

**CHUTI**  
**v**  
**THE ATTORNEY GENERAL**

COURT OF APPEAL  
FERNANDO, J., AND  
EDIRISURIYA, J.  
C.A.HAMBANTOTA 41/99  
M.C.TANGALLA 33429/NS  
OCTOBER 23, 2002

*Penal Code – Murder – Penal Code, sections 296 and 297 – Evidence Ordinance, section 33 – Witness abroad – Deposition read – Defence of sudden fight – Sudden provocation – Objective test.*

**Held :**

Mere abuse even unaccompanied by any physical act may be in certain circumstances regarded as sufficient provocation.

- (ii) When considering a prosecution for murder whether the accused was deprived of self control by grave and sudden provocation, the jury must apply an objective test. It must be considered objectively in relation to the class of society to which the accused belongs.

**APPEAL** from the judgment of the High Court at Hambantota.

**Cases referred to:**

1. *K v Kirigoris* – 48 NLR 407
2. *Regina v K.Piyasena* – 57 NLR 226
3. *A. Punchibanda v Queen* – 74 NLR 494
4. *Q v Mutubanda* – 56 NLR 217
5. *Jamis v The Queen* – 53 NLR 313, 401

*Dr. Ranjith Fernando* with *S.Munasinghe* and *S.Manatunga* for accused-appellant.

*Paliitha Fernando*, Deputy Solicitor-General for Attorney-General.

October 23, 2002

**EDIRISURIYA J.**

The accused in this case was indicted for the murder of one Adikari Pattuge Rohinie an offence punishable under section 296 of the Penal Code. 01

The accused having pleaded not guilty to the charge was tried by the High Court Judge of Hambantota without a jury and convicted for murder.

Dr. Ambepitiya who performed the Post-Mortem Examination on the body of the deceased testified that he observed four external injuries on the deceased. His evidence was that injury no: 1 was a stab injury 2 inches above her left breast. Corresponding to this there was a cut injury on the left lung. Injury no:2 was a stab injury 1/2" above the right breast. Corresponding to this right lung was damaged. Injury no:3 was a stab injury 4 inches above the left nipple. Corresponding to this left ventricle had been cut. He said this injury was necessarily fatal. Injury no: 4 was 10

on the chest bone of the deceased. According to the doctor all these injuries could have been caused with a sharp cutting weapon similar to P2.

Adikari Pattuge Dayanie gave evidence to the following effect: At the time of the incident her age was 12 years and the deceased was her elder sister. The deceased sister lived in a house at a lower elevation. A fence separated their houses. According to her at or about 2.00 p.m. while she was inside her house she heard the deceased sister shout “බුදු අම්මෝ”. Thereafter her elder sister Shriyanie, younger brother Sarath Kumara and she came out of their house. Instantly she saw the accused stab the deceased and pull out a knife from her body. The deceased sister ran about 50 feet and fell on the ground. Subsequently she came to know that the elder sister Rohinie died whilst she was being taken to the hospital.

The younger brother of the deceased Sarath Kumara giving evidence said that on the day of the incident at or about 4.30 p.m. while he was staying in his house along with his sisters Dayanie and Shriyanie he heard shouts of “බුදු අම්මෝ”. At that time he came out of the house with sister Dayanie. He saw the accused stab the deceased sister with a knife. He saw the accused pull the knife from the deceased's body. He said at the same time the accused ran away. Thereafter the deceased ran towards elder sister Ranjanie's house and fell down. Thereafter the deceased told him “බුදු මල්ලියේ වූවි පිහියෙන් ඇත්තා.”

Even though Adikari Pattuge Shriyanie, a sister of the deceased was listed a prosecution witness she was not summoned by the prosecution. At the time the trial was taken up in the High Court she was abroad. The defence led in evidence her deposition in the Magistrate's Court under section 33 of the Evidence Ordinance. Her evidence was that on the day of the incident while she was staying in her house she heard the deceased say “වූවි මය පාවි එකට එන්න එපා”. Instantly the accused ran towards the field and she heard shouts of “බුදු අම්මෝ”. She did not see any other person in the house.

The accused made a statement from the dock denying knowledge of the incident. He also said since the Police had come

to his house looking for him he went to the Police station with his father and surrendered on the instructions of an attorney at law.

The father of the accused giving evidence corroborated what the accused said in his statement from the dock. His evidence shows that the accused's occupation was cutting and packing fish to be sent to Colombo. He also said he came to know of an affair that the accused had with one Kalunona, a sister of the deceased.

At this stage it is pertinent to consider certain items of evidence in this case to determine whether there was culpability for a lesser offence on the basis of grave and sudden provocation. The learned trial judge has observed that there had been an exchange of words between the accused and the deceased prior to the stabbing. The sister of the deceased Sriyani has testified that she heard the deceased telling the accused "චූටි මග පාවි චකට චන්න චපා" 60 Dayanie the sister of the deceased has admitted that she told the Police that she heard a loud exchange of words between the deceased and the accused. Having regard to the fact that the accused used to be in and out of the house of the deceased and 70 the fact that there was some displeasure between the accused and the deceased over an affair that the accused had with the sister of the deceased and the loud exchange of words heard by the witness, it may safely be inferred that the words "චූටි මග පාවි චකට චන්න චපා" which the prosecution witness Dayanie heard, was only a part of the exchange of words. The above evidence gives rise to the consideration of the defences of sudden fight and also grave and sudden provocation by the trial judge.

It has been held in the case of *King v Kirigoris* (1) that mere abuse even unaccompanied by any physical act may be in certain circumstances regarded as sufficient provocation *Regina v K. Piyasena* (2), and *A. Punchibanda v Queen* (3). 80

The husband of the deceased Sumathipala has stated that Shriyani, a sister of the deceased had an affair with the accused and that the deceased was against it. The deceased had told him that she did not like this affair. The father of the accused has given evidence to the effect that the accused had an affair with the sister of the deceased. It should be noted that the accused was engaged in cutting fish. Also it is in evidence that he used to pluck coconuts.

The prosecution witnesses Dayanie and Sumathipala say the accused used a knife. This suggests that the weapon used in this incident was his tool of trade. The above facts clearly indicate that the accused was an illiterate person whose livelihood depended on manual work and who was likely to be provoked into serious retaliation. 90

In the case of *Queen v. Mutubanda*<sup>(4)</sup> it has been held that when considering a prosecution for murder whether the accused was deprived of the power of self-control by grave and sudden provocation the Jury must apply an objective test i.e. whether in the particular case under consideration a reasonable or average man with same background and in the circumstances of life as the accused would have been provoked into serious retaliation. Also in *Jamis v The Queen*<sup>(5)</sup>, it has been held that a mitigatory plea of grave and sudden provocation is considered objectively in relation to the class of society to which the accused belongs. 100

In the circumstances we set aside the conviction for murder entered against the accused-appellant and substitute therefor a conviction for culpable homicide not amounting to murder on the basis of GRAVE and sudden provocation and or sudden fight under section 297 of the Penal Code. We also set aside the sentence of death imposed on the accused-appellant and substitute therefor a sentence of 15 years rigorous imprisonment. 110

**FERNANDO, J.** - I agree.

*Conviction for murder set aside;  
Conviction for culpable homicide not amounting to murder substituted.*