

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.

01) Bilingahawattegedera
Karunaratne alias Raja
Bogambara Prison
02) Bilingahawattegedera Ariyaratne,
Bogambara Prison

Accused

C. A. Case No. : 104/12

H. C. Kandy Case No. : 248/2004

Vs

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

Complainant

And now

02) Bilingahawattegedera
Karunaratne alias Raja,
Bogambara Prison
03) Bilingahawattegedera Ariyaratne,
Bogambara Prison

Accused-Appellants

Vs

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

Complainant Respondent

BEFORE : M. M. A. Gaffoor, J &
K. K. Wickramasinghe, J

COUNSEL : Dr Ranjith Fernando AAL for the Accused Appellants
DSG Haripriya Jayasundera for the Complainant Respondents

ARGUED ON : 03/06/2016

DECIDED ON : 16/02/2017

K. K. WICKRAMASINGHE, J.

Two Accused Appellants (herein after referred to as the 1st appellant(1A) and the 2nd Appellant (2A) were indicted for committing murder in the High Court in the High Court of Kandy, for having committed the murder of one Dewategedera Wimalasena on 07.09.2001.

After the conclusion of the trial, the learned trial judge convicted both appellants on the 23.02.2012 on the count of murder and sentenced them to death.

Facts of the case:-

The two appellants are brothers. The parents of the deceased are eye witnesses to this incident. This has taken place at the compound near kadulla/ fence to the house of the deceased. Both appellants were known to the deceased party previously. The incident has taken place around 7.45 in the evening. According to the mother of the deceased (PW1) eye witness Soma, the appellants have called her from the road near their house. When she went to check on them, the deceased has followed her and asked them “why aiya?” without any warning or any exchange of words the two appellants have attacked the deceased, 1A with an iron rod and the 2A with a pestle. Upon receiving injuries the deceased has fallen on the ground and with the help of the neighbours he has been rushed to the hospital where he later succumbed to his injuries.

In cross examination it has been suggested to her that the appellants too got injured at that time but the witness has vehemently denied them being injured. At another point it has also been suggested to the witness that the deceased went to the house of the appellants around 8 – 8.30pm with two others and attacked the appellants. This too has been denied by the witness. It is pertinent to note that the suggestions made to the witness show

1. An admission on the part of the appellants that there was an incident that happened at the house of the deceased
2. That both appellants were present at the time of the said incident
3. The first suggestion cuts across the second suggestion which says that the appellants were attacked at their own home

4. The second suggestion has been made on the basis that the deceased who received severe injuries at the hands of the appellants was capable of going about with such injuries to the house of the appellants to inflict injuries to the appellants.

Therefore It is apparent that the suggestions are baseless and made without any solid ground

The father of the deceased– Premadasa (PW2), is an eye witness to the murder in question and has corroborated the version of Soma on all the important aspects in the case.

In cross examination he has stated that he saw the 1A at the police station but did not observe any injuries on him.

Jyaratne (PW3) who is a neighbor, on hearing cries and noises has rushed to the place of the deceased and found the mother of the deceased crying out for help near the fallen deceased. According to him the incident has taken place around 7.30pm.

His evidence confirms the fact

1. That the incident in question took place near the house of the deceased around 7.30pm
2. That the deceased was not in a position to get up even after receiving the injuries

ASP Hapuarachchi who visited the crime scene has observed patches of blood near the house of the deceased.

According to SI Sunil Ekanayake, 1A has only complained of an assault to the police around 9.50hrs on 07.09.2001 but has not made a statement. At the time he set off to conduct investigations no complaint has been received by the police. Witness Soma – mother of the deceased has been present at the crime scene. SI Sunil Ekanayake has observed blood stains near the fence of the house of the deceased.

In the course of the investigations it has revealed that another incident has taken place nearly 1-2 hours after the incident in which the deceased was injured. It has revealed that the 1A has

received injuries in the second incident that has taken place at his house. In the course of the investigation pertaining to the second incident, name of the deceased has not transpired as an assailant, which is said to have happened nearly 1 ½ hours after the first incident in which the deceased was injured.

The witness has further confirmed that names of three other persons transpired as assailants in the second incident.

He has also stated that the name of the deceased did not come up as a suspect in any of the incidents. In the course of the investigations a pole has been recovered on the statement of the 2A, which was identified and marked as P2. (Page 158)

PC Wijeratne has testified that the 1A came to the police station around 9.50pm on the 07.09.2001 and he observed an injury on his mouth and he was dispatched to the hospital with a MLEF.

According to the evidence of the Judicial Medical Officer (JMO) there have been 8 injuries on the dead body including a surgical incision. He has observed blunt trauma injuries on the dead body and has opined that heavy force has been used as the skull has been fractured into small pieces and the brain matter has come out from the torn Dura through the skull fractures. He has further stated that the injuries have been caused due to several blows.

This witness has further confirmed that the pole marked P2 can cause the injuries observed by him. This clearly shows that the observations made by the Doctor on the injuries and the weapon, corroborate the evidence of eye witnesses Soma and Premadasa.

Defence case

Both appellants has made dock statements.

1A stated that while he was at home he heard someone uttering obscenities and when he requested that person not to do so he assaulted him which broke his teeth. Thereafter he has gone to the police station and then been dispatched to hospital where he received hospitalized treatment.

It is noteworthy to observe that he has not denied the following instances:-

1. The allegation that he went to the house of the deceased with his brother and assaulted him and nor has he given any reason for assaulting the deceased
2. Does not implicate the deceased as the person who assaulted him

The 2A stated that he went to the place of the brother (1A) upon hearing a commotion and then he saw some people gathered in his compound. He has stated that his brother has been assaulted and he was getting ready to go to the hospital.

