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

Welage Kaluwahumpurage Gunadasa

Accused-Appellant

Vs

The Democratic Socialist Republic of Sri Lanka

Complainant Respondent

CA 79/2007
HC Ratnapura 161/2003

Before : Sisira J de Abrew J &
PWDC Jayathilake J

Counsel : Upalie Gunaratne President's Counsel for the appellant
Navarathne Bandara DSG for the Respondent

Argued on : 26.8.2013 and 27.8.2013
Decided on : 21.10.2013

Sisira J de Abrew J.

The accused appellant in this case was convicted of the murder of a woman named Hathdurukande Chandrawathi and was sentenced to death. He was also convicted of the attempted murder of his own son and was sentenced to a term of ten (10) years rigorous imprisonment (RI). Being aggrieved by the said convictions and the sentences he has appealed to this court. Facts of this case may be briefly summarized as follows.

The accused appellant who was a soldier of the Sri Lanka Air Force was having a love affair with the deceased woman Chandrawathi and as a result of this love affair Chandrawathi produced a child (Amila Pradeep). The accused

appellant, in his evidence, admitted that Amila Pradeep was his child. The accused appellant refused to marry Chandrawathi and at the time of the incident, the accused appellant was paying Rs.1000/- as maintenance to his child who was with Chandrawathi. This amount has been ordered by the Magistrate's Court.

On the day of the incident around 9.00 p.m. when Chandrawathi was breast feeding the child in the bed in one of the rooms in the house, her mother who was in the room heard somebody saying not to move. When she looked back she saw the accused appellant at the entrance to the room armed with a gun. Her daughter Chandrawathi, at this stage, shouted saying "mother". Then she heard firing of a gun. Altogether she heard three shots being fired. Chandrawathi and the child sustained gunshot injuries as a result of this firing. Both were admitted to the hospital. But Chandrawathi succumbed to her injuries. The doctor who conducted the Post Mortem Examination (PME) says that Chandrawathi had sustained three entry wounds and three exit wounds. Amila Pradeep (the child) too sustained a gunshot injury.

Siriyawathi who is one of the sisters of Chandrawathi says that on the day of the incident around 9.00 p.m. when she was in the kitchen she heard her sister shouting. Then she heard a firing of a gun. When she came to the room, she saw the accused appellant running away carrying a gun and the sister and her son with bleeding injuries. The gun which was issued to the accused appellant by the Air Force was subsequently produced at the police station by Vasantha Ratnayake who is an officer attached to the Air Force camp in which the accused appellant was working. The investigating officer picked up two empty cartridges at the scene of offence. Government Analyst confirms that two empty cartridges had been fired from the gun issued to the accused appellant.

The accused appellant, in his evidence, took up the defence of alibi. He stated that on 13.6.1997 he was in the camp as he had reported sick. Vasantha

Ratnayake who was in charge of the Air Force camp says that a soldier who has reported sick is expected to be in the camp. But it is possible for such a soldier to leave the camp without permission through the jungle area and come back to the camp. Although the accused appellant says that he was in the Air Force camp at the time of the incident, the two empty cartridges found at the scene of offence had been fired from the gun issued to him. Thus this evidence completely destroys his defence of alibi. In my view his evidence does not create a reasonable doubt in the prosecution case. Therefore I hold that the learned trial judge was right when he rejected the evidence of the accused appellant.

When the case was taken up for trial Indika Rupasinghe Attorney-at-Law (A-a-L) moved for a date on the ground that he had not received instructions from Mr.Justin A-a-L who had been retained to appear for the accused. He further stated that he had not received instructions from the accused. But the learned trial Judge refused this application and proceeded with the trial. Learned Presiedent's Counsel (PC) who appeared for the accused appellant contended that the accused appellant was denied of a fair trial as the said application was refused by the learned trial Judge. I now advert to this contention. Although the application by Indika Rupasinghe A-a-L for a postponement was refused by the learned trial Judge, he continued to appear for the accused and in fact he appeared from the beginning to the end. The said application was refused on 20.9.2004 but Indika Rupasinghe cross examined the witness (the doctor) on the same day. Thereafter the trial was put off. If Mr. Rupasinghe had not received instructions from Mr. Justin or the accused appellant, how did he cross examine the witness on the same day. When I consider all these matters, I reject the above contention as there is no merit in it.

Learned PC drawing our attention to page 27 of the brief contended that the learned trial Judge had not read both charges in the indictment to the accused appellant. He submitted that only one charge had been read to the accused

appellant. The language used by the learned trial Judge at page 27 of the brief is as follows. "Charge from the indictment is read over to the accused. The accused pleads not guilty to the charge." According to this language only one charge has been read to the accused. But can it be contended that when the trial Judge read out the indictment to the accused through the Officiating Registrar, he only read one charge and did not read the other charge. I think not. If the word 'charges' was used instead of the word 'charge' there would not have been any problem. In my view this appears to be a typographical error. For the above reasons, I am unable to agree with the above submission.

After conclusion of the evidence of lay witnesses, the learned trial Judge remanded the accused. Learned PC contended that the accused was denied of a fair trial as he could not communicate with his lawyer. I note the date of commencement of the trial. It was on 20.9.2004. The order remanding the accused was made on 12.10.2005. If his lawyer wanted to have more communication with the accused, it was possible for him to do it in the prison. Further he could have done it in the court premises itself with the permission of trial Judge.

Learned PC contended that the learned trial Judge had failed to comply with Section 203 of the Criminal Procedure Code (CPC) as he had not delivered the judgment within ten days of the conclusion of the trial. The fact that the learned trial Judge has not delivered the judgment within ten days of the conclusion of the trial is correct. But should the Court of Appeal set aside the conviction on this ground alone? I would like to consider a judicial decision on this matter. In Anura Shantha Silva Vs Attorney General [1999] 1 SLR 299 His Lordship Justice De Silva held: "The provisions of Section 203 of the Code are directory and not mandatory. This is a procedural obligation that has been imposed upon Court and its non compliance would not affect the individual's rights unless such non compliance occasions a failure of justice." I have earlier held that the evidence of

the accused appellant was not capable of creating a reasonable doubt in the prosecution case. When I consider the facts of this case, I am of the opinion that non compliance of Section 203 of the CPC has not occasioned a failure of justice. I therefore reject the above contention of learned PC. I would like to state here that the judges presiding in the Criminal Courts must always comply with the procedure laid down in the CPC. Failure on the part of the trial Judge to deliver the judgment within the time period stipulated in Section 203 of the CPC will lead to erosion of public confidence in the judicial system and to laws delay.

Learned PC contended that the learned trial Judge had not explained to the accused appellant of his right to be tried by a jury or a judge. In Attorney General Vs Aponso [2008] BLR page 145 His Lordship Justice JAN De Silva held thus: "As long as it is in the statute book that the accused can elect to be tried by a jury the trial judge has an obligation not only to inquire from him whether he is to be tried by a jury, judge must also inform that the accused has a legal right to that effect. Non observation of this procedure is an illegality and not a mere irregularity." Page 26 of the brief indicates that the accused appellant, on 7.5.2004, has elected a non jury trial. Thus it appears that the accused appellant has elected a non jury trial after the learned trial Judge explained the rights of the accused regarding jury option. For the above reasons, I reject the contention of learned PC.

Learned trial Judge at page 257 of the brief stated that the evidence of the accused appellant had not destroyed the prosecution case. Learned PC harping on this observation contended that the learned trial Judge had placed a burden on the accused appellant to prove the defence of alibi. When an accused person raises a defence of alibi there is no burden on him to prove it. This view is supported by the following judicial decisions. In Banda Vs Attorney General [1999] 3 SLR 168 His Lordship Justice Jaysuriya held: "there is no burden whatsoever on an accused who puts forward a plea of alibi and the burden is always on the prosecution to establish

beyond reasonable doubt that the accused was not elsewhere but present at the time of the commission of offence." The same principle was laid down in King Vs Marshal 51 NLR 157 and King Vs Fernando 48 NLR 251.

In Punchi Banda Vs The State 76 NLR 293 His Lordship Justice GPA de Silva observed "when an alibi is pleaded in defence, the burden of proof on the accused is not similar to that in a case where the accused raises a mitigatory or exculpatory plea. Where the defence is that of an alibi, the accused has no burden as such of establishing any fact to any degree of probability." I would like to lay down the following guide lines regarding the defence of alibi.

In a criminal trial,

1. If the plea of alibi raised by the accused is accepted the accused should be acquitted.
2. If the plea of alibi raises a reasonable doubt in the prosecution case, the accused must be acquitted.
3. When an accused raises a plea of alibi, there is no burden on the accused to prove it.

The question that must be decided is whether the learned trial Judge placed a burden when he said that the evidence of the accused had not destroyed the prosecution case. What happens if the evidence of the accused had destroyed the prosecution case? The learned trial Judge must then say it in order to acquit the accused. In the same way if the evidence of the accused had not destroyed the prosecution case, it is fair for the learned trial Judge to make such observation. This does not mean that he had placed a burden on the accused. I have earlier held that the evidence of the accused appellant was not capable of creating a reasonable doubt in the prosecution case. When I consider all these matters, I hold that there is no merit in the contention advanced by learned PC.

Learned PC next contended that the learned trial Judge had not adequately considered the defence of alibi. But when I consider pages 255 and 256 of the brief, I hold the view that the learned trial Judge had adequately considered the defence of alibi. I therefore reject the said contention.

Learned PC contended that it was not possible for the accused to come to Balangoda from Ampara as he was sick in quarters (SIQ). But Vasntha Ratnayake, the Air Force Officer says that it was possible for soldiers in the camp to go out through jungle although they were officially prohibited from leaving the camp. When I consider all these matters, I am unable to accept the above contention of learned PC. I therefore reject it.

Podinona says that she heard the sound of firing when the deceased woman was lying in bed. The doctor who conducted the PME says that the deceased woman had received gunshot injuries while she was lying in bed. Thus her evidence has been corroborated by the medical evidence. Defence Counsel has failed to mark any vital contradictions with her statement made to the police. Therefore her evidence satisfies the test of consistency. Siriyawathi, the daughter of Podinona says that she saw the accused appellant running away from the scene carrying a gun when she came towards the deceased woman's room on hearing the sound of firing. Thus Podinona's evidence was corroborated by Siriyawathi's evidence.

I have gone through the evidence led at the trial. I am of the opinion that prosecution has proved its case beyond reasonable doubt.

For the above reasons I affirm the conviction and the sentence and dismiss this appeal.

Appeal dismissed.

Judge of the Court of Appeal.

PWDC Jayatilake J

I agree.

Judge of the Court of Appeal.