

GAMINI SILVA
v.
ATTORNEY-GENERAL

COURT OF APPEAL
GUNASEKERA, J. (P/CA) &
DE SILVA, J.
C.A. NO. 60/96
HC BALAPITIYA NO. 4/94
JUNE 05TH, AND 11TH, 1997

Murder – S. 294 exception 1 – Grave and Sudden Provocation – Interval of time between the Act of Provocation and the time of causing injuries.

The accused-appellant was indicted with having committed murder by causing the death of one J. on or about 20.5.90. After trial he was found guilty and sentenced to death.

On appeal it was contended that the trial judge had erred by rejecting the defence of grave and sudden provocation taken up by the defence.

Held:

1. Although the accused-appellant was not justified in killing the deceased, taking the facts in the instant case, 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.

APPEAL from the judgment of the High Court of Balapitiya.

Case referred to:

1. *Samythamby v. Queen* 75 NLR 49.

Dr. Ranjith Fernando with Ms. Premali de Silva and Ms. Kishali Pinto – Jayawardane for accused appellant *Buwaneka Aluvihare* S.S.C for A.G.

Cur. adv. vult.

June 11, 1997.

GUNASEKERA, J. (P/CA)

In this case the accused-appellant Weeraratne Gamini Silva was indicted with having committed murder by causing the death of Agampody Norman Piyadasa de Soyza Jayatilake on or about 20.05.1990 at Nelligaskele in the Kosgoda Police area. After trial before a learned Judge of the High Court he was found guilty of the offence and sentenced to death on 04.07.1996. The prosecution relied on the evidence of Malini Jayatilake the daughter-in-law of the deceased who identified his body at the post-mortem examination, Newton Thabrew who was an eye witness, M. B. Wilman, a villager, Dr. Piyaratne who testified, having produced the post-mortem report of Dr. Vithanage. Sub Inspector Gunadasa and Inspector Kumarasinghe, the O. I. C. of the Kosgoda police station at the relevant time. The accused testified on his own behalf and called his wife M. Priyanka Niranjani de Silva in support of his evidence.

The facts relevant to this case are that the deceased who was about 82 years in age who was a coroner was living in retirement in a Wadiya located in a cinnamon plantation. The accused had been living with his young wife and an infant child together with his in-laws about 1/4th mile away from the deceased's house. According to the evidence on the evening of the 19th May, 1990, the accused's wife had gone to a boutique close by in order to fetch some coconuts whilst the accused was at home. A short while after she left, the accused had heard cries. When she returned home the accused is alleged to have questioned his wife as to the reason which prompted her to raise cries. As she had not divulged the reason there had been an altercation and argument between the accused and his wife which had gone into the early hours of the morning of the 20th. After a couple of slaps was given to the wife, she had disclosed to her husband, the accused that Ralahamy, namely the deceased Jayatilake had pulled her by her hand and made some improper suggestions to her. The following morning witness Thabrew and William had been on the road in front of the accused's house chatting with each other. At about 11.00 in the morning, the deceased had come on a bicycle

and had seen the two witnesses and had got off from the bicycle and engaged himself in a conversation with the two witnesses stating that he was coming forward as a candidate in the forthcoming election that was to be held and solicited their support. At that time, according to the evidence the accused had suddenly emerged and dealt several blows on the deceased with a Katty. The medical evidence revealed that there had been 8 injuries on the body of the deceased:

- (1) a cut injury 4 1/2" long extending from below the left eye towards the left ear.
- (2) a deep cut injury above the left ear cutting through all tissues into the cravial cavity.
- (3) a deep cut injury above the left elbow on the anterior aspect.
- (4) a deep cut injury on the left forearm almost severing left forearm.
- (5) a penetrating wound on the left knee.
- (6) a deep cut injury on the right-hand severing the little finger.
- (7) a cut injury on the back of the left leg.
- (8) the penis had been completely amputated.

The cause of death according to the post mortem report was shock and haemorrhage from multiple cut injuries causing injuries to the head and fracature of bones caused by a sharp cutting instrument.

The case for the defence was that the deceased an 82-year old retired coroner was a land owning gentleman in the village who had a fancy for a wide and varied sexual life. He was in the habit of making advances on women young and old in the village. In fact it transpired in the evidence that the deceased had been charged for molesting a giril of 9 years and a case was pending in the Magistrate's Court

of Balapitiya. According to the accused about a month prior to the 20th May the deceased had gone to his house and inquired about his wife from his mother-in-law. The accused on hearing this inquiry had chased the deceased away having reprimanded him. On the 19th of May when his wife went to fetch some coconuts, the deceased who was near the boutique had held her by the hand and had made improper advances. It is in this state of the evidence that the accused in his evidence stated that when he went to the smithy at Uragasmanhandiya in order to have his katty which was used in peeling cinnamon sharpened and was returning at 10.30, 11.00 that he heard cries of distress of his wife when he was about 4 blocks away from his house. As he approached he had seen the deceased coming out of his premises. On seeing him he had recounted the events that had taken place the previous evening and stated that he lost his self-control and did not know what happened.

Learned state counsel in cross examination at the trial had suggested to the accused that as a result of the improper advances made to his wife by the deceased that he had been lingering with the idea of taking revenge and had caused the injuries on the deceased which resulted in his death.

The learned High Court Judge having considered the evidence has rejected the defence of provocation raised by the accused, in his judgment at page 194 holding that there was an interval of time between the act of provocation namely the incident that occurred on the evening of the 19th and the time of causing injuries namely at 11.00 am on the 20th.

Learned counsel for the accused-appellant submitted that the learned trial judge had erred by rejecting the defence of grave and sudden provocation taken up by the defence. It was submitted by learned counsel in support of his contention that on the prosecution evidence and on the uncontradicted evidence of the accused and his wife that the accused-appellant was entitled to succeed in his defence of grave and sudden provocation. Learned counsel submitted that the prosecution conceded that there was an incident on the 19th evening where the deceased had made improper advances to the wife

of the accused and over that incident that there were arguments between the accused and his wife which went on till the early hours of the morning of the 20th which ended after his wife had disclosed as to what happened on the evening of the 19th, as a result of his having assaulted her. The following morning on seeing the deceased coming from near his house what was lingering in his mind over the advances made to his wife would have provoked him as a reasonable man.

It was submitted that the extent to which the accused had been provoked is evident from the conduct of the accused in severing the penis of the deceased and taking it as a souvenir which was found with him after his arrest.

Learned counsel drew our attention to the decision in *Samyathamby v. Queen*⁽¹⁾ where H/L the Chief Justice H. N. G. Fernando held: "that 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 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".

Taking the facts in the instant case we are 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. In the circumstances for the reasons stated we are of the view that the conviction of the accused for murder should not be allowed to stand. Thus we set aside the conviction of the accused-appellant for murder and the sentence of death passed on him and we find the accused-appellant guilty of culpable homicide not amounting to murder on the basis of grave and sudden provocation under section 297 of the Penal Code. We sentence the accused to a term of 12 years, rigorous imprisonment. Subject to this variation the appeal is dismissed.

DE SILVA, J. – I agree.

Appeal dismissed.