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/0110/22

High Court of Rathnapura

Case No: HCR/257/13

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Rassagala Polwaththe Kulasena Gunasekara
2. Rassagala Polwaththe Gunasekara

ACCUSED

AND NOW BETWEEN

Rassagala Polwaththe Kulasena Gunasekara

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: U. R. De Silva, P.C. with Savithri Fernando with H. Ruberu for the Accused Appellant
	: Dishna Warnakula, DSG for the Respondent
Argued on	: 27-03-2023
Written Submissions	: 20-01-2023 (By the Accused-Appellant)
	: - (By the Respondent)
Decided on	: 26-05-2023

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) being aggrieved of his conviction and the sentence by the learned High Court Judge of Rathnapura.

The appellant was indicted along with another before the High Court of Rathnapura for causing the death of one Silindukande Kirimenikelage Siripala on 03-11-2011, and thereby committing an offence punishable in terms of section 296 read with section 32 of the Penal Code.

After trial, by the judgement dated 07-04-2022, the learned High Court Judge of Rathnapura found the appellant who was the first accused mentioned in the indictment guilty as charged, while the second accused was acquitted. Accordingly, the appellant was sentenced to death.

At the hearing of this appeal, the learned President's Counsel for the appellant formulated the following ground of appeal for consideration of the Court.

1. Whether the learned High Court Judge has failed to consider the evidence led at the trial in terms of section 297 of the Penal Code on the basis of a sudden fight on provocation.

The facts led to the death of the deceased Siripala can be summarized in the following manner. On the day of the incident, around 7.30 in the night, PW-01 has heard a quarrel and heard the voices of PW-03 Udayakumara and the appellant. He has heard the quarrel from the direction of the village temple. Later, he has heard his brother Rohana shouting stating 'our Siripala is finished', which has led to the witnesses opening his house door. He has seen the deceased fallen in front of the house and had taken steps to take him to the hospital.

On his way to the hospital, the deceased has made a dying declaration to PW-01 stating "ලතා අප්පු පිහියෙන් ඇන්නා බාප්පේ". The deceased had succumbed to the injuries at the hospital. In the trial Court, the witness has identified the appellant as the person mentioned by the deceased as Latha Appu.

The main witness who has described the incident had been PW-03 Udayakumara. At the time of this incident, he had been with the deceased Siripala. Before the altercation with the appellant occurred, the deceased Siripala had been selling illicit liquor inside an abandoned house, which belonged to the grandmother of the appellant. A relative of the appellant who had a mental condition had come and consumed liquor sold by the deceased, which has led to an altercation. At that time, the appellant has warned the deceased to leave before he would return in 20 minutes time. He has also scolded the deceased in filth. The appellant had objected to the selling of illicit liquor inside the abandoned house stating that the land belonged to him, and the deceased should not sell liquor in the manner it was carried out in his land.

The appellant has returned in about 10 minutes time. However, the deceased has refused to leave stating that he also has a right to the land. When the appellant returned, he was carrying a broken spring leaf and had assaulted the deceased towards his cheek. In order to prevent an incident occurring, PW-03

has forced the deceased to leave. While walking towards his mother's elder sister's house, the deceased has stopped near the place that leads to the appellant's house. The appellant had come and stopped about 250 – 300 meters away and had again started to scold the deceased in filth. Being angered by this, the deceased has taken two rocks, and had confronted the appellant. However, the appellant without coming near the deceased had continued to scold him in filth.

However, some moments later, the appellant had come and stabbed the deceased. According to the witness, the first attempt by the appellant to stab the deceased had failed. At the same time, the deceased has taken a rock in his hand and almost simultaneously the appellant had stabbed the deceased for a second time and the deceased had attacked the appellant with the rock on the appellant's face. The deceased had sustained a stab injury to his chest.

It was the evidence of PW-03 that after the attack, the appellant fainted because of the injury suffered by him to his face and as the appellant appeared to be injured severely, the witness has taken him to the hospital. He has later seen the deceased also being admitted to the hospital and had come to know later that he passed away.

The Judicial Medical Officer who conducted the postmortem on the deceased has observed two stab wounds out of which the stab wound that he observed on the chest had been the more serious one. He has described the first stab wound as a wound that can cause the death in the ordinary course of nature.

When called for a defence, the appellant has made a dock statement and has claimed that the deceased was in the habit of selling illicit liquor from his grandmother's house. Although he has informed the deceased several times not to do that, he has continued to do so. On the day of the incident, he found that the deceased has given the illicit liquor to his father's younger brother who had a mental disease. The appellant has claimed that there was an argument over this and he and the deceased exchanged fist cuffs. It had been his position that

when he was returning home, he heard PW-03 saying "ගල බිම දාපන්". Thinking that he is being attacked he hid, but the deceased came and attacked him with a rock and both of them engaged in a scuffle. As a result, he was fainted and regained his consciousness only at the hospital. Because of the attack, he lost four frontal teeth and later he was arrested while taking treatment in the hospital by the police.

The Consideration of the Ground of Appeal

It is clear from the evidence adduced before the trial Court that the appellant has not taken up the position that he was provoked by the deceased or it was he who attacked the deceased due to being provoked. In his dock statement too, the appellant has pleaded ignorance as to how the deceased suffered the stab wounds.

However, at the hearing of this appeal, the position taken up by the learned President's Counsel on behalf of the appellant was that there was evidence available before the trial Court that the appellant acted due to being provoked by the actions of the deceased and the incident where the deceased suffered fatal injuries were due to the provocation extended upon the appellant. Under the circumstances, it was his view that the conviction should have been in terms of either exception 01 or 04 of section 297 of the Penal Code.

It was the submissions of the learned DSG that the incident cannot be termed as an incident occurred due to a sudden fight or a provocation for that matter. It was her position that when the first incident occurred, the evidence clearly establishes the fact that the deceased had done nothing to aggravate the situation. The learned DSG pointed out that there was a clear time gap between the first incident and the incident where the appellant had stabbed the deceased. It was her position that although the appellant has also received injuries, the actions of the appellant would not fall under the definition of a provocation or a sudden fight.

Under the circumstances, it was her view that the appeal should be dismissed as it is devoid of merit.

It is clear from the evidence adduced before the trial Court that the appellant has not taken up a defence that the incident was a result of a sudden fight or due to him being provoked. Although he has admitted that there was a quarrel between him and the deceased, due to the deceased selling illicit liquor from an abandoned house belonging to his grandmother, he has not admitted that it was he who caused the stab wound to the deceased.

However, it had been his position that it was he who suffered injuries and as a result fainted, and only regained his consciousness at the hospital.

Since the learned President's Counsel's position was that the actions of the appellant fall within the general exceptions in terms of section 294 of the Penal code, I find it desirable to consider the relevant law in that regard.

In the instant appeal, the appellant mainly 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.**

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.

Although there is a specific provision in the Evidence Ordinance as to by whom a general exception or any special exception should be established, our Superior Courts have consistently held that even if no such exception has been pleaded by an accused person during a trial, 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 verdict."

The above line of authorities clearly establishes that for a trial Judge to consider whether there was provocation, which reduce the offence of murder to that of a lesser culpability, there must be evidence available in the trial.

The evidence made available to the trial Court clearly suggests that this was not a single incident where the appellant has stabbed the deceased, but an incident which has taken place over a period of time. Therefore, it is the view of this Court that this incident would not fall under exception 4 of section 294 of the Penal Code.

It is the view of this Court that the appellant can succeed in his argument if there was evidence to establish that the incident falls within exception 1 of section 294 of the Penal Code as exhibited before.

It clearly appears from the judgement of the learned High Court Judge, the Counsel who represented the appellant at the trial had, rather than pleading the general exceptions of section 294, has pleaded the special exception as described in section 89 of the Penal Code, where it has been stated that nothing is an offence which is done in the exercise of the right of private defence.

As the wording of the section clearly suggests, if it can be established that an action of an accused person was done in the exercise of the right of private defence, there cannot be a conviction against such a person, but only an acquittal.

In the judgement, the learned High Court Judge has considered the special exception pleaded in relation to the general exceptions mentioned in section 294 of the Penal Code, and has extensively considered whether the actions of the appellant can be considered in terms of the said exceptions.

It is my considered view that there is a clear distinction between section 89 of the penal code and exceptions mentioned in section 294, which are exceptions to the offence of murder. If a trial Court finds that the actions of an accused person fall within any of the exceptions mentioned in section 294 of the Penal Code, such an accused person cannot be acquitted on the basis of right of private defence, but can only be convicted on the basis of culpable homicide not amounting to murder in terms of section 297 of the Penal Code.

It clearly appears from the judgement that the learned High Court Judge has considered the evidence to find that whether there was a basis to conclude that the injury caused to the deceased was an act by the appellant in exercising his right of private defence based on the last confrontation between the two, where the evidence shows that both the stabbing and the deceased hitting the appellant with a rock occurred simultaneous to each other. On the basis that there was no

material placed before the Court to conclude that the appellant exercised his right of private defence, the stand taken up by his Counsel at the trial has been rejected by the learned High Court Judge.

The appellant has been convicted for the offence of murder in terms of the third limb of section 294 where it is stated that, "if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

It is therefore clear that the learned High Court Judge's attention had not been drawn to whether this incident falls within exception 1 of section 294. 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 earlier judgements of our Superior Courts had followed a strict interpretation in 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. The Queen 75 NLR 79**, **H. N. G. Fernando, C.J.** gave a more pragmatic interpretation to the term sudden provocation. It was held,

> *"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 1 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 the judgement of **Premalal Vs. The Attorney General (2000) 2 SLR 403**, it was held,

> **Per Kulatilaka, J.,**
>
> *"Our judgements 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 to the manner as the accused did.*
>
> *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 look into the consideration of the prior course of relationship between the accused and his victim."*

The law in relation to the term sudden provocation has been developed on the same lines in the Indian Courts as well. In the Indian case of **Poovammal Vs. State Represented by Inspector of Police V. K. Puram Police Station, Tirunelveli District (2012(2) MLJ (Crl) 482),** the Court referring to the case of **K. M. Nanavati Vs. State of Maharashtra (1962) 1 MLJ (Crl) 531 (SC)** referred to the offence of manslaughter in English Law, an offence committed during provocation and observed thus,

> *"Under the English Criminal Law, the provocation must be grave and also sudden. But by way of judicial thinking, the Indian Criminal Law has gone ahead. In our system there is a concept of sustained provocation. It is concerned with the duration of the provocation. There may be incidents/occurrences, which are such that they may not make the offender suddenly to make his outburst by his overt act. However, it may be lingering in his mind for quite some time, torment continuously and at one point of time erupt, make him to lose his self-control, make his mind go astray, the mind may not be under his control/command and results in the offender committing the offence. The sustained provocation/frustration nurtured in*

the mind of the accused reach the end of breaking point, under that accused causes the murder of the deceased."

It is therefore clear that our Courts have viewed the term sudden provocation to include cumulative provocation in considering whether an act committed by an accused person would fall within the ambit of exception 1 of section 294 of the Penal code.

It is therefore necessary to consider the facts that had been revealed before the trial Court, in the above perspective, since there had been a time gap between the first incident and the incident where the appellant has caused the fatal injury to the deceased. It is clear from the evidence that the deceased had been in the habit of selling illicit liquor based in an abandoned house, which belonged to the grandmother of the appellant. The words that had been uttered by the appellant when he first confronted the deceased provides sufficient proof that the appellant had been opposing the deceased continuously.

When the appellant met the deceased, he was selling illicit liquor at the abandoned house and one of the consumers had been a mentally retarded person who is a close relative of the appellant. The appellant has scolded the deceased in filth because his continuous engagement in selling illicit liquor in the house and the land claimed by the appellant. After the initial outburst, the appellant had left the place stating that he will be returning in about 20 minutes and if the deceased still remains there, he would be killed. However, he had returned in about 10 minutes time and even at that time, the deceased had refused to leave stating that they also have a right to these houses.

It appears that the deceased's continuous presence has aggravated the anger that had been boiling within the appellant because of his previous actions, which has resulted in him assaulting the deceased. After the assault, the appellant has continued to scold the deceased in filth, and PW-03 has separated the two. While going away from the place of the first incident, the deceased has stopped near the turn towards the appellant's house. Thereafter, the appellant also has come

near that place, he has stopped some distance away, but had continued to scold the deceased. This has angered the deceased and he has picked up two rocks and had confronted the appellant. In the ensuing scuffle, the appellant has stabbed the deceased and the deceased also has attacked the appellant with a rock he has picked up from the ground.

According to PW-03's evidence, the appellant also has received grievous injuries to his face and had fainted. The deceased had been taken to the hospital subsequently where he was pronounced dead.

It is the view of this Court that the above facts taken cumulatively establishes that the attack on the deceased by the appellant was not a premeditated intentional act done with the intention of causing the death of the deceased. It sufficiently proves that due to the illegal activities of the deceased, which he carried out in a house claimed by the appellant, the initial provocation was by the deceased, although it may not be a sudden provocation. It is the refusal by the deceased to stop carrying out the illegal selling of illicit liquor that has sparked a series of events within a short span of time relevant to this incident.

It is the view of this Court that due to the cumulative provocation and the events of the given day, and due to the heat of passion, the appellant has committed this act where the deceased received a stab wound, which had been proved fatal. The Judicial Medical Officer who has conducted the postmortem has categorized this injury as an injury that could cause the death in the ordinary course of nature, but not as an injury that would be essentially fatal. The evidence establishes that the delay in taking the injured deceased to the hospital may also have been a reason for the death of the deceased person due to haemorrhage.

Under the circumstances, it is my view that convicting the appellant in terms of section 296 of the Penal Code is not warranted. I am of the view that if considered in the correct perspective, there was ample evidence before the trial Court to convict the appellant in terms of section 297 of the Penal Code under exception 1 of section 294. Accordingly, I set aside the conviction of the appellant and

convict him for culpable homicide not amounting to murder in terms of section 297 of the Penal Code.

As considered above, I am of the view that the act committed by the appellant had been an act done with the knowledge that it is likely to cause death but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

Therefore, acting in terms of the second limb of section 297 of the Penal Code, I sentence the appellant for a rigorous imprisonment period of 10 years. In addition, I order him to pay a fine of Rs. 25000/=, and in default, he shall serve an additional rigorous imprisonment period of 2 years.

The appeal is allowed up to the above extent.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal