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

In the matter of an Appeal against an order of the High Court under Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

C. A. No. HCC 227/2010
H.C. Polonnaruwa No. HC 315/2006

Guneththi Dharmaratne Perera

Accused-Appellant

Vs.

Hon. Attorney General
Attorney General's Department

Colombo 12 .

Complainant- Respondent

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BEFORE : **ACHALA WENGAPPULI, J.**

K. PRIYANTHA FERNANDO, J.

COUNSEL : Indica Mallawaratchy for the Accused-Appellant.

A. Navavi D.S.G for the respondent

ARGUED ON : 11th September 2020

DECIDED ON : 16th October 2020

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ACHALA WENGAPPULI, J.

This is an appeal preferred by the Appellant against his conviction for the offence of murder of one *Sakalaccharige Wilson* on or about 22.11.1999 at *Diyasenpura*, and the consequential imposition of sentence of death by the High Court of *Polonnaruwa*.

During the trial against the Appellant, the prosecution relied primarily on the evidence of three lay witnesses, in support its allegation of murder. The wife of the deceased *Karunawathie*, a daughter of the deceased *Malkanthi* and an inmate of his house *Hewasinghe*, gave evidence at the trial, in addition to the official and expert witnesses, in support of prosecution.

The case presented by the prosecution was that the deceased, who was farming his paddy land, left his house at about 6.30 a.m. and within few minutes, the inmates of the house have heard a sound of gun fire. When *Karunawathie* ventured out to investigate, saw her husband lay fallen on the ground and the Appellant standing close to his body with a gun in his hand. When the witness raised cries, her daughter *Malkanthi* too had joined her, prompting the Appellant to threaten them that they too would be shot at (තොපිටත් වෙඩි තියනව). *Karunawathi* saw four holes on the back of her husband's chest as he lay fallen face down. Realising her husband had died after being shot at, *Karunawathil* lost consciousness. Upon seeing *Hewasinghe* coming his way, the Appellant, having jumped over the body of the deceased, had chased after the intruder, threatening to shoot him as well.

Thereafter, the Appellant left the scene, informing the villagers who have gathered around that he would go to Police.

The 1st information of this incident was received by PC 29843 *Wijeshinghe* of *Medirigiriya* Police at 8.15 a.m., on 22.11.1999 from the Appellant himself, who had surrendered with a 84-S weapon bearing number 301346, issued to him as he was attached to the said Station as a home guard. The weapon was smelling of recently burnt gun powder.

Chief Inspector *de Silva* upon scene visit, had recovered 4 spent ammunition casings and a single live ammunition, lying near the body of the deceased. The deceased had a "පෝරුදණ්ඩ" of about 4 feet in length, clutched to his hand and the body was lying face down. The witness noted four gunshot injuries on the back of the deceased. The body was lying in front of a house and about 60 meters away from his own house. The Appellant's house too was located in the same compound.

The weapon surrendered by the Appellant was sent for analysis along with the productions recovered at the scene and the report of the Government Analyst indicate the weapon is an 84-S assault rifle bearing number 301346, and the four spent ammunition casings were fired, using the said assault rifle.

Post Mortem Examination on the body of the deceased was performed by Dr. *Rupasena*, noted four firearm entry wounds on the back of the chest of the deceased and multiple exit wounds from his front lower abdomen. The medical witness was of the opinion that the death of the deceased, which would have occurred within a very short space of time since being shot, was due to haemorrhagic shock. This was due to said four necessarily fatal firearm injuries. The witness further added that the deceased had been shot at from his back and from a distance.

When the trial Court ruled that the Appellant had a case to answer, the Appellant opted to make a statement from the dock. In that, the Appellant took up the defence of accident as he stated that the deceased, upon seeing him on that morning on his way to Police, attempted to attack him with a pole. He bent down clutching his weapon and felt that his gun was emitting bullets (මගේ තුවක්කුවෙන් උණ්ඩ පිට වෙනව කියා දැනුනා). He did not fire at the deceased deliberately (මම හිතල මතල මේක කරේ නැහැ) nor had any enmity towards him. Then he realised the bullets have struck the deceased and had thereafter surrendered to Police. The deceased had broken several of his teeth during an earlier incident and the Appellant had been avoiding a confrontation with the deceased.

At the conclusion of the trial, the Court had rejected the defence of accident, relied upon by the Appellant, and convicted him for the offence of murder.

Being aggrieved by the said conviction and sentence, the Appellant preferred the instant appeal challenging them. At the hearing of his appeal, learned Counsel for the Appellant had raised following grounds of appeal for consideration of this Court;

a. the trial Court fallen into error when it considered the defence of accident raised by the Appellant by imposition of a burden on him,
b. the trial Court erroneously convicted the Appellant on its failure to consider the overall burden of proof,
c. the trial Court failed to consider the lesser culpability of the Appellant on the basis of cumulative provocation.

In support of the first ground of appeal, leaned Counsel contended that the judgment of the trial Court does not indicate the reasons for rejecting the defence of accident, although the Court merely states that it had rejected what the Appellant said in his statement and the dock statement does not raise a doubt about the prosecution case.

However, it is evident upon the perusal of the impugned judgment, that the trial Court had in fact devoted a separate section under the heading evaluation of the dock statement, in which the Court had applied the tests of consistency and probability on the claim of accidental shooting and decided that the said claim had failed in both these tests. It had been noted by the trial Court that the Appellant had not suggested the claim of accidental shooting to prosecution witnesses, particularly to the medical expert who opined that the deceased was shot at from his back and from a distance. In applying the test of probability the trial Court had tested the claim of the Appellant as it considered his claim of attempted attack on him by the deceased. The trial Court noted that the pole deceased had with him is only 4 feet in length and to attack the Appellant, the deceased must be in front of the Appellant, facing him within a distance of at least 6 feet. But the medical evidence points to a totally different position. The Court also noted that the angle of the bullets that had pierced the deceased body does not tally with the position taken by the Appellant that his gun went off when he was in bended position and excluded the probability of accidental shooting. It is significant to note in this context that the Appellant had opted not to cross-examine the medical expert at all.

The defence of accident, as it is generally referred to, is one of the general exceptions to criminal liability recognised in Chapter IV of the Penal Code, and described in Section 73 of the Penal Code. The section reads thus;

"Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner, by lawful means and with proper care and caution."

The consideration of this defence would arise only if some evidence was presented before the trial Court to that effect but the prosecution need not exclude its possibility by the proof of its negative. This position was clearly stated by the Court of Criminal Appeal in ***The King v Podimahattaya*** 46 NLR 31,

" ...for the exception of accident to arise for consideration the person accused must, at least, adduce some" material in support of it either by way of evidence led by him, or by way of matters elicited from the witnesses for the Crown, or by way of some" circumstance clearly pointing to accident or misfortune. We find nothing of the kind here-not the last scintilla of evidence direct or circumstantial to support or even suggest it. And there, certainly, is no burden on the Crown to eliminate all fanciful theories of ingenious minds, as a part of its case. All the evidence there is, tends to negative accident."

In the appeal before this Court, the Appellant, had in fact placed evidence before the trial Court, warranting consideration of the defence of accident, through his statement from the dock. It is significant to note that the Appellant had specifically stated that he had no intention of causing the death of deceased "(මම හිතල මතල මේක කරේ නැහැ)". In view of the allegation of murder it was incumbent upon the prosecution to prove that the Appellant had entertained the requisite mental element to commit the said offence at the time of committing the act and that the Appellant, in his evidence, claimed that he had none. The trial

Court had rejected the Appellant's claim of accidental fire. In view of the contention by the learned Counsel for the Appellant, this Court must then examine, whether the trial Court had erroneously rejected the claim of accidental fire.

In the judgment of ***Dionis v The King*** 52 NLR 547, the Court of Criminal Appeal considered the approach a trial Court should take, into consideration of the said defence, which had arisen from the evidence presented before it. It is stated by the Court that;

> *"... there was no burden on the appellant to prove any of the facts alleged by him. The burden lay throughout on the Crown to prove beyond reasonable doubt that the death in question was caused by an act done by the appellant and done by him with the intention or knowledge requisite for the constitution of the offence of murder. If his version of the circumstances created a reasonable doubt either as to the factum or as to the mens rea he was entitled to be acquitted of the offence charged. It was a misdirection to tell the Jury that there was a burden on the appellant to satisfy them that his version was probably true and that " he must not leave the matter in doubt ".*

The Court had also considered the reasoning of an Indian judgment of ***Mohammed Saddia v. The Crown*** A. I. R. (56) 1949 Lahore 85, where this position is expounded in following terms;

> *"If considering every relevant fact, the theory of accidental explosion remains as likely as that of intentional firing or even reasonably possible the accused must be acquitted on the ground*

that the prosecution has failed to prove one of the essential ingredients of the offence of murder. In such a case, it is wholly incorrect to say that the burden of proof that the firing was accidental is, by reason of s. 105, Evidence Act, or on some general principle, on the accused, and that the accused must take a special plea to that effect and prove it in the same manner as the prosecution is required to prove a fact. It is not and has never been the law in this country that if the Crown satisfies the Judge that the deceased died at the prisoner's hands then the prisoner has to show that there are circumstances to be found in the evidence produced by the prosecution or by the prisoner which alleviate the crime so that it is only culpable homicide not amounting to murder or which excuse the homicide altogether by showing that it was a pure accident".

This being the general approach a trial Court should take into consideration of the defence of accident, the Court of Criminal Appeal also considered the specific circumstances under which it is justified in imposition of an evidentiary burden on an accused, who relies on the defence of accident. The said judgment further reads;

"It is possible to conceive a case in which an issue of accident arises in circumstances that do not raise a question as to whether the prosecution-has proved beyond reasonable doubt the ingredients of the offence charged. For example, in a trial for murder the defence may, without disputing the allegations that the accused caused death by doing an act with the intention of causing death, claim an

acquittal nevertheless on the ground that he did the act in the lawful exercise of the right of private defence but accidentally wounded and killed a person other than his assailant. In such a case the burden of proving the existence of circumstances bringing the case within section 73 (and also section 99) of the Penal Code would in terms of section 105 of the Evidence Ordinance clearly be upon the defence."

This is the consistent approach adopted by the Court of Criminal Appeal, as indicative from the judgment of ***Kandakutty v The Queen*** 75 NLR 457.

In the instant appeal before this Court, although the Appellant had couched his statement in such a way, at the first glance it appears that he takes up his right of private defence, in addition to the defence of accident as his version of events indicate that the accidental firing resulted simultaneously with the attack on him by the deceased. However, a closer examination of his position indicates otherwise. The Appellant did not attribute any action on his part upon the unexpected attack on him by the deceased, other than to take evasive action by ducking away. He did not pull the trigger of his weapon, to initiate the firing and thereby saving himself from the attack of the deceased.

The Appellant was specific that he only knew that his weapon emitted bullets which struck on the deceased. He then clearly denies any intention as he stated "මම හිතල මතල මේක කරේ නැහැ". If he had shot at the deceased in exercise of right of private defence, then the pulling of trigger had to be considered as a conscious act by the Appellant. But, in this instance, he denies any physical act

by himself other than clutching the gun and also of any mental involvement in its firing.

Therefore, the applicable consideration for the trial Court would be whether his claim of accident had raised a reasonable doubt in the prosecution allegation of intentional shooting. The evidence of the Appellant, presented in the manner of a statement from the dock, apparently failed to convince the trial Court for its credibility. The trial Court had clearly rejected the Appellant's dock statement after rightly applying the time honoured tests on credibility.

In the instant appeal, the trial Court had considered the statement of the Appellant and rejected it, before even it ventured to consider the question whether the prosecution had proved its case to the required standard of proof. The acceptability of this approach was considered in ***Sarath v Attorney General*** (2006) 3 Sri L.R. 96, where it was held;

> *"The learned Judge considered the dock statement while having a picture of the unchallenged evidence adduced for the prosecution. If the shooting took place only at a single place, the defence raised at the dock statement would have attracted a closer examination. Considering the fact that the shooting took place in more than one place which made the dock statement unworthy of credit, it left the Judge with only one choice, namely, to reject it. The Judge stated that the dock statement does not create doubt in the prosecution case. Thereafter the learned judge began to analyse the prosecution evidence."*

The trial Court had rejected the dock statement of the Appellant completely and concludes that the prosecution had proved the allegation beyond reasonable doubt.

As referred to earlier in this judgment, the immediate and spontaneous utterance of the Appellant, as spoken to by the three lay prosecution witnesses when they rushed to the scene after hearing the first and second rounds of fire, that they too would be shot, indicates the deliberate firing as opposed to an accidental firing. The Appellant did not exclaim remorsefully on that first available opportunity that it was an accident but continued to display his aggression by chasing after one of them. The Appellant had taken up the defence of accident only before the High Court and that too only in his dock statement.

