

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

1. Dassanayake Lekamlage Somapala alias
Gangabada Sudu
2. Hangwellage Premawardena alias Poto
Prema alias Walpita Preme
3. Dassanayake Lekamlage Priyantha Kumara

ACCUSED-APPELLANTS

C.A. No. 208-210/2011
(H.C.Panadura 2257/2006)

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &
Sunil Rajapaksa J.

COUNSEL: Dr. Ranjit Fernando for the 1st Accused-Appellant
Asoka Weerasuriya with Kithsiri Liyanage for the 2nd Accused-Appellant
Indika Mallawarachchi for the 3rd Accused-Appellant
Thusith Mudaliga S.S.C. for the Complainant-Respondent

ARGUED ON: 31.07.2014

DECIDED ON: 02.09.2014

GOONERATNE J.

The three Accused-Appellants were indicted on three counts. Count No. (1) was a charge of murder of one K.L.Don Dharmaratne. An offence committed along with Jagath Jayaweera (deceased) on or about 15.9.1997. Count Nos. (2) & (3) are charges of attempted murder of K. Dharmadasa and K. Somadasa respectively caused within and during the same transaction. The Appellants were convicted for culpable homicide not amounting to murder on count No. (1) and sentenced to 8 years rigorous imprisonment and a fine of Rs. 10,000/- which carries a default sentence of 6 months imprisonment. On

count No. (2) Accused were sentenced to 5 years rigorous imprisonment with a fine of Rs. 5000/- which carries a default sentence of 6 months simple imprisonment. All three Accused were acquitted on count No. (3).

The facts of this case appear to be a brutal murder of the above named deceased and causing severe injuries to the persons named in count Nos. (2) & (3), by manna knives by several of the Accused and others. It is also in evidence that the left leg of K. Somadasa was completely severed, cut by a manna knife. Thereafter acid had been poured on to the place where the leg had been cut. K. Somadasa the injured gave evidence and was subject to lengthy cross-examination. Eleven contradictions and some omissions were marked in evidence. However the learned High Court Judge had rejected his evidence on the basis that the witness had not clearly and properly identified the Accused persons or the perpetration of the crime at the time and place of the incident although they were known to the witness from childhood. When the incident took place the question of identity was in issue. On that basis evidence of the only eye-witness had been rejected by the learned High Court Judge. These facts were urged by learned counsel who appears for the Accused-Appellant. All the learned counsel vehemently objected to the Dying declaration (P5) of D. Dharmadasa since he was dead by the time of the trial in

the High Court and that it is unsafe to act on such a declaration, to convict the Accused party.

The learned Senior State Counsel very correctly observed that the prosecution case was mainly based on the deposition of K. Dharmadasa, and suspects are not properly identified or that identity is not properly fixed or specific identity cannot be proved or established.

A very important aspect of a criminal trial is that the perpetrators of the crime need to be identified with certainty. Absence of identity of accused would be fatal to the prosecution case. The learned High Court Judge has merely referred to the items of evidence of the declaration (P5) but has not considered its probative value.

The trial Judge or the jury as the case may be, must bear in mind the following.

- (1) Statement of the deceased person was not made under oath.
- (2) Statement of the deceased person has not been tested by cross-examination. 51 NLR 322; 66 NLR 409.

It is equally important to be satisfied that the statement in fact was accurate, and could be accepted beyond reasonable doubt. Further was the witness telling the truth, and able to speak at the relevant time.

In all the above facts and circumstances it is unsafe to allow the conviction to stand. When Accused are facing a capital charge every point in favour of the Accused need to be considered. If the court is left with only circumstantial evidence, court need be extra cautious and careful. In the case in hand it is undesirable to act on the deposition P5 to convict the Accused. In these circumstances we set aside the conviction and sentence and allow this appeal. All three Accused acquitted.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

N. S. Rajapaksa J.

I agree.

JUDGE OF THE COURT OF APPEAL