

**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/0110/18

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Gampaha

Case No: HC/306/2006

Wijesinghe Pedige Wimalasena *alias* Wimale

ACCUSED

AND NOW BETWEEN

Wijesinghe Pedige Wimalasena *alias* Wimale

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Indica Mallawaratchy for the Accused Appellant
: Madhawa Tennakoon, DSG for the Respondent

Argued on : 10-10-2022

Written Submissions : 25-02-2019 (By the Accused-Appellant)
: 13-05-2019 (By the Respondent)

Decided on : 21-11-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) preferred this appeal on the basis of being aggrieved of his conviction and the sentence by the learned High Court Judge of Gampaha.

The appellant was indicted before the High Court of Gampaha for causing the death of one Kudadurage Simon *alias* Dahiria on 2nd November 2003 and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

After trial without a jury, High Court Judge of Gampaha by his judgement dated 26-07-2018, found the appellant guilty as charged and he was sentenced to death accordingly.

Facts in Brief

PW-01 Hema Rohini was the only eye witness to this incident. At the time relevant to this incident, she and her husband were running a small boutique in their village. On the day of the incident, namely, 2nd November 2003, at around 6.30 – 7.00 in the evening, she had been alone in her boutique. The deceased, who was well-known to her had come to the boutique in order to purchase some cigarettes. In the meantime, the appellant who is also well-known to her has

come scolding the deceased which has led to a verbal altercation between them. It has been her evidence that after scolding the deceased, the appellant took out a knife and stabbed the deceased. At that point, she has closed her eyes due to fear. When she opened her eyes, she has seen the deceased fallen inside the shop and after hearing her cries, the villagers who gathered has taken the deceased to the hospital. Later she has come to know that the injured had passed away.

In her evidence as well as under cross-examination, she had been very categorical that it was the appellant who came to the shop and started scolding the deceased and thereafter stabbed him. When cross-examined on behalf of the appellant, a question has been asked whether she knew that the appellant was suffering from a mental ailment for which she has replied that she has heard such a thing but was unaware whether it was so.

The postmortem report had been an admitted document. It is clear from the report that the deceased had 12 injuries, out of which ten are cut injuries, while the other two being stab wounds. The postmortem report also has confirmed that the death was due to the mentioned injuries suffered by the deceased.

At the conclusion of the prosecution case and when the appellant was called for his defence, he has made a dock statement. In his dock statement he has narrated at length about the mental health problems he had and has claimed that the deceased misled him by offering various divine cures for his ailment. Explaining the incident, he has stated that since he realized that the deceased could not cure him, he told him not to come again, but on the day in question, he came to meet him which resulted in a verbal altercation. He has claimed that during the altercation, the deceased took out a photograph of his wife where he has torn off the portion which he and his child was also featured and threatened to take his wife away from him and take over his property. He has claimed that at which point he felt dizzy and he did not know what happened afterwards.

The appellant has called Consultant Psychiatrist Dr. Gamage Gamini Jayanath to give evidence on behalf of him. According to his evidence, the appellant has

attended hospital clinics since 2001 and has taken medication for the mental ailment called depression. It was his evidence that the ailment suffered by the appellant was a mild depression that can be controlled through medication. According to the hospital records, the appellant has taken treatment on August 2003 from the hospital clinic and his next visit to the clinic had been on the 30th of December 2003. However, he has been categorical that although the appellant has missed some of the clinics which he should have attended, he has not shown any mental condition to suggest that he was suffering from depression when he attended the clinic in December. He has expressed the opinion that his mental condition has stayed stable during the period where he has not attended the clinic.

The appellant has also called an official from the Magistrate Court of Gampaha where the relevant non-summary case inquiry file No. NS-473 has been produced. A photograph of a female which was available among the productions produced for the purposes of the non-summary inquiry has been marked as V-X on behalf of the appellant.

In his judgement, the learned High Court Judge has clearly considered the two defences that appears to have been taken by the appellant. It has been considered whether there was material to find that the appellant was suffering from a mental ailment at the time of this incident and whether that has led to a grave and sudden provocation leading to the stabbing of the deceased by the appellant.

The learned High Court Judge has found that there was no basis to come to such a conclusion and accordingly, the appellant was found guilty of murder.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following two grounds of appeal for the consideration of the Court.

1. Rejection of the plea of grave and sudden provocation is factually untenable.
2. Evidence on record warrant the benefit of the grave and sudden provocation to the accused appellant.

It was the submission of the learned Counsel for the appellant that the appellant had not denied the incident and the evidence of PW-01, the only eye witness clearly suggests that there was a provocation for the appellant to act in the manner the witness stated in her evidence. It was her position that the appellant has well explained the provocation and the mental faculty in his dock statement, which should have been considered in favour of the appellant.

It was also her position that the evidence clearly suggests that there was no preplan by the appellant when this incident occurred, which also should have been considered by the learned High Court Judge and the conviction should have been in terms of section 297 of the Penal code on the basis of grave and sudden provocation.

The learned DSG was of the view that the eyewitness account of the incident by PW-01 provides no basis to consider the actions of the deceased was a result of a grave and sudden provocation of him by the deceased. He also points out that the appellant has failed to set up a defence on such a basis, nor has he claimed that he was suffering from a mental ailment at that time until he has referred to such an ailment in his dock statement. However, he points to the fact that the learned High Court Judge has well considered both these scenarios, although they do not go in hand in hand.

The learned DSG also separately pointed out the evidence of PW-01 where she has been every categorical as to the part played by the appellant which shows no provocation by the deceased towards the appellant, for him to claim the benefit of exception 1 of section 294 of the Penal Code.

Consideration of the Grounds of Appeal

It is well settled law that there is a duty upon a Trial Judge to consider whether there is evidence before the Court to suggest a sudden fight or a grave and sudden provocation or any other exception in terms of the exceptions provided in section 294 of the Penal Code, even if an accused person did not rely on such an exception for his defence.

In the case of **The King Vs. Albert Appuhamy 41 NLR 505**, the Court of Criminal Appeal held;

“Failure on the part of a prisoner or his Counsel to take up a certain line of defence does not relieve a Judge of the responsibility of putting to the jury such defence if it arises on the evidence”.

In the case of **Gamini Vs. Attorney General (2011) 1 SLR 236**, it was held as follows;

1. “Though the accused appellant in his defence did not take up the defence of grave and sudden provocation, the Trial Judge must consider such a plea in favour of the appellant if it emanates from the evidence of the prosecution.
2. Failure on the part of the petitioner or his Counsel to take up a certain line of defence does not relieve a Judge of the responsibility of putting to the jury such defence if it arises on the evidence.”

However, it needs to be noted that this is not a case where the learned High Court Judge has failed to consider evidence to find out whether there is a basis for him to act under section 297 of the Penal Code where the appellant can be convicted for culpable homicide not amounting to murder.

Although the appellant has not directly taken up this position, it appears from his dock statement that his position had been that the deceased came looking for him and provoked him and after that he did not know what happened. Although the learned Counsel contended that the appellant has not denied the

incident where the deceased received cut and stab wounds, in fact he has not taken up such a position at the trial. Therefore, the learned High Court Judge has clearly considered whether the evidence available establishes such a fact. The learned High Court Judge has also considered whether the actions of the deceased were a result of any mental ailment suffered by him. He has come to a definite finding that there was no evidence to show that the appellant was suffering from a mental condition when this incident occurred as the Consultant Psychiatrist summoned by the appellant himself has opined that it cannot be so. As the appellant has claimed provocation which appears to be on the basis that the deceased provoked him, the learned High Court Judge has correctly considered the relevant exception 1 to section 294 of the Penal Code which reads as follows.

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.

In her arguments before this Court, although the learned Counsel for the appellant attempted to portray that the incident spoken of by the appellant in his dock statement and the evidence of the PW-01 refers to one and the same incident, I find no basis to agree with such a contention. As pointed out correctly by the learned DSG, the evidence of PW-01 which was never challenged, shows abundant proof that it was the appellant who confronted the deceased by abusing him, and thereafter attacking him. The evidence shows that the deceased was never the aggressor. The evidence also shows that the appellant has come prepared because he used the knife carried by him to attack the deceased. According to the postmortem report, the deceased had received 12 injuries out of which ten are cut wounds while the other two are stab wounds. This goes on to establish that the deceased has acted with the intention of causing bodily injury to the deceased causing his death.

For the reasons as considered above, I find no reasons to interfere with the conviction and the sentence of the appellant by the learned High Court Judge.

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