

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

C.A. No.214/2009

H.C. Trincomalee Case No.HCT/191/2007

1. Vappukutti Mohamed Nazeer
2. Raja Mohamed Mohomi Japarji
3. Adam Labbei Rajudeen
4. Adam Bava Salman Faris

ACCUSED-APPELLANTS

VS

Hon. The Attorney General

COMPLAINANT-RESPONDENT

BEFORE : ANIL GOONERATNE, J. &

P.R. WALGAMA, J.

COUNSEL : Nizam Kariapper with M.I.M. Iynullah for the 1st & 2nd Accused-Appellants.

Saliya Peiris for the 3rd & 4th Accused-Appellants.

A. Jinasena DSG for the Complainant-Respondent.

ARGUED ON : 28.10.2014 & 04.11.2014

DECIDED ON : 08.12.2014

P.R. WALGAMA, J

The Accused- Appellants(: herein after sometimes called and referred to as the Accused) had preferred in instant appeal against the conviction and the sentence of the Learned High Court Judge of Trincomalee dated 16.12.2009, by which conviction the Accused were sentenced to death. Being aggrieved by the said conviction and sentence the Accused had appealed to this Court to have the said conviction and sentence set aside accordingly.

The facts in appeal ~~are~~ albeit brief are as follows;

The all four Accused stood indicted for having committed murder of one Mohamed Nisam Sahibu on 23.05.2002, at Kandy Road, Anuradhapura Junction in Trincomalee. It was the testimony of the father of the Deceased on this fateful day at about 4.00 p.m one of the suspect came to his house and inquired about the deceased and had proceeded. It is also revealed that the deceased too had followed the van in which all these accused were travelling. There upon the witness had gone out of his house to see what was happening out side and observed a White colour van purported to have carried the accused. The said witness was not aware of the registered number of the alleged vehicle. Another three witnesses who had adduced evidence for the prosecution had only testified to the fact that the Accused came in search of the Deceased but had not seen the alleged incident that occurred at Kandy Road.

It is salient to note and the Counsels for the Accused had adverted court to the fact that the van came in search of the deceased had a number plate where as the White van that ran over the Deceased was without a number plate. So was the version of the witnesses for the prosecution who testified in Court as to the death of the Deceased.

It is also the contention of the Defence that the eye witnesses to the said accident too had stated that the van allegedly involved in the said accident did not carrying a number plate whereas the van in which the accused were travelling had a registered number. Therefore it is contended by the defence that there is a serious doubt as to the identity of the accused and the van that involved in the alleged accident.

It is common ground that all the Accused went to the house of the deceased and it was explained by the accused themselves. The unequivocal position of the Accused was that the alleged accident had occurred due to the negligence driving of a driver who drove a van without a number plate on it. Therefore in the light of the above contention and the evidence that emerged do not convinced the culpability of the accused and this court will be compelled to set aside the impugned judgment and the conviction imposed on these accused.

The vital facts stemmed from the prosecution case is that these 4 accused came in a white van to meet the deceased, and after sometime they had left the deceased place

thereupon the deceased too had followed them. There is not a single eye witness who can speak as to who knocked the deceased down and who was driving the vehicle concerned and more fully the deceased was knocked by which vehicle driven by whom. Hence the above vital issues cannot be answered to the detriment of the accused. In fact it is intensely relevant to note that there is no direct evidence to establish the guilt of the accused. The only nexus between the accused and the alleged accident was the fact that the accused visited the deceased.

The defence does not dispute the fact that the deceased died of a road accident. But contend that the alleged accident was not due their fault. Even if the deceased had died as a result of the road accident it is only the driver could be held responsible for the alleged accident. Hence no culpability rests on the others who were travelling in the van.

In the instant matter the Learned High Court Judge has convicted and imposed a jail term in respect of all the Accused, on the basis that all the accused had acted in furtherance of a common intention to murder Mohamed Nisam Sahibu. As such all the Accused were sentenced to death, punishable under section 296 of the Penal Code.

It also pertinent to note that the prosecution has not been able to established the charge of murder as they do not reveal any murderous intention on the part of the Accused and existence and the sharing of the common intention to commit murder of said Mohamed Nisam Sahibu. In the result no intelligible motive has been proved by the prosecution. Therefore it is ostensible that most vital ingredient has not been established by the prosecution.

In the said back drop it is salient to note that the only evidence available in respect of the alleged incident is the fact that one of the accused came in search the deceased to his house. The fact that the accused came in search of the deceased is not suggestive of the fact that all the accused are involved in a crime of this nature.

Hence the above circumstances do not establish the guilt of the accused. To buttress the above position the counsel for the defence has adverted court to the weight of circumstantial evidence in a criminal case and cited the case of Queen .vs. M.G.Sumanasena- 66 NLR- 350. Which has observed thus,

"in criminal cases suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt".

For the above compelling reasons this court is bound to arrive at the irresistible conclusion that there was no proper basis and cogent evidence to convict the Accused-Appellants for the charge of murder of Mohamed Nisam Sahibu.

Thus the Appeal is allowed. Conviction is set aside, Accused-Appellants are acquitted and discharged accordingly.

JUDGE OF THE COURT OF APPEAL

ANIL GOONERATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL