

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

In the matter of an Appeal under Section 154(P)
of the Constitution read with Section 331 of the
Criminal Procedure Act No 15 of 1979.

**CA Case No:
HCC 44-45/2016**

The Attorney General of the
Democratic Socialist Republic of Sri Lanka

**HC Chilaw
Case No: 25/2006**

Complainant

Vs

1. U.Christoper alias Chuti
2. W.H. Athula Mahinda
3. Velayudhan Nimal Dayarathna

Accused

And Now Between

- 1.U.Christoper alias Chuti
- 2.W.H.Athula Mahinda

Accused-Appellants

Vs.

The Attorney General
Attorney General's Department
Colombo 12

Complainant-Respondent

Before : **Devika Abeyratne,J**
P.Kumararatnam,J

Counsel : Palitha Fernando PC for the 1st Accused- Appellant
Neranja Jayasinghe for the 2nd Accused- Appellant
Shanil Kularatne DSG for the AG

Argued On : 08.03.2021

Decided On : 01.04.2021

Devika Abeyratne,J

The Accused Appellants *U.Christoper* alias *Chuti* and *W.H. Athula Mahinda* and another accused *V. Nimal Dayaratne* were indicted before the High Court of *Chilaw* on the following Counts.

1. Committing the offence of criminal trespass within *Warnakulasooriya Reymond Feernando*'s premises, an offence punishable under section 433(1) of the Penal Code read along with section 32 of the Penal Code.
2. Committing the murder of *Warnakulasooriya Reymond Feernando*, an offence punishable under section 296 of the Penal Code read along with 32 of the Penal Code.

After trial, the 3rd accused was acquitted on all counts and the 1st and the 2nd accused were convicted on both counts and were sentenced separately for 6 months rigorous imprisonment for the 1st count and the death sentence was passed for the second count. Aggrieved by the said convictions and sentences the appellants have preferred this appeal to this court.

At the hearing of the appeal, it was submitted by the learned President's Counsel for the appellants that the learned trial judge has failed to consider the distinction between Section 293 (2) and Section 294 (3) of the Penal Code and that there is no proof beyond reasonable doubt established by the prosecution that the accused had the intention of causing injuries which in the ordinary course of nature were sufficient to cause death.

Both Counsel were heard on their respective cases.

The background to the case briefly can be summarized as follows. The evidence of lay witnesses PW 1, PW 2, PW 3 were led among the other official prosecution witnesses.

It transpired from the evidence of PW 1 *Pradeep Fernando* the son of the deceased, that on the day of the incident around 2.30 pm, the dog owned by *Muriel Augusta* one of their neighbours, had tried to attack PW 1 and he had fallen off the bicycle. When he requested *Muriel Augusta* to tie up her dog and keep, she and her son *Asanga* had scolded him. He had informed about the incident to his father the deceased, who had gone to inquire about the incident around 5.30 to *Muriel's* house. PW 1 had heard loud noises emanating from the neighbours area and had gone to inquire about it and had witnessed, *Muriel* and her second son *Asanga*, assaulting the deceased. *Muriel* with a broom stick and the son with his hands and feet. When the witness tried to intervene, he also had got a few blows from them. However, he has brought the father home.

In the evening around 7.00 pm, the deceased had left home to meet '*Karune*' (PW 3) who the deceased visits frequently and had returned home around 8.00 pm. Thereafter, the 1st and 2nd accused had come with a crowd of people to their garden and called out to the deceased “ඉරිමන් එලියට බැහැලා වරෙන්”. The 1st accused has had a pole with him and the 2nd accused was with a sword or a knife. As it was a *Poya day* with the aid of moonlight he had witnessed the father being assaulted by the 1st and 2nd accused. All the accused are neighbours and the house of the 3rd accused was the closest

of the houses. After being assaulted, the father had come home and the accused have been shouting for them not to come out that they will be killed. The father when he came home had said that “චුවිලා ගැහුවා”.

In page 73 of the brief;

ප්‍ර : ඒ එනකොට මේ විත්තිකරුවන් මොනවද කලේ ?

උ : එලියට බහින්න එපා තොපි මරනවා කියලා කෑ ගහලා යන්න ගියා.

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ප්‍ර : ගහපු සිද්ධිය ගැන කිවුවද?

උ : චුවිලා ඇවිල්ලා ගැහුවා කියලා කිවුවා.

The deceased had complained of body pains and wanted to go to hospital. But, the witness was unable to take the injured father to the hospital that night as the accused were flashing their torches from the nearby houses and shouting for them not to come out. The deceased had asked for some water around midnight and had again complained of body pain. On the following morning around 7.00 am, the 1st accused appellant had come in front of the house with a blood stained knife and showing as if he was licking the knife, had again threatened that if they come out of the house they were going to kill them. (The 1st accused is alleged to have tasted the blood that was on the knife with his tongue.) At that moment, the wife of PW 1 had shouted that the deceased was not responding to her and when they checked on him, he was not conscious and when he was rushed to the hospital he was pronounced dead.

PW 2 the wife of PW 1 has corroborated the evidence of PW 1. She also testified that the reason that they could not take her father-in-law to the hospital when he requested was for the fear of the threats of the accused who were shouting in the area. She also testified about the 1st accused licking the knife with his tongue. They are neighbours and the houses are close to each other.

PW 3 *Karunaratne* is the person who was visited by the deceased on the night of the incident. This witness is closely related to all the accused and a close associate of

the deceased. From his evidence it transpired that he was informed by the deceased he was scared to go home as some people were waiting to attack him. He asked the deceased to stay the night at his place, when it was declined, he had accompanied the deceased to his home and an incident had taken place on the way. Near the house of the mother of the 2nd accused *Athula*, the three accused had been waiting. *Nimal* the 3rd accused had been seen with a knife. PW 3 had identified all three of them and spoken with them and told them to sort out whatever problem in the morning. However, the deceased had been struck by the 1st accused with a stone which hit the shoulder area of the deceased. The witness had been able to bring the deceased home without further incident.

According to PW 8 *Dr Sisira Kumara*, the cause of death is due to excessive bleeding due to rupture of the spleen due to assault with a blunt weapon. There is only one injury corresponding to that. No cut injuries have been detected according to the post mortem report.

The counsel for the appellant confined his argument to the fact that the learned judge had not considered the distinction between ‘Knowledge’ against ‘Intention’ and submitted that the learned Judge should have considered lesser culpability.

The learned Deputy Solicitor General, following the best traditions of the Attorney General’s Department has conceded that in the circumstances of the case, the learned trial judge could have considered the position the Counsel for the appellant is arguing on.

It has transpired in evidence that the families of the deceased and the accused had no prior enmity and were having cordial relationships previous to the incident. There are two incidents that had taken place on the day of the incident, where the deceased had been assaulted. Once around 5.30 in the afternoon, thereafter, the incident in the night where the two appellants are involved. From the medical report it can be

gathered that without any visible wound, due to the rupture of the spleen, the death has been caused.

We have considered the judicial decision by *Ninian Jayasuriya J* in CA 64/94 decided on 11.03.1999 in *Ranjith Wijesiri alias Wije Vs AG* and *King vs Mendis* 54 NLR page 177 referred to in that case.

Considering the facts of the case and the above cited judicial decisions and the submissions of the Counsel, we set aside the findings and convictions for the offence of murder for the second count imposed by the learned trial judge and we find the accused appellants guilty of culpable homicide not amounting to murder on the basis of intention an offence punishable under section 297 of the Penal Code. The sentence of death imposed on the appellants are set aside.

The learned Presidents Counsel for the appellant submitted that the accused were 22 years old when the incident took place in 1998 approximately 22 years ago and that they do not have any previous convictions. However, it is noted that the 1st accused has previous convictions.

This Courts considers the following facts when considering the sentence that has to be imposed now. The families had no previous animosity and the background to the incident is based on a request to tie up a dog who had tried to attack PW 1. The deceased being attacked over such an incident and to come to his demise is very pathetic and unfortunate. He had been only 45 years old according to the post mortem report. Further, the threats by the accused had stopped the injured being taken to the hospital. The threatening way a knife having blood appearing to being tasted in front of witnesses, which is unbecoming of a decent human beings. These are unchallenged evidence.

Taking in to consideration the time it has taken to conclude the case and the time already spent by the appellants awaiting the conclusion of the Appeal, we sentence the

appellants separately to a term of ten years rigorous imprisonment for the second count. The ten years rigorous imprisonment will take effect and be operative namely from the date of conviction 17.03.2016. The conviction and sentence in regard to the 1st count will remain unchanged. The conviction, finding and the sentence of death imposed by the learned trial judge is set aside. The appeal is partly allowed.

The registrar is directed to send a copy of the judgment together with the original case record to the High Court of *Chilaw*.

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL