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

In the matter of an appeal in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Case No:

C.A.16/2013

HC Batticaloa Case No.

HCB/2536/08

Attorney - General

VS.

Kulanthaivel Ramesh alias

Vishvalingam SasiKumar

Accused

AND NOW BETWEEN

Kulanthaivel Ramesh alias

VishvalingamSasiKumar

Accused - Appellant

VS.

Hon. Attorney- General,

Attorney-General's Department,

Colombo-12.

Respondent

Before : **H.N.J. Perera, J &**

A. H. M. D. Nawaz, J

Counsel : Dr.Ranjith Fernando for the accused-appellant

P.Kumararatnam DSG for the Attorney-General

Argued on : **24.02.2015**

Decided on : **27.03.2015**

A.H.M.D.Nawaz J

The accused -appellant was indicted by the Attorney General in the High Court of Batticaloa for having committed the murder of Bhaskaran Lavakaran at Eravur on or about 10th August 2006 –an offence punishable under section 296 of the Penal Code. Upon the accused pleading not guilty to the indictment, the trial commenced before the High Court Judge and the evidence that unfolded at the trial goes as follows.

The first witness called by the prosecution was the mother of the deceased-Muthulingam Kaliyamma who stated that on the day in question the deceased Lavakaran -her eldest had gone to sleep, as was his wont, at the house of her husband's aunt which was located about 400 to 500 metres away from her house. Upon hearing that there was a commotion she rushed to the scene where she saw the accused-appellant come running and stab

her son in the ribs with a knife. Immediately after he was stabbed, the deceased cried out-"Amma, Ramesh (an alias of the accused appellant) has stabbed with a knife (*sic*)" Though the incident took place around 9p.m in the night, the witness testified that she was able to witness the stabbing with the aid of light emanating from the house of her younger sister. On a question by the state counsel as to what words the accused-appellant had uttered at the time of the incident, the witness stated that the accused had said to the deceased, "Come, let's fight and see."

The witness made the first statement to Eraviur police on the same night and both this 1st information and the dying deposition therein were marked contemporaneously at the trial. On cross examination the witness clarified that what she heard was a quarrel had been going on between her deceased son and Poomany (mother of the accused-appellant), the accused-appellant and his relatives inclusive of his sister Manjula. In fact when she saw the accused appellant stab her son with the knife, all relatives of the accused appellant had been standing in the compound where the stabbing took place. Though she rushed her son to the hospital he had succumbed to his injuries as they brought him to the hospital. So the testimony of this witness brings out an eye witness account of the incident which had followed a commotion among the deceased, accused-appellant and some of the relatives of the accused-appellant.

It has to be observed that while the first witness for the prosecution was the mother of the deceased, the second witness Visalingam Poomany who is referred to in evidence as the mother of the accused-appellant omits any reference to the incident of stabbing –presumably so owing to maternal instincts of preservation. This omission notwithstanding, Poomany supplies

the essentials of the narrative which throw light on the antecedent events which could not be spoken to by the first witness. The deceased was in the habit of coming to their house to sleep as they were relatives and on the day in question around 8.30 pm in the night he came home drunk and kicked up a shindig by hitting the children of his own sister. When the witness remonstrated against his behavior, he laid his hands hitting her on the cheek. When her daughter Manjula who was 7 months pregnant protested at the assault on the witness, the deceased had pushed her down knocking her unconscious. It was thereafter that the accused-appellant had appeared on the scene posing the question as to who had hit his mother-the witness. The witness further testified that her pregnant daughter and the sister of the accused-appellant Manjula who had been pushed down to the ground was lying unconscious for a while and every body had thought that she was dead. In fact the fact that the deceased came inebriated, hit the 2nd witness Poomany and knocked Poomany's daughter Manjula (sister of accused-appellant) unconscious is spoken to by the 3rd witness who also stated that the accused-appellant stabbed the deceased. The 3rd prosecution witness Karthigesu Karunaiamma testified that she was aware that the accused appellant stabbed the deceased in the backdrop of all this rumpus where the mother of the accused-appellant had been beaten and his sister Manjula was lying unconscious -all these antecedent events happening at the hands of the deceased preceding the incident of stabbing. This witness corroborated the dying deposition too when she said that she heard the deceased say to his mother-"he has stabbed (*sic)*"

