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

In the matter of an Appeal under and in terms of Article 138 of the Constitution, read together with section 11 (1) of the High Court of the Provinces (Special Provinces) Act No. 19 of 1990 with the section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal No:

CA/HCC/210A/00B/15

High Court of Chilaw

Case No: HC 151/06

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Hettiarachchilage Pradeep Chandana *alias* Dahathahamara *alias* Hettiarachchige Pradeep Chandana Priyadrashana Appuhamy

2. Samaraweera Arachchilage Saman Nandasiri *alias* Chandrathilaka Dasanayaka Weerasekara Appuhamilage Saman Nandasiri

ACCUSED

AND NOW BETWEEN

1. Hettiarachchilage Pradeep Chandana
   alias Dahathahamara *alias*
   Hettiarachchige Pradeep Chandana
   Priyadrashana Appuhamy

1ST ACCUSED-APPELLANT

2. Samaraweera Arachchilage Saman
   Nandasiri *alias* Chandrathilaka
   Dasanayaka Weerasekara
   Appuhamilage Saman Nandasiri

2ND ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Champika Monarawila with Michelle Fernando and for the 1st Accused-Appellant.
	: Punraji D. Karunasekara for the 2nd Accused-Appellant.
	: Anoopa de Silva, D.S.G. for the Respondent.
Argued on	: 09-02-2024
Written Submissions	: 27-08-2019 (By the 1st Accused-Appellant)
	: 27-10-2023 (By the 2nd Accused-Appellant)
	: 10-12-2018 (By the Respondent)
Decided on	: 22-05-2024

Sampath B. Abayakoon, J.

The first and the second accused-appellants (hereinafter sometimes referred to as the 1st appellant or 2nd appellant) were indicted before the High Court of Chilaw for causing the death of one Herath Jayasinghe Mudalige Anuruddika Jayasinghe *alias* Bandara on 23-03-2022 at a place called Iddamalgama within the Jurisdiction of the High Court of Chilaw and thereby committing an offence punishable in terms of section 296 read with section 32 of the Penal Code.

After trial without a jury, the learned High Court Judge of Chilaw of his judgment, dated 25-06-2015 found the appellants guilty as charged and they were sentenced to death accordingly.

Being aggrieved by the said conviction and the sentence, the appellants have preferred these appeals.

Before considering the grounds of appeal in detail, I would now proceed to briefly consider the evidence placed before the trial Court.

The Evidence in Brief

At the trial, PW-02 and PW-16 has given evidence as eyewitnesses to the incident.

According to the evidence of PW-02, he and another friend called Asoka, has attended a village fair held in Meda Nattandiya area on 23-03-2022. While on their way to the fair, around 10.30-11 in the night, he has seen the incident relevant to this case, which occurred near the junction situated before one could reach the fair ground. The junction had been well lit at that time. The witness has seen the 1st appellant Pradeep and the 2nd appellant Saman, both of whom were well known to him, attacking the deceased person. He had been about 15 meters away from them at that time. The deceased person was unknown to him. He has seen the 2nd appellant stabbing the deceased twice using a knife, towards the left-hand side of his body. He has seen the 1st appellant near the fence having in his hand, a knife and a club. The distance between the 1st and the 2nd appellant was about 5 feet. Once stabbed, the deceased had fallen and the two appellants had gone towards opposite directions. Before they left, they have told the witness not to divulge them (පාවා දෙන්න එපා).

The witness and his friend had thereafter gone towards the fair and informed one Janaka about the incident. The said Janaka has gone and identified the deceased as one of his friends, and has taken steps to admit him to the hospital.

The witness has stated that he gave a statement about the incident to the Marawila police on the same night, but informed that he did not see the incident. Explaining the reasons as to why he made such a statement, the witness has stated that he was scared and the appellants were not arrested by that time and

he feared that some harm will happen to him if he told the truth. He has stated further that after 2-3 days of making the 1st statement he made a 2nd statement to the police and stated what really happened and what he saw, because his fellow villages informed him that if he saw something to inform the police about that.

Under cross-examination the witness has maintained the position that what he told to the police in his 1st statement was false and it was in the 2nd statement he divulged the truth. It had been his position that it was the 2nd appellant that told him not to divulge their identity. He has stated that he is not giving evidence under the influence of anyone, but because he actually saw what happened.

The other eyewitness namely PW-16, is a housewife who was living in a 10 perch land adjacent to the junction where this incident occurred. On the day of the incident, her husband has been out of the house as he has gone to attend the fair. The fair had been on a playground situated about 5 houses away from her house. Around 10.30 in the night she had heard a commotion near the cashew tree situated by the side of the road in front of her land. She has come out of the house and had seen three persons grappling against each other. After seeing that, she has come near the fence of her land and had seen two persons holding the 3rd person. She has seen the person whom she knew as Saman, namely the 2nd appellant, stabbing the person held by the 1st appellant namely Pradeep. She has stated that there is a 3-way junction and also a 4-way junction in front of her house and both junctions had street lights, therefore, she could see what was happening in front of her.

She has stated that after the stabbing, the 2nd appellant punched the person who was stabbed and as a result the injured person fell onto the nearby ditch. After the attack, the two appellants have left leaving the deceased on the ground. She has seen a person named Rexsy meaning PW-02, and another person also observing the incident, and had seen Rexsy going towards the fair after the incident. Thereafter, she had seen some persons coming and taking the injured

person in a three-wheeler. Later, she has come to know that the injured person had died.

She too has stated in her evidence that she did not inform the police that she saw the incident initially, through fear. However, she has stated that after some days, she went and informed about what she saw to the police. In her evidence she has been categorical that it was the two appellants who attacked the deceased and has stated that she is only speaking about what she saw and not giving evidence having been influenced by others.

It is relevant to note that PW-02 has given evidence five years after the incident while, PW-16 has given evidence some two years thereafter.

The other witness of relevance was PW-21, who is also well known to the appellants, and a fellow villager. He too had attended the mentioned village fair held on the day of the incident. He is a person who knew the deceased as well. The deceased was a person from the neighbouring village and PW-21 had seen the deceased Bandara also attending the fair.

According to his evidence, several persons who attended the fair had consumed liquor at the playground and there had been a rumor that the deceased Bandara was involved in a brawl occurred at the Nattandiya Church some days prior to this incident. The witness has stated that while they were there, he inquired from the 1st appellant whether the deceased Bandara was the one who was involved in the previous brawl. He has later seen Bandara as well as the two appellants leaving the fair. While in the fair, he has come to know about the incident of stabbing, and had seen the deceased fallen near the junction.

The Judicial Medical Officer (JMO) who conducted the postmortem has observed four stab wounds on the body of the deceased and has opined that the 1st stab injury which has damaged the heart of the deceased has caused this death.

When the appellants were called upon for a defence, both the appellants had chosen to give evidence under oath.

It had been the position of the 1st accused appellant that on the day of the incident, there was a party which he attended along with some other friends and he consumed liquor at the party, returned home around 11.00 p.m. and slept. He has stated that while he was at home, some persons came near his house and shouted which frightened him and as a result he ran away from the house and went to Puttalam area. Since he came to know that he is a suspect in a murder case, he surrendered to police after two months, had been his position. He has claimed that somebody had set him up for this murder.

The 2nd accused appellant's evidence had been that, on the day of the incident there was a fair in his village and he attended it, with several other friends including the 1st accused appellant, and returned home around 11.30-12.00 in the night. He has claimed that he did not know the deceased person and had no animosity with him, but several persons came and accused him of the crime and later assaulted and handed him over to the police. He has denied that he was instrumental of the death.

On behalf of the 2nd accused-appellant, a person named Janaka Sujeewa has given evidence. It had been his position that he knew the deceased Bandara. On the day of the incident when he was returning from the fair held in his village, Rexsy, Asoka and another person have come and informed him that a person had been stabbed. This information had been provided around 11.00 and 12.00 in the night. When he went to the place of the incident, he has seen the person who was stabbed and has recognized him as Bandara, and it was he who has taken steps to admit him to the hospital.

It had been his position that, when he was informed by Rexsy or Asoka about the stabbing, they did not tell him as to whether they actually saw the stabbing but only informed that they saw a person fallen after being stabbed.

This shows that the purpose of calling this witness on the behalf of the appellants had been to show that eyewitness PW-02 or the other person who was with him

at that time did not inform that they saw the incident, to the first person whom they met.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the 1st appellant formulated the following grounds of appeal.

1. The evidence of the two eyewitnesses is contradictory to each other.
2. The contradiction in relation to the other witnesses, especially the medical evidence, has not been considered by the learned High Court Judge.
3. The learned High Court Judge has not considered the possibility of a sudden fight.

The learned Counsel for the 2nd appellant relied on the grounds of appeal urged by him, in his written submissions.

The said grounds of appeal are as follows,

A. Has the learned Trail Judge failed to evaluate correctly the *inter se* contradictions between PW-02 and PW-16 which goes to the root of the matter?
B. Has the learned Trial Judge erred in accepting both versions of PW-02 and PW-16 as both testimonies are incompatible with the medical evidence.
C. Has the learned Trial Judge failed to consider that PW-02 categorically, in couple of occasions, that it is true in admitting that he did not observe both accused Pradeep and Saman at the scene of the incident under the statement dated 24-03-2002
D. Has the learned Trial Judge failed to properly analyze the improbabilities f PW-02 evidence.
E. Has the learned Trial Judge failed to consider the omissions arisen out from PW-02's testimony.

F. Has the learned Trial Judge failed to consider *per se* contraindications of PW-02

G. Has the learned trial judge failed to consider the evidence of defence witness's No.2 Dhadallage Janaka Sujeewa, for the 2nd accused.

H. Has the learned Trial Judge failed to analyze the contradictions arisen out from the testimony of PW-16?

I. Has the learned Trial Judge failed to identify that a different type of an attack (which has been gone uninvestigated) had been committed beyond the described version of PW-02 and PW-16.

J. Has the learned Trial Judge made an error by accepting the reasons of the delay of making statements to the police with the light of these improbabilities and contradiction etc.

K. Has the learned Trial Judge failed analyze properly the improbabilities arisen out of prosecution witness No.16's evidence.

L. Has the learned Trial Judge failed to recognize that, one Asoka being not called during the investigations and it creates a doubt under section 114(f) of the Evidence Ordinance.

M. Are there inferences been created which would have been considered in favor of the defence.

Consideration of the grounds of appeal

Although the learned Counsel for the 2nd accused-appellant formulated 13 grounds of appeal, I will now proceed to consider the grounds of appeal formulated by both Counsel together, since they are similar in nature and interrelated.

As it was argued that there were contradictions *inter se* and *per se* of the evidence of PW-02 and that of PW-16, who are the eyewitnesses to the incident, I will now consider whether such a contention can be accepted and whether the learned High Court Judge was misdirected when it was decided to rely on the said evidence to connect the appellants to the crime.

At the very outset, it must be stated that the contradictions or omissions in evidence of a witness have to be material contradiction and omissions that affects the core of the case, which creates a reasonable doubt as to the evidence of such witnesses.

Shiranee Thilakawardena J in the case of The **Attorney General Vs Potta Naufar and Others (Ambepitiya Murder Case) (2007) 2 SLR 144** observed that;

> *"…when faced with contradictions in a testimonial of a witness, the Court must bear in mind the nature and the significance of the contradiction.*
>
> *…the Court must come to a determination regarding whether these contradictions were an honest mistake on the part of the witness or whether it was a deliberate attempt to mislead Court."*

In the case of **Mahathun and Others Vs. The Attorney General (2015) 1 SLR 74** it was held:

(1) When faced with contradictions in a witness testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness.
(2) Too great a significance cannot be attached to minor discrepancies, or contradictions.
(3) What is important is whether the witness is telling the truth on the material matters concerned with the event.
(4) Where evidence is generally reliable much importance should not be attached to the minor discrepancies and technical errors.
(5) The Court of Appeal will not lightly disturb the findings of a trial judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong.

In the case of **The Attorney General Vs. Sanadnam Pitchi Theresa (2011) 2 SLR 292 at page 303, Shirani Tilakawardane,J.** stated:

> *"…that whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature and tenor of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies, which do not go to the root of the matter and assail the basic version of the witness, cannot be given too much importance.* ***(Vide- Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR (1983) SC 753)"***

In the case of **State of Uttar Pradesh Vs. Anthony 1985 AIR SC 48,** the danger of disbelieving an otherwise truthful witness on account of a trifling contradictions have been spotlighted. It has been stated that;

> *"The witness should not be disbelieved on account of trivial discrepancies, especially where it is established that there is a substantial reproduction in the testimony of the witness in relation to his evidence before the Magistrate or in the session court and that minor variation in language used by witness should not justify the total rejection of his evidence."*

In the case of **State of U.P. Vs. M. K. Anthony, AIR 1985 SC 48**, it was held:

> *"While appreciating the evidence of a witness the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence,*

attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole."

It is clear from the evidence of both PW-02 and PW-16 that the place of the incident was well lit even though the incident has occurred around midnight. There had been no dispute that the appellants were well known to the witnesses as they are fellow villages. There had been no allegation that the two eyewitnesses had any animosity towards the appellants or had any reason to say something they did not witness.

It was also not a disputed fact that, both the witnesses did not come out and informed the police that they are eyewitnesses to the incident at the initial stages of the investigations. In fact, PW- 02 has given a statement to the police on the day of the incident itself and has stated that he did not see the crime being committed. It was after two- or three-days PW- 02 has made a 2nd statement to the police stating that he was an eye-witness to the incident and as to what he saw. PW-16 has also come forward as an eyewitness several days after the incident.

Therefore, the fact that both of them are somewhat belated witnesses, has to be considered in deciding whether their belatedness has been sufficiently explained before the Court, and that can be accepted.

PW-02 has explained his reasons as to why he did not tell the police in his initial statement that he was an eyewitness by stating that the two appellants told him not to divulge what happened and he was fearful for his life because the accused were not arrested when the initial statement was made. He has explained further stating that, his fellow villagers persuaded him to come out with the truth if he saw the incident and that was the reason that he came forward later and gave his 2nd statement.

PW-16 has been a female who had been living in the village with her husband and children. She too has clearly stated that, although she saw the incident clearly she did not come forward to make a statement as she too was fearful of making a statement against the appellants, believing that there will be repercussions for her if she comes forward as an eyewitness.

I am of the view that, the reasons given by the witnesses for the belatedness need to be considered with the evidence they gave before the trial Court in relation to the incident. I find that in a village setting this kind of behaviour on the part of a witness or witnesses can be expected. It clearly appears that the witnesses were reluctant to come forward initially due to fear and their hesitancy to get involved. That is the very reason as to why the PW-02 has stated in his 1st statement that he did not see the incident as explained by him. The PW-16 has also well explained her delay in coming forward as an eye witness of the incident. When considering the manner in which the witnesses have given their evidence, there is no basis to conclude that they are lying or speaking about something that they did not see.

For the reasons considered above, I am of the view that the belatedness in making statements has not dented the credibility of the evidence of the two eye witnesses.

Although the learned Counsel for the appellants claimed that, there were contradictions *inter se* and *per se* in the evidence, I find no reasons to agree with such a contention.

As I have emphasized before, for a contradiction or omission to become relevant, it should be material that goes into the core of the case. No one can expect several witnesses who speak about an incident that occurred some years ago to explain the same incident in the same manner, as the power of observation and power to remember and explain may differ from person to person.

In the case of **Bhoginbhai Hirjibhai Vs. Statee of Gujarat AIR 1983 753** the Indian Supreme Court held as follows:-

> *"By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*
>
> *Ordinarily it so happens that a witness is overtaken by events. The Witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to attune to absorb the details.*
>
> *The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on."*

What matters is whether the witness can be considered as trustworthy and cogent enough to be believed. It is also trite law that evidence in a case has to be looked at in its totality and not in isolation.

I find no basis for the contention that the evidence of the eye-witnesses, cannot be believed as they are contradictory to the evidence of the Judicial Medical Officer (JMO) who conducted the postmortem either.

The witnesses have clearly spoken about a stabbing and an assault on the deceased by the two appellants. The JMO has observed four cut injuries on the body of the deceased towards the heart and front chest area of the deceased. The cut injury to the heart being the fatal injury. The witnesses not speaking about the number of times the deceased was stabbed is not a reason to claim contradictions in that regard. The JMO has not observed any other injuries than cut injuries, although witnesses speak about an assault of the deceased. This

may be due to the reason that although the deceased was assaulted, he has not received any visible injuries as a result. However, I am of the view that, the opinion expressed by the JMO does tally with the evidence of the eyewitnesses where they say that the attack to the deceased using a knife was towards his frontal area and it was only after the attack, the deceased fell on the ground.

Another matter argued by the Counsel was that, the learned High Court Judge has failed to consider whether there had been a sudden fight between the parties, which would bring down the offence to that of culpable homicide not amounting to murder.

It is settled law that even if an accused did not take up such a position during the trial, it is the duty of the trial Judge to consider such a possibility in evaluating the evidence. However, for a trial judge to consider such an eventuality there must be evidence placed on record in that regard, even though no such position has been taken by an accused person.

In the appeal under consideration, no such position has been taken when the witnesses were giving evidence. Therefore, the trial Judge did not have the benefit of considering such a possibility when analyzing the evidence of the two eyewitnesses or that of PW-21 who was the other relevant witness in that regard.

Although the JMO has been cross-examined expecting an opinion from him as to whether the injuries observed by him on the body of the deceased could have been a result of a sudden fight, the JMO has not been in a position to express such an opinion for obvious reasons. Whether there was a sudden fight or any provocation by either party is a fact sensitive issue, for which a JMO cannot express an opinion. I am of the view that, since there was no evidence before the Court that would bring down the charges to that of culpable homicide not amounting to murder, in terms of section 294 of the Penal Code, there is no basis to argue that conviction would have been on the basis of culpable homicide not amounting to murder.

I find that, in fact the learned High Court Judge has considered whether there is material before him to come to such finding and had come to a correct determination in that regard.

I am of the view that this is a case where, the prosecution has led sufficient evidence to prove the charge against the appellants beyond reasonable doubt. The appellants have failed to create a reasonable doubt or has failed to provide a reasonable explanation as to the charge of murder against them.

It is the view of this Court that the learned High Court Judge has come to a correct finding after analyzing the evidence in its correct perspective, which needs no disturbance from this court.

Accordingly, the appeal is dismissed for want of merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal