

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

**In the matter of an appeal under and
in terms of Section 340 of the
Criminal Procedure Code Act No.
15 of 1979 read with Section 16 of
the Judicature Act, No. 2 of 1978**

The Attorney General of the Democratic
Socialist Republic of Sri Lanka.

Complainant

**Court of Appeal
Case No. CALA 05/2013**

Vs,

1. Maswalagoda Kankanamlage
Priyantha
2. Kuda Kandage Sarath Wijeweera

Accused

And Now Between

Don George Anton Warnakula
No.406,
Galle Road,
Maggona

Aggrieved Party - Appellant

**High Court of Ampara
Case No. HC/AMP/1560/2013** Vs,

- a) Maswalagoda Kankanamlage
Priyantha
- b) Kuda Kandage Sarath Wijeweera

Accused - Respondents

- c) The Attorney General of the
Democratic Socialist Republic of
Sri Lanka

Respondent

Before : S. Devika de L. Tennekoon, J &
S. Thurairaja PC, J

Counsel : Amila Palliyage for the Aggrieved Party- Petitioner
Tenny Fernando for the 1st and 2nd Accused-Respondents
Ayesha Jinasena, SDSG for the Respondent

Judgment on : 23rd January 2018

Judgment

S. Thurairaja PC J

Father of the deceased being aggrieved with the decision of the High Court of Ampara, of accepting a plea and giving a suspended sentence, preferred an appeal to the Court of Appeal.

Honourable Attorney General had forwarded an indictment against the 1st and 2nd accused respondents for committing the murder of Madura Nirakshana Warnakula. When the matter was taken up before the Judge of the High Court of Ampara, counsels made submissions and the learned State Counsel had reduced the charge of murder to culpable homicide not amounting murder on the basis of a sudden fight, punishable under section 297 of the Penal Code. Both accused respondents pleaded guilty made submissions in mitigations. The learned trial Judge imposed 2 years rigorous imprisonment and a fine of Rs. 5000/- in default 12 months simple imprisonment. In addition to the above the judge had ordered to pay a compensation of Rs. 50,000/- to the father of the deceased, and in default, sentence of 2 years imprisonment ordered. The learned trial Judge having considered the facts ordered to suspend the sentence imposed on the accused persons for a period of 10 years.

The Court, granted leave to the appellant and proceeded the matter for argument. When the matter was taken up for argument the appellant had submitted following grounds of appeal;

- I. The learned trial judge has failed to appreciate the direct and circumstantial evidence available against the accused-respondents warrants the maintainability of a charge under section 296 of the Penal Code.
- II. The learned trial Judge has failed to consider that the Medico Legal Report substantiate the charge under section 296 as there was no medical evidence to support the version of the Accused -Respondents.
- III. The learned trial judge has misdirected himself by failing to consider the medical aspect of the case before come in to a wrongful conclusion that the cause of death of the deceased was due to a fall.
- IV. The learned trial judge erred in law by accepting a plea under a sudden fight as there was evidence of murder.
- V. The learned trial judge has failed to consider the evidence led at the Non-summery inquiry in the event of accepting a plea on the basis of a sudden fight.
- VI. The submissions made by the both the defence and the State counsel in mitigation are contrary to the fact of the case.
- VII. The sentence imposed by the learned trial judge is unreasonable and inadequate when consider the facts and the circumstances of the case.

All counsels made submissions and the counsel for the appellant and the State filed written submissions. On perusing the submissions and the case record, the facts reveal as follows; The deceased was about 30 years old, on the 23rd November 2011 at around 8 in the morning, had drinks with the first accused and another friend. When they finished liquor bottles, they called the 2nd accused, who was three-wheeler driver to bring arrack bottles. He went to Hingurana to bring the bottles, when he returned the

deceased quarrelled with him for the delay. Thereafter all of them consumed alcohol for some time. There were some arguments and disputes among them at the time of drinking. This shows that there was no animosity among these people, in fact it was a friendly drinking session.

On many occasions the deceased who was high on liquor, started quarrelling with others. They walked out of the house to the road, where all of them were little out of their control. The deceased started shouting and quarrelling with others then the second accused had slapped him on the face, then the deceased fell on the tarred road backwards and went motionless. 1st, 2nd accused and others attended to him and found that the deceased had a bleeding injury on the back of the head, second accused cleaned up the injury and made him to sleep at the deceased's home. The deceased was taken to the hospital and admitted there. The deceased died on the 15th January 2012, and the post-mortem was held on the 17th instant. According to the Judicial Medical Officer (JMO) "the cause of death was due to intracranial injuries (injuries to brain and meningeal spaces)", further the JMO had made the following opinion in the PMR, " There was multiple blunt force trauma over the head and limbs. Multiple Nature of injuries compatible with injuries sustained by an assault."

It is clear that there is no pre-planned attack on the deceased by any one including the accused persons. None of the witnesses who made statements to the police and gave evidence at the Non- summary inquiry, (Since there is no evidence led before the high court, for the purpose of information and clarity, we made use of these materials.) reveals of any motive for any attack. All of them were drinking and playing a game of draught together. Considering, up to this point none of the prosecution witness revealed of any premeditation nor motive of any attack. It can be easily concluded that this is not a pre-planned murder.

Materials submitted by the prosecution at the Magistrate court and the high court reveals that the 2nd accused slapped (one witness says kicked) the deceased and he fell backwards on the tarred road. This is the only available evidence regarding an assault. It is further revealed that the deceased had received an injury on the back of his head, it was bleeding, he was hospitalised and treated for a period of 53 days in the intensive care unit of the General Hospital of Ampara. Evidence reveal the fact that the deceased had one injury on the head and became unconscious and there is no instantaneous death. This shows us that the act done by the assailant couldn't have anticipated result of death of his act. It is further fortifying the argument of the state that the death had occurred after 53 days of the slap and fall and this reveals that the injury caused was not fatal and did not bring death immediately.

It will become necessary to refer the relevant sections in the Penal Code.

Section 293;

Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Section 294 defines murder as states as follows,

294. Except in the cases hereinafter excepted, culpable homicide is murder-

Firstly- if the act by which the death is caused is done with the intention of causing death; or

Secondly- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

Thirdly- If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

Fourthly- If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

We peruse the PMR there the JMO had recorded 13 injuries on the body of the deceased. Since the observation of the JMO caused severe confusion we reproduce the list of injuries for easy reference;

Ante mortem injuries

- 1. Contusion 9 x 8 cm was situated over the left side of the head superimpose on the left parietal bone. On reflecting the scalp revealed subgaleal hematoma 9 x 3.5 underneath this contusion.*
- 2. There was 13 x 12 cm depressed area of the left side head as result of surgical removal of underline bony fragment.*
- 3. Healed Abrasion 1.2 x 2 cm was situated over the to of the head with an area of alopecia (loss of hair)*
- 4. Healed Abrasion 1 x 2 cm was situated over the left side of the head 3 cm behind and left to the injury no 4, with an area of alopecia (loss of hair)*
- 5. Infected laceration was situated super imposed over the posterior aspect of the craniotomy incision (this injury had been altered by surgery)*
- 6. Healed Abrasion 1.2 x 1 cm was situated over left side of the head 2 cm below the middle of the craniotomy incision.*
- 7. Contusion 2 x 3 cm was situated over posterior aspect of the left elbow.*

8. *Tramline contusion 4 cm with a gap between two lines measured 0.8 cm was transversely situated over antero-lateral aspect of the right middle thigh, 7 cm above the upper border of right knee cap.*
9. *Tramline contusion 12 cm with a gap between two lines measured 1.2 cm was transversely situated over antero-lateral aspect of the right upper thigh 5cm above the injury no. 8.*
10. *Tramline contusion 12 cm with a gap between two lines measured 1 cm was transversely situated semi circumferentially over anterior, medial and posterior aspect of the left upper thigh 22cm above the upper border of the left knee cap.*
11. *Tramline contusion 16 cm with a gap between two lines measured 1 cm was transversely situated semi circumferentially over anterior, medial and posterior aspect of the left upper thigh 28 cm above the upper border of the left knee cap.*
12. *Linear contusion 3.5 cm was situated over anterior aspect of left thigh 2 cm below the injury 11.*
13. *Abrasion 3 x 2 cm was situated over the anterior aspect of left knee.*

Surgical incisions,

Craniotomy over left side of the head, Tracheotomy and feeding Jejunostomy. (sic)

Anyone who goes through the PMR, especially the observation made under the Cause of death column, will seriously suspect that the deceased died due to severe assault, which caused the trauma on the head and limbs.

There is no doubt that these injuries were on the body of the deceased, but the question is how are these injuries caused. Studying the PMR carefully we find that the deceased was hospitalised for a long period and he was subjected to many types of treatment and examinations. For an example the tram line contusion is a clear indication of an assault with a cylindrical object. There is no evidence in this case, what

so ever to that effect, so these injuries were caused at the hospital, other observations made in the PMR provide details, that the deceased was subject to tracheostomy and there were evidence of intense intensive care in the form of tracheostomy, indwelling catheter, 3-line central venous access over neck and intravenous canula over left arm.

We are unable to understand the views/ observation made in the last column of the PMR by the JMO. He is also from the same health authority and he should have access to all medical records of the deceased including the Bed Head Ticket (BHT) at the time of the Post Mortem or before he prepared the report. We are also confused, as the appellant, of the observation of the JMO. Especially the conclusion he came, regarding the availability of evidence of assault. The only assault was, slapping before 53 days, the maximum would be a contusion and it could not stand for that long. All injuries other than the injury on the back of the head were caused during the treatment at the hospital. JMO was the best person to identify, understand and provide explanation to those injuries. Which is not available in the PMR.

Moving to the next issue that there is no question of the prerogative powers of the Attorney General in accepting a plea. He is the best person to assess the evidence and keep a balance between the Society and the accused especially between the victim and the accused.

In this case, the available evidence does not reveal any sort of serious offensive attack on the deceased. Witness Hewathantrige Nimal Priyantha Peries had come to the house of the deceased at around 8am on 23/11/2011, he had seen the deceased and his friends were consuming arrack (alcohol). After the bottle was finished the deceased had told that it's not enough he wants more, then they have called the 2nd accused who was a three-wheel driver and told him to go to Hingurana to bring Arrack.

In the meantime, the deceased and others went to play a game of draught with Gaminidasa. At around 11 am the 2nd accused brought the bottle, the deceased quarrelled with for the delay in bringing the bottles. It was evidence that the 1st accused heard saying that they had to hit the deceased to control because he was drunk and uncontrollable. No one had observed any injuries at that time on the deceased. It appears that most of them were drunk at that time. There were quarrels among them but no big fights.

When they were playing game of draught the 2nd accused had told witness Chutti Aiya to take the deceased away because he was becoming violent. Deceased walked up to the tarred road and the 2nd accused were there with others had told him to go home, when he refused the 2nd accused had slapped the deceased on the face, since the deceased was drunk he lost his balance and fell backwards on the tarred road. He was seen lying there, when others including both accused persons checked him he had a bleeding on the back of the head, it was cleaned and he was taken to home.

Sarath Munaweera who was washing clothes at the pier had seen the 2nd accused taking the deceased home. Available material reveals that many people around including the accused persons were attempted to send the deceased to his house because he was drunk and became unruly.

If we consider the charges against the 1st accused, there is no evidence that he was involved in any attack on the deceased. Any how he presently pleaded guilty and there is no appeal in that regard, we are not revisiting the conviction and the sentence.

Considering the appeal, we find the father of the deceased had strengthened the thoughts and argument to treat this incident as murder because of the observation of the JMO in the PMR. We have extensively discussed about this earlier in this judgment, The learned SDSG submits that the available evidence will not bring home the conviction for murder. Considering all available materials, we are in agreement of the

decision of the Learned State Counsel and the learned Judge of the High Court. We have no reason to interfere with the said decision.

Regarding the sentence, participation of the accused persons was different. There is no evidence that the 1st accused was involved in an assault. Considering the evidence available, we have no reason to interfere with sentence imposed on him.

The 2nd accused was seen slapping the deceased once, considering his participation it should be noted that he was not at the scene originally but invited by the deceased to bring alcohol. There is no evidence of a voluntary or planned attack. He was seen treating and caring the deceased after the slapping and falling incident.

Considering all factors including the above we are of the view that the sentence given on the accused respondents are reasonable and we have no reasons to interfere with the said decision. We do not find any merit in the grounds of appeal hence we dismiss the appeal and affirm the conviction and sentence.

Appeal Dismissed

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J
I agree,

JUDGE OF THE COURT OF APPEAL