

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

In the matter of an appeal against an Order of the High Court under section 331 of the code of Criminal Procedure Act No.15 of 1975.

**Court of Appeal Case No: CA /HCC/ 254/14  
High Court Jaffna Case No: HC/881/04**

Hon. Attorney General,

**Complainant**

**Vs.**

Poothathamby Muruganathan

**Accused**

**And Now Between**

Poothathamby Muruganathan

**Accused-Appellant**

**Vs.**

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

**Complainant-Respondent**

**Before: N. Bandula Karunarathna J.**

**&**

**R. Gurusinghe J.**

**Counsel:** Thambiah AAL with Neshanee De Zoysa AAL for the Accused-appellant

Dilan Ratnayake SDSG for the Complainant-Respondent

**Written Submissions:** By the Accused – Appellant on 24.11.2017

By the Complainant-Respondent - 24.05.2018

**Argued on :** 10.11.2021

**Decided on :** 22.02.2022

## **N. Bandula Karunarathna J.**

This appeal is from the judgment, delivered by the learned Judge of the High Court of Jaffna, dated 01.10.2014, by which, the accused-appellant, who is before this Court, was convicted and sentenced to death for having murdered one Rasarathinam Uthayakumar Alias Rasarathinam Uthayaharan.

The two (02) accused persons named in this case have been indicted by the Attorney General on 01.11.2004. There were 2 charges in the indictment. They are as follows;

(a) Count 1

On or about 27.06.2001 at Puttur in the district of Jaffna within the jurisdiction of this Court you did murder by causing the death of Rasarathinam Uthayakumar Alias Rasarathinam Uthayaharan and that you have thereby committed an offence punishable under section 296 of the Penal Code read with section 32 of the same.

(b) Count 2

On the contrary to the above charge, at the same time, place and during the same act, you the 02<sup>nd</sup> accused person has aided and abetted the 01<sup>st</sup> accused person to commit the 01<sup>st</sup> offence and thereby committed an offence punishable under section 296 of the Penal Code read with section 102 of the same.

Following the indictment, the case proceedings were taken up and as requested by the accused persons, a trial before the Jury was conducted and the two (02) accused persons were sentenced to death on 15.06.2005. The two (02) accused persons have appealed against the judgement to the Court of Appeal and in appeal No: 37/2005, in a unanimous judgement, the learned Judges of the Court of Appeal Hon. Justice S. Sriskandarajah and Hon. Justice A. W. A. Salam have ordered a retrial against the two (02) accused persons.

According to the judgement of the Court of Appeal, notice was issued again to the accused persons and the indictment was read over the accused persons pleaded not guilty to charges individually and chose a trial without jury and the trial began for the second time on 07.02.2012 before the High Court of Jaffna.

The case for the prosecution was concluded along with the following witnesses for the prosecution,

- (i.) Rasarathinam Kanmani
- (ii.) Tharmakulasingham Thayalan
- (iii.) Tharmakulasingham Nakuleswary
- (iv.) Judicial Medical Officer, K. Ratnasingham
- (v.) Inspector of Police D. M. S. M. Thennakone

The prosecution case was closed leading evidence and productions marked "P-1" to "P-3. On the part of the defence, the first (01<sup>st</sup>) accused person Poothathamby Muruganathan made a statement from the dock. The second (02<sup>nd</sup>) accused person Poothathamby Mahenthiran

led evidence from the witness box. Chanthiran Saroja led evidence and the case for the defence concluded. Submissions were made on 22.07.2014 and Judgement was delivered on 01.10.2014.

After the 02<sup>nd</sup> trial, the learned trial Judge found the 01<sup>st</sup> accused-appellant guilty of the 01<sup>st</sup> charge levelled against him and imposed the death sentence. The 02<sup>nd</sup> accused was acquitted from the 02<sup>nd</sup> charge.

Being aggrieved by the said conviction and sentence, the 01<sup>st</sup> accused-appellant has preferred this appeal.

Counsel for the Appellant had raised the following grounds of appeal in the Petition of Appeal;

- (i) Learned trial Judge has not given the benefit due to the accused arising from material contradictions in the evidence led by the Prosecution.
- (ii) Evidence of the eye witness implicated both the accused but only one Accused was sentenced the other accused were acquitted. Having acquitted the 2<sup>nd</sup> accused on the first charge it is untenable for the learned Judge to have convicted the first accused on the same charge.

The learned counsel for the accused-appellant argued that the evidence of witness Tharmakulasingham Thayalan, said to have been the eye witness, sought to implicate both accused and therefore, the verdict should have been either an acquittal or conviction of both accused based on his evidence. Having acquitted the second accused, on the first charge, it is untenable for the Learned Judge to have convicted the first accused, on the same charge.

The 1<sup>st</sup> charge was against the accused-appellant under section 296 of the Penal Code read with section 32 of the same. The 2<sup>nd</sup> charge was against the 02<sup>nd</sup> accused person for aiding and abetting the 1<sup>st</sup> accused person to commit the said murder. There is no legal barrier to convict the accused-appellant for murder and acquit the 2<sup>nd</sup> accused person for aiding and abetting. Therefore, the said argument of the learned counsel for the accused-appellant has no merit.

The deceased person and the witnesses who gave evidence, namely Tharmakulasingham Thayalan and his mother Tharmakulasingham Thayalan belong to one section of the community. At the same time, the two accused persons belong to another section of society. They have revealed in their evidence that they are toddy tappers by descent. The defence evidence states that on the night before this unfortunate incident, the sisters of these two brothers who are the first and second accused persons who lived near their house were involved in a dispute with some youngsters from the community to which the witnesses of the prosecution namely Tharmakulasingham Thayalan and Nakuleswary belonged.

Saroja the sister of the two accused person who gave evidence for the prosecution stated in her evidence that the previous night, before the incident which is the reason for this case happened, in the place where one of the sisters of these two accused persons lived with her children who were young girls. The accused persons and their sisters lived next to each other. Some young men hooted and shouted at them and they went to the army camp in the vicinity

to complain about this incident. She also stated that following this complaint the army came to that place and stayed there for a long time. The unfortunate incident relating to the deceased person happened on the following day.

Witness, Thayalan accepted during cross-examination that he did not mention anything about the second accused person in his statement to the Police. It is important to note the major contradiction in what he had said during the inquest and what he had said in the statement given to the Police after the incident, particularly about the second accused person. The evidence was given by Nakuleswary, the mother of Thayalan has stated that she saw the first and the second accused person and when the two ran towards the place of the incident, they had knives in their hands. Later she said that she saw these two accused persons run back and that the first accused person had a knife in his hand and the second accused person did not have anything in his hand. This is an important matter in this case as far as the evidence for the prosecution is concerned. According to Thayalan's evidence, the knife was in the hand of the first accused person. He did not give evidence to say that the second- accused person had anything like a knife in his hand.

Thayalan's fifty-seven-year-old mother Nakuleswary, had stated that when the first and the second accused persons ran, both of them had knives in their hands. When they came back the second accused person did not have anything in his hand and the first accused person had a knife in his hand. The other important argument was that the appellant has strongly challenged the evidence led under section 27(1) of the evidence ordinance and raised considerable doubt regarding the recovery of the knife described as the weapon with which the death of the deceased was caused. The learned counsel for the accused-appellant submitted that the evidence led by the defence in this regard has not been fairly and reasonably considered by the learned trial Judge while he accepted the version of the prosecution without adequate analysis. I wish to consider the evidence lead before the learned High Court Judge at a later stage of this judgement and decide whether the decision to convict the accused-appellant was fair and reasonable.

It was further argued by the learned counsel for the accused-appellant that the learned Judge has in his judgment, observed that the first charge of both accused murdering the deceased Rasarathinam Uthayakumar, an offence punishable under section 296 of the penal code read together with section 32 of the same code failed. Consequently, the only logical and legal verdict should have been an order of acquittal of both accused and not the second accused alone. Even this argument could be dealt with after I analysed the evidence led before the trial Judge, at a later stage of this judgement.

The 02<sup>nd</sup> witness for the prosecution, Tharmakulasingham Thayalan was produced as an eye witness. His evidence was led before the Court on 14.05.2013, during which he stated that on 27.06.2001, while he was getting ready to go out to school, he witnessed this murder happen before him about 100 meters away from his house. He gave evidence before Court that this particular incident happened around 7.30 in the morning. The first accused person connected to the incident, took the knife from the second accused person and went and held Rasarathinam Uthayakumar's head with his left hand and cut the left side of his neck with his right hand. He also stated in his evidence, that even after the first accused person took the

knife from the second accused person, the second accused person had another knife with him.

He has given evidence stating that while this incident happened, he watched it from a distance of 15 meters from the place of the incident and the first accused person went past him and then cut the deceased person with the knife. He has stated further in his evidence that after the first accused person cut the deceased person, the second accused person called the first accused person saying "come we shall go" and took him away. The 3<sup>rd</sup> witness in his evidence stated that there was a crowd during this incident and when this first accused person came with the knife, they all ran from that place and he stood by the side of the road and watched the incident and once the deceased was injured, he ran away after that. Further, he has stated in his evidence that the second accused person was engaged in tapping toddy in the house of this witness, Tharmakulasingham Thayalan, he was involved in tapping toddy in same manner. Thereafter, when he got down from the tree the first accused person took the knife from him.

The second witness states very clearly the eyewitness account of this incident where a person was cut with a knife and killed. Even though there was an extensive cross-examination before Court, he clearly states that the first accused person took the knife from the second accused person and after that, the second accused person ran behind the first accused person to the place of the incident. After the deceased was cut, both of them ran towards the western direction, whereas the incident happened in the east and both of them ran in the western direction.

The 7<sup>th</sup> witness for the prosecution appeared before Court on 06.02.2014 and gave evidence. This witness is the investigating officer from the Police, who did the investigation of this incident. He has said clearly in his evidence that he went to the place of this incident as soon as he received information regarding this crime. He observed the crime scene and took notes and recorded the statements of the witnesses connected to this incident. This witness gives a full account of the place where it happened and said that this incident happened by the side of the road and there were many houses at that place. One of the important points of evidence given by this witness is that he identified these two accused persons whom he arrested and are now in the dock and stated that he arrested them in a house at Kalaimathy Colony while they were in hiding. This again is clear evidence to prove that the particular accused persons were directly involved in this incident. The witness has stated that he recorded the statement of Poothathamby Muruganatham who is the first accused person. When the first accused person said that he could identify the product which is a knife and showed it to the witness. The witness took it into his custody. This production was taken by this witness and marked as "P-2" and it is a production in this Court. Further, the attested copy of the statement given by the accused person regarding this knife has been marked as "P-1". This witness has stated that he took part in the inquest and inspected the corpse and there was a cut injury on the left side of the neck.

The next witness for the prosecution, the Judicial Medical Officer while producing the Post-mortem report and giving evidence stated to corroborate the evidence given by witness number 2, Tharmakulasingham Thayalan and witness number 07 who stated that he saw the cut injury during the inquest. There was a cut injury on the left side of the neck from the top

to the bottom and this injury had caused the severance of the main artery which leads to the brain. The particular injury can cause immediate death to the person injured in such a manner. The witness placed his opinion before the Court stating that the injured person must have been standing straight and the person who caused the injury must have been standing before him while inflicting this injury. When this knife which was marked and annexed as "P-2" was shown to the Judicial Medical Officer and asked if this particular injury could have been caused by "P-2", he had said that it can surely cause it, in a manner as to corroborate with the evidence already provided.

Witness number 7 of the prosecution has stated in his evidence that when he took the knife, there was sand on it and it was a knife used for toddy tapping. They were involved in toddy tapping. The knife was in their possession, or that this incident happened while the second accused person was involved in tapping toddy. Therefore, the evidence of this witness corroborates with what was said earlier. When the defence had stated that the 01<sup>st</sup> accused person had gone to the Police station with Theiventhiram Thanarasa, it was denied by this witness.

However, there was no evidence produced during the defence case to prove that the particular accused person had gone to the police station with Theiventhiram Thanarasa. Therefore, the learned counsel for the respondent says that the Court should consider this particular statement as a fabricated false statement. When the defence stated that this knife was taken from Chanthiran Saroja's house, the 7<sup>th</sup> witness denied it and said that when this first accused person showed the knife, it was taken from outside, at a distance away from Chanthiran Saroja's house. When Chanthiran Saroja came as the 3<sup>rd</sup> witness for the defence to Court and gave evidence, she has not mentioned anything about that.

The 5<sup>th</sup> witness for the prosecution has given evidence before Court on 11.03.2014. The witness had stated in his evidence that Rasarithnam Uthayakumar was his cousin's son and the particular incident happened by the side of the road and the main reason for this incident was the fight which ensued between two communities during the previous night. Further, this witness stated that during a dispute and a fight on the previous day before this particular murder incident happened, this accused person Mahenthiran and his wife and relations had fought with each other. The witness had stated that on the second day while returning from the Police, Mahenthiran, Muruganathan, Selvaranjan and the others had assaulted them.

The accused had confirmed this fact while giving evidence from the dock. This witness had stated that the two accused persons who are the first and the second accused persons ran towards the east with knives the first accused person had a tapping knife in his hand and while Muruganathan the first accused person came with the knife and despite her attempt to stop him he went ahead and involved himself in this incident.

Further, the witness in her evidence stated that when Muruganathan came running from the place where the incident had occurred, the knife which was in Muruganathan's hand had blood stains and both the accused person ran from the east to the west. It is evident that the main reason for this incident was the dispute between the two communities which

happened on the previous day. Thayalan who is the witness for the prosecution has given evidence saying that they were assaulting each other with clubs.

Many were watching this fight. It is stated in their evidence that many men, women and children were watching. It was at this moment that the second accused person climbed down from a tree in the house of the witness Tharmakulasingham Thayalan and his mother Nakuleswary. He has also stated that this person who climbed down from tapping toddy had on his back a container where the tapping knife and other equipment used for tapping toddy is kept. Thayalan stated that at that moment, this first accused person came there and asked for the knife from the second accused person and the second accused person gave the knife to him and after that, the two ran past him. When they ran in this manner, at one stage there was approximately a distance of three feet between them and the witness.

Out of the two accused persons who came running in this manner, the first accused person injured the deceased person with a knife who was leaning on a Palmyrah tree. He also stated that when the people who were involved in the fight saw the knife before he injured the deceased, they all ran away from there. The gist of the evidence given by Thayalan is that when men belonging to two different communities were assaulting each other with clubs, and when they saw the first accused person who belonged to one of those communities come with a knife, the ones with the clubs ran away. People were belonging to the community of the first accused person among those who ran away. The people who were involved in this dispute have belonged to the community of the first accused person. Thayalan's evidence states that they ran as soon as they saw the first accused person with the knife. His evidence says that not only the people of the deceased person's community but all those involved in the fight ran away. Thayalan's evidence is that everyone who was involved in the fight ran away.

The learned counsel for the accused-appellant raised the question of whether it can be an acceptable fact that people belonging to the first accused person's community too ran away once they saw him with the knife. The fact that the first accused person asked for the knife and took it from the second accused person who is his brother, can be considered as important evidence given by Thayalan under oath. When this incident occurred, Thayalan must have been about 13 years of age. Because, while giving evidence before the trial Judge for the second time, he has stated that his age is 26 years. What we can infer from his evidence is that though the adults who belonged to both the communities who were involved in the incident at that time, ran when they saw the first accused person with the knife, the 13-year-old boy did not run.

According to his evidence, as soon as the first accused person asked for the knife, the second accused person took it from his sheath and gave it to the first accused-appellant. It was brought to our notice that when this witness gave evidence at the inquest after a few days from the date of the incident, questions were asked from him. During the cross-examination at that time, he was asked;

"During the inquest, you said that the first accused person snatched the knife from the second accused person, didn't you?"

He answered "No" to this question. That contradiction has been marked as D-1 in the record of the inquest which is annexed in this case record and the proceedings of the lower Court. The learned counsel for the accused-appellant says that this is a major contradiction. The 13-year-old eye witness has stated during the inquest, which was held a few days after the incident happened, that the first accused person snatched the knife from the second accused person. It was further argued by the learned counsel that he could not have been vague in this matter. But during the trial of this case when he is twenty-six years old and giving evidence, he had said that the first accused person asked the second accused person for the knife and took it.

The learned counsel for the appellant submits that the attention of the court should be drawn to the difference between a person asking for the knife from another person and snatching the knife from another person. Learned counsel for the appellant raise the question of whether this witness witnessed this incident. One reason for that is the contradiction that had indicated in his evidence. The second reason is that fact that he had mentioned that everyone who was fighting with clubs ran away immediately after they saw the first accused person with the knife. Counsel for the appellant raises a doubt saying that, is it an acceptable fact that a thirteen-year-old boy who was watching the fight continued to stand in that place even when everyone who was involved in the fight ran away?

Apart from this, during the defence trial, the first accused person had made a statement from the dock. He had confirmed his presence at the time the fight occurred on that particular day. Poothathamby Mahenthiran, the second accused person had given evidence from the witness box as a defence witness. He had stated in his evidence that he was a toddy tapper and that he had to go and see his wife in the Jaffna Hospital on that day. The first accused person claims an alibi and that has to be rebutted. When the prosecution witnesses are under cross-examination, the defence was obligated to present their defence case very clearly before the trial Court. It is my view that such an alibi was not produced under any circumstance when the prosecution witnesses gave evidence but it was suddenly put forward when the second accused person gave evidence from the witness box.

During the cross-examination, his evidence was presented to Court in a manner where the argument relating to the claim of alibi was a false one. The particular second accused person had stated that he had gone to the hospital to see his wife at 5.30 on the morning of the said incident and returned home at 8.05 am. But when he was questioned about the time taken to go to the hospital by bus, he had answered 15 minutes and that the hospital was 2 1/2 miles away from his house. Further, he had stated in his evidence that he went to the hospital and saw his wife at the time when the visitors were allowed at 6.00 am and later, he came home directly.

This witness had said that he came out at 6.15 after seeing his wife. This witness said that he left the hospital at 6.15 and that it will take 15 minutes to reach his house. Therefore, it is placed before Court that this second accused person left the hospital at 6.15 and took another 15 minutes to reach home. He was at home by 6.30. The Court has to consider the alibi as a false argument. The particular accused person to work at Tharmakulasingham Thayalan's house had tied the rope and also said that when he goes to work, he uses equipment such as



tapping knife, pot and rope. Therefore, his evidence corroborates with the evidence of Tharmakulasingham Thayalan who said that he works in his house.

The learned counsel for the accused-appellant says that the shortcomings in the evidence of the defence cannot fill the gaps in the evidence of the prosecution. Therefore, his submission was that if this court accepts the evidence of the first accused person and the Dock statement, evidence of the second accused person and sister Saroja's evidence, need not accept it. But if this court believes that it creates a reasonable doubt on the part of the Prosecution, then the accused-appellant is entitled to receive a judgement of acquittal.

The learned counsel for the appellant further says that in a situation where this evidence and the things that they have said are rejected, this Court will examine to see if the evidence of the prosecution has proved beyond a reasonable doubt regarding the charges. In this case, there is Thayalan's evidence, Thayalan's mother's evidence and the dispute that happened before many people. The two people who were mother and son were called to give evidence. They are closely related to the deceased person. They know the accused persons very well. The learned counsel argued that definitely, a question has to be raised in this case, if we presume that this incident happened as a result of the fight between the accused person's and the deceased person's community because of a dispute between them on the previous night and as a result of this a fight occurred the next day and it resulted in this incident, we have to raise the question as to whether these two witnesses who are Tharmakulasingham Thayalan and Tharmakulasingham Nakuleswary have honestly said what they have witnessed or they were stating otherwise in their evidence. Because there is a gap and a contradiction in the evidence given by Thayalan and his mother Nakuleswary. There is a contradiction between the evidence given here by Thayalan and his evidence during the inquest and the evidence regarding the second accused person and particularly about how the knife exchanged hands.

Chanthiran Saroja has given evidence as to the 3<sup>rd</sup> witness of the defence. She has given evidence in a manner in which it corroborates the evidence given by the witnesses for the prosecution regarding the date and time of the incident. Also given evidence regarding the incident which happened on the 27.06.2001. Further, this witness in her evidence had stated that the said incident happened on the 27<sup>th</sup> and they went to the army camp which was close by and complained. They came back to the place of the incident at 8 am along with the Army. Though this second accused person had mentioned that he had gone to the hospital, the third witness in his statement was not in a position to establish the time when he returned. Because she went to the army camp and complained and then returned at 8 am.

The incident had happened at 7.30 in the morning and she had mentioned that Chanthiran and Mahenthiran had gone to get hold of those people who hooted during the dispute which happened on the 26<sup>th</sup> of June near their house. But it is important to note that Mahenthiran had given false evidence stating that no incident connected to the accused person's community had happened. Therefore, the second and third witnesses who testified on behalf of the defence have placed contradictory evidence regarding the 1<sup>st</sup> and 2<sup>nd</sup> accused persons. Since they have placed contradictory evidence which cannot believe and may have been fabricated after the incident took place. Therefore, the evidence of such defence witnesses

become questionable. In my view, the defence witnesses were unable to create a doubt on the prosecution case.

The learned counsel for the accused-appellant says that there was indisputable evidence that showed that members of two caste groups were engaged in a violent fight at the scene of the incident where the deceased was killed. Viewed against this background, there is an irresistible question of whether the death of the deceased was a case of murder or culpable homicide not amounting to murder. The learned counsel further argued that the learned trial Judge has not addressed his mind on this question. The evidence led by the prosecution corroborates one another of the prosecution witnesses very clearly. The second witness is an eye witness who witnessed this incident which was carried out by the first and second accused persons. The prosecution along with their witnesses have proved the charge against the accused-appellant beyond a reasonable doubt.

When I consider the evidence lead before the learned High Court Judge, it is crystal clear that the accused-appellant brutally murdered Rasarithnam Uthayakumar Alias Rasarithnam Uthayaharan with the intention of killing.

Therefore, the Judgement of the learned High Court Judge of Jaffna dated 01.10.2014 is affirmed. There is no reason to interfere with the findings of the learned trial Judge. We affirm the conviction and the sentence dated 01.10.2014.

The appeal is dismissed.

Registrar is directed to send a copy of this judgment along with the original case record to the High Court of Jaffna.

**Judge of the Court of Appeal**

**R. Gurusinghe J.**

**I agree.**

**Judge of the Court of Appeal**