

PREMLAL
v.
ATTORNEY GENERAL

COURT OF APPEAL
JAYASURIYA, J.
KULATILAKE, J.
CA. No. 194/95
H. C. COLOMBO 6904/94
21ST SEPTEMBER, 1998

Murder - Penal Code S.294(1) - Plea of grave and sudden provocation - Attendant circumstances - Availability of plea of cumulative provocation.

The Trial Judge found the accused Appellant guilty of committing the murder of his girl friend and sentenced him to death.

The Accused Appellant had come from behind and asked the deceased to stop, and thereafter had stabbed her twice and run away through fear. Thereafter the accused Appellant had taken a bottle from his pocket and had drunk the contents of the bottle. The evidence revealed that the love affair had blossomed to be a very close bond between them. However it is also in evidence that whilst she was carrying on with the accused Appellant, she had an existing love affair with a village lad and had secretly contracted a marriage by registering her marriage.

On appeal it was contended that the attendant circumstances warrant a substitution for the conviction for murder of a conviction of culpable homicide not amounting to murder on the basis of continuing and cumulative provocation.

Held : *Per* Kulatilaka J.,

"Our Judgments interpreted the phrase "sudden provocation" to mean that provocation should consist of a single act which occurred immediately before the killing so that there was no time for the anger to cool and the act must have been such that it would have made a reasonable man to react in the manner as the accused did."

Per Kulatilaka J.,

"Of late we observe a development in other jurisdictions where courts have taken a more pragmatic view of the mitigatory plea of provocation . . . in a series of cases Court took into consideration the prior course of relationship between the accused and his victim."

- (i) The act of stabbing cannot be taken in isolation. The accused Appellant's ambition of becoming a Lecturer was shattered. He could not face the Campus community because he and M had been seen as confirmed lovers in that community. His only consolation had been M. He was losing her. The unusual behaviour reflects the mental agony and the strain that the accused was undergoing because of the haunting thought that he was going to lose her.
- (ii) It could be inferred that he had lost all self control at the point of time he stabbed her. The brutal manner in which he attacked the girl who was so precious to him, and the attempted suicide are indicative of the fact that he in fact had lost his self control at the time of stabbing.

APPEAL from the Judgment of the High Court of Colombo.

Cases referred to :

1. *Samithamby vs. Queen* - 75 NLR 49.
2. *Jan Muhammed vs. Emperor* - AIR 1929 - Lahore - 861.
3. *Nanavati vs. State of Maharashtra* - AIR 1962 - 605(SC).
4. *Amarjit Singh Sohan Singh* - 1970 76 Crim LJ 835.

Cur. adv. vult.

Dr. Ranjith Fernando with *Gayana Perera* for the accused - Appellant
Dappula De Livera, Senior State Counsel for the Attorney - General.

July 27, 1999.

KULATILAKA, J.

In this prosecution after a trial by the Judge, the learned trial Judge found the accused-appellant guilty of committing

the murder of his girl friend named Pushpa Maduwanti Gunawardena on the 22nd of April, 1992 and convicted him of that offence and pronounced the sentence of death on him. This appeal is against that finding, conviction and the sentence.

The main contention urged by the learned counsel who appeared for the accused-appellant is that even though the learned Trial Judge did give his mind to the question whether the evidence in the case would justify the acceptance of a plea of grave and sudden provocation in terms of Exception (1) set out in Section 294 of the Penal Code, he has failed to consider whether the attendant circumstances of this particular case would warrant the availability of a plea of cumulative provocation.

The prosecution relied upon the evidence of two eye witnesses, namely Celine Patrika Jayatilaka, a close associate of the deceased and PC 19096 Chandrasiri Banda, who was manning the security post in the Kelaniya University Campus at the time of the incident.

According to witness Patrika Jayatilaka she and Maduwanti were final year undergraduate students at the Kelaniya University. She knew the accused. He was a student in a junior batch. The final year examinations for the year 1992 were to commence on 22.4.92. Around 8 a.m. Maduwanti and Patrika set forth towards the examination hall. As they entered the University premises Patrika saw the accused-appellant coming from behind. Then the accused-appellant had made the following utterance:

“මටුවන්ති නවතින්න.”

Witness Patrika had seen the accused-appellant carrying a knife in his hand. At the behest of the accused both of them had stopped. Thereupon she saw the accused-appellant stabbing Maduwanti twice, while she was in a

standing position and then the witness had run away through fear.

Chandrasiri Banda had witnessed the stabbing from a distance of about 50 yards. He had seen the accused-appellant stabbing the deceased on her chest five or six times while clutching her hair. Thereafter the accused-appellant had taken a bottle from his pocket, dropped the knife and drank the contents of the bottle.

The defence did not challenge the fact that the accused-appellant did in fact cause the death of Maduwanti by inflicting stab injuries.

Patrika at the time she gave evidence was a teacher. The learned trial Judge has observed that Patrika was reluctant to come out with the fact that the deceased was very close to her as a friend during their stay at the University Campus. She told Court that Maduwanti was just another friend of hers in the University.

“විශේෂ ඇසුරක් තිබුණේ නැහැ මධුවන්ති එක්ක.”

The learned trial Judge had observed that Patrika was not a truthful witness, in her testimony relating to the deceased's relationship with the accused-appellant during their stay at the Campus. She even went to the extent of saying that to her knowledge deceased Maduwanti and the accused-appellant were only friends and not in love. The defence witness Kulasiri Bandara testified to the fact that it was Patrika who was instrumental in arranging the love affair between Maduwanti and the accused-appellant. If Patrika, had testified without suppressing facts and uttering lies, the factual position would have been brought to light in regard to the developments which ultimately came to a climax with Maduwanti receiving murderous assaults at the very hands of her lover.

In this context the learned counsel for the accused-appellant invited Court to carefully scrutinize the evidence elicited from the defence witness Kulatilaka Bandara a close friend of the accused-appellant who in fact was his room mate at the Campus hostel, in order to come to a finding whether the attendant circumstances of this particular case would warrant a substitution of the conviction for murder by a conviction of culpable homicide not amounting to murder on the basis of continuing and cumulative provocation.

Until the judgment of Chief Justice H. N. G. Fernando in *Samithamby vs. Queen*⁽¹⁾ (de Kretser, J. - dissenting) our Courts followed a strict view in applying Exception (1) set out in Section 294 of the Penal Code. Our Judges following their counterparts in England interpreted the phrase "sudden provocation" to mean that provocation should consist of a single act which occurred immediately before the killing so that there was no time for the anger to cool and the act must have been such that it would have made a reasonable man to react in the manner as the accused did. Our Courts were reluctant to take into consideration any special circumstances which manifested in the particular offender's case.

In *Samitamby* Chief Justice H. N. G. Fernando (Samerawickrema, J. agreeing) applying Exception (1) set out in Section 294 of the Penal Code expressed the view that even though in that particular case there was an interval of time between the affording of the provocation and the time of the stabbing, the evidence relating to the interim period made it quite probable that in fact the accused all the time suffered under a loss of self control.

Of late we observe a development in other jurisdictions where Courts and juries have taken a more pragmatic view of the mitigatory plea of provocation. In a series of cases in applying the mitigatory plea of provocation Courts took into

consideration the prior course of relationship between the accused and his victim. Vide *Jan Muhammad vs. Emperor*⁽²⁾ *Nanavati vs. State of Maharastra*⁽³⁾ and *Amarjit Singh Sohan Singh*⁽⁴⁾ referred to in the article on "The Doctrine of Continuing Provocation" by Dr. M. Sornarajah published in the *Journal of Ceylon Law*, June 1971.

In the latter case Sankaria, J. observed -

"The past conduct of the non earning father in coming home drunk daily . . . was already a standing and continuous source of provocation to the son whose meagre earnings were hardly sufficient to meet the bare needs of the family. The resentment that was building up in the mind of the son as a reaction to the continuous provocative conduct of the father spread over the past month or so, had reached a breaking point shortly before the occurrence when the drunken father set upon the son with a torrent of horrible oaths".

In the instant case Patrika Jayatillaka a close associate of Maduwanti in the University maintained a solemn silence about the past relationship of the accused-appellant with Maduwanti the deceased. Therefore it is necessary to have a close scrutiny of the totality of the evidence led in this case in order to ascertain whether this is a proper case where the mitigatory plea of cumulative provocation should have been adopted.

According to the defence witness Kulatilaka Bandara who was the Principal of Mutukandiya Junior School at the time of giving evidence, it was Maduwanti who had expressed her feelings towards the accused-appellant and her willingness to start a love affair with the accused-appellant. At that point of time the latter had expressed his reluctance to have a campus affair. His ambition had been to study well and become a Lecturer. The fact that Maduwanti was a senior undergraduate and the fact that

he would not be able to bear the pain of mind in the event of the affair being broken up were other factors that made him to decline the proposal at an anterior point of time.

However, at the persisting request of the deceased the accused-appellant agreed to commence a love affair. In his own words what he expected of his partner to be was to the following effect -

“මාත් සමග ආචාර පසුව මොන වගේ චරිතයක් වුණත් මට අවතන වෙලා මට අවශ්‍ය විදියට ජීවත් වෙන්න ඕනෑ.”

The evidence reveals that the love affair that commenced had blossomed to be a very close bond between them. In his evidence Kulatilaka Bandara referred to exchange of letters between them vide page 246 of the appeal brief, posing for photographs together (vide V3, V4, V7). Their affair was made known to the campus community. The couple used to roam about the area exclusively reserved for lovers.

On the other hand it is in evidence that whilst she was carrying on with the accused-appellant, she had an existing love affair with a village lad by the name Susantha Gunasekera. It was an affair she had started during her schooling days. It was a secretive one. Even witness Chandrasena Gunawardena, Maduwanti's father was not aware of such a relationship. Sometime prior to the death of Maduwanti, Kulatilaka Bandara who was the accused-appellant's room-mate had observed from the behaviour of the accused-appellant that the accused-appellant and Maduwanti were in a dilemma.

The accused-appellant had come to know that his fiancée had contracted a marriage by registering her marriage with Susantha Gunasekera. The marriage certificate was marked and produced as D21. It is to be stressed that Maduwanti's father Chandrasena Gunawardena had testified to the fact

that he became aware of this marriage only on the date of his daughter's death. D21 reveals that the marriage had been registered on 26.4.91. There is no evidence to indicate at what point of time the accused-appellant had come to know about this marriage.

Kulatilaka Bandara had specifically told Court that even after the accused-appellant became aware of this marriage, Maduwanti and the accused-appellant had secretly continued their intimacy. They had even secretly met at a motel called "Kelaniya Inn". Few days prior to the commencement of the final examinations at the University, Maduwanti had called over to collect her admission card and had met the accused-appellant. Thereafter Kulatilaka Bandara had noticed a change of behaviour in the accused-appellant. He had stated to the witness Kulatilaka Bandara that Susantha Gunasekera was going to take Maduwanti out of the country and that Maduwanti had been his only consolation and that he was going to lose her. He had stopped studying. He had proceeded to a place called "Ambasevena" and had consumed arrack. He had returned drunk and had used to make various utterances. His behaviour was out of sorts. This was the accused-appellant's behaviour during the period just prior to the stabbing of Maduwanti, as described by his room-mate.

The learned Senior State Counsel referred us to certain contents of a letter dated 5.6.91 sent by the deceased to the accused-appellant where she had pleaded with the accused-appellant to allow her to live without interference.

"... මම බැඳුණු ගැනියෙක් නිසා ඔයාට හැකි තම් මිනිස්කමේ තාමයෙන් ඔයාත් ජීවත් වෙලා මටත් ජීවත් වෙන්න ඉඩ දෙන්න."

The learned Senior state Counsel submitted that the very fact that the accused-appellant disregarded this fervant appeal of the deceased should militate against any suggestion

made on behalf of the accused-appellant to consider the mitigatory plea of cumulative provocation. In this context a careful reading of the entire letter reveals that Maduwanti herself was very much perturbed by the suffering of the accused-appellant for which she was solely responsible. She goes on to say -

“මියා ඉතාමත් හොඳ මිනිස්කම් වලින් පෙළුන අවිංක කෙනෙක්. මම හිතා මතා වැරදි කරලා නැහැ ලාල්. මට සමාවෙන්න ලාල් නෑම දේකවම. මියාගේ ජීවිතයට මෙතරම් වේදනා එකතු වුනේ මම නිසා බව මම දන්නවා ලාල්.”

The contents of this letter indicated that the deceased herself had realized that the accused-appellant was suffering from an unbearable pain of mind.

The contents of this letter is important because it explains the state of mind of the accused-appellant prior to the act of stabbing and the attempted suicide. It has to be read in juxtaposition with witness Kulatilaka Bandara's description of the accused-appellant's behaviour during the period prior to the act of stabbing. In this regard it is pertinent to refer to the observations of Agha Haidar, J. (Broadway, J. agreeing) in *Jan Muhammad vs. Emperor (supra)*-

“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”.

Thus, in the instant case the act of stabbing cannot be taken in isolation, the accused-appellant's ambition of becoming a Lecturer was shattered. He could not face the campus community because he and Maduwanti had been seen as confirmed lovers in that community. His only consolation had been Maduwanti. Now he was losing her. His own words to that effect was -

“මටුවන්ති තමයි ටිකක් මට සැතපීමක් තිබෙන්නේ. ඒකක් නැතිවෙනවා.”

Witness Kulatilake Bandara's description of the unusual behaviour of the accused-appellant reflects of the mental agony and the strain that the accused was undergoing because of the haunting thought that he was going to lose her. We could infer that he had lost all self control at that point of time he stabbed her. The brutal manner in which he attacked the girl who was so precious to him and the attempted suicide by taking poison are indicative of the fact that he in fact had lost his self control at the time he committed the act of stabbing the deceased.

In the circumstances, we set aside the finding and conviction of murder and the sentence of death and substitute a conviction for culpable homicide not amounting to murder on the basis of intention and impose a term of fifteen years rigorous imprisonment. The appeal is partly allowed.

JAYASURIYA, J.

- I agree.

Sentence altered to culpable homicide not amounting to murder.