GUNADASA *ALIAS* APPUWA AND ANOTHER
v.
ATTORNEY-GENERAL

COURT OF APPEAL
JAYASURIYA, J.,
KULATILLEKE, J.
C.A. NO. 35-36/96
H.C. HAMBANTOTA NO. 29/95
AUGUST 17 & 18, 1998.

Criminal Law – Common intention – Similar intention – Murder – Causation – Attempted culpable homicide not amounting to murder – Section 294 Clause 1 – Explanation 1 to section 293 of the Penal Code – Dying declaration.

Held:

The 1st accused caused two injuries to the head of the deceased with a katty and when the deceased fell the 2nd accused with a sword cut the leg of the deceased and inflicted on him a mortal wound on the rear of the chest saying he would finish off the deceased. The trial judge trying the case without a jury did not address the question of common intention. The facts support the inference of only a similar intention.

The inference of common intention must be an irresistible and necessary inference from which there is no escape. A distinction must necessarily be drawn between the concepts of similar and same intention and the concept of common intention. Where, as here, the two accused acted in furtherance of a similar intention the liability of each accused would rest solely on the particular acts committed by him and one accused would not be constructively be liable for the acts and consequences traceable to the other accused.

In the post-mortem report enumerating the injuries the doctor reported that death was due to cardio-respiratory failure resulting from shock and haemorrhage due to the damage caused to the internal organs which led to profuse bleeding. The doctor had not stated that death was due to any injuries to the skull or brain nor was evidence elicited on this point.

There was very great antecedent probability as opposed to a mere likelihood of the injury to the rear of the chest causing the death of the injured if left to nature and there was no resort to medical treatment.

The 2nd accused had the clear intention to cause the death of the deceased and his case comes within the ambit of clause 1 to section 294 of the Penal Code. If at the time of death the wound inflicted by the 2nd accused is still an operating cause and a substantial cause then death can properly be said to be the result of that wound albeit some other cause of death is also operating. This is the principle of causation. Explanation 1 to section 293 of the Penal Code gives effect to this principle which is founded on sound reasoning and common sense. Thus when the second accused caused bodily injury to the injured in this case who was labouring under a disorder and bodily injury inflicted by the first accused and by that process he, thereby accelerated the death of the deceased, he shall be deemed in law to have caused the death of the injured and the requirement of causation is established beyond doubt.

At the time the deceased was still alive though possibly mortally injured if the accused inflicts an injury which at least short-terms the period of his life the law makes him guilty of murder.

The dying declaration of the deceased is corroborated by the evidence of a witness and consistent with the oral evidence. Hence, the judgment cannot be flawed for the trial judge's use of the dying declaration.

No evidence was illicited as to whether the injuries caused by the 1st accused to the head were sufficient in the ordinary course of nature to cause death. The benefit of the doubt on this point has to be resolved in favour of the 1st accused. He is, therefore, guilty of attempted culpable homicide not amounting to murder.

Cases referred to :

1. *King v. Assappu* – 50 NLR 324.
2. *Wilson Silva v. The Queen* – 76 NLR 414, 426.
3. *Rex v. Mubila* – (1956) 1 SALR 31.
4. *Boiler Inspector and Insurance Company of Canada v. Sherwin Williams Company of Canada Ltd.* – (1951) AC 319, 339.
5. *Weld-Blundel v. Stephens* – (1920) AC 956, 986.
6. *Rex v. Smith* – (1959) 2 All ER 193, 197.
7. *Rex v. J. C. Jorden* – (1956) 50 Cr. App. Rep. 152.
8. *R. v. Mgxwiti* – (1954) 1 SALR 370.
9. *Thabo Meli v. Queen* – (1954) 1 WLR 228.
10. *Regina v. Mathias Anthony Pillai* – 69 NLR 34.
11. *Queen v. Somasundaram* – 76 NLR 10.
12. *Weerappan v. King* – 76 NLR 109.
13. *Republic v. Sheila Sinharage* – (1985) 1 Sri LR 1.
14. *Soates* – (1858) 50 NC 409.

APPEAL from the High Court of Hambantota.

Ranjit Abeysuriya, PC with *Ms. Priyadarshani Dias* and *Ms. M. Thalgodapitiya* for appellant.

Buwaneka Aluwihare, SSC for respondent.

Cur. adv. vult.

September 15, 1998.

JAYASURIYA, J.

The first and second accused-appellants were charged before the High Court of Hambantota on an indictment which alleged that they had on the 16th of December, 1985, at Bengamukande committed the offence of murder in respect of Banagalage David acting in furtherance of a murderous common intention, which was an offence punishable in terms of section 296 of the Penal Code read with section 32 of the Penal Code. The learned High Court Judge before whom the trial was held without a jury, has not referred to the principle of liability – common intention – in his judgment and neither has he collated and referred to any facts established by the prosecution manifesting that the two accused were acting in furtherance of a common intention. In the course of the argument, learned senior state counsel made a futile attempt to refer to evidence in the case which he contended was sufficient evidence of common intention. However, we are unable to accept his submission that the evidence placed by the prosecution established a case that the two accused were actuated by a common intention on account of the insufficiency of such evidence. In this context we emphasize the trite proposition of law which has been laid down in a *cursus curiae* that the inference of common intention must be an irresistible and necessary inference from which there is no escape and that a distinction has necessarily to be drawn between the concepts of similar and same intention and the concept of common intention. The Privy Council has emphasized that the distinction and partition which divides these concepts is very thin and narrow but,

nevertheless, since the consequences arising from the application of these concepts are of a far-reaching character, the inference of common intention should not be lightly drawn unless it is a compelling and necessary inference from which there is no escape. The facts established by the prosecution in the particular case under consideration, on the contrary, pointed to the conclusion that the two accused were acting in furtherance of a similar intention and not a common intention. In view of our finding on this point, the liability of each accused would rest solely on the particular acts committed by him and one accused would not be constructively liable for the acts and consequences traceable to the other accused. Even though the indictment presented a charge of joint liability of acting in furtherance of a common intention, we sitting in appeal and investigating into the merits of the appeals are required to look into the case of each accused separately and to analyse separately the case presented against each accused in relation to the separate acts committed by each of them. Vide the observations in this regard laid down by Justice Dias in *King v. Assappu*[1]; *Wilson Silva v. Queen*[2]. The evidence which was led by the prosecution in regard to the alleged murderous assault on the deceased Banagalage David which was on 16th December, 1985, was of a clear, cogent and overwhelming nature. In the course of the evidence, prosecution witness Kusumawathie explicitly and clearly stated that Gunadasa the first accused, who was also known as Appuwa, used a Katty to inflict injuries on the head of the deceased and after the deceased was felled to the ground, the second accused cut him with a sword on his back and on his right leg. Thus, there is clear, cogent and intelligible evidence that the first accused inflicted the injuries on the head of the deceased which are described as injuries Nos. 1 and 2, whereas the second accused Banagalage Ariyaratne *alias* Ukkuwa inflicted the cut injuries on the back and leg of the deceased which have been described as injuries Nos. 3 and 4 in the post-mortem report. The post-mortem was performed by Dr. Nalin Vithane on 17.12.85 at 3 pm. The post-mortem report has been produced marked P4 and an assessment has been made in regard to the time of death, as having taken place on 16.12.85 at 4.30 pm. It is in evidence that the alleged murderous attack on the deceased and the incident took place on 16.12.85 at about 12 noon.

Dr. Vithana in his post-mortem report has recorded that the death of the deceased was due to cardio-respiratory failure resulting from shock and haemorrhage. He has further stated that shock and haemorrhage was due to the damage caused to the internal organs which led to profuse bleeding. It is to be emphasized and stressed that this doctor has not stated anywhere in his report that death was due to any injuries to the skull or brain. In his report marked P4, Dr. Nalin Vithana has desribed the four injuries in detail. A reproduction of his description is rendered necessary in view of the contentions raised on behalf of the accused-appellants at the hearing of this appeal:

1. A sharp cut injury on the scalp about 2" above the right ear lobe; the underlying bone was also sliced. This was 1" in depth and 5" in length.

2. A sharp and deep cut injury on the scalp about 3" above the left ear lobe; the underlying bone appeared to be cut and the brain was exposed through the wound; the scalp injury was 3" in length and the process of bleeding into the brain was detected.

3. Cut injury on the right leg about 3" above the ankle joint. This was a sharp cutting injury where the tibia and fibula were cut and the leg was connected to the body only by the mere skin.

4. A deep cut on the rear of the chest which commenced in the midline at the midpoint of the scapula angles and extended downwards towards the right side upto the right iliac crest. This was a deep cut and as a result the liver and the right kidney with its ureter and the large and small intestines were damaged at several points and the length of the wound was about 11".

We have taken into consideration the effect of the injuries caused to the head specified at page 5 of the post-mortem report certified by Dr. Vithana. The evidence elicited is to the effect that the first accused inflicted the injuries on the deceased with a Katty initially and, thereafter, when the deceased was felled to the ground, the second accused inflicted injuries Nos. 3 and 4 using the sword in

his hand and exerting considerable force to achieve his object. In addition to the aforesaid medical officer who gave evidence, the prosecution called Professor Chandrasiri Niriella who held the post of Professor of Forensic Medicine and Medical Jurisprudence at the Medical Faculty of the Ruhunu University in Galle. In the course of his evidence, (recorded at page 133), in relation to injury No. 4 as listed in the post-mortem report marked P4, Prof. Niriella has described the injuries as follows:

පපුවේ පිටුපස පැත්තේ (රේඛීය) දිග තුවාලයක් දකුණු පැත්තේ තියෙනවා. එය කැපුම් තුවාලයක්. අක්මාව කැපී තියෙනවා. දකුණු වකුගඩුව කැපී තියෙනවා. සම්පූර්ණයෙන් වාගේ වකුගඩුවේ මුත්‍රා ගෙන යන නාල කැපී තියෙනවා. මහ බඩවැලේ කොටසකුත් කැපී තියෙනවා. කුඩා බඩවැලුත් කැපී ගොස් තිබෙනවා. පැ. 2 වශයෙන් ලකුණු කොට පෙන්නූ කඩුවෙන් මෙම තුවාල හතර සිදුවෙන්නට පුලුවන්. තුවාල අංක 1, 2, 3 මරණය සිදුවීමට ප්‍රවණතාවය අඩුයි. මරණයට ලේ ගැලීම හා කම්පනය හේතු වී ඇත. වකුගඩුව කැපීමෙන් හුහක් ලේ යනවා. අක්මාව කැපීගොස් තියෙනවා. අංක 3, 4 තුවාල සිදුවී ඇත්තේ වැටිලා ඉන්න අවස්ථාවක. මොලයේ කඳ තුවාල වීමක් වාර්ථාවේ සඳහන් වී නැත. අංක 4 තුවාලය ඉතා ගැඹුරු තුවාලයක්, අංක 3 හා 4 අධික ලෙස ලේ ගලන තුවාල වේ.

Under further cross-examination, Prof. Niriella has very distinctly and explicitly stated that after receiving injuries Nos. 3 and 4 which induced considerable bleeding and haemorrhage, the injured would have lived only for half an hour to one hour at most and that the maximum period after receiving injuries Nos. 3 and 4, the injured would have lived, would be one hour and thereafter his death would be brought about due to the intense bleeding and haemorrhage. This evidence has been elicited from the Professor by learned counsel who appeared for the accused at the trial. Having regard to the nature of injuries manifested in the post-mortem report marked P4 and the aforesaid clear evidence given by Prof. Niriella, it is manifestly established and proved that there was a very great antecedent probability as opposed to mere likelihood of injuries 3 and 4 causing the death of the injured if left to nature and there was no resort to medical treatment *Rex v. Mubila*[3] even the resort to medical treatment could not have averted his death due to the intense bleeding and haemorrhage resulting from injuries to the kidney, the liver, intestines and

the ureter and the death of the injured would have necessarily taken place within a space of one hour. Vide the observations of Lord Wright that "potency of the Act and not chronology is the test"–1950 13 Modern Law Review P3. In regard to the aforesaid evidence of Prof. Niriella, learned counsel for the appellant relied on the contents of the post-mortem report P4 and contended that the incident took place on 16.12.85 at 12 noon, whereas the time of death, as disclosed in the document P4, is at 4.30 pm on 16.12.85. In regard to this contention it must be stressed and emphasized that the post-mortem was performed on 17.12.85 at 3 pm by Dr. Nalin Vithana and in the report he has merely given the approximate assessment of the time of death.

It has been elicited as part of the prosecution evidence that after the deceased was felled to the ground, the second accused-appellant had cut his leg with the sword and, thereafter inflicted the mortal injuries at the rear of his chest. Before cutting the deceased's leg he has uttered this statement:

උඹ ඉවරයක් කරල දාල යන්න ඕන කියල කඩුවෙන් ගැහැව්වා. වම් කකුලට.

