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

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

The Democratic Socialist Republic of Sri Lanka.

Plaintiff

Vs

Kolamba Acharige Pushpakumara

Accused

Court of Appeal Case No:
CA/HCC/0027/18

High Court of Gampaha Case No:
94/10/HC

AND NOW BETWEEN

Kolamba Acharige Pushpakumara
(Presently in Prison)

Accused – Appellant

Vs

The Attorney General
Attorney General's Department
Colombo 12.

Respondent

Before	:	**Hon. P Kumararathnam, J.**
		Hon. Pradeep Hettiarachchi, J.
Counsel	:	Chathura Amaratunga, Assigned Counsel for the Accused – Appellant.
		Sudharshana de Silva, S.D.S.G. for the Respondent.
Inquiry on	:	06.06.2025
Decided on	:	25.07.2025

Pradeep Hettiarachchi, J

JUDGMENT

1. The only question to be determined in this appeal is whether the conviction for murder can be reduced to a culpable homicide not amounting to murder, in light of the evidence adduced at the trial.

Background to the appeal:

2. The appellant was indicted for committing the murder of his wife Usliyanage Piyaseeli on or about 15.04.2008, an offence punishable under section 296 of the Penal Code. When the indictment was read out to the accused, he pleaded not guilty. The trial commenced before the Judge of the High Court of Gampaha. For the prosecution, 5 witnesses testified. The accused made a dock statement and a daughter of the deceased testified for the defense.

3. At the conclusion of the trial, the learned High Court Judge found the accused guilty of the charge. Accordingly, the accused was convicted and sentenced to death. This appeal is preferred against the said conviction and sentence.

4. Although there were several grounds of appeal, during the argument, the counsel for the accused informed that he would only contest the conviction for murder as there was sufficient evidence to reduce the charge to culpable homicide not amounting to murder committed under grave and sudden provocation.

5. It must be noted that in his dock statement, the accused admitted the cutting of the deceased neck by using a bread knife, but stated that it was done under grave and sudden provocation as the deceased was with her paramour when the accused came home.

6. Hence, the issue of paramount importance to be determined in the present appeal is whether the circumstances under which the accused causing injuries to the deceased would be sufficient to infer that it was done under grave and sudden provocation.

7. Although the accused stated that he saw the deceased with her paramour shortly before he attacked the deceased, there was no evidence forthcoming to that effect during the trial.

8. As evinced by the testimony of the defense witness, the accused had a suspicion that the deceased was having and illicit relationship with an employee at the deceased's work place. On one occasion, the defense witness, her husband and the accused had gone to the deceased's work place and inquired about it from the person concerned but he denied any such affair.

9. Furthermore, there was no evidence to establish that the person they had met at the deceased's workplace was the same individual who was with the deceased on the day of the incident, as alleged by the accused in his dock statement.

10. Moreover, if the accused had seen a person named Dayananda with whom the deceased allegedly had an illicit affair, talking to the deceased and then running away upon seeing the accused, it is not sensible to believe that the deceased would have remained at the same spot until being assaulted by the accused with an axe.

11. In this regard, the evidence of the JMO Dr Jayaweera Bandara, who conducted the autopsy of the deceased would be also of much relevance. The witness whilst referring to the autopsy report marked as P 09, explained the extent of the injuries observed on the body of the deceased.

12. According to the JMO's evidence, there was only one injury, which almost severed the head from the neck. According to his opinion, the cut injury he observed on the body was caused by a heavy sharp weapon like an axe and also was inflicted with a severe force. He testified as follows:

ප්‍ර : එම පියසීලි කියන මරණකාරියගේ ශරීරයේ තුවාල කොපමණ සංඛ්‍යාවක් වෛද්‍යතුමා නිරීක්ෂණය කලාද ?

උ : එක තුවාලයයි.

ප්‍ර : එය පැ.09 වාර්තාවේ සඳහන් කර තිබෙනවද ?

උ : එහෙමයි.

ප්‍ර : තුවාලය දකින්න ලැබුනේ මරණකාරියගේ ශරීරයේ කවර ප්‍රදේශයකද ?

උ : බෙල්ලේ.

ප්‍ර : ඒ තුවාලය කොපමණ දිගකින් යුක්ත තුවාලයක් ද ?

උ : සෙන්ටිමීටර 24 ක්.

ප්‍ර : කොහොමද ඒ තුවාලය බෙල්ලේ පිහිටා තිබුනේ ?

උ : බෙල්ලේ වටා බෙල්ලේ දකුනු පස සහ පිටුපස ප්‍රදේශ ආශ්‍රිතව සෙන්ටිමීටර 24 ක් දිග තුවාලයක්.

ප්‍ර : එය කවර ආකාරයේ තුවාලයක් ලෙසද දක්වා තිබෙන්නේ ?

උ : කැපුම් තුවාලයක්.

ප්‍ර : කවර කැපුම් තුවාලයක් ද ?

උ : ගැඹුරු කැපුම් තුවාලයක්.

ප්‍ර : කවර කැපුම් තුවාලය දකින්න ලැබුනේ මරණකාරියගේ බෙල්ලේ ?

උ : එහෙමයි.

ප්‍ර : සෙන්ටිමීටර 24 ක් දිගයි කියන එකෙන් අදහස් වන්නේ ඇයගේ බෙල්ලේ කොපමණ ප්‍රමාණයක් කැපී කිබුනාද ?

උ : එය සී අකුර හැඩැති කැපුම් තුවාලයක්. එයට බෙල්ල සම්පූරණයෙන් වෙන්වෙලා තිබුනා. ඉතිරිවෙලා තිබුනේ බෙල්ලේ වම් පැත්තේ සහ ඉදිරිපසින් සෙන්ටිමීටර 13 ක් දිග සම් කෑල්ලක් පමණයි. ඉතිරිව තිබුනේ. අනිකුත් සියලුම ඉන්ද්‍රියන් කැපිලා.

ප්‍ර : හම හැරුනාම අභ්‍යන්තර ඉන්ද්‍රියන් කැපිලා තිබුනාද

උ : අනිකුත් සියලුම අවයව කැපිලා තිබුනා.

ප්‍ර : එවැනි හම විතරක් ඉතිරිවුන සියලුම අවයව කැපී යන ආකාරයේ ආයුධයක් පිළිබඳව වෛද්‍යතුමාට යම් මතකයක් පල කරන්න පුලුවන් ද ?

උ : කැපෙන බර ආයුධයක්.

ප්‍ර : වෛද්‍යතුමාට යම් ආයුධයක් නිරීක්ෂණය කලහොත් එවැනි ආයුධකින් ඔබතුමා සඳහන් කරන ආකාරයේ ගැඹුරු කැපුම් තුවාලයක් ඇති විය හැකිද කියලා මතයක් පල කරන්න පුලුවන් ද ?

උ : පුලුවන්.

ගරු උතුමාණෙනි මේ අවස්ථාවේදී සාක්ෂිකරුට පැ. 02 ලෙස ලකුණු කර ඇති නඩු භාණ්ඩය එනම් පොරව පෙන්වා සිටිනවා. සාක්ෂිකරු එය පරීක්ෂා කර බලයි.

ප්‍ර : මෙවැනි අයුධයකින් ගැඹුරු කැපුම් තුවාලයක් ඇති කිරීමට හැකියාවක් තිබෙනවා ද ?

උ : පුලුවන්.

ප්‍ර : ඒ සඳහා කවර ආකාරයේ බලයක් යෙදිය යුතුයිද මෙවැනි ආයුධයකට ?

උ : ඉතා වැරෙන් පහරක් එල්ලකල යුතුයි.

13. More importantly, during cross-examination by the defense counsel, the JMO unequivocally ruled out the possibility that such a grave injury could have been caused by a sharp cutting knife similar to a bread knife. He categorically stated that the fatal injury could not have been caused by a bread knife, but rather by a heavy, sharp cutting weapon. He testified further as follows:

ප්‍ර : මහත්තයාට කියන්න පුලුවන්ද ඔය තුවාලය පෙන් වූ ආයුධයෙන් කෙටීමක් සිද්ධ වූනහොත් කී පාරකින් විය යුතුද ?

උ : තුවාලය තියෙන විදියට එක පාරින්.

ප්‍ර : බර නැති නමුත් ඉතා තියුණු පිහියක් වගේ ආයුධයකින් පාන් කපන ආකාරයට කැපීමකින් මෙවැනි තුවාලයක් සිදු වන්න පුලුවන් ද ?

උ : බැහැ. මම ඒක විශේෂයෙන් සඳහන් කර තිබෙනවා බර ආයුධයකින් පමණයි කටු කැපෙන්න පුලුවන්. කොදු ඇට පේලිය කැපිලා තිබෙනවා. ඒසේ වන්න බර ආයුධයක් වෙන්න පුලුවන්.

ප්‍ර : කශේරුකා බිදිලා තිබෙනවා ද ?

උ : කශේරුකා දෙක සහ තුන අතරින් කැපිලා බෙනවා.

14. Thus, the JMO ‘s testimony negates the accused’s version that he cut the neck of the deceased with a bread knife.

15. In ***Bakhtawar v State of Haryana AIR 1979 - SC 1006*** the Indian Supreme Court held as follows:

> *"For the commission of the offence of murder it is not necessary that the accused should have the intention to cause death. It is now well settled that if it is proved that the accused had the intention to inflict the injuries actually suffered by the victim and such injuries are found to be sufficient in the ordinary course of nature to cause death, the ingredients of clause Thirdly, of sec. 300 of the Indian Penal Code are fulfilled and the accused must be held guilty of murder punishable under sec. 302 of the Indian Penal Code."*

(Section 300 of the Indian Penal Code is in terms identical to sec. 294 of the Ceylon Penal Code.)

16. It is also significant to note that the accused, in his dock statement, claimed that he returned home around 3:30 p.m. and saw the deceased talking with a person named Dayananda. He stated that, having lost his self-control, he used a bread knife allegedly

found suddenly on the table, to cut the deceased's neck. However, according to the evidence of the prosecution witnesses, the incident occurred around 10:30 p.m., a fact that remained unchallenged. If this is the case, the accused's version, that he inflicted the fatal injury at around 3:30 p.m. is demonstrably false.

17. Conversely, if the accused did return home at 3:30 p.m. and saw the deceased chatting with Dayananda, then he had ample time to regain his self-control, given that the incident occurred some seven hours later, at approximately 10:30 p.m.

18. The testimony of PW1, PW2, and PW4 confirmed that the killing took place around 10:30 p.m. on 15.04.2008, and not at 3:30 p.m. as alleged by the accused in his dock statement. It is noteworthy that, during cross-examination, the time of the incident was never disputed by the defense.

19. In ***Dadimuni Indrasena & Dadimuni Wimalasena v AG (2008)*** Sisira de Abrew J stated that: Whenever the evidence given by a witness on a material point is not challenged in cross examination it has to be concluded that such evidence is not disputed and is accepted by the opponent.

20. This principle is enunciated in ***Pilippu Mandige Nalaka Krishantha Kumara Tissera v. AG (2007)*** and is in line with the approach adopted by Indian Courts.

21. In ***Sarwan Singh v State of Punjab (2002) (AIR SC 111)***, it was held that:

> *It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted ',*

22. In ***Motilal v. State of Madhya Pradesh (1990) (CLJ NOC 125 MP)*** it was held that the absence of cross examination of Prosecution Witnesses of certain facts leads to inference of admission of that fact.

23. Thus, it can be safely concluded that the time of the incident was established as 10:30 p.m., a fact also accepted by the defense, and not 3:30 p.m. as claimed by the accused in his dock statement. Furthermore, the JMO's testimony, that the cut injury found on the deceased's body could not have been caused by a bread knife, as alleged by the accused remains unchallenged. The JMO has adequately explained the reasons behind

his opinion regarding the nature of the weapon used to inflict the neck injury on the deceased, and this opinion also remains uncontested.

24. Therefore, the dock statement of the accused is not only unworthy of belief but also fails to raise any doubt in the prosecution's case, and must be rejected in its entirety. These facts clearly indicate that the appellant has not discharged the burden of proof required by law.

25. For the defense of grave and sudden provocation to succeed, the provocation must be both unexpected and instant, allowing no time for reflection or planning. In other words, the act that triggered the provocation must be of such a serious nature that it would cause a reasonable person to lose self-control. If there was a time gap between the provocation and the act, the defense would fail, as this would suggest a cooling-off period and the possibility of premeditation.

26. In the present case, it has been established that the killing occurred around 10:30 p.m. Therefore, if the accused returned home at 3:30 p.m. and witnessed the deceased having a conversation with one Dayananda, he had a cooling-off period of approximately seven hours before the incident. This clearly indicates that the accused is not entitled to rely on the defense of grave and sudden provocation.

27. Furthermore, the axe recovered consequent to the accused's statement, was shown to the doctor during questioning by the state counsel. The doctor expressed the opinion that, given the nature and extent of the cut injury observed on the deceased's body, the axe could have been the weapon used to inflict the fatal injury. This position remains unchallenged.

28. The circumstances and the Appellant's own statements indicate that he had not only regained his self-control but was also planning for the future. Nearly six hours had elapsed between the time the Appellant arrived at his house and the time the murder took place. Therefore, even if he had not regained his composure earlier, there was ample time for him to do so. On the contrary, the Appellant's conduct clearly demonstrates that the murder was deliberate and calculated.

29. In ***Mancini and Director of Public Prosecutions (on Behalf of His Majesty) [1941] UKHL J1016-1*** the court established a key principle regarding provocation and murder. The case clarified that provocation, while potentially reducing a murder charge to manslaughter, must be "grave and sudden" and sufficient to cause a reasonable person

to lose self-control. The court emphasized that the provocation must be so severe that it temporarily deprives the person of their self-control, leading them to commit an unlawful act resulting in death.

30. As stated earlier, this appeal was argued on a limited ground, namely, whether the offence of murder could be reduced to culpable homicide not amounting to murder, on the basis that the appellant acted under sudden and grave provocation.

31. Once the prosecution has proved the charges beyond reasonable doubt, the burden shifts to the accused to establish any exceptions upon which he relies. In the present case, it was argued on behalf of the appellant that the learned High Court Judge had failed to properly evaluate the appellant's dock statement and erred in rejecting it.

32. In the judgment dated 02.02.2018, the learned High Court Judge has duly considered the dock statement and clearly explained why it was devoid of truth. Furthermore, the learned Judge concluded that no sufficient evidence had been presented to establish that the offence was committed under grave and sudden provocation.

33. In ***K.M. Nanavati v. State of Maharashtra, AIR 1962 SC 605***, the Supreme Court discussed the elements to be considered when grave and sudden provocation is pleaded. The provocation must be both grave and sudden. The accused must have acted immediately upon receiving the provocation, before regaining self-control. There must be a genuine loss of self-control, and the response must be proportionate to the provocation. If the reaction is excessive or brutal, the court may reject the defence.

34. In the instant case, a careful examination of the evidence adduced by both the prosecution and the defence reveals that none of the essential elements of grave and sudden provocation articulated in the aforesaid authorities have been proved.

35. The extent of the injury, the brutality evident in the act, the absence of evidence supporting grave and sudden provocation, and, more importantly, the falsity of the dock statement, do not persuade me to accept the arguments advanced on behalf of the appellant.

36. Based on the foregoing analysis, the appellant's conviction under Section 296 of the Penal Code and the death sentence imposed by the High Court are found to be justified. There are absolutely no grounds for interference. Hence, we affirm the judgment and sentence of the learned Judge of the High Court of Gampaha.

37. Accordingly, the appeal stands dismissed.

Judge of the Court of Appeal

Hon. P. Kumararatnam,J (CA)
I agree,

Judge of the Court of Appeal