

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

In the matter of an Appeal against the conviction / sentence of the High Court of Kalmunai under the Provisions of The Code of Criminal Procedure Act No. 15 of 1979.

A1 - M.S.M. Ibrahim alias Naleen Thatha  
A2 - Abusali Nawshad alias Padayappa  
A3 - Mohamed Thambi Baithullah  
A4 - Mohamed Thambi Rasheed  
**ACCUSED – APPELLANTS**

**Case No. CA 123-126/2016**

**HC (Kalmunai) Case No. 233/12**

**Vs**

Hon. Attorney General  
**RESPONDENT**

**BEFORE**

: Deepali Wijesundera J.

**COUNSEL**

: L.U. Jayasuriya J.

: Dr. Ranjith Fernando for the

Accused – Appellants

Parinda Ranasinghe S.D.S.G.

for the Attorney General.

**ARGUED ON**

: 26<sup>th</sup> January, 2018

**DECIDED ON**

: 02<sup>nd</sup> February, 2018

**Deepali Wijesundera J.**

The appellants were indicted in the High Court of Kalmunai under section 296 of the Penal Code for the murder of A.M. Mohamed alias Samurdeen Thandayal on the 18<sup>th</sup> of June 2009. After trial all the appellants were convicted and sentenced to death.

Prosecution Witness Number 1 giving evidence has stated that on the 18<sup>th</sup> of June 2009 around 8.30 p.m. when he was riding the bicycle with the deceased towards his house the fourth accused appellant had come and held the handle of the bicycle inquiring about cutting of a fishing net in his boat and has said that he will make a complaint to the police. The fourth appellant has said that he came after he received a phone call. While they were talking the second appellant had come from behind and struck the deceased on his back with a wooden club and the deceased had fallen. The first and third appellants have also come with his shouting "hold and hit" in tamil. Thereafter witness has been chased away by the appellant. Prosecution Witness Number 2 has testified that he saw the first, second and third appellants running at about 8.30 p.m. that day.

The medical evidence has revealed that the deceased had died on the 18<sup>th</sup> night from an injury caused to his head.

The learned counsel for the appellants stated that they are only contesting the sentence and not the conviction. He also submitted that the fourth appellant should have been acquitted on the basis that he met the deceased by chance and was talking to him when the deceased was attacked. Prosecution Witness Number 1 in his evidence has stated that he did not see from where the first, second and third appellants came. (vide page number 105 of the brief).

Pages 356 to 400 of the brief shows that the cross examination and re-examination of the second appellant has been recorded in the narrative form. The questions asked by the learned High Court Judge (page 396) is also recorded in the narrative form. (Q.A. there is a stab injury on the head). We find it difficult to fathom as to what questions were posed to the appellant.

**Section 273 of the Code of Criminal Procedure Acts provides thus;**

- 1. In the High Court and Magistrate's Courts, the evidence of each witness shall be taken down in writing by the Judge or in his presence and hearing and under his personal direction and superintendence and shall be signed and dated by the Judge and where the evidence is taken at an inquiry shall also be signed by the interpreter if any who shall have been employed.***

**2. The evidence shall not ordinarily be taken down in the form of question and answer but in the form of a narrative, but the Judge may in his discretion take down any particular question and answer.**

**Provided however that in the High Court the evidence shall be taken down in question and answer.**

We find that the learned High Court Judge was not mindful of the said provision and the procedure to follow in recording evidence in a criminal trial. Although the learned counsel for the appellants did not bring this irregularity to our notice we wish to place on record that this type of conduct by a High Court Judge can not be condoned. The second appellant was not given a fair trial.

For the afore stated reason we decide to send the case back for retrial. Judgment dated 22.06.2016 is set aside and a retrial is ordered.

**JUDGE OF THE COURT OF APPEAL**

**L.U. Jayasuriya J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**