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

Wijesinghe Arachchige Gamini

Accused-Appellant

C.A.No,142/2009

H.C.Anuradhapura No.142/2009

Attorney General

Attorney General Department

Colombo 12.

Respondent.

C.A. No. 142/2009 H.C. Anuradhapura Case No: 142/2009

Before : M. M. A. Gaffoor, J. &

K. K. Wickremasinghe,J.

Counsel : Y .Wijerathne for the Accused-Appellant

Thusit Mudalige DSG for the A.G.

Argued On : 17.05.2016.

Decided on : 30/08/2016

****

M.M.A. Gaffoor, J.

Heard both Counsel in respect of their respective cases. The Accused-Appellant in this case was convicted of murder of one of his senior officer by shooting with the service weapon while on guard duty, and was found guilty of a charge of murder under Section 296 of the Penal Code.

Being aggrieved by the said conviction and sentence he has appealed to this Court.

Facts of this case may be briefly summarized as follows.

The accused appellant was a soldier attached to 6th Infantry Regiment of the Sri Lanka Army, stationed at Medawachchiya. The victim was a corporal attached to the same camp.

At the time of the incident there had been an animosity between the appellant and the deceased regarding a girl whom the appellant had fallen in love with. It is admitted that the deceased who was to get married to another girl, had made undue advances towards appellant's girl friend. Notwithstanding, the request made by the appellant the deceased had humiliated the appellant in the presence of his girl friend. This had developed into an animosity which culminated in the death of the said corporal.

Both Counsels are in an agreement with regard to the facts of the case and essence of their submission is that the entire episode

should be considered in the light of the background to this case, as a sudden fight.

The evidence of the witness Sarath Wijemanna and Captain Nandimitra bears testimony to the fact the appellant was provoked by the deceased, hence the unfortunate incident.

The Deputy Solicitor General, in his submissions agreed to the fact that the charge of the murder could be reduced to culpable homicide not amounting to murder, due to a sudden provocation.

In the instant case it is significant to note that no evidence of sudden fight arises from the evidence of the prosecution or suggested in the cross examination. It has been laid down in series of cases although a plea for a lesser offence had not been taken up by the accused, it is the duty of the presiding judge to have directed his mind to the circumstances the appellant was entitled to have the benefit of the lesser verdict. The King v. Bellana Vithanage Eddin 41 NLR 345; the King V.Albert Appuhamy 431 NLR 305.

It was held that in Jayasena v. Queen 72 SLE 313 that when an exception to the murder is pleaded by the accused. The benefit of that

exception read with section 105 and 3 of the Evidence Ordinance imposes upon accused a responsibility to adduce evidence to the said fact. Hence it is a fundamental principle that if an accused pleads an exception to the charge of 296 he must prove it on a balance of probability . Exception 4 to Section 296 of the penal Code 296 reads as follows.

"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heart of passion upon a sudden quarrel, and without offender taken undue advantage or acted in a cruel or unusual provocation.

A careful consideration of the said exception indicates the basis of mitigation is purely dependent on the fact that, the murder has taken in place in a sudden fight with had occurred in the heated passion upon a sudden provocation

In terms of 294 of the Penal Code, the following requisites must be satisfied;

01. it was a sudden fight.

02. There was no premeditation,

03 The act was committed in a heat of passion , and

04. The assailant had not taken any undue advantage or acted in a cruel

Manner.

All the above conditions must exist in order to invoke Exception 4 to the Section 296 . In a case of Premalal Vs AG 20001 SLR 403, Kulatileka J. held that:

Our judgments interpreted the phrase "Sudden provocation" to mean that provocation should consist of a single act which occurred immediately before the 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."

It is evidence of fact of the case that the deceased has tempted to make inroads into the love affair between accused and his girl friend. The evidence of Corporal Wjemanna testify to the fact that the deceased had harassed the accused in the presence of his girl friend. The learned DSG submits the charge of murder could be reduced to culpable homicide not amounting to murder.

The Court has to consider the pleas of a sudden fight in the light of the evidence and the submissions made by the counsel.

As observed in the case of Munjali Powade V. State of Maharashtra 122 AIR 1079 S.C. at p 134, the Apex Court observed that as far as the word "sudeden" is concerned, it implies that the fight should not have been pre-arranged. The word "fight" is used to convey something more than a verbal quarrel.

Gour in the Penal Law of India (19th Edition Vol. 4 at p.2370 states: "Pre-meditation may be established by direct or positive evidence or by circumstantial evidence. Evidence of pre-meditation can be furnished by former grudges or previous threats and expressions of ill feeling."

It is paramount duty of this court in the exercise of its appellate powers to be mindful of Article 137 of the Constitution in determining whether the substantial rights of the parties had been prejudiced or a failure of justice had been occasioned in contemplating the reversing or varying of a judgment. With this guideline in mind I have perused the entirety of the proceedings, the judgment, the written submissions and the case law authorities submitted by both parties.

Bearing in mind the background and the above said authorities, and the conclusion of the trial judge, I now proceed to examine the legal situation as to the application of the mitigatory plea of grave and sudden provocation and cumulative provocation and explore the extent of their applicability to the facts of this case. It is opportune to reiterate the following principles in the application of the aforesaid mitigatory plea.

1. The accused, in order to succeed to in the mitigatory defence, must prove by way of an objective test that such provocation was likely to destroy the self control of an average man of the class of society to which the accused belonged *(Vide Gration, J. in Jamis (1952) 53 NLR at p. 403)*

2. The word "sudden" implies that the reaction of the accused should be almost instinctive, without any element of scheming or contriving.

3. Where there was time for the accused to cool off or control his emotions, provocation cannot be considered as sudden.

4. The accused must have lost his power of self-control, in consequences of the provocation. *(Vide Rose, C.J., in Mutubanda (1954) 56 NLR 217).*

5. 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 so grave without at the same time considering the act which resulted in provocation. *(Vide-Lord Goddard (Privy Council) in K.D.J. Perera (1952) 54 NLR at P.266)*.

6. ***The doctrine of continuing provocation or cumulative provocation,*** which has received judicial acceptance in our jurisdiction, introduces a qualification to the basically objective character of the test of provocation. The doctrine requires that a particular act of provocation should be regarded not as an isolated event, but the ultimate step in a chain of provocative events

bestowing increasing strain on the accused person up to a breaking point in a strained relationship. *(italics supplied)*

7. On a corollary and analysis of the above principles governing the mitigatory plea of grave and sudden provocation, it is quite evident that this is a concession offered by law to human frailty in the distinctive offence of murder under Section 296 of the Penal Code.

In the light of the above salient features springing to the eye. 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.

Close perusal of the evidence on the actions of the accused appellant shedding light on his mental situation gives rise to a scenario where the accused from the point of receiving the provocation and up to the point of retaliation, when closely analyzed, bring the accused for the entitlement to the mitigatory plea on the balance of probability.

In view of the circumstances, enumerated above, I am firmly of the view that the accused appellant had succeeded in establishing on a preponderance

of evidence that the *actus reus* was committed by him in the heat of passion whilst being deprived of his self control due to sudden provocation or cumulative provocation. Considering all these matters we set aside the death sentence and convict this appellant for culpable homicide not amounting to murder. We sentence the accused-appellant to a term of 15 years rigorous imprisonment. We direct the Prison Authorities to implement the sentence from the date of sentencing by the learned Trial Judge.

Subject to the above variation the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe,J.

I agree.

JUDGE OF THE COURT OF APPEAL