

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

**In the matter of an Appeal in terms of Section  
331 (1) of the Code of Criminal Procedure Act  
No 15 of 1979.**

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**CA/136/2008**

**H/C Matara case No. 91/05**

1. Rasika Prabath Priyadarshana Senanayake
2. Jasingh Dissanayake Chaminda  
alias Heen Mahaththaya

**ACCUSED**

And,

1. Rasika Prabath Priyadarshana Senanayak
2. Jasingh Dissanayake Chaminda  
alias Heen Mahaththaya

**ACCUSED-APPELLANTS**

Vs,

Attorney General  
Attorney General's Department  
Colombo 12.

**RESPONDENT**

**Before: Vijith K. Malalgoda PC J (P/CA) &  
H.C.J. Madawala J**

**Counsel:** Dr. Rajith Fernando for the 1<sup>st</sup> Accused-Appellant  
Tenny Fernando for the 2<sup>nd</sup> Accused-Appellant  
Sarath Jayamanna PC ASG for the Attorney General

Argued on: 26.05.2015, 02.07.2015, 27.07.2015, 02.10.2015

Written Submissions on: 16.11.2015, 26.04.2016

**Decided on: 23.09.2016**

## **Order**

### **Vijith K. Malalgoda PC J**

The two accused-appellants namely Rasika Prabath Priyadarshana Senanayake and Jasingh Dissanayake Chaminda alias Heen Mahaththaya were indicted before the High Court of Matara for committing the abduction and murder of Tenison Kulasiri Senanayake with a person unknown to the prosecution, committing the Robbery of a Motor Cycle belonging to one Sumith Nishantha during the same transaction, offences punishable under section 355, 296 and 380 read with section 32 of the Penal Code.

When the indictments were served on the accused-appellants, they elected to be tried before the High Court Judge without the jury. At the conclusion of the said trial, both accused-appellants were found guilty of the two counts of abduction and the Count of Murder and each of the accused were sentenced to 5 years Rigorous Imprisonment on the 1<sup>st</sup> and the 2<sup>nd</sup> counts and were sentenced to death on the 3<sup>rd</sup> count. In addition to the above the 1<sup>st</sup> accused-appellant was further convicted to the 4<sup>th</sup> count and was sentenced to 10 years Rigorous Imprisonment.

Being aggrieved by the said convictions and sentences imposed on each of the accused, they have preferred the present appeal before this court.

During the arguments before this court the Learned Counsel appears for the two accused-appellants have raised the following grounds of appeal.

### 1<sup>st</sup> Accused-Appellant

1. The Learned Trial Judge had erred in law when he found guilty of the first accused on count 3 on the basis of common intention
2. Learned Trial Judge had erred in law when he acted on the uncorroborated testimony of the witness Ariyadasa who made the statement to police several days after and the evidence of Sarath Kumudu

### 2<sup>nd</sup> Accused-appellant

1. Belatedness of recording the statement of the main witness had caused prejudice to the accused
2. Illegal investigation carried out by the police had denied a fair trial to the accused
3. Learned Trial Judge failed to evaluate the evidence of the sole eye witness in its proper context

When considering the nature of the grounds of appeal raised on behalf of the two accused appellants, this court is of the view that it is more appropriate to first consider the prosecution version of this case. The deceased and the 1<sup>st</sup> accused-appellant who were children of two brothers, were the co-owners of the bus which was known as "Senanayake Bus" referred to in this case. However as revealed at the High Court trial, the said bus was managed by the deceased.

According to the evidence of the main witness for the prosecution, Ariyadasa who was the driver of "Senanayake Bus" for nine months, the said bus was operating between Panakaduwa and Urubokka via Kotapola and Matara. The bus had reached Panakaduwa from Matara around 7.30-8.00 pm in its final trip for that day. The deceased "Senanayake Mudalali" was also in the bus at that time. As a practice the deceased took over the bus from Panakaduwa to take it to his house which is about 3 km away, and the driver and the conductor of the bus used to get down at their houses.

As revealed by the evidence of witness Ariyadasa the driver of the "Senanayake Bus", when the deceased took the wheel at Panakaduwa after the last passenger got down from the bus, the time was around 7.30 pm. The witness was seated in one of the passenger seat and the conductor got down prior to him. When the bus reached Kosgashandiya around 8.30 pm, three people on the road had signaled to halt the bus. With the help of the head lights, the witness had identified two of them as 1<sup>st</sup> and the 2<sup>nd</sup> accused but he could not identify the 3<sup>rd</sup> person. When the bus was stopped, 2<sup>nd</sup> accused and the unknown person got in to the bus from the front passenger door whereas the 1<sup>st</sup> accused-appellant got in to the bus from the door near the driving seat.

Having entered from the said door the 1<sup>st</sup> accused-appellant had pulled the hand brake and at the same time the 2<sup>nd</sup> accused-appellant and the unknown person pulled the deceased out from the driving seat and dragged him to the rear of the bus. Having taken control of the bus the 1<sup>st</sup> accused-appellant switched off the lights inside and turned the bus to a different direction. When the deceased was dragged off from his seat, the sarong he was wearing was entangled with the gear lever and the 2<sup>nd</sup> accused-appellant had taken the said sarong and covered the face of the witness with that. At that time he saw a knife in the hand of the 2<sup>nd</sup> accused-appellant.

The 1<sup>st</sup> accused drove the bus at a high speed and during that time the witness heard the deceased pleading not to kill him.

After while the witness had heard and felt the bus being collided and few minutes later when the witness was able to remove the blindfold, he did not see anybody inside the bus except the deceased who was lying fallen in the back of the bus with bleeding injuries. The witness realized that the bus had collided with another bus called "Sinhajaya Bus".

Witness further refers to, taking the deceased to Mawarala hospital when the police arrived at the scene and thereafter going to Matara hospital in the ambulance, but the deceased succumbed to his injuries on their way.

The next witness the prosecution had relied was witness Amarasena Gurusinghe, the owner of ""Sinhajaya Bus". According to his evidence, his bus was parked facing the main road and he was cleaning the windscreen with the help of the inner lights of the bus when he heard a loud noise of a vehicle coming at a very high speed. When looked, he saw a vehicle coming with the head lights on but could not recognize what it was since the it had turned off its inside lights.

In few seconds the said vehicle had collided with his bus, and at that time he recognized it as "Senanayake Bus." The 1<sup>st</sup> and the 2<sup>nd</sup> accused-appellants who got down from the two entrances had ran towards the same direction they came, but the witness in his evidence had not said that he saw a 3<sup>rd</sup> person getting off from "Senanayake Bus".

Even though this witness speaks of the collision and the 1<sup>st</sup> and the 2<sup>nd</sup> accused-appellants fleeing from "Senanayake Bus", he did not speak of seeing the deceased inside the "Senanayake Bus" since he was rushed to a nearby doctor for medication as a result of the accident but later he got to know from Ariyadasa that the deceased was inside the bus.

Sarath Gurusinghe a relative of the previous witness Amarasena Gurusinghe in his evidence had said that, he rushed to the scene having heard a loud noise and saw the collision of the two known buses. When he reached he saw Ariyadasa getting off from one of the collided busses; i.e. "Senanayake Bus"

Ariyadasa told the witness that three persons had run away. Witness who got into one of his relatives Motor Cycle and went towards the direction shown by Ariyadasa. When he reached a shop, he saw three persons and among them he identified the 1<sup>st</sup> accused-appellant, but the other two were unknown to him. When he grabbed the collar of 1<sup>st</sup> accused, the other two threatened the witness with an object they had and demanding to release 1<sup>st</sup> accused-appellant. The 1<sup>st</sup> accused also pulled something from his pocket and shouted saying that he will destroy everybody.

Thereafter the 1<sup>st</sup> accused and the two others got in to the Motor Cycle of the shop owner and fled from that place. When returned he saw the deceased with bleeding injuries inside the bus.

