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

In the matter of an application for Special leave to appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C. Appeal 73/2015
SC (SPL) LA ApplicationNo.318/2013
CA Appeal No. CA331/2007
High Court Kurunegala No.230/2001

Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

Dissanayake Mudiyanselage Jayasiri

Accused

And Now

Dissanayake Mudiyanselage Jayasiri

Accused-Appellant

Vs.

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

Respondent

And now Between

Dissanayake Mudiyanselage Jayasiri

Presently at
Bogambara Prison,
Kandy.

Accused-Appellant-Petitioner

Vs.

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

Complainant-Respondend-Respondent

BEFORE:	Priyasath Dep, PC., C.J. Buwaneka Aluwihare, PC., J & Vijith K. Malalgoda, PC., J.
COUNSEL:	Amila Palliyage for the Accused-Appellant-Appellant. Ms. Harippriya Jayasundera, DSG, for the A.G.
ARGUED ON:	07.12.2017
DECIDED ON:	18.09.2018

ALUWIHARE, PC.,J:

The Accused-Appellant-Petitioner-Appellant (hereinafter referred to as the Accused-Appellant) was indicted before the High Court of Kurunegala, for committing the offence of murder. After trial by Judge, the Accused-Appellant was found guilty as indicted and accordingly was sentenced to death.

Aggrieved by the conviction and the sentence aforesaid, the Accused-Appellant appealed to the Court of Appeal and their Lordships by their judgment dated 14th November, 2013 affirmed the conviction and the sentence imposed by the Learned High Court Judge.

The accused-appellant moved this court by way of Special Leave to Appeal and Special Leave was granted on the following questions of law:

Whether the Court of Appeal erred in law and/or of fact;

(i) By failing to consider that the learned trial judge had misdirected himself in evaluating the dock statement made by the accused appellant.

(ii) By failing to appreciate that the proviso to Section 334 of the Code of Criminal Procedure Act has no application to the instant case.

(Subparagraph (iv) and (vi) of Paragraph 13 of the Petition of the Petitioner).
It was the contention of the learned counsel for the accused-appellant that a substantial miscarriage of justice resulted, due to the errors alleged.

The facts, albeit briefly, can be narrated as follows:

The deceased Shiromala on the day in question, around 10 in the morning, had proceeded to a location of about 10 fathoms away from her house to fetch a pitcher of water, accompanied by her younger brother Premalal who testified at the trial. According to his evidence they (the deceased and the witness) had to pass the house of the accused en route which was by the side of the road.

According to witness Premalal, his sister having collected water was on her way home, while witness Premalal was leading the way, approximately 10 feet in front of his deceased sister, Shiromala. On the return journey, the accused appellant who happened to be a relative of theirs was seen standing by the stile leading to his house, and witness Premalal had walked passed him. All of a sudden he had heard the cries of his sister to the effect "what is this" (" මේ මොකද"). When the witness paid attention in that direction, he had seen the accused-appellant attacking the deceased with a knife, which the witness had described as a "fish knife". Witness had also added that he saw several blows being dealt to his sister. On seeing the attack, the witness had raised cries and had run. The witness had also testified to the effect that he was given chase by the accused-appellant and as such he ran home and closed the door. Soon after, the witness had heard the accused attacking the front door of their house. This has been corroborated by the evidence of the Investigation Officer who had observed the damage on the door. Due to the commotion, the villagers had gathered and had overpowered the accused-appellant. The witness had also referred to an incident where one of his sisters (a younger sister) was involved with an intimacy with a friend of the accused-appellant, over which a police complaint had been lodged. Although evidence given on this matter appears to be very scanty, it appears that younger sister had eloped with the friend of the accused-appellant and subsequently she had been handed back to the family through the Probation Office. This incident, according to witness Premalal, had taken place a couple of days before the attack on her deceased sister, and the accused-appellant had been angry with them over this incident. The motive for the attack on his sister, according to Premalal is the animosity entertained by the accused-appellant over this incident. I have scrutinized the evidence given by the witness Premalal and apart from minor discrepancies, his testimony has stood the test of cross examination and I see no cogent reason to discredit or reject the testimony of Premalal. The accused-appellant on the other hand, is a close relative of Premalal, he is the husband of

Premalal's mother's sister. The medical evidence reveals a number of cut injuries inclusive of an injury on the back of the neck which had severed the spinal cord, an injury which the Judicial Medical Officer had described as necessarily fatal, a blow which had brought about the deceased's death within 4 to 5 minutes of her sustaining the injury.

Although the law does not cast any burden whatsoever on the accused-appellant to prove his innocence, he had elected to make a dock statement which has now been a part of the evidence in the case. Although he had commenced his dock statement by stating that he is "not guilty", had admitted the incident and his presence at the scene.

The two questions of law on which leave was granted relate to the alleged failure to evaluate the dock statement by the learned trial judge, the dock statement in verbatim is reproduced below:

"ස්වාමිනි, මේ නඩුව සම්බන්ධයෙන් නිවැරදිකරු කියා සිටිනවා. එදා මරනකාරියත්, ජගත් ප්‍රේමලාල් කියන අයත්, මම වැට කප කපා ඉන්නවිට පාරේ අයිනෙන් යන විට නොපි ඔක්කොම මරණවා කියා, පුතාගේ බෙල්ල මිරිකන්න කියා ආව අවස්ථාවේ තමා මේ සිද්ධිය වුනේ. ඒ අවස්ථාවේ ප්‍රේමලාල් සාක්ෂිකරු පොල්ලෙන් පහර දුන්නා. ඒ නිසා ස්වාමිනි මම නිවැරදිකරු කියා සිටිනවා."

I shall now proceed to consider the issues raised on behalf of the accused-appellant.

In the course of the arguments, learned counsel for the accused-appellant contended that the failure on the part of the learned trial judge to consider the special exception of grave and sudden provocation emanating from the dock statement has caused grave prejudice to the accused-appellant.

At the outset, it must be noted that, this was not a ground of appeal urged in the Petition of this application nor a ground on which leave was granted. Nowhere in the Petition (filed before this court) this ground is referred to. At least at the stage of granting special leave, the counsel could have invited the court to consider granting special leave on this issue if it was the position of the accused-appellant that he ought to have benefitted from the special exception to section 294 of the Penal Code of grave and sudden provocation.

Rule 3 of the Supreme Court Rules relating to Special Leave to appeal clearly stipulates in mandatory terms that,

*"Every application……. **shall** contain a plain and concise statement of all such facts and matters as are necessary to enable the Supreme Court to determine whether special leave to appeal should be granted, including **the questions of law** in respect of which special leave to appeal is sought……"* (emphasis added)

The Petition filed in the instant case carries a repetition of grounds of appeal in paragraphs 10 and 13 but is bereft of the very argument placed before this court. This court needs to take cognizance of the fact that the Respondent is required to meet the questions raised by the Petitioner and the questions on which special leave was granted and not questions of law that are totally alien to the Petition filed for special leave or the questions of law on which special leave was not granted.

I find the two questions of law on which special leave was granted, are interwoven to some extent.

The crux of the argument of the learned counsel for the accused-appellant was that the manner in which the learned trial judge evaluated the dock statement was erroneous in that the learned trial judge had made use of the 'statutory statement' made by the accused-appellant at the conclusion of the non-summary inquiry, as a factor to reject the dock statement as one not credible to act upon. Their Lordships in the Court of Appeal had acknowledged the fact that the trial judge had misdirected himself on this aspect, however, their Lordships were of the view that no substantial miscarriage of justice had been caused to the accused-appellant resulting from the misdirection and was of the view that there is no reason to set aside the judgment of the learned trial judge.

Firstly, the argument of the learned counsel for the accused-appellant was that the misdirection was sufficiently grave and therefore it is not safe to sustain the conviction for murder (the1st question of law) and secondly, due to the gravity of the misdirection referred to, their Lordships ought not to have applied the proviso to Section 334 of the Code of Criminal Procedure Act which is applicable exclusively to jury trials and not to cases tried by a judge sitting alone, as in the instant case. (The 2nd question of law)

As far as the 1st question of law is concerned, it was argued that if not for the misdirection referred to, the learned judge in all probability would have accepted the dock statement. It was also contended that sufficient material emanates from the dock statement to come to a finding that the accused appellant acted under sudden and grave provocation, and as such the finding ought to have been one of culpable homicide not amounting to murder and not one of murder.

I am in agreement with the view expressed by their Lordships of the Court of Appeal, that the learned trial judge had misdirected himself as to the manner in which the learned trial judge had taken into consideration the statement made by

the accused-appellant at the conclusion of the non-summary inquiry, which is commonly referred to as "statutory statements" which are recorded in compliance with Section 151 (1) and 151 (2) of the Code of Criminal Procedure Act.

Statutorily, if an accused had said anything in response to the charge at the conclusion of the non-summary inquiry, that statement must be led in evidence at the trial, thus it becomes a part of the record. As such, making use of such material cannot be said obnoxious to any evidentiary principle, however, the trial judge is required to ensure that the statement is used in the context in which it was made.

The learned trial judge, in my view, cannot be said to have acted on inadmissible or irrelevant evidence, but the inference he drew from the statement does not appear to be the only irresistible inference that could be drawn from the statement; to that extent the learned High Court Judge appears to have misdirected himself.

This court is now called upon to decide as to whether, if the learned High Court Judge had not made that error, would he have accepted the dock statement and found the accused guilty only of a lessor culpability, namely culpable homicide not amounting to murder on the basis of grave and sudden provocation.

The learned trial judge having carefully considered the evidence given by the witness Premalal, the medical evidence which is consistent with the eyewitness version and the evidence of the police officer who investigated the incident, had come to the finding that the prosecution had established the charge beyond reasonable doubt. Even at the hearing of this appeal, although the learned counsel for the accused-appellant drew the attention of this court to the two contradictions marked, V1 and V2, there was no serious challenge to the credibility of the

testimony of the eyewitness. His submission was that the version of the accused-appellant, as to how the attack on the deceased took place, is more probable.

Before I consider the version of the accused-appellant, I wish to deal with the legal position with regard to the legal burden in establishing a special exception under Section 294 of the Penal Code.

In fairness to the learned trial judge, he had dealt with the aspect of the burden of proof with regard to a special exception pleaded by an accused and correctly had referred to Section 105 of the Evidence Ordinance (Pages 27 to 29 of the judgment). Although in the judgment, he had made no specific reference to the fact that the burden is cast on the accused to establish a special exception on a balance of probability, it is quite evident from the judgment that the learned trial judge had been very much alive to the burden of proof envisaged in the Evidence Ordinance.

Section 105 of the Evidence Ordinance clearly stipulates that;

> "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."

Illustration (b) to Section 105 is a clear example of that situation:

> "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."

In the case of **THE KING v. JAMES CHANDRASEKERA. 44NLR pg. 97**, Howard CJ held; (at page 100)

"In regard to section 105, the expression " burden of proving " is used in the sense of burden of introducing evidence and not burden of establishing a case, for the latter remains throughout the trial on the prosecution. The burden of proof in section 105 is an evidentiary provision. All that the section says is that the duty of making a general or special exception a fact in issue is on the accused. I adopt the interpretation given to section 105 and to the word " proved " in section 3 by the four out of the seven Judges in Parbhoo v. Emperor1 [(1941) A. I. R. All. 402], particularly the reasoning of the Chief Justice. There is nothing in section 105 or in the definition of " proved" inconsistent with the recognition and acceptance of the fundamental principle of law enunciated in Woolmington's case [(1935) A. C. 462.] In the words of Iqbal Ahmad C.J., in Parbhoo v. Emperor (supra): " The concluding portion of section 105 means no more than this: that, in considering the evidence for the defence relating to an ' exception' or ' proviso' pleaded by the accused, the Court must start with the assumption that circumstances bringing the case within the exception or proviso do not exist. It must then decide whether the burden of proof has or has not been discharged by the accused. If it answers the question in the affirmative it must give effect to its conclusion by acquitting the accused or punishing him for the lesser offence. **If, on the other hand, it holds that the burden has not been discharged, it cannot from that conclusion jump to the further conclusion that the existence of circumstances bringing the case within the exception or proviso has been disproved. All that it can do in such a case is to hold that those circumstances are ' not proved'.** It would be noted that section 3 draws distinction between the words ' proved ', ' disproved' and ' not proved '. It enacts that ' a fact is said not to be proved when it is neither proved nor disproved'. **The burden of bringing his case within an exception or proviso is put on the accused by section 105….." (**Emphasis added)

As far as the first question of law on which special leave was granted, what is required to be considered is whether the accused-appellant had discharged the burden referred to above, in establishing that his case comes within the special exception of grave and sudden provocation under Section 294 of the Penal code.

The dock statement is to the effect that; Both the deceased and witness Premalal while going on the road by his house, threatened them with death and approached his son to throttle him, ("නොපි ඔක්කොම මරණවා කියා පුතාගේ බෙල්ල මිරිකන්න කියා ආව අවස්ථාවේ තමා මේ සිද්දිය වුනේ. …") when the incident happened. He had added that witness Premalal attacked with a club.

It is uncontroverted that this incident happened on the return journey of the deceased and witness Premalal, who had gone to fetch water. It is also in evidence that the deceased was carrying a water pot full of water. This had been corroborated by the investigating officer who had observed the fallen aluminium pot near the place where the body of the deceased was seen fallen and had noted that water had flown out from it (Page 105 of the brief)

If what the accused had said was correct, then it would have been only witness Premalal who was capable of approaching the accused's son to throttle the child as claimed by the accused, as the deceased was carrying a pot of water and it is highly improbable for a young woman of early 20's to leave the pot of water she was carrying and challenge the deceased, who was armed with a knife. The accused had admitted that he was pruning the hedge at the time.

On the issue of provocation, the accused does not say who uttered the words "නොපි ඔක්කොම මරණවා..", which is significant. As such there is no clear evidence who made the provocative utterance, assuming it was made, as the act that caused the death, must be of the person who gave him the provocation if he is to benefit from the exception. On the other hand, for the court to consider as to whether the situation demanded the accused to act in the defence of his son, the dock statement refers only to an attempted attack, again by witness Premalal.

When one considers the untested and unsworn statement the accused appellant made from the dock, it is not clear as to 'who' made the alleged provocative statement and on the other hand, the dock statement does not contain anything to suggest that the situation warranted the accused to act in the exercise of the right given to him by law to defend his son, against the deceased.

In the circumstances, I am of the view that the accused-appellant had failed to discharge the burden of establishing that, either the special exception 1, (provocation) or exception 2, (private defence) is applicable to him, within the meaning of Section 105 of the Evidence Ordinance. Having regard to the overwhelming case against the accused appellant and the cogent evidence placed before the court by the prosecution, the trial judge was justified in rejecting the dock statement of the accused-appellant and I answer the first question of law in the negative.

Special leave was also granted on the question, as to whether the Court of Appeal erred in applying the proviso to the Section 334 of the Code of Criminal Procedure Act.

It was contended on behalf of the accused-appellant that, on one hand Section 334 is a provision applicable exclusively to jury trials as such the Court of Appeal erred when the provision was applied to the instant case which was heard by a judge sitting alone. The learned counsel also pointed out that there is a separate set of provisions in the Code of Criminal Procedure Act applicable to non-jury cases such as the instant case. The learned counsel for the Accused Appellant argued that the misdirection on the part of the trial judge cannot be cured by the application of the proviso and the benefit of the misdirection on the part of the trial judge should enure to benefit of the accused-appellant and the proper conviction ought to be one of culpable homicide and not one of murder.

I have already referred to the alleged misdirection earlier in the judgment and had expressed the view that it is of a trivial nature and does not affect the root of the findings.

Application of the proviso to Section 334 of the Code of Criminal Procedure Act to non-jury trials, nevertheless is a cause for concern; especially when distinct sets of provisions govern the conduct of jury trials and non-jury trials.

In my view, with all due deference to their Lordships, the Court of Appeal did err in applying the proviso referred to above to the instant case.

In fact, the applicable provision is the proviso to sub-article (1) of Article 138 of the Constitution which was promulgated in 1978. Article 138 whilst vesting appellate jurisdiction on the Court of Appeal, the proviso to the said Article [138 (1)] states:

> *"Provided that no* ***judgment, 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 is mine)

It is to be observed that in jury trials there is no "judgment, decree or order" but only a "verdict" returned by the jurors. As such the curative provision embodied in the constitutional proviso referred to above would have no application to a jury trial.

The Legislature in its wisdom, in order to overcome this lacuna, when enacting the Code of Criminal Procedure Code in 1979 made provision for a 'curative

provision' by way of a proviso to Section 339 of the Code of Criminal Procedure Code.

For ease of reference the proviso to Section 334 of the Code of Criminal Procedure Act is reproduced below:

> "Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that **no substantial miscarriage of justice has actually occurred**".

It is to be observed that although the two provisions are couched in different words, however, in substance carry the same meaning/effect.

Thus, the issue before us is whether the accused stand to benefit due to the wrong application of the proviso by the Court of Appeal and I think not.

The principle laid down in the case of **Peiris Vs. The Commissioner of Inland Revenue 65 NLR 457,** in my view is applicable to the instant situation.

In the said case, Justice Sansoni held:

> " It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. **This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power. "**

If an incorrect provision has been cited as the authority for doing of a particular act, but in fact if there is another provision that gives validity for that act, then the act ought to be considered a valid one. As such I see no merit in the argument of

the learned counsel for the Appellant on the second question of law on which leave was granted.

For the reasons set out above, I answer the second question of law on which special leave was granted, also in the negative.

I see no reason to disturb the findings of the learned trial judge or their Lordships of the Court of Appeal and accordingly the appeal is dismissed.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE PRIYASATH DEP, PC.

I Agree

CHIEF JUSTICE

JUSTICE VIJITH K. MALALGODA, PC.

I agree

JUDGE OF THE SUPREME COURT