

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

SC. Appeal 34/2015

SC (SPL) LA Application No. 59/2014

CA Appeal No. CA 33/2008

HC Hambantota Case No. 363/2006

In an Application for Special Leave to Appeal under Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as Amended read with Articles 128 & 154P 3(b) of the Constitution of the Democratic Socialist Republic of Sri Lanka

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Kattadige Amarasena

ACCUSED

AND BETWEEN

Kattadige Amarasena

ACCUSED-APPELLANT

Vs.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

Kattadige Amarasena

ACCUSED-APPELLANT-APPELLANT

Vs.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT-RESPONDENT-RESPONDENT

BEFORE: Priyasath Dep P.C., C.J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: R. Arsecularatne P.C. for Accused-Appellant-Petitioner
Warantha Bandaa P.C., A.S.G.
for Complainant-Respondent-Respondent

ARGUED ON: 04.10.2017

DECIDED ON: 13.12.2017

GOONERATNE J.

In this case the Accused is charged for having murdered his wife on or about 20.11.2005 in very close proximity to the Tangalle Police Station. Accused-Appellant is an Attorney-at-Law. In the course of the trial before the High Court the Accused-Appellant had pleaded the mitigatory plea of grave and sudden provocation, but the State Counsel refused to accept such a plea and the trial proceeded and ultimately the accused was found guilty of murder and sentenced to death. The accused being aggrieved of the conviction and sentence appealed to the Court of Appeal. However as referred to in the submissions of

the State, in the Court of Appeal learned counsel for the accused confined the case to the availability of a mitigating plea of continuing cumulative provocation. The Court of Appeal rejected the plea and affirmed the conviction and sentence.

Supreme Court on 19.02.2015 granted Special Leave to Appeal on questions (a) and (b) set out in paragraph 25 of the petition.

It reads thus:

- (a) Whether their Lordships of the Court of Appeal erred in law by holding that the entertainment of a murderous intention disentitles the Petitioner to the mitigatory plea of grave and sudden provocation contained in exception 1 of Section 294 of the Penal Code.
- (b) Whether their Lordships of the Court of Appeal erred in law by holding the fact that the Petitioner after being provoked by the words “උම කොහොම හරි හිරේට යවලා පස්ස බලන්නේ” (“I will only look behind after sending you to jail”) the Petitioner going to purchase a knife disentitles him to the mitigatory plea of grave and sudden provocation set out in exception one (1) of Section 294 of the Penal Code.

Learned President’s Counsel for the accused raised another question of law, as follows:

“Whether the accused was entitled to the plea of cumulative provocation having regard to the facts that preceded the incident.

The learned President’s Counsel in his submissions states there is no disagreement between the prosecution and the defence that the accused

caused the injuries to his deceased wife on the day of the incident on the evidence of the eye witnesses.

The facts of this case, as gathered from the available material are as follows. The Appellant was an Attorney-at-Law practising in Walasmulla Courts. The Appellant married the deceased in the year 2001 and had a child by that marriage. They resided at the parental house till about May 2003 and thereafter the Appellant purchased a land and built a two storied house at Middeniya in the name of his wife. There is evidence to the effect that a person called Upul Shantha Wijesinghe alia 'Sudha' was employed as a driver by the Appellant. The said Wijesinghe was a relative of the deceased. It is alleged that the deceased had an affair with the said driver. By 2004 the Appellant gave up his practice as a lawyer and got employed at an estate in Hiniduma as Assistant Superintendent, leaving his wife and children at Hallmilla, Ketiya, in the parental house of the deceased.

In or about May 2005 the Appellant had returned from the workplace to find that the deceased wife and child was missing from the parental house and the brother of the deceased had made a complaint to the Middeniya Police. Appellant was informed that his wife had gone to Urubokka and was living with the said driver and continued the illicit affair with him. Later

on the deceased wife returned to the parental house but there were altercations between the two and continued to live at the parental house.

I will at this point of the Judgment get on to the incident. The learned President's Counsel for the Accused-Appellant states in the written submissions that there is no disagreement between the prosecution and the defence, as regards the injuries caused to the deceased.

In the dock statement the accused inter alia state that the deceased informed over the telephone that a complaint would be lodged in the Middeniya Police regarding the transfer of the house. Accused pleaded with the deceased that he be left alone without harassing him. In order to give more clarity to this I would incorporate the words stated therein as follows:

ඉන්පසුව මම 2005.11.20 වන දින ඉරිදා ඇය දුරකතන ඇමතුමක් ලබා දුන්නා වීම පෙර දින කිහිපයකට මත්තෙන් ඇයට ඉරිදා දිනය වන විට මිද්දෙනිය පොලිසියේ පැමිණිල්ලක් දානවා ගේ පවරා ගැනීම සම්බන්ධයෙන් කියලා. ඉන්පසු මම ඇයට දැනුම් දුන්නා මට කරදර කරන්න එපා පාඩුවේ මට ඉන්න දෙන්න නියලා. ඇය ඒ කිසිම දෙයක් අහන පාටක් ජේන්න තිබුණේ නැහැ.

Thereafter the accused borrowed a motor cycle from a friend and proceeded to the Middeniya police station. The police informed the accused that she did not come to the Middeniya police but advised him that it is possible that she had gone to the Tangalle police. Accused left for Tangalle and at the Tangalle police he was told that a complaint would be lodged. As such the

accused pleaded with the deceased not to make any complaint and that he would give anything to her provided the accused is left alone. Deceased replied “උඹ කොහොම හරි නිරෝඪ යවලා පස්ස බලන්නේ” (as stated in the dock statement).

It is also necessary to consider material evidence of the few witnesses who gave evidence at the trial.

Witness Jayawickrema who runs a grocery shop stated that the accused borrowed a motor cycle to go to the Middeniya Police Station.

Nimal Karunaratne Officer-In-Charge of the Middeniya Police states maintenance case filed by the deceased was pending. There was a problem regarding the deceased's house, and such house was to be transferred to some other person. Witness advised the deceased to file a civil suit. On the day of the incident the deceased met him to lodge a complaint regarding a land dispute. Witness advised the deceased to complain to the Tangalle Police relating to a fraudulent deed.

Witness Samarasena a vendor of iron goods states accused went pass the shop and turned the motor cycle towards the shop. Thereafter the accused purchased a knife. Accused bargained with the witness to reduce the price. The knife was priced at Rs. 275/- but sold to the accused for Rs. 250/-.
Witness Priyantha a three wheeler driver who parks the three wheeler at a park

near the Tangalle hospital. He heard the cries of a woman shouting “මෙහි මිනී මරනවා”. Then the witness went towards the scene of the crime. He saw a woman walking in front of a man and the man held her and turned her, and the man cut her with a knife near the ear. The woman fell and the man dealt two further blows with the knife. The woman was carrying a baby and an umbrella. This witness identified the accused at an identification parade.

Inspector Mahagedera of the Tangalle Police states the deceased came to make a complaint to the Fraud Bureau against the accused. Sub Inspector Dayaratne and WPC Kanthi stated that they heard some one making cries that “මම එකී මරුවා එල්ලම් ගස් හතේ ගියත් කමක් නැහැ. W.P.C Kanthi states she saw the accused coming into the police station with hands raised.

I observe that the above utterances were made by the accused which are spontaneous and contemporaneous statements. At that point of making the utterances accused was not a suspect, and statements made in the air. Res Gestae – Sec 6 of the Evidence Ordinance. Facts, which, though not in issue, are so connected with a fact in issue as to form part of same transaction, are relevant, closeness of the connection between the fact sought to be proved and the fact in issue 42 NLR 244; R Vs. Iyasamy Wijeratnam (1941) 22 CLW 1). This is a group of facts so connected together, as to be referred to by a single legal name, as a ‘crime’ (1964) 67 NLR 8; (1931) 34 NLR 19. The utterances are

admissions by the accused and made immediately after the occurrence R. Vs. Herashamy (1946) 47 NLR 83;

Our Penal Code more particularly Sec 294 Exception (1) of the Code Contemplates (a) offender deprived of self control (b) By grave and sudden provocation, and cause the death of the person who provoked the offender. Penal Code does not refer to cumulative provocation. But our courts seems to have dealt with the question of 'cumulative provocation in some decided cases. One such case is Premalal Vs. A.G. This could be look at as a development in law in that area. But it is also possible to argue otherwise. The question is whether such a plea goes beyond the provisions of the Penal Code. Whatever it may be in the oral and written submissions on behalf of the Accused-Appellant-Appellant following have been urged on the footing that the Court of Appeal erred in law by failing to consider the following facts.

- (a) The fact that the deceased was having an illicit love affair with Upul Susantha Wijesinghe alias Suddha
- (b) The deceased on or about 12.05.2005 eloped with the said Upul Susantha Wijesinghe alis Suddha and her brother, Mahinda Kithsiri Ekanayake made a complaint to the Middeniay Police in that regard on 18.05.2005 (V1) and the Petitioner too made a complaint to the Middeniya Police in that regard on 20.05.2005 (V2).
- (c) The fact that the deceased and the Petitioner were subjected to a binding over order to observe peace by the Police, under Sec. 81 of the Criminal Procedure Code, in or about May 2005.

- (d) The fact that the deceased and her paramour, the said Upul Susantha Wijesinghe alia Suddha were parties to the abduction of the Petitioner on or about 20.07.2005 in respect of which incident, Case No. MC Walasmulla 96961 was pending at the time of the instant incident on 20.11.2005.
- (e) The fact that there was a maintenance case pending in the Magistrate Court of Walasmulla, filed by the deceased against the Petitioner in which case the Petitioner challenged the paternity of the deceased's child.
- (f) The fact that on 28.10.2005, the Petitioner had made a complaint that there are death threats against him from the deceased and the said Upul Susantha Wijesinghe (V3) and
- (g) The fact that on 11.09.2005, the Petitioner has made a complaint against the deceased and Upul Susantha Wijesinghe for the theft of the electricity meter, a cut out and the water meter in his Middeniya house (V4).

The above suggest the ill-feeling between the accused and the deceased.

No doubt the above items at (a) to (g) spread over a period of time. In normal circumstances between estranged married couples such allegations may be prevalent. The question is whether (a) to (g) above could be considered in a plea of cumulative provocation, to bring the case within culpable homicide not amounting to murder? In A.G Vs. John Perera 54 NLR 265 vividly describe what is required in a case of this nature.

Where the mitigatory plea of grave and sudden provocation is taken under Exception 1 to Section 294 of the Penal Code, the accused must show that the kind of provocation

actually given was the kind of provocation which the jury as reasonable men would regard as sufficiently grave to mitigate the actual killing of the deceased person.

“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”.

The question is whether words uttered by the deceased (as in the dock statement) provoked the accused gravely and suddenly and the accused lost his self-control. Can a reasonable man in the same class likely to lose his self-control as a result of provocation? No other witness heard what was uttered by the deceased. “උඹ කොහොම හරි හිරේට යවලා පස්ස බලන්නේ”. It is apparent from the dock statement that he went to the police initially to prevent the deceased making a statement against him regarding a forgery of a deed, which was the main issue, in this murder case. The dock statement of the accused explains the position very clearly. Accused stated “මම උත්සහ කලේ මාව අපහසු නාවයට පත්කරන එක මාව විනාශ කරන එක වලක්වා ගන්න”. Notwithstanding (a) to (g) above on which the accused relies to establish his plea, by the above statement of the deceased as contained in the dock statement, it could be assumed that accused tried his best to prevent the deceased wife making a statement against the accused based on a forgery of a deed which deed in fact was in the name of the deceased’s wife. This could well destroy the accused

professional career, as an Attorney-at-Law. Even criminal proceedings could be initiated.

I agree with the learned Additional Solicitor General that it is the point at which the accused premeditated the murder of the accused. I also agree that the complainant of forgery is extraneous to the incidents that arose consequent to the illicit affair. As such (a) to (g) above explains only the ill-feelings between the accused and the deceased wife. It is somewhat a prestige battle at a very low level between husband and wife. The illicit affair between the accused driver and the deceased wife was the earliest stage of this episode. Over the years it matured and a fact well known to others in the village, including the police. The incidents in (a) to (g) are separate to the act of alleged forgery. The murderous intention was entertained by the accused only at the point of the deceased wife making a complaint to the police and the above utterance by the deceased. Further if one were to argue from the point of view of the accused party, I wish to observe that from the time the deceased wife made utterances in the police station which is somewhat of a threat to the accused he would have been easily provoked with such utterance of the deceased wife and then and there or spontaneously could have reached and attacked her. In the case in hand it was not so. Assuming the accused was provoked, but the stabbing took place

very much later. It was more than sufficient time to cool down. As such the plea of cumulative provocation was in any event not available to the accused.

I note that the accused prepared himself to commit the act of murder as he went to the Tangalle town to purchase a knife for which he bargained for the price, with the vendor. By that time the murderous intention was entertained by the accused, and consequently attacked the deceased wife with a deadly weapon (knife).

A formidable deadly weapon which was a knife was used by the accused. Use of such a weapon and having cut the deceased near the ear itself demonstrate the accused murderous intention. Deceased wife fell with the first blow with the knife and having fallen further blows were dealt by the deceased. This would further fortify the murderous intention of the accused. In this regard I refer to the text "*The Law of Crimes*" 18th Ed by Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore Pg. 724, Chapter XVI

'Imminently dangerous.' - Where it is clear that the act by which the death is caused is so imminently dangerous that the accused must be presumed to have known that it would, in all probability, cause death or such bodily injury as is likely to cause death, then unless he can meet this presumption, his offence will be culpable homicide, and it would be murder unless he can bring it under one of the exceptions? Thus a man who strikes at the back of another a violent blow with a formidable weapon must be taken to know that he is doing an act imminently dangerous to the life of the person at whom he strikes and that a probable result of his act will be to cause that person's death. Similarly, if a man strikes another in the throat with a knife he must have known that the blow is so imminently dangerous that it must in all probability cause death

and the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

Can the accused rely on the plea of grave and sudden provocation and the plea of cumulative provocation? Was he deprived of his self-control. I would refer to the above text which lay down certain guide lines.

At pg. 272..

The test to see whether the accused acted under grave and sudden provocation is whether the provocation given was in the circumstances of the case likely to cause a normal reasonable man to lose control of himself to the extent of inflicting the injury or injuries that he did inflict. In *Mancini v. Director of Public Prosecutions* Viscount Simon laid down – “It is not all provocation that will reduce the crime of murder to manslaughter. Provocation, to have that result, must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death ... The test to be applied is that of the effect of the provocation on a reasonable man, so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.” In another case Lord Simon said: “The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm is negated. Consequently, where the provocation inspires an actual intention to kill, or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one very

special exception has been recognised viz. the actual finding of a spouse, in the act of adultery.”

In all the facts and circumstances of the case in hand it is not possible to conclude that the accused was provoked and thereby caused by a sudden and temporary loss of self control. Mere abusive words cannot amount to grave and sudden provocation. In the context of the case in hand the provocation was not sufficient to deprive a reasonable man of his self control. There was no immediate impulse of provocation. Murderous intention would be further fortified by the accused purchasing a knife. No reasonable man would do so, and it was done according to a plan to murder the deceased wife and the accused entertained a murderous intention, and committed murder. There is no justification to bring the case within exception (1) of Section 294 of the Penal Code. Questions of law are answered in the negative. Therefore both Judgements of the High Court and Court of Appeal are affirmed. This appeal is dismissed.

Appeal dismissed.

Priyasath Dep. P.C., C.J.

I agree.

Priyantha Jayawardena P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

CHIEF JUSTICE

JUDGE OF THE SUPREME COURT

