

**IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA**

The Democratic Socialist Republic of Sri Lanka
Vs

CA 123/2010
HC Gampaha 4/97

1. Ponweera Archchige Sarath Kumara
 2. Ukwatta Liyanage Don Saman Kumara
 3. Kahadawela Archchige Don Udaya Kumara
- Accused**

And Now Between

1. Ponweera Archchige Sarath Kumara
 2. Kahadawela Archchige Don Udaya Kumara
- Accused-Appellants**

Vs

The Democratic Socialist Republic of Sri Lanka

Respondent

Before : Sisira J de Abrew J &
PWDC Jayathilake

Counsel : ASM Perera PC with Harshika Samaranayake
for the 1st Accused Appellant.
Neville Abeyratne with Asitha Vipulanayake for the 2nd appellant
(3rd accused)
Vijith Malalgoda PC, ASG for the Respondent.

Argued on : 18.2.2013 and 19.2.2013

Decided on : 3.4.2013

Sisira J de Abrew J.

The above named three accused were indicted for committing the murder of a man named Don Roland. The 2nd accused died before the commencement of the

trial. Thereafter the charge was amended to read as that 1st and 3rd accused with the 2nd accused committed the murder of Don Roland. After trial the learned trial judge found the 1st and the 3rd accused guilty of the offence of culpable homicide not amounting to murder an offence punishable under Section 297 the Penal Code. Each accused was sentenced to a term of ten years rigorous imprisonment (RI) and to pay a fine Rs.5000/- carrying a default sentence of six months RI. Being aggrieved by the said conviction and the sentence they have appealed to this court. The facts of this case may be briefly summarized as follows: The deceased person was in the habit of visiting the house of Jayasena and on some days he used to sleep in this house. On the day of the incident around 7.30 p.m when Jayasena was getting ready to have his dinner the deceased person came and started watching the television in the hall of the house. At this time he came to the hall of the house as he heard a glass breaking sound. Then he saw the 1st, 2nd and 3rd accused in the hall of the house. The 1st accused was carrying a sword. The deceased person was lying fallen in the adjoining room. Furniture and plates of the house had been damaged. The 1st accused told Jayasena that he inflicted injuries to the deceased person as he (the deceased person) had assaulted his father. This is the summary of the deposition of Jayasena at the Non Summary inquiry. Jayasena died before the commencement of the trial.

Main contention of learned PC for the 1st accused was that Jayasena was not a reliable witness. I now advert to this contention. Jayasena made a statement to the police around 9.50 p.m on the same day. Chief Inspector (CI) Adikari says that he recorded the second statement of Jayasena as he felt that Jayasena had not made a full disclosure in his first statement. Jayasena died before the commencement of the trial in the High Court. Therefore his deposition at the non summary inquiry was produced as evidence under section 33 of the Evidence Ordinance. Learned defence counsel at the non summary inquiry pointed out that

Jayasena had not mentioned the names of the accused persons in his first statement made to the police. This appears to be a vital omission. The question that arises is whether the deposition of Jayasena could be believed in view of the said omission. He saw the deceased person lying fallen and the three accused persons in his house. The 1st accused was having a sword. There was blood on the floor. Why didn't he mention the names of the accused persons in his first statement made to the police? According to Jayasena before he heard the glass breaking sound, the deceased person was watching the television. Soon after the said sound he saw the deceased person lying fallen and the three accused persons inside his house. Any reasonable man under these circumstances would think that the accused persons were responsible for inflicting injuries to the deceased person. When I consider all these matters a serious doubt is created in the credibility of this witness. According to Jayasena's deposition he got to know that the deceased person had had a fight with the 1st accused's father in the afternoon of the day of the incident. According to Jayasena, the 1st accused told him that he inflicted injuries to the deceased person as he (the deceased person) had assaulted his father. But the 1st accused who gave evidence at the trial proved by producing the death certificate of his father that his father had died fourteen years ago. Thus the above deposition of Jayasena becomes false. If Jayasena's deposition is false the accused appellants should be acquitted. According to Jayasena, motive for the killing of the deceased person was that the deceased had had a fight with the 1st accused's father. But the 1st accused's father had died 14 years ago. Thus Jayasena fabricated a false reason as the motive for the killing. The learned trial judge has not considered these matters. Prosecution case depended only on deposition of Jayasena.

The 1st accused appellant in giving evidence denied the incident and proved that his father had died 14 years ago. But according to Jayasena, accused appellant inflicted injuries on the deceased person as he had had a fight in the same

afternoon with the father of the 1st accused. Therefore one has to consider whether the evidence of the 1st accused creates a reasonable doubt in the truth of the deposition of Jayasena. In my view, the evidence of the 1st accused creates a reasonable doubt in the deposition of Jayasena. The entire case of the prosecution depends on the deposition of Jayasena. Thus if the evidence of the 1st accused creates a reasonable doubt in the deposition of Jayasena, it creates a reasonable doubt in the truth of the prosecution case. In a criminal case, when the evidence of an accused person creates a reasonable doubt in the truth of the prosecution case what should the court do? The answer to this question is found in the judicial decision of Ariyadasa Vs Queen 68 NLR 66 wherein His Lordship Justice TS Fernando held thus: (1) If the jury believed the accused's evidence he is entitled to be acquitted. (2) Accused is also entitled to be acquitted even if his evidence, though not believed, was such that it caused the jury to entertain a reasonable doubt in regard to his guilt.

I have earlier held that the 1st accused's evidence creates a reasonable doubt in the truth of the prosecution case. Then the accused is entitled to be acquitted. The learned trial judge has not considered these matters. Applying the principles laid down in the above judicial decision, I hold that the accused appellants are entitled to be acquitted even on this ground.

When I consider all these matters I feel that it is unsafe to allow the conviction to stand. I therefore set aside the conviction and the sentence and acquit the appellants of the charge of which they were convicted.

Appeal allowed.

Judge of the Court of Appeal

PWDC Jayathilake

I agree.

Judge of the Court of Appeal.