

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

In the matter of an Appeal
against an order of the High Court
under Sec. 331 of the Code of
Criminal Procedure Act No. 15 of
1979.

Sengavelu Chandramogan,
Welikada Prison,
Colombo-09.

Accused-appellant

C. A. No : 267/2013

H. C. Matara No : 15/2006

V.

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent

**BEFORE : H. N. J. Perera, J. &
K. K. Wickramasinghe, J**

COUNSEL : Indica Mallawaratchy for the Accused-appellant.
S. Rajaratnam DSG, PC for the Attorney General.

ARGUED ON : 02nd July 2015

DECIDED ON : 13th August 2015

K. K. WICKREMASINGHE, J.

The accused-appellant (Sengavelu Chandramogan) was indicted in the High Court of Matara on the following two counts:

Charge No.1:

Committing the death of Raju Rajendran, on or about 04.06.2003 and thereby committing an offence punishable under Sec. 296, read with Sec. 32 of the Penal Code. He was convicted of murder and sentenced to death on 04.12.2013.

Charge No.2:

Voluntarily causing hurt to one Mannikam Marimuthu, thereby committing murder, an offence punishable under Sec. 314 read with Sec. 32 of the Penal Code and sentenced to one year of rigorous imprisonment.

This case was tried by the judge. This appeal is against the conviction and the sentence of count no.1. At the very outset the Learned Senior Deputy Solicitor General conceded to the application of the Learned Counsel for the accused-appellant to acquit the accused-appellant on count no.1 for short of evidence.

According to the version of the prosecution, the incident happened as follows;

Raju Rajendran (the deceased) was an estate worker for hire living in the Nillalla Estate. (Room No.6 in a line of houses ("leima")). Sengavelu Chandramogan (the accused appellant) was also residing in the same estate with his uncle. The deceased's wife stated in her testimony that the deceased did not to have had any kind of relationship with the accused-appellant. (Page 172 of the brief)

On the day of the incident (2003.06.04) in the evening, the deceased accompanied Mannikam Marimuthu (Witness No.1) who also resided in Room No.6 of Nillalla Estate and with whom he worked in the estate to a boutique after which they proceeded to Mannikam Marimuthu's grandmother's house ("Lechchimi") which was the seventh house in the line of houses ("leima") around 6.00pm. Mannikam Marimuthu and the deceased left the vicinity of his grandmother's house with a kerosene lamp to return to Mannikam Marimuthu's house at around 7.00pm.

When they had approached the Room No.11 junction, Chandramogan (the accused-appellant) and Vishvanadan (the second accused) stopped them and offered the deceased something to drink, which the deceased drank. After this Mannikam Marimuthu and the deceased headed forward and came to a footpath where suddenly someone hit Mannikam Marimuthu's hand sending the lamp flying near a drain. Mannikam Marimuthu testified that he was able to identify the person who hit him as Chandramogan (the accused-appellant) and three others who were with Chandramogan as Govinda Raja (third accused), Vishvanadan (second accused) and Chandrakumara or Kaluwa as he was commonly known (fourth accused).

Mannikam Marimuthu testified at that time that Chandramogan (the accused-appellant) started hitting him with a club. According to Mannikam Marimuthu's testimony, he categorically stated that Chandramogan was hitting him while the other accused were hitting the deceased. (Pages 92, 93, 99, 100, 129 & 152 of the brief) Thus Mannikam Marimuthu did not witness Chandramogan hitting the deceased. (Page 100 of the brief)

As Mannikam Marimuthu's eye was hit with the club during the incident, he could not see and he crawled home and told his father about the incident, upon which Mannikam Marimuthu was taken to the hospital by his father. Mannikam Marimuthu testified that after he left he had no knowledge of what happened to the deceased until he got to know that the deceased was dead.

In Kandaiah Kamala's testimony (the deceased's wife), she stated that the day of the incident, her husband (the deceased) failed to come home at the usual time. At around 8.30pm Chandrakumara or "Kaluwa" (fourth accused) and Vishvanadan (second accused) had come to the deceased's home and inquired about where the deceased was and left shortly thereafter. About 5 minutes after they left, the deceased's wife saw an estate worker with a torch outside and followed him. She then saw the deceased lying on the floor some distance away, bleeding heavily. The deceased was then taken to the Kosnegoda hospital, where he succumbed to his injuries on 2003.06.05.

The medical evidence given by the Judicial Medical Officer Dr. Rohan Ruwanpura of the General hospital in Karapitiya was consistent with the evidence of the Prosecution witnesses: the cause of death was due to the injuries caused to the brain by a blunt object. Dr. Ruwanpura noted that although falling from a high elevation could cause such injuries, it is unlikely that that was the case. After observing the poles collected as evidence, Dr. Ruwanpura stated that such injuries could have been caused by the poles if they were fresh at the time of the incident, that the injuries could have been inflicted by one or more persons, and that these injuries could cause the death of an individual.

The Assistant Judicial Medical Officer, Dr. Adithyapala Sisira Seneviratne, recorded five wounds on Mannikam Marimuthu (Witness No.1) which he stated were most likely caused by a blunt object. Dr. Seneviratne added that although such injuries could have been caused by a fall, that it is unlikely. Dr. Seneviratne also noted that the deceased told the doctor that three people had hit him with poles. (This was at around 7.30pm on 2003.06.04) Mannikam Marimuthu did not however, mention them by name. Dr. Seneviratne also noted that Mannikam Marimuthu spoke without any visible difficulty. (Page 206 of the brief)

The Learned Trial Judge in his decision found the first accused guilty on both charges and acquitted the second, third and fourth accused of both charges. (Pages 411 & 412 of the brief) The Learned Trial Judge also remanded the sole eye witness (Mannikam Marimuthu) for deviating from his police statement. (Page 77 of the brief)

The counsel for the accused-appellant has submitted that the evidence led at the trial does not support a conviction of murder against the accused-appellant and that the Learned Trial Judge seriously misdirected himself on critical issues of fact.

The grounds for appeal urged by the Learned Counsel for the accused-appellant are as follows;

- I. The Learned Trial Judge erred by remanding the sole eye-witness during the trial when he deviated from his police statement.
- II. Evidence led at the trial does not support the conviction for murder against the accused-appellant and the Learned Trial Judge seriously misdirected himself on very critical issues of fact. (Findings of the Learned Trial Judge are contrary to the evidence led at trial)
- III. The Learned Trial Judge relied upon the inadmissible evidence by taking cognizance and relying upon contradictions and omissions not proved or admitted by the defence at the trial.
- IV. The Learned Trial Judge flouted Sec.110 (4) of the Criminal Procedure Code by perusing police statements and treating them as substantive evidence.
- V. The Learned Trial Judge erred in applying the maxim *Falsus in Uno Falsus in Omnibus* to the instant case.

Charge No.1:

The Counsel for the Respondent has conceded to the application of the Counsel for the accused-appellant to acquit the accused-appellant in respect of charge no.1 as there is no reliable evidence to convict the accused-appellant on the said charge.

The evidence submitted by the sole witness (Mannikam Marimuthu) reveals several contradictions in his testimony. The witness in his testimony in the Magistrates Court stated that the deceased had drunk too much and that the witness had to carry the deceased on his shoulders. (Page 109 of the brief) Where as in the High court the witness testified that the deceased had not drunk that much and thus he did not have to carry the deceased. (Page 106 & 108 of the brief) The Witness also stated in his police statement that he could not recognize his assailants but in the High court he stated that he could recognize them. (Page 134 of the brief) Further the witness stated that the accused-appellant (Chandramogan) attacked only the witness and not the deceased. He amply demonstrated the fact that it was the other three accused who had attacked the deceased and not the accused-appellant.

Apparently the Learned High Court Judge had misdirected himself by convicting the accused-appellant for charge no.1 and acquitting the other three accused. The Learned

Senior Deputy Solicitor General correctly submitted that in the backdrop of the evidence presented at the trial he is unable to support the conviction in respect of charge no.1. Since there is no evidence to support the conviction of the accused-appellant for charge no.1 we hereby set aside the conviction of the accused-appellant for charge no.1.

The Learned Counsel for the accused-appellant is not challenging charge no.2, and the Learned Senior Deputy Solicitor General is supporting the conviction of the accused-appellant in respect of the said charge. Considering the above facts we see no reason to interfere with the findings of the Learned High Court Judge with regard to charge no.2. Therefore we affirm the conviction and the sentence imposed by the Learned High Court Judge with regard to charge no.2.

Subject to the above variation the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

H. N. J. Perera J

I agree.

JUDGE OF THE COURT OF APPEAL