

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

In the matter of an appeal in terms of the
Section 331 of the code of Criminal
Procedure Act No. 15 of 1979 and in terms
of Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka
Complainant

Vs

1. Weligas Hethuge Pradeep Priyantha Bogaha
2. Weligas Hethuge Oliver Chandrathilake
3. Ediriweera Patabendige Chaminda
4. Ediriweera Patabendige Ranjith

Accused

CA Application Case No. 117-118/2016

H.C. Tangalle Case No. 01/2004

AND NOW BETWEEN

1. Weligas Hethuge Pradeep Priyantha Bogaha
2. Weligas Hethuge Oliver Chandrathilake

Accused – Appellant

Vs

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

Respondent

BEFORE

: Deepali Wijesundera J.

: L.U. Jayasuriya J.

COUNSEL

: Anil Silva P.C with Sahan Kulatunge

For the 1st Accused – Appellant

Saliya Peiris P.C with Thanuka

Nandasiri for the 2nd Accused –

Appellant.

Thusith Mudalige D.S.G. for the

Attorney General

ARGUED ON

: 29th May, 2017

DECIDED ON

: 30th June, 2017

Deepali Wijesundera J.

The first and second appellants along with two others (third and fourth accused respectively) were indicted in the High Court of Tangalle under section 140, section 146 read with 296, section 196 read with section 32 of the Penal Code for the murder of Arukuttu Jayasooriya Patabendige Sujith and Arukuttu Jayasooriya Patabendige Sunil respectively.

After trial first and second appellants were convicted on the fourth charge for the murder of Sujith and Sunil. Third and fourth accused were acquitted on the basis of not being identified.

On the day in question prosecution witness Malini wife of the deceased Sunil has been feeding her 2 years old child around 11 in the night and the deceased husband had been eating rice when they heard gun shots from the beach and according to the witness they both have rushed towards the beach. Sunil had rushed out saying that his brother Sujith was on the beach. The witness has followed her husband about ten feet behind and had seen first and second appellants coming towards them armed with knives. She has said that both the appellants attacked the deceased, the first had stabbed him with the knife and chased her away and she has run from that place. The witness has later returned to the place of the incident and found the husband lying on the beach with injuries and rushed him to hospital. This witness has said that she did not see the shooting taking place.

On perusal of the evidence of this witness I find that there was another unknown person present at the scene of the crime. The learned High Court Judge has acquitted all four accuseds on first, second and

third charges as there was no evidence to say there was an unlawful assembly.

Geetha Shanthi wife of the deceased Sujith had testified before the Magistrate and her evidence has been adopted under section 33 of the Evidence Ordinance. She has testified that after attacking Sujith the first appellant aimed a gun at her and Malani and threatened to kill, at which point both of them had run away. On perusal of Malani's evidence she doesn't refer to a gun been aimed at them. She has not seen Sujith been shot. Malani's evidence and Geetha Shanthi's evidence differ therefore the testimonial trustworthiness of both witnesses comes into doubt.

Witness Malani while testifying has stated that she was not sure about the identity of the third and fourth accused therefore this should apply to all the accused. The appellants have been convicted for the murder of Sujith on circumstantial evidence which I find is not enough to convict an accused.

The learned High Court Judge has delivered a 36 page judgment and convicted the first and second appellants on the fourth charges and acquitted them on first, second and third charges. She has failed to either convict or acquit the appellants on the fifth charge.

There was no direct evidence placed before the High Court to establish the fifth charge. Therefore the learned High Court Judge has relied on the previous conduct of the first accused appellant and has referred to an incident which happened seven months prior to the murder. The High Court Judge has also observed that the first accused appellant was absconding for a while, after deceased Sunil complaint to the police. This item of evidence does not fall within the provisions of *section 8 (2) of the Evidence Ordinance*.

Section 8 (2) reads thus;

“the conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.”

The learned High Court Judge has failed to apply the relevant tests in analyzing the evidence placed before the especially the test of contradictions inter – se.

The learned Deputy Solicitor General submitted to court that absconding after a complaint was made against him by the first appellant and his previous conduct are not sufficient to establish the charges levelled against him. He further submitted that the credibility of the eye witness as far as Sujith's murder is concerned is in doubt. He further stated that the identity of all the accuseds have not been established beyond reasonable doubt. The learned Deputy Solicitor General informed court due to the above reasons he's not contesting the conviction.

We thank him for maintaining the high standard of the Attorney General's Department.

For the afore stated reasons I decide to set aside the judgment and conviction dated 28/09/2016.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

L.U. Jayasuriya J.

I agree.

JUDGE OF THE COURT OF APPEAL