

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

In the matter of an appeal under and in terms
of the provisions of Section 331 of the Code of
Criminal Procedure Act No. 15 of 1979 against
the conviction and sentence of the learned
High Court Judge of Jaffna dated 03.05.2017
in Case No. 2005/2016

CA HCC-137-142-17

HC of Jaffna Case No.2005/2016

Democratic Socialist Republic of Sri Lanka.

Complainant

1. Dissanayaka Mudiyansele Chinthaka
Nishantha Priya Bnadara
2. Gnanalingam Mayuran.
3. Pathinathan Dewadayalan
4. Rajapaksha Mudiyansele Sanjeewa
Rajapakse
5. Kogalage Jayantha
6. Weerasinghe Dorayalage Hemachandra
Weerasinghe
7. Vijayaratnam Gobikrishnan
8. Munugoda Hewage Wijesinghe

Accused

AND NOW BETWEEN

1. Dissanayaka Mudiyansele
Chinthaka Nishantha Priya Bnadara

2. Gnanalingam Mayuran.
4. Rajapakse Mudiyansele Sanjeewa Rajapakse
5. Kogalage Jayantha
6. Weerasinghe Dorayalage Hemachandra Weerasinghe
7. Vijayaratnam Gobikrishnan

1st, 2nd, 4th, 5th, 6th and 7th Accused-Appellant

v.

Hon. Attorney General,
Attorney Generals Department
Colombo 12

Respondent.

Before: Menaka Wijesundera, J.
B. Sasi Mahendran, J.

Counsel: Dushit Johnthagan with K. Raveendran and Nipuni Jav for the
Accused-Appellant in HCC 142/17
Janaka Bandara, DSG for the Respondent

Written 25.06.2018 (by the 1st, 2nd, 4th, 5th and 6th Accused-Appellants)

Submissions: 02.07.2018 (by the 7th Accused-Appellant)

On 24.07.2018 (by the Respondent)

Argued On : 08.05.2023

Decided On : 04.07.2023

Sasi Mahendran, J.

The Accused-Appellants (hereinafter referred to as the Accused) along with Pathinathan Divadayalan 3rd Accused and Munungoda Hewage Wijesinghe 8th Accused, (both acquitted after trial) were indicted for the commission of an offence punishable under the provision of Section 2 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment Act No. 22 of 1994 read with the provisions of Section 32 of the Penal Code for torturing Srisikandarajah Sumanan (hereinafter referred to as the deceased) whilst detained in custody on suspicion of the commission of robbery along with 4 other accused persons during the 25th of November 2011 and 28th of November 2011 in order to obtain information or confession or intimidate or force him to do something or discriminating him.

On 19th of October 2016 except the 7th accused all others were present and pleaded not guilty to the charge. Thereafter steps were taken in terms of Section 241 of the Code of criminal procedure and proceeded the case against the 7th Accused in his absence however he was represented by the Attorney At Law in terms of the provision Section 241(2) of the Code of Criminal Procedure.

The prosecution lead 10 witnesses along with the Judicial Medical Officer and Closed its case with documents marked P1 to P11B. The Accused gave dock statements. Both prosecution and defence made submissions.

On the 3rd of May 2017, the Learned High Court judge delivered the judgement finding the 1st, 2nd, 4th, 5th, 6th, and 7th guilty to the charge and imposed a sentence of 10 years of imprisonment, fined, awarded compensation and acquitted the 3rd and 8th Accused.

Being aggrieved by the said judgement and sentence the accused preferred this appeal.

On the 8th of May 2023 When the matter came for argument the counsel for the 7th accused informed that since the other accused have already served their sentences they are not canvassing this appeal.

The following are the Grounds of Appeal urged by the accused in their written submission.

1. The Learned trial Judge has not considered the favourable evidence to the Appellants.
2. The Learned trial Judge has not considered the defence of the Appellants.
3. The Learned trial Judge has also misdirected himself in analysing the evidence against the Appellants and has failed to consider the evidence adduced by the Appellants and witnesses.
4. The evidence led by the prosecution, if properly evaluated by court, could have led to the acquittal of the Appellants.
5. The Learned trial judge has not considered the contradictions of the prosecution witnesses.
6. The Concept of proof beyond reasonable doubt was not properly applied to the facts of the case.

Before we analyse the evidence lead at the trial it is pertinent to refer to the relevant section which describes torture.

Section 12 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment Act No. 22 of 1994., read as follows;

“Torture” with its grammatical variations and cognate expressions, means any act which causes severe pain, whether physical or mental, to any other person, being an act which is—

- a. done for any of the following purposes that is to say-
 - i. Obtaining from such other person or a third person, any information or confession; or
 - ii. Punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or
 - iii. Intimidating or coercing such other person or a third person; or
- b. Done for any reason based on discrimination, and being in every case, an act which is done by, or at the instigation of, or with the consent or acquiescence of, a public officer or other person acting in an official capacity.

In addition to the above, there is a provision available in the Constitution that prohibits torture.

Article 11 of the constitution reads as follows “No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

Now we have to consider whether the prosecution has led sufficient evidence to establish a charge of torture beyond reasonable doubt which is punishable under the said act.

The facts and circumstances giving rise to this appeal are that:

According to PW1 Rajadurai Suresh who is an eye witness has stated that he was arrested on the 23rd of November 2011 by the 1st, 2nd, 7th Accused and other Police officers for the count of theft. He was held in custody inside a room behind the traffic room situated at the Chunnakam Police Station. PW1 and the Deceased were confined and tortured in the same room amongst the agonizing torture endured by PW1 he also witnessed Sumanan being tied and restrained on a table and was assaulted after he was suspended above the ground. Sumanan had pleaded not to assault him because he is a patient under medication. Sumanan died during the course of the torture where he was seen to have been bleeding from his nose and mouth whilst the 1st, 2nd, 7th Accused and the other police officers proceeded to assault his lifeless body, after his death the deceased body was loaded on to a pickup and they departed. It was later revealed that the deceased’s lifeless body was disposed of in the Iranaimadu tank.

The following excerpt expounds on how the deceased was assaulted by the Accused.

In Page 193-194 of the translated brief:

Q: You said that you and Suman were kept in one room and were tortured, who tortured you like that.

A: Gopi, Mayuran, Chinthaka Bandara Prasath and another two Sinhala Policemen.

Q: What did they do to you and Suman after detaining both of you?

A: I was asked to be on my knees and tied both my hands behind to a pillar found in the middle. They tied the hands and legs of Suman to a table and hit him after lifting it up. They lifted him up tying his legs. He was hanging on one side of the table with his head and one leg with the table lifted up on both sides. They hit asking where the stolen Jewellery and cash were when he said that he was a patient and asked them not to hit him, they hit us both one after the other. It was then he died when he was hit. Even

after his death, they hit his body in a rage continually. Mayuran told the police not to hit him since he was about to die. Thereafter there was no breathing of Suman and he lay still. There was bleeding from his nose and mouth. He had died. After he died, they lowered him and took his body putting it in a pickup. It was after that I was taken to the residence of the Magistrate.

Q: You said you and Suman were tied inside a room and were assaulted. Do you know who were the people who assaulted both of you?

A: It was Mayuran, Gopi, Chinthaka Bandara and another two Sinhala Policemen. I know all of them.

When we consider this evidence, this court observes his evidence was consistent and there is no contradiction in his evidence. We don't see any reason to disbelieve or reject his evidence. This court observes the way this witness answered the following question. The question propounded by the counsel was as to why did he not divert to the judge when he was produced.

In Page 214 of the translated brief

Q: At that time, you had told about the beating of you. Why didn't you tell the matter of a person who was beaten to death in your presence.

A: I was in fear of being beaten to death thinking that I too might be killed. Hence I did not mention it. They said that they would file a new case- a Ganja case.

He has given a reason for the delay in providing the relevant information. This court accepts the explanation given by the witness.

This court is mindful of how our courts take into consideration with regard to these belated statements.

In Dharmasiri vs. The Republic of Sri Lanka 2012 (1) SLR 268 Tilakawardane, J held inter alia;

"Two critical tests before considering belated evidence as reliable evidence are: firstly reasons for delay and secondly, whether those reasons are justifiable."

In **Dharmasiri v Republic of Sri Lanka the Court of Appeal (2010 (2) SLR 241)**
Sisira de Abrew, J held inter alia;

"Because the witness is a belated witness, Court ought not to reject his testimony on that score alone. Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of the belated witness."

It is clear that the reason for PW1's delay in implicating the accused was due to the fear of his own safety. This court accepts the reason for delaying which is justifiable. Therefore this court could act on the evidence of the belated witness.

On careful consideration of this evidence, this witness version is intrinsically credible. We don't see any reason for the witness to have forcefully implicated this accused, also there's no suggestion presented by the accused. This witness's version of the evidence is well supported by the evidence corroborated by PW3 and PW26 the Judicial medical officer.

According to the evidence delivered by PW3 namely Thurairasa Logeswaran, he expounds that he was arrested by the Chunnakam police by the 1st, 2nd Accused and other Police officers for commemorating the Maveerars and for robbery with 4 other suspects on the 21st of November 2011, and was held in custody for 5 days where he was tortured by the methods of Electrocutation with wires.

On the day of the arrest was the first time he had met the deceased Sriskandarajah Sumanan where he was held in a separate room, although he didn't see the deceased being beaten he identified that the deceased was bleeding from his forehead when brought by the 1st and 2nd Accused passing PW3's cell on the 24th of November 2011.

Page 184 of the translated brief

Q: When you were detained in the police station, when did you see Sumanan for the 1st time?

A: On the 24th.

Q: In what condition did you see him?

A: I saw him bleeding from his forehead. I saw Sumanan when he was brought by police officer Chinthaka Bandara and Mayuran.

Q: Did you see Sumanan in the Police Station thereafter?

A: I did not see him.

It is evident that when this witness was cross examined two contradictions were marked. This court has to consider whether the said contradictions have created any doubt to disbelieve or reject this witness.

This court is mindful of the dictum of **Sisira De Abrew J** with regard to the contradiction.

In Oliver Dayananda Kalansuriya alias Raja Vs The Democratic Socialist Republic of Sri Lanka, CA 28/2009 decided on 13.2.2013, His lordship held:

“His conduct is, therefore, in my view, very much compatible with a conduct of a normal human being.

It is an accepted principle that a criminal case cannot be proved with a mathematical accuracy as it has to be proved by the evidence given by human witnesses. Thus discrepancies, errors and contradiction are bound to occur. If they do not create a reasonable doubt in the prosecution case court should disregard them. Courts should not reject evidence of witnesses on the basis of minor discrepancies and contradictions.”

In light of the above said authority, the said contradictions have not created any doubt to disbelieve or reject this witness.

The following observation made by PW26 Dr. Ramesh Alagiyawanna who conducted the postmortem on the 28th of November 2011 of the deceased Sriskandarajah Sumanan with regard to the injuries sustained in his body corroborated with the version of PW1.

The following excerpt from his evidence is reproduced below.

In Page 319-320 of the translated brief:

Q: Explain about the 4th part.

A: Based on my examination especially after I peeled the skin, I was able to observe many multiple muscular contusions. They were not grievous injuries. I arrived at a conclusion that they had been caused by blunt weapon (blunt force trauma). They had been caused by force used with blunt weapons.

Q: That is if it is said that attacking with a clenched fist using force, could that be said as a force.

A: Yes.

Q: Can this take place when using a pole or as you say, using force with a blunt weapon?

A: Yes.

Q: You said you observed few injuries in the buttocks of the deceased in your Postmortem Report. In your opinion, what would have been the condition of the victim so as to make these injuries.?

A: These injuries could be caused when attacking a person who is bending forward on the buttocks or where a person. Falls in such a manner that his buttocks hit the ground.

Q: Are there possibilities of internal injuries from 09-16 when that person's legs and hands are tied in the front?

A: Those injuries could take place when a person's hands are tied and by falling continually when that person is attacked by another.

Q: Are all the external injuries mentioned from 01-06, abrasions?

A: Yes.

Q: Are there possibilities for the said abrasion from 1-6 to occur while a person is kept tied or while pulsing that person in that position with force.

A: Yes. Both the 3rd and 6th external injuries had similar marks. External injuries No,01,02,04,05 had been caused by using a weapon with a rough surface or with a weapon is used on the body.

The above said medical evidence corroborates with the evidence of PW1's version that PW1 had seen the way the Accused assaulted the deceased with blunt weapons. Therefore, this court accepts PW1's Evidence as reliable and truthful.

The other point taken in by the Defence is whether the learned High Court Judge has rightly evaluated the dock statement. In this regard, the relevant excerpt from the judgement is reproduced below. (On page 449 – 451 of the translated Brief – Judgment dated 03.05.2017);

The Dock Statement of the 1st accused corroborated most of the evidence of the prosecution witnesses. This is a charge made of torture. It is important that the accused had not mentioned anything about the charge in his dock statement.

The 2nd accused in his dock statement had denied that he was engaged in assaulting or threatening Sumanan and denied the torture charge. The dock statement of the 2nd accused made above corroborated most of the evidence of the Prosecution witnesses.

The Court rejects the claim of the accused that he did not engage in torturing.

The 3rd accused and the 8th accused had given dock statements. Their dock statements are that of credibility.

The 4th, 5th, and the 6th accused having made the dock statement, had denied the charges. Their dock statements are found to be unreliable. Therefore the Court rejects the dock statement as unreliable.

On analysing this excerpt, we are of the view that the learned High Court Judge has rightly considered the dock statement and their Defence. We hold that the learned Trial Judge has correctly concluded that the dock statement has not created any reasonable doubt in the evidence of the Prosecution.

Additionally, the Accused has not been successful in establishing any of the limbs set out in the dictum of Shah J. in the case of *Kirpal Singh v The State of Uttar Pradesh AIR (1965) SC 712*, which was insisted upon by our courts. For the purpose of convenience, it is pertinent to set out the said dictum of Shah J;

"The conclusion recorded by the Court of First Instance and affirmed by the High Court is based upon appreciation of evidence and no question of law arises therefrom. Normally this Court does not proceed to review the evidence in appeals in criminal cases, unless the trial is vitiated by some illegality or irregularity of procedure or the trial is held in a manner violative of the rules of natural justice resulting in an unfair trial or unless the judgment under appeal has resulted in gross miscarriage of justice. "

Considering the same, this Court is of the view that the Accused has failed to satisfy us of any such gross miscarriage of justice. Therefore, we see no reason to interfere with the judgment dated 03.05.2017. The conviction and the sentence are affirmed, and the appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL