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**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/0182-184/2016**

**High Court of Nuwara Eliya**

**Case No. HC/34/2009**

1. Perumal Mahalingam
2. Balakrishnan Suganeswaram alias  
Puwaneswaran
3. Mahalingam Sivaneswaram

**ACCUSED-APPELLANTS**

**vs.**

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

**COMPLAINANT-RESPONDENT**

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

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**COUNSEL** : **Nayantha Wijesundara for the Appellant.**  
**Shanil Kularatna, SDSG for the**  
**Respondent.**

**ARGUED ON** : **19/07/2022**

**DECIDED ON** : **01/08/2022**

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### **JUDGMENT**

**P. Kumararatnam. J,**

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted for committing murder of Sandanam Michael on 06/08/2003 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 Appellants guilty of the charge and sentenced them to death on 09/09/2016.

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

The Learned Counsel for the Appellants informed this court that the Appellants have given consent to argue this matter in their absence due to the Covid 19 pandemic. Also, at the time of argument the Appellants were connected via zoom platform from prison.

The Appellant's first written submission was filed on 17/05/2018 raising two grounds of appeal. Thereafter, with the leave of the court a further written

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submission was filed on 09/09/2019. In that written submission the Counsel for the Appellants had raised only one ground of appeal that the Learned High Court Judge had not considered the defence of cumulative provocation. Hence the Counsel for the Appellant has restricted his argument only on this ground during the argument.

### **Background of the Case**

According to PW1, she is the wife of the deceased and was blessed with six children. On the day of the incident at about 7.45 am when PW1 and the deceased were on their way to the estate where the deceased was employed, the Appellants waylaid and attacked the deceased with swords and knife. At that time the witness was about 30 feet away from the place of incident. According to her the first appellants had used a pruning knife and the rest had used swords to cut the deceased. The identity of the appellants was very well established because 1<sup>st</sup> appellant is the brother of PW1 and the 3<sup>rd</sup> Appellant is the son of 1<sup>st</sup> Appellant. The 2<sup>nd</sup> Appellant is a relation of 1<sup>st</sup> Appellant. According to PW1 there is strong motive existed as on a previous occasion the deceased was accused of cutting and inflicting injury to the leg of the brother of 2<sup>nd</sup> Appellant. Although the deceased was removed immediately to the estate medical centre, but the deceased had already succumbed to his injuries.

PW3 had conducted the investigation, arrested the Appellants and recovered two swords and a knife upon the statement made to the police by 1<sup>st</sup> appellant and recovered a knife upon the statement of 2<sup>nd</sup> Appellant.

According to medical evidence three deep cut injuries were found on the head of the deceased. Some bones had also been broken. The JMO opined that the injuries could have been caused by sharp and heavy cutting weapons. According to PW6, the death could have occurred due to haemorrhage as the vein in the brain had been severed.

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After the closer of the prosecution case, the defence was called and the Appellants had made statements from the dock.

The first Appellant denied any involvement to the incident while other two raised the defence of *alibi*.

As stated above the Appellants only argue that the evidence led at the trial warrants the consideration of the exception of cumulative provocation, and therefore, they should have been awarded the benefit under the said exception. The Counsel had stressed following items of evidence to support his argument.

The Counsel for the Appellant contended that according to PW1 there had been a dispute between the deceased and the Appellants with regard to watering the plant of the estate. PW1 further admitted that as the deceased had cut the leg of the elder brother of the 2<sup>nd</sup> Appellant, another dispute also existed among the parties. The counsel for the Appellants therefore argues that these incidents had given rise to cumulative provocation which the Learned High Court judge had not considered in his judgment.

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 **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*

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*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 **R.W.M.Nandana Senarathbandara v Attorney General** SC/Appeal/32/2015 decided on 17/07/2020 His Lordship Jayantha Jayasuriya C.J. 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*

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*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 Appellants as claimed by them under this ground of appeal.

During the trial PW1 was cross examined with regard to three incidents which according to the Counsel for the Appellants constitute cumulative provocation on the deceased. In the first incident canvassed by the Appellants is that a dispute existed due to watering the plants of the estate where deceased cultivated. The second incident which led to a dispute is that the deceased had cut leg of the brother of the 2<sup>nd</sup> Appellant. The third incident suggested is that the PW1 had eloped with the deceased even though she had been given marriage to another person. But according to PW1 this incident cannot be the cause as she had given birth to six children upon living with the deceased up to his death.

As correctly pointed out by Learned Senior Deputy Solicitor General, in the instant appeal, the plea of cumulative provocation was not specifically raised by the defence when the cross examination of the prosecution witnesses took place. Further, the Appellant had not raised the plea in their dock statements too. Further it is not elicited from the evidence for the prosecution that existence of plea of cumulative provocation.

Hence, considering the circumstances advanced by the Appellants in this appeal and the series of incidents mentioned above cannot be considered in

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favour of the Appellants benefit for a plea of cumulative provocation under Exception-1 to Section 294 of the Penal Code. Therefore, the only ground of appeal fails without any merit.

For the reasons stated above, I am of the view that there is no merit in the appeal ground urged by the Counsel for the Appellants. The evidence presented by the prosecution establishes beyond reasonable doubt that the Appellants are guilty of the charge with which they have been convicted.

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

Appeal is dismissed.

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

**JUDGE OF THE COURT OF APPEAL**

**Sampath B. Abayakoon, J.**

I agree

**JUDGE OF THE COURT OF APPEAL**