This appellatant too has not denied

1. The allegation that he went to the house of the deceased with his brother and assaulted him and nor has he given any reason for assaulting the deceased
2. Does not implicate the deceased being present among the crowd in the compound of his brother
3. the recovery of the club by the police on his statement (recovery under section 27 of the evidence ordinance)

The defence called the wife of the 1A – Seelawathi as a witness. She has stated that one Sumanadasa, Piyal another called Ajith came to their hose and assaulted her husband - 1A, and her husband received injuries on his mouth. However it is important to note that nowhere in her evidence, she has implicated the deceased as one of the assailants who came to her place that night.

In analyzing the evidence the learned trial judge has held that none of the witnesses has said that 1A suffered injuries as a result of an attack launched by the deceased and his presence has not been referred to by any of the witnesses at the time the 1A received injuries. Hence the learned judge has held the court cannot come to the conclusion it was the deceased who broke the teeth of the 1A.

The learned trial judge has quite correctly held that the accused had not taken up any exceptional grounds in their defence and nor have they explained their position when a strong prima facie case is established by the prosecution.

According to the evidence it does not show that this case comes under any of the exceptions. Therefor the learned trial judge has rejected the Defence case and held that the appellants are guilty of the offence of murder.

The learned counsel for the appellants neither in his submissions before court and nor in his written submissions has raised any specific grounds of appeal, other than quoting various portions from the judgment in his written submissions. His main contention is that the learned trial judge has erred both in facts and law with regard to the applicability of the exception of grave and sudden provocation.

Is there evidence before court that supports grave and sudden provocation?

The available evidence against the appellants can be itemized as follows:

1. The two appellants came to the place of the deceased that night around 7.30 pm¹
2. the two appellants did not deny the said position in their dock statements
3. police observations confirm that the incident has happened near the 'kadulla' to the house of the deceased²
4. A neighbour confirms that the deceased was found fallen on the ground at the time he went to the place of the incident on hearing cries and noises. Thus it confirms that the deceased was not in a position to get up and he was lying fallen near his 'kadulla'³
5. witness Soma has stated that she did not observe any injuries on the 1A at the time he came to attack the deceased with 2A
6. according to PC Wijeratne the 1A has come to the police station around 21.50hrs that night with a bleeding injury on his mouth
7. PC Wijeratne immediately dispatched the 1A to the hospital with a MLEF

¹ As per the evidence of the two eye witnesses

² Vide evidence of ASP Hapuarachchi and SI Sunil Ekanayake

³ Vide evidence of Jayaratne

8. 1A did not inform of any incident that resulted in the death of the deceased to the police and nor did he make a complaint against the deceased
9. by that time no complaint has been received by the police which implicated the deceased
10. three other persons have been implicated by the 1A and Seelawathi⁴ as persons responsible for assaulting and causing injuries to the 1A
11. according to said Seelawathi, 1A and the 2A, the incident which resulted in causing injuries to 1A happened in the compound of the 1A
12. police observations confirmed that two separate incidents have happened at two places within a gap of 1-2 hours⁵
13. according to the Seelawathi, 1A and 2A, immediately after 1A receiving the injuries he has gone to the police station from where he was sent to the hospital⁶
14. this confirms that the deceased was injured prior to the incident in which 1A was injured
15. none of them had implicated the deceased as responsible or of being a member of the group who assaulted the 1A
16. thus it is clear from the evidence that the incident in which he 1A was injured happened much after the incident in which the deceased received injuries
17. from the facts of the case and the sequence it is clear that it was the deceased who received injuries first
18. the deceased had nothing to do with the incident that caused injuries to the 1A
19. in such circumstances the learned trial judge is correct in holding that there was no evidence placed before court either by the prosecution or the defence that the murder in question falls under any of the exceptions, namely grave and sudden provocation

⁴ Defence witness – wife of 1A

⁵ Vide evidence of ASP Hapuarachchi and SI Sunil Ekanayake

⁶ Vide evidence of SI Sunil Ekanayake and PC Wijeratne

According to section 105 of the Evidence Ordinance ‘When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of general exceptions in the Penal Code, or within any special exception or proviso contained in any part of the same Code,... is upon him, and the court shall presume the absence of such circumstances.’

In the instant case there is no evidence on record to show that the appellants were provoked by any act done by the deceased. As per the eye witnesses the appellants have launched an attack on the deceased, without any warning or any exchange of words. As far as the eye witnesses were concerned they were taken up by surprise. There is absolute no evidence on record to support the contention the deceased did any act to provoke the appellants before they attacked him. In the circumstances the appellants are prevented from taking refuge under the exception grave and sudden provocation as there is no material to support the same. In the circumstances the learned trial judge cannot be faulted for rejecting the defence of grave and sudden provocation.

In the case of The King v Seedar de Silva 41 NLR 337 the principle laid down in the following dictum of Lord Ellenborough in the case of Rex. v. Lord Cochrane and others [Gurney's Rep. 479.] was quoted ‘ No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him ; but, nevertheless if he refuses to do so where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.’

This dictum applies in the present case. A strong prima facie case was made against the appellants on evidence which was sufficient to exclude the reasonable possibility of someone else having committed the crime. Without an explanation from the appellants the learned trial judge was justified in coming to the conclusion that they were guilty.

For the reasons mentioned above we affirm the convictions and the death sentences imposed on the 1st and the 2nd Accused Appellants.

Hereby we dismiss the appeal

Judge of the Court of Appeal

M.M.A. Gaffoor J

I agree

Judge of ~~the~~ Court of Appeal