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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure Act, No. 15 of 1979 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant

CA. No. 163/2014

Vs.

High Court of Chilaw
Case No. 73/09

Kandatha Kankanamlage Suranga Pradeep Lasantha Perera

Accused

And Now Between

Kandatha Kankanamlage Suranga Pradeep Lasantha Perera

Accused-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Tenney Fernando for the Accused-Appellant.

Rohantha Abeysuriya ASG., for the Respondent.

ARGUED ON : 03.05.2021

DECIDED ON : 26.10.2021

R. Gurusinghe, J.

The Accused-appellant (appellant) had been indicted in the High Court of Chilaw for committing the murder of two persons. The deceased were husband and wife.

First count:

On or about 3rd of May 2006, within the jurisdiction of this Court at Chilaw, you did commit murder by causing the death of one Arachchige

Gunathilaka and that you have thereby committed an offence punishable under Section 296 of the Penal Code.

Count two:

On the date and place mentioned above, in the course of the same transaction, you did commit murder by causing the death of one Rangedara Liyanage Don Manel Angela, and that you have committed an offence punishable under Section 296 of the Penal Code.

The appellant was convicted for the second count and sentenced accordingly.

Being aggrieved by the conviction and sentence, the appellant preferred this appeal.

Grounds of appeal according to the Petition of Appeal are as follows:

a). The learned Trial Judge erred in law by failing to evaluate the evidence of alibi as a defence for the charge of a criminal offence.

b). The learned Trial Judge misdirected himself by assuming facts that were not transpired as evidence at the trial.

c). The learned Trial Judge erred in law by failing to appreciate the degree of proof required for a conviction based on principles of the law of evidence.

The facts of the case briefly are as follows:

The female deceased, her son, and the daughter were at their home when a neighbour "Chathu" called out and said that Gunathilake had been attacked. The female deceased was assaulted near the gate in front of her house while running towards her husband. The appellant was a

neighbour of the two deceased. The appellant and the deceased had a land dispute. The appellant had taken up the defence of alibi that he was at Gampola at the time of the incident. In the evening of the 3rd of May 2006, both deceased were killed. The son and daughter of the deceased, PW1 and PW2, respectively, are eyewitnesses to the murder of their mother. PW1 was 11 years old, and PW2 was 15 years old at that time. PW1 and PW2 had given their statements to the police within three or four hours after the incident that same evening.

In the appeal, the main ground advanced by the counsel for the appellant is that the Trial Judge had violated the rules governing the calling of fresh witnesses after the case for the defense had been closed, which was prejudicial to the appellant and amounts to a miscarriage of justice.

The next argument is that there was no sufficient light at the time and the place of the incident, and the evidence of PW1 and PW2 cannot be relied upon.

PW1 is an eyewitness to the murder of the female deceased. He had given evidence that the appellant had attacked his mother and fled from the scene. PW1 had given a statement to the police within few hours after the incident. He was only 11 years old at that time. No contradiction had been marked. The only point marked as an omission is that a person known as “Chathu Akka” informed his mother or his sister. However, the fact that “Chathu Akka” told that his father had been attacked was an unshaken fact that led them to run towards where the male deceased was attacked. PW1 and PW2 had stated that the bulb at their main door was switched on, and there was sufficient light near the gate to identify the assailant. PW1 had stood by what he had stated to the police on the day of the incident. He was an eleven-year-old boy, and his mother and father were murdered three or four hours before, so

he could not have concocted a story to implicate the appellant. There are no contradictions and inconsistencies in his evidence per se or inter se. PW2, in her evidence, stated that the appellant had attacked her mother. Both PW1 and PW2 were eyewitnesses. Learned Trial Judge has considered the evidence of the two eyewitnesses.

The evidence of PW1 and PW2 corroborated each other. PW2 was 15 years at the time of the incident. She had also given a statement to the police within few hours of the incident.

The defence had marked few contradictions in the evidence of PW2. The learned Trial Judge has considered them and concluded that the contradictions were not of serious nature and did not go to the root of the case. I find no reason to disagree with these findings.

The defence of the alibi was not confronted with all the prosecution witnesses. The following is the only question where there is only a passing reference that the appellant was not at the village at the time of the incident.

ප්‍ර: මම තමාට යෝජනා කරනවා යම් පුද්ගලයෙක් විසින් එම පහර දීම සිදු කල පසු තමා එම පැරණි ආරවුල මත, ඒ වෙලාවේ ගමේ සිටියේ නැති මේ චූදිත මේ සිද්ධියට සම්බන්ධකරමින් අසතය සාක්ෂි දෙනවා කියලා?

උ: මම ගහනවා දැක්කා.

The above is not straightforward and is a composite question that has many questions or assumptions;

a) Somebody has attacked the deceased.
b) The appellant was implicated for a previous animosity.
c) The witness is giving false evidence.

d) The appellant was not there in the village at the time of the incident.

The above is the only question with a passing remark that the appellant was not there at the time of the incident. This witness was only 11 years old at the time of the incident, and he was an eighteen-year-old student at the time of trial when this question was put to him. This type of composite question should not have been allowed.

The defence of alibi should have been confronted with the witnesses directly. The appellant indulged in an exercise of hide and seek with the witness without drawing the pointed attention to his defence of alibi.

Not a single question was put to the second eyewitness PW2 regarding his plea of alibi. Nothing has been suggested to the police witnesses about his defence of alibi. Nothing has been mentioned about the two witnesses called by the defence. Not a single document was produced to show that the appellant went to a foreign employment agency on the fateful day. Counsel for the respondent pointed out that the appellant could have produced his telephone details as evidence to prove his whereabouts. He has not done so. Solid evidence like video footage, photos, swipe card record, phone or GPS records were not produced by the appellant. However, the defence need not prove an alibi. It is sufficient if the defence can produce some unsuspected evidence.

The defence of alibi does not change the requirement that the prosecution should prove guilt of the accused beyond reasonable doubt

With regard to the defence of alibi in the case of *Jayatissa Vs. Hon. Attorney General 2010 1 Sri LR 279* the Supreme Court observed as follows;

When the defence sets up an alibi, the prosecution is entitled to lead evidence in rebuttal. When the accused take up an alibi defence, three positions could arise. (i) If the evidence is not believed, the alibi fails (ii) If the evidence is believed the alibi succeeds (iii) If the alibi evidence is neither believed nor disbelieved but would create a reasonable doubt the accused should get the benefit of the doubt

In the case of *Gunasiri and others Vs. Republic of Sri Lanka 2009 1 Sri LR 39* Court of Appeal held as follows:

In evaluating a dock statement, the Trial Judge must consider the following principles:

(1) If the dock statement is believed, it must be acted upon.

(2) If the dock statement creates a reasonable doubt in the prosecution case, the defence must succeed

(3) Dock statement of one accused person should not be used against the other persons. *Vide Kularatne vs. the Queen*.

The learned counsel who appeared for the defence at the trial did not suggest prosecution witnesses to the plea of alibi raised by the accused-appellant.

The failure to suggest the defence of alibi to the prosecution witnesses were dealt with in the above mentioned *Gunasiri and others'* case as follows:

"Although the 3rd accused-appellant raised an alibi in his dock statement, he failed to suggest this position to prosecution witnesses. The learned counsel who appeared for the defence did not suggest to the prosecution witnesses the alibi raised by the 3rd accused appellant. What is the effect

of such silence on the part of the counsel? In this connection, I would like to consider certain judicial decisions. In the case of Sarwan Singh vs. State of Punjab at 3656 Indian Supreme Court held thus: "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in Bobby Mathew vs. State of Karnataka. Applying the principles laid down in the above judicial decision, I may express the following view. Failure to suggest the defence of alibi to the prosecution witnesses who implicated the accused, indicates that it was a false one. Considering all these matters I am of the opinion that the defence of alibi raised by the 3rd accused-appellant is an afterthought."

In this case, the learned Trial Judge has considered the evidence called by the defence. He has given reasons why he cannot believe the story of the defence.

