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/0100/2018

High Court of Panadura

Case No: HC/2800/2011

Democratic Socialist Republic of Sri Lanka

PLAINTIFF

Vs.

Ballanthuda Arachchige Runil Wickrema,

No.74/1, Ambalangoda, Polgasowita.

ACCUSED

AND NOW BETWEEN

Ballanthuda Arachchige Runil Wickrema,

No.74/1, Ambalangoda, Polgasowita.

(Presently at Welikada Prison)

ACCUSED-APPELLANT

Vs.

The Attorney General

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Palitha Fernando, P.C. for the Accused Appellant

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

Argued on : 05-08-2022

Written Submissions : 30-01-2019 (By the Accused-Appellant)

: 18-01-2021, 25-03-2019 (By the Respondent)

Decided on : 21-09-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Panadura for causing the death of one Pohonwawa Durage Upali on or about 07th February 2009, and thereby committing murder, an offence punishable in terms of section 296 of the Penal Code.

After trial without a jury, the appellant was found guilty as charged by the learned High Court Judge of Panadura, and was sentenced to death.

Being aggrieved by the said conviction and the sentence, the appellant preferred this appeal.

The facts in brief are as follows;

The deceased was married to the sister of the appellant. They have got married as a result of a love affair without the blessings of the family members of the appellant. After the marriage, they had little contact with the appellant as well as the other family members. This incident has happened two and a half years after the marriage. During that time the deceased and his wife Sujeewa (PW-01) were running a beauty saloon at the Kahathuduwa junction. They used to open

the saloon around 9.00 a.m. and close around 7.30 in the night. The saloon had two sections. The front section was used for the saloon and the smaller back section was used as a resting area. They were living in a rented house about two kilometers away from the saloon.

The appellant was the elder brother of PW-01. He was a driver by profession, married and living in his wife's house in Polgasowita area. After her marriage, the appellant has never visited the sister.

On the day of the incident, namely on the 07th February 2009 at around 4.30 in the evening, PW-01 was in the back section of the saloon preparing a drink, while the deceased was with a customer who was having a haircut. After few minutes, the witness has heard a sound of a scuffle and coming out to the saloon section, she had seen her husband and the appellant engaged in a scuffle. She had seen a knife in the hand of the appellant. She has then seen the appellant running away and her husband with a stab wound to his stomach. Although she has attempted to confront her brother, she has failed. At the hospital, she had been informed that her husband has passed away.

The cross-examination of the witness reveals that her father had passed away three months ago and the day of the incident was the third month alms giving. Although the witness and the deceased had visited the funeral house, they had not participated in the alms giving. It was her evidence that she did not know that the alms giving was on that day. It had been suggested to the witness that her brother came to the saloon to inquire into as to why she did not participate in the alms giving and the deceased quarreled with him.

PW-05 Upali, was a person well known to the appellant. On the day of the incident, he had been near a fruit stall belonging to one Shyam Kumara situated near the place of the incident. He has seen the appellant coming in a three-wheeler around four in the evening and alighting near the fruit stall, and taking the knife that was on the deck of the stall and leaving calmly.

According to the evidence of Shyam Kumara (PW-06) who was the owner of the fruit stall, he had not been in the stall when the appellant had come and taken the knife he used to cut fruits in his stall. After informing one of his friends called Bhodika to look after the stall in his absence, he has gone to attend to some other work, and upon his return he has been informed that another person took the knife away. However, the witness has failed to identify the knife produced by the prosecution as the knife he used.

As a result of that, the prosecution has treated the witness as a witness detrimental to the prosecution under section 154 of the Evidence Ordinance and had him subjected to cross-examination on that basis.

PW-09 Satheera was the customer who was with the deceased at the time of the incident. According to his evidence, while the deceased was engaged in cutting his hair, the appellant who walked into the saloon has started assaulting the deceased without saying anything and it has lasted about thirty seconds. The witness has then gone out of the saloon seeking help and has seen the wife of the deceased engaging the appellant verbally, outside of the saloon. He has also seen the appellant carrying a knife at that time. Later the witness has seen the deceased holding on to a chair inside the saloon.

PW-17 was the Judicial Medical Officer (JMO) who has conducted the postmortem on the deceased (the report marked P-04). He has observed three cut injuries on the body. The 2nd and the 3rd had been to the left-hand fingers and the palm, which he has described as defensive injuries. The 1st injury was a deep stab injury to the stomach of the deceased which has penetrated deep into the body cutting through several vital organs. And it was the opinion of the JMO that this was an essentially fatal wound where the death could occur within a short span of time.

At the conclusion of the prosecution case, and when the appellant was called upon for a defence, he has chosen to give evidence under oath. He has

admitted that the incident happened on the day of his father's alms giving. It was his position that since his sister and her husband did not attend the event, he went to their saloon in order to ask the sister to come home as his mother insisted that she wants to see her.

He has admitted having entered the saloon while the deceased was engaged in cutting the heir of a customer. However, it was his position that as soon as he entered, the deceased questioned him as to why he came, pushed him and started assaulting him. It was also his position that the deceased got hold of a knife from a nearby cupboard and attempted to stab him and due to the fear of being attacked by him he struggled with the deceased in order to get the knife.

He has admitted that by the time his sister came to the scene the knife was in his hand and the sister confronted him and a verbal confrontation occurred outside of the saloon. He has claimed that thereafter, he discarded the knife and came home in his three-wheeler.

The Grounds of Appeal

At the hearing of the appeal, the learned President's Counsel for the appellant urged the following grounds of appeal for the consideration of the Court.

(1) The learned High Court Judge has failed to consider certain obvious infirmities in the prosecution case.

(2) The learned High Court Judge failed to consider clear evidence that there was a sudden fight.

(3) The learned High Court Judge sought to offer explanations in respect of the prosecution case.

(4) The learned High Court Judge has come to a finding that there was provocation and has stated that it was not sufficient and thereby failed to consider cumulative provocation.

Consideration of the Grounds of Appeal

I will now proceed to consider all the grounds of appeal together as they are interrelated.

I am in no position to agree with the contention that the introduction of the knife as evidence in the case was a result of a fabrication and the learned High Court Judge has failed to address his mind to the said infirmity. On the contrary, I find that fact has been well considered by the learned High Court Judge.

As commented rightly by the learned High Court Judge, the failure by the owner of the shop (PW-06) to identify the knife which was in his shop some eight years after the event, was not a reason to consider the witness as a witness hostile to the prosecution. Due to the fact that the witness has been considered so, and subjected to cross-examination by the prosecution, the learned High Court judge has decided not to consider the evidence of PW-06 for the purposes of the judgment. However, the fact remains that it was a sharp cutting weapon that has been used to cause injuries to the deceased and the evidence of PW-05, which was uncontradicted evidence that it was the appellant who came to the fruit stall belonging to PW-06 and took away the knife used in the stall to cut fruit.

I am unable to agree with the contention that there was a sudden fight between the appellant and the deceased and the learned High Court Judge has failed to consider it in its correct perspective.

It is trite law that any stand taken by an accused in a case must be put to the witnesses for them to respond to that position.

In the case of **Sarwan Singh Vs. State of Punjab 2002 AIR Supreme Court iii 3652 at 3655, 3656** it was stated thus;

> *"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted."*

His Lordship **Sisra de Abrew, J.** in the case of **Pilippu Mandige Nalaka Krishantha Thisera Vs. The Attorney General, CA 87/2005 decided on 17-05-2007** held:

> *"….I hold whenever evidence is given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness."*

The Indian Supreme Court observed in the case of **Motilal Vs. State of Madya Pradesh (1990) (CLJ NOC 125 MP);**

> *"Absence of cross-examination of prosecution witnesses of certain facts leads to inference of admission of that fact."*

PW-09 would have been the best person to explain whether the incident was a result of a sudden fight or not. He was a stranger who happened to be there as a customer of the deceased. It was his evidence that the appellant who came into the saloon started assaulting the deceased and the only question the deceased asked was 'why'. According to him the scuffle was a result of the initial assault. As observed correctly by the learned High Court Judge, the two defensive injuries clearly suggest that the deceased had attempted to evade the appellant. The witness has been very specific in his evidence that the deceased never attempted to attack the appellant.

If it was the position of the appellant that it was the deceased, who started to assault him, when he went to meet his sister because their mother wanted her

to come home. At least, the proposition of a sudden fight should have been put to the witness who was the best person to speak about it, which has not been done.

The PW-09 was a cogent and trustworthy witness and I find no reason to disbelieve his evidence that there was no sudden fight, but an unexpected assault on the deceased by the appellant.

The argument that there was cumulative provocation on the part of the deceased for the appellant to act in the way he did is considered, it becomes necessary to consider whether there was such evidence before the learned High Court judge to come to a finding on such a basis.

In the case of **E. Samithamby Vs. The queen 75 NLR 49,** it was held that;

> *"An offender may be said to have been deprived of his power of self-control by grave and sudden provocation within the meaning of Exception I to section 294 of the Penal Code even though there was an interval of time between the giving of the provocation and the time of the killing, if the evidence shows that, all the time during the interval, the accused suffered under a loss of self-control."*

In taking into consideration the plea of provocation the Courts look into the prior relationship between the accused and the victim as relevant given the facts and the circumstances of each case. **[Vide- Jan Muhammad Vs. Emperor- AIR 1929- Lahore-861, Nanavati Vs. State of Maharashtra- AIR 1962-605(SC)]**

In **Amarjit Singh Sohan Singh-1970, 76 Crim. LJ 835, Sankaria, J.** observed:

> *"The past conduct of non-earning father in coming home drunk daily…was already a standing and continuous source of provocation to the son whose meagre earnings were hardly sufficient to meet the bear needs of the*

family. The restraint that was building up in the mind of the son as a reaction to the continuous provocative conduct of the father spread over the past month or so, had reached a braking point shortly before the occurrence when the drunken father set upon the son with a torrent of horrible oaths."

After taking into consideration the above judgments and the developments of other jurisdictions, **Kulatilaka, J.** held in the case of **Premalal Vs. Attorney General (2000) 2 SLR 403,** that;

"Of late we observe a development in other jurisdictions where Courts have taken a more pragmatic view of the mitigatory plea of provocation… in a series of cases Court took into consideration the prior course of relationship between the accused and the victim."

Held further:

(1) The act of stabbing cannot be taken in isolation. The accused appellant's ambition of becoming a lecturer was shattered. He could not face the campus community because he and M had been seen as confirmed lovers in that community. His only consolation had been M. He was losing her. The unusual behaviour reflects the mental agony and the strain that the accused was undergoing because of the haunting thought that he was going to lose her.

(2) It could be inferred that he had lost all self-control at the point of time he stabbed her. The brutal manner in which he attacked the girl who was so precious to him, and the attempted suicide are indictive of the fact that he in fact had lost his self-control at the time of stabbing.

When it comes to the facts of the appeal under consideration, there was no evidence of cumulative provocation of any kind. It is true that the sister of the

appellant married the deceased against the wishes of the family members, which has happened two and half years before. After the marriage the deceased and the sister of the appellant has built their own life together, without being a burden to anyone. Although it appears that there had been little or no contact between the parties, that cannot be considered as a reason for any kind of cumulative provocation.

It is clear from the evidence that the appellant has arrived at the saloon with the motive of attacking the deceased. He has taken the right tool for that purpose from the fruit stall and used that for the committing of the crime.

I find that the learned High Court Judge was correct in his assessment that although there was previous anger for obvious reasons, that cannot be considered as a sudden provocation. This Court is of the view that even it cannot be considered as cumulative provocation in the absence of any evidence in that regard.

For the reasons as aforementioned, I find no reason to interfere with the conviction and the sentence of the appellant as the learned High Court Judge has come to his findings with a proper analysis of the facts and the relevant legal principles.

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