

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

In the matter of an appeal in terms of Section
331 of the Code of Criminal Procedure Act No.
15 of 1979

C.A. Case No: 266-268/2015

H.C. Chilaw Case No:

102/2005

The Democratic Socialist Republic of Sri Lanka

Complainant

-Vs-

1. Paramajothige Aruna Jeewantha
2. Bothalage Ajith Shantha
3. Bothalage Sanjeewa Kumara
4. Pohorugama Arachchilage Siriwardena alias
Rathne

Accused

-AND NOW BETWEEN-

1. Paramajothige Aruna Jeewantha
2. Bothalage Ajith Shantha
3. Bothalage Sanjeewa Kumara

Accused-Appellants

-Vs-

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

Complainant-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

K. Priyantha Fernando J.

Counsel : Anil Silva, PC with Buddhika Mallawarachchi for the
1st Accused-Appellant.

Gayan Perera with Prabha Perera for the 2nd and 3rd
Accused-Appellants.

Janaka Bandara, SSC for the Complainant-
Respondent.

Written Submissions: By the 2nd and 3rd Accused-Appellants on 07/03/2018

By the 1st Accused-Appellant on 08/03/2018

By the Complainant-Respondent on 07/11/2018

Argued on : 11/03/2019

Judgment on : **03/04/2019**

A.L. Shiran Gooneratne J.

The 1st, 2nd and 3rd Accused Appellants (hereinafter referred to as the 1st, 2nd and 3rd Appellants, together with the 4th accused were indicted in the High Court of Chilaw under Section 32 to be read with Section 296 of the Penal Code for causing the death of Shantha Gunerthilake (deceased) in the 1st count and under

Section 317, causing injury to two others in the 2nd and 3rd counts. Upon conviction on all 3 counts, the Appellants were sentenced to death on the 1st count.

The main ground of appeal relied by the learned counsel for the 1st, 2nd and 3rd Appellants were that, the Appellants were not positively identified. The objection raised on identification of the Appellants were based on evidence prevailing on light condition for a positive identification.

Anoma Indrani (PW1), concubine of the deceased, in her evidence stated that around midnight on the date in question, she heard the 1st Appellant calling out for the deceased (Chandia), in a threatening manner demanding the deceased to come out of the house. PW1 was known to the 1st Appellant for 2 to 3 months prior to this incident and has identified him as the son-in-law of the veterinary doctor attached to the estate, where the deceased was working as a watchman. Moments later, this witness re-calls that she saw the Appellants and the 4th accused forcibly opening the main door and entering the house. The 1st Appellant had been armed with a katty and the rest had clubs in hand. The 1st Appellant had turned to the deceased who was in bed at the time and had attacked him repeatedly with a katty, shouting out to the deceased. The 1st Appellant also attacked PW1 and the other Appellants attacked the children of the deceased who were sleeping close to him.

The Appellants had left the house and moments later had come for the second time and had attacked the deceased and the injured once again and the

witness re-calls the 1st Appellant commenting that all four should be killed to prevent them giving evidence.

“ප්‍ර: 2 වැනි පාර ආප්‍රවහමත් කෙටුවාද?”

උ: 2 වැනි පාරටත් ඇවිල්ලා මරන්න ඕනෑ කියලා කෙටුවා.

ප්‍ර: කවිද?

උ: අරුණ.

ප්‍ර: ඒ වෙලාවේ තමාට මොනවා හරි කිව්වාද මේ වින්නිකරු?

උ: කල්පනාවක් නැහැ. අපිටත් බැන වැදුනා. සාක්ෂි නැතුව 4 දෙනාම මරණවා කියලා තමයි කිව්වේ. මට වචන මතක නැහැ.”

She also re-calls meeting a Buddhist monk soon after the incident. According to her evidence, the Appellants were identified by a bottle lamp light, which was about 5 feet away from the place of attack. Another bottle lamp was burning outside the house. She was uncertain as to whether the lamp outside the house was broken or burning, at the time of the attack. However, the burning lamp inside the room had given sufficient light to the adjoining room as well.

“ප්‍ර: ඒ හරියේ කොනනකද ලාම්පුව තිබුණේ?”

උ: ලාම්පුව තිබුණේ කාමර දෙකටම එළිය වැටෙන්න.”

This witness has identified the katty, which was used by the 1st Appellant to attack the deceased, marked P1. PW1 states that even though she had identified the Appellants at the identification parade held before the learned Magistrate, there

was no necessity for such identification, since she identified the Appellants at close proximity, at the time of the attack. She further state that, she knew the 2nd and 3rd Appellants before this incident, however, did not know them by name. This witness testified to the repeated assault by the 1st Appellant to the head of the deceased, which is corroborated by medical evidence.

In cross-examination, it is revealed that the police had shown the 1st Appellant to PW1, when she was hospitalized. However, there are no follow up questions posed to this witness regarding the said encounter.

PW2, the injured daughter of the deceased, who was 12 years at the time of the incident, stated that she knew the 1st Appellant as the person who was married to the daughter of the man in charge of the estate and re-calls seeing him fishing in the lake, close to the estate, a special reason to remember the Appellant. She also knew the 2nd and 3rd Appellants before this incident, however, did not know them by name. Corroborating the evidence given by PW1, she stated that the 1st Appellant attacked the deceased with a katty and the rest of the Appellants had used clubs to attack the deceased, PW3, and the injured and she identified them from a distance of 3 feet. She also re-calls that all the Appellants threatened them with death and states that the 2nd Appellant claimed that the whole family will be killed, if they come forward to give evidence.

She identified the Appellants from the light emanating from the bottle lamp, which was in close proximity. In cross examination, she stated that the light was kept low in the night and was 4 to 5 feet away from her.

PW3, the injured son of the Appellant, who was 9 years old at the time of the incident, has also identified the Appellants and contends that there was sufficient light inside the room to identify the Appellants. He stated that the 1st Appellant was dressed in women's clothing at the time of the attack. There was no follow up question put to this witness in cross-examination regarding the said stand. It is observed that this was not a situation where the 1st Appellant was using a face-mask or some other means to conceal his identity. He had clearly identified the 1st Appellant attacking the deceased with a katty and the other Appellants attacking with clubs.

The evidence given by PW1 reveals that, the lamp burning inside the room had spread to two rooms in the house. According to her evidence, the Appellants were seeing inside the house for a second time to attack and threaten the witnesses with death. Therefore, these witnesses had the opportunity to identify the Appellants for a second time and the duration of such observation of identity, is a vital factor for consideration. The evidence that the Appellants came into the house for the second time and threatened the witnesses with death is not challenged by the defence.

All the Appellants were previously known to the witnesses. PW1 had known the Appellants by name. PW2 has identified the Appellants as known persons who lived in close proximity to where she lived. PW2 and PW3 have also identified the Appellants by name in the history given by the patient in the Medical Legal Report (MLR) tendered by the Medical Officer. The distance between the Appellants and the witnesses were a few feet away from each other. It is observed that PW1 in her evidence stated that, there was no necessity for her to identify the Appellants at the identification parade, since she identified the Appellants at the time of the incident. In the said background, seeing the 1st Appellant in hospital, prior to holding the identification parade, would have no impact on the positive identification of the 1st Appellant by PW1.

The learned trial judge has evaluated the evidence regarding the light condition prevalent at the time of attack and has rightly concluded that there was sufficient light for the witnesses to have identified the Appellants. The evidence points out to the fact that the Appellants came in search of the deceased. This position is further confirmed by the testimony of the witnesses, where they state that the Appellants threatened with death in order to prevent them giving evidence. In achieving their objective, the Appellants attacked the women and the children causing injury to them.

The learned trial judge has evaluated the reliability and the testimonial trustworthiness of the witness evidence. It is observed that the witnesses have testified to this incident after a lapse of 11 years and also that PW2 and PW3 were

11 and 9 years old respectively, at the time of the incident. There are no contradictions or omissions highlighted in the evidence given by the said witnesses. When evaluating the said evidence, we do not find any reason to doubt the reliability or truthfulness of the said evidence. In the circumstances, we are convinced that the Appellants were sufficiently identified by PW1 and PW2 in the prevalent light conditions.

The counsel for the 2nd and 3rd Appellants raised 2 additional issues, that;

- *The learned trial judge has not properly evaluated the evidence against the 2nd and 3rd Appellants on their liability on common intention under Section 32 of the Penal Code.*
- *The learned trial judge has not properly evaluated the evidence of the Judicial Medical officer (JMO), in arriving at the conclusion of convicting the 2nd and 3rd Appellants under common intention to cause the death of the deceased.*

According to the Post Mortem Report, all injuries sustained by the deceased are cut injuries, whereas the evidence of the JMO refers to injury No. 8 and No. 9 as contusions caused by a blunt weapon. The argument of the learned counsel is that the 2nd and 3rd Appellants cannot be liable under Section 32 of the Penal Code for the fatal blows inflicted on the deceased, since there is no credible evidence to prove that the acts committed by the said Appellants are in furtherance of a common intention.

In a similar case, **CA Appeal No. 164/2002, Ranjith Silva J.** held that;

“this proposition in my view is outrageous”

In the said case, it was contended that the *“failure on the part of the learned trial judge to evaluate the evidence on the basis of common intention arising out of Section 32 of the Penal Code in that the learned judge failed to consider the nature of the culpability which arises in law in relation to the responsibility attributed to the person who may have struck the fatal blow”*

The court held that;

“it is my view that who inflicted the fatal blow would be immaterial if the murderous intention of the Appellant was carried out and the object was realized or accomplished, even if the fatal blow was inflicted not by the Appellant but by the person who assisted him”

In **Attorney General Vs. Munasinghe, 70 NLR 241 cited with approval in CA Appeal No. 164/2002 (Supra), Tennakoon J.** (as he was then) held that;

“in my view ---- in that there was a simple charge of murder against one accused and the judge directed the jury that they could convict the accused even if, on the evidence, they came to the conclusion that the fatal blow was not struck by the accused but the deceased had been inveigled to a particular place in pursuance of a common plan between the accused and another and that the other assaulted the deceased in pursuance of that common plan to kill”

The same view was endorsed by this Court in *Gunasiri and two others vs. Republic of Sri Lanka (2009) 1 SLR 39 at page 44.*

According to the testimony of PW1, PW2 and PW3, we are convinced that the Appellants forcibly entered the house of the deceased around mid-night, on the date material to this incident armed with a katty and clubs in furtherance of a common intention to cause the death of the deceased. Having entered the house, the Appellants attacked the deceased resulting in the death of the deceased and causing injury to 2 other inmates. After having committed the said criminal act, the 2nd and 3rd Appellants together with the 1st Appellant, entered the house of the deceased for the second time to continue with their act of brutality where the 1st Appellant had attacked the deceased for the second time. Therefore, the intention of the Appellants acting in furtherance of a common object to cause death and injury to the deceased and the injured respectively, is established.

In all the above circumstances, we uphold the conviction dated 05/11/2015 and the corresponding sentence and dismiss the Appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL