

CHANDRASENA
v.
ATTORNEY-GENERAL

COURT OF APPEAL
GUNASEKERA, J. (P/CA),
J. A. N. DE SILVA, J.
CA 108/95
HC GALLE 1525
APRIL 1, 3, 4 AND 29, 1997.

Murder – S. 296 Penal Code – Grievous Hurt s. 316 – S. 294 exception 1 – Grave and Sudden Provocation – Act of Provocation and Retaliatory Act not a distinct and separate element – Directions to the Jury.

The accused-appellant was indicted on two Courts, the first was with having committed murder by causing the death of his mother-in-law – S. 296 – and the second, in the course of the same transaction, causing grievous hurt to his wife – S. 316 – and was found guilty on both counts. On appeal, it was contended that the learned Trial Judge erred in directing the jury as regards provocation and retaliation.

Held:

- (1) Consideration of the method and degree of the retaliation was necessarily integral to assessment of the gravity of the provocation.
- (2) The relation between the act of provocation and the retaliatory Act is not a distinct or separate element but is an aspect of the issue of the gravity.

APPEAL from the judgment of the High Court of Galle.

Cases referred to:

1. *King v. Kirigoris* – 48 NLR 407.
2. *Perera v. King* – 53 NLR 193.

3. *Regina v. Piyasena* – 57 NLR 226.
4. *Punchi Banda v. Queen* – 74 NLR 494.
5. *AG v. K. D. J. Perera* – 54 NLR 265 (P.C.)

Dr. Ranjith Fernando with Ms. K. P. Jayawardena and Ms. Premila de Silva for accused-appellant.

C. R. de Silva, P.C, Addl. S.G with B. Aluvihare S.S.C for Attorney-General.

Cur. adv. vult.

May 6, 1997.

J. A. N. DE SILVA, J.

The accused-appellant was indicted on two counts. The first count was with having committed murder by causing the death of one Augustinuge Susannona, his mother-in-law on the 12th of November, 1987, an offence punishable under section 296 of the Penal Code.

The second count was that in the course of the same transaction that he caused grievous hurt to his wife Meewaralage Chitra (මීවරලගේ චිත්‍රා) an offence punishable under section 316 of the Penal Code.

The trial was by a Jury and after the conclusion of the case on 13.10.1995 by an unanimous verdict the accused was found guilty on both counts. On the first count he was sentenced to death. On the second count a sentence of 3 years was imposed and in addition to a fine of Rs. 1,000.

The prosecution case was that the appellant married Meewaralage Chitra in the year 1975 and was having three children by that marriage. There had been displeasure between the two parties. As there was financial difficulties the wife had gone to the Middle-East for employment. She had been remitting monies from there and the husband had failed to account for them and as a result she had stopped sending money. Thereafter the accused has written several letters threatening her that he would deal with her when she returns. After the expiry

of the contract of employment the wife had returned to the Island without informing the husband and had been living with her parents at Ratnapura. Having come to know of the wife's arrival the appellant had proceeded to Ratnapura and had persuaded the wife to return with him. Thereafter both of them had lived together for about two weeks and when the appellant assaulted her with a door bar she had left him and gone back to her parents and initiated action in Magistrate's Court to claim maintenance from the appellant who was a Field Officer in the Forest Department.

On the day of the incident at about 7.30 in the morning she had been going with her mother Susannona to the Magistrate's Court for the maintenance case and the accused had accosted them near the main bus stand, Galle and in a threatening manner had asked them where they were going (කොහෙද නොපි යන්නේ). Thereafter the appellant had suggested that there should be a settlement and as the wife and the mother-in-law refused, took a barber's razor from his pocket and started attacking the wife. The wife had fallen on the ground with injuries. In order to prevent the appellant attacking the daughter further the mother had fallen on the daughter. Thereafter he had cut her neck with the razor. When he was doing this a Police Officer who happened to pass that place had seen this and rushed to the scene and having wrested the razor from the accused had taken him to the Police Station. Later the injured had been taken to the hospital by the Police where the mother-in-law was found to be dead on admission.

For the prosecution several witnesses had given evidence. Chitra, the wife of the accused described the incident and the circumstances under which the attack took place. Police Officer Ananda has stated as to how he saw the appellant cutting the throat of Susannona. Professor Niriella who conducted the Post-mortem examination supported the evidence of these two witnesses who stated that the injuries were caused with a razor. According to the Professor there had been injuries on the neck, right shoulder and right hand of the deceased. The cut injury on the upper part of the neck had been 19 cm long. The wound was deepest at the centre and the depth had been gradually less towards the right side. The thyroid cartilage, windpipe and the blood vessel were completely severed. There had

been a cut wound on the back of the right shoulder and three more cut injuries on the right hand. The cause of death had been due to severe bleeding resulting from a complete severance of the blood vessels in the neck. Dr. Selvaratnam who had examined Chitra had stated that he found six cut injuries on her and out of them 4 injuries were grievous injuries. Some injuries have caused a disfiguration of the face too.

Apart from these witnesses, an investigating officer and a son of the deceased who identified the body had given evidence for the prosecution.

The accused-appellant had given evidence on oath. According to him, he married Chitra after a ten year old love affair and is the father of three children. Due to the interference of the in-laws there were problems in the family. He always wanted to reconcile with the wife and live a harmonious life. On the day of the incident he came to attend Courts. When he came to Galle town he saw his wife and mother-in-law going towards the Fort.

He went behind them and pleaded with the wife to come back with him for the sake of the children. The wife refused to come and the mother-in-law scolded him in filth and attacked him with her umbrella. The wife was laughing and when the mother-in-law assaulted him she too joined her. As this happened in a public place he felt ashamed and lost his self control and waived the barber's razor with which he used to shave. He also stated that he did not realize that he was doing something wrong till he saw blood in his hands. Thereafter he was walking towards the Police Station when a person carrying some files held him by his hand and he gave the razor to him.

The Counsel for the appellant submitted that the learned trial Judge misdirected the Jury on the law with regard to exception one to section 294 of the Penal Code relating to grave and sudden provocation. He drew the attention of Court to pages 141 to 151 of the summing-up where the learned trial Judge has invited the Jury to consider provocation. The learned trial Judge had stated to consider whether

the retaliatory act is in proportionate to the provocation offered. The learned Counsel submitted that this is not the correct position of the law in Sri Lanka. In support of this contention he relied on the following authorities. *King v. Kirigoris*⁽¹⁾, *K. D. J. Perera v. King*⁽²⁾, *Regina v. Piyasena*⁽³⁾ and *Punchibanda v. Queen*⁽⁴⁾.

The Additional Solicitor-General who appeared for the State submitted that the law relating to Exception 1 to section 294 in the Penal Code was settled in *K. D. J. Perera's Case*⁽⁵⁾ which was decided by the Privy Council.

In that case the conclusion reached by the Privy Council was that a consideration of the method and degree of the retaliation was necessarily integral to assessment of the gravity of the provocation. Additional Solicitor-General submitted that the resulting position in the Privy Council decision in *K. D. J. Perera's case* is that the provocation is not held to be grave in the absence of appropriate correlation between the provocation and retaliatory gestures. He also pointed out that the relation between the act of provocation and the retaliatory act is not a distinct or separate element but is an aspect of the issue of the gravity. In the circumstances, the Additional Solicitor-General submitted that the learned trial Judge's directions to the Jury in this case were correct. We are inclined to agree with the learned Additional Solicitor-General on this point and hold that the learned trial Judge had properly and adequately directed the Jury on the question of provocation.

It is to be noted that in this case when the wife Chitra was giving evidence it had been suggested to her by the defence that it is she who abused the appellant and offered the provocation. The appellant in his evidence stated that it was the mother-in-law who provoked him to act in this manner.

According to the evidence the deceased and Chitra were peacefully walking towards the Court house when the appellant suddenly appeared and accosted them. The question is whether the plea of provocation can be availed of by an accused in mitigation of the

offence of murder under the first proviso, if the provocation was itself sought by the accused; according to the evidence the appellant is the one who started the abuse and he was also armed with a barber's razor which he used immediately. However, the learned trial Judge had invited the Jury to consider the plea of provocation as the accused had raised it in his evidence. We are of the view that the Jury had properly considered and rejected that plea. In our view this is not a fit case to interfere with the finding of the Jury. This appeal is dismissed and the conviction and sentence is affirmed.

GUNASEKERA, J. (P/CA) – I agree.

Appeal dismissed.