

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

In the matter of an appeal in terms of Section  
331(1) of the Code of Criminal Procedure Act, No.  
15 of 1979.

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

**Complainant**

CA. No. 315/2012

**Vs.**

High Court of

1). Vijitha Jayalala Chandrakumara

Colombo

Warushawithana (Deceased)

Case No. 8467/1997

2). Saliya Nanada Chandrasumith

Warushawithana

**Accused**

**Now**

2). Saliya Nanada Chandrasumith

Warushawithana

**Accused-Appellant**

**Vs.**

Honourable Attorney General,

Attorney General's Department,

Colombo 12

**Complainant-Respondent**

BEFORE : N. Bandula Karunaratna, J.

: R. Gurusinghe, J.

COUNSEL : Saliya Pieris PC., with Pasindu Thilakarathne for the  
Accused-Appellant.

Dilan Ratnayake DSG., for the Respondent.

ARGUED ON : 26.03.2021

DECIDED ON : 28.07.2021

R. Gurusinghe, J.

In this case, the appellant and his brother, the first accused (who was deceased before the trial) was indicted before the High Court of Colombo sitting without a jury for the murder of Vithanarachchige Premarathne, punishable under Section 296 read with Section 32 of the Penal Code.

Since the first accused had died before the indictment was served, the indictment was amended accordingly. The second accused, who is the appellant, was convicted for culpable homicide not amounting to murder and was sentenced to a term of seven years' rigorous imprisonment and to a fine of five thousand rupees with a default term of six months' imprisonment.

The facts relating to this case are as follows:

There was a commotion between the deceased and the accused's family members at about 7.30 a.m. on 3<sup>rd</sup> December 1991. After that, at about 9.30 a.m. the deceased had left his home to go to work. He was wearing a uniform of a security guard. The deceased's house and the house of the accused were on the same side of the road, and the premises were adjoining. PW2 's house was on the other side of the road, and both the entrances to the deceased's house and the accused's house could be seen from there.

According to the evidence of PW2, while the deceased was going on the road in front of the accused's house both accused had come out from the gate and jumped across the road, and assaulted the deceased with an iron rod. The deceased had fallen on the road and raised again and ran, but again had fallen at the gate of the PW2's brother-in-law's house. PW2 had seen the wife of the deceased, PW1 also watching from a little distance. PW1 had asked her, "what shall we do?". PW2 told to her to bring a vehicle and take him to the hospital. At this stage, the first accused had chased PW1, and PW1 had run into PW2's compound where the first accused had caught PW1 from her hair and pointing a knife to her chest, threatened to kill her if she gives evidence.

As per the evidence of PW1, there was a commotion between the members of the accused's family and the deceased over an incident of scolding the children of the deceased by one Shantha the previous day. However, that commotion was over by 7.30 a.m. The deceased left his house to go to work at about 9.45 a.m. When he was going, both accused jumped across the road from their gate and the second accused assaulted the deceased with an iron rod. When the deceased had fallen on the road, the first accused had stabbed the deceased several times.

When PW 1 had come to the deceased, the first accused had threatened to kill PW1 holding her, and at that moment, the second accused had taken the first

accused away. For this or whatever reason, the appellant was already rewarded by not convicting for the murder.

In the appeal, the main argument for the second accused-appellant is that only the first accused had inflicted stab injuries which cause the death of the deceased. The appellant had only assaulted with the club. Therefore, the second accused did not share a common intention of killing the deceased. Counsel for the appellant further argued that the second accused had dragged away the first accused when he tried to stab PW1, it demonstrates that the second accused did not have a common intention.

According to the evidence of PW1 and PW2, both the first and the second accused had come out from the same gate simultaneously, and both had attacked the deceased with an iron rod. PW2's evidence was that she did not see stabbing to the deceased. As per the evidence of PW1, the first accused stabbed the deceased several times when the deceased had fallen on the road at the gate of the PW2's brother-in-law. The appellant and the first accused assaulted the deceased together. The appellant also assaulted the deceased with the iron rod. When the deceased had fallen on the road, the first accused stabbed the deceased. There were seventeen injuries found in the body of the deceased. Thirteen out of them were stab injuries; two were cut injuries, one abrasion, and one contusion.

According to the doctor's evidence, injuries number 2 and 11 were deep stab injuries that penetrated deep into the chest cavity injuring the heart. The injuries numbers 3,5 and 9 sufficient to cause the death of the deceased in the ordinary course of nature.

The appellant was with the first accused until he had inflicted all those fifteen injuries with a knife. He was not just standing there. He had assaulted the deceased with the iron rod, and after being assaulted by the iron rod, the deceased had fallen on the ground. Then the first accused stabbed the deceased.

The appellant had facilitated the first accused by assaulting the deceased and had him fallen on the ground.

Counsel for the appellant argues that the second accused had dragged the first accused, preventing an attack on PW1. Had he done anything similar to that with regard to the deceased, this argument could have been succeeded. The deceased had 13 stab injuries and two cut injuries. What the second accused did was to assault the deceased with the iron rod and wait there until all stab and cut injuries were inflicted by the first accused.

The appellant being the elder brother of the first accused, if he had not shared the intention to kill the deceased, he could have prevented the 1<sup>st</sup> accused from stabbing the deceased as he did with regard to PW 1. The appellant had not even by a word or a gesture objected or disapproved what his brother was doing. Both of them went together after killing the deceased. The conduct of the appellant shows that both accused had acted in furtherance of their common intention.

The existence of a common intention can be inferred from the attending circumstances of the case and the conduct of each accused. The appellant is not a mere bystander at the scene. He had actively taken part in the act of killing the deceased.

The fact that both accused had come together and jumped across the road and both had attacked the deceased with the iron rod; The appellant was present all the while until the first accused had completed inflicting thirteen stab injuries and two cut injuries; They left the scene together. All these facts manifest that the appellant had shared the intention to kill the deceased. The argument that the appellant had not shared a common intention with the first accused to kill the deceased cannot be accepted.

The next argument is that the evidence of PW2 contradicts the medical evidence. The argument is that PW2 had only seen the accused assaulting the deceased

with the iron rod and not seen any stabbing, and therefore, the evidence of PW2 is not reliable to act upon. According to the evidence of PW1, after the deceased had fallen on the ground, he was stabbed by the first accused. PW2 had also seen PW1 was watching from a short distance of the road. PW2 had described the event that happened at her compound where the first accused held PW1 and threatened to kill her, pointing a knife to her chest if she gives evidence.

Even though, PW2 did not see the deceased being stabbed by the first accused, she had seen both accused assaulting the deceased, the deceased falling on the ground, and the use of a knife by the first accused at that moment. The evidence of PW1 proves that the first accused had stabbed the deceased several times.

The appellant relies on the evidence of PW2 with regard to the appellant's intervention where the first accused had threatened to kill PW1 and use that fact to exculpate him and at the same time argues that the evidence of PW2 is not reliable. If PW2 wanted to implicate the appellant falsely, she could have easily said that she had seen the stabbing. However, she did not say so. She is the witness who says that the appellant had done some act that was supportive of the appellant. Therefore, this argument has no merit.

The next argument is that the Trial Judge had not given reasons for the findings. The learned Deputy Solicitor General for the respondent argues that the Trial Judge had given adequate reasons for the decision.

The learned Trial Judge has considered each injury inflicted on the deceased. Both accused were holding a grudge against the deceased at the time of the incident. She had also addressed her mind to each act done by both accused separately and come to the conclusion that they had acted together in furtherance of the common intention of both accused. I find no reason to disagree with the findings of the learned Trial Judge.

For the reasons set out above, the appeal of the appellant is dismissed. The conviction and the sentence is affirmed.

Judge of the Court of Appeal

**N. Bandula Karunarathna, J.**

I agree.

Judge of the Court of Appeal