

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

In the matter of an Appeal under and in terms
of Article 138(1) of the Constitution, read
together with Section 11(1) of the High Court
of the Provinces (Special Provisions) Act No.
19 of 1990, with Section 331 of the Code of
Criminal Procedure Act No.15 of 1979.

CA Case No: CA-HCC 395/17

HC of Kalmunai Case No: 156/2009

The Democratic Socialist Republic of Sri
Lanka.

COMPLAINANT

Vs

1. Mohammad Yusuf Siyath alias Jeskhan
2. Meera Sahib Mohammad Riyath alias Ali
3. Sally Mohammad Alimudeen alias
Alimudeen alias Aleem

ACCUSED

And Now in Between

Mohammad Yusuf Siyath alias Jeskhan
(In Bogambara Prison)

ACCUSED -APPELLANT

Vs

The Attorney General

Attorney General's Department

Colombo 12.

COMPLAINAT- RESPONDENT

Before: B. Sasi Mahendran, J.

Amal Ranaraja, J

Counsel : Nalin Ladduwahetty PC with Kavithri Ubeysekera, Yasas
Hewapathirana and Rajith Samarasekera for the Accused- Appellant

Azard Navavi ASG, PC for the Respondent

Written 22.04.2022, 06.10.2022 and 05.01.2026 (by the Accused-Appellant)

Submissions: 07.05.2021 (by the Respondent)

On

Argued On : 27.11.2025

Judgment On: 28.01.2026

JUDGEMENT

B. Sasi Mahendran, J.

The first Accused Appellant (herein after referred to as the Appellant) has filed this appeal against the judgment delivered on 11.08.2017. It should be noted that originally the Accused Appellant, along with 3 other Accused, namely Meera Sahib Mohammad Riyath, Zaimulabdeen Nizfer, Sally Mohammad Alimudeen, had been indicted for committing the murder of Mohammad Mohammadu Musthapa Thaskhan on or about 8th September 2006 at Kalamuni, which is punishable under section 296 and read along with section 32 of the Penal Code.

After the trial, the Learned High Court Judge delivered judgment on 10.07.2012, acquitted Zaimulabdeen Nizfer and convicted the other three Accused. Against the said judgment, the Appellant, along with the other 2 accused, referred an appeal to the Court of Appeal. By judgment dated 01.08.2014, the case for retrial was ordered on the basis that the Accused party had not been afforded a proper and fair trial.

Thereafter, the 1st accused Appellant, along with the other 2 accused, namely Mohammad Riyath, Sally Mohammad Alimudeen (hereinafter referred to as the 2nd and the 3rd Accused), were charged for the murder of Mohammadu Musthapa Thaskhan. Later, Honourable Attorney General amended the indictment by inserting all three accused, along with an unknown person, to the prosecution caused the death of Mohammadu Musthapa Thaskhan. The said trial was commenced on 31st May 2016, and the prosecution led the evidence of PW 01, Mohamadu Ismail Nazeer, PW 3, Mohamadu Ismail Bazeer, PW 5, Ibralebbe Najeem, PW 4, Mohamadu Mustaq Muhamadu Rizly, PW 6, Abdul Cader Faizal, PW 7, Dr Arjuna Thilakaratne, PW 8, Police Sergeant Abubaker Anzar, PW 09, Retired Sub Inspector - Nimal Karunaratne, PW 10, Chief Inspector Jemeel, PW 11, Dr Mohammad Thambi Mohamed Marsuk, and closed the case.

Thereafter, the defence was called, the Appellant gave evidence from the evidence box, and the other 2 gave dock statements. On behalf of the 2nd accused, two defence witnesses were called. After the conclusion of the trial, the Learned High Court Judge found the Appellant

guilty and acquitted the 2nd and 3rd accused. Against the said judgment, the Appellant has preferred this appeal.

The Counsel for the Appellant advanced the following grounds:

1. Not having a Jury brings an injustice to the accused
2. The evidence of the prosecution shows the vital conviction
3. There is no eyewitness to prove that the Accused had committed the crime
4. The prosecution's evidence failed to prove beyond a reasonable doubt.

The facts and circumstances of this case are as follows,

PW-01, Mohamadu Ismail Nazeer, stated that he received information that the Appellant and his associates were assaulting the deceased. He thereafter proceeded to the scene and subsequently went to Ashraf Memorial Hospital. The Learned High Court Judge, however, treated this witness's evidence as inadmissible on the basis that he had not personally witnessed the assault.

PW-3, Mohamadu Ismail Bazeer, testified that he received a call from PW-5 informing him that the Appellant and his associates were assaulting the deceased in front of the Appellant's boutique. Upon arriving at the scene, he observed Nayeem, Faizer, Rizly, and Faizal present who are the friends of the Appellant. He then saw the deceased with bleeding injuries and noted a stone lodged in the leg of the deceased. During the trial, PW-3 further stated that he had seen the Appellant together with Saleem, Riyal, Fazeel, Farook, and Nisfer (who had already been acquitted) at the scene, but that they left upon noticing his presence.

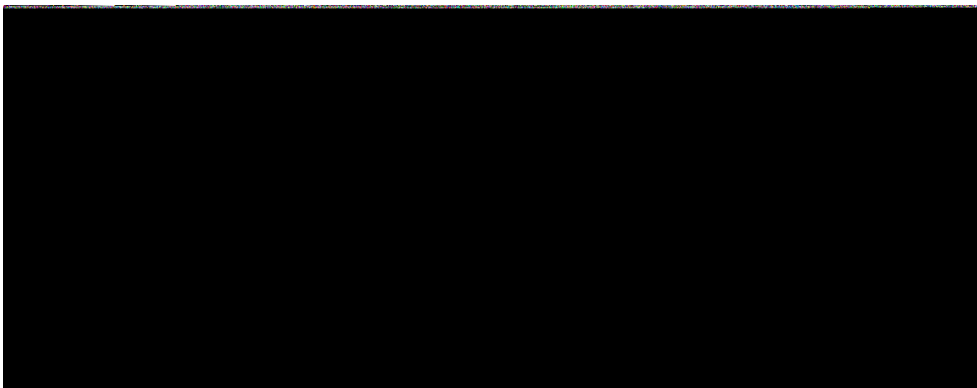
During cross-examination, PW-3 admitted that he had not stated in his police statement that he received a phone call from PW-5 informing him that the 1st Accused and his associates were assaulting the deceased. He further acknowledged that he had not mentioned the names of the 2nd and 3rd Accused in his statement, and also conceded that he had not seen the 3rd Accused at the scene. PW-3 ultimately stated that the names he provided were taken from the statement given by the deceased to the police.

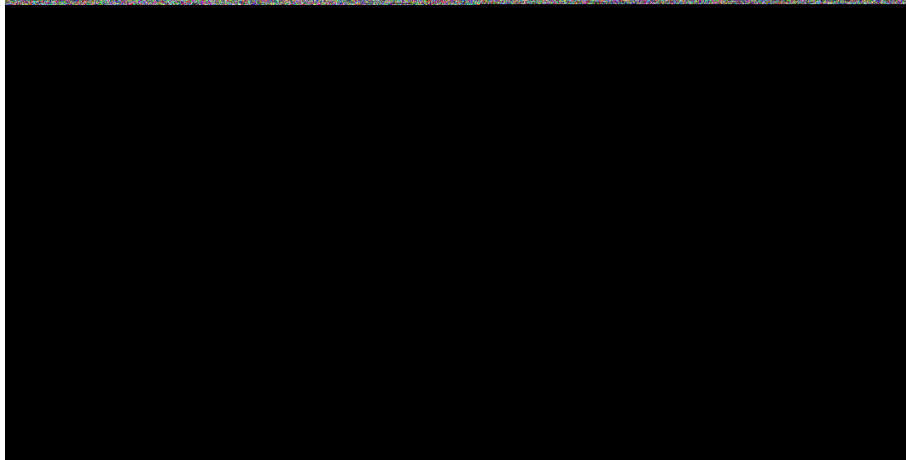
According to his testimony, although the witness had known the 3rd Accused for five years, he failed to mention the 3rd Accused by name. Significantly, his evidence was recorded at the hospital on the 19th. Yet, in that statement, he did not record that the Appellant and his associates were attacking the deceased. This omission was duly marked, further casting doubt on the reliability and completeness of his evidence.

PW-5, Ibralebbe Najeem, corroborated the testimony of PW-3. He stated that PW 4 informed him that the Appellant, together with his associates, was assaulting the deceased. At that time, Faisal, PW 6, was with him, and the three of them had proceeded to the scene. There, PW-5 observed the Appellant striking the deceased, while **Riyath (2nd Accused) and Aleem (3rd Accused)** were also present. He later testified that **all three Accused were attacking the deceased with their hands**. As a result of these blows, the deceased fell to the ground (*vide page 272 of the brief*). We note that on the alleged day of the incident, he did not give evidence to the police.

During the cross-examination, the defence brought to notice that in his statement to the police, he had stated the following. (*vide page 304*)

“Further, beef stall Farook had a wooden pole, grandson of lodge keeper Baseel had an iron rod, and Mason Nazeer had a wooden pole -his name is Aleem, were assaulting. Further, Azeem from Thaikka Road, who has a quarry, was kicking Dhaskhan”.





It should be noted that on 25th September 2006, the witness provided a statement to the police, which was recorded by IP Jameel, PW 10, the same officer who had recorded the deceased's dying declaration. In his statement, the witness asserted that he had seen the 3rd Accused attacking the deceased with a stick.

Page 334 of the brief,

Q : I put it to you on behalf of the 3rd accused that the 3rd accused must have been one among the onlookers but he had not attacked or hit the injured person.

A : No. he did assault.

Q : Who assaulted?

A : Alim

Q : How did he assault?

A : He hit him with a stick.

Q : I put to you that you never mentioned about the 3rd accused hitting the injured person, during the Examination in Chief.

A : He did not ask about hitting with a stick. Hence, I did not say so but I told that he assaulted him.

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Q : You said that the 3rd accused assaulted the injured person.

A : Yes.

Q : Did he assault him with both his hands or with one hand?

A : I did not see whether he and his friends assaulted with one hand or both hands or with how many hands.

Q : Didn't you see him whether he hit with one or both hands?

A : No.

Q : I put it to you that therefore you did not see anything.

A : I did see.

Page 347 of the brief,

Q : Witness, during the Cross Examination did you say that all the friends of Jeskhan were assaulting?

A : Yes.

Q : When you said "all", who were the people that you were referring to?

A : All those who had been mentioned in the complaint in the Police.

Q : If so, do you remember those who were mentioned in the Police complaint can you mention their names?

A : Jeskhan, Basheer, Farook, Faseel, Nazaar, Riyath and Saleem

Page 351 of the brief,

Q : Witness, you said that the 3rd accused had been assaulting the Dhaskhan when you saw.

A : Yes

Q : Who were those who had been in that place?

A : Jeskhan and his friends

The Learned High Court Judge did not take this portion of evidence into account in his judgment.

PW-4, Mohammad Mustaq Muhamadu Rizly, who has seen the incident from the beginning has testified that while he was waiting near a shop at the Pura Dudu junction due to rain, the deceased arrived there. Shortly thereafter, a three-wheeler arrived carrying the Appellant and a person called Azim, who immediately began assaulting the deceased. He further stated that both individuals struck the deceased on the head during the attack.

Page 373 of the brief,

Q : If so, where were you when this incident took place?

A : While I was in that place, two people came in a three-wheeler. They attacked Dhaskhan on his head and took him away in the three-wheeler

Page 374 of the brief,

Q : You said that two people who came to that place attacked deceased Dhaskhan in this case and took him in a three-wheeler. Can you say who those people were?

A : Yes.

Q : Who were they?

A : Azeem and Jeskhan.

Q : Are the two people whom you mentioned now, here in this Court?

A : Yes

Q : Where are they?

A : Jeskhan is standing as the 1st person in the dock. The person Azeem is not in the Court at that moment.

Thereafter, the witness stated that he followed the three-wheeler and observed both the Appellant and Azim taking the deceased from the vehicle to Thaikka Road, where other friends of the Appellant continued to attack him. Following this, the witness went and

informed PW-5. Upon returning, he saw the deceased lying on the ground, but he was unable to identify who had struck him at that stage. On 25th September, the witness made a statement to the police regarding these events.

During the cross-examination defence has marked an omission.

Page 415 of the brief,

Q : Did you, in your statement to the police say as follows:-

“Grandson of lodge keeper from Kalmuni OPD Road. Faisal and Farook who has a meat shop in Cassim Road and Aseem from Thaikka Road and mason Naser’s brother Aleem and the boy working in Jeskhan’s shop were assaulting with iron rods on the head and legs indiscriminately”

Did you say so to the Police?

A : I don’t remember

The witnesses denied having identified several individuals as being involved in the assault on the deceased, which demonstrates inconsistencies in their testimony.

PW-6, Abdul Cader Faizal, testified that while he was working with PW-5, PW-4 approached and informed them that the Appellant and his friends were attacking the deceased. They immediately rushed to the scene, where PW-6 observed the deceased lying on the ground with injuries. At that point, he saw the Appellant holding a club, while the others present did not possess any weapons. Thereafter, with the assistance of others, the deceased was admitted to the hospital.

PW-7, Dr. Arjuna Thilakaratne, who conducted the post-mortem examination, testified that he identified twenty-six injuries on the body of the deceased. He further stated that the cause of death was twofold: firstly, an abscess on the left kidney, and secondly, multiple injuries inflicted by blunt trauma. These injuries facilitated the onset of infection, which ultimately resulted in septicemia.

According to the evidence of PW 10, Chief Inspector Jemeel, he has recorded the statement from the deceased and in his statement, he has identified a number of people who assaulted him. The prosecution marked the dying declaration as P5 and marked as P5 a,b as portions of the declaration.

During cross-examination, the defence contended that the deceased did not have his left-hand thumb prior to the incident. The Learned High Court Judge correctly concluded that the prosecution had failed to dispel the doubt raised by the defence. On this basis, the Learned Judge declined to accept the purported dying declaration as reliable evidence.

Upon analyzing the evidence presented before the Learned High Court Judge, it becomes apparent that the following material facts were not taken into consideration.

1. PW-4 testified that the Appellant, together with one Azim, assaulted the deceased. He further stated that Azim, along with the Appellant, took the deceased to Thaikka Road and attacked him there. Despite Azim being identified in the initial incident and implicated in the assault, the investigators failed to question him in connection with the murder. The evidence indicates that Azim also attacked the deceased. However, the Learned High Court Judge did not consider this issue, and the prosecution has offered no explanation as to why Azim was excluded from the investigation.
2. There is evidence implicating the 2nd and 3rd Accused in the assault on the deceased. PW-5 categorically testified that he identified all three Accused actively attacking the deceased. Despite this direct evidence, the Learned High Court Judge acquitted the 2nd and 3rd Accused on the basis that there was no evidence against them.

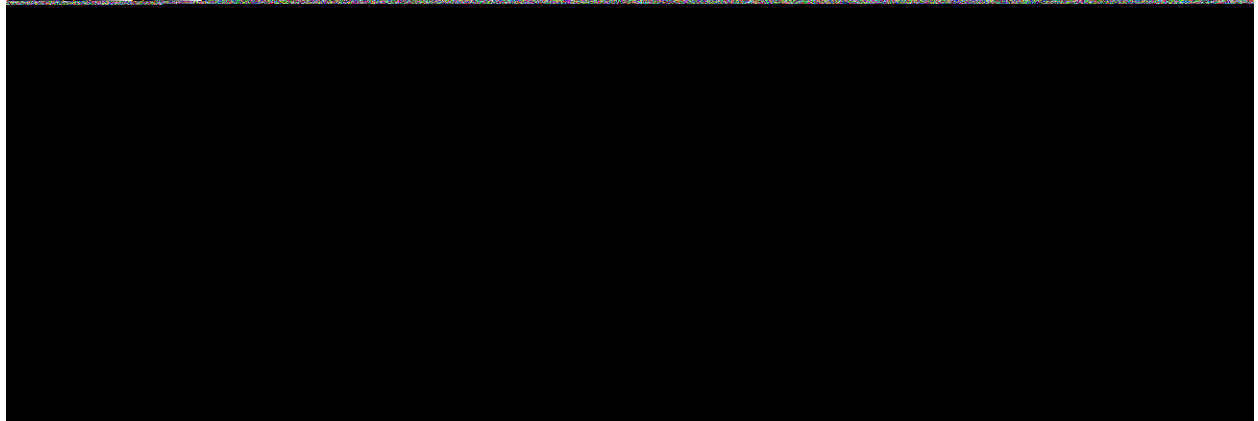
Page 272 of the brief,

Q : While they were assaulting him, how did they assault him?

A : they hit him with their hands

Q : You said while he was being assaulted, he was screaming. What was he telling while screaming?

A : He collapsed after he screamed



The Learned High Court Judge made the following observation after evaluating the evidence.

Page 794 of the brief,

“PW - 5 Najeem also has seen the 1st accused hitting the deceased at the Thaikka Road. However he in his evidence has stated that 2nd accused and 3rd accused were just standing there and only 1st accused Jeskhan was hitting the deceased.”

Counsel for the defence brought to the attention of the court that the concept of divisibility of the credibility dictum referred by G. P. S. De Silva, J. (as he was then) in *Siriwardena And Another V. The Attorney General* 1998, 2 SLR,222 at page 226 as follows,

*“Mr. Rohan Jayetilake, senior state counsel, submitted that the verdict of the jury is not unreasonable because the jury may have found that the "alibi" put forward by the 4th accused credible whereas, the "alibi" of the appellants unacceptable. Even so, it seems to me that the moment the jury had a reasonable doubt as to the truth of Mahipala's evidence implicating the 4th accused, the jury could not have on the very same evidence acted with confidence as against the appellants. The doubt in regard to the veracity of Mahipala's evidence, created by the alibi of the 4th accused, must necessarily have an impact on the rest of Mahipala's evidence. The principle is that the testimony of a witness which is identical and **which is exactly of the same weight** as against two or more accused persons, cannot be found to be*

unacceptable against one accused and acceptable as against the others. In this context, the view of the Judicial Committee of the Privy Council, expressed in Baksh v. the Queen⁽¹⁾, as regards the indivisibility of the credibility of a witness is very relevant:

"Their credibility cannot be treated as divisible and accepted against one and rejected against the other. Their honesty having been shown to be open to question, it cannot be right to accept their verdict against one and reopen it in the case of the other. Their Lordships are accordingly of opinion that a new trial should have been ordered in both cases."

*Another case that is relevant is R v. Margulas⁽²⁾, where the alleged eyewitnesses claimed to have identified two accused jointly committing the offence of burglary. The jury convicted the 1st accused and acquitted the 2nd accused. The Court of Criminal Appeal quashed the conviction of the 1st accused on the ground that the evidence against him cannot be considered sufficient if those against the man whom the jury acquitted **"was exactly of the same weight"**. As in the present case, in Margulas's case too, no complaint was made of the summing-up. On the other hand, Mr. Rohan Jayetilake strongly relied on the case of Francis Appuhamy v. The Queen ⁽³⁾ in an effort to support the convictions. Senior state counsel referred to that part of the judgment where T. S. Fernando, J., discussed Baksh v. the Queen (Supra) and the principle of the indivisibility of the credibility of a witness. Counsel relied particularly on the following dicta:*

"The remark that credibility of witnesses could not be treated as divisible came to be made in the circumstances related above. We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. Certainly in this country it is not an uncommon experience

to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are

either members of the family of that person or enemies of such witnesses. In that situation, the judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true (at page 443)."

In this case, the Crown relied on the evidence of a single eyewitness named Irene Rodrigo. It was a case of shooting by night and hence the possibility of mistaken identity could not be discounted. Having referred to Baksh's case, T. S. Fernando, J. proceeded to state in the course of his judgment:

"In the instant case, in the light of the directions given by the trial judge, it is, in our opinion, not permissible to infer that the jury considered Irene's evidence in respect of her identification of the 5th accused to be false. The high probability is that they concluded she was merely mistaken in regard to the identity of the fifth man, the man with the pistol . . . References were made also to the case of Harry Margulas (17 Cr. A.R. 3) and cases which have purported to follow it. In all those cases, however, the jury on evidence of the same weight had in the case of one or more of the accused persons returned a verdict of guilty while acquitting another or others. Such a result would, of course, be unreasonable; but that is not the position in the instant case where the distinction drawn by the jury can be shown to be based on sufficient reason." (The emphasis is mine.)

Thus, it is manifest the learned judge was there dealing with a case where the facts were entirely different from the facts of the instant case. It is equally clear that Francis Appuhamy's case has not departed from the principle laid down in Margulas's case (Supra).

Accordingly, I am of the opinion that Mr. A. A. de Silva's submission that the verdict of the jury is unreasonable, is entitled to succeed. The appeals of the 2nd and 3rd accused-appellants are allowed, their convictions and sentences are quashed, and they are acquitted"

In the instant case, we are mindful that the deceased had died due to septicemia due to multiple injuries caused to him. JMO further testified that the deceased had a septicemia condition mainly due to fractures and laceration caused to his body, but not due to abrasions caused to his body. There were several injuries to the body of the deceased. We observe that JMO has stated that internal contusions could be caused by kicking the abdominal region. Further, he has stated that there is a fracture in the skull, but he did not observe any such damage to the arteries that supply blood to the brain of the deceased, and accordingly, the skull fracture described above could not be a threat to the life of the deceased.

The JMO opined that the death of the deceased was caused by two factors: firstly, an abscess on the left kidney, and secondly, multiple injuries sustained on his body due to blunt trauma, which led to the spread of infection and ultimately resulted in septicemia. According to the testimony of PW-4, he witnessed the Appellant together with Azim attacking the head of the deceased. PW-5, however, did not specify the part of the body where the deceased was assaulted. PW-3 stated that the Appellant, along with two others, were hitting the deceased. Nevertheless, none of the witnesses testified to having seen the deceased being struck in the abdominal region. This fact was conceded by the prosecution during the argument stage.

In the present case, the Learned High Court Judge accepted the evidence of PW-4 and concluded that the Appellant was involved in the incident. The evidence establishes that the Appellant, together with another individual named Azim, assaulted the deceased, transported him in a three-wheeler, and continued the assault thereafter. At no stage did PW-4 indicate that the 2nd or 3rd Accused participated in the attack; instead, he specifically identified Azim as the other assailant. The issue that arises for determination is whether the conduct of the Appellant, as established by the evidence, falls within the third limb of Section 294 of the Penal Code.

It is relevant to consider the 3d limb of Section 294, which reads as follows:-

Except in the cases hereinafter excepted culpable homicide is murder

"Firstly - (omitted)

"Secondly - (omitted)

"Thirdly -if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; "

It is relevant in this case to consider illustration "C" under Section 294. It reads as follows:-

"A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death"

According to the evidence presented before the Learned High Court Judge, there is no indication that the injuries attributed to the Appellant were fatal. The manner in which the evidence was placed does not clearly establish how the Appellant inflicted the injuries, nor does it demonstrate that such injuries were intended to cause the death of Mohammodu Musthapa Thaskhan.

It is acknowledged that the death was caused by septicemia resulting from multiple injuries. The deceased passed away ten days after being admitted to the hospital. The post-mortem examination revealed several injuries on the body of the deceased. While the evidence refers to a head injury inflicted by the Appellant, it is clear that the deceased did not die as a result of that injury. Moreover, there is no evidence establishing that the injuries attributed to the Appellant directly caused the death of the deceased.

I am of the view that the prosecution has failed to prove beyond a reasonable doubt that the Appellant shared the common intention with an unknown person to commit the death of Mohammodu Musthapa Thaskhan. As I mentioned earlier, the evidence of PW 4 speaks about a person called Azeem also participated in the attack. But he has not been named as an accused in this case.

In light of the foregoing evidence, it is my considered view that the Appellant should be acquitted of the charge of murder. The evidence does not establish beyond a reasonable doubt that the injuries attributed to the deceased were fatal or intended to cause death. However, the evidence does demonstrate that the Appellant inflicted grievous injuries upon the deceased. Accordingly, the Appellant ought to be convicted for the offence of grievous hurt by attacking with a club, punishable under Section 317 of the Penal Code.

Accordingly, I convict the Appellant under Section 317 of the Penal Code and sentence him to 10 years of rigorous imprisonment and a fine of Rs. 10,000. In addition, I order the Appellant to pay compensation of Rs. 1,000,000.00 to the deceased.

The substantive term of imprisonment shall commence from 11.08.2017. In default of payment of the fine, the Appellant shall undergo 1 year of rigorous imprisonment, and in default of payment of compensation, the Appellant shall undergo 2 years of rigorous imprisonment, which shall operate from today's date.

The Registrar of this Court is directed to communicate this Judgment to the High Court of Kalmunai for compliance.

Appeal partly allowed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL