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

Godakandage Nihal Perera alias Paul

Accused-Appellant

C.A. Appeal No.293/2009
H.C.Colombo No.4810/09

Vs.

The Republic of Sri Lanka

Complainant-Respondent

Before : **Sisira de Abrew, J.**
P.W.D.C.Jayathilake, J.

Counsel : Neranjan Jayasinghe for the Accused-Appellant
Sarath Jayamanne DSG for the Attorney-General.

Argued &
Decided on : 28.02.2013

Sisira de Abrew, J.

The accused-appellant produced by Prison Authorities is present in Court.

Heard both Counsel in support of their respective cases.

The accused-appellant in this case was convicted for being in possession of 2.45 grams of heroin. Learned trial Judge imposed life imprisonment on the accused. According to the prosecution case, officers attached to the Police Narcotic Bureau arrested the accused at a place called "Madampe by lane" and they found heroin in his trouser pocket.

The accused-appellant who started giving evidence said that at the time that the police came to his house he was sleeping in his house. When the accused was giving evidence learned trial Judge, acting under the provisions of Section 126A of the Criminal Procedure Code as amended by Act No.14 of 2005, did not permit him to proceed with his evidence on the basis that he has taken up a defence of alibi. The learned trial Judge was of the opinion that the accused-appellant had not followed the procedure laid down in Section 126A of the Criminal Procedure Code. Thereafter he went back to the dock and made a dock statement stating that he was at home at the time the police officers came to his house. Learned Counsel for accused-appellant contends that the order made by the learned trial Judge is wrong. He submits that the defence taken up by the accused is not an alibi. The learned Deputy Solicitor General concedes this position and submits that since the accused-appellant's house was within walking distance from the place of arrest described by the police officer it cannot be considered that the defence taken up by the accused is an alibi within the definition given to an alibi in Section 126A of the Criminal Procedure Code as

amended by Act No. 14 of 2005. He therefore submits that the order made by the learned trial Judge disallowing the accused to give evidence in the witness box is wrong. I am pleased with the submissions made by the learned Deputy Solicitor General. The contention of the learned Deputy Solicitor General is, in my view, correct. When we consider the evidence, the place of arrest described by the police officer is at 'Madampe by lane'. The accused's house is within walking distance from this place. Therefore the defence taken up by the accused-appellant at the trial cannot be considered as an alibi within the meaning of the definition of alibi in Act No.14 of 2005. Section 126A(3) of the Criminal Procedure Code as amended by Act No. 14 of 2005 read as follows:-

> "For the purpose of this Section 'evidence in support of an alibi' means evidence tending to show that by reason of the presence of the defendant at a particular place or in particular area at a particular time he was not, or was not likely to have been, at the place where the offence is alleged to have been committed at the time of the alleged commission."

In order for the defence evidence to come within the meaning of 'evidence in support of an alibi' mentioned in Section 126A(3) of the Criminal Procedure Code as amended by Act No.14 of 2005 the said evidence must show that by reason of the presence of the accused at a particular place or in a particular area,

he (the accused) was not, or was not likely to have been, present at the place where the offence is alleged to have been committed. When the accused claims that he was within walking distance from the place of the alleged offence described by the prosecution witnesses, his defence does not fall within the ambit of the definition given to 'alibi' in Section 126A(3) of the Criminal Procedure Code as amended by Act No.14 of 2005. Therefore the learned trial Judge was wrong when he did not permit the accused to continue with his evidence.

For the above reasons I hold that the Order of the learned trial Judge disallowing the accused to give evidence is wrong. The learned trial Judge, after considering the evidence, convicted the accused. We are of the opinion that the conclusion reached by the learned trial Judge to convict the accused is erroneous as he did not permit the accused to continue with his evidence. . We therefore set aside the conviction and the sentence imposed by the leaned trial Judge and order a re trial. We direct that re-trial be taken up before a different Judge.

Re trial ordered .

JUDGE OF THE COURT OF APPEAL

P.W.D.C.Jayathilake, J

I agree.

JUDGE OF THE COURT OF APPEAL

KLP/-