

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

In the matter of an Appeal in terms of
Section 331(1) of the CPC read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

Palangamrachchige Anthony Perera

1st Accused-Appellant

C.A Appeal No: CA 266-268/2007

Bulathsinhala Kulathanthrilage Wijeratne

2nd Accused-Appellant

Bulathsinhalage Ratnasiri

3rd Accused-Appellant

High Court Colombo

Case No: 9524/1998

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

BEFORE : L.UJayasuriya J.
Deepali Wijesundera J.

COUNSEL : Dr. Ranjith Fernando for the 1st Accused-Appellant
Indika Mallawarachchi for the 2nd & 3rd Accused-Appellant
Wasantha Nawarathna Bandara A.S.G for the A.G

ARGUED ON : 8th December, 2016

DECIDED ON : 17th February, 2017

L.U Jayasuriya J.

The Accused Appellants along with one B.A Jayathissa were indicted in the High Court of Colombo under three counts.

- (1) Under section 140 of the Penal Code
- (2) Under section 296 read with section 146 of the Penal Code
- (3) Under section 296 read with section 32 of the Penal Code.

The Appellants were convicted for the 1st count and were imposed 6 months of imprisonment and a fine of Rupees 5000/- carrying a default term of six months for the 1st count.

Death sentence was imposed for the 2nd count. This appeal is from the said conviction and the sentence.

The story of the prosecution is that on the day in question, the deceased along with witness Chaminda Perera had proceeded to the CWE to purchase some provisions around 9.30 am. Thereafter, the deceased had walked about fifteen feet ahead of the witness and had crossed the road. The witness was prevented from crossing the road by a van which passed him. The witness had seen the Appellants among the assailants. The witness had seen the Appellants attacking the deceased with knives. The case for the prosecution rests or falls on the evidence of the sole eye-witness Chaminda Perera.

Witness Chaminda Perera stated that the Appellants were known to him for 15-16 years and has categorically stated that he identified the Appellants on the day in question.

The medical evidence suggests that the deceased was attacked with more than one weapon.

Therefore, the Medical evidence corroborates with the evidence of the sole eye-witness.

The incident has taken place during broad day-light and the eye-witness had known the Appellants for nearly 20 years. This in-fact establishes the identification of the Appellants by the witness.

There has been an incident in which a bomb has been thrown which fact proves the motive of the killing.

The defence of Alibi taken up by the 1st Accused-Appellant cannot be considered since they have not given notice on the defence of Alibi to the prosecution as provided for in section 126 (A.) of the Code of Criminal Procedure Act.

- (1) No person shall be entitled during a trial on indictment in the High Court, to adduce evidence in support of the defence of an alibi, unless he has,
- a) Stated such fact to the Police at the time of his making his statement during the investigation; or
 - b) Stated such fact at any time during the preliminary inquiry; or
 - c) Raised such defence, after indictment has been served, with notice to the Attorney General at any time prior to fourteen days of the date of commencement of the trial;

Provided however, the Court may, if it is of opinion that accused has adduced reasons which are sufficient to show why he delayed to raise the defence of alibi within the period set out above, permit the accused at any time thereafter but prior to the conclusion of the case for the prosecution, to raise the defence of alibi.

- (2) The original statement should contain all such^c information as to the time and place at which such person^u

claims he was and details as to the person if any, who may furnish evidence in support of his alibi.

- (3) For the purposes 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 a 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.

The Evidence Ordinance, on the burden of proof as to particular fact further stipulates:

“**103.** The burden of proof as to any particular fact lies on that person who wishes to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

Illustrations

A prosecutes **B** for theft, and wishes the court to believe that **B** admitted the theft to **C**. **A** must prove the admission.

B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it.”

It was held in **State of Haryana Vs. Sher Singh, AIR 1981 SC 1021: 1981 SC Cr R 317: 1981 Cr LJ 714: (1981) 2 SCC 300** that the plea of alibi taken by the accused, it is he who has to prove it.

The evidence of the sole eye-witness has not been shaken by contradictions or omissions and therefore the Appellants cannot claim that they were not given a fair hearing by the High Court Judge.

Although the Appellants advanced the argument that the dock statements of the Appellants have not been considered by the learned High Court Judge, on a perusal of the Judgment (at page 132) we find that the learned High Court Judge has considered the dock statements.

Moreover, the dock statements of all the Appellants, by themselves, fail to raise any doubt on the un-contradicted evidence of the eye-witness.

This court finds that the Learned High Court Judge has analyzed the evidence applying the several tests and has come to the correct conclusion.

For the foregoing reasons, this court moves to affirm the judgment dated 11.09.2007 and dismiss the Appeal.

Appeal Dismissed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J. :

I Agree.

JUDGE OF THE COURT OF APPEAL