

[COURT OF CRIMINAL APPEAL]

1971 Present : H. N. G. Fernando, C.J. (President), Samerawickrane, J., and de Kretser, J.

E. SAMITHAMBY, Appellant, and THE QUEEN, Respondent

C. C. A. 84 of 1971, with Application 116

S. C. 456/70—M. C. Batticaloa, 29047

Penal Code—Section 294, Exception 1—“Deprivation of the power of self-control by grave and sudden provocation”—Interval of time between provocation and killing—Circumstances when the exception would be applicable even then.

An offender may be said to have been deprived of his power of self-control by grave and sudden provocation within the meaning of Exception 1 to section 294 of the Penal Code even though there was an interval of time between the giving of the provocation and the time of the killing, if the evidence shows that, all the time during the interval, the accused suffered under a loss of self-control.

APPEAL against a conviction at a trial before the Supreme Court.

V. E. Selvarajah, with (assigned) B. B. D. Fernando, for the accused-appellant.

E. D. Wikramanayake, Crown Counsel, for the Crown.

Cur. adv. vult.

August 3, 1971. H. N. G. FERNANDO, C.J.—

The accused in this case was convicted of committing the murder of his wife on 13th September, 1969. There was no doubt that the accused did in fact cause the death of his wife by a stab injury.

The accused gave evidence in his defence. He and his wife had been married for about 25 years and there were seven children of that marriage. A few months prior to this incident he discovered his wife in an act of intimacy with her sister's husband, and after that discovery his had been a miserable existence. The wife used to scold him and order him out of the house. He had himself attempted to commit suicide by taking poison some weeks before this incident and had been in hospital for about four days. On the day of this incident he had gone out to work in his field and

had returned home for the noon meal after consuming some toddy. After he had the meal, his wife again abused him saying " You, cursed fellow, you have not died even after taking poison ". He then left the house intending to work in the field but returned home because he felt giddy and depressed. At home he kept brooding over his wife's insulting treatment. He had taken a knife from the kitchen and went to his wife's sister's house. There he asked his wife why she had made the earlier remark, and when she did not reply, he stabbed her.

Having referred in the summing up to this evidence, upon which the defence sought a verdict of culpable homicide on the ground of grave and sudden provocation, the learned trial Judge left it quite open to the Jury to return such a verdict. But in doing so, he pointed out that in the submission of the Crown the provocation offered to the accused, although grave, was not sudden. In returning a verdict of murder the Jury appear to have agreed with that submission.

The majority of us were of opinion that in the circumstances of this case the directions as to the defence of provocation were incomplete. It will be seen from the summary of the accused's version that he 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 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.

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.

For these reasons we made order setting aside the verdict of murder and the sentence of death, and substituting a conviction of culpable homicide not amounting to murder.

DE KRETSER, J.—

At the hearing of this appeal I was in the unfortunate position of not being able to agree with My Lord the Chief Justice and my brother Samerawickrane that in the circumstances of this case the directions given by the trial Judge, my brother Alles, as to the defence of provocation were incomplete and that, had he presented to the jury that the events that happened after the receiving of the provocation made it quite probable that in fact the accused all the time suffered under a loss of self-control, they would have returned a verdict of culpable homicide. I now set down my reasons for the view I hold.

This was a case in which in answer to the charge of murder the accused pleaded guilty to committing culpable homicide not amounting to murder under grave and sudden provocation.

Counsel for the Crown was not willing to accept the plea and the case proceeded to trial on the charge of murder. The jury after a deliberation of nearly an hour returned a verdict of murder.

The evidence on which the accused relied for his plea that he had stabbed his wife whilst deprived of the power of self-control was given by himself.

The evidence was that on the night of the 14th April, 1969, he had found his wife, who had been married to him for 25 years, "having an illicit affair" with the husband of her younger sister. He says he advised her to reform herself but from that time he and she had constant quarrels in the course of which she used to tell him to leave the house saying, "go anywhere and die you cursed fellow".

On the 30th July, 1969, the unhappiness that he was having over the trouble between him and his wife led him to attempt to commit suicide. This resulted in his being in hospital for about a week during which time, he says, his wife did visit him a couple of times. After his return home there was no improvement in the relations he had with his wife and even his meals were attended to by his daughter Easwari and not by his wife. These facts formed the background for what happened on the 13th September, 1969. On that day he had come back for his noon meal and when he was getting ready to go back to work, his wife came out of the kitchen and, standing in front of him said, "you cursed fellow you have not died even after taking poison." The time was 1.30 p.m. The accused says he set out for work but halfway out returned and sat in the verandah adjoining the kitchen. He was disturbed in mind as to what his wife had said. He felt sick and giddy. Whilst seated there he saw a knife stuck in the cadian

wall of the kitchen and he took it without thinking of what he was doing and put it in his waist. He says, "I waited for sometime and thought I have done no wrong, why should my wife curse me like that ?".

" Q. In other words you were brooding over what your wife has told ?

A. Yes.

Q. You were very angry and very worried about it ?

A. Yes.

Q. Then what did you do ?

A. I went to my wife's sister's house in order to ask my wife what wrong I had done.

Q. Yes, then ?

A. When I went there I saw my wife seated on a raised verandah. I asked my wife, "Why did you say that I had not died even after taking poison—what wrong did I do to you ?". After that I took out the knife and stabbed her."

The trial judge in summing up to the jury referred very fully to this evidence and the circumstances on which the defence relied in seeking a verdict of culpable homicide. He also told them, as he was bound to do, why the Crown claimed that the facts did not warrant such a verdict and why the Crown claimed a verdict of murder. He told them in the clearest possible terms that it was entirely a question of fact for their decision and that he did not wish to express his opinion "one way or the other."

It was a situation in which the jury had to perform its classic function of indicating what was in its opinion the correct verdict, and the jury, after a long deliberation, decided it was murder that the accused committed on this day. What the jury had to make up their minds on was whether what happened between the receiving at 1.30 p.m. of the provocation complained of "you cursed fellow you have not died even after taking poison"—which the defence claimed was grave provocation in itself and in the light of what had been going on from 14th April, 1969 — a claim the prosecution did not contest—and the stabbing of the woman at 4.30 p.m. pointed to accused having lost his self-control at 1.30 p.m. and having not regained it even at 4.30 p.m. ; or whether the accused annoyed over the remark had let it rankle and having brooded over it decided that the solution to his misery was

to kill his wife; whereupon arming himself with a knife he had gone to the house — quarter of a mile away—where his wife was and stabbed her through the heart.

In my opinion it is impossible to say on the facts that it was *more* probable that the accused had not still regained his self-control at 4.30 p.m. assuming that he had lost it at 1.30 p.m. of which on the facts narrated by him there is no sign and I think the trial Judge was entitled not to present the case to the jury on the footing that it was more probable that the accused had not regained his self-control at the time he stabbed his wife. Had he done so he would have been, at best, giving his opinion on the matter and it does not follow that the jury would or should have agreed with it and returned a lesser verdict.

The trial judge in my opinion correctly left the matter for the jury to decide. In concluding his observations on the matter he said: “Therefore, give this case your anxious consideration and ask yourselves after you have considered both the pros and cons and having regard to the matters to which I have drawn attention, can you come to the conclusion as to *whether there was grave and sudden provocation which made him to lose the power of self-control or not*. That is a matter entirely for you being the sole judges of fact.”

The evidence given by the accused does not establish that the words complained of caused in the accused a sudden or temporary loss of self-control and made him so subject to passion as to make him for the moment not the master of his mind, but indicates rather that the remark rankled in his mind. It may well be, that at the time the accused stabbed the wife he was still disturbed in mind by his wife's remark. To be disturbed in mind is quite different to having lost self-control and it is well to remember that to be disturbed in mind may lead to a decision to murder.

The mere length of time intervening between the provocation and the retaliation may be evidence in itself of deliberation. As is pointed out in East—*Pleas for the Crown*, Volume 1, page 251, *et seq.*—“In every case of homicide how great soever the provocation may have been if there be sufficient time for the passion to subside and for reason to interpose such homicide will be murder with respect to what interval of time shall be allowed for passion to subside the immediate object of inquiry is—whether the suspension of reason arising from sudden passion continued from the time of provocation received to the very instant of the mortal stroke given, for if from any circumstance whatsoever it appear that the party reflected, deliberated or cooled any time before the fatal stroke was given the killing would amount to murder.”

In my opinion on the evidence before them in this case the jury were entitled to their opinion that this was a case of murder.

For the above reasons I would dismiss the appeal.

Verdict altered.
