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

In the matter of an Appeal under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979.

C.A.No. HCC 94 /2015
H.C. Ampara No. HC/Amp 1473/2011

Ratnayake Mudiyanselage Mahindapala

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 with K.Kugaraja for the Accused-Appellant.

P.Kumararatnam S.D.S.G for the respondent

ARGUED ON : 26.05. 2020 and 27.08.2020

DECIDED ON : 16.10.2020

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ACHALA WENGAPPULI, J.

The Appellant was indicted before the High Court of *Ampara* for committing murders of *Basnayaka Mudiyanselage Mahindasiri* and *Amarasinhe Arachchilage Rasika Sampath,* by shooting on 25.09.2008, in addition to committing attempted murder of *Konara Midiyanselage Surawimala,* in the same course of transaction.

After trial, the Appellant was convicted to both murder counts and also to the attempted murder count. He was sentenced to death on account of two murder counts while an 8-year term of imprisonment was imposed on account of attempted murder with a fine of Rs. 5000.00, and in default of which, a further 6 months of imprisonment.

Being aggrieved by the said conviction and sentence the Appellant had preferred the instant appeal in seeking to have them set aside.

At the hearing of the Appellant's appeal, learned Counsel primarily challenged the conviction for murder on the ground that the trial Court had failed to consider of the lesser culpability of the Appellant on the basis of grave and sudden provocation, sudden fight and exceeding private defence.

The prosecution evidence revealed that the Appellant, who was serving as a Home Guard attached to *Maha-Oya* Police Station, had been assigned to the guard room of the pumping station of National Water Supply and Drainage Board, off *Nil Oba-Pallebadde* Road, located in close proximity to *Maha-Oya* stream. This pumping station supplied water to almost all Government buildings in *Maha-Oya* town, including the Government Hospital and *Maha-Oya* Police. There was a gravel road leading up to the stream, through which water bowsers

and other vehicles could arrive at the pumping station for their water requirements. The pump house was built on a land in an extent of about one Acre and had a barbed wire fence around its perimeters. The premises had and entrance fitted with iron gates and the guard room was located within the said premises.

On the day of the incident, the Appellant had assumed duties at this guard room at 6.30 a.m., along with another Home Guard, *Tennakoon Mudiyanselage Priyantha Samarajeewa* (PW6). The guard room was under the supervision of a Police Sergeant *Dissanayake.*

The deceased *Basnayaka Mudiyanselage Mahindasiri* was an army soldier, serving in the operational areas and had returned home on leave. He, along with the other deceased, who is a sailor and also was on leave and the injured, had arrived at *Maha-Oya* town in his own three wheeler and, having purchased a bottle of alcohol, was searching for a place to bathe. Having heard about a tube well, a popular bathing spot of the area, the three had proceeded only to find that the tube well was dysfunctional. Then they thought of *Mah- Oya* stream near the pump house as a convenient bathing spot, and have travelled along the road up to the pump house, where the Appellant was stationed.

The three of them have arrived near the pump house at about 3.00 p.m. and have stopped the three wheeler near the entrance to the pump house. The injured *Surawimala* in his evidence said that they had stopped the vehicle near the pump house and was planning to proceed up to the stream on foot. At that point of time a Home Guard, who was later identified as the Appellant, had

stopped them to inform that they could not be allowed to go beyond that point. The two deceased and the Appellant had an exchange of words over that direction and the Appellant had said "මම උඹලට හොඳ වැඩක් කරන්නම්". One of the deceased *Rasika Sampath* then started to reverse the three wheeler as he could not turn it to go back. The injured was seated in the back and as the vehicle turned, he heard sounds of gun fire. He heard about 6-7 shots being fired. With the hearing of gun fire, *Rasika Sampath* and the injured had got down from the vehicle. The injured received a gunshot and lost consciousness.

Several days later, he learnt that while receiving treatment at the Government hospital the other two had died due to the shooting,.

The other eye witness to the incident, *Samarajeewa*, had narrated a different version of sequence of events that had culminated with the act of shooting.

