

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal made in terms of Section 11 of the High Court of Provinces (Special Provisions) Act No.19 of 1990 and Section 331(1) of the Code of Criminal Procedure Act No.15/1979 .

C.A. No. 223-225/2011

H.C. Kandy No. HC 115/2002

1. Godahire Gedara Kapilaratne Banda
2. Udumangala Gedara Keerala alias Gamini Wijesuriya
3. Udumangala Gedara Ukku Banda alias Sudda.

Accused-Appellants

Vs.

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

Respondent

BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULI J.

COUNSEL : Srinath Perera P.C. with S.C. Bulathsinghalage for
the Accused-Appellants.
Anoop de Silva S.SC. for the Respondent

ARGUED ON : 07th December, 2018

DECIDED ON : 22nd March, 2019

ACHALA WENGAPPULI J.

This is an appeal against the conviction of the three Appellants by the High Court of *Kandy* and sentence of death imposed on them upon said conviction.

In forwarding an indictment against 12 accused to the High Court of *Kandy*, the Hon. Attorney General charged them under 13 separate counts.

These counts referred to the offences set out in the indictment as being members of an unlawful assembly, being members of the said unlawful assembly in the abduction of *Meegahapattiye Gedara Kalubanda*, *Meegahapattiye Gedara Mudiyanse* and *Ihalagedara Allahakoon Banda* in order to commit murder (Sections 146 and 355 of the Penal Code), committing

their deaths whilst being members of an unlawful assembly (Sections 146 and 296 of the Penal Code), abduction of the three deceased in order to commit murder (Sections 32 and 355 of the Penal Code), causing their deaths (Sections 32 and 296 of the Penal Code) on or about 11th June 1989 at *Narangamuwa of Laggala Pallegama*.

Upon the election of all the accused, they were tried by the High Court without a jury. The trial of the accused commenced on 08.11.2005, after 16 years since the alleged incident and the High Court pronounced its judgment on 30.12.2011 after another 6 years of proceedings before it and 22 years since the incident.

With the delivery of its judgment, the High Court of *Kandy* convicted only the 3rd, 8th and 9th accused on all counts while acquitting the remaining nine accused from all counts against them.

The Appellants were imposed sentence of death in relation to 5th, 6th and 7th counts and the Court decided not to impose any sentence on them in respect of the other counts upon which they were found guilty of.

Being aggrieved by the said convictions and sentences of death, the 3rd Accused-Appellant *Godahire Gedara Kapilaratne Banda*, the 8th Accused-Appellant *Udumangala Gedara Keerala alias Gamini Wijesuriya* and the 9th Accused-Appellant *Udumangala Gedara Ukku Banda alias Sudda* (hereinafter referred to as the 3rd, 8th, and 9th Appellants respectively) have invoked appellate jurisdiction of this Court, seeking to set them aside.

The prosecution presented evidence for the abduction through witnesses *Ariyawathie Menike*, *Priyanthi Menike* and *Dingiri Amma*. The only witness to the murder of the three deceased is witness *Meegahapattiye Gedara Appuhamy* who was dead at the time of trial before the High Court. His deposition was therefore led before the trial Court under Section 33 of the Evidence Ordinance. Witness *Kirimenika* was called by the prosecution to support its evidence on the presence of the accused in the vicinity since she did not witness either the abduction or murder.

It is the evidence of the prosecution that on the day of the incident one of the deceased *Mudiyanse* was at his house while his brother (another deceased) *Kalubanda* was at their ancestral house, which was in the same neighbourhood. At about 10.30 or 11.00 p.m. witness *Ariyawathie Menike* heard the voice of *Kalubanda* calling out for her husband. As the door was opened, she saw *Kalubanda* was kneeling outside and was surrounded by a group of about 10 people. She identified 1st, 2nd, 3rd, 4th, 5th, 6th and one *Ariyatilaka* (points as the 8th) from that group. She also claimed to have identified one *Keerala* who is not among the accused. She made a confused identification by pointing out 11th accused as *Ukku Banda*, whereas *Udumangala Gedara Ukku Banda* is listed as the 9th accused.

Witness *Priyanthi Menike*, daughter of the deceased *Mudiyanse*, has also seen the abduction and has identified 1st, 2nd, 5th, 6th accused and 3rd Appellant from the group of intruders.

Dingiri Amma is the wife of the deceased *Ihalagedara Alahakoon Banda* who identified 1st, 2nd accused and 3rd Appellant.

In describing a separate incident, witness *Kiri Menika* claimed that a group of persons consisting of 1st, 2nd, 4th, 5th, 6th, 7th accused and 3rd Appellant came to her house that night and cut her hair. She was assaulted using clubs and one of the persons who came that night called *Samaranayaka* is not among the accused who are present in Court.

Thereafter, the group had taken away the two deceased and their bodies were discovered on the following morning, along with the body of *Ihalagedara Alahakoon Banda* near a grocery. A burnt motor cycle and a cassette radio was also seen lying near the place where the bodies were found. IP *Abeyratne Bandara* of *Laggala* Police Station conducted investigations into this incident and, at the place where the bodies were found, observed that the assailants have left behind hand written posters issued by *Deshapreemi Sannaddha Balakaya*, describing its reasons for the "execution" of the three deceased persons.

In support of the appeals of the three Appellants, learned President's Counsel who appeared for them, contended that it is unsafe to allow their conviction to stand since the trial Court has relied upon unreliable evidence in determining the identity of the persons who have abducted and murdered the three deceased.

Learned President's Counsel invited our attention to the answers given by the witnesses to the abduction during their cross examination on the question of identity and submits that their unreliable evidence on the point, viewed with the admission of prior animosity that existed between the parties over politics, it is more probable that the three Appellants were falsely implicated at a late stage.

He also contended that the trial Court, in placing reliance on the contents of the deposition of the witness under Section 33 of the Evidence Ordinance to convict the Appellants, also relied on the fact that there is no inconsistency highlighted off the statement made by the same witness to the police in relation to their identification. Challenging this finding by the trial Court, the Appellants now invites this Court to peruse the statement made by the witness *Appuhamy* and thereby ensuring a fair trial to them, in spite of the failure of their Counsel to mount a challenge on the question of identity before the inquiring Magistrate. Learned President's Counsel relied on the judgment of *Keerthi Bandara v Attorney General* (2000) 2 Sri L.R. 245, *Muniratne and Others v The State* (2001) 2 Sri L.R. 382 and another unreported judgment of this Court in *Premasiri and Another v Republic of Sri Lanka* (CA 39-40/2000 - decided on 22.02.2007) in support of his submission.

Witness *Ariyawathie Menike* during her cross examination candidly admitted that she could not identify any of the intruders in the night of the abduction, but claims she identified them at a later stage. During further cross examination, she revealed how she identified the intruders at a late stage. When asked how she identified the intruders, she stated that :-

“ඉ: පුද්ගලයා හඳුනා ගත්තේ කොතොමද?

උ: ගමේදී පොඩි පොඩි රංඳු වෙනවා. එතකොට අහවල්ලු අපි නමයි මැරුවේ කියලා කිව්වා.”.

Thereafter the witness reiterated her earlier position that she did not identify any of the intruders that night.

She also admitted that compensation was paid to them on the basis that the deceased were abducted by an unidentified group and even after a lapse of four years since the incident, she did not make any complaint implicating any of the Appellants.

Priyanthi Menike was a 14-year-old girl at the time of the incident and she stated that her father, the deceased *Allahakoon Banda*, was the Chairman of *Gramodaya Mandalaya* at the time. He was actively engaged in politics under United National Party. The Appellants were connected to Sri Lanka Freedom Party and the two sides had difference of opinion over political activities.

During her cross examination, she did not answer when it was put to her that in her statement to Police she had only said that she could identify the unidentified persons if seen again. Her mother *Dingiri Amma* claimed that she identified the 1st, 2nd accused and 3rd Appellant at the time of abduction but did not mention their names to Police due to fear. Soon after the abduction, she took refuge in the house of her *Loku Amma* but admitted she did not tell *Loku Amma* of the names of any person. Contradictions V2 and V3 marked off her evidence as she stated to Police there were unidentified persons with guns. She also admitted that she came to know of their identities only after the incident and offered the reason for it. It is stated by the witness that “මේ සම්බන්ධයෙන් කියලා තියෙනවා කළමල්ලිගෙ අම්මා. එතකොට තමයි සොයාගෙන තියෙන්නෙ” indicating she relied on village gossip to identify the names of the intruders.

Witness Kiri Menika who claims that 1st, 2nd, 5th, 6th, 7th accused and 3rd Appellant were identified when they came to cut her hair that night, was contradicted when V4 was marked upon her statement to Police that unidentified persons came to her house.

The trial Court, having considered these infirmities and particularly the acceptance of compensation on the basis that unidentified persons have abducted the deceased, has correctly decided to acquit the 1st, 2nd, 4th, 5th, 6th, 7th, 10th 11th and 12th accused from all counts. It primarily relied on the evidence of *Appuhamy* in convicting the three Appellants for all counts and sought reliance from the other witnesses to decide there was an unlawful assembly consisting of five or more persons at the time of abduction.