Thus the prosecution evidence elicited at the trial clearly established that an altercation occurred between the deceased, the mother and the sister of the accused-appellant over the drunken exchange the deceased had with

them subsequent to which the deceased dealt a blow to the mother and kicked the sister of the accused appellant Manjula who lay unconscious consequent to the fall and there is evidence that there was commotion as everybody thought that Manjula was dead. It was thereafter that the accused-appellant appeared on the scene and turned on the deceased.

The prosecution called the Doctor who conducted the post mortem examination and the medical evidence established the fact that there were three stab injuries out of which two were fatal and even an immediate medical intervention would not have arrested the ensuing fatality. After the formal evidence of the police and the non summary deposition which was marked of one Mutulingam Selvarani under section 33 of the Evidence Ordinance, the prosecution closed its case marking in evidence its productions which included the knife-the murder weapon.

The accused-appellant made a dock statement in which he spoke of noise emanating from his house. As soon as he heard the cry from the house to the effect that his pregnant sister Manjula had died, he rushed home and grappled with the deceased. Other than the fight he referred to he had with the deceased, the accused-appellant spoke nothing of any stabbing and pleaded no exception in the dock statement. The defence also called Manjula who confirms the prosecution version that subsequent to an altercation with the deceased, he kicked her down and she lapsed into a state of unconsciousness.

So much for the facts. Both the prosecution evidence and the evidence for the defence do not materially differ on the facts except that the prosecution evidence clearly establishes the fact that the deceased came by his death at the hands of the accused-appellant. Be that as it may, the High

Court Judge after having indulged in an extensive narration of the evidence has found the accused guilty of murder as she states in the last paragraph of her judgment that as both mens rea and actus reus have been established, the accused-appellant has to be found guilty of murder and accordingly the learned High Court Judge convicted the accused-appellant of murder and sentenced him to death on 28.02.2013. I observe that there are vitiating factors that impinge on the conviction for murder. Except for a narration of evidence led for the prosecution and defence, there has been no evaluation of the evidence or an analysis that ought to have been undertaken more particularly in a trial when an accused faces the capital punishment.

The evidence led at the trial clearly shows that there was evidence of provocation. As elicited from the prosecution witnesses the incident had taken place in the compound where the accused-appellant had been living. The witnesses speak of the deceased coming intoxicated and slapping the mother of the accused. When the sister of the accused remonstrated against this he kicked her down into unconsciousness. The people around had made an outcry that the sister Manjula had passed away obviously because she had been lying unconscious for a while. The accused stated in his dock statement that as soon as he heard this he rushed to the scene and the melee ensued with the deceased. The stabbing took place in the course of this fight. All these items of evidence provide the basis for an investigation whether the accused was provoked into the criminal act of doing the deceased in. But the learned High Court Judge falls foul of this task which is enjoined on all triers of facts.

An exception need not be pleaded by the accused-***Mangal Ganda v Emperor*** (1925) 25 Cr.LJ 1073 and **Faudi Keat v Emperor (1920) 22 Cr.LJ 799** . In

the instant appeal before us, it has to be noted that the plea of grave and sudden provocation was not specifically raised by the defence when the cross examination of the prosecution witnesses took place or when the defence witnesses gave evidence. Neither did the accused-appellant raise the plea in his dock statement. On the contrary the evidence led from the prosecution and the defence evidence brought out circumstances which manifested the availability of a plea of grave and sudden provocation. No doubt Section 105 of the Evidence Ordinance places the burden of proving a general or special exception on an accused in the event that he pleads such an exception and the Divisional Bench by a majority of 6 to 1 declared in ***The King v James Chandrasekera*** 44 N.L.R 97 that the standard of proof of these exceptions is on a balance of probabilities but there are a number of decisions that lay down the rule that such a burden does not exist where it is manifest from the evidence for the prosecution that the plea must be upheld-vide ***The King v Sellammai*** (1931) 32 N.L.R 351; 8 T.L.R 143. Therefore it follows that the burden of proof of an exception may be discharged not only by the evidence for the prosecution but also by the evidence for the defence or both- vide the jurisprudence for these propositions in ***Rajnikanth v State*** (1970) 2 S.C.C 866; ***In re KannegatiChowdarayya*** A.I.R. (1938) Mad 656; ***Anand v Emperor*** A.I.R (1923) All 327; 24 C.L.J 225; ***Emperor v Damapala*** (1937) 38. Cr.LJ 524; ***Mohamed Rafiq v Emperor*** A.I.R (1933) Lah.1055.

