

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

In the matter of an appeal against a Judgement of the
High Court under Section 331 of the Code of Criminal
Procedure Act No. 15 of 1979

The Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal

Case No: CA/HCC/361-362/18

Case No: HC Vavuniya.

2704/2017

Vs.

1. Kalimuttu Sivarasa
2. Muniyandi Thayaparan

Accused-Appellant

The Hon. Attorney General,

Attorney General's Department,

Colombo 12

Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : K Kugarajah, AAL for the accused Appellants

Dilan Ratnayake, DSG for the AG

ARGUED : 29/07/2021

DECIDED : 03/11/2021

R.Gurusinghe J

The Two accused-appellants were indicted in the High Court of Vavuniya for committing the murder of one Rasiah Suresh on 16th September 2013. After trial, both appellants were convicted for the charge of murder and sentenced to death.

The facts of this case briefly are as follows:

The incident took place near the Valliparam school. There was a house near it; part of it was used as an office of a political party, and a carpenter and his helper occupied the rest. The accused and some of the witnesses had a party there on that fateful day. They had brought six bottles of arrack and some beer cans. Food was prepared to be consumed with the liquor. The 1st and 2nd accused, PW1, PW3, and one other person was there at the beginning. They have been consuming liquor and eating for a considerable amount of time. The deceased, Suresh also came there at about 12.00 noon and had also consumed liquor. There was an argument between PW3 and the 2nd accused. The 2nd accused hit PW3. The 1st accused also assaulted PW3. This incident has taken place around

2.30 – 3.00 pm. The deceased was not present there at that time. After that, PW3 was taken away by a woman named Gnanam, that was not her real name. While PW3 was crying outside the house, the deceased came and asked as to why he was crying. PW3 told him that the two appellants had assaulted him. Then the deceased scolded the accused and asked why they assaulted PW3 in that manner as PW3 had no father.

PW3 was assaulted again by the two accused while PW3 was standing near a motorbike. By this time, PW4 and PW5 came and saved PW3 from the accused and took him a short distance away.

The deceased came again and sent PW3 away on the motorcycle. However, PW3 did not go very far, he alighted from the motorcycle about 300 meters away and sat by the side of the road crying.

As per the evidence of PW4 and PW5, when they arrived at the place of the incident, the 2nd accused and PW3 were arguing. After about 5 minutes, the deceased also came there. The deceased was an uncle of PW4 and PW5. The deceased had hit PW5 and scolded his nephews as to why they came to a place where liquor was consumed. He asked them to leave and PW4, PW5, and PW6 left. When they were walking away, the deceased also followed them. When they had walked about 25 meters towards their home, they heard the sound of a dealing of a blow. When they immediately turned and looked back, they saw that the 1st accused was carrying a helmet, and the 2nd accused was carrying a stem of a Palmyrah stalk. The deceased was lying on the ground. Immediately PW4, PW5, and PW6 came to the place where the deceased had fallen. PW6 lifted the deceased's head and placed it on his lap. The 2nd accused, who was carrying the Palmyrah Stalk and the 1st accused had run away. PW2, Keithiswaran, had also come to the scene. After that, PW2, PW4, and PW5 together took the deceased to the hospital in a three-wheeler. The deceased was pronounced dead after 30 minutes of admission to the hospital. The deceased had not spoken to the

witnesses while they were going in the three-wheeler. The evidence of PW4 and PW5 are consistent and similar to each other.

PW3 had narrated a detailed account of what had happened before he left the place of the incident. PW3 also stated that while he was crying outside, the deceased had come and asked why he was crying. The incident that killed the deceased had occurred between 6.00 – 6.30 pm.

Counsel for the appellant relies on four grounds of appeal to it:

1. The appellants were convicted on the footing of a common intention and the Trial Judge had failed to consider the evidence against each accused separately.

2. The Learned Trial Judge had failed to address his judicial mind as to whether the presence of the 1st accused was a mere presence or participatory presence.

3. The Learned Trial Judge had failed to consider the inherent weakness in the prosecution case.

4. The Trial Judge had misdirected himself regarding the facts of the case.

It was contended by the appellants that the evidence of PW1 was not reliable and that the Trial Judge should have rejected the evidence. If the evidence of PW1 is left aside, then there is no evidence as to who dealt the blow on the deceased. PW4 and PW5 were just about 15 meters away from the place where the deceased was assaulted. As per the evidence of PW4 and PW5, they heard a sound of

dealing of a blow. Immediately they saw that the deceased had fallen on the ground. The second accused was carrying a Palmyrah stalk, and the first accused was carrying a helmet. Only the two accused were there near the deceased. Then the three witnesses ran towards the deceased. The two accused had run away. Even after leaving aside the evidence of PW1, the evidence against the second accused is sufficient to support the conviction. According to PW4 and PW5, there was nobody who could have dealt the blow on the deceased other than the two accused. The second accused was there carrying a palmyrah stalk; there was only one grievous injury. The injury could have been caused by a club. The first accused had only carried a helmet, and the injury was not compatible with one dealt by a helmet.

PW1 stated that he saw the second accused had dealt a blow on the deceased by a Palmyrah stalk and the first accused was also carrying a Palmyrah stalk. One of the arguments by the appellants was that PW1 was not a reliable witness. PW2, PW3, PW4, and PW5 had not seen him there. However, the appellants had not challenged the evidence of PW 4 and 5 before this court. PW4, PW5 and PW6 were just fifteen meters ahead of the deceased when PW4 heard the sound of the blow. He turned and saw the deceased had fallen and the second accused near him was carrying a Palmyrah stalk. The first accused also was there carrying a helmet. PW4, PW5 and PW6 were just 15 meters away from the deceased. When they approached the deceased immediately upon hearing the blow, the two accused had run away.

The evidence of PW5 was almost the same; he too had seen the second accused. Both these witnesses had categorically stated that only the two accused was there at that place. PW2, PW4 and PW5 had immediately taken the deceased to the Puthukkudiyiruppu hospital. Even if the evidence of PW1 is considered as unreliable evidence, the evidence of PW4 and PW5 is sufficient to infer that the second accused dealt the fatal blow on the accused.

On pages 76 and 77 of the translated brief (PW 3 stated as follows):

Q. What was the noise which was heard?

A. The noise of dealing a blow was heard

Q. Witness, how did you see the individual falling down around 6.30 pm?

A. We were walking in front of Uncle; Uncle was following us; I turned and looked no sooner the noise was heard; at that time, Kalimuttu Sivarasa was carrying a helmet; Thayaparan was carrying a stem of the Palmyrah stalk.

On page 85 of the brief

Q. Witness, are you saying that the place of the incident is different from the place where the argument took place?

A. The assault was carried out in front of the temple.

Q. When you looked at the place, who else was there?

A. The two accused persons Kalimuttu Sivarasa and Thayaparan.

In the evidence before court PW5 stated as follows: (Page140)

Q. Witness, when you turned and looked, what did you initially see?

A. I saw my uncle fallen.

Q Who was there next to him?

A. Sivarasa and Thayaparan was there.

The defence counsel had made no complaint against this witness. When considering the evidence of PW4 and PW 5, it is proved beyond reasonable doubt that the second accused had dealt the fatal blow on the deceased. The second accused had been absconding from the police for about two weeks.

The argument is that the prosecution case rests on circumstantial evidence. PW4 and PW5, prosecution witnesses, had seen the deceased and the two accused within seconds after they had heard the noise of dealing a blow. They are eyewitnesses to the incident. The second accused was carrying a Palmyrah stalk. Other than the accused, nobody was near the accused. Therefore, there is no doubt that the second accused dealt the fatal blow on the deceased.

The Learned Deputy Solicitor General for the respondent rightly conceded that there was a sudden fight. There was no evidence that the first accused and the second accused had agreed to kill the deceased. The second accused had grabbed the Palmyrah stalk from the vicinity. Therefore, the evidence is insufficient to prove that the first accused had shared the common intention with the second accused to kill the deceased.

In the circumstances, the charge against the first accused is not proved beyond a reasonable doubt. The first accused-appellant is therefore acquitted of the charge.

The incident occurred among intoxicated people in a sudden fight. Therefore, the second accused is guilty of culpable homicide, not amounting to murder and not to the charge of murder.

Therefore, the second accused-appellant is acquitted of the charge of murder and convicted for the charge of culpable homicide not amounting to murder. The

death sentence against him is set aside. The second accused-appellant is sentenced to seven years of rigorous imprisonment.

The first accused-appellant is acquitted.

The second accused-appellant is sentenced to seven years of rigorous imprisonment, effective from the date of conviction, namely 02nd November 2018.

Appeal allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree

Judge of the Court of Appeal

