

**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 Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979 read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka and the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

**C.A.No. HCC No.180-182/2017**

**H.C. Gampaha No. HC 85/1999**

- 01. Kollure Appuhamilage Ajith Kumara
- 04. Mananna Devage Saman Premachandra
- 05. Palitha Abeysekera

**Accused-Appellants**

**Vs.**

Hon. Attorney General  
Attorney General's Department

Colombo 12 .

**Complainant- Respondent**

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**BEFORE** : ACHALA WENGAPPULI, J.  
DEVIKA ABEYRATNE, J.

**COUNSEL** : Indika Mallawarachchi with K. Kugaraja for the 1<sup>st</sup>  
and 4<sup>th</sup> Accused-Appellants.  
Neranjana Jayasinghe with Anusha Ratnayake for the  
5<sup>th</sup> Accused-Appellant  
Riyaz Bary S.S.C. for the respondent.

**ARGUED ON** : 13<sup>th</sup> February 2020

**DECIDED ON** : 11<sup>th</sup> September, 2020

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**ACHALA WENGAPPULI, J.**

This is an appeal, lodged by the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused-appellants (hereinafter referred to as the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants respectively) against their conviction and sentence.

In the indictment presented by the Hon. Attorney General, 1<sup>st</sup> to 5<sup>th</sup> accused were charged under 11 counts, which included being members of an unlawful assembly, causing hurt, murder, mischief by fire to two dwelling houses, robbery without being a member of the said unlawful assembly and causing hurt, murder, mischief, robbery with common intention. All five accused elected a trial without a jury.

The prosecution led evidence of several lay witnesses who are immediate family members of the deceased and also one of his neighbours. At the close of

the prosecution case, when the trial Court ruled that all the accused had a case to answer they made statements from the dock.

The High Court of *Gampaha* convicted the 1<sup>st</sup> 4<sup>th</sup> and 5<sup>th</sup> accused for committing murder of *Hettiarachichige Sugath Nishantha Perera* on 23.09.1994 with common intention and also for causing mischief to property with common intention, under the count Nos. 7 and 8 with its judgment pronounced on 02.05.2017. The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants were sentenced to death. Other accused were acquitted from all counts.

In challenging the validity of their conviction, learned Counsel for the 1<sup>st</sup> and 4<sup>th</sup> Appellants at the hearing of their appeal had raised following grounds of appeal;

- a. the trial Court erred on critical issues of fact causing severe prejudice to the appellants,
- b. the conviction entered by the trial Court for the offence of murder is clearly flawed,
- c. no reliance could be placed on the inconsistent, erratic, unreliable multiple dying declarations made by the deceased.

Learned Counsel for the 5<sup>th</sup> Appellant, whilst associating himself with the above grounds of appeal, had, in addition, raised the following grounds of appeal;

- a. the trial Court failed to consider the prosecution evidence which indicate the absence of intention to cause injury,
- b. the trial Court had erroneously rejected the dock statements of the Appellants upon a comparison made with the prosecution evidence.

In view of the several grounds of appeal raised by the three Appellants and for its proper appreciation in the correct perspective, a brief account of the evidence that had been presented before the trial Court is helpful at this stage of the judgment.

The two houses that were set on fire were occupied by the members of the deceased's family and were standing on the same property. The deceased was married and had two young children. He was unemployed at the time of the incident while his brother *Ajith Kumara* operated a boutique store adjacent to one of the houses. The deceased lived in one of the houses with his sisters *Suranji*, *Nilanthi* and *Priyanganie* while *Ajith Kumara* lived in the other with their parents.

The prosecution called the mother of the deceased *Chandrani*, , *Priyanganie*, *Ajith Kumara* and one of their immediate neighbours, *Upali* as the witnesses who saw the incident by which the two houses were burnt and the deceased had suffered his burn injuries, resulted in his death 13 days later. Two sisters of the deceased *Suranji* and *Nilanthi* have committed suicide before the trial and their depositions were led under Section 33 of the Evidence Ordinance.

The incident took place in the evening of 23.09.1994 after 7.00 p.m. *Priyanganie* was in the house where the deceased was when it was set on fire. He was drunk and was sleeping in one of the rooms. She heard a commotion in front of the house and when she peeped through the main door, saw the front part of the house was already on fire. She saw all five accused there. She claimed that the 4<sup>th</sup> Appellant had a white can in his hand while the 5<sup>th</sup> Appellant was carrying a television set. The 1<sup>st</sup> accused is the brother-in-law of the deceased. Later she said the 1<sup>st</sup> accused also had a can and saw the 4<sup>th</sup> Appellant throwing what he had in his can to the house. Thereafter the 3<sup>rd</sup> accused and 4<sup>th</sup> Appellant

had entered her house and shouted at them to run out since the house was set on fire ( ගිනි තිබ්බා එලියට පලයවී). The witness tried to wake up her brother but since the fire was raging she had run out to safety.

She took shelter in a nearby house and after the Police had visited the scene, she saw the deceased who had crawled back to their land calling their mother. The deceased told them that he was taken to an abandoned house and was set on fire. The witness saw the deceased had burnt almost all of his skin exposing pink skin. The Police helped them to rush the deceased to hospital.

*Chandrani* also claim to have seen the deceased crawling back but according to her what the deceased said was it was his friends who did this to him and thereafter mentioned all five names of the accused. She admits that she did not see any of the Appellants near their houses that evening.

One of the deceased's sister *Suranji* said that she retired for the night by 9.00 p.m. and woke up after hearing a sound and found out that the house is on fire. She ran out and hid herself near a breadfruit tree. She saw the 1<sup>st</sup> Appellant splashing some liquid to the fire from a can, while the 5<sup>th</sup> Appellant used a torch to light the rear part of her house up. The deceased was still inside the house but no one took him out. According to *Nilanthi*, all five accused came that evening and they chased the women out of the house saying that not to stay back and if they did they too would be put to the fire. No one came to their rescue and when someone splashed some liquid, the rear part of the house also caught fire.

Their immediate neighbour *Upali*, heard some shouting from the direction of his neighbour's house. When he came out, saw the two houses were already on fire. After a while he saw the deceased rolling down from the roof of his

house and fell outside. He also saw the 1<sup>st</sup> and 5<sup>th</sup> Appellants near the burning houses but did not attribute any act to them.

IP *Ranbanda* of *Ragama* Police recorded the first information about this incident on 24.09.1994 from *Chandrani*. He received message from *Ragama* Hospital and visited the deceased who was being treated at that hospital. He was screaming in pain but had said in a short statement "*Ajith, Rajah, Shelton*" had caused his burn injuries.

Medical evidence revealed that the deceased had suffered burn injuries over 48% of his body and at the time of medical examination these injuries were already infected. The death of the deceased was due to septicaemia following burn injuries.

With the above summary of evidence for the prosecution, this Court now turns to consider the grounds of appeal in detail.

Relying on the prosecution evidence, learned Counsel for the 1<sup>st</sup> and 4<sup>th</sup> Appellants contended that the conviction for murder entered by the trial Court was on the basis of the fourth limb of Section 294 of the Penal Code. After concluding that the three Appellants are responsible for setting the house on fire while the deceased was still inside, the trial Court arrived at that conclusion. It is her contention that the said conclusion is an erroneous one since there is clear evidence that the deceased escaped from the burning house alive and according to the prosecution witnesses the deceased himself said that he was set on fire at an abandoned house at a different location. Thus, she contends that the burn injuries sustained by the deceased were not due to the fact that the house he had slept in was set on fire but due to a totally separate incident.

There is merit in this contention by the 1<sup>st</sup> and 4<sup>th</sup> Appellants. Witnesses *Priyanganie*, *Chandrani* and *Upali* confirm that the deceased escaped from the burning house alive. *Nilanthi* saw, when she re-entered the burnt house with Police, that her brother had stacked two chairs on top of each other and had escaped through the roof of the burning house. She was specific that he had no burn injuries at that point of time.

*Upali* saw the deceased rolling down the roof and fall outside the house. Both *Priyanganie* and *Chandrani* attribute burn injuries of the deceased to the act of setting him on fire at the abandoned house, based on his statement made after he crawled back into their garden. There is no evidence that the deceased had suffered life threatening burn injuries when he escaped from the burning house and *Nilanthi* negates any such inference. When the deceased had emerged from hiding, *Chandrani* saw most of his skin had peeled off.

Therefore, the basis on which the trial Court found the three appellants guilty to the offence of murder had no evidentiary support and ought to be set aside.

In view of the above finding, the other aspect of the 1<sup>st</sup> and 4<sup>th</sup> Appellants have highlighted over the unreliability of the multiple dying declarations attributed to the deceased should be considered by this Court.

Since the deceased did not sustain injuries due to the act of the Appellants in setting his house on fire, the only remaining basis to impute criminal liability on them for his death should be based on the dying declaration made by the deceased. The trial Court did not base its conviction on the dying declarations as it found the Appellants guilty on the fourth limb of Section 294 of the Penal



Code. In the circumstances, this Court will have to consider the truthfulness and reliability of the multiple dying declarations that re-attributed to the deceased.

Before this Court ventures to consider the truthfulness and reliability of dying declaration, it is relevant to consider the applicable legal considerations that are laid down by the superior Courts.

The Supreme Court in *Sheela Sinharage v Attorney General* (1985) 1 Sri L.R. 1, reiterated the “necessity for the ipsissima verba used by a deceased in a dying declaration”. This Court in *Ranasinghe v Attorney General* (2007) 1 Sri L.R. 218 stated that;

*“ ...the trial Judge or the jury as the case may be must be satisfied beyond reasonable doubt on the following matters. (a) Whether the deceased, in fact, made such a statement. (b) Whether the statement made by the deceased was true and accurate. (c) Whether the statement made by the deceased person could be accepted beyond reasonable doubt. (d) Whether the evidence of the witness who testifies about the dying declaration could be accepted beyond reasonable doubt. (e) Whether witness is telling the truth. (f) Whether the deceased was able to speak at the time the alleged declaration was made.”*

As the learned Counsel for the 1<sup>st</sup> and 4<sup>th</sup> Appellants contended, the evidence reveal that there are multiple dying declarations that are attributed to the deceased.

Mother of the deceased said the deceased told her “ මමේ යාච්චෝ කරනු අපරාධ” and said all five names of the accused. *Priyangani* who also saw the deceased at the same time said what the deceased told them was “ මාට අරන්



ගිහින ගිහි තිබීම". Nilanthi added that " මේ ගොල්ලෝ ගෙනිහිල්ලා අයිසට පුටුවලා යටිපතුල්වලටත් ඇන්න". The deceased himself mentioned three names only but did not attribute any act to any of them.

When these somewhat inconsistent declarations that are attributed to the deceased, this Court finds that none of the witnesses' evidence in relation to multiple dying declarations could be accepted as truthful and reliable. The Police officer merely stated that the deceased said " අසල පදිංචි අරිත්, රාජා, මෙල්වන් යන අය විසින් ගිහි තබා තුවාල කලා ". The dying declaration made by the deceased himself is bereft of any detail. It is not clear whether his mentioning of three names in relation to the incident of setting fire to his house or to the incident his mother and sister had attributed to him during which he claims to have sustained burn injuries at the abandoned house.

In view of the above considerations, this Court is of the view that none of these dying declarations satisfy the tests that had been enunciated by the judicial precedents and should be rejected as unreliable, leaving no evidentiary basis to sustain a conviction for murder. The contention of the Learned Counsel for the 5<sup>th</sup> Appellant that the evidence of the prosecution witness that the Appellant had chased the occupants away after setting fire to the house negates any intention to cause harm to them is relevant in this context.

The three Appellants were also found guilty of causing mischief, the count No. 8 of the indictment, under Section 410 of the Penal Code with common intention. This Court finds the said conviction is based on the available evidence and is therefore justified. The 5<sup>th</sup> Appellant's contention that the trial Court had failed to consider the prosecution evidence which indicate the absence of intention to cause injury to anyone might not have direct reference to the

elements of the offence of mischief. The evidence is that the intruders claimed that they set fire and shouted that the inmates to leave the burning house. The requisite intention to cause damage and destruction to property is clearly evident from the testimony of the witnesses.

The other contention of the 5<sup>th</sup> Appellant; that the trial Court had erroneously rejected his dock statement upon a comparison with the prosecution evidence, is apparently based on the statement in which the trial Court states that “ ... පැමිණිල්ලෙන් ඉදිරිපත් වී ඇති ඉහත දැක්වූ සාක්ෂි සැලකිල්ලට ගැනීමේදී 5 වන විත්තිකරුගේ එම ප්‍රකාශය ද සත්‍යයෙන් තොර බවත්, ඔහු ගිනි තැබීමට කෙලින්ම සම්බන්ධවී ඇති බවත් පෙනී යයි. මේ අනුව මෙම නිවෙස් දෙකටම ගිනි තැබීමට 1 සහ 5 විත්තිකරුවන් කෙලින්ම සම්බන්ධ වී ඇති බවට පැහැදිලි සාක්ෂි මගින් පැමිණිල්ල සාධාරණ සැකයෙන් තොරව ඔප්පු කර ඇති බවට මම සැඟීමට පත් වෙමි ”.

In his statement from the dock, the 5<sup>th</sup> Appellant stated in relation to the incident that he heard that his name transpired as the person who set fire to the houses and therefore he went there to investigate.

The position that he went near the burning house merely to see what was going on had not been put to any of the prosecution witnesses by the 5<sup>th</sup> Appellant and was advanced for the first time in his statement from the dock. In applying probability test, it is noted that his conduct of visiting the burning houses as admitted by the 5<sup>th</sup> Appellant, especially when he is accused of the said crime, is highly an improbable act.

The highlighted portion of the judgment is in relation to the said conduct of the 5<sup>th</sup> Appellant and the impression that the wording used by the trial Court creates in the mind of the reader that it had compared the two versions side by side in determining to reject is a result of its manner of presentation and not necessarily due to such a comparison.

Therefore, this Court is not convinced that the trial Court had in fact compared the two versions of events and of the view that it was merely rejecting the 5<sup>th</sup> Appellant's position that he was there at the scene only as an observer, by applying the probability test.

In the circumstances, this Court partly allows the appeals of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Appellants by setting aside their conviction for the offence of murder and the sentence of death. Their conviction for the offence of mischief is accordingly affirmed. The three Appellants are sentenced by this Court for 2 years of imprisonment, being the maximum punishment with which they can be punished. In view of the fact that they were incarcerated since their conviction on 02.05.2017, this Court accordingly imposes a fine of Rs, 100,000.00 on each of the Appellants and in default six months of imprisonment. In the event the default sentence is to be implemented, it should run consecutive to the other sentence.

**JUDGE OF THE COURT OF APPEAL**

**DEVIKA ABEYRATNE, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**