Courts have gone to the extent of holding that even if the accused denies the allegation *in toto,* mitigatory circumstances must be considered by the jury if the evidence unfolds such circumstances. Thus, in **The Queen v Sinnathamby**(1965) 68 N.L.R 195 the Court of Criminal Appeal held that even though the defence was a total denial of the acts which caused the death, the judge was justified in putting the question of insanity to the jury for consideration in the event of their holding that it was the accused who struck

the fatal blow, and that it is not the law that the question of insanity should be put to the jury only if the defence counsel raises the defence.-see the observations of Lord Denning in ***Bratty v Attorney General for Northern Ireland*** (1963) A.C.386; **R v Kemp** (1957) 1 Q.B 399; **R v Hopper** (1915) 2 K.B 431.

Thus we distil the wisdom in these cases namely no burden of a general or special exception is undertaken by an accused if such an exception arises on the prosecution evidence or evidence led for the defence or both. I hold that this proposition is consistent with the stipulations contained in section 105 of the Evidence Ordinance. That section casts the burden on an accused of proving **the existence** of circumstances bringing the case within any of the general or special exceptions in the Penal Code or within a proviso contained in any other part of the same Code, or in any law defining the law and the Court shall presume the absence of such circumstances. If the existence of the extenuating circumstances stipulated in the exceptions and provisos of the Penal Code or even the elements constituting a defence contained in a law are brought out by the evidence that emerges at the trial, whether it be that of the prosecution or defence, then the Court does not have to presume the absence of those circumstances and Section 105 will have no application in such a situation. In such a situation there will be no burden as required by Section 105 as the extenuating circumstances have already emerged at the trial. When such extenuating circumstances arise, it is the duty of the trial judge to leave the issue of extenuation to the jury-see the pith and substance of this principle also encapsulated in cases such as ***Rolle v R*** ((1965) 3 All.ER 582 (PC); ***Bullard v R* (1961)** 3 All.ER at 471 n, (1958) 42 Cr App R 1 per Lord Tucker;; ***Lee Chun-Chuen v R*** (1963) 1 All E.R at 79, 80 (PC) (HK) per Devlin.

This Court finds that there were circumstances that manifested on evidence led for the prosecution and defence bringing the special exception of grave and sudden provocation into operation but sadly enough there was no consideration by the learned High Court Judge of these extenuating circumstances. This Court holds that a High Court Judge sitting without a jury as a trier of fact is obliged to embark upon an investigation whether circumstances of a general or special exception may have accompanied the killing. In fact Lord Tucker in ***Bullard v R*(1961)** 3 All.ER at 470 (at p 471), (1958) 42 Cr App R 1 (at p 7) (an appeal from the Supreme Court of Trinidad and Tobago) vigorously defended this approach with Earl Jowit and the Rt.Hon.L.M.D.de Silva agreeing in the Judicial Committee of the Privy Council.

> "*Every man on trial for murder has the right to have the issue of manslaughter left to the jury if there is any evidence on which such a verdict can be given. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached.*"

The above jurisprudence on the responsibility of the judge to apprise the jury of all facts of potential relevance pertaining to defences equally applies to a judge sitting alone in a case of murder.

Elements of the Defence of Grave and Sudden Provocation

This Court highlights the necessity that a High Court judge has to be guided by the requisites of grave and sudden provocation that have been held to be essential enough to afford the foundation for a reduction of a charge of murder to one of culpable homicide not amounting to murder. Mere provocation will not avail the accused. In order to bring a case under Exception 1 to Section 294 of the Penal Code the accused must establish the following elements or they must arise on evidence.

(1) the provocation was sudden
(2) the provocation was grave
(3) and the accused lost his self-control

In fact Nagalingam, S.P.J. in **Kumarasinghege Don John Perera (K.D.J. Perera) v The King** (1951) 53 N.L.R 193 at 201-204 sets out some salient elements of the plea of grave and sudden provocation.

a) There must be provocation; that is, anything that ruffles the temper of a man or incites passion or anger in him or causes a disturbance of the equanimity of his mind. This may be caused by mere words not amounting to abuse or by word of abuse, by blow with hands or stick or club or a pelting of stones or by any other more serious method of doing personal violence –(Provocative Conduct).

b) The provocation must be sudden. There should be a close proximation in time between the acts of provocation and of retaliation. This is a question of fact . The interval of time should not have afforded the assailant an opportunity of regaining his normal composure-time for "cooling" of his temper-See how the concept of suddenness has been watered down by the doctrine of continuing or cumulative provocation as seminally commented upon by the eminent jurist Dr.M.Sornaraja (Journal of Ceylon Law) 1971 and developed and applied by our Courts in cases such as ***Samithamby v The Queen*** 75 N.L.R 49; ***Gamini Silva v AG*** (1998) 3 Sri.LR 248 and ***Ranjith Premalal v AG*** (2000) 2 Sri.LR 403.

c) The provocation should be grave. It should be grave where an ordinary or average man of the class to which the accused belongs would feel annoyed or irritated by the provocation given to the extent that, smarting under the provocation given he will resent or retaliate the act of provocation **(Objective Test)**

d) As a result of the grave and sudden provocation given, the prisoner was actually deprived of his power of self-control

e) The prisoner must have caused the death whilst he was in the state of deprivation of the power of self-control.

((d) and (e) would constitute elements of **the subjective test of provocation).**

From the above one could see that the defence of grave and sudden provocation contains both a subjective and objective standard. The Jury or the judge sitting alone has to assess the existence and extent of grave and sudden provocation with regard to these subjective and objective indicia. The learned High Court Judge in this case was innocent of these requirements and this Court deems it appropriate that the elements of the defence be delved into for purposes of elucidation. Before I proceed to engage in the task a summation of what constitutes provocation is apposite at this stage.

What would amount to provocation?

The first question to be posed is-was there a provocative conduct ? As evidenced in this case, the provocative acts need not have been directed at the accused. In **R v Pearson** (1992) Crim LR 193- two brothers killed their violent, tyrannical father with a sledgehammer. It was held that the father's violent treatment of the younger brother, during the eight years when his older brother was away from home, was relevant to the older boy's defence, especially as he had returned home to protect his brother. There are a slew of instances as to what would constitute provocation prominent among which is the doctrine of continuing or cumulative provocation.

This would coalesce into a discussion on the requirement of sudden and temporary loss of self-control inherent in the plea . As adverted to above, the Sri Lankan courts have adopted the concept of cumulative provocation in cases such as ***Samithamby (ibid),*** and this is remarkable given that the English law at the time of the Penal Code's promulgation (1883) restricted the provocation to the deceased's conduct immediately prior to the killing and refused to take into account previous provocation which might have continued to affect the accused's mental state when the killing occurred-See Stephen, J.E, ***Digest of the Criminal Law,*** 3rd edn, Arts 224 and 225 (1883). In fact both the Sri Lankan and Indian courts have embraced the concept of cumulative provocation and the willing acceptance appears to have been aided by the presence of the requirement of "sudden provocation" alongside "grave provocation" in the Exception. The courts could thereby relegate all matters having a time element to the requirement of suddenness, leaving them free to recognise instances of provocation occurring well beyond a limited timeframe under the concept of grave provocation. Thus, considerations such as that the provocation must have been unexpected as opposed to planned in advance by the accused, that the interval between the homicide and provocation must be brief, and that the accused must have been operating under loss of self-control caused by the provocation are all discussed under the requirement of sudden provocation. But when it comes to deciding on what could count as "grave provocation", all instances of the deceased's provocative conduct, perhaps extending over weeks, months or even years before the homicidal incident, could constitute provocation-see the seminal decision of the Indian Supreme Court in ***Nanavati v State*** **AIR 1962 SC 605.**

English courts have since embraced and adopted the concept of cumulative or continuing provocation-see the Court of Appeal decisions in ***R v Ahluwalia*** (1992) 4 All ER 889 and ***R v Thornton* (No 2)** (1996) 2 All ER 1023-where the Courts heard evidence that battered women may suffer a "slow burn reaction"-also see in this context M.Wasik-"Cumulative Provocation and Domestic Killing" (1982) Criminal Law Review 29.

In fact as is apparent there are mainly two limbs to the defence of grave and sudden provocation.

(1) The accused must establish on a balance of probabilities or the evidence must emerge that he or she was provoked to lose his or her self-control and kill by the provocation offered.

(2) A reasonable person would have been provoked to lose his or her self-control and do as the accused did.

It is acknowledged that whilst the first limb embodies the subjective test, the second limb connotes the objective test.

It is during the investigation of the subjective test that the trier of fact must focus on the question of whether what was said or done by the deceased would amount to provocation and at the end of that investigation the trier of fact must reach the decision that the accused actually lost his or her self-control. Enveloped in this investigation is whether the accused suffered a sudden and temporary loss of self-control. A modification of this concept would give rise to an appraisal based on the facts whether there was continuing provocation. The trier of fact must decide all these questions having regard to the accused. In other words the need to show that the accused was provoked to lose his self-control is a subjective question. That is it requires the jury or the trier of fact to look into the mind of the accused

and ask the question whether the accused actually lost his or her self-control. It is a question of fact for the jury or the trier of fact having regard to the evidence and it is in the process of that fact finding that all that I have discussed above such as whether the deceased's words or conduct would constitute provocation and whether the provocation was sudden and temporary would beg the question.

Accordingly, the defence is unavailable where a killing contains elements of premeditation or deliberation. This is not to say that the accused must have lacked a murderous intent. It has been laid down by the Privy Council that the defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm, but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. Proof of any sort of intent to kill does not negative provocation-see ***Lee Chun-Chuen v R*** (1963) 1 All ER 73 at 79 (PC) (HK). Lord Goddard CJ affirmed this in **Attorney-General v K.D.John Perera** (1952) 54 N.L.R 265 at 269 (PC); (1953) A.C 200 at p 206 Indeed, the defence arises only if a prima facie case of murder has been made out. What the subjective condition of the defence requires is that murderous intent must not have been formed independently of the provocation. The subjective condition stands apart from the objective condition or evaluative question. If an accused had not in fact lost self-control, the defence would fail even though a jury might think that a reasonable or ordinary person in like circumstances could have lost self-control.

Objective Test

It has to be observed that the vexed question has been the application of the objective test in the context of the plea of grave and sudden provocation.

Our courts have read the ordinary person test into the wording of Exception 1 to Section 294 of the Penal Code by ruling that the judge must tell the jury that the test for deciding on whether the provocation was adequate is an objective test, namely, the test whether a reasonable man of the class of society to which the accused belonged would have been provoked, and whether the retaliation was reasonably proportionate to the provocation.

The Court of Criminal Appeal has decided on a number of occasions that when the plea is taken, the question whether in the opinion of the jury the provocation was grave or not should be considered in relation to an ordinary reasonable man of the class to which the accused belongs, and not in relation to the particular accused, that is, the objective test-see ***David Appuhamy v The King*** 53 N.L.R 313; ***Jamis v The Queen*** 53 N.L.R 401, which partly overruled the former case; ***Muthu Banda v The Queen*** 56 N.L.R 217 at 217-218; also ***K.D.J.Perera v The King*** 53 N.L.R 193 (CCA); ***Punchibanda v The Queen*** 74 N.L.R 494. In fact Gratiaen J defined the reasonable man as a hypothetical person who, in this context, is an average man of the class of society to which the prisoner belongs-See ***Jamis v The Queen*** 53 N.L.R 401 at p.405.

