

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

In the matter of an Appeal under  
Section 331 of the Criminal  
Procedure Code.

Vithanagama Sivantha Perera  
alias Podi Mahathun

Accused-Appellant

C.A. No.186/2014

H.C. Avissawella No. 118/2005

Vs.

Hon Attorney General

Attorney General's Department

Colombo 12.

Respondent

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BEFORE : DEEPALI WIJESUNDERA, J.  
ACHALA WENGAPPULI, J.

COUNSEL : Chathura Amaratunga for the Accused-  
Appellant.  
Dileepa Peiris D.S.G. for the Attorney General

ARGUED ON : 08<sup>th</sup> May, 2018

DECIDED ON : 25<sup>th</sup> May, 2018

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ACHALA WENGAPPULI, J.

The accused -appellant was indicted for committing the murder of *Nandika Pushpalal* and attempted murder of *Dehiwala Ralalage Abeywickrema Bandara* on or about 25<sup>th</sup> January 1999 at *Kimbula Wela* in the jurisdiction of the High Court holden at *Avissawella*.

Upon his election, he was tried without a jury and was convicted on both these counts. Consequent to the pronouncement of the judgment of the High Court, the accused-appellant was sentenced to death in relation to the charge of murder. However, it did not impose any sentence on the accused-appellant on the 2<sup>nd</sup> count of attempted murder on account of already imposed death sentence on the charge of murder.

Being aggrieved by the said convictions and sentence, the accused-appellant sought intervention of this Court to set aside his convictions and sentence of death.


At the hearing of the appeal, learned Counsel for the accused-appellant, confined his submissions only to the conviction and sentence on the charge of murder. In support of the appeal, learned Counsel for the accused-appellant submitted that the High Court has erroneously found his client guilty of murder since it failed to properly evaluate the reliability of the only eye witness's evidence, in the light of several contradictions marked during his evidence.

Learned Counsel for the accused-appellant invited this Court to consider the contradictions marked **V1** to **V4** and submitted that in view of these contradictions, the sole eye witness's evidence ought to be treated as unreliable and should not have been acted upon by the trial Court.

In view of the submissions of the accused-appellant, it is necessary to consider the sequence of events as narrated by the sole eye-witness to the incident, who himself is an injured, in order to fully appreciate the significance of the contradictions marked **V1** to **V4**.

Witness *Bandara*, in his evidence before the High Court stated that, at the time of the incident he was employed as a driver of a private bus which serviced the bus route of Maharagama - Jayawardanepura Hospital. The deceased was the conductor of this bus. The witness knew the accused well and addressed him as *Podi Mahatun*. On the day of the incident, the accused-appellant got in to their bus when they were returning home in the night. He wanted the bus to be stopped by the side of a paddy field for him to pick a "spiral". Time was about 9.15 in the night.

Upon a request by the accused-appellant, the deceased too had accompanied him to bring this item to the bus. After a few minutes, the accused-appellant returned to the parked bus alone and wanted the witness also to come with him. When enquired about the deceased, the accused -appellant strangely replied that "he died and was drunk".



The witness complied with the request and when they walked about 100/150 meters through the paddy field from the place where the bus was parked, the witness heard a moan. When asked from the accused-appellant as to who it was, he replied that he had no idea. At the same time, the person who moaned has called out the witness's name. The witness then identified the voice of the deceased. When the witness was trying to locate the place where the deceased was, the accused-appellant came from behind and cut his neck.

Being frightened with this experience, the witness then ran to his sister's house which was located about 300 meters away from the place his neck was cut. The accused-appellant has chased after him up to a point and then gave up. Once the witness reached the house, he narrated the incident to his aunt and made a request to locate the deceased, who was in a critical condition. The witness was then rushed to hospital and was treated for his injuries.

The contradictions could be considered at this stage against the evidence reproduced above.

Contradiction marked as **V1** is in relation to the witness's assertion in the High Court that he met the accused-appellant at about 1.00 p.m. who wanted the witness to transport a "spiral". Then the witness declined his request on the basis he was about to take his due turn for the bus. However, through his statement to Police, a contradiction was marked that he did not reply to the accused-appellant's request.

Contradiction marked as **V2** is in relation to a meeting the witness had with the accused-appellant in the same evening. In his evidence the witness stated that he met the accused-appellant at about 7.00 p.m. whereas he has stated in his statement to Police that he met the accused-appellant at about 7.45 p.m.

Another contradiction was marked as **V3** by the accused-appellant on the witness's statement made to the Police where it is stated that when the accused-appellant returned to the bus without the deceased, he was clad in a shirt and a pair of shorts whereas his evidence at the non-summery inquiry reveals that the accused-appellant was only clad in a pair of shorts.

The last of the contradictions, marked **V4**, was marked on the evidence of the witness that he only heard the moan but did not see the deceased while in his statement the witness has stated that he saw someone wincing in pain near a canal.

Learned High Court Judge, in evaluating testimonial trustworthiness of the evidence of this witness, has applied the test of consistency. She quite correctly concluded that they are in relation to trivial matters which had no adverse impact on the issue of his credibility and truthfulness. In fairness to the witness, we note that he has repeatedly stated in evidence that he could not recall every detail of the incident accurately. This is to be expected as the witness has given evidence 12 years after the incident. In the circumstances, we agree with the learned

High Court Judge's conclusion as these four contradictions would not make the evidence of this witness unreliable or untruthful.

In support of his contention, learned Counsel for the accused-appellant cited judgments of *Wickremasuriya v Dedoleena and Others* (1996) 2 Sri L.R. and *Wimalaratne Siva v Attorney General* (2008) 1 Sri L.R. 103.

Learned Deputy Solicitor General, in his submissions in reply referred to the nature of evidence presented by the prosecution against the accused-appellant. He contended that witness *Bandara's* evidence relating to the sequence of events which resulted in the death of the deceased and him suffering a cut injury on his neck satisfied the tests of spontaneity, consistency and probability. He further submitted that his evidence was amply corroborated not only by the witnesses *Chandrapala* and *Karunawathie* but also by the official witnesses.

Learned Deputy Solicitor General referred to the evidence of Police officers *Wimalasiri* and *Suraweera* who conducted investigations. According to their evidence, the accused-appellant was arrested few hours after the incident at his house. At the time of arrest, he had a bleeding injury on his chest and was smelling of liquor. Several items of productions were recovered after his statement was recorded. These items of production included a knife with a curved blade. Dr. Neranjan, who

performed the post mortem examination is of the opinion that the necessarily fatal injury he noted among the 23 injuries the deceased has suffered, could have been caused using this knife. The Government Analyst has identified "blood" on its blade.

In addition, the Government Analyst testified that he identified human blood on the shirt (P3) recovered from the accused-appellant and the blood patch was spread from the outer side to the inner side of the garment.

Learned Deputy Solicitor General contended that therefore the trial Court has rightly disregarded the inconsistencies which were marked on trivial aspects of the evidence of the eye witness and come to the right conclusion that the accused-appellant was guilty to the charges of murder and attempted murder. He also invited the attention of this Court to the *allocutus* made by the accused-appellant where he has admitted causing injuries to witness *Bandara* and sought to explain the mitigatory circumstances.

The only ground of appeal of the accused-appellant is in relation to proper evaluation of several contradictions in *Bandara's* evidence. The trial Court has adequately considered them and rightly decided that it has no adverse effect on the trustworthiness of *Bandara's* evidence. It has then proceeded to convict the accused-appellant on two counts in consideration

of the evidence presented by the prosecution in its entirety. We are of the considered view that the complaint by the accused-appellant that *Bandara's* evidence has not been rejected by the trial Court owing to the highlighted inconsistencies has no merit. Therefore, we affirm the conviction entered against the accused-appellant on the two counts.

The trial Court decided not to impose a sentence on the accused-appellant on the count of attempted murder. We cannot approve the approach adopted by the trial Court in not imposing a sentence on the accused-appellant after finding him guilty of the offence of attempted murder as it has thereby acted contrary to applicable law.

The accused-appellant was found guilty of the offence of attempted murder. Section 203 of the Code of Criminal Procedure Act No. 15 of 1979 imposes a duty on the trial judge "*... if the verdict is one of conviction pass sentence on the accused according to law.*" In this instance applicable law would be the provisions contained in Section 300 of the Penal Code. Section 300 of the Penal Code imposes a mandatory requirement of imposition of an imprisonment up to 20 years, if hurt is caused as in this instance. The trial Court must also impose a fine on such an accused. In the circumstances, this Court ought to correct this error of law.

In consideration of the evidence presented before the trial Court, we impose 10 years rigorous imprisonment in relation to the charge of



attempted murder on the accused-appellant. In addition, a fine of Rs. 5000.00 is also imposed. In default of the fine, the accused-appellant to serve a further 12 months imprisonment. In the event of the sentences of imprisonment are carried out, the default term of 12 months imprisonment should be operative consecutive to the imprisonment of 10 years.

The accused-appellant is entitled to pay the fine within three months from the date of pronouncement of this judgment by the High Court. We further direct the relevant High Court to issue a fresh committal in view of the sentence imposed by this Court.

Accordingly, we make order dismissing the appeal of the accused-appellant after affirming the conviction. We also affirm the sentence of death imposed on the charge of murder and impose 10 years imprisonment on the charge of attempted murder.

**JUDGE OF THE COURT OF APPEAL**

**DEEPALI WIJESUNDERA, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**