

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

In the matter of an Appeal made under
Section 331 of the Code of Criminal
Procedure Act No.15 of 1979.

Court of Appeal Case No.

Agampodi Sumith Silva

CA/HCC/ 0146/2020

High Court of Kalutara

ACCUSED-APPELLANT

Case No. HC/ 524/2005

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE

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

COUNSEL

**: Kasun Liyanage with Thilakkana Indunil for
the Appellant.
Rohantha Abeysuriya, PC, ASG for the
Respondent.**

ARGUED ON : **19/06/2024**

DECIDED ON : **27/09/2024**

JUDGMENT

P. Kumararatnam J

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted for committing the murder of Uduwarage Wijesiri Silva on 13/03/2002 which is an offence punishable under Section 296 of the Penal Code.

After a non-jury trial, the learned High Court Judge had found the Appellant guilty of the charge and had sentenced him to death on 02/07/2020.

The Prosecution had called PW1, PW2, PW3, PW4, PW7, PW9, PW10 and the Court Interpreter to substantiate their case. As the evidence of the prosecution warranted a case to be answered, the learned High Court Judge had called for the defence. The Appellant had given evidence from the witness box and called five witnesses on his behalf.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence. At the time of argument, the Appellant was connected via zoom from prison.

On behalf of the Appellant only a single ground of appeal is raised. According to the Counsel for the Appellant, it is the failure on the part of the Trial Judge to properly evaluate the defence evidence with regard to the plea of Cumulative Provocation.

Background of the Case

The incident had occurred at PW2's new house which was under construction. According to PW2, when the deceased was seated on the veranda of the house and where other workers were having lunch, the Appellant, had gone there with a pole and dealt a blow to the deceased's head. As a result, the deceased had fallen face downwards onto the floor. This was witnessed by PW4, a passerby in the vicinity who had questioned the Appellant before the assault as to why he was carrying a club. After the attack, the Appellant dragged the deceased to an adjacent land. PW3, a neighbour of the location also had seen the Appellant dragging the deceased to the adjacent land. The witnesses who saw the assault and the accused dragging the deceased to the adjacent land had not witnessed nor heard anything from the adjacent land.

PW1, the father of the deceased had lodged the first complaint at the police station. Police arrived at the scene and conducted the investigation. The investigator had discovered the deceased's body in the adjacent land with a rock placed on the head. The Appellant was arrested and an iron rod was recovered upon his statement under Section 27(1) of the Evidence Ordinance.

The post mortem examination revealed that the deceased's body had seven lacerations and two contusions. According to the findings of PW10, the JMO who held the post mortem examination, injury number 04 on the head and injury number 07 on the chest were fatal in nature.

The Counsel for the Appellant takes up the position that the case against the Appellant should have been considered in combination with the plea of cumulative provocation and that he should have been convicted not for murder but for culpable homicide not amounting to murder under Section 297 of the Penal Code.

According to exception 1 of Section 294 of the Penal Code:

“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 explanation under this exception read as that;

“Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact”.

Although the Counsel for the Appellant seeks relief for lesser culpability on the plea of cumulative provocation, on perusal of the evidence led before the High Court no evidence of sudden fight elicited either from the evidence of the prosecution nor from the defence evidence. According to Section 105 of the Evidence Ordinance it is the responsibility of the Appellant to prove the existence of a general or special exception during the trial on a balance of probabilities. In the absence the learned trial Judge should direct his mind to the circumstances and the fact that the Appellant is entitled to have the benefit of the lesser verdict.

In **The King v Bellana Vithanage Eddin** 41 NLR 345 the court held that:

"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 on record, although such defence was not raised nor relied upon by the accused".

It is very important at this stage to discuss the development of law regarding the acceptance of cumulative provocation as a special exception to a murder charge in our jurisdiction.

In **Premalal v Attorney General** [2000] 2 SLR 403 Kulatilaka, J held that:

"Until the judgment of Chief Justice H.N.G Fernando in Samithamby v Queen (1) (de Krester, J-dissenting) our court followed a strict view in applying Exception (1) set out in Section 294 of the Penal Code. Our judges following their counterparts in England interpreted the phrase "sudden provocation" to mean that provocation should consist of a single act which occurred immediately before 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. Our Courts were reluctant to take into consideration any special circumstances which manifested in the particular offender's case".

Kulatilaka, J. further held that:

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

In **W. A. Gamini v Attorney General** CA/142/2009 the court held that:

“the chain of stressful events in the troubled relationship of the accused and the deceased culminating in the aforesaid unfortunate incident, are probable reasonably sufficient to entertain a plea of continuing or cumulative provocation because the accused retaliated at the spur of the moment and that he could reasonably show that he was deprived of his self-control”.

Citing the above two judgments His Lordship Jayantha Jayasuriya C.J. in **R. W. Nandana Senarathbandara v Attorney General** SC/Appeal/32/2015 decided on 17/07/2020 has held that:

“Jurisprudence referred to above demonstrate that in considering the plea of grave and sudden provocation an accused is entitled to rely upon a series of prior events that ultimately led to the incident at which the death was caused. A court should not restrict its focus to an isolated incident that resulted in the death, in considering a plea of grave and sudden provocation. The aforementioned jurisprudence has widened the scope of this plea by expanding the limitations recognized in its statutory form. Thereby, the concept of “Continuing or Cumulative” provocation has been recognized as a plea coming within the purview of the plea of grave and sudden provocation recognized under Exception-1, section 294 of the Penal Code. Therefore, the proximity of time between the “actus reus” of the accused and the “provocative act” of the victim should be considered in the context of the nature and circumstances in each case, in deciding whether an accused is entitled to the benefit of the plea of Grave and Sudden Provocation”.

Further His Lordship in **R. W. M. Nandana Senarathbandara v Attorney General** (Supra) has cited an Indian Judgment to explain how the concept of ‘Sustained Provocation’ has been recognised and developed by the Indian superior courts.

In **Poovammal v State** 2012 (2) MLJ (Crl.) 482 the court held:

“30. 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. (K. M. NANAVATHI Vs STATE OF MAHARASTRA [A.I.R.] 1962 S.C. 605). In our system, there is the 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 to 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 reached the end of breaking point, under that accused causes the murder of the deceased.”

.....

“34. In SUYAMBUKKANI Vs STATE OF TAMIL NADU [1989 LW (Crl.) 86], it is held as under: - “Though there has been here and there attempts in those decisions to bring the sustained provocation under Exception-1 to Section 300, I.P.C., there is a cardinal difference between provocation as defined under Exception-1 and sustained provocation. The only word which is common is ‘provocation’. What Exception-1 contemplates is a grave and sudden provocation, whereas the ingredient of sustained provocation is a series of acts more or less grave spread over a certain period of time, the last of which acting as the last straw breaking the camel’s back may even be a very trifling one. We are, therefore, far from grave and sudden

provocation contemplated under Exception-1 to Section 300, I.P.C. Sustained provocation is undoubtedly an addition by Courts, as anticipated by the architects of the Indian Penal Code”.

Considering the above cited judgments and the facts of this case I now consider whether it is appropriate to consider the plea of cumulative provocation under Exception-1 to Section 294 of the Penal Code under the present circumstances.

In this case, according to the prosecution the Appellant had arrived with a pole and assaulted the deceased who was just seated on the floor of the newly constructed house of PW2. No iota of evidence surfaced that the deceased had provoked the Appellant at that time. PW2 in his evidence stated when he questioned the Appellant whether he was going to assault the deceased, the Appellant had replied that he not only had come to assault the deceased but to kill him as well. PW4 had heard the conversation which happened between PW2 and the Appellant. Hence, it is quite clear when the Appellant had assaulted the deceased, the deceased did not do anything in response towards the Appellant.

Now I consider the evidence given by PW3, a neighbour who had seen the Appellant dragging the deceased to the nearby land. While she was witnessing this, the Appellant had shouted not to divulge.

PW9, the investigating officer stated that a large rock was placed over the face of the deceased. According to PW10, the JMO one of the fatal lacerations was noted on the head of the deceased. Although it was revealed that the deceased was an Island Reconvicted Criminal (IRC) but at the time of the incident the deceased had not been involved in brawls with anybody.

In the evidence given by the Appellant and his witnesses made a desperate attempt to show that the incident had happened due to cumulative provocation orchestrated by the deceased.

The Appellant had told court that the deceased used to harass his father. But the Appellant admitted that he had not made any complaint to the police in this regard. Further, the Appellant had alleged that deceased had killed a rooster belonging to his father as such a dispute existed between his father and the deceased. But here too neither the Appellant nor his father lodged any complaints with the police.

The defence witnesses brought forth evidence of bad character in relation to the deceased. But there was no single complaint lodged against the deceased either by the Appellant or defence witnesses or anybody in the village.

Ashworth in 1975 Criminal LR 558-559 opines as follows:

“The significance of the deceased’s final act should be considered by reference to the previous relations between the parties, taking into account any previous incidents which add colour to the final act” The point is that the significance of the deceased’s final act and its effect upon the accused-and indeed the relation of the retaliation to that act-can be neither understood nor evaluated without reference to previous dealings between the parties”.

In **R. W. M. Nandana Senarathbandara v Attorney General** (Supra) His Lordship further held that:

“Therefore, for an accused to succeed in a plea of Grave and sudden provocation on the basis of continuing or cumulative provocation, the court on a balance of probability should be satisfied that the accused had gone through a state of continued mental stress and agony during the gap between the provocative conduct and the fatal attack”.

Upon the analysis of the evidence presented in this case it clearly demonstrates that the events and the strained relationship of the Appellant and the deceased had not resulted in the unfortunate incident. The learned High Court Judge had very correctly considered the evidence presented and

defence taken, had correctly refused to award the benefit to the Appellant under the said mitigatory plea.

Considering all the circumstances stressed before this court I conclude that this is not an appropriate case in which the Appellant should be given the benefit of a plea of cumulative provocation under Exception-1 to Section 294 of the Penal Code.

Therefore, he is guilty of murder as charged. I affirm the conviction and the sentence and dismiss this appeal.

The Registrar is directed to send this judgment to High Court of Kalutara along with the original case record.

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree

JUDGE OF THE COURT OF APPEAL