In view of these considerations, this Court is of the considered opinion that the trial Court had correctly applied the legal principles that are connected with defence of accident, that had been taken up by the Appellant in his statement from the dock, and rightly concluded that the prosecution had proved its case to the required degree of proof after rejecting the defence of accident.

The first and second grounds of appeal therefore fails.

In relation to the 3rd ground of appeal, that the trial Court had failed to consider the lesser culpability of the Appellant on the basis of cumulative provocation, learned Counsel submitted that the remorseful conduct of the Appellant, indicated by his surrender to the Police soon after the incident, coupled with the fact of admitted continuous hostility between the two, which

had reached its climax with the serious physical assault on the Appellant by the deceased, resulting the Appellant being treated as an inpatient of a Government Hospital for some time and the institution of a criminal prosecution against the deceased on that account, had been downplayed by the trial Court, and thereby denying him of the benefit of lesser culpability on cumulative provocation.

The plea of *"cumulative provocation"* was considered as a ground justifying lesser culpability as opposed to the *"grave and sudden provocation"* and acted upon by this Court in its judgment of ***Premalal v Attorney General*** (2000) 2 Sri L.R. 403, following its recognition by the Indian Courts. It is stated by the Court as to the reason on which it had chosen as the justification of acting upon a plea of cumulative provocation in that particular situation was;

> *"The brutal manner in which he attacked the girl who was so precious to him and the attempted suicide by taking poison are indicative of the fact that he in fact had lost his self-control at the time he committed the act of stabbing the deceased."*

However, in *Culpable Homicide, proof and defences – C. Ananda Grero* (1988), a reference to an earlier local judgment is referred to (at p.45). Learned author cites the 1947 judgment of *Howard* CJ in ***Rex v Michel*** 35 CLW 15, where three Judges of the then Supreme Court held *"... if this question had been left to the jury they would have said that there was* ***cumulative provocation*** *arising from the earlier incident ...".* (emphasis added).

In view of this statement, learned author adds (at p.46) that;

> *" ... the accused might get provoked due to the first act of the deceased and the provocation may continue for some time till he was again provoked as a result of a subsequent act of the deceased. Such a subsequent act on the part of the deceased can increase the passion that the accused had already in his mind and pave the way to cause the fatal injury or injuries on the deceased. It can be said that in such a case, the plea of grave and sudden provocation is available to the accused."*

A similar approach was adopted by English Courts, under the consideration of *"slow burn provocation"* which the prosecution so succinctly sought to define in ***Ruth Ellis v R*** [2003] EWCA Crim 3556 as;

> *" ...provocation over a prolonged period that has a gradually mounting effect on the person, who is subjected to it, so that a point is reached where a relatively minor provocation pushes the person too far and he or she acts in a way that might be seen as a disproportionate response to the final part of the provocation but is to be understood, and thus viewed, as the response of a reasonable person, to all that has happened over the prolonged period".*

The English Court of Appeal had considered the acceptability of a plea of cumulative provocation on the principles of proportionality as indicative from the said judgment where it was stated that;

"In considering the proportionality of the response the jury would have been obliged to consider not only the final instance of violence which had resulted in the violent response leading to death but also the whole history of violence against which background the violent response had to be seen to be fully understood. Thus a violent response, which might, if it were a response to a single isolated incident, be judged to be disproportionate, might nonetheless be considered not to be unreasonable if the whole background was taken into account. This is the whole basis of the concept of " slow burn provocation". However, there would remain a necessity for there to be a triggering event and the response had to be considered as a response to that triggering event, albeit set against any earlier violent background."

It is observed in that judgment that the acceptance of this plea was a result of the Common law evolving to reflect changes in the values of society and that the Court is required to have regard to those changes that have taken place since. At the forefront of such changes is the recognition of the need to have regard to the personal characteristics of the defendant in considering the reaction of the reasonable man. Further it is suggested that the law has developed to reflect a much better psychological understanding of what has come to be known as "*slow burn provocation*" in relation to the concept of the reasonable person. Now this consideration is governed under *"Loss of Control"* and Section 54(1)(b) of Coroners and Justice Act 2009, states if a person kills a person under *" the loss of self-control had a qualifying trigger"* he is not be convicted for murder and *"it does not matter whether or not the loss of control was sudden".*

Archbold, 2015 Ed at p.46 para 19-72 of its supplement, states under the sub heading "*cumulative provocation*" that "*although it is established that a temporary and sudden loss of self-control arising from an act of provocation is essential, it is less clear to what extent previous acts of provocation are admissible.*"

Returning to the appeal under consideration, the Appellant before this Court seeks to rely on the violent history between him and the deceased in justifying the application of the plea of cumulative provocation. During her submissions, learned Counsel for the Appellant stressed the point that the deceased had continuously harassed the Appellant and had displayed violent conduct towards him.

In view of her submissions, it is relevant to examine the evidence in relation to the alleged history of violence between the two.

The Appellant, in his dock statement stated that the deceased used to physically assault whenever they met and due to a violent attack by the deceased the Appellant had lost a few teeth. He also referred to an incident in which the deceased had mounted an attack on him and tried to grab his weapon, aided by a group of persons.

These assertions of the Appellant were rejected by the trial Court since none of these were ever put to any of the lay prosecution witnesses during cross-examination and raised only during his statement from the dock, rather belatedly at the tail end of the case. In applying the test of consistency the trial Court had rejected these assertions on the basis of its credibility and reliability.

During her examination in chief, the prosecution led evidence on the alleged motive through its witness *Karunawathi.* She said that the displeasure between her husband and the Appellant arose over the share entitlement of the harvest from the paddy field over which both parties had an interest. The Appellant demanded a larger share from the harvest and was yielded by the deceased only up to a limited extent, leaving the former smarting over the issue. She recalled an incident which took place over 6 months prior to the date of incident during which the Appellant, armed with a club, had threatened the deceased which then turned to a fight at the very spot where the latter was shot. She also referred to several other instances where the Appellant armed with a gun hiding behind a bush, in anticipation of the return of the deceased from the fields. She had lodged 3 or 4 complaints against the Appellant over several similar attempts since the earlier violent altercation.

During cross -examination of the witness, it was elicited by the Appellant that he is the deceased's sister's son and over the incident referred to above, he had sustained injuries to his mouth, losing several of his teeth. The deceased was remanded only for one day on that account and was eventually released. Although the witness was cross-examined by the Appellant over her claim of lodging complaints against him at the Police, he did not suggest that these complaints were fabrications.

The trial Court had noted that the Appellant did not raise any basis for lesser culpability over provocation nor has he claimed that he acted in self-defence.

In ***Chandrasena v Attorney General*** (1998) 1 Sri L.R. 415, this Court had decided not to interfere with a conviction of murder, arrived at by a jury after rejecting the plea of provocation, after considering the issue "*whether the plea of provocation can be availed of by an accused in mitigation of the offence of murder under the first proviso, if the provocation was itself sought by the accused*".

Having rejected the Appellants' evidence on the basis of credibility, the trial Court had proceeded to convict him for the offence of murder as he did not raise provocation as a basis of lesser culpability. The evidence that had been elicited by the Appellant through the prosecution witness *Karunawathi* tends to point him as the aggressor rather than the deceased, being the source of alleged provocative conduct. The incident over which the Appellant lost some of his teeth, too was a result of the Appellant's own act of aggression by initiating an attack on the deceased with a club at his own home to which the latter had retaliated with more violence.

The triggering incident on which the Appellant relies on the plea of cumulative provocation, is the alleged attempt by the deceased to attack him with a pole in that morning, which had taken place prior to his act of shooting. However, this is not a proposition to be treated as the triggering incident, since the unchallenged evidence is that there were two separate rounds of gunfire, the deceased was shot at from his behind and that too was from a distance. That clear evidence negates any occurrence of any triggering incident prior to the acts of shooting. In all probability the deceased would have walked past the Appellant, who was waiting on the narrow road, without an incident. Then only he was shot at from behind. The wife of the deceased did not hear any loud or heated conversation between the two, except the two rounds of gun fire. The Appellant

did not suggest to her that there was in fact an incident which had triggered his grossly disproportionate response.

This Court, having considered the evidence on this aspect, as raised in the appeal by the Petitioner is more inclined to agree with the submissions of the learned DSG that, the circumstances point to a case of a premeditated murder rather than a case of cumulative provocation.

Hence, this Court is of the view that the conviction for murder is amply justified in these circumstances and proceeds to declare that the third ground of appeal too has no merits.

Accordingly, the conviction and sentence imposed by the trial Court is affirmed.

The appeal of the Appellant is therefore dismissed.

JUDGE OF THE COURT OF APPEAL

K. PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE COURT OF APPEAL