The appellant had not informed his parents that he was going to Gampola that day. His position was that he was going to meet his aunt Mary Jacintha. She was not at Gampola that day, and she came there only after two days. According to the evidence of the appellant, Mary Jacintha had gone to Kandana to meet her husband. Kandana is close to Ja-Ela, where he had gone to a foreign employment agency. He could have easily met her at Ja-Ela if this evidence is true. In this regard, the appellant's position was that he did not give a telephone call to Mary Jacintha which is difficult to believe.

The appellant had evaded the police for about seven days and directly surrendered to Court, avoiding the police. He had ample opportunity to prepare a story. His statement was not prompt. He had waited seven days to surrender to Court and evaded the police entirely.

The second defense witness merely said that the appellant had come to Gampola and stayed there for about ten days. The third witness for the appellant had said that he had worked at 'Lanka Bell' on behalf of the appellant. This witness and the appellant had telephone conversations about work. His position was that both of them knew that the appellant was the suspect for the double murder: however, they did not discuss the murders. It is difficult to believe this kind of evidence.

These two defence witnesses had come forward for the first time in seven years to give evidence supporting her nephew and the friend, the appellant. Generally, the spontaneity or the promptness in which a witness makes a statement to the police will add in favor of the creditworthiness of the witness, as it precludes the time needed for deliberate fabrication.

After the case of the defence was closed, counsel for the prosecution had moved to call evidence in rebuttal. Counsel for the defence had objected to this application. The learned Trial Judge had decided to call PW3 in terms of the provisions under Section 439 of the Criminal Procedure Code, without determining the application and the objections.

In the case of *The Queen Vs. M.S. Perera 57 NLR 274*, the Court of Criminal Appeal held that the evidence in rebuttal should not be permitted except in the case where the matter has arisen ex-improviso or the evidence was not admissible before the prosecution case was closed.

As the Defence Counsel failed to suggest that the appellant was elsewhere at the time of the incident to the prosecution witnesses, the prosecution may have believed that he was not pursuing that defence.

The application made by the prosecution was not wholly unreasonable. The prosecution could have called PW3 before the case was closed because the prosecution knew that the appellant had taken up that position in his statement to the police. I think that PW3 should not have been called after the defence case was closed.

However, PW1 and PW2 were eyewitnesses to the murder of their mother. They were very young at the time of the incident, 11 and 15 years old. There was no reason for the Trial Judge not to believe the evidence of PW1 and PW2. They have made statements to the police within three or four hours from the incident. They have said that they did not see the assault on his father. If they were lying, they could have easily said so because two incidents happened within a very short time. Even without the evidence of PW3, the evidence for the prosecution was more than sufficient to justify the conviction. Therefore, the decision to call PW3 after the defence case was closed had not occasioned a failure of justice or miscarriage of justice.

When there is substantial compliance with the requirements of law, a mere procedural irregularity will not vitiate the trial unless the same results in a miscarriage of justice.

In the case of *The King v Aiyadurai 43NLR 289*, held thus;

In the course of his address to the Jury, Counsel for the defence told them that a certain witness, whose name appeared on the back of the indictment, had not been called and that he was entitled to ask them to draw an inference adverse to the Crown from that fact. He also asked the Jury to infer that Crown Counsel had not called him because he knew that his evidence would be inconsistent with the case for the Crown.

Held, that the Judge was justified in the circumstances in calling the

witness himself and allowing him to be cross-examined by the counsel for the defence.

Fresh evidence called by a Judge, except upon a matter which arises ex-improviso, is irregular. It would vitiate a trial if such evidence was calculated to prejudice the accused.

Article 138 of the Constitution is as follows:

138(1) - The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any court of first instance.

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

Section 436 of the Criminal Procedure Code Act is thus:

S.436. *Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account -*

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or

(b) of the want of any sanction required by section 135,

unless such error, omission, irregularity, or want has occasioned a failure of justice.

The evidence for the prosecution without the evidence of PW 3 is sufficient to justify the conviction. I hold that there was no failure of justice. The appeal of the accused-appellant is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal