

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

In the matter of an appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka, against a judgment of the Court of Appeal.

S C Appeal 86 / 2015

C A case No. 205 / 2009

High Court of Trincomalee

case No. 158 / 2001

1. Jauffer Mohamed Nuhuman,

ACCUSED - APPELLANT -
APPELLANT

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT - RESPONDENT -
RESPONDENT

Before: PRIYANTHA JAYAWARDENA PC J

P. PADMAN SURASENA J

S. THURAIRAJA PC J

Counsel:

Darshana Kuruppu with Buddhika Thilakarathna for the Accused - Appellant - Appellant.

A R H Bary SSC for the Complainant - Respondent - Respondent.

Argued on : 22 - 05 - 2019

Decided on : 01 - 11 - 2019

P Padman Surasena J

In this case, Hon. Attorney General has indicted the Accused - Appellant - Appellant (hereinafter sometimes referred to as the Accused), in the High Court of Trincomalee, on a charge of murder. The said charge has alleged that the Accused, on or about 27th November 1997, at Trincomalee, has caused the death of one Ismile Lebbe Izzadeen and committed an offence punishable under section 296 of the Penal Code.

The Accused, upon the charge in the indictment being read over and explained to him, had pleaded not guilty to the said charge.

Learned High Court Judge thereafter having taken steps to conduct the trial, has pronounced his judgment dated 27th November 2009 convicting the Accused for the charge in the indictment and consequently imposed the death sentence on him.

Being aggrieved by this conviction, the Accused had appealed to the Court of Appeal. The Court of Appeal after the argument of the case, by its judgment dated 07th February 2014 had dismissed the appeal and affirmed the conviction and the sentence of the Accused.

It is the said conviction and the sentence that the Accused is seeking to canvass before this Court in this appeal.

At the time of argument, the learned counsel for the Accused stated before this Court that it would suffice for this Court to answer one question of law and therefore he will confine his submissions only to that question.¹ The said question of law is as follows.

Question of law

¹ Vide the journal entry dated 22-05-2019 in the docket.

- Was the Judgment of the Court of Appeal contrary to law and against the weight of the evidence adduced at the trial?

In order to answer the above question of law it would be necessary for this Court to briefly refer to the evidence led at the trial. The prosecution has led evidence of several Witnesses at the trial. It would be helpful to first outline the salient facts revealed from the evidence of witness Abu Bakar Iqbal. Those facts are as follows.

- i. The deceased is the brother in law of this witness.
- ii. The deceased lived in front of his house in Palaiyutru with his family.
- iii. The uncle of the deceased shouted that someone had stabbed with a knife calling for help.
- iv. When he went to the house at which this incident had happened, the Accused, his wife, his children and the uncle of the deceased were present.
- v. The uncle was in the house of the Accused.
- vi. He and uncle took the injured deceased to the hospital.

The evidence of witness Ismail Sahabdeen is limited to the fact that he had identified the body of the deceased as that of his elder brother and the fact that he had identified a knife and a stone, which Police had recovered upon the statement made by the Accused.

The evidence of the Medical Superintendent of the General Hospital Trincomalee, Dr. Gnanakunalan is also important as it establishes the nature of injuries sustained by the deceased. In his evidence, he has confirmed that there were three stab injuries two of which were found in the stomach area and the other on the left jaw of the deceased. He has further stated that the said injuries could have been caused by the knife recovered by the police upon the statement made by the Accused.

Father of the Accused, Mohammadu Muhaideen Muhammadu Jauffer giving evidence before the High Court has stated that;

- (i) he was sleeping at that time,
- (ii) he woke up as children shouted,
- (iii) there was a scuffle in the house on the date of the incident,
- (iv) the Accused who is his son told him that the deceased assaulted him,

- (v) he saw the deceased with bleeding injuries in a serious condition,
- (vi) therefore, he also helped to take him to the Trincomalee hospital.
- (vii) thereafter, he made a statement to Police.

A remarkable feature of this witness (Jauffer) is the fact that he is the father of the Accused. Thus, demonstrably, he appeared to have been somewhat reluctant witness for the prosecution. Despite his reluctance, he has categorically established the presence of the Accused at the very time of the incident at the scene. His evidence has also positively established the involvement of the Accused in the incident as he has described the incident as a fight between the Accused and the deceased.

Wife of the deceased Mohammed Izzadeen Fausal Jemmina in her evidence has stated that the deceased is her husband and she was not there at the time of the incident. Her younger brother (Nuhuman) is the Accused.

The Accused had given evidence in this case. He also had admitted that it was his brother in law who had died in this incident. He has taken up the position that he has no knowledge at all about the incident relevant to this case. It is his position that he was not present at the scene at the time of the incident and only returned home on Friday evening after working in

Colombo. It is his position that he came to know later, that someone has stabbed the deceased and that his father has taken the deceased to the hospital.

Further, he had taken up the position that he has got to know from his wife, that there were some people who are blood relatives of the deceased who had engaged in gambling there at that time. According to the Accused, it was the said blood relatives who may have killed the deceased. He has categorically stated that he was not there at the time of the incident in that house.

Section 103 of the Evidence Ordinance reads as follows;

“The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”

The second illustration mentioned under the above section states thus, “B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.”

Thus, in the face of the evidence and the circumstances of this case, this Court would now consider whether the Accused had managed at least to

create a reasonable doubt before Court regarding the fact whether he was indeed present there at that place at the relevant time.

The Accused, apart from his own evidence, had led no other evidence on his behalf. What remains in the case, is only his bear statement that he does not know what happened on that day. His position was that he was not at home. It was his evidence that he was arrested soon after he arrived at home from Colombo.

The following facts are revealed from the evidence of Chief Inspector Sunil Shantha.

- (i) He served as the Officer in Charge of the Crime Branch of Kanthale Police station at the time of the incident relevant to this case.
- (ii) The first information relating to this incident was given to the Police Station by the father of the Accused whose statement was recorded by Police Constable Upatissa at 1545 hrs. at the Police Station.
- (iii) On his instructions, Police Constable Upatissa had arrested the Accused little afterwards at the Police Station and recorded his statement around 1715 hrs. on the same day.

(iv) It was little thereafter that he and Police Constable Upatissa along with some other Police officers had gone to the scene.

(v) Consequent to the statement and upon being pointed out by the Accused, he had recovered a blood-stained knife from the backyard of the house where the incident occurred.

The Government Analyst has confirmed (report was produced marked **P 7**) that the stains found on the said knife is human blood.

Moreover, as has already been mentioned before, there is absolutely no reason for the father of the Accused to fabricate false evidence against his son. The Accused had made no attempt to explain his father's evidence against him.

According to the prosecution evidence including the evidence of the father of the Accused, the fact that the Accused was present at the scene at or about the time of the incident has become a strongly established fact. The position taken up by the Accused is that he just arrived from Colombo and was arrested by Police. The Accused does not explain his father's evidence that he was engaged in a scuffle with the deceased and that the deceased had received three stab injuries in the said scuffle. The evidence has also

positively established that no other person other than the Appellant could be held responsible for inflicting these injuries on the deceased as only the deceased, the Accused, father of the Accused, wife of the Accused (apart from the children) had been there in the house at that moment. It is the view of this Court that the learned counsel for the Appellant in the course of his submissions did not succeed in controverting the above conclusions.

The above circumstances clearly show that the Accused in the trial, without making any attempt to explain as to how the incident had occurred, had chosen to take up a defence of alibi making a failed attempt to convince Court that he was not there at the scene of the incident at the relevant time. The evidence of the Accused is not only unconvincing per se but also does not draw support even from the evidence of his father.

In these circumstances, it is the view of this Court also that the decision by the learned High Court Judge to reject the evidence of the Accused particularly because the father of the Accused himself has positively established the presence of the Accused at the very moment of this incident is a well-founded decision.

This Court is satisfied that the evidence of this case taken in its totality, would only be consistent with the guilt of the Accused and inconsistent with any reasonable hypothesis of his innocence.

Perusal of the judgment of the High Court shows to the satisfaction of this Court that the learned High Court Judge had rightly decided that the Accused should be convicted for the offence of murder punishable under section 296 of the Penal Code.

Therefore, it is the view of this Court that the Court of Appeal was correct when it held that there are no grounds to interfere with the judgment of the learned trial judge.

This Court cannot find any basis to deviate from the course of action that was adopted by the Court of Appeal when it decided to affirm the judgment of the High Court and to dismiss the appeal filed before it by the Accused.

In these circumstances, this Court has no basis to interfere with either the judgment of the Court of Appeal or that of the High Court.

This Court answers the question of law mentioned above in the negative.

For the foregoing reasons, this Court affirms the judgment of the High Court dated 27 November 2009 and the judgment of the Court of Appeal dated 07th February 2014. This appeal is therefore dismissed.

Appeal is dismissed.

JUDGE OF THE SUPREME COURT

PRIYANTHA JAYAWARDENA PC J

I agree,

JUDGE OF THE SUPREME COURT

S. THURAIRAJA PC J

I agree,

JUDGE OF THE SUPREME COURT