Samarajeewa said in his evidence that the Appellant, having stopped the vehicle, had very politely enquired from the passengers where they intend to proceed. The response to that polite query by the Appellant was in the form of harsh reply in obscene and offensive language making derogatory references to the Appellant's mother. The Appellant tried to explain that he was simply doing his duty to the three, who by this time had alighted from the three wheeler. They were unarmed.

The stopping had resulted in an argument between the Appellant and the three passengers which then turn to a fight. *Samarajeewa* too had received few blows which made him to take evasive action and then to withdraw from the scene. At that point of time, the witness saw the Appellant firing his T 56 weapon at the three intruders. All three fell down after the firing. *Samarajeewa* was told by

the Appellant, only at a subsequent point of time, that he too was assaulted during the scuffle by two of the three, who arrived by the three wheeler.

Having witnessed that three of them have sustained injuries due to the Appellant's firing, the witness had run up to Police check point to inform of the incident. He conveyed that the Appellant fired shots after the group had assaulted them.

Witnesses *Bandara, Attanayaka* and *Jayatilaka* were attached to *Maha -Oya* Police and were resting in the barracks. They have heard sounds of gun fire from the direction of the pump house. Due to the situation that prevailed in the area due to terrorism and the frequent attacks on Government forces, the three of them have ran towards the pump house taking their weapons with them thinking it was under attack.

Jayatilaka was the first to arrive at the scene and upon seeing him the Appellant said they attacked us (අපිට මුං ගැහුවා) and handed over his gun. It smelt burnt gun powder. They saw three persons with bleeding injuries lying on the ground and have taken them to the hospital using the three wheeler that was parked near them. They also saw the Appellant who appeared to be disturbed and under stress.

IP *Upali Silva* investigated this incident. He noted an empty bottle of alcohol and a half empty coca cola bottle with few packets of savouries. There was also a bucket, soap and clothing. The Appellant was produced to him by *Jayathilake.* The Appellant appeared to be quite shaken. Three buttons of his uniform was missing and he had several nail marks on his chest and several scratch marks on abdomen. The witness also smelt alcohol from the Appellant.

At the scene, the witness noted three blood patches and recovered 4 spent ammunition casings. He also noted that the three wheeler had damages due to gun fire.

The witness described the importance of the pump station to the area as the STF and the Army were dependent on this facility for their water requirements, in addition to supplying water to *Maha-Oya* town and its civilian population. Due to the security concerns the general public was prevented having access to the road leading up to the pump house.

Since the two deceased were serving members of Army and Navy, there had been instances of reprisals by the members of these two forces on check points manned by Home Guards over this incident and the Police was deployed to diffuse the tense situation during the funeral of the two deceased.

The medical evidence confirmed that the two deceased have died due to firearm injuries and the injured too had similar injuries.

The Appellant too had given evidence under oath. He testified to the effect that he has served as a Home Guard for 17 years and had studied up to grade 8. At the time of the incident, he was assigned to the pump house for his 12-hour duty shift.

A water bowser from STF had pumped water and the officers have informed the Appellant they would return soon for the second loading. He saw a three wheeler being parked near the gate at about 3.30 p.m. He walked up to the three wheeler and politely told the passengers that the water bowser is due to arrive and for them to park the vehicle further down the road without obstructing the bowser. This request had irked the passengers, who then got off and uttered obscenities. One of them pulled the Appellant by his shirt while the

other person attempted to grab his weapon. He was assaulted by the two. As the three of them were grappling for the weapon and the gun accidently went off. During cross-examination too the Appellant maintained his position that he did not shoot at them deliberately.

During the trial, although *Samarajeewa* gave contradictory version to that of the injured, the prosecution had opted not to treat him as an adverse witness to its case. In the impugned judgment, however, the trial Court had opted to disbelieve the prosecution witness *Samarajeewa's* evidence and also the Appellant. The basis on which *Samarajeewa* was disbelieved by the trial Court appears to be that it had formed the view that he is a partial witness towards the Appellant and gave an improbable and inconsistent version of events as to the incident. The improbability of *Samarajeewa's* version of events, as per the judgment, was his claim of three unarmed persons have attacked two armed persons. It appears that the trial Court applied the test of probability in consideration of only one of many probabilities favourable to the prosecution while failing to consider the probabilities that are in favour of the Appellant. If *Samarajeewa's* claim of three unarmed persons attacking two armed men is improbable, as justifiably found by the trial Court, similarly the prosecution version too carries a similar improbability of its version, when it claimed that the Appellant, who had 16 years of unblemished service as a Home Guard, had indiscriminately shot three total strangers, against whom he absolutely had no motive, merely because they had an exchange of words, totally disregarding the consequence of his acts. It is unfortunate that the trial Court failed to consider this probability also with the probability it did consider and stated its reasons adopting the reason of the prosecution.

As to the inconsistencies of the witness's evidence, the trial Court noted *Samarajeewa,* having said that he did not see the Appellant being hit by the three intruders had subsequently changed position by stating that he did. The evidence of the said witness does not indicate any inconsistency as to whether he saw the Appellant being assaulted by the intruders. In his examination in chief as well as cross-examination the witness was consistent that the Appellant was assaulted by two, while he was assaulted by the other. The witness even had distinguished that the person who assaulted him did not assault the Appellant, although he too was shot at during the firing.

Another reason on which the trial Court rejected *Samarajeewa's* evidence is its perceived partiality towards the Appellant. It is the prosecution who called the witness during its case and was cross examined by the Appellant. If he was partial towards the Appellant, the witness could have said that no civilian was allowed near the pump house, a fact confirmed by IP *Silva.* But contrary to the Appellant's claim, the witness said that anyone could use the road leading to the pump house during his cross-examination. The witness claimed the three had assaulted two of them. If he was partial towards the Appellant, he could have merely said that only the Appellant was assaulted and not him, since that would have helped the Appellant to set up a claim of self-defence. The trial Court also ruled that he is a partial witness because they lived in the same village for some time and the witness could not recollect when they met after the Appellant was released on bail. None of these consideration support a proposition that the witness is in fact a partial witness and any absence of any contradiction indicated that he gave a consistent version of events since the incident. The only blemish attributable to him is he gave evidence inconsistent with the evidence of the injured.

The trial Court had failed to consider IP *Upali Silva's* evidence that the Appellant's shirt had torn buttons and his upper body had nail and scratch marks, an observation that supports the claim of *Samaraweera* in the absence of any explanation by the prosecution to the contrary that the Appellant was attacked by the two deceased.

This Court, being mindful of the principle that a determination of credibility of a witness is a question of fact and therefore is best left to the trial Court, nonetheless, is of the view that it should interfere in this instance with a finding of fact by the trial Court, since *Samaraweera's* evidence could not have been rejected on an erroneous considerations in the guise of improbability of version and being inconsistent. It was held in ***Dharmasiri v Republic in Sri Lanka***(2010) 2 Sri L.R. 241, that an appellate Court could interfere with such findings if they are manifestly wrong and the said finding of fact qualifies to be treated as such.

The trial Court, having considered the evidence on the point and formed the view that there could have been an incident by which the Appellant was grabbed by his uniform and assaulted, nonetheless concludes that these factors would not alter the prosecution case as the Appellant was simply acting on his anger and not in the interest of security of the pumping station or his right to self-defence.

In a single sentence the trial Court further holds that the evidence does not satisfy the requirement to apply the exception of grave and sudden provocation, but did not elaborate on its process of reasoning leading up to that conclusion by giving reasons.

It is on that basis the Learned Counsel for the Appellant contends that the evidence clearly points to a case of grave and sudden provocation, which factor should have been considered in the Appellant's favour by the trial Court.

It appears that the trial Court had formed the impression that the pumping station was not considered as a facility that requires high level of security as the Appellant claims since IP *Upali Silva* in his evidence admitted that general public could leave their vehicles near the pumping station and to have access to *Maha-Oya* stream.

Contrary to this view formed by the trial Court, IP *Upali Silva* had testified that he had assigned two Home Guards under a Police Sergeant for the security of the facility and it was guarded 24 hours since the area was constantly under the threat of terrorist attack. During his cross-examination, when the witness was questioned whether the civilians use the road leading to the pump house, he answered in the negative and added;

> " නෑ සාමාන්‍ය මිනිස්සු එතෙන්ට යන්න දෙන්නෙ නෑ. හැම හමුදා කඳවුරකටම එතෙනින් තමයි වතුර අරගෙන යන්නෙ. නගරයටත් ඔයවල්වලටත් වතුර දෙන්නේ එතැනින්. ඒවාට මොනවත් වෙයි කියන බලාපොරොත්තුවෙන් තමයි කාටවත් එතෙන්ට එන්න දෙන්නේ නෑ. ජල පොම්පාගාරයේ වැඩ කරන නිළධාරීන් කණ්ඩායම විතරයි එතන ඉන්නෙ."

When considered in the light of the evidence quoted above, the view formed by the trial Court as to the level of security provided to the pump house is indicative of the fact that the pump house was not considered as a security sensitive facility is clearly erroneous as well as the conclusion reached by the Court that there were no restrictions that had been placed to civilians in having

access to the general pump house area. This particular view would not have adversely affected the position of the Appellant, if not for another view formed by the Court, based on this conclusion. That is the trial Court's observation that the Appellant's act of stopping and questioning the three wheeler passengers was totally an unnecessary act and was clearly in excess of his assigned duties. It appears that the trial Court had therefore formed the opinion that the Appellant confronted the three wheeler quite unnecessarily and had created the situation, which ended up in a tragedy.

This particular act of the Appellant, being the turning point of the sequence of events, which eventually led to the death of two servicemen and caused serious injuries to the injured, clearly will have a bearing on the determination of the question of whether there was provocation and if so, whether that provocation is self-induced provocation.

In the absence of any reasons by the trial Court, this Court could only guess the reasons for the rejection of the exception of grave and sudden provocation.

But the evidence seemed to suggest a different conclusion is also possible and could even be justified, if the trial Court had considered the evidence in its proper context and indicated its mind by giving reasons.

It is undisputed that the area in which the Appellant was assigned to is vulnerable to terrorist attacks and he was placed on a 12 hour shift with his colleague. It is natural for him to feel anxious and tensed due the prevailing security situation at that point of time. The Appellant is quite justified in making enquiries when the three wheeler came to a halt near the pumping facility with three passengers. *Samarajeewa* said the Appellant asked politely from the

passengers, who were apparently after liquor, as to where they were going. Their response was an obscene reference to the mother of the Appellant. This led to a verbal altercation between the two sides, which soon turn out to be a physical confrontation. The Appellant too was after liquor and was attacked by three persons, while his colleague had abandoned him by running away after receiving a blow, leaving him to defend himself.

In this context the place where the firing took place is important. One large blood patch that was noted by IP *Silva* near the gate post. Dr *Ratnapriya* confirmed that deceased *Rasika Sampath* had an entry wound with blackening round it, indication a close range fire. These factors indicative of the position that when the firing commenced the three persons were near the gate although the second blood patch was located over 50 feet from the gate. The Appellant who was facing an unmatched contest had been provoked to lose his self-control, had shot the three individuals.

PS 36878 *Jayatilaka* was the first person who spoke to the Appellant after the incident of shooting. The Appellant responded when his name was called out. The Appellant appeared shocked and fearful and, in order to comfort and instill confidence in him, the witness held his hand and guided him to the Police. There was no indication, that the Appellant had approved what he did, to the witness either by words or by his conduct.

On the contrary, the conduct of the Appellant, which had been observed by the witness, after a lapse of only few minutes since the shooting, was that he had regained senses and realised the gravity of his actions.

In view of these considerations, this Court will now consider whether these factors fall short of the criterion that had been laid down by judicial

precedents in relation to grave and sudden provocation, as concluded by the trial Court.

In the case of ***Muthu Banda v The Queen*** 56 NLR 217, the trial Court summed up the jury on following terms;

> *" ... by provocation is meant anything which a reasonable man is entitled to resent. Provocation, as I said, must be sudden, and provocation must be grave. Grave provocation would be provocation that can cause a reasonable man, a man of ordinary sense and prudence and temper of the same class of life or station in life as the accused, to lose his power of self-control. It is quite possible that an act which may not cause a sober man to lose his self-control may cause a drunken man to lose his self-control.*
>
> *Once you are satisfied that provocation was grave and that it would be grave provocation to a reasonable man, then in considering whether this particular accused lost his self-control as a result of that provocation you should take into account the circumstance that he was drunk, if you are satisfied that he was drunk. But if you are considering whether the provocation was grave, it is not open to you to say, ' it is true that this act of the deceased man would not be grave provocation to a sober man but to a drunken man it would be '. You will not take into account the particular weakness of the accused when you are considering whether the provocation offered was grave. That question you will resolve by reference to an ordinary reasonable man, that is to a man who is sober."*

The Court of Criminal Appeal, having considered the submissions challenging its validity, has held; "*... it seems to us that there can be no doubt that the law was correctly stated by the learned trial Judge in the case now before us.*"

In view of the principles of law enunciated in this judgment, the provocation should be sufficient in the first place to destroy the self-control of a reasonable man, who is an average man of the class of society to which the Appellant belongs. Then secondly, whether the Appellant had lost his power of self-control, an essentially a subjective test.

The absence of any motive against the three individuals, the Appellant's conduct in firing indiscriminately at three persons following a fight, which had erupted over his legitimate enquiry into the reason for their presence and the harsh obscene response, which was couched in references to his mother, would clearly provoke an average man of the Appellant's social standing. The word provoke was defined in ***Perera v The King*** 53 NLR 202 as " *...anything that ruffles the temper of a man or incites passion or anger in him or cause disturbance of the equanimity of his mind.*" In this sense too, the act of aggression displayed by the three, amply qualified to be considered as sufficient provocation of an average man of the Appellant's standing. Obviously the provocation is "sudden" and, if taken in the proper context rightly be termed as "grave". Then in relation to the secondary consideration of whether the Appellant had lost his power of self-control, it must be noted that the act of indiscriminate shooting at three unknown individuals in the absence of any compelling motive seemed clearly an irrational and improbable act on the part of the Appellant, unless he had lost his senses.

There is no indication that the Appellant had any ideological inclinations or had displayed happiness, in the killing of people and he derived happiness off an achievement after the shooting.

However, in determining this issue, it is equally important to have regard to the Privy Council decision of ***Attorney General v John Perera*** 54 NLR 265, where it states that;

> *"The words " grave " and " sudden " are both of them relative terms and must at least to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation; otherwise some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon. A blow with a fist or with the open hand is undoubtedly provocation and provocation which may cause the sufferer to lose a degree of control but will not excuse the use of a deadly weapon, and in the opinion of Their Lordships it is quite wrong to say that because the Code does not in so many words say that the retaliation must bear some relation to the provocation it is true to say that the contrary is the case."*

In the instant appeal, as noted above the Appellant received very much more than a *"a blow with fist"* as he was berated with obscenities in reference to

his mother for an act he had legitimately performed and then was attacked by three individuals without a justification for such an act of aggression. The subsequent conduct of the Appellant, as referred to earlier, in this judgment, is an indication whether or not he had lost control of himself during that short interval before the arrival of witness *Jayatillake* to whom the weapon was handed over calmly, having shot three individuals a few minutes before.

This Court is thus satisfied that the Appellant is entitled to the benefit of being imputed with lesser culpability and the trial Court should have found him guilty of culpable homicide not amounting to murder, instead of murder, in relation to the death of the two deceased and attempted culpable homicide of the injured instead of attempted murder.

Therefore, the conviction of murder is hereby set aside in relation to the 1st and 2nd counts of the indictment along with the conviction for attempted murder in relation to 3rd count and substituted them with culpable homicide not amounting to murder in relation to 1st and 2nd counts while substituting of attempted culpable homicide in relation to the 3rd count.

The Appellant is imposed an 18-year sentence of imprisonment on the 1st and 2nd counts, in addition to a fine of Rs.1000.00 each, and in default of 2 years of imprisonment. The sentence imposed by the High Court of *Ampara* on the 3rd count remain unaltered. All sentences to run from the date of his conviction i.e. 16th March , 2015.

Appeal of the Appellant is partly allowed.

JUDGE OF THE COURT OF APPEAL

K.PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE COURT OF APPEAL