

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

In the matter of an Appeal in terms of Section 451(3) of the Criminal Procedure Act No.21 of 1988.

1. Mazur Ieven
2. Iana Bereznah
No. 130, Tanganrogskay
Divisu 5, Mariupol
Ukrain
(presently at Welikada Remand)

SC Appeal No. TAB/1/2015
High Court Colombo Case No.
6091/2011(TAB)

Accused - Appellants

Vs.

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

Respondent

Before	:	Priyasath Dep, PC. J B.P. Aluwihare, PC. J Sisira J. de Abrew, J Priyantha Jayawardana, PC. J Anil Goonaratne, J
Counsel	:	Amila Palliyage with Madushanka Deeyagaha and Eranda Sinharage for 1 st Accused Appellant. Indica Mallawarachchi with Nihara Randeniya and Upul Dissanayake for 2 nd Accused Appellant.
		Thusith Mudalige, DSG for AG.
Argued on		23.07.2015, 24.07.2015, 03.09.2015, 04.09.2015 and 22.01.2016,
Decided on	:	08.12.2016

Priyasath Dep, P.C., J.

The Attorney General exhibited information in the High Court on 24-12-2012 under section 450 (4) of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 21 of 1988 to try the following Accused before the High Court at Bar by three judges without a jury in respect of offences specified below. The charge sheet signed by the Registrar of the High Court is given below.

Charge Sheet

Accused	01	Mazur Yevgen alias Mazur Ievgen /Yevgen Mazur
	02	Yana Berezhna alias J. Berezhna/Berezhna Yana

1. That on or about 23rd February 2010 at Rajagiriya within the jurisdiction of this Court you did agree to commit or abet or act together with a common purpose for or in committing or abetting an offence to wit, the murder of Victoria Kim and thereby committed the offence of conspiracy, in consequence of which conspiracy the said offence of murder was committed; and that you have thereby committed an offence punishable under Section 113B of the Penal Code read with Section 296 and 102 of the said Code.
2. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 1 you the 1st Accused did commit the murder by causing the death of Jason Kim and that you have thereby committed an offence punishable under Section 296 of the Penal Code.
3. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 2 you the 2nd Accused aforementioned did abet the 1st Accused in the commission of the said offence which offence was committed in consequence of such abetment; that you have thereby committed an offence punishable under Section 296 of the Penal Code read with Section 102 of the Penal Code.
4. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 3, you the 1st Accused did commit murder by causing the death of Daisy Manohar and that you have thereby committed an offence punishable under Section 296 of the Penal Code.
5. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 4, you the 2nd Accused aforementioned did abet the 1st Accused in the commission of the said offence, which offence was committed in

consequence of such abetment; and that you have thereby committed an offence punishable under Section 296 of the Penal Code read with Section 102 of the Penal Code.

6. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 1 you the 1st Accused did stab Victoria Kim with a knife, with such intention or knowledge and under such circumstances that had you by such act caused the death of the said Victoria Kim you would have been guilty of murder, and that you by such act caused hurt to the said Victoria Kim; and that you have thereby committed an offence punishable under section 300 of the Penal Code.
7. That on the date, place and time as aforementioned and in the course of the same transaction as referred to in count No. 6, you the 2nd Accused aforementioned did abet the 1st Accused in the commission of the said offence which offence was committed in consequence of such abetment; and that you have thereby committed an offence punishable under Section 300 of the Penal Code read with Section 102 of the Penal Code.

The charges were read to the Accused at the commencement of the trial and the Accused pleaded not guilty to the charges and thereafter the case proceeded to trial.

Background

Victoria Kim, an Uzbekistan national while living in Thailand in the year 2003 had an intimate relationship with Janak Sri Vithanage, a Sri Lankan national. As a result of this intimacy a child was born to them named Jason. When Jason was three months old, in the year 2004 Victoria came to Srilanka with the child and resided at the premises bearing No. 54/9, Galpotta Road, Nawala. She was staying in the house with son Jason and the servant Daisy Manohar. As Victoria was not employed Janak Sri Vithanage provided support and maintenance. While in Sri Lanka, Victoria came to know the Accused Mazur Ieven and Yana Berezhna who are Ukrainian nationals. Both of them are married to different persons in Ukraine but were living together in Sri Lanka. According to the 1st Accused Victoria is a friend of his and through her travel agency he used to buy tickets and when he goes abroad he used to leave his belongings at Victoria's place. Sometimes he used to change foreign currency from Victoria

Motive

Victoria knew that the 1st Accused was previously arrested and deported by the immigration authorities for overstaying and he has come to Sri Lanka using a forged passport. She threatened to inform the immigration authorities regarding this fact. Further, she threatened to inform the wife of the 1st Accused that he is living together in Sri Lanka with the 2nd Accused.

Prosecution case

Victoria Kim, the injured in this case is the main witness for the prosecution. She is a national of Uzbekistan and was living in Nawala. 1st and 2nd Accused are well known to her. According to her on 21st February, 2010 the 1st Accused borrowed US \$ 500 from her as a loan. On 22nd at about 7.40 pm Victoria called him and asked him to return the money. At this point 1st Accused refused to repay the money back and threatened Victoria and told her that she has to lend him money whenever he asked for. Victoria informed the 1st accused that if he does not return the money or do something to hurt her, she will inform his wife about his girlfriend and also would inform the immigration authorities that he is staying in Sri Lanka illegally with a forged passport. She informed her boyfriend Janak Withanage regarding the threat and gave a call to 119 and informed about the threat and the officer informed her to lodge a complaint with the local police station. But Victoria told Janak that she will handle the matter herself. Neither Janak nor she did not pursue with this matter and made a complaint.

On the 23rd of February, 2010, between 6.00-6.15 am, when Victoria was sleeping in her bedroom with her son, she heard someone knocking at the door. She assumed that it was the servant Daisy who wanted to wake her up. When she opened the door the 1st Accused started beating her. She ran into the bathroom which was inside the room to avoid her son getting up. He demanded money and threatened to kill her son if she refused to give money. She came to the room again and opened the safe and gave him around US \$11,100. Her son Jason got up and asked for her phone to give a call. At this time the servant Daisy came to the room. Then she ran downstairs to distract the 1st Accused thinking that servant Daisy and her son will escape from the 1st Accused and run for safety while the 1st accused is in pursuit of her

At this moment her son, servant Daisy and the 1st accused were in the room. But her son stayed in the room and the servant came down following the 1st Accused. The 1st Accused then grabbed the phone from her son and threw it towards Victoria. When she came downstairs, she tried to open the front door which was locked and she could not find the key. She went towards the back door, but the 1st Accused came and started beating her. At this time servant Daisy was there and when she tried to prevent the 1st Accused from beating Victoria he started beating Daisy as well. He stabbed Daisy when she was near the front door with a knife which he took from his back concealed under the shirt. Then he started stabbing Victoria while she was trying to reach the back door. Then Daisy came towards the 1st Accused and asked him to stop attacking them. The Accused started stabbing Daisy again. Victoria tried to reach upstairs but she fell down in the middle part of the staircase. She heard Daisy going to the bathroom downstairs. Then the 1st Accused went inside the bathroom and stabbed Daisy again. Thereafter first accused gave a call to the 2nd Accused and stated "*Yana come soon - to burn her alive -come with petrol. This bitch is going to die*". All this time her son was in a room upstairs. 1st Accused went upstairs and came down again while Victoria was lying in the middle part of the staircase and the Accused went out of the house and came back within a short period of

time and went to the room in the upstairs where her son was. Then she heard her son shouting "don't don't". Victoria then summoned her courage and ran out of the house from the back door. She came out from the front gate and went towards the house on the opposite side of the lane. Victoria was rushed to Kalubowila Hospital and her condition was critical and she underwent surgery. Before the surgery was performed she made a statement to the Police implicating the 1st Accused.

The learned Counsel for the 1st Accused questioned this witness as to why she did not raise cries when the Accused started to assault her. She replied that she did not do so initially thinking that her son Jason will get frightened. She said that she subsequently raised cries loudly but the 1st Accused threatened her that he will harm the child. She said that she cannot give a definite answer as to whether she mentioned this fact to the police or not. She could not exactly remember as to what she said to the police. The sole purpose of her making a statement to the police even against the advice of the doctors was to give information regarding the person who was involved in this incident.

According to her evidence the knife which was used by the Accused does not belong to the household. She saw the knife for the first time when it was pulled out by the Accused from his backside and stabbed Daisy. This witness was questioned as to why she went towards the kennel of Parakrama Hettiarachchi. Her reply was that due to the penetrative injury on the neck she did not expect to survive long and she went towards the kennel to induce the dogs to bark which will alert the neighbors.

The learned Counsel for the 1st Accused suggested to the witness that the 1st Accused is not responsible for stabbing her, Jason and Daisy but a person who stayed in the house in the night was responsible for this incident. She denied the allegation and reiterated that the 1st Accused is responsible for the stabbing. Further it was suggested to the witness that she stated that the 1st Accused gave a call to the 2nd Accused to falsely implicate her in this incident. She denied the allegation. It was suggested on behalf of the 2nd Accused that she was involved in human trafficking by bringing girls from abroad. She had invited the 2nd accused to join her. But she declined. Due to this reason she was falsely implicated.

Parakrama Hettiarachchi is living at No. 54/10, Galpotta Road opposite the house bearing NO. 54/9 which was occupied by Victoria. He stated that he has known Victoria for about 2 years. He possessed two Doberman dogs which were kept in a kennel within the premises. On 23.02.2010 around 6.15 am he heard the dogs barking and he requested the driver to go to the kennel and see what was happening. The driver went to the kennel and returned and said that Jason's mother was lying fallen with bleeding injuries. He went to that place and saw Victoria lying with bleeding injuries. When this witness inquired from Victoria as to what happened, Victoria with difficulty uttered the words "my son Jason". This witness gave a call to 119 and informed the police emergency unit. Police officer came to the scene and when inquired she

stated "my son Jason" and thereafter uttered the word "Mazur". Before Victoria was taken to the hospital she gave the telephone number of Janak Sri Withanage, the father of Jason. He informed Janak Sri Withanage.

Janak Sri Vithanage, father of Jason stated that on 21.02. 2010 he visited Victoria's house and helped Jason to do his homework. At about 7.30 the 1st Accused came to the house and had a conversation with Victoria and thereafter spoke to him and left the house. He was in the house for about fifteen minutes. He came to know from Victoria that the 1st Accused borrowed US \$500 Dollars from her. This witness stated that on 22.02.2010 between 5.30-6.00 pm he visited Victoria's house and left the house at 8.30 pm. That day Victoria received several calls and she refused to answer some calls. In answering the last call, she spoke angrily in Russian language. When questioned by him, Victoria said that the 1st accused is threatening her. Victoria told him that she will inform the immigration that the 1st Accused was previously deported from Sri Lanka. However, neither Victoria nor this witness informed the police of the threat. On 23.02.2010 at about 7.45 am, Parakrama who is staying closer to Victoria's house gave a call stating that Victoria is in a serious condition and wanted him to come immediately. He rushed to the place and saw Victoria lying fallen with bleeding injuries closer to Parakrama's house. When he inquired about Jason, Victoria informed him that he is in upstairs. He ran to the house and he found Jason fallen on the stairs midway. Then he ran towards Victoria again. Then Victoria informed him that Shanya killed Daisy. The 1st Accused was referred to as Shanya.

Mohomad Imthiyas Hameed is a person living in a lane closer to the residence of Victoria. In the morning on 23.02.2010 he went in his three wheeler to a Kovil taking items for an offering (Pooja) to be performed on behalf of his daughter. Whilst returning home he found a three wheeler parked partly obstructing the road leading towards his house. With difficulty he was able to enter the lane and he saw a foreign lady staying beside the three wheeler holding it. The foreign lady was wearing a denim trouser and a dark t - shirt. He returned home and between 6.55 to 7.05 he left home again with his daughter to drop her at the school. At that time three wheeler which was parked earlier obstructing the road was not there. When he was returning home after dropping his child in school between 7.05 to 7.15 a foreigner was seen running from the direction of the lane towards Galpotta Road. He thought he was doing his morning exercises. He returned home and after about 10 minutes he heard a resident shouting in an excited manner that there is a problem at Jason baby's house. So he went towards that house.

According to this witness he had previously seen the foreign male twice in the vicinity. He identified the 1st and 2nd Accused at the identification parade and in Court. It was suggested to the witness that he has falsely implicated the accused at the instance of Victoria and Janak Withanage. He denied the allegation. In cross examination a contradiction was marked and according to the contradiction in his statement to the police the witness had stated that the 2nd Accused was seen standing outside the three wheeler whereas in evidence he had stated that she was seen inside the three wheeler.

Prasad Gooneratne Arthanaayake residing at No. 54/14 gave evidence to the effect that before going for early morning walk he went to his niece's house and plucked some beli fruits and he came back to his house. When getting down the steps to go for the early morning walk at about 6.00 am, he saw a foreign male scaling the wall of Victoria's house. He saw that person and the servant conversing and the girl opened the door. He did not feel suspicious about this matter due to the fact that the servant girl allowed him to enter the house. Then he went for his walk and after about 45 minutes when he returned home he heard the wife of Parakrama Hettiarachchi raising cries and he went towards that direction and saw Victoria Kim lying fallen. Later he came to know that servant girl and the baby Jason had died. When the police arrived he showed the place from where he saw the foreigner scaling the wall. He identified the 1st Accused at the identification parade and in Courts.

Wijesiri, a pumper of the Rajagiriya Petrol Station giving evidence stated that on 23.02. 2010 around 7.10 am the 2nd Accused came to the petrol shed and filled 5 liters of petrol each to two cans she brought with her and paid Rs. 1100/=. She came in a yellow colour three wheeler and she was wearing a denim pant and a black colour t- shirt. He identified the 2nd Accused at the identification parade and in Courts.

Witness Nimalasiri, a three-wheel driver stated that on 23.02.2010 around 6.45 am a white lady got into his three wheeler and wanted him to take her to Galpotta Road. This witness stated that prior to this date this lady had travelled in his three wheeler sometimes alone and at times with a foreign gentleman. The lady was wearing a denim pant and a black colour t-shirt. Thereafter vehicle was driven to Rajagiriya and the lady wanted to go to Galpotta Road. When the three wheeler was turning towards Galpotta road, the lady showed 2 cans and wanted to buy petrol. Then this witness turned the vehicle and went towards Kotte and went to Rajagiriya petrol shed. She got down and filled the two cans with petrol and came back to the vehicle. Thereafter they went to Galpotta Road and stopped near house No. 54/9. The time was around 7.00 to 7.05 am. The lady got down from the three wheeler and gave a call using her mobile phone. He saw a foreign gent leman inside the premises. She came back to the three wheeler and gave two cans to that person. Thereafter, she wanted him to take her to the McDonald's Rajagiriya and he dropped her at Rajagiriya. She paid Rs. 600/- as the hire. He identified the 1st Accused as the person who was seen inside the premises No. 54/9 and the 2nd Accused as the person who travelled in his three wheeler on that day. The Defence suggested to this witness that he identified these two Accused at the instance of the police and before the identification parade he was given photographs of the Accused by the police. The witness denied the allegation made against him. This witness stated that while travelling from Wellawatta to Galapotta road the 2nd Accused had thrice given calls from her mobile phone.

Roshan Sherantha Mallikarachchi said that on 23.02.2010 he dropped his two children in school and between 7.15 to 7.30 am went towards the residence of Victoria to take Jason to school. When he came towards the residence, a white person was seen running towards them.

He saw this person when he was turning the vehicle to the Lane where house No. 54/9 is situated. This person went pass his three wheeler. He had seen this person twice previously. When he went to the Victoria's house he saw Victoria lying fallen with bleeding injuries. Police emergency unit 119 arrived at the scene and he assisted in dispatching Victoria to hospital. When he came back from the hospital he came to know that Jason and the servant girl had died. He identified the 1st Accused at the identification parade and in Court.

Witness Weerakkodige Rukshan Perera is a school mate of Janak Sri Withanage and he is married to an Uzbekistan lady. In the noon he heard over the radio that an Uzbekistan child and a Sri Lankan domestic aid were killed and an Uzbekistan lady was seriously injured and admitted to hospital. He contacted Janak Sri Withnage over the phone and Janak while crying explained to him as to what had happened. He with his wife rushed to Victoria Kim's residence and saw the dead bodies of Jason and the servant. Janka Sri Withanage was seen crying and informed him that Victoria was admitted to Kalubowila hospital. He went to the hospital with his wife at about 2.15 pm and saw Victoria Kim and at that time she was dressed for an operation. He went towards Victoria Kim and touched her head. She opened her eyes and inquired about Jason. He informed her that Jason is with the police. He stated so because doctors informed him that Victoria Kim might die. The police were trying to record her statement. As the police had a difficulty in recording her statement he translated the statement given in English to Sinhala. She was in a critical condition and the doctors informed that an emergency surgery has to be performed. Victoria clearly stated that the person who stabbed her is Mazur. She stated that she overheard the conversation of the 1st Accused over the phone asking Yana to bring petrol. Mazur and Yana are not known to this witness. He stated that Victoria gave this statement with much difficulty but she was in a proper state of mind. He identified the dead body of the Jason at the inquest and took charge of the body and the funeral was held on 24.02. 2010.

Investigations

Chief Inspector of Police (retired) Gamini Sarath stated that on 23.02. 2010 he was the Officer in Charge of the Welikada Police and he received a message from 119 regarding a case of causing injuries. At about 7.45 a.m. he proceeded with a police party to the residence No. 54/9 Galpotta Road, Rajagiriya. At that time P.S. Sarath of the police emergency unit 119 was present at the scene. He entered the premises and near the stairway on the floor he found a boy around 7 years old in a pool of blood and the body was facing downwards. In downstairs of the house near the bath room he found a female wearing a night dress lying fallen in a pool of blood. The head was near the door and the feet lying inside the bathroom. Thereafter he proceeded towards the house of Parakrama Hettiarachchi and found a lady fallen with bleeding injuries and screaming. He questioned her in Sinhala and the son of Parakrama Hettiarachchi

translated the questions into English. When questioned as to who stabbed her, she replied 'Mazur' who is living at No 22/2, Majestic Apartment, Station Road, Colombo 6. He dispatched Victoria Kim to the hospital. Thereafter, he made further inquiries at the scene. He found two 5-liter plastic cans filled with petrol containing the label 'crystal'. These cans were found on the end of the stairway leading to the upper floor. He took charge of these two cans. He found Nokia 3710 black colour mobile camera phone, Nokia 6830 black colour mobile phone, vodaphone 225. He also produced a sealed glass bottle containing 2 ear studs of square design studded with white coloured stones belonging to the deceased Daisy Manohar. He came to know that the persons who were killed were Jason Kim and the servant Daisy Manohar.

Police Sergeant Sarath Premalal stated that on 23.02.2010 when he was on duty in the emergency unit 119 he received a message from Welikada Police to proceed to the scene. At the scene Parakrama Hettiarachchi showed a foreign female lying fallen with bleeding injuries. When questioned she stated in English (which was translated into Sinhala by Parakrama) the name of Mazur Yevgen and gave his address as 22/2 Majestic Apartment, Station Road, Wellawatta. He dispatched the injured to the hospital in a vehicle belonging to Parakrama Hettiarachchi. Thereafter he assisted in the investigations.

I.P Samarasinghe on receiving information that a foreign male and female were arrested at the airport went to the airport and took charge of the 1st and 2nd Accused at the airport. They were handed over to him by I.P. Ratnayake of State Intelligence Service attached to Katunayake Airport Police. He took charge of 3 documents each from the Accused namely: passport, air ticket and boarding pass. Further he had taken into his custody several items including a black colour t- shirt, ash colour short black and brown colour two slippers, 2 black colour Nokia phones, 3 sim cards, sim card of mobile no. 071-3543012, a silver colour bracelet, 35 US \$ 100 dollar notes, 3 Dubai dirham 100 notes and Rs. 15,570. He took charge of the passport, boarding pass and air ticket and a Sony digital camera from the possession of the 2nd Accused. He also recovered several items from the 2nd accused such as perfumes, battery charger, clothes, foreign currency, Sri Lankan Rupees 540. He brought the Accused to Welikada police Station and their statements were recorded at the Police Station. He identified the 1st and 2nd Accused in court as the persons who were arrested and taken into custody by him. He stated that the shirt worn by the 1st accused, pair of slippers and the bracelet were forwarded to the Government Analyst for examination and report.

This witness stated that he took charge of the suspects at about 11.30 am. He observed that the 1st suspect had a contusion on the outer part of the right palm and an abrasion on the right arm, red colour patch on the hair and red dots on the shirt worn by the Accused. According to the air tickets and boarding passes both suspects had booked seats in UL 103 departing to Male at 7.05 pm.

Evidence regarding the use of mobile phones.

Prosecution summoned Premasiri Ratnayake, Asst. Manager (Investigations) of Dialog to give evidence regarding the issuing of mobile phone connections under the names of the Accused. Mobile No. 077-6640691 was issued under the name of Mazur Yevgen on 29.11.2004. This application was marked as X25 and the page containing the photo copy of bio data page of the passport of the applicant was marked as X25A. The date of birth of the applicant was given as 12.12.1975. This mobile phone was in use up to 29.11.2004 under the customer's name. An application was made under the name of the 2nd Accused on 26.11.2008 which was marked as X26 and a mobile phone connection was given under No. 077- 8022936. This was disconnected on 12.01.2012. The date of birth given by the applicant was 12.02.1984.

This witness gave a detailed statement of the calls taken by the users of the above mobile phones on 23.02.2010. This document contained calls taken from 077-6640691 and 077-8022936 and calls taken between the users of these two phones. There were recorded instances of calls taken between these two phones on 23.02.2010. These details give the area from which the calls were made referring to the telecommunication towers and also the place where the recipient was at the time of receiving the calls. The prosecution tried to establish the movements of the Accused with reference to the call data. However, sim cards of these connections were not recovered from the possession of the Accused.

Evidence of the immigration officer

Ranjith Wimalasuriya, Immigration Officer stated that the 1st Accused Yevgen Mazur was deported from Sri Lanka on 03.03.2006 but he has returned under a different passport. When comparing both passports there is a discrepancy in the first name as it was spelt differently in the passports so that it could not be detected by the immigration officers from the system.

Medical Evidence

Doctor Jeewana Chandrin Samaraweera, Asst. Judicial Medical Officer conducted the post mortem examination at the scene on the bodies of Jason Kim and Daisy Manohar. He found the dead body of Jason in the middle of the stairway leading to the upper floor lying fallen in a pool of blood and the body was facing downwards. He found one external injury which is a stab injury on the right side of the neck measuring 3cm x 1cm in size and 03.5 cm in depth. This injury had cut the right ca-rotid artery and this caused his death. According to the doctor this injury is sufficient to cause death in the ordinary course of nature. According to the doctor considerable force was used to inflict this injury.

The post mortem examination on the body of Daisy Manohar was also conducted by the same doctor. There were 27 external injuries found on the body. According to the doctor the cause of death is hemorrhagic shock due to a stab injury to the left lung. According to the medical report she had 14 injuries of which 13 injuries are stab injuries. Injuries 1,3,4, and 13 are grievous injuries and injury No.14 is sufficient to cause death in the ordinary course of nature.

Dr. P.C.L. Sandakan Waduge, Assistant Judicial Medical Officer, Colombo South Teaching Hospital Kalubowila examined Victoria Kim and submitted the medical legal report. According to him though she had received several stab injuries and in a critical condition she was in a good state of mind and was able to speak. She had 13 incised wounds which were sutured after surgery. Injury no. 14 refers to cumulative effect of the other injuries led to excessive hemorrhage which resulted in shock. Her pressure had dropped and blood was transfused several times to save her life. The doctor stated in his evidence that injuries Nos 6,7,9,10 and 11 are defensive injuries received as a result of attempts to ward off the attack. The injuries found on Victoria are consistent with the history given by her.

Dr.R.P. Nadeesha Samersekera, surgeon who performed surgery on Victoria gave evidence describing the injuries found on Victoria. She was admitted to the surgical theatre on 23-02 2016 at 3.30 pm. She stated that though Victoria had 13 stab injuries she was in a position to make a statement.

Evidence of the Assistant Government Analyst:

Vinitha Jayawardana Bandaranayake, Assistant Government Analyst stated that among other productions submitted to her for examination and report she examined a shirt, short trouser, pair of sandals and a bracelet. She found blood stains on it. She said that there were blood stains below the pocket of the shirt and also on the inner and outer sides of the bracelet.

After the close of the prosecution case the High Court-at-bar called upon the Accused for the defence. The Accused gave evidence under oath and called witnesses. The prosecution led evidence in rebuttal.

Defence Evidence:

The 1st Accused Ievgen Mazur giving evidence stated that he is a Ukrainian national and an engineer by profession. He first visited Sri Lanka either in 2001 or in 2002. He used to come to Sri Lanka between December to January which is a winter season in his country. He had visited Sri Lanka five or more times. His wife is Tatyana and he has a daughter who is 12 years old. He is living together with Yana Berezhna the 2nd Accused. When his wife came to Sri Lanka she stayed with them. His wife knew the relationship he is having with the 2nd Accused and there was no dispute between him and the wife regarding this relationship. He stated that Victoria

procured/supplied women for money. Victoria is a friend of his and through her travel agency he used to buy tickets and when he goes abroad he used to leave his belongings at Victoria's residence. Sometimes he used to change foreign currency from Victoria. Though Victoria is not married in Sri Lanka he is aware that Janak Sri Vithanage is the father of her child. He said that at any given time of the day there are 4 to 5 males at Victoria's residence. (This fact was not suggested to the neighbours who gave evidence)

In 2005 he had to apply for a new passport as all the pages of the passport were used. He stated that the last time he arrived in Sri Lanka by using the passport which was produced as X11 and his date of birth is given as 12.12.1975. He stated that he was never arrested in Sri Lanka and he was not blacklisted by the immigration authorities.

The 1st Accused stated that he used a Mobitel mobile phone but he never used a Dialog Phone No. 0776640691. He denied that the scanned application form marked X25 which was produced by Dialog was submitted by him. He stated that the hand writing and the signature in X25 was neither his handwriting nor his signature. He further stated that the passport produced as X25 does not belong to him though his date of birth is given. His name was misspelt in the passport.

The Accused stated that he last visited Victoria's house was on 22.02.2010 at about 10.00 p.m. He made a request to Victoria about a week ago to reserve two air tickets to go to Male on 23-02-2010 to celebrate the Men's day and also stay till March 8th which is a day of celebration for women in Ukraine. He spent about half an hour in Victoria's house and Victoria had informed him that she had already reserved tickets.

On 23.02.2010 at about 7.00 a.m. they went in a three wheeler to the airport and reached the airport at 9.00 am and went to the ticket counter at about 10.00a.m. At the counter they realized that Victoria has not reserved the tickets though she stated that she had reserved two tickets in the flight leaving at 11.30 am. Thereafter, they purchased two tickets at the counter to fly to Male in the flight leaving after 6.00 p.m. As there was adequate time for the flight they checked in to a room in the airport. When they were in the airport, police came and searched the room and wanted them to accompany them. He stated that brown colour short marked as X, shirt marked X8 and the pair of slippers are items which he was wearing at that time. He denied that there were blood stains at the time the police took charge of those items. He admitted that the bracelet marked X5 is the same that he was wearing but denied that at that time there were blood stains in the bracelet. They were taken to Welikada Police station from the airport. On the following day they were produced before a medical officer for examination but they refused to be examined by the doctor. He stated that he did not have any enmity with Victoria, Jason or Daisy Manohar but he was falsely implicated by Victoria in order to conceal the identity of the perpetrator of the crime.

The 2nd Accused Yana gave evidence and stated that she was born on 12.02.1984 and she was married and has a child aged 7 years. She admitted that from 2008 onwards she was living together with the 1st Accused and the 1st Accused's wife was aware of this relationship. She has two passports and she first visited Sri Lanka by using the old passport. After returning to Ukraine her child tore a page of the passport so that she was compelled to apply for a fresh passport. The 2nd Accused stated that though she had visited Victoria's house on 2 occasions she did not want to associate with her as she was engaged in illegal business. She stated that she had met Rukshan Perera and his wife in a shopping mall and they wanted her to supply women to the business run by Victoria. As she declined the request Rukshan Perera is angry with her. (This was not suggested to Rukshan Perera when he gave evidence). She admitted that on 22.02.2010, the 1st Accused visited Victoria's residence and that was to collect the air tickets. They were expected to leave to Male on 23.02.2010. After the arrival at the Airport they realized that Victoria has failed to book tickets. They purchased tickets at the Airport to take a flight to Male which departs at about 7.00 p.m. As there was sufficient time for the flight they booked a room at the airport and the police arrested them while they were in the room. She denied that she submitted an application to obtain a connection in relation to the mobile No. 077-8022936. She denied that she used a dialog mobile phone. She stated that she had a mobitel connection and used the same sim card in different phones.

Thereafter the defence called Chaminda Prasad Samarakoon, Sales Manager of Ceylon Petroleum Corporation, Tatyana, the wife of the 1st Accused and the third Secretary of the Ukrainian Embassy.

Tatyana the wife of the 1st Accused testified to the effect that she was aware of the relationship between the 1st Accused and 2nd Accused. When she came to Sri Lanka she stayed with them.

Thereafter the defence closed its case.

Evidence in rebuttal

The prosecution led evidence in rebuttal. The witness Ajith Senaratna Perera, Senior Authorized Officer of the Immigration and Emigration Department gave evidence to the effect that on 01.03.2006 he arrested the 1st Accused along with 3 girls and took them to the detention camp and subsequently deported them. He identified the 1st Accused as the person whom he arrested.

The Judgment of the High Court at Bar

The High Court at Bar after recording of evidence, permitted the parties to file written submissions. Thereafter the High Court at Bar entered the following verdict and imposed the following sentences against each accused in respect of the charges framed against them.

Count 1 - both Accused were found guilty and sentenced to death for conspiring to commit the murder of Victoria Kim and consequent to such conspiracy causing the death of Jason Kim and Daisy Manohar, an offence punishable under section 296 read with sections 113B and 102 of the Penal Code.

Count 2 - 1st Accused was found guilty for committing the murder of Jason Kim an offence punishable under section 296 of the Penal Code.

Count 3 - 2nd Accused was acquitted of the charge of abetment under section 296 read with section 102 of the Penal Code.

Count 4 - 1st Accused was found guilty of committing the murder of Daisy Manohar an offence punishable under section 296 of the Penal Code.

Count 5 - 2nd Accused was acquitted of the charge of abetment under section 296 read with section 102 of the Penal Code.

Count 6 - 1st Accused was found guilty of the attempted murder of Victoria Kim an offence punishable under section 300 of the Penal Code and sentenced to 15 years' rigorous imprisonment, a fine of Rs. 25,000/- carrying a default term of 12 months' simple imprisonment and compensation in a sum of Rs. 500,000/- carrying a default term of 12 months' simple imprisonment.

Count 7 - 2nd Accused was found guilty of abetment to commit the attempted murder of Victoria Kim an offence punishable under section 300 read with 102 of the Penal Code and sentenced to 15 years' rigorous imprisonment and a fine of Rs. 25,000/- carrying a default term of 12 months' simple imprisonment and compensation in a sum of Rs. 500,000/- carrying a default term of 12 months' simple imprisonment.

The Accused appealed against the conviction and sentence to the Supreme Court on following grounds.

GROUNDS OF APPEAL

1. The Accused-Appellants have been denied of a fair trial as an application to effectively prepare for their defence on the part of the Counsel was denied by the learned Trial Judges.
2. Prosecution has not explained the presence of a 3rd party at the crime scene at the time of the incident thereby creating a serious doubt in the prosecution case.
3. Presence of an unidentified /unclaimed mobile phone at the crime scene further creates a doubt in the prosecution case.
4. Learned Trial Judges have misdirected themselves on a very critical issue of fact causing serious prejudice to the 1st Accused-Appellant.
5. Learned Trial Judges have failed to address their minds to the serious doubts/infirmities in the evidence relating to telephone conversations.
 - The Dialog Sim cards were not recovered from the possession of the 2nd Accused at the time of arrest;
 - Authenticity with regard to the application forms to obtain the said Dialog sims-scanned photocopies being produced;
 - Serious doubt with regard to the 2nd Accused obtaining the Dialog sim where the date of application being 20/11/2008 and prosecution evidence being that she arrived in Sri Lanka only on the 21/11/2008;
 - Application form of the 1st Accused being dated 29/04/2004 whereas prosecution evidence is that the 1st Accused came to Sri Lanka first on the 06/02/2006;
 - Prosecution has failed to prove the authenticity of X25 and X26 (application forms for the Dialog Sim Cards) in terms of Section 67 of the Evidence Ordinance.
 - Expertise of the prosecution witness namely Premasiri Ratnayake (Dialog Officer) was not proved in terms of the Evidence Ordinance.
6. Serious doubts arise in the prosecution case in the backdrop of the conflicting evidence of the prosecution witnesses which have totally escaped the attention of the learned Trial Judges.

7. Prosecution has not established the link between the blood stained clothes recovered from the 1st Accused at the time of arrest and the crime.
8. Accused-Appellants have been denied of a fair trial as their evidence on oath has been rejected on erroneous premise.
9. Learned Trial Judges erred in law by permitting the prosecution to lead evidence in rebuttal and relying upon same.
10. Learned Trial Judges failed to evaluate in its correct perspective the evidence of Ajith Senarathne Perera (evidence in rebuttal) which evidence negate motive.
11. With regard to the conviction of the 2nd Accused on count 1, the said conviction cannot be supported on the learned Trial Judges own findings.
12. With regard to the conviction against the 2nd Accused on Count 7, the evidence at the trial does not support the said conviction.

The High Court at Bar having considered the evidence came to the conclusion that the case against the Accused was proved beyond reasonable doubt. The Court held that there was a conspiracy to murder Victoria and consequent to the conspiracy Victoria received serious injuries and Jason and Daisy Manohar succumbed to the injuries. The High Court at Bar found the accused guilty of conspiracy to murder and sentenced them to death.

The Appeal

This Court has to consider whether there was sufficient evidence to prove the charge of conspiracy. The prosecution tried to establish the conspiracy charge by using the evidence of Victoria who testified to the effect that the 1st Accused had requested the 2nd Accused to bring petrol to burn her alive and also the data provided by Dialog to establish that the 1st Accused and the 2nd Accused were in contact with each other on 23.02.2010 from 6.30 a.m. onwards. Further the prosecution tried to establish the movements of the Accused using the messages received by transmission towers of Dialog, the service provider of mobile phones used by the Accused. However, the data provided by the service provider is not satisfactory and cannot be relied upon to prove the offence of conspiracy. The defence challenged the expertise of the witness summoned on behalf of Dialog. The relevant sim cards were not recovered from the possession of the Accused. In view of these deficiencies the learned Senior State Counsel indicated to Court that he will not support the conviction against the 2nd Accused.

This Court is required to consider the evidence in respect of each accused and come to a conclusion whether the case against each accused was established beyond reasonable doubt. As

against the 1st Accused the evidence is overwhelming. The evidence of the main witness Victoria was corroborated in material particulars by independent evidence. The evidence is consistent with the medical and other items of circumstantial evidence. She had revealed the name of the 1st Accused at the earliest opportunity. 1st Accused's presence at the scene was established by independent evidence. Therefore, the verdict of the High Court at Bar that the 1st Accused is guilty in respect of murder of Jason and Daisy Manohar and the attempted murder of Victoria is in accordance with the law as the charges were proved beyond reasonable doubt.

The defence marked several contradictions and referred to several omissions in the evidence of the prosecution witnesses and thereby challenged the testimonial trustworthiness of the witnesses. However, these contradictions and omissions are minor contradictions and omissions which did not go to the root of the prosecution case. The High Court at Bar correctly disregarded the contradictions and omissions. At this stage it is appropriate to refer to the Indian case of Bhoginbhai Hirjibhai Vs. State of Gujarat (AIR 1983-SC 753 at pp756-758) very often cited in our courts. It was held:

- 1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.
- 2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.
- 3) The powers of observation differ from person to person. What one may notice, and other may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.
- 4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.
- 5) In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.
- 6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometime so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him – perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

The next question is whether there was a conspiracy to commit the murder of Victoria as alleged in Count 1 of the charge sheet. In other words, whether the attempted murder of Victoria and the murder of Jason and Daisy Manohar were committed pursuant to a conspiracy. The evidence available is not sufficient to prove the charge of conspiracy as alleged by the prosecution. In order to establish the charge of conspiracy there should be evidence of prior agreement before the commission of the acts and in this case prior to the acts of stabbing. In other words, the agreement should precede the commission of the acts.

The evidence regarding the conspiracy prior to stabbing is insufficient and unreliable. Though there was insufficient evidence regarding an agreement which preceded the acts of stabbing, there could be a conspiracy formed subsequently. This Court has to examine whether there was an agreement formed between the Accused subsequent to the stabbing of the victims. Witness Victoria stated that she overheard a conversation of the 1st Accused asking Yana to come saying "*Yana come soon- to burn her alive -come with petrol. This bitch is going to die*". The prosecution had led the evidence to prove that the 2nd Accused Yana came in a three wheeler from Wellawatta to Galpotta Road bringing 2 cans of petrol and handing over to the 1st Accused. Petrol pumper gave evidence stating that the 2nd Accused purchased 10 liters of petrol which were filled into two 5 liter cans brought by the Accused. Police recovered 2 cans of petrol inside the house. As the petrol was not used for the purpose of burning the victim alive and the acts of stabbing were completed the 2nd accused has not contributed towards the commission of the offence. Had the 1st accused used petrol and burnt the injured and if she died 2nd Accused will be guilty of murder.

The question that arises is whether the 1st Accused as well as the 2nd Accused could be convicted under 113A of the Penal Code. It is relevant at this stage to consider the law applicable to conspiracy under the Penal Code. Before the introduction of section 113A to the Penal Code by Ordinance No.5 of 1924, the conspiracy was considered as a manner /mode of committing abetment under section 100 of the Penal Code.

Section 100 of the Penal Code reads thus:

A person abets the doing of a thing who –

- Firstly - Instigates any person to do that thing; or
- Secondly - Engages in any conspiracy for the doing of that thing; or
- Thirdly - Intentionally aids, by any act or illegal omission, the doing of that thing.

The Explanation 2 to section 100 refers to conspiracy thus:

‘A conspiracy for doing of a thing is when two or more persons agree to do that thing or cause or procure that thing to be done....,’

Prior to the introduction of section 113A to the Penal Code, conspiracy was considered as a species of abetment and was penalized to a limited extend. In *King vs. Silva* 24 NLR 493 an accused was acquitted due to the defect in the law which necessitated the introduction of section 113A which made criminal conspiracy a distinct offence.

Section 113A reads thus:

Sec 113A (1)

If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence whether with or without any previous concert or deliberation, each of them is guilty of an offence of conspiracy to commit or abet that offence, as the case may be.

In a series of cases starting with The *King vs Andree* 42 NLR495 it was held that:

“an agreement is the essence of conspiracy”

In *King vs. M.E.A. Cooray et.al* 51 NLR 433, Gratian J referring to the two limbs in section 113A held that:

‘In either set of circumstances conspiracy consists in the agreement or confederacy to a criminal act whether it is done or not’

It was held in several cases that to complete the offence of conspiracy it is not necessary to commit any act pursuant to the agreement or in other words anything should be done beyond the agreement. However, the acts committed pursuant to the agreement could be used to establish the agreement. The offence of conspiracy as like any other offence could be proved either by direct or circumstantial evidence or by combination of both.

In *R vs Mulcahy* L.R.3 H.L.306 cited in The King vs Cooray (supra) it was held that:

“proof of acts committed in pursuance to the agreement is relevant only so far as they furnish evidence from which the prior agreement may be legitimately inferred”.

The *Queen vs Liyanage* 69 NLR 193 followed the judgment in *King vs Cooray* (supra) and cited with approval *Queen vs. Aspinall* (1872)2 Q.B.D. 48 and *R vs Mulcahy* (supra) and it held that:

“The essence of the conspiracy is the agreement to do the unlawful acts alleged; but it is not necessary that any act should take place in pursuance of the agreement. Whether a criminal act is done or not, the agreement and not the act is what is penalized. Proof of acts committed in pursuance of the agreement is relevant only so far as they furnish evidence from which the prior agreement may be legitimately inferred”

In *Queen vs Liyanage* (supra) the conspirators abandoned the plan and did not execute it. However, they were found guilty for conspiring to wage war against the Queen, an offence punishable under section 115 of the Penal Code.

In the case before us we find that the Accused had conspired to burn alive Victoria who had received fatal injuries and was about to die. Punishment for conspiracy is referred to in section 113b. The section 113 states thus:

“If two or more persons are guilty of the offence of conspiracy for the commission or abetment of any offence, each of them shall be punished in the same manner as if he had abetted such offence.”

In this case pursuant to the conspiracy to burn Victoria alive the 1st Accused did not perform any act to burn her though he received two cans of petrol from the 2nd Accused. This may be due to the fact that Victoria was able to leave the house and move towards the house of Parakrema Hettiaratchi and the neighbours gathered near the house.

In the case of The *Queen vs. Aspinall* (1872) 2 Q.B.D.48 referred to in *King vs Cooray* (supra) it was held that:

“The conspirators will repent and stop; or they may have no opportunity, or may be prevented, or may fail; nevertheless, the crime is complete and was completed when they agreed”

As no offence was committed pursuant to the conspiracy the applicable sentence is given in section 108 of the Penal Code which reads thus:

“Whoever abets the commission of an offence punishable with death shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extent to seven years, and shall also be liable to a fine”

This court finds that there is no sufficient or credible evidence to establish that the Accused conspired to murder Victoria Kim and pursuant to the conspiracy committed the murder of Jason Kim, Daisy Manohar and attempted Murder of Victoria Kim an offence punishable under section 296 of the Penal Code read with sections 113A and 102 of the Penal Code. The evidence available is insufficient to establish that the conspiracy preceded the alleged acts of stabbing or

in other words acts were committed pursuant to the conspiracy. Therefore, the sentence of death imposed on Count 1 has to be set aside.

The Court finds that there was a conspiracy to burn Victoria Kim alive. However pursuant to the conspiracy no acts were committed to burn Victoria alive. Therefore, the Accused are only liable to be punished under section 296 read with 113 and 108 of the Penal Code for criminal conspiracy based on agreement. The maximum sentence that could be imposed is seven years' imprisonment.

The findings of the Supreme Court

Count 1 - The death sentence imposed on both Accused for conspiring to commit the murder of Victoria Kim and pursuant to that conspiracy committing the attempted murder of Victoria Kim and committing the murder of Jason kim and Daisy Manohar set aside. However, both Accused are guilty of conspiring to commit the murder of Victoria Kim by burning her alive. As no criminal acts were committed by the Accused pursuant to such conspiracy they are guilty only of criminal conspiracy punishable under section 296 read with sections 113B and 102 of the Penal Code. The maximum punishment that could be imposed is seven years' imprisonment of either description and also liable to a fine. As the 1st Accused is found guilty on counts 2, 4 and 6, he is sentenced to 7 years' rigorous imprisonment. The 2nd Accused was acquitted of all other charges level against her. Considering the fact that she was in remand custody since the commission of the offence a sentence of two years' simple imprisonment imposed on her.

Count 2 - 1st Accused was found guilty for committing the murder of Jason Kim, an offence punishable under section 296 of the Penal Code and the Accused was sentenced to death. The conviction and the death sentence is affirmed.

Count 3 - 2nd Accused was acquitted of the charge of abetment under section 296 read with section 102 of the Penal Code.

Count 4 - 1st Accused was found guilty of committing the murder of Daisy Manohar an offence punishable under section 296 of the Penal Code and was sentenced to death. The conviction and death sentence is affirmed.

Count 5 - 2nd Accused was acquitted of the charge of abetment under section 296 read with section 102 of the Penal Code.

Count 6 - 1st Accused was found guilty of attempted murder of Victoria Kim an offence punishable under section 300 of the Penal Code and sentenced to 15 years' rigorous imprisonment and a fine of Rs. 25,000/- carrying a default term of 12 months simple imprisonment and compensation in a sum of Rs. 500,000/- carrying a default term of 12 months simple imprisonment. The conviction and sentence is affirmed.

Count 7 – The conviction and the sentence imposed on the 2nd accused of abetment to commit the attempted murder of Victoria Kim an offence punishable under section 300 read with 102 of the Penal Code is set aside.

Subject to this variation the appeal is dismissed.

Judge of the Supreme Court

Buwaneka Aluvihare P.C., J.
I agree.

Judge of the Supreme Court

Sisira J. de Abrew J.
I agree.

Judge of the Supreme Court

Priyantha Jayawardena P.C., J.
I agree.

Judge of the Supreme Court

Anil Goonerathne J.
I agree.

Judge of the Supreme Court