Vide the evidence given by witness Banagalage Kusumawathie at page 35 of the record, which statement manifests that the second accused-appellant had the clear intention to cause the death of deceased and the evidence against the second accused-appellant brings his case even within the ambit of clause 1 to section 294 of the Penal Code.

In this state of the medical evidence it was strenuously argued by learned President's Counsel appearing for the accused-appellants that causation in relation to the result was not established beyond reasonable doubt; in regard to the acts of Cutting with a sword established against the second accused-appellant. He specifically referred the court to injuries Nos. 1 and 2 listed in P4 which were caused by first accused and urged that as a result of these injuries, the skull was fractured, parts of the brain were seen and there was some slight injury to the brain. In the circumstances, he contended strenuously that the second accused by his acts cannot rationally and

logically be said to have caused the death of the deceased and that the ingredient of causation had not been established against the second accused-appellant beyond reasonable doubt.

We are unable to agree with the learned President's Counsel in regard to his contention founded on the requirement of causation, both on principle and on reason. Vide *Boiler Inspector and Insurance Company of Canada v. Sherwin Williams Company of Canada Ltd.*[4]; *Weld-Blundel v. Stephens*[5] per Lord Surne. Initially, we would advert learned President's Counsel's attention to the explanation No. 1 to section 293 of the Penal Code. explanation No. 1 sets out that "a person who causes bodily injury to another *who is* labouring under a disorder disease or bodily infirmity and thereby accelerates the death of that other, shall be *deemed* to have caused his death". The principle of law relating to causation as laid down in explanation 1 militates against the adoption of learned President Counsel's submission on causation. Further, Prof. H. L. A. Hart and Prof. A. M. Honore in their learned article on "Causation in the Law" 1956 72 LQR 58 and a series of English and South African decisions lay down principles and cogent reasoning which would induce us to reject the contention of learned President's Counsel as wholly unsustainable and devoid of all merit. Expressing succinctly principles of law on Causation, Lord Parker in *Rex v. Smith*[6] remarked thus: "It seems to the Court that if at the time of death the wound inflicted by the accused is still an *operating* cause and a *substantial* cause then death can properly be said to be the result of that wound albeit *some other* cause of death is also operating. Only if it can be said that the original wound is merely the setting in which another cause operates, can it be said that death does not result from that wound. Putting it in another way, only if the second cause is so overwhelming as to make the orginal wound merely part of the history can it be said that death does not flow from that wound." Even in the decision in *Rex v. J. C. Jorden*[7] Justice Hallett observed thus in regard to normal treatment which was alleged to effect a breach in the line of causation – "We are disposed to accept it as the law that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as being caused by the felonious injury". Explanation 1 to section 293 of the Penal Code gives effect to this principle which is founded on sound

reasoning and common sense. Vide dicta of Lord Sumner in *Weld - Blundel v. Stephens* (*supra*). Thus, when the second accused caused bodily injury to the injured in this case who was labouring under a disorder and bodily injury inflicted by the first accused and by that process he, thereby, accelerated the death of the injured, he shall be deemed in law to have caused the death of the injured. This explanation clearly manifests that though the injured was suffering and labouring under a disorder and a bodily injury inflicted by the first accused, the injury inflicted by the second accused accelerated his death and thereby the second accused is deemed to have caused his death and the requirement of causation is established against him beyond reasonable doubt. The rule embodied in explanation 1 is founded on cogent reasoning and on sound principles. It finds support in Stephen's Digest – Article 262, subsection (*d*), where the learned author states the principle thus: "A person is deemed to have committed *homicide although his action is not the immediate or not the sole cause of death,* if by any act he *hastens* the death of a person suffering under any disease or injury, which, apart from such act would have caused death". Thus, this rule is consistent with the English Criminal Law as outlined by Sir James Fitzgerald Stephen. This principle is also recognized in the Penal Codes which obtain in the African legal system. The Penal Code of Tanganyka in section 203 (*d*) sets out thus: "A person is deemed to have caused the death of another person although his act is not the immediate or *sole cause of death* . . . if by any act or omission he *hastens* the death of a person suffering under any disease or injury which, apart from such act or omission would have caused death".

In the course of the argument, learned senior state counsel drew the attention of this Court to the decision in *Rex v. Mgxwiti*[8] In this decision Justice Schreiner agreed with the conclusion reached by Justice Greenberg and Justice de Beer for different reasons outlined by him in his judgment. In the course of his judgment he dealt with certain principles of law which in effect enshrine the Rule contained in explanation 1 to section 293 of the Sri Lanka Penal Code. Justice Schreiner in this context remarked: "The appellant did inflict a stab wound on her (the deceased) while she was alive and so at least shortened the period of her life, a conlusion which on any view of

the law would make him guilty, *however, near to death she might already have been brought by other injuries*". Thereafter, His Lordship referred to the principles of ratification too in this context and observed thus: "I can see no objection, however, to accord in this narrow field recognition to the principle of ratification – that whoever joins in a murderous assault upon a person must be taken to have ratified the infliction of injuries which have already been inflicted, whether or not in the result these turn out to be fatal either individually or taken together".

Justice Schreiner in regard to the facts of that particular case held, as the accused-appellant had joined in an obviously murderous attack *at the time when the deceased was still alive though possibly mortally injured* that he was guilty of murder. Disagreeing with the other two judges he laid down the law in general terms as follows: "I consider the law to be that where an accused has joined in an assault which he knows to be aimed at the death of someone else his responsibility for the resulting death will depend on whether the victim was alive at that time when the accused joined in the assault and *not* on whether the victim had or had not at that stage received mortal injuries". His reasoning for such a conclusion appears at page 382 of his judgment.

Prof. Hart and Prof. Honore in the learned article consider the following situation – the two acts of two persons are contemporaneous and each act is adequate to give rise to the legally punishable harm. For example, where A & B simultaneously shoot at C, each shot being sufficient to kill C; in the situation the authors conclude that there is no doubt that both A & B are criminally liable for C's death and causation is brought home against both A & B – Vide Granville Williams. This appears to be the rule even though the penalised harm would have happened equally If one of these accused had not acted. This is the rationale underlying the principle of causation. Vide the decision of the Privy Council in *Thebo Meli v. Queen.*[9] For the aforesaid principles and reasons, we reject learned President's Counsel's contention that causation has not been proved beyond reasonable doubt.

The only other complaint and ground of appeal urged before us by learned President's Counsel was to the effect that though the trial was before the High Court Judge without a jury, the learned High Court Judge had failed to give his mind specifically for the need for caution before deciding to act upon the contents of the dying declaration made by the deceased shortly before his death to Dharmadasa, the deceased's brother. Learned counsel relied on the decisions in *Regina v. Mathias Anthony Pillai*[10]; *Queen v. Somasunderam*[11]; *Weerappan v. King*[12]; *Republic v. Sheila Sinharage*[13]. It must be emphasized that all the decisions cited by learned counsel for the appellant relate to trials where dying declarations were admitted before juries. The trial in the particular case under consideration was before a trained and experienced judge and he has taken special effort to consider carefully how far the other facts and surrounding circumstances proved in evidence might be looked upon to support the truth or otherwise of the contents of the dying depositions. Having given his mind prominently to this issue, he has arrived at the finding that the contents of the dying declaration deposed to by witness Dharmadasa, has been corroborated by the evidence given by Kusumawathie and the contents of the dying declaration are wholly consistent with the oral evidence given by Kusumawathie, the main witness for the prosecution. Vide page 195 of the judgment. Though the learned President's Counsel referred us to page 183 of the record, the passage in the judgment at page 183 must be read in the light of the observations made by the learned judge at page 195 of the record. In the circumstances, we hold there is no substantial merit in the only other contention urged on behalf of the accused-appellants. In the result, we affirm the finding, conviction and sentence imposed by the learned High Court Judge of Hambantota on the second accused-appellant.

The case presented against the first accused-appellant assumes a different complexion, particularly as the learned State counsel who appeared at the trial had failed to question both Dr. Nalin Vithane and Prof. Niriella in regard to the probability of death resulting from the injuries inflicted by the first accused-appellant, namely, injuries Nos. 1 and 2, which are listed in the post-mortem report marked P4. The prosecution was required to invoke clause 3 of section 294

to bring home a charge of murder against the first accused-appellant in regard to injuries Nos. 1 and 2 inflicted by him with the use of a Katty. Learned State counsel who appeared at the trial had merely put questions to Dr. Nalin Vithane and elicited the nature of the injuries as described in the post-mortem report itself. There was a culpable failure on his part to question the doctor in regard to his grounds and reasons for the conclusion that there was a very great antecedent probability as opposed to a mere likelihood of death resulting from injuries Nos. 1 and 2. Not even the bare opinion of the medical witness has been elicited on this aspect. Thus, having regard to the paucity of the evidence elicited from the medical witnesses, there is a doubt as to whether the injuries Nos. 1 and 2 inflicted by the first accused-appellant were sufficient in the ordinary course of nature to cause death. That doubt has necessarily to be resolved in favour of the first accused-appellant and we are induced to hold on the paucity of the evidence led that the injuries inflicted by him on the deceased were merely likely to cause death and therefore the offence that he has committed is the offence of *attempted* culpable homicide not amounting to murder and in the process of committing this offence the first accused had inflicted grave injuries on the deceased. In the circumstances, we set aside the finding, conviction and sentence imposed on the first accused-appellant and in substitution we hold that he is guilty of attempted culpable homicide not amounting to murder punishable under section 301 of the Penal Code and we proceed to convict the first accused-appellant of this offence and sentence the first accused Banagalage Gunadasa to a term of imprisonment for six years.

Learned President's Counsel had drawn our attention to certain cogent observations made by Justice Weeramantry in the decision in *T. H. Wilson Silva v. The Queen* (*supra*) Justice Weeramantry having decided to quash the convictions, then proceeded to consider whether the Court should not proceed to convict the accused for their individual acts on the basis of the evidence of the eyewitnesses in the case. His Lordship's observations were directed pointedly to the fact that the trial in that case was before a *jury* presided over by a single judge. His Lordship having given anxious consideration to this issue remarked thus:

"We reach the conclusion that the interests of justice viewed from the angle of both the prosecution and the defence would best be served if we left all these questions to the *decision of a jury at a fresh trial.* The defence would then have the benefit in the event of the failure of the charges based on vicarious responsibility, of an evaluation by the *Jury whose minds were specifically directed to this question,* of the evidence relating to specifc acts by individual accused . . . If indeed a jury after giving their due attention to the legal principles applicable should find as the prosecution alleges, that there was an unlawful assembly with a common murderous object or that the accused shared a common murderous intention, it would be less than just to the prosecution that conviction for simple hurt should be entered against the majority of the participants. We, therefore-consider that the course most consonent with justice *in this case* was to order that the accused-appellants be tried afresh upon the same count before *another jury.*" These observations have emphasized that the trial in question was before a jury and therefore an evaluation by the jury whose minds were specifically directed to the issues of law raised and to the evidence relating to the specific acts by individual accused, was desirable and therefore necessary. These observations will not apply to the instant case as the trial in the case was before a judge without a jury. This appeal was argued before two trained judges of the Court of Appeal who have had considerable experience as presiding judges in the High Court and we are of the view that we are in a better position than a sole trial judge to apply the relevant principles of law to the evidence already elicited relating to the specific acts committed by each of the accused-appellants. We are of the considered view that ordering a retrial in such circumstances would merely add to the delays in the administration of the law and would expose both accused-appellants to the needless expenditure of additional sums of money at a retrial. The consideration which weighed with Justice Weeramantry were weighty, having particular regard to the fact that the original trial was before a jury. Those considerations have no relevance to the instant case because the original trial was before a sole presiding judge and the present appeal has been argued before two judges in the Court of Appeal who have had considerable experience specially in murder prosecutions launched before the High Courts. In the circumstances,

we are unable to accede to the request made by learned President's Counsel not to arrive at a decision on the merits after considering the evidence relating to the specific acts committed by individual accused but to order a retrial in the instant prosecution.

We have only convicted the first accused-appellant of an *attempt* to commit culpable homicide not amounting to murder following the dicta laid down in the American Case – *Soates*[14] where the judge of the American Court observed thus: "If one man inflicts a mortal wound by which the victim is lingering and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have *killed* him without involving the absurdity of saying that the deceased was killed twice". The appeal of the second accused-appellant is dismissed. Appeal of the first accused-appellant is partly allowed and a substituted finding, conviction and a term of imprisonment is imposed on the first accused in appeal.

KULATILLEKE, J. – I agree.

Conviction of 1st accused set aside. 1st accused convicted of attempted culpable homicide not amounting to murder.

Appeal of 2nd accused dismissed.