IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC

OF SRI LANKA

In the matter of an application for Revision made under Article 138 of the Constitution, read together with Section 364 of the Code of Criminal Procedure Act No. 15 of 1979.

CA Case No: CA-HCC-111-112/2017

HC Panadura Case No:

HC 2556/2009

Hon. Attorney General

Attorney General's Department,

Colombo 12

Complainant

1. Illukpalla Gamage Karunanayake
2. Paththinigamage Suneetha

Accused

AND NOW BETWEEN

1. Illukpalla Gamage Karunanayake
2. Paththinigamage Suneetha

Accused-Appellants

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondents

Before: **B. Sasi Mahendran, J.**

Amal Ranaraja, J.

Counsels: Saliya Pireris, PC with Rukshan Nanayakkara and Nisal Hennadige for the 1st Accused-Appellant

Neranjan Jayasinghe with Imangsi Senarath and Randunu Heellage for the 2nd Accused- Appellant

Rohantha Abeysuriya, SDSG for the Respondent

Argued On: 24.03.2025

Judgment On: 28.05.2025

JUDGMENT

B. Sasi Mahendran, J.

The Accused- Appellants (hereinafter referred to as the Accused) were indicted before the High Court of Panadura on two charges of committing the offence of

murder of one Saul Hameed Jahan and his wife Abdul Asees Ummul Safeera on 07.05.2006, punishable under Section 296 of the Penal Code as amended.

The Prosecution led the evidence through eleven witnesses and marked productions from P1 to P10 and thereafter closed its case. The Accused, in their defence made dock statements. At the conclusion of the trial, the Learned High Court Judge, by judgment dated 22.03.2017, found the Accused guilty of murder and imposed the death sentence. Further, a fine of Rs. 10,000 was imposed for each count.

Being aggrieved by the afore-mentioned conviction and the sentence, the Accused persons have preferred this appeal to this Court.

The following are the grounds of appeal as pleaded by the Accused;

1. Whether the Learned High Court Judge properly evaluated the contradictions and omissions marked by the prosecution in her judgments.
2. Whether the legal principles pertaining to the 'common intention' were properly evaluated in the judgment.
3. Whether the Learned High Court Judge had wrongly evaluated the evidence in her judgment
4. Whether the Learned High Court Judge erred in law in evaluating the circumstantial evidence of this case
5. Whether the Learned High Court Judge had properly evaluated the dock statement made by the appellant.

During the argument stage, the main ground urged by the Counsel for the 1st Accused was that from the evidence led before the Learned High Court Judge, she

had failed to give the benefit to the Accused, the plea of provocation as contained in exception 1 to Section 294 of the Penal Code which would convert the offence of murder to the lesser offence of culpable homicide not amounting to murder. The Counsel for the 2nd Accused indicated that there is no evidence to prove that there was a common intention to convict the 2nd Accused. The Senior Additional Solicitor General appearing for the Prosecution agreed that based on the evidence placed before the Court, the Trial Judge should have considered the mitigatory plea of provocation, which she had failed to consider.

The facts of this case are briefly summarized as follows;

According to the evidence of PW4 Alahendra Acharige Mangalika Perera, who was a tenant living in the Accused's building, the Accused had rented four rooms to three couples and a lady, in one of which the deceased couple lived.

According to her, on the day in question, around 9 PM, the deceased Jahan started shouting at the Accused, stating that there was no electricity and therefore his child could not sleep. The Accused has indicated that the electricity was cut down due to nonpayment of the bill by the Muslim Couple who are deceased. According to this witness, there was a heated argument between the deceased couple and the Accused over this issue. Thereafter, the Accused and his wife came to their room and went outside with an iron bar.

On pages 200 - 201 of the brief:

"ප්‍ර: ඊටපස්සේ මොකද්ද කලේ?

උ : ඊටපස්සේ 09.00 පහුවෙද්දී මුදලාලියි පවුලයි මේ කට්ටියයි බනිනවා වගේ ඇහුනා.

ප්‍ර: කාට ද බනිනවා වගේ ඇහුනේ?

උ; මුදලාලිට.

ප්‍ර: කොහේ ඉන්නකොටද ඇහුනේ?

උ: කාමරයේ ඉන්නකොට.

ප්‍ර: මොනවා කියලද බනිනවා ඇහුනේ?

උ: පොඩි බබාට නිදා ගන්න විදියක් නැහැ. ෆෑන් එක දාන්න ලයිට් එක දාන්න කියලා.

ප්‍ර: කාටද එහෙම කිව්වේ?

උ: මුදලාලිට.

ප්‍ර: ඊටපස්සේ මොකද උනේ ?

උ: ටික ටික කතාව වැඩි වෙනවා වගේ දැනුනා.

ප්‍ර: ඊටපස්සේ මොකද උනේ ?

උ: අපේ කාමරයට අරගොල්ලන් දොර ඇරගෙන ආව.

ප්‍ර: අරගොල්ලන් කිව්වේ කව්ද?

උ: මුදලාලියි එයාගේ නෝනයි.

ප්‍ර: ජාකිර් කිව්වා ලයිට් දාන්න ඕනෑ ෆෑන් දාන්න ඕනෑ , බබාට නිදා ගන්න විදියක් නැහැ ලයිට් දෙන්න කියලා කිව්වම මුදලාලි මොකද්ද කිව්වේ?

උ: බිල් ගෙවන්න කිව්වා.

ප්‍ර: එක මුදලාලි කොහොමද කිව්වේ කියලා අහුනාද?

උ: බිල් ගෙවන්න කියලා කිව්වා.

ප්‍ර; කොහොමද බිල් ගෙවන්න කියලා කිව්වේ. සාමාන්‍ය විදියට කිව්වා, සැරෙන් කිව්වාද?
උ: ලයිට් බිල් ගෙවපල්ලා කිව්වා ලයිට් දෙන්න.''

Then she heard the cries of the deceased namely Safeera, the wife saying 'එපා මුදලාලි'. Thereafter, she saw both the Accused come towards their door and go to their house. Then she heard Jakir's wife asking for water, then the 2nd Accused had gone towards her, saying that, 'හිටපන් මන් උබට දෙන්නම් වතුර'.

In the meantime, Deepika and her husband came to this witness's room and stayed there. Later, she saw the 1st Accused going alone with a manna knife. Again, she heard the voice of the deceased saying 'එපා මහත්තයා'.

Then she saw the 1st Accused bringing the child of the deceased and giving the child to the 2nd Accused. She further stated that she heard the deceased insisting that the child could not sleep because of not having electricity. Then there was a quarrel between Jakir and the 1st Accused, and the latter had stated 'බිල් ගෙවපල්ලා'. This had continued for some time.

According to her evidence, for some reason, the police had come for an inquiry with regard to a complaint made by Deepika against the deceased. But the Prosecution has not revealed the reason for the Police to come.

This witness stated the following facts at the inquest;

On page 224 of the brief;

> ''ප්‍ර : තමුන් මරණ පරීක්ෂණයේදී සාක්ෂි දෙන විට කිව්වද " පොලිසියෙන් ආවා දොරට ගහනවා ඇසුනා ගෙදර කවුද කියලා. මියගිය අයගේ ගෙදරට පොලිසියෙන් ගැසුවේ. පොලිසියෙන් කියනවා ඇසුනා ඒ අය නැහැ උදේට එන්නම් කියා. පොලිසියෙන් ගියා... කියලා.''

Also, there is evidence to show that Deepika and her husband came to the room and stayed there in fear. It shows that some incident happened prior to this incident between the deceased and the neighbours.

Further, she revealed that on the day in question in the early morning, Deepika and the deceased had a fight, and the Accused was also involved in that. According

to her, Deepika went to the Police Station with her to lodge a complaint against the deceased Jakir. After she made the complaint, the Police came and inquired.

Further, she has revealed that there were always quarrels between the deceased husband and wife and the deceased Jakir used to consume liquor and fight with his wife.

On page 237 - 238 of the Brief;

"ප්‍ර: නිතරම දෙන්නා අතර රන්ඩුසරුවල් වෙනවා?

උ: ඔව්.

ප්‍ර: බිරිඳත් දරුණු තැනැත්තියක්?

උ: ඔව්.

ප්‍ර: ජාකිර් කියන පුද්ගලයත් බීලා ඇවිත් බිරිඳට පහර දෙනවා?

උ: පහර දෙනවා නම් දන්නේ නැහැ. බීලා රණ්ඩු වෙනවා ඇහෙනවා."

The Counsel for the Accused suggested that the deceased had thrown stones at Deepika's house.

According to PW3, Nihal Wasantha Kumara, who was considered as an adverse witness by the Prosecution, had stated that he got to know that there was a fight between the Muslim family and Deepika's family. Further, he stated that he heard that the deceased was scolding Gamage for the disconnection of electricity.

According to PW5, Kalabandaralage Rupasinghe, he admitted that his wife Deepika had complained against the deceased Jakir.

On page 267 of the brief;

"ප්‍ර : සිද්ධිය වෙච්ච දින රෑ යම් අවස්තාවක පොලිසියෙන් ආවද?

උ : මම කෑම ගෙන්න කඩයට ගිහින් සිටියා. ඒ ඇවිත් මගේ බිරිඳ සිටියේ නැහැ. මම මුදලාලිගෙන් ඇහුවා මගේ බිරිඳ කෝ කියලා. ඊට පසුව කිව්වා ඔයාගේ නෝනා එක්ක ආපහු රණ්ඩු වුනා. පොලිසියට පැමිණිල්ලක් දාන්න පත්මා අක්කා එක්ක ඔයාගේ නෝනා පොලිසියට ගියා කියලා."

He affirmed that Deepika and PW4 had gone to the Police to complain against the deceased. According to this witness, the Police had come around 9.30 PM for the inquiry about the complaint made by Deepika. The Police had come and asked for his wife, but she was not at home.

Then, the Police had inquired the deceased regarding the incident.

It has been established that the deceased couple had issues with others, creating an unpleasant environment for others to live peacefully, which could have provoked the landlord, the 1st Accused, who has rented out the whole house to several people. According to the evidence, there is no cordial relationship between the deceased and the neighbours.

On the night in question, due to the failure of not paying the money by the deceased, electricity was disconnected. Because of that, all the tenants of the Accused's building were scolding the Accused for the non-availability of electricity. Even the deceased who had failed to pay the bill scolded the Accused.

With the above inferences, it is pertinent to consider whether the killing of the deceased falls under the plea of grave and sudden provocation, against the weight of the evidence at the trial.

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

> "Exception I.- Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> The above exception is subject to the following provisos –
>
> Firstly- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.
>
> Secondly-That the provocation is not given by anything done in obedience to the law, or by a public servant, in the lawful exercise of the powers of such public servant.
>
> Thirdly, that the provocation is not given by anything done in the lawful exercise of the right of private defence.
>
> Explanation- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

The plea of grave and sudden provocation is discussed by Prof. G.L. Peiris in *Offences Under the Penal Code of Sri Lanka*, (1998), 2nd edition at page 99,

> "(ii) The requirement that the provocation should be 'grave' is embodied in the statutory statement of the exception. The Explanation contained in the Penal Code declares that "Whether the provocation was grave enough to prevent the offence from amounting to murder is a question of fact. In *Punchirala*, Bertram C.J. said: "Although the term is a relative one,

nevertheless the provocation must still be grave. It must have some element of gravity. The merest idle word or gesture. . . is not sufficient. " However, the proper construction of the word 'grave' has been the subject of acute controversy in Ceylon.

Several different interpretations of "gravity" have been suggested in the cases:

(a) Provocation is grave when a reasonable man would be prompted to retaliate against it;

(b) Gravity of provocation requires that the provocation offered should be such as to result in loss of self-control in the person provoked;

(c) The element of gravity of provocation is satisfied in circumstances where the reasonable man would resent deeply the provocation offered;

(d) Provocation is grave only where the reasonable man is likely to lose his self-control in consequence of the provocation."

Ratanlal Ranchhoddas & Dhirajlal Keshavlal Thakore, *The Law of Crimes*, 19th Ed, pg. 729, Chapter XVI

"Grave and sudden provocation.'-The provocation must be grave and sudden and of such a nature as to deprive the accused of the power of self-control. In determining whether the provocation was so, it is admissible to take into account the condition of the mind in which the offender was at the time of the provocation.13 But it is not a necessary consequence of anger, or other emotion, that the power of self- control should be lost. It must be shown

distinctly not only that the act was done under the influence of some feeling which took away from the person doing it all control over his actions, but that that feeling had an adequate cause. It has, therefore, been held in a series of cases that the commission of adultery by a wife within the sight of her husband is a sufficient grave provocation to bring the husband within this exception if he kills her. In such cases very mild punishment is usually inflicted.

Information received from a reliable person and believed to be credible as to the existence of a provoking act, which is being done in the immediate neighbourhood and the existence of which is instantaneously verified, can be said to be provocation given by the person committing that act just as much as if the person provoked had seen it in the first place with his own eyes.

"It must not however be understood that any trivial provocation, which in point of law amounts to an assault, or even a blow, will of course reduce the crime of the party killing to manslaughter... For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than Of human frailty: it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation."

When the derangement of the mind reaches such a degree that the judgment and reason cases to hold dominion over it their authority being suspended and yielding place to violent and ungovernable passion- the man who was before a rational being is no longer the master of his own understanding, becomes incapable of cool reflection, and ceases to have control over his passions. It is to such a state of mind that the law in judging of acts which cause death, gives indulgent consideration. And no mental perturbation or agitation which falls short of this, and leaves sway to reason and the power of self-control, can reduce a murder to an offence within the range of this mitigating exception.

The provocation must be such as will upset not merely a hasty and hot-tempered or hvpersensitive person, but one of ordinary sense and calmness. The Court has to consider whether a reasonable person placed in the same position as the accused would have behaved in the manner in which the accused behaved on receiving the same provocation. If it appears that the action of the accused was out of all proportion to the gravity or magnitude of the provocation offered, the case will not fall under the exception. The case can only fall under the exception when the court is able to hold that provided the alleged provocation is given, every normal person would behave or act in the same way as the accused in the circumstances in which the accused was placed, acted. Where the deceased inquired twice from the accused as to where the accused lived and on receiving no reply the deceased said to the accused "Hai tu poora chamar" and thereupon the accused struck the deceased in the neck with a hatchet with the result that the deceased

died instantaneously, it was held that though the act was committed in a fit of passion the intention of the accused was to kill the deceased and he was therefore guilty of murder. The mere sight of a person going to Court who had filed a criminal complaint should not give rise to grave and sudden provocation in the mind of the accused and if he kills the complainant after some altercation the offence will be murder."

Mr. Palitha Fernando, PC (Former Attorney-General) in his book *Selected Essays on Criminal Law of Sri Lanka*, page 311 states that:

"As stated previously, any provocation will not entitle the offender to the protection of the mitigatory plea. It has to be a degree of provocation that would result in a reasonable person loosing his self control. In deciding whether the provocation measures up to that degree, court would have to examine the provocatory words objectively. Even mere verbal abuse, if sufficiently provocative, will attract the protection of the mitigatory plea. However in considering whether the provocation given satisfies the requirement necessary to bring it within the exception, court should necessarily consider the education and social standing of the offender. Thus the test used for the purpose is the test of a reasonable average man of the same social back ground and education of the offender. Therefore, in my view, the provocatory statement alleged to have been made should necessarily be considered by court in arriving at the conclusion whether the accused would be entitled to the mitigatory defence of provocation. It is necessary that court considers whether the statement attributed to the victim was sufficiently provocative to provide the accused of the mitigatory

defence so that the offence of murder could be reduced to culpable homicide not amounting to murder.

The issue as to whether the retaliatory action triggered off by the provocation should be proportionate to the provocation given, in order to attract the provisions of the exception has also been considered by our courts. Our courts have approved the view that the retaliatory action and the provocation should not be taken as two separate acts but as an integral part of the whole process when deciding on the application of the exception of grave and sudden provocation to any given case."

Our Courts have held that to determine a plea of provocation, the Courts have to determine whether the Accused was deprived of his self-control, due to such provocation and the provocation is grave.

What is provocation is considered by His Lordship Nagalingam S.P.J in K.D.J. Perera v. The King, 53 NLR 193, at page 201, held that:

> "Under our law, what has to be established by a prisoner who claims the benefit of exception 1 to section 294 of the Penal Code is : (1) that he was given provocation, (2) that the provocation was sudden, (3) that the provocation was grave, (4) that as a result of the provocation given he lost his powers of self-control, (5) that whilst deprived of the power of self-control he committed the act that resulted in the death of the victim."

Further held that:

> "In the first place, it would be necessary to ascertain what is meant by provocation. Provocation, according to the dictionary, would be any annoyance or irritation, and for our purpose it must be defined as anything that ruffles the temper of a man or incites passion or anger in him or causes

a disturbance of the equanimity of his mind. It may be caused by any method which would produce any one of the above results-by mere words which may not amount to abuse or by words of abuse, by a blow with hands or stick or club or by a pelting of stones or by any other more serious method of doing personal violence.

The next requisite is that the provocation must be such as to bring it within 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 there had been a " cooling " of his temper.

The third element is that the provocation should be grave. That is the element with which we are concerned particularly in this case. Provocation would be grave where an ordinary or average man of the class to which this accused belongs would feel annoyed or irritated by the provocation given to the extent that he would, smarting under the provocation given, resent the act of provocation or retaliate it. It is entirely dependent upon the act of the provoker and cannot be said to be based upon the nature or mode of resentment adopted by the person provoked in giving expression to his resentment."

In the instant case, the 1st Accused is the landlord who had rented out his premises to several people. By the evidence, it is established that on the day in question, the deceased had a dispute with PW1, Deepika. Thereafter, at night, the tenants were complaining about the failure of the electricity. The deceased who were the cause of this disconnection, annoyed the Accused, demanding electricity. Furthermore,

the Police had come at night to inquire regarding the complaint made by PW1 which also involved the deceased.

This series of incidents had provoked the 1st Accused. We are mindful that the 1st Accused was the landlord and the deceased were tenants. Because of the failure to pay the bill by the tenants who are deceased, there was an interruption of electricity. The deceased themselves started to irritate the Accused by questioning why there was no electricity.

Our Courts have considered how a reasonable man would react to provocation and whether he is able to self-control.

In Jamis v. The Queen, 53 NLR, 401, at page 403, His Lordship Gratiaen J. held that;

> "With regard to this ground of objection,' we have been confronted with a recent decision to the contrary effect in Rex v. David Appuhamy et al.1[(1952) 53 N. L. R. 313] in which the majority of a Bench of three Judges had ruled that a charge to the jury in almost precisely similar terms did amount to a misdirection. It was there conceded that the element of gravity did in fact introduce an objective standard, but the Court decided that, for the purposes of Exception 1, the provocation given would be sufficiently " grave " if it were " such as would cause deep resentment in the mind of a man ", or, to quote another passage, sufficient merely " to cause the ordinary man of the class to which the accused belongs to lose his temper ". This formula purported apparently to draw a distinction between provocation of a kind which may cause a mere loss of temper from provocation which is likely (although not necessarily certain) to result in an ordinary man losing his power of self-control."

“In the present case, the learned Judge's charge to the Jury as to the test of " gravity " in relation to the plea of provocation was substantially the same as the following direction in the summing-up in Naide's case (supra) which is quoted in a passage labelled " A " in the dissenting judgment of my Lord the Acting Chief Justice :-

> "A. It is important that you should not forget the emphasis that the law places on the need that the provocation should be grave. It must be provocation of a kind that a man belonging to the class of society to which the accused belongs would reasonably be expected to resent, and it must be provocation of such gravity as one would expect a person of that class to resent so deeply as to temporarily deprive him of the power of self-control."

In Muthu Banda v. The Queen, 56 NLR 217, at page 218, Her Ladyship Rose, J held that:

> “The direction criticized in this appeal is that which expresses the proposition that in considering whether a particular episode contains the elements of grave and sudden provocation the jury must apply an objective test, i.e. whether in the particular case under consideration a reasonable or average man with the same background and in the same circumstance of life as the accused would have been provoked into serious retaliation.”

Further held that;

> “The argument, as I understood it, for the appellant was that the jury, in considering the reaction of the hypothetical reasonable man" to the acts of provocation, must not only place him in the circumstances in which, the accused was placed, but must also invest him with the personal physical

peculiarities of the accused. Learned counsel, who argued the case for the appellant with great ability, did not, I think, venture to say that he should be invested with mental or temperamental qualities which distinguished him from the reasonable man ; for this would have been directly in conflict with the passage from the recent decision of this House in Mancini's case which I have cited."

Recently, in Premlal v. Attorney General, 2000 (2) SLR 403, at page 407, His Lordship Kulathilake, J. 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. Vide Jan Muhammad vs. Emperor Nanavati vs. State of Maharastra and Amarjit Singh Sohan Singh(4) referred to in the article on "The Doctrine of Continuing Provocation" by Dr. M. Sornarajah published in the Journal of Ceylon Law, June 1971.

In the latter case Sankaria, J. observed - "The past conduct of the non earning father in coming home drunk daily ... was already a standing and continuous source of provocation to the son whose meagre earnings were hardly sufficient to meet the bare needs of the family. The resentment that was building up in the mind of the son as a reaction to the continuous provocative conduct of the father spread over the past month or so, had reached a breaking point shortly before the occurrence when the drunken father set upon the son with a torrent of horrible oaths."

Further held on page 411

"The contents of this letter is important because it explains the state of mind of the accused-appellant prior to the act of stabbing and the attempted suicide. It has to be read in juxtaposition with witness Kulatilaka Bandara's description of the accused-appellant's behaviour during the period prior to

the act of stabbing. In this regard it is pertinent to refer to the observations of Agha Haidar, J. (Broadway, J. agreeing) in Jan Muhammad vs. Emperor (supra)

"Each case must depend upon its own facts and circumstances. In the present case my view is that, in judging the conduct of the accused, one must not confine himself to the actual moment when the blow, which ultimately proved to be fatal, was struck, that is to say, one must not take into consideration only the event which took place immediately before the fatal blow was struck. We must take into consideration the previous conduct of the woman. Her evil ways were the common scandal of the village and must have been known to the husband, causing him extreme mental agony, shame and humiliation".

Further, our Courts have also considered whether the Accused had an opportunity to control his anger.

In Samithamby v. The Queen, 75 NLR 49, at page 50, His Lordship H.N.G. Fernando, C.J. held that;

"In these circumstances, the majority of us considered that in terms of Exception (1) set out in s. 294 of the Code the attention of the Jury should have been drawn to the question whether the act of stabbing took place whilst the accused was deprived of the power of self-control. There was no doubt an interval of time between the giving of the provocation and the time of the stabbing, but the provocation given was sudden, in the sense that the accused must have been taken aback when he realised that his wife wished him to be dead. The evidence concerning the subsequent period made it quite probable that in fact the accused all the time suffered under a loss of self-control. Had this aspect of the matter been presented to the Jury, they should, in the opinion of the majority of us, have returned the lesser verdict."

In Rasingolle Weerasinghe Mudiyanselage Nandana Senerathbandara alias Chandi vs. The Attorney General, SC/Appeal/32/2015 decided on 17.07.2020, His Lordship Jayantha Jayasuriya, PC, CJ 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 recognised in its statutory form. Thereby, the concept of 'Continuing' or 'Cumulative' provocation has been recognised as a plea coming within the purview of the plea of grave and sudden provocation recognised 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."

In the instant case, there is evidence to show that the *actus reus* was committed by the 1st Accused in the heat of the passion whilst being deprived of his self-control due to the cumulative provocation. We are mindful that the fatal attack had taken place after a series of events that caused disturbance and irritation that existed between the Accused and the deceased. Considering that the 1st Accused is the landlord where the deceased had failed to pay the electricity bill which resulted in other tenants complaining to him and where the Police had come and inquired him about a quarrel involving the deceased, it shows that provocation was sufficient to result in a reasonable man losing his power of self-control. In addition, the deceased's wife had continuously irritated the Accused, saying that

the child could not sleep because of the interruption of electricity. That should have caused mental stress to the 1st Accused.

There is no evidence to show that this was a preplanned attack. We hold that the Learned Trial Judge failed to consider the evidence placed before her with regard to the mitigatory plea of cumulative provocation which would have reduced the conviction to culpable homicide not amounting to murder. We are also mindful that for an Accused to succeed in the plea of grave and sudden provocation, it could be proved on a balance of probability.

We are mindful that the Accused, in their defence did not take the defence of grave and sudden provocation. But the Judge has a duty cast on him to consider such a plea if it emanates from the evidence of the Prosecution.

In King vs. Widanalage Lanty, 42 NLR 317, His Lordship Moseley SPJ held that

> "The remaining ground of appeal is that the jury were not directed properly on the matter of a fight before the deceased was stabbed. That is to say, that it was not brought to the notice of the jury that there was some evidence upon which, if they believed it, it was open to them to find that the appellant was guilty of culpable homicide not amounting to murder, as provided by exception 4 to section 294 of the Penal Code. The learned Judge did in fact put it to the jury that, if they were convinced beyond reasonable doubt by the evidence for the prosecution, it was clearly their duty to find the appellant guilty of murder, but that, if they believed the defence, they would not hesitate to acquit him. No question of culpable homicide not amounting to murder, he said, arose on his defence. It is a fact that no such defence

was put forward by him or on his behalf. In William Hopper ' the defence, as in this case, was that of accident. In that case, however, Counsel for the defence indicated that, if that defence failed, he should hope for a verdict of manslaughter only. But the Court expressed its view that, even if Counsel had not contended for a verdict of manslaughter, the Judge was not relieved of the necessity of giving the jury the opportunity of finding that verdict. In The King v. Bellana Vitanage Eddin 2 Howard C.J. in referring to a defence that had not been raised nor relied upon at the trial, said that that fact was not in itself sufficient to relieve the Judge of the duty of putting this alternative to the jury " if there was any basis for such a finding in the evidence on the record". A similar view was expressed in The King v. Albert Appuhamy'."

Applying the principles laid down in the said judicial decision, we hold that the Learned Trial Judge should have convicted the 1st Accused for the offence of culpable homicide not amounting to murder under section 297 of the Penal Code on the basis of grave and sudden provocation.

Regarding the 2nd Accused, there is no iota of evidence to show that she shared a common intention with the 1st Accused with regard to the murders of both the deceased. It is true that she had gone with the 1st Accused around 9 o'clock. But there was no evidence to show that the deceased were murdered at that time. Thereafter, the 1st Accused had gone alone with a knife. We are mindful that the medical evidence revealed that both the deceased had cut injuries. According to PW4, she had seen the 1st Accused going alone with a manna knife. But the Learned High Court Judge had misdirected herself that the 2nd Accused had also gone with the 1st Accused at the 2nd time.

For the said reasons, we set aside the conviction of murder and the death sentence imposed on the 2nd Accused.

Against the 1st Accused, we substitute a conviction of culpable homicide not amounting to murder, which is an offence under Section 297 of the Penal Code under grave and sudden provocation.

We sentence the 1st Accused to a term of 10 years of rigorous imprisonment for each count and to run concurrently. Accordingly, the sentence of imprisonment shall take effect from the date of conviction, 22.03.2017.

The fine imposed by the Learned Trial Judge on each count remains unaltered.

In addition, we direct the 1st Accused to pay Rs. One Million as compensation to the child of the deceased, in default, he has to serve 3 years of rigorous imprisonment in addition to the earlier sentence, which should run consecutively.

Further, we direct the Learned High Court Judge to take steps to grant the said compensation to the deceased's child.

Subject to the above variations of the sentence, the appeal of the 1st Accused is dismissed, and the appeal of the 2nd Accused is allowed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.
I AGREE

JUDGE OF THE COURT OF APPEAL