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

In the matter of an Appeal in terms of 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 No:

CA/HCC/0044/2018

High Court of Puttalam

Case No: HC/73/2016

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Muthukuda Arachchilage Abeysundara

alias Sundara

ACCUSED

AND NOW BETWEEN

Muthukuda Arachchilage Abeysundara

alias Sundara

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Kasun Liyanage for the Accused Appellant

: Rohantha Abeysooriya, P.C., ASG for the Respondent

Argued on : 18-07-2022

Written Submissions : 28-07-2021, 19-09-2018 (By the Accused-Appellant)

: 30-01-2019 (By the Respondent)

Decided on : 10-08-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Puttalam on following counts.

1. That he caused the death of one Srimathi Anuruddhika on 19th September 2010 and thereby committed the offence of murder, punishable in terms of section 296 of the Penal Code.
2. At the same time and at the same transaction causing grievous injuries to one Samindi Rashmitha alias Amandi Rashmika, an offence punishable in terms of section 317 of the Penal Code.

After trial, the learned High Court Judge of Puttalam by his judgment dated 22/05/2018, found the appellant guilty on count one, and he was acquitted on count two preferred against him. Accordingly, he was sentenced to death.

Being aggrieved by the said conviction and the sentence the appellant preferred this appeal. At the hearing of the appeal, although several grounds of appeal have been urged on behalf of the appellant in the written submissions filed, it was informed by the learned Counsel representing the appellant that he is no longer pursuing the grounds of appeal mentioned in his original written

submissions. Accordingly, he formulated the following new ground of appeal for the consideration of the Court.

1. Whether there was evidence before the learned High Court Judge for him to convict the appellant in terms of section 297 of the Penal Code on the basis of culpable homicide not amounting to murder rather than in terms of section 296 of the Penal Code under which he was convicted.

It was the submission of the learned Counsel for the appellant that there was evidence before the Court to consider the matter in terms of section 294 exception 1 of the Penal Code on the basis of grave and sudden provocation. It was his view that the term 'sudden provocation' includes cumulative provocation and the evidence led in this case directs towards cumulative provocation towards the appellant under which this incident has occurred.

Citing several decided cases of our Superior Courts on the concept of cumulative provocation, and also on the basis that a trial judge should consider whether there was evidence of culpable homicide not amounting to murder even if no such defence has been taken at the trial, it was the view of the learned Counsel that this is a fit and proper case where the conviction should have been in terms of section 297 of the Penal Code.

It was the view of the learned Additional Solicitor General (ASG) that he is in agreement with the argument that the term 'sudden provocation' mentioned in section 294 exception 1 of the Penal Code includes cumulative provocation as decided by our Superior Courts.

However, it was contended that for a trial judge to come to such a finding, there must be evidence before the trial Court. It was his view that the appellant who has never taken up such a defence at the trial has no basis to argue that his act amounts to culpable homicide not amounting to murder as there was no evidence before the trial Court to come to such a conclusion. It was the view of the learned ASG that although section 105 of the Evidence Ordinance provides that the burden of proving that the case of the accused comes within exceptions

is upon an accused person who seeks to prove existence of such circumstances, our Superior Courts have consistently held that it was the duty of a trial judge to consider whether there was such evidence before the Court, even if no such defence has been taken.

It was his position that since there was no such evidence available in this case, the position of the appellant is untenable and has no merit, and the appeal should stand dismissed.

Before considering the ground of appeal urged in detail, I would now briefly consider the facts as established by evidence that led to the conviction of the appellant.

The appellant was the father-in-law of the deceased Anuruddhika. The deceased's husband and their 3 children lived with the appellant and his wife in their matrimonial home which was a house built by the appellant and his wife and later improved upon. At the time of her death, the deceased and her 3 children have been living in the matrimonial home and her husband who is the son of the appellant has been separated from her and the children. The appellant and his wife have been living in a separate dwelling built by the appellant about 50 meters away from the house where the deceased and her children were living. Her husband who was working in the army used to visit his parents and not the deceased and his children. At the time relevant to the incident, it has been revealed that the deceased has filed a maintenance case before the Magistrate's Court in order to obtain maintenance for her and the children from the son of the appellant, who was her husband.

Consideration of the Ground of Appeal

At the hearing of the appeal, it was not disputed that it was the appellant who caused injuries to the deceased which resulted in her death. However, the defence taken up by the appellant at the trial was a complete denial that it was he who committed the crime.

Therefore, it becomes necessary to consider whether there was evidence of cumulative provocation as urged by the learned Counsel for the appellant.

Under our Penal Code, there are several exceptions that can be considered to in order to find whether causing the death of a person amounts to culpable homicide not amounting to murder.

In the instant appeal, the appellant relies on exception 1 of section 294 of the Penal Code which 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 the 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 is 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.**

The term sudden provocation used in exception 1 of section 294 of the Penal Code has been subjected to several interpretations by our Superior Courts.

The judgement in **Premalal Vs. Attorney General (2000) 2 SLR 403** is a judgment by Kulatilake, J. where this term has been well considered.

The earlier judgements of our Superior Courts had followed a strict interpretation applying exception 1 of section 294 of the Penal Code 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.

However, in the case of **Sinnathambi Vs. Queen 75 NLR 49,** this strict interpretation of the term 'sudden provocation' has been given a more pragmatic interpretation. The Court has expressed the view that even though in that particular case, there was an interval of time between the affording of the provocation and the time of the stabbing, the evidence relating to the interim period made it quite probable that in fact the accused all the time suffered under a loss of self-control.

Therefore, if the evidence of a case provides that there was cumulative provocation by the provocator towards to the provoked over a period of time which has led to the incident where the provoked has killed the provocatory, it may provide a basis to consider the facts in terms of culpable homicide not amounting to murder. However, to come to such a conclusion, there must be evidence before the trial Court, and not otherwise.

In the appeal under consideration, if such an argument to be accepted, the provocator should be the deceased and the provoked should be the appellant, and there must be evidence that due to the continuance acts of provocation by the deceased towards the appellant this incident has occurred.

Section 105 of the Evidence Ordinance, which provides for burden of proving a case of an accused comes within the exceptions reads as follows:

Section 105- When a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exceptions or proviso contained in any other part of the same Code or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances.

Illustrations

(b) A, accused of murder alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

As agreed correctly by the learned ASG, although the burden of proving such circumstances falls on an accused person, our Superior Courts have consistently held that even if no such exception has been pleaded, it is the duty of a trial judge to consider whether such circumstances do exist.

In the case of **King Vs. Bellana Withanage Eddin 41 NLR 345,** a Court of Criminal Appeal held thus;

"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 of record, although such defence was not raiser nor relied upon by the accused."

In **King Vs. Albert Appuhamy 41 NLR 505,** it was held,

"Failure on the part of a prisoner or his counsel to take up a certain line of defence does not relieve the judge of the responsibility of putting the jury such defence if it arises on the evidence."

In the case of **King Vs. Withanalage Lanty 42 NLR 317**, the Court of Criminal Appeal, observed the following;

> *"There was evidence in this case upon which it was open to the jury to say that it came within exception 4 to section 294 of the Penal Code and that the appellant was guilty of culpable homicide not amounting to murder. However, no such plea was put forward on his behalf. In the course of his charge to the jury, the presiding judge preferred to this evidence as part of the defence story but not as evidence upon which a lesser verdict possibly be based."*
>
> *It was the duty of the presiding judge to have so directed the jury and that in the circumstances, the appellant was entitled to have the benefit of the lesser wording."*

The above line of authorities clearly establishes the fact that, for a trial judge to consider whether there was provocation which reduces the offence of murder to that of a lesser nature, there must be evidence available before him.

It needs to be noted that this is a case where a single learned High Court Judge has heard the evidence in its entirety and pronounced the judgement.

In the case of **De Silva and Others Vs. The Attorney General (2010) 2 SLR 169** it was held that;

> *"Credibility is a question of fact, not law. Appeal Court Judges repeatedly stress the importance of trial judge's observation of demeanor of witnesses in deciding questions of fact. The acceptance or rejection of evidence is therefore is a question of fact for the trial judge, since he or she is in the best position to hear and observe witnesses. In such a situation the appellate Courts will be slow to interfere with the findings of a trial judge unless such evidence could be shown to be totally inconsistent or perverse and lacking credibility. Evidence must be weighed and not counted."*

In the case of **Chaminda Vs. The Republic (2009) 1 SLR 144,** it was held:

> *"An appellate Court will not lightly disturb the findings of a trial judge who has come to a favourable finding with regard to the testimonial trustworthiness of a witness whose demeanor and deportment had been observed by a trial judge. Findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal."*

In this case, there was no evidence before the trial Court that the deceased was in the habit of provoking the appellant who was her father-in-law. There was no evidence to conclude the reasons behind the appellant and his wife moving away from the house where they lived with the deceased and her 3 children.

Although the learned Counsel who represented the appellant at the trial has put questions to PW-01 on the assumption that the appellant and his wife moved to a small hut and lived there, the evidence of the witnesses does not support such an assumption. The evidence shows that they have moved to a small house built lately, which had two rooms and situated near to their original house. The deceased who had three children out of her marriage to the appellant's son and her filing of an application for maintenance before the Magistrates Court against her husband cannot be termed as cumulative provocation towards the appellant. There was no evidence before the Court as to what triggered the incident where the deceased was attacked by the appellant. It appears that the allegation of an illicit relationship by the deceased after she and her husband separated was an attempt to tarnish the image of the deceased without any basis.

Under the circumstances, it is the view of this Court that in the absence of any evidence that leads to a conclusion that there was cumulative provocation by the deceased towards the appellant, there was no basis for the learned High Court Judge to consider such a proposition.

It is the view of this Court that the learned High Court Judge had well considered the evidence placed before the Court with a clear understanding of the relevant legal principles and had come to a correct finding of guilt of the appellant on the first count preferred against him.

For the reasons aforementioned, I find no merit in the ground of appeal urged.

The appeal therefore is dismissed as it is devoid of any merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P.Kumararatnam, J.

I agree.

Judge of the Court of Appeal