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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:
CA/HCC/ 0172-173/2022

1. Hangamuwa Nekethige Duminda
2. Wickramasinghge Arachchige Kelum Chaturanga
3. Hangamuwa Nekethige Ranjith

High Court of Hambantota
Case No. HC/128/2007

ACCUSED

Vs.

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

COMPLAINANT

AND NOW BETWEEN

1. Hangamuwa Nekethige Duminda
2. Wickramasinghge Arachchige Kelum Chaturanga

1st and 2nd ACCUSED-APPELLANTS

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

COMPLAINANT-RESPONDENT

BEFORE	:	**Sampath B. Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**M.S.M.Imtias for the Appellant.** **Chetiya Gunasekera, PC, ASG for the Respondent.**
ARGUED ON	:	**03/10/2023**
DECIDED ON	:	**19/01/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named 1st Accused-Appellant (hereinafter referred to as the Appellant) was indicted along with 2nd Appellant and 3rd Accused by the Attorney General for committing the offences as mentioned below.

1. On or about the 27th of October 2003 the accused committed the murder of Bandula Abeywardena alias Chamilt at Uddagandara which is an offence punishable under Section 296 read with Section 32 of the Penal Code.
2. In the course of the same transaction the accused had inflicted the grievous hurt to Achala Sanath Abeywardena punishable under Section 317 read with Section 32 of the Penal Code.

The trial commenced before the High Court Judge of Hambantota as the Appellants and other accused opted for a non-jury trial. The prosecution had led 03 witnesses and marked production P1-05 and closed the case. The Learned High Court Judge having satisfied that evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the accused. The 1st and 2nd Appellants and the 3rd Accused had made dock statements and closed their case.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the 1st Appellant on first and sentenced him to death on 22/09/2022. For the second count he was sentenced to 06 years rigorous imprisonment.

The 2nd Appellant and the 3rd Accused were convicted for 2nd count and both had been sentenced to 06 years rigorous imprisonment. Both had been acquitted from the 1st count.

Being aggrieved by the aforesaid conviction and the sentence, the Appellant and 2nd Appellant had preferred this appeal to this court.

While the Appel was pending, the 2nd Appellant had withdrawn his appeal on 10.05.2023. Hence, his appeal was stand dismissed. Now this appeal is only considered in respect of the 1st Appellant and hereinafter he will be referred to as the Appellant.

The Learned Counsel for the Appellant informed this court that the Appellant has given his consent to argue this matter in his absence due to the Covid 19 pandemic. At the hearing, the Appellant was connected via Zoom platform from prison.

The background of the case *albeit* **briefly is as follows:**

According to PW3, who 15 years at the time of the incident, his second sister had a love affair with the Appellant for which the deceased vehemently opposed. On the previous day of the incident, at about 7.30pm while the witness watching TV had seen the Appellant and 3rd Accused running away from their backyard. On the following day morning when he was going to the school, had met the Appellant and the 3rd Accused on the road. When he inquired from them why they had come to their house on the previous night, the Appellant and the 3rd Accused denied the allegation. As such, PW3 had slapped both of them at that time.

On the same day when this witness was standing near the school, at about 11.15 am the 2nd Appellant had come there and asked why he had hit the Appellant and the 3rd Accused. The 2nd Appellant had threatened that he would bring his friends and assault him for not wearing school uniform.

On the same night, at around 7.00 pm when PW3 was playing carrom with his friends in a shop which belongs to PW1, heard the shouting of the deceased. When he ran there and tried to reach the deceased, the 2nd Appellant and the 3rd Accused held him and the Appellant had stabbed him on his abdomen with a knife. Immediately after stabbing, the Appellant had

stabbed the deceased twice before he ran away from the scene of crime. The other two also ran away from the scene. PW1 had taken deceased and PW3 to the hospital immediately. PW3 had given his statement to police while receiving treatment in the hospital.

PW1, Keerthiratna was the owner of the shop close to which the incident had happened. On the date of incident while he was playing carom with PW3, heard the deceased shouting that he did not scold them in the morning, it was his son had scolded them. This incident had happened about 50 meters away from his shop. As the area is properly with the light emanating from the houses situated close by, he could witness the incident properly. When he ran to the spot had seen the Appellant fighting with PW3 and assaulting the deceased. At that time when PW3 went aside holding his stomach, the Appellant had stabbed the deceased with a knife and ran away from the scene. Although PW1 had chased the deceased, but could not apprehend him. He had seen the 2nd Appellant and the 3rd Accused were sanding little

distance away from the scene. He had taken the both injured to the hospital, but the deceased was pronounced dead on admission.

PW11, ASP Dissanayake had conducted the investigation, arrested the Appellant, and recovered a knife upon his statement to the police. The handle of the knife recovered was a part of a 4-inch-long deer antler. The blade is about 4 inch long. There was stain on the knife blade.

PW14, JMO Dharmasena who held the post mortem of the deceased had noted two stab injuries on the deceased body. The 1st injury is categorized as a serious fatal injury because it penetrated the diaphragm, spleen and stomach and caused heavy bleeding. The 2nd injury is categorized a non-life-threatening injury. According to the JMO the death was caused due to haemorrhage following the stab wound to vital organs of the body.

PW13, JMO Nanayakkara who examined PW3, stated in his MLR that injury caused to the left side of the abdomen area is a grievous injury.

The Appellant making a statement from the dock denied that charges levelled against him. He claims that an incident happened between him the deceased and PW3 in the morning of the date of incident.

The Appellant had raised following grounds of appeal.

1. The Learned High Court Judge erred in law by failing to consider the special exceptions in the light of sudden fight with sudden provocation.
2. Learned High Court Judge erred in law by failing to consider the cumulative provocation.
3. The evidence led at the trial does not support the conviction of murder.

It is trite law that the burden of proof is on the prosecution in all criminal cases.

In **The Queen v. K.A. Santin Singho 65 NLR 447** the court held that:

> *"It is fundamental that the burden is on the prosecution. Whether the evidence the prosecution relies on is direct or circumstantial, the burden is the same. This burden is not altered by the failure of the appellant to give evidence and explain the circumstances.*

In this case, the case is rest on direct and circumstantial evidence.

In the first ground of appeal the Counsel for the Appellant contends that the Learned High Court Judge had failed to consider the special exceptions in the light of sudden fight and sudden provocation.

Exception 1 to Section 294 of the Penal Code reads as follows:

> "Couplable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, cause the death of the person who gave the provocation or causes the death of any other person by mistake or accident".

Further, the Explanation under this exception reads as:

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

For an accused to succeed a plea of 'provocation' there are several factors that has to be proved on a balance of probability. First there has to be a 'provocation' that had taken place. However, each and every instance of provocation would not be being a situation within the parameters of this exception. Such provocation needs to be 'grave and sudden'. In addition to the existence of such provocation, the accused should have been deprived of the power of self-control due to such provocation.

In **Attorney General v John Perera** 54 NLR 265 the court held that:

> *"In order to reduce the crime from murder to manslaughter the offender must show first that he was deprived of self-control and secondly that deprivation was cause by provocation which in the opinion of the jury was both grave and sudden".*

In **Attorney General v K.D.J.Perera** 54 NLR 265 the court held that:

> *"that the provocation must be such as to bring it with the category termed sudden, that is to say, that there should be a close proximation in time between the acts of provocation and of retaliation-which is a question of fact. This element is of importance in reaching a decision as to whether the time that elapsed between the giving of provocation and the committing of the retaliatory act was such as to have afforded and did in fact afford the assailant an opportunity of regaining his normal composure, in other words, whether had been a 'cooling' of his temper".*

The evidence led at the trial clearly proves the intention of the Appellant at the time of killing. There were two separate incidents had happened on the day of the incident in question. At the time of the incident, according to the evidence led, does not show provocative behaviour of PW3 or the deceased when they were approaching the place of incident.

The Appellant had failed to take up the position that the deceased or PW3 provoked him and he lost his self-control due to such provocation. Even if the initial incident -the scuffle between PW3 and the Appellant-is taken as an act of provocation, there was a cooling off period between the said incident and the act of stabbing with the knife.

The Learned Additional Solicitor General very correctly contended that if the incident of slapping in the morning is considered as the act of provocation, it was done by PW3 and not by the deceased and the explanation says that whether it is grave and sudden enough depends on the facts of the case. PW3 had slapped him twice because the Appellant had lied that he didn't visit PW3's house the night before. The Learned ASG further contended that merely slapping a person twice with the hand doesn't provoke a reasonable man to commit murder. Hence, he submitted that the Appellant should not be entitled to succeed in this exception of grave and sudden provocation.

Exception 4 to Section 294 of the Penal Code states:

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

Further, the Explanation under this exception reads as:

> "It is immaterial in such cases which party offers the provocation or commits the firs assault".

Although the Counsel for the Appellant contended that the Appellant had acted as a result of a sudden fight when they attacked the deceased. The evidence transpired that the deceased had been unarmed and had not harmed the Appellant. Therefore, even if the deceased was the first person to start the fight, it should not have been a very serious fight which could provoke an ordinary man to commit murder and cause such fatal injuries which could cause death in the ordinary cause of nature.

According to the evidence adduced by the prosecution the Appellant was in possession of a knife when the deceased who was unarmed had gone to the shop to buy cigarettes. This shows that the deceased was not intended to engage in a fight with the Appellant. The Appellant, carrying a knife, going to the shop and engage in fight with the deceased and PW3 clearly demonstrate his intention to harm unarmed persons.

The Learned ASG further contended that a sudden fight cannot be premeditated as the word 'sudden' clearly means that there cannot be any such pre-arrangements. The lapse of time between the initial argument and the final fight is material for an accused to come within Exception-4, since the lapse of time may grant the opportunity for an accused to premeditate for a fight. Such a fight is not spontaneous and therefore cannot be regarded as one that could be described as sudden. If there is lapse of time between incidents prior to the final assault, it is quite clear that the heat of passion upon the quarrel would have subsided and the death on such a instance an instance would be regarded as murder.

In **Velayuthan v Attorney General** the court held that:

> *"The counsel for the Appellant contended that the death of the deceased had occurred due to a sudden fight. But at the trial stage the defence had not pointed out this position. The prosecution evidence revealed, at the time of the incidents, that the deceased was unarmed and didn't*

cause any injury to the Appellant. But the Appellant had inflicted a fatal blow to the deceased. The sole eye witness and the medical evidence support this position".

In **Ahmad Sherair** A.I.R 193 1936 LAH 513 the court held that:

"Where the deceased was unarmed and did not cause any injury to the Appellant, the Appellant following a sudden quarrel had inflicted fatal blows to the deceased, it was held, exception of sudden fight did not apply".

In this case the evidence led by the prosecution revealed that at the time of stabbing, the deceased was unarmed and went to buy cigarettes from the boutique owned by PW1. The Appellant sustained no injuries at that time. Further, the Appellant had inflicted serious injury to PW3 who too was unarmed and merely went to the spot to save deceased father. Hence, the Appellant cannot take refuge under the cover of the plea of sudden fight as enshrined under Exception-4 of the Section 294 of Penal Code.

The Counsel for the Appellant contended that the Learned High Court Judge erred in law by failing to consider the cumulative provocation.

Cumulative Provocation is an extension to the exception 1 of Section 294 of the Penal Code. Cumulative Provocation as a special exception to a murder charge has been discussed in several judgments in our courts.

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 **R.W.M.Nandana Senarathbandara v Attorney General** SC/Appeal/32/2015 decided on 17/07/2020 His Lordship Jayantha Jayasuriya C.J. 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".

Guided by above cited judgments, it is pertinent to consider whether the benefit of the plea of Grave and Sudden Provocation on the basis of Cumulative Provocation could be awarded to the Appellant as claimed by him under this ground of appeal.

According to PW3, the first incident was happened in the morning where he had slapped the Appellant and the 3rd Accused. Deceased was not involved in the morning incident. In the evening when the deceased went to buy cigarettes he was stabbed by the Appellant. The deceased doesn't have a close relationship with the Appellant. Although the 2nd Appellant had an affair with the one of the daughters of the deceased, but in no case that problem can be extended to the Appellant. As such the plea of cumulative provocation was in any event should not be available to the Appellant.

In this case two eye witnesses had seen the incident. Their evidence not subjected to major omissions or contradictions. Although they were under lengthy cross examination the defence could not raise any serious doubt on the evidence given by prosecution witnesses.

As discussed under the appeal grounds advanced by the Appellant, the prosecution had adduced strong and incriminating evidence against the Appellant. The Learned High Court Judge had very correctly analyzed all the evidence presented by both parties and come to the conclusion as to why he accepting the prosecution version and rejecting the defence version.

As the Learned High Court Judge had rightly convicted the Appellant for the charges levelled against him in the indictment, I affirm the conviction and dismiss the Appeal of the Appellant.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL