

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

In the matter of an Appeal made under Section 11(1) of the High Court of the Provinces (Special Provisions) Act No.19/1990 read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka as amended by the 13<sup>th</sup> Amendment.

**C.A.No.01/2017**  
**H.C. Matara No. 167/2010**

01. Patabendi Madummage Gayan alias "Dehi Podda"
02. Hendavitharana Asanka alias "Channa".
03. Weerawarna Nilaweera  
Ranpatabendige Thushara Dilshan  
alias "Broilor"
04. Patabendi Madummage Sanath  
Nilanga alias "Dehi Lokka".

**Accused-Appellants**

Vs.

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

**Respondent**

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

**COUNSEL** : Rienzie Arasacularatne P.C. with Chaminda  
Arasacularatne and Sherindi Manuel for the  
Accused-Appellants.  
Anoop de Silva S.S.C. for the respondent

**ARGUED ON** : 18.09.2018

**DECIDED ON** : 07<sup>th</sup> December, 2018

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**ACHALA WENGAPPULI**

The 1<sup>st</sup> to 4<sup>th</sup> Accused-Appellants (hereinafter referred to as the "Accused-Appellants") and the 5<sup>th</sup> Accused were indicted before the High Court of *Marata* for being members of an unlawful assembly, causing death of *Patabendi Maddumage Dhanushka* alias *Bunty*, causing hurt to two others while being members of the said unlawful assembly and also on the basis that they shared common intention with others to commit the said offences.

At the end of the trial that had proceeded without a jury, only the 1<sup>st</sup> to 4<sup>th</sup> Accused-Appellants were convicted by the High Court for committing the murder of *Patabendi Maddumage Dhanushka* alias *Bunty* and of causing hurt to *Ajith Prasanna Seneviratne* (PW1). They were sentenced to death on the count of murder while a term of two years of

imprisonment was imposed by the trial Court on the count of causing hurt. The 5<sup>th</sup> Accused was acquitted by the High Court on all counts while the 1<sup>st</sup> to 4<sup>th</sup> Accused-Appellants were also acquitted from the count based on unlawful assembly.

Being aggrieved by the said convictions and sentences, the Accused-Appellants sought to set them aside on the basis that the trial Court had failed to evaluate the several infirmities of the prosecution case and thereby arrived at an erroneous conclusion. They also contended that the trial Court wrongly considered the individual criminal liability under Section 32 of the Penal Code and erred in its failure to identify the several items of circumstances which it considered to reach the conclusion the Court had finally arrived at.

The prosecution primarily relied on the evidence of *Ajith Prasanna Seneviratne* to establish the several counts against the Accused-Appellants, who presented an eye witness account of the sequence of events that resulted in the death of the deceased before the trial Court.

According to him, the deceased had a fight over an incident at a wedding function with a person identified as *Channa* who was with the 4<sup>th</sup> Accused-Appellant. The 4<sup>th</sup> Accused-Appellant did nothing when *Channa* was under attack, but continued to observe the assault on his companion. After this incident, the witness and the deceased have retired to a nearby house owned by one *Madura* and spent the night there. They came to this house at about 3.30 or 4.00 in the morning and had slept in the front room of that house. This room had no doors or windows fixed to it, but the opening for the windows in the walls, were covered with black polythene

sheets. The deceased slept in a bed located closer to the entrance to the room. He had covered himself with a bed sheet as he usually does in going to sleep. The witness too had lied down in the same room. They slept for some time.

