

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

In the matter of an Appeal in terms of
Section 331(1) of the CPC read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

The Hon. Attorney General

Complainant

C.A Appeal No: CA 130/2007

Vs.

Kandasamy Mohan

Accused

High Court Batticaloa

Case No: HCEP/2315/2005

AND NOW BETWEEN

Kandasamy Mohan

Accused-Appellant

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

BEFORE : L.U Jayasuriya J.
Deepali Wijesundera J.

COUNSEL : Amila Palliyage for the Accused-Appellant
D.S Soosaidas S.S.C for the A.G

ARGUED ON : 9th November, 2016

DECIDED ON : 8th February, 2017

L.U Jayasuriya J.

The Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High-Court of Batticaloa under section 296 of the Penal Code for the murder of a person named Kanapathipillai Sandanampillai and after trial was convicted and sentenced to death.

The story of the prosecution is that on 27.05.2003, there had been an argument between the fourth witness's sister and her husband. The Appellant who was living close by (having consumed alcohol) had attacked the deceased with an iron bar when the deceased was inside the toilet. The deceased succumbed to her injuries subsequently.

The grounds of Appeal urged by the Appellant is that the Learned High Court Judge erred in Law by failing to consider the available evidence

favourable to the Appellant and has failed to consider that the Appellant is entitled for lesser culpability on the basis of voluntary intoxication.

The Appellant's Counsel submitted that the evidence placed before the court suggests that the Appellant was intoxicated at the time of the incident- and further submitted that prosecution witness no.4 has stated in his evidence that the Appellant was drunk and behaved in an angry manner. Prosecution Witness Sathasivam says that the Appellant had consumed alcohol and he was quiet.

Sathasivam goes on to say that the Appellant kept the iron bar and asked the witness to call the sister. After this, the witness had walked some distance; his sister raised cries to the effect that the Appellant was assaulting the mother.

Kanapathi Pillai Yogeswari whose evidence was adopted under section 33 of the Evidence Ordinance has stated in her evidence that the Appellant drank everyday and assaulted people. When the Appellant assaulted people, she used to settle disputes; but on the day in question she has not gone near the Appellant as he had been behaving senselessly.

What this witness says is that on previous occasions the Appellant did not pick up quarrels with her but on the day in question when she asked the Appellant to not to assault the deceased, the Appellant assaulted the witness after uttering the words "What are you speaking?"

On a careful perusal of the evidence of the above witnesses, this court cannot conclude that the Appellant was intoxicated at the time of the attack.

The fact that the Appellant asked Sathasivam to call his sister indicates that the Appellant had the ability to identify a specific person before the assault took place.

Moreover, three persons namely Sathasivam, Yogeswari and the deceased were present at the scene of the crime and according to the evidence, the Appellant has selected the feeblest person who was eighty years of age to deal with the blows.

The medical evidence proves that the deceased had sustained head injuries and Sathasivam had seen the Appellant directing the blows at the head of the deceased.

This clearly establishes the murderous intention of the Appellant.

It was held in **Rathnayake Vs The Queen 73 NLR 481** that “For the purpose of Section 79 of the Penal Code the state of intoxication in which a person should be is one in which he is incapable of forming a murderous intention; and whether he has reached that stage of intoxication or not, is a question of fact for the jury to determine depending on the evidence in each case; and it is for the person who raises the plea of drunkenness to establish on a balance of probability

that he had reached the state of intoxication in which he could not have formed a murderous intention.”

In **King Vs Velauden 48 NLR 409** it was held “When in a case of murder the defense of drunkenness is put forward, the burden is on the accused to prove that by reason of intoxication there was an incapacity to form the intention necessary to commit the crime.”

Section 105 of the Evidence Ordinance provides thus “ When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code or within any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him, and the Court should presume the absence of such circumstances.”

After considering the evidence placed before the High Court and the above decisions, this court is of the view that the Appellant had not reached the stage of intoxication at the time of the attack. Therefore, this court is not inclined to agree with the argument advanced by the Counsel for the Appellant.

For the foregoing reasons, this court moves to dismiss the Appeal.

Appeal Dismissed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J. :

I Agree.

JUDGE OF THE COURT OF APPEAL