**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, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

**Complainant**

**Court of Appeal Case No. HCC/0184/2019**

V.

**High Court of Kegalle Case No. HC/3443/2014**

Seyyadu Najibudeen Moulana

**Accused**

AND NOW BETWEEN

Seyyadu Najibudeen Moulana

**Accused - Appellant**

V.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

**Respondent**

**BEFORE** : **K. PRIYANTHA FERNANDO, J. (P/CA)**

**SAMPATH B. ABAYAKOON, J.**

**COUNSEL** : Hafeel Farisz for the Accused – Appellant.

Maheshika Silva, Senior State Counsel for the Respondent.

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| **ARGUED ON** | : | 03.12.2021 |
| **WRITTEN SUBMISSIONS FILED ON** | : | 06.04.2021by the Accused – Appellant.<br>29.11.2021 by the Respondent. |
| **JUDGMENT ON** | : | 12.01.2022 |

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**K. PRIYANTHA FERNANDO, J.(P/CA)**

1. The accused appellant (hereinafter referred to as appellant) was indicted in the High Court of *Kegalle* on the following counts;

   I. That the appellant committed the murder of *Abdul Saim Ummu Nazima*, an offence punishable in terms of section 296 of the Penal Code.

   II. In the same transaction, the appellant caused hurt on *Subair Nuur Shihana*, punishable in terms of section 314 of the Penal Code.

   III. The appellant caused mischief to the value of Rs. 50000/- to the vehicle bearing registration No. 50-6275 belonging to *Mohomed Junaideen Mohomed Sadik*, punishable in terms of section 410 of the Penal Code.

   IV. The appellant caused mischief to the value of Rs.10000/- to the vehicle bearing registration No. 252-8907 belonging to *Mohomed Zubair Mohomed Rauzan*, punishable in terms of section 410 of the Penal Code.

2. Upon conviction for all four counts after trial, the learned High Court Judge sentenced the appellant to death on count no. 1. For count no. 2, the appellant was sentenced to rigorous imprisonment for one year, in addition a fine of Rs. 1000/- was imposed. For counts no. 3 and 4 the appellant was sentenced on each count to rigorous imprisonment for two years and in addition a fine of Rs. 5000/- was imposed. The instant appeal was preferred by the appellant against the said conviction and sentence on the four counts in the indictment.

3. Although seven grounds of appeal were mentioned in the written submissions of the counsel for the appellant, at the argument stage, the

learned counsel for the appellant pursued the following two grounds of appeal;

I. The learned High Court Judge misapplied the exception 1 of section 294 of the Penal Code.

II. The learned High Court Judge failed to address his judicial mind to the presumption contained in section 114(f) of the Evidence Ordinance.

4. Facts in brief;
As per the evidence of the prosecution witness *Mohomed Zubair Mohomed Rauzan* (PW1), the appellant is his brother-in-law married to his sister *Nuur Rishana*. There had been family disputes between the appellant and his wife. On the day of the incident, PW1 had been at his aunt's place watching television. He had heard the wife of the appellant (his sister) shouting "ගහන්න එනවා දොර වහ ගන්න**"** (Page 46 of the brief)**.** Upon hearing the said words from his sister *Rishana*, he had gone to his compound. The appellant who was holding an *axe* had shouted at the witness "වරෙන් වරෙන්" (Page 49 of the brief). He had seen the mother (deceased) lying fallen. When the witness went forward towards the appellant, he had gone backward. When the witness followed the appellant, he had gone inside a thicket. By the time he came back, his mother had been taken to hospital.

*Abdul Cader Mohomed Ikram* (PW2) also had been in the neighbor's house with PW1 when he heard the shout by the appellant's wife. Appellant's wife had shouted "මරන්න එනවෝ" (Page 64 of the brief). When he came out to see, the appellant had been in PW1's compound and had called them "වාංග, වාංග**"** (Page 67 of the brief). He had run as he got scared. When he came back, he had seen the deceased lying fallen. *Rauzan's* vehicle also had been damaged.

PW3 *Nuur Shihana* is the daughter of the deceased. Upon hearing the noise of a vehicle being damaged she had come out to see two vehicles were damaged. Her mother (deceased) had been lying fallen bleeding from the head. The appellant had hit her also with the handle of the axe. She had said in her evidence that the appellant uttered "උඹත් වරෙන් කියලා ඉවර වෙලා මට ගැහුවා. …පොරවේ මිටෙන්" (Page 85 of the brief), and assaulted her with the handle of the axe.

5. It is the contention of the learned Counsel for the appellant that the learned High Court Judge failed to consider that the appellant has acted whilst he was deprived of the power of self-control by grave and sudden provocation.

6. Exception 1 of section 294 of the Penal Code provides;

> *"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."*

7. The appellant has never taken the defence of grave and sudden provocation when the witnesses for the prosecution testified in court at the trial. This defence was never put to the witnesses for the prosecution even in cross examination. It seems that the appellant as an afterthought has, while admitting the offence in his statement from the dock has said that this happened due to sudden provocation.

8. In terms of section 105 of the Evidence Ordinance, when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code is upon him. Also, in terms of section 106 of the Evidence Ordinance, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

9. I bear in mind that even if the accused has not specifically pleaded the exception of grave and sudden provocation, it is incumbent upon the court to consider whether evidence suggests the same.

10. In the case of ***R.M. Karunaratne Vs. The Attorney General C.A. 181/2009***, ***H.C. Puttalam 84/05 decided on 21.11.2011***, held:

> "*If the plea of grave and sudden provocation is available from the evidence of the prosecution itself, court has a duty to consider such a plea even if the accused did not raise it."*

11. In the instant case the evidence adduced at the trial does not even suggest that the appellant was provoked. There is no evidence to show that the deceased ever provoked the appellant, nor that the deceased was assaulted by the appellant by accident. There is no evidence other than the statement by the appellant from the dock that the appellant was provoked by any

person at the crime scene or around that time. Hence, the first ground of appeal should necessarily fail.

12. It was submitted by the learned counsel for the appellant, that the failure of the prosecution to call the wife of the deceased who alarmed the others by shouting as testified by the witnesses for the prosecution, should be taken against the prosecution in terms of section 114 illustration (f) of the Evidence Ordinance. It is the contention of the learned counsel that the prosecution did not call the wife of the deceased as it would be unfavourable to the prosecution if they called her to testify.

13. In terms of section 120 of the Evidence Ordinance, wife of the appellant is not a competent witness in the instant case to testify against the appellant. However, she is a competent witness if called by the appellant. This is not a case against the appellant for causing injury or violence against his wife. Thus, the 2nd ground of appeal is devoid of merit.

14. Hence, the judgment of the learned High Court Judge convicting the appellant on all four counts in the indictment and the subsequent sentences imposed are affirmed.

Appeal dismissed.

**PRESIDENT OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**