On the same morning at about 8.25, one *Damith* came to see them and they spoke about the person who suffered an eye injury in the previous day brawl at the function. At that time the witness heard the noise of the arrival of a group of persons and one of them shouted “අබෝ බඩු ඉන්නවා, වරෙල්ලා”. When he looked up, he saw the 3<sup>rd</sup> Accused-Appellant at the entrance to the room. The deceased made an attempt to raise his head and the 3<sup>rd</sup> Accused-Appellant had struck once with what appears to be an iron “club” on the head of the deceased. With this blow on his head, the deceased fell as if “ගහක් කැපුවා වගේ “. He fell on the ground lying across the entrance to the room with his torso falling outside the room. At the same time about 6 others also have entered the room and attacked them with clubs. The witness estimated that there may have been about 20 clubs that the intruders have used in the attack. Among this group of intruders, the witness identified 1<sup>st</sup> and 2<sup>nd</sup> Accused-Appellants along with the 5<sup>th</sup> Accused. The witness claimed that it was the 1<sup>st</sup> to 3<sup>rd</sup> Accused-Appellants who attacked them most. 1<sup>st</sup> Accused-Appellant also hit the deceased with a club all over his body along with 2<sup>nd</sup> and 3<sup>rd</sup> Accused-Appellants and the witness noted his body moved due to receiving the blows only (“ඒ ප්‍රහාරයෙන් මනුගේ ශරීරය සෙලවුනා විතරයි”).

During this attack, the witness also saw the 4<sup>th</sup> Accused-Appellant outside the room armed with a firearm which he used to provide cover to the other three Accused-Appellants. The 4<sup>th</sup> Accused-Appellant then took

aim at him and the witness prevented him being shot by hitting the weapon with a piece of a reeper. Then the attackers have started assaulting him. The witness made a futile attempt to ward off the attack using a reeper piece but got hit several times by clubs. He then ran off but were chased after by the attackers. When the witness fell after the attack, the attackers left the scene counting him as dead whilst claiming that "he too is finished". Thereafter the witness was admitted to *Matara* Hospital.

The Police evidence revealed that the 1<sup>st</sup> to 3<sup>rd</sup> Accused-Appellants have surrendered to them over the death of the deceased and at the time of his surrender, the 3<sup>rd</sup> Accused-Appellant was in possession of a sword. The officer who recorded their statements noted stains like blood on the blade and few strands of hair stuck to its blade.

When the Police visited the scene, it was observed that the body of the deceased was lying closer to an entrance to a room and a blood-soaked bed sheet was also observed lying nearby. The Police party recovered five clubs in various shapes and sizes from the crime scene, in addition to several pieces of concrete and granite.

When an officer visited *Matara* hospital after five days since the incident to record a statement from the witness *Seneviratne*, it was revealed that he had already left the hospital on his own seeking private medical treatment. It was only on 07.08.2005 his statement was finally recorded.

The Consultant JMO, in his evidence stated that he had observed 44 external injuries on the deceased's body. Of this total of 44 injuries consisting of 15 abrasions, 16 contusions, 2 lacerations and 2 deep cut injuries, the expert witness highlighted the deep cut on the neck of the

deceased as the necessarily fatal injury. As a result of this injury the carotid artery, jugular vein, Vagus nerve, thyroid cartilage, 5<sup>th</sup> cervical vertebra and underlying neck muscles were cut, resulting death of the deceased within one or two minutes of receiving the said injury. He further expressed an opinion that it is more probable for the deceased to receive this injury when he was lying down or sleeping position. The other deep cut injury that was observed by the expert witness is located on the back of the right leg extending to underlying muscles. He also expressed opinion that these injuries could have been caused using the sword, marked as P3, that had been taken charge by the Police when the 2<sup>nd</sup> Accused-Appellant surrendered with it.

Learned President's Counsel who appeared for the Accused-Appellants submitted in support of their first ground of appeal that the trial Court had failed to consider the following infirmities of the prosecution case:-

- a. the only witness to the incident claimed the deceased was attacked with clubs, but he had died due to severe cut injury on his neck which is not explained,
- b. the prosecution has failed to call the other witnesses who claimed to have seen the attack, owing to the "unrealistic nature of the incident" of not seeing any cutting weapon by the sole witness,

- c. reliability of the evidence of the sole witness is doubtful owing to his improbable claim of staying at the scene when such an attack is taking place,
- d. reliability of the evidence of the sole witness is tainted as he made his statement to Police only after a lapse of two weeks since the incident.

It is seen that basically the first ground of appeal of the Accused-Appellants revolve around the issue of testimonial trustworthiness of the solitary witness to the incident and failure to call witnesses in support of his evidence.

Understandably, the most significant attack on the credibility of this sole witness was mounted on his claim of the "club" attack on the deceased whereas the death of the deceased was due to a serious cut injury on the neck. There is no evidence before the trial Court as to the infliction of the said fatal injury and as such, the learned President's Counsel contended, a question arises whether the witness in fact saw the attack on the deceased or not.

Upon perusal of the evidence of witness *Seneviratne*, it became apparent that his evidence consistently referred to an attack using "clubs" and there was no reference to any cutting weapon in the possession of any of the attackers except for a pointed weapon possessed by the 2<sup>nd</sup> Accused-Appellant. However, as the learned Senior State Counsel pointed out that the trial Court accepted his evidence as truthful and reliable, upon the conclusion that what the witness referred to as a club is in fact a sword and it was probably due to his faulty observation he had referred it to as a

club instead of a sword. In coming to this conclusion, the trial Court was mindful of the limited opportunity the witness had to absorb the finer details of this surprise attack by the Accused-Appellants.

Having considered the evidence that had been led before the trial Court, we are of the view that the said reasoning of the trial Court is justified under the circumstances. The reasons for our conclusion are given below.

The witness and the deceased had gone to sleep about five hours before the incident and just been woken up due to the arrival of *Damith* who brought news about the injured who was admitted to hospital few hours ago, after the brawl at the function. The room the witness was in covered with black polythene limiting the available light inside it. The attackers have entered through the opening to a door frame and the witness observed them against the light coming from that direction.

It is emphatically stated by the witness after the initial attack on the "head" with a "club" the deceased fell like a log and since then did not make any movement of his body, except the ones caused by the blows he received. Witness also described the "club" as an iron rod or a *kitul* club, upon its dark appearance. He also admitted that "යකඩ පොල්ලක් කියා හිඟ්විතට කියන්න බැහැ".

According to witness the deceased did not have any voluntary movement after the initial attack. The medical evidence in relation to the neck injury supports such a claim as the death would have occurred almost instantaneously upon receiving such an attack. The PMR shows that the deceased had another cut injury on the back of his head. But the



witness claimed that the deceased tried to raise his head as he was lying on the bed when he was hit by the "club". This statement of the witness is well supported by the medical expert when he said in evidence that it is more probable that the cut injury on the neck could have been inflicted when he was on a horizontal position rather than vertical. The body of the deceased did not shift after the initial attack with a "club" as the witness claimed when he left the house and the Police found it lying across the entrance to the room, when they arrived at the scene after some hours.

The only cut injury on the head of the deceased was observed on the back side. The witness did not see any attack, prior to the "clubbing," from behind the deceased, supporting the trial Court's conclusion that it may have been inflicted after the initial attack on the neck. Therefore, the attack on the "head" by a "club" as perceived by the witness was clearly a faulty observation by the witness. The attack only lasted five minutes and with several attackers clubbing the deceased. Therefore, an attack on the neck by a sword, although seen by the witness as a "club" is in fact the attack which resulted in the death of the deceased as concluded by the trial Court.

The other challenge that was mounted on the credibility of the witness *Seneviratne* is the application of the test of spontaneity in evaluating his evidence. Admittedly the witness made a statement to the Police only after a lapse of a period of two weeks since the incident.

The trial Court had applied the test of spontaneity on the evidence of the witness. In accepting his evidence as truthful and reliable, it had accepted the explanation offered by the prosecution for the delay in

making the statement to Police by the witness. The witness said that after his admission to *Matara* Hospital, he had entertained apprehensions about his security and therefore he decided to get his head injury treated at a private hospital in Colombo. Only after receiving medical treatment and returning to his village he made a statement to Police. During his cross examination, the witness was suggested that his concerns on the security had no valid basis but these suggestions were refuted by him. In fact the Court record indicates that he did not present before the trial Court since its 1<sup>st</sup> date of trial in November 2011 until the commencement of the trial in September 2015, despite the fact that a warrant had been issued against him. He was represented by an Attorney-at-law who informed Court of the reluctance of the witness to be present in Court due to threats to his life. The witness had stated so in his evidence before the trial Court. Having considered the evidence on this aspect, the trial Court had accepted the explanation for the belated complaint. We see no reason to interfere with the conclusion reached by the trial Court on the acceptance of the explanation for the delay in making the statement.

Whether the conduct of the witness during the attack is probable or not had also been considered by the trial Court. The trial Court had considered this aspect of the evidence at length in its judgment citing the portions of evidence of the witness in the light of the principles of evaluation of evidence as laid down by judicial precedents. Having examined the evidence and the reasoning of the trial Court as to whether its decision to accept the probability of the version given by the witness is justified, we are of the view that the trial Court had reached the correct conclusion. The complaint by the Accused-Appellants on the probability of

a “club” was used in the initial attack and he is a truthful and reliable witness whose evidence is well supported by the medical evidence. In addition, the trial Court has had the distinct advantage of observing the demeanour and deportment of the witness and in fact the Court had relied upon it, when accepting his evidence as truthful and reliable. As an appellate Court, we are of the view that the opinion of the trial Judge based on the demeanour of the witness in assessing his credibility and reliability is entitled to great weight.

The other ground of appeal is in relation to the imposition of criminal liability upon the basis of Section 32 of the Penal Code. The trial Court had considered individual liability of the Accused-Appellants against their conduct as described by the witness to the incident. The trial Court considered the fact that the Accused-Appellants have arrived at the crime scene together having armed themselves and contributed to the assault on the deceased in varying degrees. The initial exclamation “ඔබ ඉන්නවා” is an obvious reference to the deceased and that statement was not contested. This exclamation is a clear indication as to the state of mind of the Accused-Appellants when they stormed into the house where the deceased slept. The parting comment “ලාක් ඉවරයි” supports the inference that the attackers have achieved their objective. In between these two points, there were clear evidence as to the roles played by each of the four Accused-Appellants. Thus, the trial Court had correctly concluded that the Accused-Appellants were actuated by a common murderous intention shared by all when they attacked the deceased. The reasoning of the trial

Court is evident in this regard when it decided to acquit the 5<sup>th</sup> Accused as she was merely present at the scene.

However, the trial Court had considered the case against the Accused-Appellants as a case founded upon items of circumstantial evidence. This aspect brings us to the consideration of the third ground of appeal as presented by the learned President's Counsel. It is his contention that this being a case of circumstantial evidence, the trial Court had failed to itemise each of the circumstances that it relied on to find the Accused-Appellants guilty of the offence of murder. This complaint is apparently based on the pronouncement of this Court in *Kusumadasa vs. State* (2011) Sri L.R.240.

It is correct that the trial Court did not itemise each of the circumstances it considered in coming to the conclusion that the Accused-Appellants are guilty of murder in point form. However it had direct evidence in relation to the other count in the form of evidence of the injured himself.

But it is also correct that the trial Court did analyse and consider each of these items of circumstantial evidence in each of the segments in which the evidence presented before Court is considered for credibility and sufficiency in proving the charges.

Considering the totality of the evidence presented by the prosecution and the reasoning of the said Court in arriving at the conclusion that the Accused-Appellants are guilty to the count of murder and to the count of causing hurt, we are of the considered view that there is no basis for this Court to interfere with the conclusion reached by the trial Court.

Accordingly, the conviction and sentence of the trial Court is affirmed and the appeal of the Accused- Appellants is therefore stands dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL