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

In the matter of an Application for Special Leave to Appeal to the Supreme Court from the judgment dated 14th of February 2012, of the Court of Appeal in case No. CA Appeal No. 237/2007 under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 97/2012

SC (SPL) LA No. 61/2012

CA No. 237/2007

HC No. 300/2001

The Honourable Attorney General,

Attorney General's Department

Colombo 12.

Vs.

Parana Liyanage Chaminda

ACCUSED

And Between

Parana Liyanage Chaminda

ACCUSED-APPELLANT

Vs.

The Honourable Attorney General,

Attorney General's Department

Colombo 12.

RESPONDENT

And Now Between

Parana Liyanage Chaminda
(Presently at the Welikada Prison, Colombo)

ACCUSED-APPELLANT-PETITIONER

Vs.

The Honourable Attorney General,

Attorney General's Department

Colombo 12.

RESPONDENT-RESPONDNET-RESPONDENT

Before: Buwaneka Aluwihare PC J

Shiran Gooneratne J

Arjuna Obeyesekere J

Counsel: Saliya Pieris, PC with Susil Wanigapura for the Accused-Appellant-Petitioner-Appellant.

V. Hettige, SDSG for the Attorney General.

Written Submissions: Written submissions of the Accused-Appellant-Petitioner-Appellant 09.07.2012.

Written submissions of the Respondent-Respondent 24.08.2012.

Argued on: 04.05.2022

Decided on: 13.09.2023

JUDGMENT

Aluwihare PC. J,

(1) The Accused-Appellant-Petitioner-Appellant [Hereinafter referred to as the 'Accused'] was indicted along with another before the High Court for the murder of one Kodagodage Sunil Jayaweera [Hereinafter referred to as the 'Deceased'] on or about 9th May 1998.

(2) The trial before the High Court had proceeded only against the Accused as the Attorney-General withdrew the indictment against the other accused who was indicted along with the Accused-Appellant in the present case.

(3) At the conclusion of the trial, the learned High Court judge found the Accused guilty as indicted, and accordingly the death sentence was imposed on him. The Accused, aggrieved by the said judgement, moved by way of an appeal to the Court of Appeal. By its judgement dated 14.02.2012, the Court of Appeal dismissed the appeal, affirming the conviction and sentence imposed on the Accused.

(4) The instant appeal arises out of the said judgement of the Court of Appeal. This court granted special leave to appeal on the questions of law which are referred to in sub-paragraphs (b), (e), (h), (j) and (k) of Paragraph 11 of the Petition of the Accused-Appellant which are reproduced below;

(b) *Whether their Lordships in the Court of Appeal have failed to consider that in rejecting the evidence of the defence and accepting the version of the prosecution witness, the learned High Court judge had required of the defence the same burden of proof as required by the prosecution?*

(e) *Whether their Lordships in the Court of Appeal and the learned High Court Judge have failed to fairly and properly evaluate the Defence evidence?*

(h) *Whether their Lordships in the Court of Appeal and the learned High Court Judge have failed to consider the inconsistencies of the evidence of the prosecution witnesses?*

(J) *Whether their Lordships in the Court of Appeal and the learned High Court judge have failed to consider the evidence of the existence of a sudden fight?*

(k) *Whether in all the circumstances of the case the petitioner should have been acquitted of the count of murder or have been convicted of the lesser offence of culpable homicide not amounting to murder?*

(5) Before the legal issues raised are addressed, it would be pertinent to lay down the factual background to the incident that resulted in the death of the deceased.

(6) In the course of the evidence led at the trial, it transpired that the deceased, was living as a tenant, with his family in a small wattle and daub house belonging to the father of the Accused.

(7) Sometime before the incident, the accused had got married and he had wanted the deceased to vacate the premises as the accused intended to move in there with his wife. It appears that the deceased had wanted three months to find alternative accommodation.

(8) The deceased had not, however, moved out and on the day prior to the incident on which the deceased died, the Accused had come to the house of the deceased

accompanied by another person and had caused damage to the structure of the house when the deceased was out at work.

(9) Consequently, the deceased had complained to the police and who had inquired into the Complaint. As no settlement could be reached between the parties, the police had referred the matter to the Mediation Board but had permitted the deceased to attend to the necessary repairs to damaged house.

(10) On the day following, whilst the deceased was engaged in attending to the re-building of the damaged house, the Accused had arrived at the scene and had attacked the deceased with a 'Manna' knife and as a result he had succumbed to the injuries.

(11) According to Dr. Dahanayake who carried out the autopsy, he had observed a deep cut injury on the back of the neck, 25 cm in length which had completely severed the brain stem and the Atlas vertebra, and the injury had been 10cm in depth. The doctor has expressed the opinion that the injury referred to is one that is necessarily fatal.

The Version of the Accused

(12) The Accused testifying under oath, in his examination-in-chief itself, admitted that he attacked the deceased with a knife and that the deceased sustained an injury as a result. According to the Accused, the deceased had been residing there for about 13 years and about a year prior to the incident, he had asked the deceased to vacate the house as he wished to move in there after his marriage, however, the deceased had not acceded to his request.

(13) The accused also had admitted that, on the day before the incident he visited the deceased and demanded vacant possession of the house. However, the deceased again was not agreeable. Infuriated by this response the accused had kicked the walls of the house, and as a result the walls had collapsed. Then, both parties had gone to the police. As the police could not resolve the dispute, they had referred the matter to the Mediation Board and had told the feuding parties that the deceased should be permitted to continue occupying the premises until such time the matter is inquired into by the Mediation Board. It is also significant to note that the deceased had sought permission to re-erect the walls and the accused said in his evidence that he agreed to allow the deceased to repair the damage.

(14) In switching to an incident out of sequence, the Accused had said in his testimony that the deceased suddenly grabbed a mamoty and as he got frightened, in order to protect himself he picked a knife that was kept on the roof of a nearby chicken coop and attacked the deceased. Then he says he fled the area through fear and later surrendered to the police through his relatives.

(15) Under cross examination it was elicited, that the Accused had gone in the direction where the deceased was living the day after the parties went to the police over the housing dispute. The Accused had said that he saw the deceased engaged in the process of re-building the house but had observed that the new construction was larger than the one that existed, and he questioned the deceased why so, having walked up to him. The deceased had been kneading clay at the time. The accused, in his examination-in-chief, had said that the deceased grabbed the mamoty and due to fear, he picked the knife and attacked the deceased.

(16) The daughter of the deceased, Nilusha who had been a girl of 13 years at the time had testified to the effect that both the Accused and another person had come to their house on the previous day and toppled the posts that supported

the structure of the house and it collapsed. Her father had been out at work at the time. On the day her father died, the family members were engaged in the process of rebuilding. At one point, after kneading clay, her father had squatted complaining that he is exhausted. She had also seen the Accused hovering in the vicinity looking in the direction of the construction that was going on. At one point, the accused had approached her father from behind and having pulled out a knife which was tucked under his shirt, had dealt a blow on the neck of her father. Apart from a solitary omission highlighted by the defence, Nilusha's testimony is free from any contradictions or any other infirmities.

(17) The wife of the deceased Vinitha had also testified, but she had not witnessed the attack on her husband as she had gone to fetch water and only had rushed to the scene on hearing the cries of distress of her daughter Nilusha.

The Issues raised on Behalf of the Accused

(18) It was contended on behalf of the Accused that both the learned High Court Judge as well as the Court of Appeal failed to consider the applicability of special exceptions to the Section 294 of the Penal Code, namely grave and sudden provocation and/or sudden fight. It was the contention of the learned President's Counsel that there was evidence emanating from the testimony of the prosecution witnesses of a sudden fight.

(19) It was further contended that the learned High Court Judge failed to consider the omission in the testimony of the sole eyewitness, Nilusha, who testified on behalf of the prosecution. It was pointed out that, although Nilusha in her evidence had stated that the accused pulled out a knife that was tucked behind his shirt, she had not stated this fact either in her statement to the police or the depositions she made at the non-summery inquiry.

(20) Considering the fact that the witness [Nilusha] was a child of 13 years at the time she made the statements, it is possible that due to her tender age, she may not have been mature enough to appreciate the significance of that fact, at the time she made the statements. In addition, she would have been a distressed child having lost her father. In this context, I am of the view that the omission referred to is not of such gravity to discredit the testimony of Nilusha. As referred to earlier, other than this omission, her evidence had been consistent and remains un-impugned.

The Questions of Law

(21) Before dealing with the questions of law, it is necessary to bear in mind the Constitutional provision embodied in the proviso to Article 138(1) which reads;

*"Provided that **no judgement** decree or order of any court **shall be reversed or varied** on account of any error, defect or irregularity, which has **not** prejudiced the substantial rights of the parties or **occasioned a failure of justice".*** [Emphasis added]

(22) In view of the constitutional provision referred to, which is in mandatory terms, the duty cast on the Court of Appeal would be to consider the appeal within the scope of the proviso and, this court in turn, would be required to consider whether the Court of Appeal and/or the High Court were in error in coming to the conclusions, notwithstanding that the Accused had satisfied that his substantial rights have been prejudiced or the error or the defect relied on by the Accused had occasioned a failure of justice.

(23) Similar thresholds are found in the proviso to Section 334(1) and Section 436 of the Code of Criminal procedure Act No.15 of 1979 which stipulate that notwithstanding the fact that the point raised in appeal might be decided in

favour of the Appellant, the court can dismiss the appeal if it is of the opinion that "no substantial miscarriage/failure of justice" has in fact occurred.

(24) The legal effect of these two provisions which are applicable to criminal appeals, in my opinion, would be that, in order to succeed in his appeal, it is not sufficient for an accused to merely impress upon court that the issue raised might be decided in favour of the Accused. The accused must also satisfy court that a substantial miscarriage of justice has in fact occurred or that the decision had occasioned a failure of justice.

(25) In relation to the question of law referred to in sub-paragraph (b) of paragraph 11 of the Petition of the Accused, it was submitted that the Court of Appeal failed to consider the fact that the learned High Court judge had placed the same burden of proof on both the prosecution as well as the defence. It was pointed out that the burden on the prosecution to establish the charges is beyond reasonable doubt whereas as it is not so in case of the defence.

(26) In explaining the conduct of the Accused, in the course of the submissions, it was pointed out that the situation was such that the Accused acted in self-defence. In considering the defence raised on behalf of the Accused, the learned trial judge had referred to the applicable legal principles on the burden of proof cast on an accused in a criminal case in relation to establishing a 'defence' [Page 8 of the judgement]. The Trial Judge had gone on to state that the burden [on an accused] is on a 'balance of probability' and also had referred to the fact that even in instances where the defence raised fails to reach that threshold, if a reasonable doubt arises from the prosecution case, the accused would be entitled to the benefit of the doubt. The learned trial judge had also referred to the fact that, even if the defence version is totally rejected, still the prosecution cannot succeed, unless it proves the case beyond reasonable doubt.

(27) The relevant portion is produced in verbatim below;

> "මෙහි ඉදිරිපත් වූ සාක්ෂි අනුව මෙම නඩුවේ චූදිත විසින් සුනිල් ජයවීර ඔහු හට උදැල්ලකින් පහර දීමට තැත් කළ නිසා තම ආත්මාරක්ෂාව මත එම ස්ථානයේ තිබූ මන්නා පිහියකින් පහර දුන් බවට සාක්ෂියක් විත්තිය වෙනුවෙන් ලබා දී ඇත. විත්තියට එම කරුණ ඔප්පු කිරීමට වගකීම ඇත්තේ වැඩි බර සාක්ෂි මත වන අතර, එම කරුණ ඔප්පු කිරිමට නොහැකි වන අවස්ථාවක දී වුවද, සැකයක් මතුවන්නේ නම් එහි සැකයේ වාසිය විත්තියට ලබා දිය යුතු අතර, විත්තියේ ස්ථාවරය ප්‍රතික්ෂේප කරනු ලැබුවද පැමිණිල්ල විසින් නඟා ඇති චෝදනාව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කිරීමේ වගකීම සෑම විටම පැමිණිල්ල මත රඳා පවතී."

(28) The passage in the judgement referred to above not only demonstrates that the learned trial judge had been alive to the relevant principles on burden of proof and this court wishes to observe that the learned trial judge had not erred in that regard, particularly in relation to the burden of proof cast on an accused in establishing a special exception under Section 294 of the Penal Code.

(29) Considering the above, it cannot be said that the learned High Court Judge had placed the same burden of proof on both the prosecution and the defence. When the question of law raised on behalf of the Accused is viewed in the light of the observations made by the learned High Court Judge referred to above, I answer the question of law referred to in sub-paragraph (b) of paragraph 11 of the petition in the negative.

(30) The next question of law [sub paragraph (e) of paragraph 11] on which special leave was granted was whether the Court of Appeal and the High Court failed to evaluate the defence version 'properly and fairly'.

(31) As referred to earlier, there is no dispute that the injury that resulted in the death of the deceased was inflicted by the Accused. The only question that this

court has to address is whether the injury was caused at a time the accused was deprived of the power of self-control due to grave and sudden provocation offered by the deceased.

(32) From the evidence led in the course of the trial, it is quite evident that the deceased had acted with considerable restraint throughout the incident, in the context of what he faced at the hands of the Accused. In his absence, his house where he lived with his young family was demolished by the accused and another. This was not denied by the Accused either.

(33) The only action the Deceased took was to seek the assistance of the law enforcement by lodging a complaint with the police, an action any law-abiding citizen would resort to in the face of an adversary of this nature. At the police inquiry he requested that he be given permission to rebuild his house, the request which the Accused acceded to.

(34) The following day, the deceased with the help of his family members were engaged in the process of rebuilding the damaged house, and even when they saw the Accused hovering in the vicinity, there is nothing to say that the deceased acted in any manner that would have provoked the Accused.

(35) According to the Accused's own evidence, it was he who approached the Deceased and questioned him. The fact remains that the deceased had had no dealings with the Accused, the reason being it was the father of the Accused who was the landlord, he had not interfered with the peaceful occupation of the premises.

(36) In the backdrop of the events that took place on the previous day, which ended with the Deceased and the Accused having to attend the police station, the Accused ought not to have disturbed the deceased who was in the process of rebuilding his house and if he had any issue with the way the house was being

put up by the deceased, the Accused could easily have lodged a complaint with the police rather than confronting him.

(37) The gravamen of the argument of the learned President's Counsel was that the learned Trial Judge failed to consider whether the Accused acted under grave and sudden provocation and in addition, the Trial Judge ought to have considered whether the deceased sustained the injury in the course of a sudden fight.

(38) The Accused did say in his evidence that when he questioned the Deceased as to why he was putting up a building that was larger than the one that was destroyed, the deceased became abusive and he supposed to have retorted;

"I do not do things the way you want. I will build the house the way I want."

[තොට ඕනෑ විදිහට මම වැඩ කරන්නේ නැහැ. මට ඕනෑ විදිහට මම ගෙය හදනවා].

(39) In addition to the mitigatory exception of grave and sudden provocation, the learned President's Counsel also argued that both the learned High Court Judge and the Court of Appeal failed to consider the special exception 4 of Section 294 of the Penal code, namely whether the act of causing the fatal injury was committed in a sudden fight. The President's Counsel argued that the evidence unfolded in the course of the trial provided the existence of circumstances to bring the case within the ambit of the two exceptions referred to.

(40) In view of the contrasting versions of the prosecution and the defence, as to how the attack on the deceased took place, it would be necessary to consider the 'legal burden' cast on the accused to establish his version, if he is to succeed in his mitigatory defences referred to above.

(41) Section 105 of the Evidence Ordinance delineates the burden of proving the existence of circumstances bringing a case within the ambit of special exceptions of the Penal Code and states;

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

The illustration (b) of that section sheds further light as to the burden of proof and reads;

"A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control. The burden of proof is on A."

(42) In the case of ***James Chandrasekera v. The King* 44 NLR 97**, seven judges of the Court of Criminal Appeal considered this issue in depth and held,

"*Where, in a case in which any general or special exception under the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the Jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is not entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the Jury as to whether he is entitled to the benefit of the exception pleaded.*"

(43) The majority of the judges, [de Kretser J dissenting], in the case of ***Chandrasekera*** [*supra*] held that, in a case where a general or special exception under the Penal Code is pleaded, a reasonable doubt being created in the minds of the jury, as to the applicability of the exception, does not render the accused entitled to its benefit. **Dr. G.L. Peiris** expresses the view that "*the relevant provisions of the Evidence Ordinance, read with the majority judgment in James Chandrasekera [supra] have the effect that the plea of grave and sudden provocation is required to be established by the accused on a balance of*

probability" [**Offences under the Penal Code of Ceylon, first edition at pgs., 102-103**].

(44) Thus, the law as it stands today is that, where in a case in which any general or special exception under the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the court affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is not entitled to relief if, upon a consideration of the evidence as a whole, a reasonable doubt is created as to whether he is entitled to the benefit of the exception pleaded.

(45) Along with the decisions of ***King v. Coomaraswamy*** **41 NLR 289**, ***King v. Kirigoris*** **48 NLR 407** and ***Regina v. Piyasena*** **57 NLR 226** relied on by the learned President's Counsel, the decision in the case of ***James v. The Queen*** **53 NLR 401** was also considered. The main issue that confronts us in the instant case is, even if the version of the accused is believed [which the learned High Court Judge had rejected] would the alleged provocation, satisfy the objective norms postulated by the law. In the case of ***James*** [*supra*] the Court observed that;

> "*He [accused] must in addition, establish that such provocation, objectively assessed, was "grave and sudden enough to prevent the offence from amounting to murder". That depends upon the actual effect of the provocation upon the person provoked and upon the probability of its producing a similar effect upon other persons*".

In the same case Justice Gratiaen went on to state;

"*On grounds of public policy, the Legislature which enacted Exception 1 to section 294 designedly denies the mitigatory plea of "grave and sudden provocation" to a prisoner whose reaction to provocation in any particular case falls short of the minimum standard of self-control which can*

reasonably be expected from an average person of ordinary habits, placed in a similar situation, who belongs to the same class of society as the prisoner does".

(46) In the context of the case, I find the Accused cannot benefit from the mitigatory defence of provocation due to two reasons;

Firstly, even assuming the deceased uttered the alleged provocative words, still they do not meet the objective norms of the exception.

Secondly, the benefit of the exception is denied to a person who seeks provocation or where the offender voluntarily provokes, as an excuse for the retaliation.

(47) The facts of the case, in my view did not warrant the consideration of either the exception of provocation or sudden fight and in the circumstances the questions of law referred to in sub-paragraph (e) [evaluation of defence evidence], sub-paragraph (j) [failure to consider evidence of the existence of a sudden fight] and the consequential question of whether in the circumstances of the case the accused should have been convicted of the lesser offence of culpable homicide not amounting to murder, referred to in sub-paragraph (k) of paragraph 11 of the Petition are also answered in the negative.

(48) The learned President's Counsel also argued that the learned High Court Judge had failed to consider the inconsistencies of the evidence of the prosecution witnesses. [Question of law referred to in sub paragraph (b) of Paragraph 11 of the Petition]. Apart from the omission relating to the act of the Accused pulling out the knife tucked under his shirt, there are no major inconsistencies in the testimony of the sole eyewitness Nilusha. I have dealt with the testimony of Nilusha in detail in paragraphs (19) and (20) of this judgement and I do not wish to refer to my findings again.

(49) It was pointed out on behalf of the Accused that the wife of the deceased was contradicted by a statement she made at the inquest which was indicative of a sudden fight which was not considered by the learned Trial judge. Witness Vinitha was categorical in her evidence that she saw the Accused in the vicinity, but she did not see the Accused speaking to the deceased. She also rejected the suggestion put to her that her husband spoke to the Accused in a provocative manner. It was pointed out, however, that at the inquest proceedings she had said "then he [meaning the accused] was talking to my husband". The eyewitness Nilusha was also cross examined as to whether there was an exchange of words between the Accused and the deceased to which she answered in the negative. I am of the view that when the contradictory statement referred to is considered with the rest of the evidence, it would not be possible to draw the inference that there was an exchange of words that led to a sudden fight. Accordingly, I answer this question of law [Sub paragraph (b)] also in the negative.

(50) Having considered the evidence led at the trial, I am of the view that the learned High Court Judge was justified in accepting the evidence of witness Nilusha and acting on the same. When one considers the totality of the evidence of this case, the accused had failed to discharge the evidentiary burden cast on him in terms of Section 105 of the Evidence Ordinance to bring his case within the ambit of the special exceptions to Section 294 of the Penal Code and the learned High Court Judge cannot be faulted for not acting on the evidence of the Accused.

(51) I am further of the view that the grounds urged on behalf of the Accused are not sufficient to mitigate the conviction of murder to that of culpable homicide not amounting to murder, and I hold that neither the learned High Court Judge nor the Court of Appeal erred in arriving at the conclusion that the accused was guilty of the offence of murder.

Accordingly, the conviction and the sentence imposed on the Accused is affirmed and the appeal is dismissed.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Shiran Gooneratne J

I agree

JUDGE OF THE SUPREME COURT

Arjuna Obeyesekere J

I agree

JUDGE OF THE SUPREME COURT