The comparable formulation of the objective test has been laid down by the Indian Supreme Court in the following terms:

> *"The test of "grave and sudden provocation" is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control"*-see the Indian Supreme Court in ***Nanavati*** AIR 1962 SC 605 at 630 in relation to the identical Exception 1 to Section 300 of the Indian Penal Code.

The pure objectivity of this test is brought out by the declaration that the susceptibilities and idiosyncrasies of the accused are material only in regard to the separate and distinct issue, whether the accused had in fact lost his self-control under the stress of the provocation offered-see ***Jamis v The Queen*** 53 N.L.R at 403-404, 405-408. The attempt of Bertram CJ in ***Punchirala*** 25 N.L.R 458 to invest the reasonable man with the peculiar susceptibilities naturally incident to the offender was given short shrift by the following repudiation by Gratiaen J in ***Jamis v The Queen*** 53 N.L.R at 401 at 408.

> *"We certainly reject the argument that, so long as the dictum in Punchirala's case is allowed to stand, its ratio decidendi must logically be extended to every other case where a person charged with murder pleads that he was peculiarly prone to loss of self-control under the stress of provocation which was insufficient in point of degree to produce a similar effect on the mind of an average person."*

Though Gratiaen J deliberately refrained from declaring Punchirala's case wrongly decided, the case of ***The King v Punchirala*** was overruled in ***Muthu Banda v The Queen*** 56 N.L.R 217 (C.C.A) where it was held that when considering whether the accused was deprived of the power of self-control by grave and sudden provocation, the jury must apply an objective test, that is, whether in the particular case under consideration, a reasonable or an average man with the same background and in the same circumstances of life as the accused would have been provoked into serious retaliation. The effect of this proposition is that the intoxication of the accused is not to be regarded as affecting the gravity of the provocation offered, and should only be taken into account, together with the idiosyncrasies of health and

temperament, when the jury determines subjectively whether or not the accused lost his self-control under the stress of provocation.

Be that as it may, the English reasonable man whose shadow of pure objectivity we see reflected in cases such as ***Jamis v The Queen*** and ***Muthu Banda v The Queen*** (supra) underwent a change in England itself when he was subjectivized in 1978 by the House of Lords in ***DPP v Camplin*** (1978) AC 705. The House had held that the reasonable man must be regarded as having the power of self-control to be expected of an ordinary person (not unusually pugnacious or excitable) of **the age and sex of the accused**, and **bearing such other characteristics of the accused as are relevant to the gravity of the provocation.** Lord Diplock suggested a justification for making age a qualification to the ordinary power of self-control requirement.

> *"To require old heads upon young shoulders is inconsistent with law's compassion to human frailty."-**DPP v Camplin*** (1978) 2 All ER 168 at 174

So age and sex of the accused became attributes that could be attributed to the ordinary man. The English courts have not stopped at this but have advanced the concept of "such other characteristics of the accused as are relevant to the gravity of the provocation" as articulated by Lord Diplock in ***DPP v Camplin*** (supra). Today the pronouncement made in the Privy Council case of **Attorney General for Jersey v Holley** (2005) UKPC 23 seems to reflect the current articulation on who a reasonable man is for purposes of the objective test. The Privy Council has accepted a statement made by Professor Ashworth of Oxford University in 1976 that:

> *"The proper distinction.... is that individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas*

individual peculiarities bearing on the accused's level of self-control should not."-see Professor Andrew Ashworth's observation in **"The Doctrine of Provocation"** (1976) CLJ 292 at 300.

It has to be noted that the majority in ***Luc Thiet Thuan v The Queen*** (1997) AC 131 (PC) commented at 140-141 that the House in ***DPP v Camplin*** (supra) had accepted Professor Ashworth's observation. Thus, the Privy Council in **Attorney General for Jersey v Holley** (supra) has drawn a distinction between what have been described as 'control characteristics' and 'response characteristics'. Control characteristics are those which merely have an effect on the accused's ability to control themselves and these characteristics could not be taken into account for the objective test of provocation. Response characteristics are those which are the subject of the provocation and could be taken into account. For example, a boy is very sensitive because he has big ears, and is taunted about being a bad player at football. If the boy kills, his big ears ought not to be a relevant characteristic because it merely makes him more provocable – the taunt is just as provocative to a boy with ordinary ears as to the boy.

In **R v James; R v Karimi** (2006) EWCA Crim 14 the Court of Appeal held that the Privy Council case of **Attorney General for Jersey v Holley** (2005) UKPC 23 reflected the current law in England. So England has moved away from the hidebound and strait-jacketed reasonable man who could not be attributed at one time with any characteristics of the particular accused. Closer home across the Palk Straits the Indian Courts have been very clear that a purely objective test would create injustice if applied to a multi-cultural, multi-religious and multi-class structured society like the one in

India. They were assisted in reaching this viewpoint by referring to the Code framers themselves:

> *"A person who should offer a gross insult to the Mohamedan religion in the presence of a zealous professor of that religion; who should deprive some high-born rajpoot of his caste; who should rudely thrust his head into the covered palanquin of a woman of rank, would probably move those he insulted to more violent anger than if he had caused them some severe bodily hurt. That on these subjects our (English) notions and usages differ from theirs is nothing to the purpose. We are legislating for them, and though we may wish that their opinions and feelings may undergo a considerable change, it is our duty, while the opinions and feelings remain unchanged, to pay as much respect to those opinions and feelings as if we partook of them."*-see **Macaulay, Mcleod, Anderson and Millet** –*The Indian Penal Code as originally framed in 1837 with Notes* which was cited by the Supreme Court in ***Nanavati*** AIR 1962 SC 605

The proposition of the Supreme Court in ***Nanavati*** cited above is a good example of the way the Indian courts have modified the purely objective test contained in the English law at that time. By placing the ordinary person in the "same class of society as the accused" and in the situation in which the accused was placed, the court was obviously contemplating certain of the accused's personal characteristics and circumstances to have a bearing on the ordinary person test. As with the English and Indian laws that prevail today, these characteristics can be categorised into those affecting the

gravity of the provocation and those affecting the power of self-control of an ordinary person.

Characteristics affecting the gravity of the provocation

As a general proposition, it appears that even Sri Lankan Law, like Indian counterpart, must be prepared to recognise all such characteristics as are relevant to the gravity of the provocation provided the provocation was directed at the characteristic. This stems from the Explanation to Exception 1 which states that the question whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact. Hence, the Code framers had deliberately left the question to be decided by the jury or the trier of fact in every case, finding it futile to lay down a universal standard for measuring the gravity of the provocation- see the comments to this effect in the Indian case of ***Abdul Majid v State*** 1963 (2) Cr LJ 631, p 633. This is a sensible approach, given the infinite variety of accused's characteristics and circumstances which, **when attributed to the ordinary person,** might persuade the jury or the judge to decide that such a person could be provoked into losing self-control.

The Indian courts have recognised a host of characteristics and circumstances including age (***State v Bhand Jusub Mamad*** 1982 Cr.LJ 1691), religious beliefs and values (***Pancham v Emperor*** AIR 1947 Oudh 148), mental and physical disabilities(***Aktar v State*** AIR 1964 All 262), drunkenness (***Sadhu Singh v State*** 1969 Cr.LJ 1183) a, criminal conduct (***Nga Paw Yin v Emperor*** AIR 1936 Rang 40) , ethnicity (***Jamu Majhi v State*** 1989 Cr.LJ 753), cultural and social environment (***Nanavati*** AIR 1962 SC 605), and past experiences (***Aktar v State*** AIR 1964 All 262).

In light of English and Indian developments, it is apposite to highlight the need to revisit our concept of a reasonable man who still remains as he was having been defined as partaking of a reasonable average man of the class of society to which the accused belongs but devoid of some of the relevant characteristics of the accused. He has to be attributed with such characteristics of the accused as would impact on the gravity of provocation to the reasonable man, as has been modified in England and India. It is worth mentioning here that the Coroners and Justice Act of England enacted in 2009 has already abolished the partial defence of provocation in England and instead installed different standards for loss of self control giving effect to the clarion call for reforms of the defence of provocation. Maybe the time has come for us to consider all this in the future to orient our law in line with the development of an ordinary man who has since grown as a subjectivized reasonable man in many parts of the world.

This Court indulged in this comparative exercise in order to clarify the law on provocation that has undergone such a vast transformation in other jurisdictions though we stand yet moored to a reasonable man who requires a uniform standard regardless of relevant characteristics.

In any event the law as the Court has articulated above relevant to the usual directions that the judge has to bear in mind whether he directs the jury or himself has to be borne in mind in a case where the plea of provocation arises in future. None of these directions did the learned High Court Judge bear in mind when she proceeded to convict the accused for murder having regard only to *mens rea* and *actus reus* of murder.

Failure to advert to extenuating circumstances

There is a long established line of cases that failure to direct the jury adequately on the issue of provocation necessitates, in appeal, the substitution of a verdict of culpable homicide not amounting to murder in place of one of murder.

In ***Mohideen MeeraSaibo***(1940) 19 C.L.W 129 the acrimony between the accused and the deceased stemmed from matters connected with a debt which the deceased owed the accused. In appeal, Moseley J, declared; "in our view, that part of the story of the accused should have been put to the jury, describing the journey, eighteen miles in all, made by the accused for the purpose of obtaining payment of the debt due to him, the hope held out by the deceased that payment would be made at Bandarawela, the attempt made by the deceased to elude the accused on their arrival in the town and, finally, the apparent blunt refusal of the deceased to settle the debt. Another factor to be considered was the state of the accused's mind when he was told, as he says that he was, his children were starving".

In ***Premaratne***(1947) 34 C.L.W 32 Howard C.J, on behalf of the Court of Criminal Appeal, stated at p 32. "The trial judge goes on to deal with the facts in the case and, having done so, asks the jury to consider those facts, so far as the defence based on the exercise of the right of private defence is concerned. The jury, however, is not asked to consider the facts and decide as to a defence based on the fact that the accused had lost his power of self-control by reason of grave and sudden provocation". In ***Rex v Michael*** (1947) 35 C.L.W 15, Howard C.J said at p 16: "in dealing with the defence of the accused, the learned judge, it is true, puts before the jury the defence of the accused that he was acting in the exercise of the right of private defence

and also puts to them the question as to whether there was a sudden fight, but with regard to the question of grave and sudden provocation..... he finishes his remarks on the point by saying that the question of grave and sudden provocation really fails. In other words, he has withdrawn that issue from the jury."

In all these cases, the Court of Criminal Appeal, on the basis that applicability of the special exception of grave and sudden provocation had not been put clearly to the jury, intervened to alter convictions of murder to those of culpable homicide not amounting to murder.

Upon a consideration of the evidence for the prosecution, evidence led for the defence and both, there are, in our view, items of evidence that would affirmatively bring the case against the accused within Exception 1 to Section 294 of the Penal Code, though the accused did not plead the exception. We hold that it is imperative, in a case of murder heard without a jury, that the learned High Court Judge must direct his or her mind to ascertain whether there are extenuating circumstances that would bring the case against the accused within a general or special exception notwithstanding the fact he did the act, and the imputable intention was murderous.

Quite regrettably none of the above principles had been borne in mind by the High Court Judge of Batticaloa when she convicted the accused-appellant for murder and imposed a sentence of death on 28.02.2013. Such a failure to take into account the extenuating circumstances amounts to a non direction resulting in a miscarriage of justice and having regard to the principles adumbrated above we alter the conviction for murder to one of culpable homicide not amounting to murder and substitute a sentence of 12

years rigorous imprisonment which is to be operative from the date of conviction namely 28.02.2013. We also impose a fine of Rs 5,000 in default of which a term of 6 months' rigorous imprisonment is ordered.

Subject to the above variation of the conviction and sentence, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J.Perera J

I agree

JUDGE OF THE COURT OF APPEAL