Sumith Nishantha whose Motor Cycle was used by the three accused to flee, was also called to give evidence. According to his evidence, he was in his shop when he heard the loud noise of an accident and he immediately closed his shop to go and see what is was. When the witness came to the road he saw two people fighting on the road and he identified them as the 1<sup>st</sup> accused-appellant and Sarath Gurusinghe. Witness heard 1<sup>st</sup> accused-appellant shouting saying 'hit' and saw pulling something like a bomb from his pocket.

The witness having seen this had rushed up to his Motor Cycle to leave the place and when he tried to start the Motor Cycle by inserting the key, the 1<sup>st</sup> accused-appellant and another grabbed the bicycle and fled away. It was the 1<sup>st</sup> accused who rode the bicycle. He could not identify the other. This witness did not speak of a 3<sup>rd</sup> person travelling in his Motor Cycle.

PC Weerashinghe who arrived at the scene immediately after receiving the information by Urubokka Police Station, had taken up the position that he arrived the scene 15 minutes after the accident and he claims that he was the first to get into Senanayake bus after the accident. When he inspected the bus with the help of a torch, he found the deceased lying four rows behind of the driving seat with bleeding injuries and was still alive. With great difficulty the deceased told the witness "machan I was

cut by Rasika, take me to the hospital". This witness had taken steps to dispatch the injured to Mawarala Hospital and informed the police station with regard to the nature of the incident.

When considering the above evidence led at the trial, we observe that the prosecution had relied on several items of evidence, most of them are circumstantial in its nature to establish the prosecution case. Among them the most important piece of evidence was placed by witness Ariyadasa.

As observed above the evidence of witness Ariyadasa was challenged by both counsel and I will now proceed to consider the arguments raised by the two counsel with regard to the evidence of witness Ariyadasa.

- ❖ Learned Trial Judge had erred in law when he acted on the uncorroborated testimony of witness Ariyadasa who made the statement several days after the incident
- ❖ Belatedness of recording the statement of the main witness had caused prejudice to the accused
- ❖ Learned Trial Judge failed to evaluate the evidence of the sole eye witness in its proper context

When considering the above grounds of appeal raised by the two counsel, it appears that one of the main complaint by the two accused was the time taken by the police to record the statement of Ariyadasa. As revealed before us, the police had recorded a short statement on the same day when he returned from the hospital. His detailed statement was recorded four days after the incident but according to Ariyadasa each day he had gone to the police station and remained at the police station for hours until his statement was recorded. However, as revealed before us, witness Ariyadasa had given evidence before the inquest, prior to his statement being recorded by the police. However as observed by us, no major contradictions or omissions were marked before the trial with regard to his evidence at the inquest.

It is further observed by this court that, the presence of witness Ariyadasa at the scene was confirmed by several independent witnesses.

According to the evidence of Amarasena Gurusinghe, immediately, after the collision he saw the 1<sup>st</sup> accused and the 2<sup>nd</sup> accused fleeing from the “Senanayake Bus”. Witness was in severe pains after the collision and he was then rushed to a doctor nearby and after his return he met Ariyadasa and it is Ariyadasa who told him that the deceased was inside the bus, but this witness had not seen Ariyadasa getting down from the bus. However according to the evidence of Sarath Grurusinghe, after hearing the loud noise of the collision he rushed to the place where “Sinhajaya Bus” was parked and at that time he saw “Senanayake Bus” collided with “Sinhajaya Bus”. At that time he saw Ariyadasa getting down from the “Senanayake Bus” and it is Ariyadasa who told him that three persons ran away.

The said information given by Ariyadasa, made him to chase them and finally ended at the shop belonging to Sumith Nishantha where he saw three people including 1<sup>st</sup> accused, and all three fled the area in the Motor Cycle belonging to Sumith Nishantha. Even though witnesses Sumith Nishantha refers to two suspects only, he too had identified 1<sup>st</sup> accused among them.

As observed by this court, the entire incident is an unexpected incident, and one cannot expect a witness to see each and every thing happened in such a situation. However as observed by us, witness Ariyadasa’s evidence had been corroborated by all three lay witnesses, Amarasena Gurusinghe, Sarath Gurusinghe, and Sumith Nishantha.

The conduct of the 1<sup>st</sup> and the 2<sup>nd</sup> accused-appellant along with the 3<sup>rd</sup> person clearly indicated that they were fleeing after committing an offence. If they have only tried to leave the area due to the accident, then there was no reason for them to threaten others by showing objects similar to hand bombs and flee from the area in a robbed Motor Cycle.

In the light of this evidence we see no merit in the argument raised by both accused-appellants when they submitted that the evidence of Ariyadasa had not been corroborated and it is unsafe to act on his evidence since his police statement had been recorded 4 days after the incident.



- ❖ Learned Trial Judge erred in law when he found guilty the 1<sup>st</sup> accused-appellant of murder on the basis of common intention

As observed above, there was ample evidence before the trial court with regard to the fact that the 1<sup>st</sup> and the 2<sup>nd</sup> accused-appellant along with a 3<sup>rd</sup> person was inside the “Senanayake Bus” when it collided with “Sinhajaya Bus”. In this regard the evidence of the three independent witnesses have corroborated Ariyadasa. It is also established before court that the deceased was inside the “Senanayake Bus” with bleeding injuries in a critical condition when the said bus collided with “Sinhajaya Bus”.

Under these circumstances this court has no reason to reject the evidence given by Ariyadasa and witness Ariyadasa in his evidence has clearly narrated the events took place prior to covering his face by the 2<sup>nd</sup> accused-appellant and what happened thereafter. According to witness Ariyadasa when the 1<sup>st</sup> and the 2<sup>nd</sup> accused-appellants along with the 3<sup>rd</sup> Person stopped the bus, there were no other passengers other than him. The first accused-appellant who entered the bus from the driver’s door had first pulled the hand brake and when the other two grabbed the deceased from the driving seat, take control of the bus, switched off the inside lights and drove the bus to a different direction at very high speed. The other two dragged the deceased towards the rear of the bus, whilst covering the face of the witness by using the deceased sarong. The 2<sup>nd</sup> accused-appellant and the other person were armed with knives at that time.

According to the medical evidence placed before the trial court the Judicial Medical Officer has found 09 injuries on the body of the deceased and out of them 08 injuries were cut injuries caused by a sharp cutting weapon, such as a knife and the doctor could not say how many knives had been used but, the knife or the knives had been used several times to inflict those injuries.

When the “Senanayake Bus” stopped after it collided with “Singhajaya Bus” the 1<sup>st</sup>, 2<sup>nd</sup> accused-appellants with the other person had fled the bus and immediately thereafter the injured was found inside the bus in critical condition.

When the police officer questioned the injured he answered saying that “he was cut by Rasika”. Even though witness Ariyadasa did not see who inflicted the injuries on the deceased, and according to Ariyadasa, Rasika the 1<sup>st</sup> accused-appellant was driving the bus when the other two dragged the deceased to the rear, one cannot rule out that, 1<sup>st</sup> accused never stabbed the deceased prior to fleeing from the bus. However what is important in this instant is not the identity of the person who stabbed the deceased but, to see whether they acted with common intention to cause the death of the deceased and the two accused appellants with the 3<sup>rd</sup> unknown entertained common murderous intention to commit the murder of the deceased Tenison Kulasiri Senanayake.

In this regard the Learned Additional Solicitor General had placed before us the following evidence revealed at the High Court Trial;

- Three persons signaled to stop the bus and when it was stopped 1<sup>st</sup> accused got in to the bus from the driver’s door where as the other two got in from the front passenger door
- 1<sup>st</sup> accused-appellant pulled the hand brake as entered and took control of the bus when the other two dragged the deceased out of the driving seat
- 1<sup>st</sup> accused-appellant switched off the lights inside the bus and driven the bus to a different direction at a high speed while the other two blind folded the witness and thereafter dragged the deceased to the rear armed with knives
- Witness Ariyadasa heard the deceased pleading not to kill him
- After the bus met with an accident and witness Ariyadasa removed the cover on his eyes he saw the deceased with bleeding injuries and the 3 persons have fled from the bus

- Witness Amarasena Gurusinghe had seen a vehicle coming at a high speed towards his bus without the inside lights and therefore he could not properly identify what it was until the accident
- This witness had seen the 1<sup>st</sup> and the 2<sup>nd</sup> accused-appellants fleeing away after getting down from the bus
- When witness Sarath Gurusinghe had arrived at the scene after hearing the noise he saw witness Ariyadasa getting down from “Senanayake Bus” and informed him that 3 fled, he immediately gave chase to them
- Witness Sarath Gurusinghe met three people near the shop belonging to Sumith Nishantha and when the witness grabbed the 1<sup>st</sup> accused-appellant whom he knew, with his collar, the other two threatened him with an object they had, demanding the release of the 1<sup>st</sup> accused-appellant and the 1<sup>st</sup> accused-appellant also pulled some object from his pocket and shouted saying that he will destroy everybody.
- All three fled the area when 1<sup>st</sup> accused-appellant take control of the Motor Cycle of witness Sumith Nishantha when he tried start his Motor Cycle.
- Witness Sumith Nishantha confirms the fact that he saw the 1<sup>st</sup> accused-appellant pulling an object from his pocket and when he tried to leave the place the 1<sup>st</sup> accused-appellant pulled the Motor Cycle from him and fled along with another. This witness had not referred to a third person but the fact that there were 3 people was confirmed by witness Ariyadasa and Sarath Gurusinghe
- According to the Medical Evidence the deceased had sustained 09 injuries and out of them 08 injuries were cut injuries and injury No.6 is sufficient to cause the death, if no treatment was given within 15-20 minutes.

The above evidence clearly reveals a pre arranged plan between the three including the 1<sup>st</sup> and the 2<sup>nd</sup> accused-appellants and they have acted in furtherance to the said plan and therefore they entertained a

common murderous intention. It is further revealed that the 1<sup>st</sup> accused-appellant's presence is not a mere presence but it's a participation presence even if the dying deposition made by the deceased is rejected, but, we have no reason to reject the dying deposition too.

In the case of *Wasalamuni Richard V. The State 76 NLR 534*, Alles J and Themodaran J held (Fernando J dissenting) that the circumstantial evidence against the 3<sup>rd</sup> appellant was sufficient, in the absence of evidence given by him to explain his presence at the scene, to establish that he acted in furtherance of a common murderous intention with the other accused to kill the deceased. His presence at the scene was a 'participating presence' as distinct from a 'mere presence'.

In the case of *Ram Jahal V. State of Uttar Pradesh (1972) 1 SCC 136* Indian Supreme Court whilst referring to section 34 of the Indian Penal Code held;

“Common intention denotes action in concert and accessorially postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character but must be actuated by the same common intention which is different from same intention or similar intention.”

In the said circumstance we see no merit of the argument raised on behalf of the 1<sup>st</sup> accused-appellant that, the Learned Trial Judge had erred in law when he found the accused-appellant guilty on the 3<sup>rd</sup> count on the basis of common intention.

❖ Illegal investigation carried out by the police had denied a fair trial to the Accused

This is the final argument raised on behalf of the accused-appellant's before us.

During the argument before this court the Learned Counsel for the 2<sup>nd</sup> accused-appellant submitted certain material which were not elicited during the trial before the High Court, specially with regard to the illegal arrest of a person by the police. The Learned Counsel had further tried to connect the said issue with the delay in recording the statement of witness Ariyadasa and argued that the said

investigation conducted by Urubokka Police was illegal and thereby the accused were denied of a fair trial.

In this regard we observe that the said incident was not suggested to a single police witness who gave evidence at the trial (four police officers have given evidence at the trial) and in fact witness K. Premarathne (PC 56012) had given reason for the delay in recording the statement of witness Ariyadasa.

What is referred above by the Learned Counsel during the argument before this court was based on the dock statement made by the 2<sup>nd</sup> accused-appellant where the said accused-appellant had taken up the position that,

“ස්වාමීණි, මෙම සිද්ධිය සම්බන්ධයෙන් භීං පුතා කියන පුද්ගලයෙක් පොලිසියෙන් අත්අඩංගුවට ගෙන මාස 3ක් පමණ නියා ගෙන ඉඳලා ඊට පස්සේ එයා අතඇරලා මාස 6කට විතර පස්සේ නමයි මම හොයාගෙන ආවේ.”

However as referred to above this position was never suggested to the four police officers including the investigating officer, during the trial and therefore it is clear that this position the 2<sup>nd</sup> accused-appellant had taken during his defence is an afterthought.

In this regard this court is mindful of the decision in *Gunasiri and two Others V. Republic of Sri Lanka [2009] 1 Sri LR 39* where Sisira de. Abrew J with Abeyratne J agreeing observed,

“Although the 3<sup>rd</sup> accused-appellant took up the position that he was at the temple at the relevant time with the priest, he never asked for summons on the priest nor did he file a list of witnesses indicating the name of the priest. The trial commenced on 29.11.2001 and the defence case was concluded on 19.09.2003. Thus during a period of 2 years he failed to move Court to get summons on the priest. Although the 3<sup>rd</sup> accused-appellant raised an alibi in his dock statement, he failed to suggest this position to prosecution witnesses. The Learned Counsel who appeared for the

defence did not suggest to the prosecution witnesses the alibi raised by the 3<sup>rd</sup> accused-appellant. What is the effect of such silence on the part of the counsel. In this connection I would like to consider certain judicial decisions. In the case of Sarwan Singh V. State of Punjab 2002 AIR SC iii 3652 at 3656 Indian Supreme Court held thus: "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in Bobby Mathew V. State of Karnataka, 2004 CR LJ 3003. Applying the principles laid down in the above judicial decision, I may express the following view. **Failure to suggest the defence of alibi to the prosecution witnesses, who implicated the accused, indicates that it was a false one.** Considering all these matters I am of the opinion that the defence of alibi raised by the 3<sup>rd</sup> accused-appellant is an afterthought."

The serious objection raised by the two counsel before us to the effect that there was a delay of four days in recording the statement of witness Ariyadasa, and the attempt by the counsel for the 2<sup>nd</sup> accused-appellant to connect the illegal arrest of another person by Urubokka Police will not have any impact on this case and in fact these two positions are contradictory to each other in the absence of any allegation that the statement of Ariyadasa was recorded after nine months to the inside just prior to the arrest of the 2<sup>nd</sup> accused-appellant.

In this regard, we have no reason to reject the evidence placed before the trial judge and as referred to above the Learned Counsel of the two accused-appellants failed to challenge the said evidence before this court.

There was clear evidence with regard to the conduct of the 1<sup>st</sup> and the 2<sup>nd</sup> accused-appellants by the witnesses Ariyadasa, Amarasena Gurusinghe, Sarath Gurusinghe and Sumith Nishantha. Witness Ariyadasa's detailed statement was recorded on 27.03 but he has given evidence before the inquest prior to his statement been recorded, but no contradictions or omissions were marked with regard to

the main incident in his evidence. Under these circumstances we see no illegality in conducting the investigations in the present case which denied a fair trial to the accused-appellants and therefore we see no merit in the said argument.

Under these circumstances we see no reason to interfere with the finding of the Learned Trial Judge. Therefore we dismiss this appeal.

Appeal dismissed. Conviction and sentence affirmed.

**PRESIDENT OF THE COURT OF APPEAL**

**H.C.J. Madawala J**

**I agree,**

**JUDGE OF THE COURT OF APPEAL**