds and three exit wounds.

After the closure of the prosecution case, the defence was called and the Appellant had opted to give evidence from the witness box.

In his evidence the Appellant took up the position that he did not entertain any murderous intention but the gun had gone off accidentally when he had grappled with the deceased's husband for the gun.

Consideration of the appeal grounds forwarded by the Appellant

The Appellant in his first ground of appeal contends that the Learned High Court Judge has cast an additional burden of proof on the Appellant thereby denying him a fair trial.

The Learned Counsel for the Appellant indicated three instances in the judgment of the Trial Judge where the Appellant was not awarded a fair trial due to the shifting of the burden to the Appellant consequently, reversing the presumption of innocence.

The three instances mentioned in the written submission filed on behalf of the Appellant are re-produced below as follows:

- At line 4 from the top of page 648 and similarly at page 656 the learned trial Judge had observed that the defence had failed to call any witnesses and had failed to prove his defence by failing to prove the necessity to leave his house with a gun to chase away wild Elephants.
- Furthermore, when evaluating the defence evidence the learned trial Judge had once again cast adverse remarks against the Appellant for his failure to call the relevant witness which is apparent at line 4 from the top on page 661 and line 3 from the bottom on page 661.

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- It is respectfully submitted that the Learned Trial Judge had once again noted that the Appellant had failed to prove that wild Elephants had encroached thereby completely misdirecting himself in law relating to the burden of proof lying on the Appellant at the 9th line from the bottom on page 663.

The Learned Counsel for the Appellant had argued highlighting the above portions of the judgment in support of the first ground of appeal.

The concept of Fair Trial has been embodied in the Constitution of Sri Lanka as a Fundamental Right. This concept of a fair trial has been considered in the following landmark judgments in our jurisdiction.

Viraj v. AG SC Appeal No.24/2008 and **Wijepala v. AG** [2001] 1 SLR 46.

Considering the evidence given by the Appellant, even though he had taken up several differing positions, those positions had not been adequately put to the relevant witnesses during cross examination. The above-mentioned portions of the judgment are comments or remarks for the better presentation of the defence case. Hence, these comments cannot be considered as casting an additional burden of proof on the Appellant.

In **King v. Attygalle** (VI C.L.W. 41) at page 43 the court held that:

“That even though the jury had been misdirected on the law, there were circumstances pointing irresistibly to the guilt of the accused quite independently of this direction.”

In this case the Learned High Court Judge had accurately considered this case keeping with the legally recognised standard of proof requirements of a criminal trial. As the evidence presented by the prosecution is strong and clear, the only definitive inference that the court could arrive at is the guilt of the Appellant. Hence, after careful consideration of the judgment, it is evident that the comments or remarks which had been highlighted in this

ground of appeal has not been prejudiced the Appellant's rights in this case. Due to afore-said reasons this ground has no merit.

In the second ground of appeal the Appellant contends that the learned High Court Judge has erroneously rejected the defence evidence.

The learned High Court Judge had called for the defence after evaluating the evidence presented by the prosecution. The Appellant had given evidence and had taken up the defence of accidental firing when according to him, he grappled with the deceased's husband and the gun went off. As this is a general exception, the Appellant should have proved the same on a standard of balance of probability under Section 105 of the Evidence Ordinance. Further this position was never suggested to PW1, who is an eye witness in this case.

The Appellant having put forth circumstances coming within his knowledge, adducing evidence to support his claim is his duty which he had failed to do so in this case. Hence, rejection of the defence is not erroneous as the Learned High Court Judge has sufficiently considered the evidence presented by both parties to come to the correct decision. Therefore, this ground of appeal is also without merit.

In the third ground of appeal the Appellant argues that the evidence led at the trial warrants the consideration of the exception of cumulative provocation.

The learned Counsel for the Appellant argues that the case against the Appellant should have been considered under the plea of cumulative provocation and the Appellant should have been awarded the benefit under the said exception. She had emphasised the following items of evidence to support her argument in this regard.

As the Appellant's wife was estranged from him and was living with her daughter in her parental house, all his efforts to reunite with his family was prevented by his father-in-law. At one occasion he was severally beaten

by his father-in-law for which he had been hospitalised with serious injuries. At the time of the incident when he inquired about her estranged wife from the deceased she had not divulged her daughter's whereabouts. Further, although he had taken several phone calls to his wife they were not answered. Further, he had been prevented from meeting her daughter during the festival day.

Due to continuous quarrels and unbearable pain inflicted through physical abuse, the Appellant's estranged wife had decided to separate from him and live with her parents instead. The Appellant had been ~~never~~ been deprived of seeing his daughter.

Cumulative Provocation is an extension to the exception 1 of Section 294 of the Penal Code which states:

“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”

Cumulative Provocation as a special exception to a murder charge has been discussed in several judgments in our courts.

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

“Until the judgment of Chief Justice H. N. G. Fernando in Samithamby vs. Queen (1) (de Kretser, J. - dissenting) our Courts 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 the 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 **R. W. M. Nandana Senarathbandara v Attorney General** SC/Appeal/32/2015 decided on 17/07/2020 his Lordship Jayantha Jayasuriya CJ 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 recognised in its statutory form. Thereby, the concept of ‘Continuing’ or ‘Cumulative’ provocation has been recognised as a plea coming within the purview of the plea of grave and sudden provocation recognised 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.”.

Guided by above cited judgments, it is pertinent to consider whether the benefit of the plea of Grave and Sudden Provocation on the basis of Cumulative Provocation could be awarded to the Appellant as claimed by him under this ground of appeal.

The evidence transpires that the wife of the Appellant had estranged from him due to matrimonial disputes. Due to this several incidents have taken place previously between the Appellant and deceased's fractions. On several occasions the Appellant had threatened the deceased that he would shoot her. On the day preceding the murder, he had gone to deceased's house brandishing a knife and had threatened PW1, the deceased and the deceased's husband with death. The Appellant had not provided any explanation why he had approached the deceased with a gun on the following morning. In the light of his previous conduct it is evident that he had a murderous intention. Further, considering the circumstances under which the Appellant had shot the deceased, it cannot be considered in favour of the Appellant for a plea of cumulative provocation under Exception 1 to Section 294 of the Penal Code.

In **R. W. M. Nandana Senarathbandara v Attorney General** (supra) the court held that:

“The fact that the accused opened fire twice, the range of fire and the location and nature of injuries on the deceased and the victim clearly demonstrate the intention to kill entertained by the accused”.

Therefore, this ground of appeal also fails without any merit.

For the reasons stated above, I am of the view that there is no merit in any of the grounds of appeal urged by the Counsel for the Appellant. The evidence presented by the prosecution establishes beyond reasonable doubt that the Appellant is guilty of the charge with which he has been convicted.

Accordingly, I affirm the conviction and the sentence imposed and dismiss the appeal.

Appeal dismissed.

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

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J

I agree

JUDGE OF THE COURT OF APPEAL