In view of the Appellant's plea to consider the statement of this witness to Police in assessing the reliability of his evidence on identification of them, this Court will consider the reasoning contained in these judgments, before it makes any endeavour in that regard.

In *Keerthi Bandara v Attorney General* (supra), *Jayasuriya J* stated, in emphasising the positive role of the trial Judge in his assessment of the testimonial trustworthiness of a witness in the light of inconsistencies and omissions with his former statements, that;

"We lay it down that it is for the Judge to peruse the Information Book in the exercise of his overall control of the said book and to use it to aid the Court at the inquiry or trial. When defence counsel spot lights a vital omission, the trial

Judge ought to personally peruse the statement recorded in the Information Book, interpret the contents of the statement in his mind and determine whether there is a vital omission or not and thereafter inform the members of the jury whether there is a vital omission or not and his direction on the law in this respect is binding on the members of the jury. Thus when the defence contends that there is a vital omission which militates against the adoption of the credibility of the witness, it is the trial Judge who should peruse the Information Book and decide on that issue. When the matter is again raised before the Court of Appeal, the Court of Appeal Judges are equally entitled to read the contents of the statements recorded in the Information Book and determine whether there is a vital omission or not and both Courts ought to exclude altogether the illegal and inadmissible opinions expressed orally by police officers (who are not experts but lay witnesses) in the witness box on this point."

When the judgment of the trial Court is perused in the light of the duty imposed by this pronouncement, we find that it had failed to consider this aspect of the evidence of witness Appuhamy, when it decided to act upon his deposition. The trial Court should have been mindful of the fact that it had no opportunity to examine the demeanour and deportment of the said witness in giving evidence before it. In the Magisterial inquiries, sometimes due to various reasons, the witnesses are not cross examined on vital issues as they should be.

The trial Court, in accepting Appuhamy's assertion of identifying the three Appellants, relied heavily on the fact that there were no contradictions marked off the witness's claim of identity.

In dealing with the evidence in relation to the identity of the accused, this Court, in its judgment of *Muniratne and Others v The State* (supra) stated thus;

"One of the important guidelines set forth by Lord Widgery, Chief Justice in Regina vs. Turnbull & Another 1977 QB 224 at 228 when examining circumstances in which the identification by a witness came to be made is to see whether there was any material discrepancy between the description of the accused given to the police by the witness when first seen by him and his actual appearance. In Francis Fraser, Robert Warren 40 Cr. Appeal 160 at 162 the Lord Chief Justice remarked that "where a crown witness gives evidence on oath in direct contradiction of a previous statement made by him which is in the possession of the prosecution it is the duty of counsel for the prosecution at once to show the statement to the Judge." Lord Widgery, Chief Justice also sounded the same remark at page 228 in Regina v Turnbull & Another (supra). Hence in the interests of justice we perused that portion of the statement relating to the description made by witness Saputantrige Karunaratne to the CID on 25.5.92 recorded by Inspector Kumarasinghe (vide page 318 of the record) which is to the effect that the person was about 5'7" tall, fat and of fair complexion.

Hence, we see a material discrepancy between the description of the accused-appellant by Karunaratne in his police statement and his actual appearance which we ourselves observed at the instance of counsel. On this point alone we are inclined to reject the evidence of Karunaratne that it was the first accused-appellant who removed the car from his garage on 21.8.90."

Having considered the reasoning of the above quoted judgments and the English precedents, and the decision to peruse the statement this Court, therefore decided to consider the claim of identity by Appuhamy against his statement made soon after the incident to the Police. In order to consider this aspect in its proper context, it is appropriate to reproduce the evidence in relation to the identification of the three Appellants in the deposition and relevant reference in the statement.

The witness Appuhamy is the father of the Kalubanda and Mudiyanse, two of the persons who abducted and killed that night.

Appuhamy, during the Magisterial inquiry stated under oath that;

“මම ගෙදර ඉන්න කොට “අප්පුවි මරණවා” කියලා අපහසුවෙන් කියනවා ඇහුනා. ඒ සද්දෙට මම දුට ගෙන ගියා. මම හැංගිලා හිටියා පාවට්ටා පදුරක් ලග. කොල්ලොන්ට මගේ පුත්තු වන කලු බණ්ඩා, මුදියන්සේ තට කෙනෙක් හිටියා හලේ කියලා. ඒ අයට යකඩ උල් වලින් අනිනවා දැක්කා. ඇන්නේ උක්කු බණ්ඩයි, සිරිසේනයි, කීරාලයි, කපිලරත්නයි. ඒ අය ඇන්නේ යකඩ උල් වලින්. ඒ අය මෙතන ඉන්නවද කියලා අදුරන්න පුළුවන් ලඟට ගියොත්. (3 වෙනියා කපිලරත්න පෙන්වයි. අනිත් අය අදුරන්න බෑ. 12 වෙනියා පෙන්වා දෙයි.”

The reference to *Ukku Banda, Sirisena, Keerala, and Kapilaratne* (3rd Appellant) in the said deposition of witness *Appuhamy* is clear since the witness attributed act of stabbing of the deceased only to these four persons. The 9th Appellant is *Udumangala Gedara Ukku Banda* while *Udumangala Gedara Keerala* is listed as the 8th Appellant. However, the witness did not identify any of them at the inquiry. Witness *Appuhamy* was 91 years of age at the time of his making the deposition and was 86 when he made his statement. What is important here is that there exists no connection with the 8th and 9th Appellants with the names the witness had mentioned, in the said deposition particularly in the absence of a positive dock identification as to their identities. Therefore, if at all the witness only identified the 3rd Appellant and 12th accused during the Magisterial inquiry. The 12th accused was acquitted by the trial Court along with several other accused.

In contrast to his evidence at the inquiry, the witness *Appuhamy*, in his statement to Police at 11.30 a.m. in the morning of 12.06.1989 stated as follows:-

“ එවිට තුන්පැල්ලේ ගෙදර කඩේ ඉදිරිපිට ගින්නදර පත්තුවෙනවා දැක්කා කටුරෝ කැ ගහනවාත් ඇසුනා අප්පුනාමියෝ අපි මරණවා කියලයි ඒ අය කැ ගැසුවේ. පස්සෙ මම හයෙන් එතැනට ආවේ නැහැ. මම ගේ ඉදිරිපිට පාරේ අඹ ගහ යටට වී සැහවී බලා සිටියා. එවිට මම දුටුවා. දැනට මෙගේ පුතුන් දෙදෙනා මියගොස් සිටින තැන කවිටිය 20ක් පමණ සිටියා. ඔවුන් අත තුවක්කුවක් තිබුනා. එම තුවක්කුව තිබුනේ සුද්ද අතය. අනෙක් අය ලහ කඩු වැනි ආයුධ තිබුනා. ඒවා දැක්කේ එතැන තිබූ ගින්නදර වලිනිය. එතැන සිටි අය අතරින් මේ ගමේ පදිංචි සුද්ද, රන්තැන්නගේ සුද්ද, ගම්පහේ විජේගේ පුතා වන සෝමදාස අයුනා ගත්තා. මේ අය සරම් කමිය ඇඳ සිටියා. අනෙක් සිටිය අය මට අයුන ගන්න බැරි වුනා. පුතාලා වැටී සිටින ස්ථානයේ තිබෙන මෝටර් සයිකලය ගිනි ගන්නා එලියෙන් මගේ ලමයින්ට කඩුවෙන් කොටනවා මා දැක්කා.”

Consideration of this quotation from his statement reveals that the witness only claimed to have identified two of the assailants. He apparently had identified "*Sudda/ Rantennage Sudda*" and also one "*Somadasa*", a son of "*Gampaha Wije*". He was emphatic that he did not identify anyone else. Thus, *Appuhamy's* claim of identifying *Ukku Banda*, *Sirisena*, *Keerala* and *Kapilaratne* at the inquiry is inconsistent with his claim of identifying "*Sudda / Rantennage Sudda*" and "*Somadasa*", a son of "*Gampaha Wije* " when he made a statement to the Police few hours after the incident. In fact his claim of identifying *Ukku Banda*, *Sirisena*, *Keerala* and *Kapilaratne* is also inconsistent with his own act of identifying only the 3rd Appellant and 12th accused from the dock. His poor eye sight will not explain the non-identification of other accused, since he was given the opportunity to make a visual identification, having had the benefit of observing the accused at the dock and thereby placing them well within his field of limited vision. He pointed out the 3rd Appellant and the 12th accused and that confirms he identified only two of them.

It is regrettable that the trial Court has deprived itself of the opportunity of evaluating the witness *Appuhamy's* claim of identifying when the appropriate course of action has clearly been identified and laid down in *Keerthi Bandara v Attorney General* (supra).

In view of these considerations, we are inclined to accept the submissions of the learned President's Counsel for the Appellants that it is not safe to allow their conviction to stand since the evidence of identification is clearly unreliable.

Therefore, we set aside the conviction and sentence of death imposed on the three Appellants.

The appeals of the Appellants are accordingly allowed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL