

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 Sec. 331 of the
Code of Criminal Procedure
Act No. 15 of 1979.

1. Mohamad Faizer Mohamad Liyakath
2. Mohamad Manzoor Mohamad Ramaz
3. Mohamad Manzoor Mohamad Harariz
4. Mohamad Manzoor Mohamad Rizwan
5. Mohamad Sali Mohamad Manzoor
(deceased)
6. Mohamad Faizer Mohamad Nizar
Hussain
7. Mohamad Manzoor Mohamad Irfan

Accused

C. A. Case No. : 230-235/2013

H. C. Kalutara Case No. : HC 874/2007

Vs

The Hon. Attorney General

Attorney General's Department,

Colombo 12.

Complainant

And now

- 1.Mohamad Faizer Mohamad Liyakath
- 2.Mohamad Manzoor Mohamad Ramaz
- 3.Mohamad Manzoor Mohamad Harariz
- 4.Mohamad Manzoor Mohamad Rizwan
- 5.Mohamad Sali Mohamad Manzoor
(deceased)
- 6.Mohamad Faizer Mohamad Nizar
Hussain
- 7.Mohamad Manzoor Mohamad Irfan

Accused-Appellants

Vs

The Hon. Attorney General

Attorney General's Department,
Colombo 12.

Complainant Respondent

BEFORE : P.R. Walgama, J &
K. K. Wickramasinghe, J

COUNSEL : Shanake Ranasinghe P C with A A L Niroshan Mihindu Kulasooriya for
1st and 6th Accused Appellants.

Razik Zarook P C with Rohana Deshapriya for 2nd 3rd 4th and 7th

Accused Appellants.

ASG Wasantha Bandara PC for Respondant

ARGUED ON : 18th January 2017

WRITTEN SUBMISSIONS FILED ON: 17TH March 2017, 17th May 2017

DECIDED ON : 16th June 2017

K. K. WICKRAMASINGHE, J.

The Accused Appellants (hear in after referred to as the Accused) in this case were indicted in the High Court of Kalutara on the following charge:-

(1) On or about 16th of November 2003 within the jurisdiction of this court in Beruwala, by being members of an unlawful assembly with the common object of causing injuries to Mohamed Jabeer Mohamed Rizmi and thereby committing an offence punishable under section 140 of the Penal Code.

(2) In the course of the same transaction, being members of the said unlawful assembly causing death of Mohamed Jabeer Mohamed Rizmi and thereby committing an offence punishable under section 296 read with section 146 of the Penal Code.

(3) In the course of the same transaction, being members of the said unlawful assembly committing attempted murder of one Abusali Mohamed Nazir and thereby committing an offence punishable under section 300 read with section 146 of the Penal Code.

(4) In the course of the same transaction, being members of the said unlawful assembly causing death of Mohamed Jabeer Mohamed Rizmi and thereby committing an offence punishable under section 296 read with section 32 of the Penal Code.

(5) In the course of the same transaction, being members of the said unlawful assembly committing attempted murder of one Abusali Mohamed Nazir and thereby committing an offence punishable under section 300 read with section 32 of the Penal Code.

At the trial the prosecution led evidence of the following witnesses:-

1. Abusali Siththi Fahira (PW1)
2. Abusai Mohamed Nazir (PW2)
3. JMO Hemantha Harischandra de Silva (PW6)
4. Mohamed Ismail Mohamed Rizwan (PW4)
5. JMO Ajith Jayasena (PW7)
6. Chief Inspector of Police B.D.L.L. Budagoda (PW11)
7. A.S.P. Mr. R.D.M. Abeyratne Disanayake (PW12)
8. P.S. Udagekankanamge Siripala (PW9)
9. D.M.S.B. Disanayake (PW8)
10. T.G.W.M.A. Sapumal Bandara (PW13)
11. Dayananda Pushpakumara De Silva- Court Interpreter

The case for the prosecution was closed after marking Documents P1, P2 and X. There after all the Accused Appellants gave doc statements. At the conclusion of the trial the Learned High Court Judge of Kalutara convicted all the Accused Appellants as follows:-

Charge 1:- 6 months RI

Charge 2:- Death Sentence

Charge 3:- 18 months RI

Charge 4 and 5:- No sentences were imposed as those charges were alternative charges.

All the Accused Appellants aggrieved by the said conviction and sentence imposed by the Learned High Court Judge of Kalutara have invoked the Appellant Jurisdiction of this Court to set aside the same.

The learned Counsel for the Appellants rose following grounds of Appeal:-

- (1.) The Learned Trial Judge has failed to properly assess that the evidence of witnesses PW1 and PW2 lacks credibility. (Inter se and per se contradictions)
- (2.) The learned Trial Judge has not considered the fact that the history given to the doctor by PW2 totally contradicts the evidence given at the trial.
- (3.) The Learned Trial Judge has failed to consider that dock identification is bad in law as there is no proper identification in this case.

(4.) The Learned Trial Judge has erred in law by convicting the Appellants under the Charge of unlawful assembly

Facts of the prosecution case in brief:-

According to Prosecution witness No.1, on 16th November 2013, the witness was woken up early morning as it was the time period that the Islamic faith conducts ritualistic fasting. She had sent her step brother (PW2) to the nearby shop and proceeded to cook. After about twenty minutes she had heard a person yelling and had come out to inquire. When she was running towards the direction which she had heard the screaming, she had stepped on a person. Then she had immediately checked and noticed the deceased (Rizmi) lying on the ground with bleeding multiple injuries. When she inquired as to who assaulted the injured he was unable to speak since his mouth was full of blood. She had screamed for help. There were about 5 people but she was unable to identify them. When she was taking the deceased to the hospital by a three wheeler he was able to speak and mentioned names of 5 people including 1st 3rd and 4th Appellants. He had mentioned names Haris, Rizmi, Rased, Rizvan, Liyakanth. After admission he was taken to the operation theatre of Nagoda hospital and there after he was pronounced dead. Her injured brother(PW2) was transferred to Colombo.

According to her evidence the deceased and the Appellants (Accused) were known to each other. Earlier her niece had met with an accident with a motor cycle belonged to the 1st accused's nephew. The police had taken steps to mediate the issue but the animosity had not completely faded away, which forms the motive for the commission of the crime. PW1 had seen the accused at the scene and that fact had not challenged in the cross examination. Since the omission had not been demonstrated, it enhances the credibility of the witness. In the case of *Himal Chandh Pradesh Vs Thakur Das (1983) 2 Cri. LJ 1694 at page 107*, it was held

that whenever a statement made by a witness is not challenged in cross examination it has to be concluded that the fact in question is not disputed.

Also in the case of **Tissera Vs AG , CA 87/2005** it was held that whenever evidence given by a witness on a material point is not challenged in cross examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subjected of course to the qualifications that the witness is a reliable witness.

It is apparent that the Accused Appellants were well-known to the prosecution witnesses and therefore there is no need to hold an identification parade. Therefore no prejudice has caused to the Accused Appellants.

According to the injured PW2, when he went to the nearby boutique to purchase bananas, he witnessed the accused assaulting the deceased. When he inquired the reason for the assault, from the 1st Accused, he had threatened the witness with death. Further said that since himself was assaulted, he was about to kill Rizmi then and there. Liyakanth (1st Accused) was armed with a 'manna knife'. When he pleaded them not to assault severely, the 1st Accused had assaulted him with a knife. He mentioned that both the 1st and the 3rd Accused were carrying knives and the rest of the Accused were carrying clubs. Although it was generally dark, the incident had taken place near a lamp post.

In the case of **Sigera Vs AG 2011 1 SLR 201**, it was held that an Appellant Court will not interfere with the findings of facts of a trial judge who has the privilege and the advantage of hearing and observing the demeanour and deportment of witnesses as and when they gave evidence in court.

In **AG Vs Potta Naufer & others SC 1/ 2006** it was held that when faced with contradictions in a testimonial of a witness, the court must bear in mind the nature and significance of the contradictions. The court must come to a determination regarding whether the contradiction was an honest mistake on the part of the witness or whether it was a deliberate attempt to mislead the court.

The doc statements of the Accused do not cast any doubt in the evidence given by the prosecution witnesses as per the rule set out in the case of **Queen Vs Kularatne 71 NLR 529**.

The short story given to the doctor cannot be treated as substantial evidence, as per section 110 of the Criminal Procedure Code. It was observed by the learned trial judge that one witness referred to one 'Yakamahatthaya' and it was a typing error.

In the light of above mentioned evidence it is clear that the prosecution had proved the guilt of the accused appellants beyond reasonable doubt and that the learned trial judge had come to the correct finding.

Therefore, the learned trial judge had not made any errors that caused prejudice to the accused appellants.

Considering above, we see no reason to interfere with the finding of the Learned High Court Judge. Hence the conviction and the sentence affirmed.

Appeal is hereby dismissed.

Judge of the Court of Appeal

P.R.Walgama J.

I agree

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