

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

An Appeal filed in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

Complainant

Vs

Court of Appeal Case No:

CA/HCC/47-48-2016

High Court of Chilaw Case No:

HC-01-2007

1. Gasbaruge Lakshman Christy Nimal Fernando
2. Warnakulasooriya Maha Muthuwala Kankanamlage Anton Sumith Fernando

Accused

AND NOW BETWEEN

1. Gasbaruge Lakshman Christy Nimal Fernando
2. Warnakulasooriya Maha Muthuwala Kankanamlage Anton Sumith Fernando

Accused – Appellants

Vs

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

Complainant - Respondent

Before : **P. Kumararatnam, J.**
Pradeep Hettiarachchi, J.

Counsel : Saliya Peries P.C. with Manujaya de Silva for the Accused – Appellant
Maheshika de Silva D.S.G for the Respondent.

Argued on : 29.07.2025, 12.11.2025 and 27.11.2025

Decided on : 27.02.2026

Pradeep Hettiarachchi, J

Judgment

1. The 1st and 2nd appellants were indicted before the High Court of Chilaw for committing the murder of Jerad Sanath Vanculenberg which is an offence punishable under Section 296 read together with Section 32 of the Penal Code.
2. The trial was conducted before the learned Judge of the High Court without a jury, and at the conclusion of the trial, the learned trial Judge found both appellants guilty of the charge and convicted them. Accordingly, both appellants were sentenced to death. Being aggrieved by the said conviction and sentence, the appellants have preferred the present appeal. Pending the determination of this appeal, the 1st appellant died at the National Hospital, Colombo, on 07.02.2024.
3. The grounds of appeal pursued by the appellants are as follows:
 - a. The evidence of PW1 is unreliable and not worthy of credit;
 - b. The High Court Judge has misdirected himself of the evidence of the defence; and,
 - c. The High Court Judge has misdirected on the medical evidence.

4. PW1, Viraj Nalin Suranga, is the sole eyewitness who testified for the prosecution. He is a brother of the deceased. According to PW1, the deceased had previously been accused of the murder of PW1's wife's brother and was on bail at the time of this incident.
5. On the day of the incident, the deceased visited PW1's residence, remained there for about 20 minutes, and thereafter left for Gallewatta on his bicycle. As the deceased was travelling alone, PW1 followed him on his own bicycle, maintaining a distance of approximately 20 meters. They were proceeding along Bulugahawatta Road.
6. When the deceased was passing the third bend of that road, two persons suddenly jumped onto the road, armed with swords, and attacked him. PW1 identified them as the 1st and 2nd appellants. Upon witnessing the attack, PW1 got off his bicycle and raised cries, but as he was also threatened by the appellants, he fled from the scene. Thereafter, PW1 returned to the scene in a three-wheeler and took the deceased to the Marawila Hospital, where the deceased was pronounced dead.
7. The next witness who testified for the prosecution was PW8, Dr. Nilupa Mudalige, who was serving at the Marawila Hospital during the period relevant to this incident. PW8 performed the post-mortem examination of the deceased.
8. According to PW8, she observed 20 external injuries on the body of the deceased. Out of these injuries, Injury No. 19 was categorized as a burn injury. She further stated that Injuries Nos. 1 and 2 had caused severe damage to the brain and were, in her opinion, necessarily fatal. Furthermore, PW8 testified that almost all the injuries observed on the body had been caused by a sharp, heavy cutting weapon.
9. PW7 is the police officer who received the information regarding this incident. Thereafter, he proceeded to the scene where the incident had taken place and made his observations. He observed bloodstains beneath a lamp post, which was illuminated at that time. As the first information revealed the names of two suspects, the witness went in search of them; however, by that time, the suspects had already fled.
10. Thereafter, the witness proceeded to the Marawila Hospital, where he made his observations of the body of the deceased. He reported the facts to the Magistrate of the

relevant jurisdiction and obtained orders for the post-mortem examination. Subsequently, on 03.01.2003, PW7 succeeded in arresting the 1st appellant. The 2nd appellant surrendered himself before the Magistrate's Court on 06.01.2003.

11. At the conclusion of the prosecution case, the 1st and 2nd appellants gave evidence. In addition, four witnesses testified in support of the defence. One of them was Dr. Deeptha Kumara Wijewardhana, the Judicial Medical Officer of the Chilaw Hospital. Since the appellant's first argument is based on the alleged lack of creditworthiness of PW1, it is pertinent to consider whether the grounds advanced by the appellant in that regard have any merit.
12. It was submitted that, since PW1 did not inform his mother at the first instance as to who had attacked the deceased when she was at the scene, it demonstrates that PW1 had not witnessed the incident. Admittedly, PW1 had not disclosed the names of the appellants to his mother when she was at the scene of the crime. However, the evidence reveals that his mother was crying profusely when he returned to the scene in a three-wheeler. In those circumstances, it cannot reasonably be expected that PW1 would have informed his mother of the identity of the attackers.
13. It is desirable to emphasize that the conduct of a witness immediately after a traumatic and shocking incident cannot be measured by any rigid or uniform standard, as reactions may vary depending on the circumstances and the emotional state of the individual concerned. In the present case, PW1 was confronted with the gruesome spectacle of his own brother lying grievously injured with severe cut wounds, and his failure to immediately disclose the identities of the assailants to others at the scene is neither unnatural nor sufficient to cast doubt on the reliability of his testimony.
14. Furthermore, PW1's failure to disclose to the police the name of the three-wheeler driver does not, in my view, cast any doubt on his credibility, as the identity of the three-wheeler driver is not material to the main incident in this case. It can be observed that the appellants placed considerable reliance on PW1's failure to mention the name of the driver of the three-wheeler in which the deceased was taken to the hospital. It was further submitted that PW1's omission to inform the three-wheeler driver as to who the attackers were demonstrates that PW1 had not, in fact, witnessed the incident.

15. The incident in question had occurred at night. The medical evidence demonstrates that the deceased had sustained severe cut injuries, which ultimately resulted in his death. PW1, at the first available opportunity, made a complaint to the police and disclosed the names of the 1st and 2nd appellants as the persons who had attacked the deceased.
16. Furthermore, PW1 stated in his testimony that both he and his brother were crying while the deceased was being taken to the hospital, as the deceased had sustained serious cut injuries to his body. In these circumstances, I see no reason to disbelieve the evidence of PW1 merely on the basis that he had failed to mention to the police the name of the three-wheeler driver, or that he had not disclosed the names of the appellants to the said driver.
17. More importantly, there are no material contradictions in the evidence of PW1, nor are there any glaring discrepancies that undermine the credibility of the prosecution case. The consistency of PW1's testimony is also evident, and there is nothing to suggest any inherent improbabilities therein.
18. It was also argued that the learned trial Judge had failed to properly evaluate and appreciate the defence evidence, in particular the evidence of Dr. Deeptha of the Chilaw Hospital. The 1st and 2nd appellants testified and maintained that, at the time of the incident, they were not present at the scene but were attending the funeral of a relative named Peter. Three additional witnesses also testified in support of the defence.
19. The 1st appellant, in his evidence, stated that he returned home between 5.30 p.m. and 7.00 p.m. from the funeral house. He further stated that he had met the 2nd appellant at the said funeral. Additionally, he testified that he was arrested seven days after the incident, during which time he was assaulted by the police and compelled to sign a statement. Nevertheless, he admitted that he had never made any complaint to the Magistrate regarding the alleged assault, despite being represented by an attorney-at-law.
20. The 2nd appellant, in his testimony, stated that he remained at the funeral house until about 8.30 p.m. to 9.30 p.m., after which he went with one Indu to his house to attend to certain bathroom repairs and stayed there for the night. It is to be noted that the 2nd

appellant did not state that he had seen the 1st appellant at the funeral house. According to the 2nd appellant, he came to know of the death of the deceased at around 8.00 p.m. while he was at the funeral house.

21. DW3 was one Joseph Fernando. According to his testimony, he came to know of the death of the deceased only on the morning of the 27th. It is noteworthy that, had the 2nd appellant become aware of the incident resulting in the death of the deceased while he was at the funeral house of Peter, it is difficult to believe that DW3 would not have been aware of it until the following morning.
22. DW4, in his evidence, stated that after the burial he returned to the funeral house but had not seen the 1st appellant there. According to DW4, the 2nd appellant remained at the funeral house until about 8.30 p.m. to 8.45 p.m., after which he left the place with Indu.
23. DW5, Indu Fernando, in his evidence stated that he could not remember whether the 1st appellant was present at the funeral house after the burial. However, he stated that the 2nd appellant returned to the funeral house at around 6.45 p.m. to 7.00 p.m. While he was at the funeral house, the witness came to know that the deceased, Sanath, had been hacked to death. It is also pertinent to note that DW5 had not made any statement to the police stating that the 2nd appellant was with him and had no involvement in the incident even after his arrest.
24. What can be gleaned from the defence evidence is that, even if the appellants were present at the funeral house, there was no inherent improbability in their having left the place to commit the offence and thereafter returned to the funeral house, or in their committing the offence after leaving the funeral house, particularly in view of the close proximity between the scene of the crime and the funeral house.
25. The appellants placed considerable reliance on the evidence of Dr. Deeptha, who testified for the defence, and argued that the presence of gunshot injuries on the body of the deceased demonstrates that PW1 could not have witnessed the incident, as he had never stated that he heard the sound of gunfire.

26. However, Dr. Deeptha had not physically examined the body of the deceased but testified with reference to the observations made by Dr. Mudalige, who conducted the post-mortem examination. It is evident from the evidence of Dr. Deepthi that he did not express any definitive opinion regarding the nature of the injury described as Injury No. 19, but merely speculated that it might have been caused by a firearm.
27. More importantly, the evidence of Dr. Mudalige was never disputed by the defence. It is also pertinent to note that Dr. Deepthi was not in a position to state the age of the alleged burn injury on the body. Hence, it remains uncertain whether that injury had already been present at the time the attack took place. Furthermore, Dr. Deepthi was unable to state whether any corresponding internal injuries were present in relation to the said burn injury. In the post-mortem report, Injury No. 19 was described as follows:
- 4 small circular? Superficial burn marks? (cigarette burns) .5cm x .5cm not penetrating the skin, around left axillary area*
28. Apparently, Dr. Mudalige was of the view that the said injury could possibly have been caused by a cigarette burn. In these circumstances, the opinion expressed by Dr. Deeptha, without having physically examined the body, is, in my view, not safe to rely upon.
29. Furthermore, according to PW1, he fled the scene immediately after being threatened by the appellants. Thus, even assuming that the deceased had sustained an injury caused by a firearm, there remains a possibility that PW1 had already fled the scene by that time, and had no opportunity to hear any gunfire. It is also worthy of note that no bullet fragments, gunpowder residues, or wadding were recovered from the scene or from the body of the deceased, which further rules out the possibility that a firearm had been discharged.
30. On a perusal of the impugned judgment, it is evident that the trial Judge carefully analyzed the evidence of Dr. Deepthi, called by the defence, and concluded that it was unsafe to rely on his evidence, given that Dr. Deepthi had not physically examined the body but had merely expressed his opinion based on the post-mortem report. Accordingly, no misdirection in relation to the medical evidence by the trial Judge can be observed, as alleged by the appellant.

31. It is true that the learned trial Judge, at certain points, rejected aspects of the defence evidence on grounds that may not have been entirely correct. However, the crucial question is whether any such alleged misdirection has resulted in grave prejudice to the appellants.

32. In the Code of Criminal Procedure Act No. 15 of 1979 and the Constitution of our country provide provisions to rectify any error, omission or irregularity in a judgment where such error, omission or irregularity which has not prejudiced the substantial right of the parties or occasioned a failure of justice. Section 436 of the Code of Criminal Procedure Act No: 15 of 1979 states as follows:

*“Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account- (a) of any error, omission or irregularity in the complaint, summons, warrants, charge, judgment, summing up or other proceedings before or during trial or in any inquiry or other proceedings under this code; or (b) of the want of any sanction required by section 135, **Unless such error, omission, irregularity, or want has occasioned a failure of justice.**” [Emphasis added]*

33. Article 138 of The Constitution of Democratic Republic of Sri Lanka states:

*“The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance: Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect or irregularity, **which has not prejudiced the substantial right of the parties or occasioned a failure of justice**”. [Emphasis added]*

34. Therefore, in my opinion, although the manner in which the learned trial Judge evaluated the defence evidence, in particular the grounds upon which he rejected it, may disclose a degree of irrationality, no substantial prejudice has been caused to the appellants for the reasons stated above.
35. In this case, no material contradictions or omissions are discernible in the prosecution evidence. PW1 disclosed the names of the appellants to the police at the earliest opportunity, and the consistency of his testimony was never seriously in question. The mere fact that PW1 did not inform the three-wheel driver as to who attacked the deceased, or failed to disclose the names of the assailants to his mother while she was weeping at the crime scene, does not detract from the credibility of his evidence, particularly in view of the traumatic circumstances he was confronted with when his own brother lay grievously injured with severe cut wounds.
36. In my view, the evidence adduced by the defence does not create any doubt as to the prosecution's version of events. The appellants and the defence witnesses primarily stated that the appellants were at the funeral house of Peter on the day of the incident. However, when considered in its entirety, that evidence does not indicate any inherent improbability in the appellants having committed the alleged offence, particularly in light of the close proximity between the scene of the crime and Peter's funeral house.
37. Thus, the grounds of appeal advanced by the appellants are devoid of merit. Accordingly, I see no reason to interfere with the findings of the learned trial Judge. In the circumstances, I affirm the conviction and sentence imposed by the learned High Court Judge of Chilaw, and the appeal is hereby dismissed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree,

Judge of the Court of Appeal