

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

In the matter of an application for Special  
Leave to Appeal.

SC Appeal 32/2015  
SC SPL LA No. 159/14  
CA Appeal No. 251/2007  
HC Polonnaruwa 101/2006

Rasingolle Weerasinghe Mudiyansele  
Nandana Senerathbandara alias Chandi  
No. 21, New Mahasenpura  
Welikanda.

**Accused-Appellant-Petitioner**

**Vs.**

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

**Complainant-Respondent-Respondent**

Before : Jayantha Jayasuriya, PC, CJ  
S. Thurairaja, PC, J.  
E.A.G.R. Amarasekera, J

Counsel : Shanaka Ranasinghe, PC with Nisith Abeysuriya instructed by  
Chatura Dissanayake for the Accused-Appellant-Appellant  
Chethiya Gunasekera, DSG for the Complainant-Respondent-  
Respondent.

Argued on : 03.02.2020

Decided on : 17.07.2020

**Jayantha Jayasuriya, PC, CJ**

The Accused-Appellant-Petitioner (hereinafter who is referred to as the accused) was indicted along with his father in the High Court of Polonnaruwa. They were indicted for Murder and Attempted Murder. The accused was convicted on both counts and his father was acquitted from both counts after trial before a Judge. Death sentence was imposed on the accused for the count of Murder and a term of fifteen years rigorous imprisonment and a fine of five thousand rupees was imposed for the count of attempted murder. The accused appealed against the convictions and sentences and the Court of Appeal dismissed the said Appeal.

Although, this Court had granted Special Leave on eight questions of law raised in the Petition of Appeal, the learned President's Counsel during the hearing before this Court submitted that the only question of law that is pursued before this Court is the question, whether the judgment of the Court of Appeal is contrary to law and against the weight of evidence adduced at the trial. In this context the Learned President's Counsel submitted that the judges of the Court of Appeal misdirected themselves and / or erred when they affirmed the conviction of the accused for murder. Further narrowing down the issue, he contended that if the trial judge as well as the judges of the Court of Appeal properly analysed the facts of this case, culpability of the 1<sup>st</sup> accused should have been reduced to Culpable Homicide not amounting to Murder on the basis of Grave and Sudden Provocation. The contention on behalf of the accused is, that he had acted due to "cumulative provocation".

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

"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".

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 bring a situation within the parameters of this exception. Such provocation needs to be ‘grave and sudden’. As the explanation to Exception 1 of section 294 of the Penal Code clarifies, whether a particular instance of provocation is grave and sudden is a question of fact. The Court will have to determine this issue based on the facts of each case. In addition to the existence of such provocation, the accused should have been deprived of the power of self-control due to such provocation. One other important aspect is that the accused should either cause the death of the person who caused that provocation or should have caused the death of any other person due to a mistake or an accident.

The Privy Council in **Attorney-General v John Perera** (54 NLR 265) observed that

“The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self control by reason of provocation” (ibid at p 269).

The Privy Council in the same judgment further 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 that deprivation was caused by provocation which in the opinion of the jury was both grave and sudden”. (ibid at p 269).

In **Jamis v The Queen** (53 NLR 401 at 404) the Court of Criminal Appeal held that

“A mitigatory plea under Exception 1 to section 294 is not available to an accused person who can only satisfy the jury that, at the time when he intentionally killed a person who had provoked him, he was acting under the stress of that provocation. He 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*”.

It is also pertinent to observe that the Court of Criminal Appeal in **K.D.J. Perera v The King** (53 NLR 193 at 202) held ,

“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 had been a “cooling” of his temper”.

It is trite law 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” G.L.Peiris , 2<sup>nd</sup> Ed, page 103).

Submissions of the Learned President’s Counsel for the accused and of the learned Deputy Solicitor-General needs to be considered in the context of jurisprudence set out above, to decide whether the appellant should have been given the benefit of the plea of provocation and convicted for the offence of culpable homicide not amounting to Murder.

The deceased in this case is a thirty-three years old lady. According to the evidence of the Judicial Medical Officer, the death was caused due to brain damage following gun shot injuries. There had been four entry wounds on the face and two of them were on either of the eyes. The victim who received firearm injuries in the course of the same transaction was 20 years old at the time of the incident. Altogether there had been seven entry wounds on his body and two of them were on the chest area. They were identified as injuries that are sufficient in the ordinary course of nature to cause death. When the nature of the injuries and the nature of the weapon used to

commit such injuries are taken into account, there is a little difficulty to conclude that the person who caused these injuries had entertained a “murderous intention” as described under section 294 of the Penal Code.

The prosecution has presented evidence of three eye-witnesses to the incident. They were the injured victim (the brother-in-law of the deceased), the daughter of the deceased who was eleven years of age at the time of the incident and a neighbour of the accused.

According to the injured victim, on the day in question, he had cycled passing the house of the accused. At that stage the accused had questioned the victim regarding an issue over the employees who were initially working for the accused and had later joined the victim. The victim was assaulted and his cycle was pushed to a side by the accused. A scuffle had ensued between the two. However, the brother and the father of the victim had later on rushed to the scene after the victim ran away and the accused had handed over the victim’s push cycle to them.

The victim who ran towards his house had met his brother, the sister-in-law and their daughter who were heading towards their paddy field. The Victim also had joined them. They’ve had to walk passing the house of the accused to reach their paddy field. When they were nearing the said house he had heard the father of the accused who stood trial as the 2<sup>nd</sup> accused verbally abusing them and thereafter asking the accused to open fire at them. Then the victim had seen the accused approaching them armed with a gun and opening fire at the deceased first. Thereafter a second shot had been fired at the victim. He sustained injuries and fell on the road. Later on the victim had seen the deceased lying with injuries and the daughter weeping near the deceased. The victim was admitted to the hospital and had been treated as an in house patient. These incidents had taken place around 7.30 in the morning.

The neighbour of the accused had corroborated the evidence of the victim on material points. She had witnessed both incidents. The witness says that she witnessed the accused bringing a gun from her house and later opening fire at the deceased and the victim. She confirmed that two shots were fired. Thereafter the accused had run away leaving the gun behind.

Police officers who visited the scene had taken charge of the gun and the witness had identified the gun at the trial. This witness said that there was a gap between the initial scuffle between the accused and the victim and the second incident of shooting.

The daughter of the deceased who witnessed the shooting also had testified at the trial and had corroborated the evidence of the other two witnesses.

Both, the accused and his father, the 2<sup>nd</sup> accused made dock statements. The accused in his dock statement admitted that there was an argument between him and the victim, initially. He said that the incident of shooting took place, thereafter. According to the accused, after the first incident he was attacked and he ran into a nearby house to hide. Then he saw the gun lying there. He claimed that the gun went off when he pointed it.

The 2<sup>nd</sup> accused claimed that he was not at the scene.

The learned trial judge having analysed the evidence had accepted the evidence of the prosecution. He had focused on the evidence of the neighbour of the accused and had concluded that she is an independent witness. The learned trial judge rejected the versions of the two accused. However, acquitted the 2<sup>nd</sup> accused on the basis that the evidence failed to prove a common intention between the two accused. The accused in his *allocutous* said that he did not intentionally shoot at the crowd. He claimed that he opened fire as he was assaulted.

The evidence transpired at the trial clearly proves the intention of the accused at the time of shooting. Furthermore, the evidence proves that there were two separate incidents on the day in question. There was a gap between the initial scuffle between the accused and the injured victim and, the incident of shooting. Evidence does not show any abusive or provocative behaviour of the victim or the deceased when they were approaching the place of the incident. The accused did not take up the position that either the deceased or the victim provoked him and he lost his self control due to such provocation. The version of the accused, namely, that a crowd of people assaulted him, was rejected by the trial judge. Even if the initial incident – the scuffle between

the victim and the accused - is taken as an act of provocation, there was a cooling off period between the said incident and the act of shooting. The jurisprudence discussed hereinbefore does not support the proposition that the accused is entitled to succeed in the plea of grave and sudden provocation.

However, an examination of the jurisprudence relating to the defence of provocation reflects that the scope of this defence had subsequently been expanded. The Court of Criminal Appeal in **Samithamby v The Queen** (75 NLR 49) a verbal abuse by the wife several hours ago which resulted in the subsequent stabbing that caused the death of the wife was considered in favour of the plea of grave and sudden provocation. The majority of the court was of the opinion that the accused was,

“brooding over his wife’s remark which was not only insulting, but also expressed the thought that she preferred him to be dead. This mood persisted and prevented him returning to work in the field”.

The court was of the view that the fact that :

“he had previously attempted to commit suicide supported the probability that he ultimately stabbed his wife at a time when his mind was still disturbed by his wife’s remark” (at p 50).

Further the Court held that :

“ There was no doubt an interval of time between the giving of provocation and the time of 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” ( at p 50).

The Court of Appeal in **Gamini Silva v Attorney-General** [1998] 3 SLR 248 following the decision in **Samythamby** did set aside a conviction for murder and found the accused guilty of

Culpable Homicide not amounting to Murder on the basis of grave and sudden provocation. The court was of the view that :

“although the accused appellant was not justified in killing the deceased, that he was entitled to have succeeded in the defence of grave and sudden provocation although an interval of time had lapsed between the time of the provocation and the acts that led to the killing” (at p 252).

In **Premlal v Attorney-General** [2000] 2 SLR 403, the Court of Appeal cited with approval the following passage from the judgment of Lahore High Court in **Jan Muhammed v Emperor**, AIR 1929 – Lahore 861 at page 862 -

“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”.

The Court of Appeal in **W.A. Gamini v Attorney-General**, C.A. No. 142/2009, decided on 30 August 2016 set aside the conviction of Murder and convicted the appellant for the offence of Culpable Homicide not amounting to Murder on the basis that the facts of the case establishes the plea of continuing or cumulative provocation on a preponderance of evidence. The Court observed that

“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”.

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.

The Madras High Court in **Marimuthu v State**, CrI.A.(MD) No 29 of 2018, judgment dated 05.11.2019, cited with approval the following passages from the judgment of a Division Bench of the same court in **Poovammal v State**, 2012 (2) MLJ (CrI.) 482, in explaining the concept of ‘Sustained Provocation’ recognised and developed by the courts in India.

“30. Under the English Criminal Law, the provocation must be grave and also sudden. But, by way of judicial thinking, the Indian Criminal Law has gone ahead. (**K.M.NANAVATHI Vs. STATE OF MAHARASTRA** [A.I.R. 1962 S.C. 605]) In our system, there is the concept of "sustained provocation". It is concerned with the duration of the provocation. There may be incidents/occurrences, which are such that they may not make the offender suddenly to make his outburst by his overt act. However, it may be lingering in his mind for quite sometime, torment continuously and at one point of time erupt, make him to lose his self control, make his mind to go astray, the mind may not be under his control / command and results

in the offender committing the offence. The sustained provocation / frustration nurtured in the mind of the accused reached the end of breaking point, under that accused causes the murder of the deceased.”

.....

“34. In **SUYAMBUKKANI v. STATE OF TAMIL NADU** [1989 LW (Crl.) 86], it is held as under:- "Though there has been here and there attempts in those decisions to bring the sustained provocation under Exception 1 to Section 300, I.P.C., there is a cardinal difference between provocation as defined under Exception I and sustained provocation. The only word which is common is 'provocation.' What Exception 1 contemplates is a grave and sudden provocation, whereas the ingredient of sustained provocation is a series of acts more or less grave spread over a certain period of time, the last of which acting as the last straw breaking the camel's back may even be a very trifling one. We are, therefore, far from grave and sudden provocation contemplated under Exception 1 to S. 300, I.P.C. Sustained provocation is undoubtedly an addition by Courts, as anticipated by the architects of the Indian Penal Code."

Certain common features in the factual circumstances can be observed in the cases where the similar concept was adopted by courts in Sri Lanka (**Samyathamby**, **Gamini Silva**, **Premalal** and **W.A.Gamini**).

In **Samyathamby**, the accused husband caused the death of the wife. They were married for nearly twenty-five years and were blessed with seven children. A few months prior to the fatal attack, the wife was discovered in an act of intimacy with another person. Thereafter the wife had been constantly scolding him and even ordered him out of the house. Further there had been an attempt of suicide by the accused. On the day in question the wife had verbally abused him. Few hours later the fatal attack by the accused took place. In **Gamini Silva**, the accused husband caused the death of an eighty-two year old person who made improper advances towards his wife. The accused husband was living at his in-laws with his young wife and their infant child. The accused in the early hours of the day of the incident came to know about an

instance where the deceased in the previous evening had made improper advances and suggestions to his wife. Thereafter the fatal attack by the accused took place around 11.00 am when the deceased came near his house. The accused in **Premalal**, was a University student. He caused fatal injuries to a female colleague. There had been a love affair between the two and later on the deceased had broken the relationship off and contracted a marriage with a person from her village. However, the accused continued to be intimate with her and was pleading not to leave him. Thereafter, the fatal attack took place at the University premises when the deceased came to sit for the examination. In **W.A.Gamini**, the accused who was a soldier caused the death of a corporal attached to the same camp. The latter had made undue advances towards a girl with whom the accused had fallen in love with. The deceased had ignored accused's plea not to interfere with the relationship. Fatal attack had taken place at a time where the deceased ridiculed the accused in front of the girl.

In all these instances, the fatal attack had taken place after a series of events that caused disturbance to matrimonial and or intimate relationship that existed between the accused and another person. In these cases the accused have gone through severe mental agony or distress up to the point where the fatal attack takes place, due to such series of events. Courts therefore had held that the accused should receive the benefit of the plea of grave and sudden provocation, even though a time gap exists between the act of provocation and the fatal attack. During the time between these two points there had not been a "cooling off" of the mind, but a state of continued mental stress and trauma due to the nature and the gravity of the provocative conduct of the deceased did exist. Therefore, for an accused to succeed in the plea of Grave and sudden provocation on the basis of continuing or cumulative provocation, the court on a balance of probability should be satisfied that the accused had gone through a state of continued mental stress and agony during the time gap between the provocative conduct and the fatal attack.

The Indian Supreme Court in **Nanavati v State of Maharashtra**, AIR 1962 SC 605 at page 629 having analysed decisions of the High Court in which the accused succeeded in the plea of grave and sudden provocation observed that,

“All the said four decisions dealt with a case of a husband killing his wife when his peace of mind had already been disturbed by an earlier discovery

of the wife's infidelity and the *subsequent act of her operated as a grave and sudden provocation on his disturbed mind*" (emphasis added).

In determining on the issue of provocation, the court should be mindful of the parameters to which the defence of grave and sudden provocation should be expanded in the context of continued or cumulative provocation. In this regard it is pertinent to note the following dicta of the High Court of Delhi, in **Suresh Kumar v State of Delhi** CRL. A 182/2002, judgment dated 19 February 2018.

“(e) Sustained provocation' will be recognised only if the last straw' or the immediate act that led to the killing is in the spur of the moment and has a nexus to the past acts of sustained provocation. The Court will have to be cautious in adding further exceptions of that kind to Exception 1 to Section 300 IPC.”

An examination of the facts of the case under consideration clearly indicates, that the series of events revealed therein cannot be brought within the parameters of the defence of cumulative or continued or sustained provocation discussed hereinbefore. There had been no provocative conduct or any other type of an interaction between the accused and the deceased lady, when they were attacked by the accused. The only connecting factor is that she happened to be the sister-in-law of the injured victim with whom the accused had an altercation in the same morning. The altercation itself, the facts surrounding the altercation and the circumstances leading to the said altercation, in my view are not of such a nature and gravity resulting the accused to have gone through continued stress or agony resulting in the subsequent act of shooting. Therefore in my view the accused is not entitled to the benefit of the Exception – 1 to Section 294 of the Penal Code.

The fact that the accused opened fire twice, the range of fire and the location and nature of injuries on the deceased and the victim clearly demonstrate the intention to kill entertained by the accused.

In view of all the findings discussed hereinbefore, there is no basis to interfere with the decision of the learned trial judge to convict the accused for the offences of Murder and Attempted Murder.

Accordingly, the question “whether the judgment of the Court of Appeal is contrary to law and against the weight of evidence adduced at the trial ?” is answered in the negative and the learned trial judge’s decision to convict the accused-appellant for murder and attempted murder and the sentences imposed on both counts are affirmed.

The appeal of the accused-appellant is dismissed.

Chief Justice

S. Thuraiaraja, PC, J.

I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekera, J

I agree.

Judge of the Supreme Court