

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA.**

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

**C.A.No. HCC No.198-199/2013**

**H.C. Monaragala No.HC 506/2008A**

01. Raterala Mudiyanseelage Gunawardene  
alias Gunaratna
02. Raterala Mudiyanseelage Piyasena

**Accused-Appellants**

**Vs.**

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

**Complainant- Respondent**

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**BEFORE** : ACHALA WENGAPPULI, J.  
DEVIKA ABEYRATNE, J.

**COUNSEL** : D. Karunaratne for the 1<sup>st</sup> Accused-Appellant.  
Neranja Jayasinghe with Sachitra Harshana and  
Anusha Ratnayake for the 2<sup>nd</sup> Accused-Appellant  
Chethiya Goonesekera D.S.G. for the respondent

**ARGUED ON** : 05.03. 2020 & 06.03.2020

**DECIDED ON** : 03.07. 2020

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**ACHALA WENGAPPULI, J.**

The 1<sup>st</sup> and 2<sup>nd</sup> accused-appellants (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Appellants) were initially indicted before the High Court of *Badulla* for committing murders of *Bandana Yaddessalage Siyadoris* and *Aluthgedara Susira* on or about 21.08.1997 at *Etimala*. After the establishment of the High Court of *Monaragala*, the case was transferred to that Court, where the trial of the two Appellants was commenced without a jury and concluded.

At the conclusion of the trial, during which the only eye witness to the incident, *Bandana Yaddessalage Gedara Tillakaratne* and others gave evidence for the prosecution while the 1<sup>st</sup> Appellant gave evidence under oath and the 2<sup>nd</sup>

Appellant making a statement from the dock, the trial Court convicted both the Appellants for committing double murder and were sentenced to death.

Being aggrieved by the said conviction and the sentence, the Appellants have preferred the instant appeal, in seeking to set them aside.

In support of his appeal, the 1<sup>st</sup> Appellant has relied on a single ground of appeal that the trial Court had erroneously concluded that the evidence of the solitary eye witness was credible and it has failed to appreciate that the deceased going on a fishing expedition is only a pretext.

The 2<sup>nd</sup> Appellant too has raised a similar ground of appeal that the trial Court has fallen into error in accepting the purported eye witness's evidence in relation to the presence of the 2<sup>nd</sup> Appellant at the scene of the incident. In addition, the 2<sup>nd</sup> Appellant raised another ground of appeal on the basis that the trial Court has erroneously rejected his statement from the dock.

In view of the common ground of appeal that revolves around the credibility of the solitary eye witness to the incident, it is necessary that this Court considers his evidence *albeit* briefly and the conclusion reached by the trial Court on its assessment of the evidence for the prosecution for its truthfulness and reliability.

Witness *Tillakaratne* was related to both deceased. The deceased *Siyadoris* is his father's brother and the other deceased too is related to the witness through his mother's side. *Tillakaratne* used to visit the 1<sup>st</sup> deceased occasionally and during the time of the incident, by which both deceased were killed, he happens to be with the deceased, having arrived there on the previous day.

On 21.08.1997, in the morning *Siyadoris* suggested to the witness and *Susira* that they go fishing in the *Etimale* tank. The three of them were fishing on a boat and after some time the 1<sup>st</sup> Appellant too had launched a boat and paddled it near to the place where the three were fishing. When the three returned to the dry land, the 1<sup>st</sup> Appellant told *Siyadoris* not to clear his land. *Siyadoris* replied that he has obtained permission from the *Grama Niladhari* to clear that plot of land. The 1<sup>st</sup> Appellant then went away after saying “ පස්සෙ බලාගනු”. After this incident, the three returned to water and continued fishing till midday and then decided to return.

They walked back to *Siyadoris's* hut along a foot path in a single file. The witness was walking in front followed by *Siyadoris* and thereafter *Susira*. On their way, they met the 2<sup>nd</sup> Appellant, a brother of the 1<sup>st</sup> Appellant, who advised *Siyadoris* not to clear the plot claimed by his brother and “ මික අත්ඇරල දන්න”. He also warned them since they knew the nature of the 1<sup>st</sup> Appellant. The 2<sup>nd</sup> Appellant had a *katty* in his hand.

The party of three continued to walk towards *Siyadoris's* hut with the 2<sup>nd</sup> Appellant following their trail with a distance of about 30 fathoms. As the party was approaching a canal, the 1<sup>st</sup> Appellant emerged from his hiding place armed with a gun and a *katty*. He shouted at the witness not to run and addressed him in filth. He then aimed his gun at *Siyadoris* and shot him. *Siyadoris* fell on the ground receiving the shot. The 1<sup>st</sup> Appellant was standing about 5 to 10 fathoms away. The witness was chased after by the 1<sup>st</sup> Appellant when he ran away from the scene, leaving the other deceased *Susira* at the scene.

The witness, in answering clearly a leading question by the learned prosecutor, claimed that, while running away from the scene, he saw the 2<sup>nd</sup> Appellant cutting the 2<sup>nd</sup> deceased *Susira*. The witness hid himself in the bush and the 1<sup>st</sup> Appellant went back in the direction of the scene. He did not return to the place where *Siyadoris* was shot immediately. When he returned to the scene with the police he saw the bodies of *Siyadoris* and *Susira*.

During cross-examination by the 1<sup>st</sup> Appellant, the witness admitted he made a statement to police on 22.08.1997 at 8.00 a.m. of an incident that took place at about 11.15 a.m., the previous day. The witness said after the incident he complained to *Monaragala* police. They visited the scene and directed the witness to complain to *Siyambalanduwa* Police Station as the place of incident is located in that police area.

There is no contradiction marked as V1. The contradiction V2 was marked off his evidence on the basis that the witness told police that he visited *Siyadoris* only in the 20<sup>th</sup> night. V3 was in relation to the fact that they agreed to fish in the following morning. V4 was marked on the basis that the witness told police, after watching TV he came to *Siyadoris's* house in that night. V5 is in relation to his statement that the 1<sup>st</sup> Appellant asked *Siyadoris* using the pet name "*Chutte*" why he cleared the former's land. V6 is in relation to the witness's claim that *Siyadoris* was not referred to as "*Chutte*". V7 indicates the witness said in his statement that *Siyadoris* replied to 1<sup>st</sup> Appellant that since it is a State land he cleared it. V8 was marked on the basis that *Siyadoris* would clear the land until *Grama Niladhari* stops him. V9 was marked when the witness denied that he stated 2<sup>nd</sup> Appellant was waiting by the footpath and V10 was marked when he denied that the 2<sup>nd</sup> Appellant asked them whether they had a good catch. V11 was marked on the reply by witness that they did not. V12 is on whether they parted saying "*අපි යනවා*". Contradiction 13 is a long sentence indicating the Appellant had sprung up suddenly after hiding behind a bush. V14 is in relation to witness walking few feet after seeing the 1<sup>st</sup> Appellant with his gun. V15 is *Siyadoris* fell on the ground screaming "*අම්මේ*".

The medical expert is of the opinion that *Siyadoris* died as a result of gunshot and cut injury caused to his neck. He agrees the lead pieces recovered from the body is indicative of a shot fired from a distance using a trap gun. Death of *Susira* was caused due to multiple cut injuries which damaged some of his vital organs, and were caused using a heavy sharp cutting weapon. The cut injuries noted on *Siyadoris* also may have been caused by a similar type of weapon.

Investigating officer was not available to give evidence before the trial Court and his deposition was admitted under Section 33 of the Evidence Ordinance. Deposition of SI *Jayasinghe* of *Siyambalanduwa* Police indicated that when he visited the scene the two deceased were fallen 26 feet apart from each other. He noted a flask, fishing gear in a bag which was found close to the body of *Siyadoris* with fishing rods. Both the deceased had sustained deep cut injuries.

He also found a paper wadding and also a thin steel rod lying close to the place where the witness had pointed out the place where the 1<sup>st</sup> Appellant was standing. There was a foot path along which the two deceased have walked and the area surrounded with jungle with shrubs closer to the foot path.

The 1<sup>st</sup> Appellant gave evidence on oath. He claims that he pleaded with the deceased to vacate his land but on that day the three of them have attacked him when he was alone. He had a gun in his hand and also had a *katty*. He fired a shot in self-defence and also swung around the *katty* to ward off the attack by the deceased who used clubs. He does not have a clear recollection of the incident as he defended himself from frantically

It was urged before this Court by the learned Counsel for the 1<sup>st</sup> Appellant that the trial Court had failed to properly evaluate the multiple contradictions that were marked off the eye witness account and, in any event, the Court also failed to consider lesser culpability of the 1<sup>st</sup> Appellant on the basis of sudden fight.

Perusal of the judgment of the trial Court indicates that it had considered all the contradictions and the two omissions marked off the eye witness's evidence, in coming to the conclusion that the said witness is a truthful and reliable witness. Having examined the extent to which the eye witness had contradicted and over the material he had contradicted himself with his statement made to Police, this Court concurs with the view of the trial Court that none of these contradictions were on the vital aspects of his testimony. Although a significant number had been marked, that did not affect the basic version of the witness. He varied with his version only on trivialities which are clearly attributable to failing human memory.

Whether the witness went to *Siyadoris's* house that night or during day time, will not alter the witness's claim that he was with the two deceased on the day of the incident. The unsuccessful fishing expedition, the brief encounter with the 1<sup>st</sup> Appellant while fishing, he had a gun with him even at that time, the brief conversation with the 2<sup>nd</sup> Appellant who also had a *katty*, and the 1<sup>st</sup> Appellant's ambush on the fishing party at a lonely spot, *Siyadoris* was shot first before the 2<sup>nd</sup> Appellant chased after the other deceased are consistently narrated by the witness. The fact that not a single contradiction was marked off his deposition and the witness had given evidence before the trial Court after a lapse of 14 years since the incident should also be considered by a Court in considering the testimonial trustworthiness of such a witness.

Since the 2<sup>nd</sup> Appellant too had made a similar complaint, it is appropriate for this Court to deal with his contention along with that of the 1<sup>st</sup> Appellant.



The witness admits there is nothing unusual about his fellow villagers to be armed with *katties* and even with guns, given the environment they lived in surrounded by jungles and wild animals, as long as they do not pose a threat to anyone. The 2<sup>nd</sup> Appellant talked to *Siyadoris* on an apparent reconciliatory tone. It could well be that he also followed the fishing party along the foot path, going on his own way.

The prosecution claims that, considering in the light of the fact that the 1<sup>st</sup> Appellant indicated his displeasure to *Siyadoris* about clearing his land when they met at the tank while fishing and mounting a surprised attack on the fishing party when they took the foot path they usually take to return home, closely followed by the 2<sup>nd</sup> Appellant, is indicative of a common meeting of minds of the two siblings.

It is unfortunate that the learned prosecutor chose to put an obvious leading question to the eye witness in relation to the role played by the 2<sup>nd</sup> Appellant during the attack mounted by the 1<sup>st</sup> Appellant. During cross-examination the witness admitted that he only saw the 2<sup>nd</sup> Appellant chasing after *Susira* and he heard his scream thereafter is a clear indication that the witness believed, even if he did not witness it, that it was the 2<sup>nd</sup> Appellant who cut *Susira*. Even if one leaves the opinion of the witness on what he did not see, it is nonetheless a justifiable inference since the two deceased were fallen apart 26 feet and *Siyadoris* too had suffered similar type of deep cut injuries, which are consistent with the presence of two attackers instead of one, especially since the

firearm injury did not result in the instantaneous death of *Siyadoris* as the medical witness opined.

The witness's claim seemed probable since he would have had a chance to check on *Susira* although the 1<sup>st</sup> Appellant was chasing after him. This is because the gun used by the 1<sup>st</sup> Appellant is only a trap gun and once its fires, it had to be reloaded. The only weapon which posed a threat to the witness's life was the *katty* in the hand of the 1<sup>st</sup> Appellant, but he was chasing after the witness who had the advantage of having a head start no sooner the shot was fired. The 1<sup>st</sup> Appellant had *Siyadoris* as his first target as he wasted no time in firing his gun at him. Then only the 1<sup>st</sup> Appellant chased after the witness, while the 2<sup>nd</sup> Appellant acted on his designated role by chasing after *Susira*.

The two brothers have evaded arrest after the incident and have surrendered to Court through an Attorney-at-Law.

Judging by the number of deep cut injuries and their locations on the bodies of the two deceased, it is clear whoever who inflicted them had acted with clear murderous intention. The way the two Appellants have acted during the ambush indicate that they shared that murderous intention and have acted according to a plan, in mounting their surprise attack on the unarmed fishing party returning to their house. The trial Court noted that the Police did not observe any poles or clubs in the scene although the 1<sup>st</sup> Appellant in his evidence said so, in addition to excluding the presence of his sibling from the scene. The

witness could not have removed any of these items since he did return to the scene only with the Police.

As to the contention of the failure to consider lesser culpability on the lines of sudden fight, this Court is of the view that the evidence does not support the proposition that the 1<sup>st</sup> Appellant was suddenly dragged into the conflict. On the contrary the evidence strongly indicative of the fact that it was a premeditated murder. The 1<sup>st</sup> Appellant's claim of acting in self-defence was advance only at the very end of the case and did not even suggest to the witness that they were armed and had commenced attack on him. The land dispute, may have provoked the 1<sup>st</sup> Appellant in causing death of *Siyadoris* but it was not a sudden loss of self-control, since he had sufficient cooling off time after his mid-morning meeting with the fishing party in the waters of *Etimale* tank.

The trial Court had correctly rejected the evidence of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants with valid reasons.

In these circumstances, this Court is of the view that there was considerable body of credible evidence before the trial Court to reach the conclusion that the two Appellants have acted with common murderous intention in causing deaths of the two deceased.

The appeals of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants are, for the reasons enumerated in the preceding paragraphs, without merit. Therefore, this Court affirms the conviction of the Appellants and the sentence of death imposed on them.

Appeals of the 1<sup>st</sup> and 2<sup>nd</sup> Appellants are accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J.

I agree.

JUDGE OF THE COURT OF APPEAL