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 Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0374/18

High Court of Chilaw

Case No: HC/13/2008

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Dishantha Vanderlan

ACCUSED

AND NOW BETWEEN

Dishantha Vanderlan

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Anil Silva, P.C. with Himali Kularatne

for the Accused Appellant

: Rohantha Abeysuriya, P.C., ASG for the Respondent

Argued on : 21-06-2022

Written Submissions : 20-09-2019 (By the Accused-Appellant)

: 27-11-2019 (By the Respondent)

Decided on : 05-08-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Chilaw.

The appellant was indicted before the High Court of Chilaw on following counts.

(1) Causing the death of one Krishantha Malinga on 25th December 2003 using a gun, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

(2) At the same time and at the same transaction, committing the offence of attempted murder of one Shrimal Nilantha Fernando, an offence punishable in terms of section 300 of the Penal Code.

(3) At the same time and at the same transaction, committing the offence of attempted murder on one Lasantha Saman Kumara, an offence punishable in terms of section 300 of the Penal Code.

(4) At the same time and at the same transaction, committing the offence of attempted murder of one Mahesh Darshana Fernando, an offence punishable in terms of section 300 of the Penal Code.

After trial without a jury, he was found guilty as charged and was sentenced to death on the 1st count, while he was sentenced to rigorous imprisonment periods of ten years each on the other three counts, amounting to a total of thirty years imprisonment. He was also imposed fines totaling to Rs. 7500/-, and in default to a period of six months rigorous imprisonment.

It needs to be noted that none of the injured have given evidence in this trial and only the deposition of PW-01 made before the Magistrate Court non-summary inquiry, who was the injured in relation to the 2nd count, has been led in evidence in terms of section 33 of the Evidence Ordinance.

Facts that led to the incident, briefly, are as follows;

The incident has happened on the Christmas day of the year 2003. The deceased, the injured, and the eyewitnesses who have given evidence in this action, have attended the midnight mass at the Wennappuwa Church and has left the Church at about 12.45 in the midnight. After reaching Siyabalagashandiya, those who gathered there have decided to light firecrackers. Evidence of PW-05 makes it clear that this was a residential area and the visibility was poor at that time. They have been throwing crackers at each other and this, which began on the road had later spread to the level of entering into the gardens of the houses nearby. This has been going on for some hours before the incident of firing of a gun happened. The evidence led in this action establishes the fact that the deceased as well as the injured and those who were playing with crackers at the time of the incident, were youngsters of ages between 15 to 18 years.

PW-05 has not seen what happened but has been informed by those who gathered there after the incident that Nilanga's Brother-in-law (the appellant), fired at the crowd who were throwing firecrackers at each other.

The evidence of PW-09 Hettiarachchige Ashoka Jeewantha has also been similar to that of the PW-05, he has stated that he is unaware as to who fired the gun at them. However, he has been treated as a witness adverse to the prosecution in terms of section 154 of the Evidence Ordinance.

I will comment further on the steps that had been taken after the witness was treated as an adverse witness, later in the judgment.

According to the evidence of PW-10 Dinesh Nishantha and PW-11 Nissanka Perera, they have seen the appellant whom they identified as the brother-in-law of Eranga coming out of his house carrying a gun, while the throwing of firecrackers at each other was going on, but have not seen the actual shooting.

PW-14 Nilanga Fernando was another participant of the throwing of fire crackers. It has been his evidence that, while this was going on, he saw the appellant coming to the junction and firing at the crowd using a gun. He has seen the appellant standing under a street light about 100-150 meters away from the place where he was. At the cross-examination, he has admitted having given evidence on two occasions at the Magistrate Court Non-summary inquiry. It has been admitted that he stated that he did not see who fired at the crowd when he gave evidence before the Magistrate on the first occasion, but later stated that it was the appellant who fired using a gun.

The evidence led in this action has been clear that the deceased had sustained gunshot wounds and the injured too have received same kind of injuries. PW-18 was one of the police officers conducted the investigation. He has recovered a licensed 12 bore shotgun, (the production marked P-01) from the custody of the father-in-law of the appellant. Although the Government Analyst has given

evidence identifying P-01 as a gun, no evidence has been led to determine whether this was the gun used in the crime.

At the trial, the deposition made by PW-01 at the non-summary inquiry before the Magistrate of Marawila has been marked through the Registrar of that Court as P-12 on 30-10-2018. The appellant has made a statement from the dock when the Court called upon for the defence at the conclusion of the prosecution evidence.

It had been his stand that after attending the 9.30 p.m. mass at the Church with his family members including his wife and the child, he went to his parents' house and stayed there and not involved in any way of the shooting incident. It was his position that he surrendered to the Court once informed that he was suspected for the shooting, and it was his belief that PW-01 who had an animosity with him, was instrumental in involving him in the case.

The Grounds of Appeal

At the hearing of the appeal, the learned President's Counsel formulated the following grounds of appeal for the consideration of the Court.

(1) Has the prosecution proved the charges beyond reasonable doubt that it was the appellant who committed the crime, and whether there was a fair trial against the appellant.

(2) Has the learned High Court Judge has misdirected herself on the proof of a defence of alibi.

(3) Has the statement sought to be admitted in terms of section 33 of the Evidence Ordinance been properly admitted at the trial.

(4) In the alternative, is there evidence of provocation, which should have reduced the charge of murder to that of an offence punishable in terms of section 297 of the Penal Code.

The learned President's Counsel was critical of the procedure that has been adopted after treating the PW-09 as an adverse witness for the prosecution, where the said witness was kept in remand until the conclusion of the trial. Citing several judgments of our Superior Courts, it was his view that this has clearly led to a situation where fair trial has been denied to the appellant.

It was pointed out that the learned High Court Judge was totally misdirected on the relevant legal principles as to the appellant's defence of alibi, where the burden of proof had been shifted to the appellant.

It was his argument that the above two matters alone have the effect of vitiating the conviction of the appellant. Moreover, it was contended that the procedure adopted before the deposition of the PW-01 was led in terms of section 33 of the Evidence Ordinance was also faulty. It was pointed out that the evidence to establish that the witness is not available to give evidence has been led some years before his deposition was marked at the trial.

In the alternative, it was his view that this was a case where the learned High Court Judge should have considered whether there was evidence of provocation given the facts and the circumstances, even if no such defence has been set up by the appellant.

After giving careful thought to the submissions made on behalf of the appellant and the cases cited, the learned Additional Solicitor General (ASG) on behalf of the Attorney General agreed that he is in no position to defend the procedure adopted in remanding PW-09 on the basis that he has given false evidence, which would have had a detrimental effect on the other witnesses. He agreed that the learned High Court Judge has clearly shifted the burden of proof to the appellant on his defence of alibi, which is untenable in law.

It was also his view that it would have been better to lead evidence in terms of section 33 of the Evidence Ordinance, when it becomes necessary to establish that the presence of a witness cannot be secured without an amount of delay

or expenses, at the relevant time, rather than years before the marking of such a deposition as evidence in the Court.

At this juncture, this Court would like to express our appreciation to the learned ASG for his submissions on the concept of a fair trial, which a trial Court should always adhere to, during a trial.

Consideration of the Grounds of Appeal

I will now consider the first three grounds of appeal before considering the fourth ground of appeal, if it becomes necessary.

The concept of a fair trial is a concept that is embedded into our legal system. It is the duty of a trial judge to make sure not to create situations where it can lead to an inference that no fair trial was held under given circumstances. It is my considered view that no prosecutor should be in a hurry to treat a witness as an adverse witness for the prosecution, although it is legally permissible, as such a course of action would not go to boost in any way the case for the prosecution.

When it comes to the facts of the case under appeal, it may be that the witness has not stated what the prosecution expected him to say based on his statement to the police. But that does not mean that he is giving evidence on purpose as it may be due to various other reasons rather than attempting to help the defence. It may be that the witness has forgotten the facts due to the time gap and his ability to remember things. It may be that he has not told the truth to the police when he made the statement, given the emotions prevalent at the time of giving the statement, and has actually forgotten what he said to the police, etc. All the victims and the witnesses, including the PW-09 had been a carefree group of youngsters who chose a wrong place, wrong time and the wrong method to enjoy themselves, without thinking about the annoyance that would be caused to others who were at the receiving end of their enjoyment.

The PW-09 has been fifteen years of age at the time of the incident and has given evidence in the Court fifteen years after the event. The way he has given evidence, even after he was treated as an adverse witness for the prosecution and questioned, clearly shows that he has forgotten, more than trying to give false evidence, as to some of the details of what happened on that night. The way most of the other witnesses have given evidence too, who were of similar age at the time of the incident, shows that they have forgotten and given evidence by taking time to remember things that happened so unexpectedly to them on that night.

In this matter, it was not the treating of the witness as an adverse witness to the prosecution, but what happened thereafter that has caused the denial of a fair trial towards the appellant.

After the conclusion of the evidence-in chief of PW-09 by the prosecution and before he was subjected to the cross examination by the defence, he has been ordered to be remanded on the basis that steps would be taken to prosecute him for giving false evidence in the Court. After he was so remanded on 04-07-2018, he was continuously kept in remand until the pronouncement of the judgment of this case on 14-12-2018 and released on bail thereafter. He has also been produced in every postponed date of the trial from the remand custody along with the accused, which appears to be a warning for the other witnesses to see.

The learned trial judge has observed on several occasions during the testimony of PW-09 as well as other witnesses who gave evidence thereafter that they are pausing and thinking before answering the questions. Commenting on one of the witnesses, it has been stated that he is blinking his eyes faster while answering the questions, although thinking behind such observations is not clear.

In the case of **The Queen Vs. K.A. Piyadasa 67 NLR 481;**

In a trial before the Supreme Court an eye-witness P, who was called by the prosecution, admitted that portions of the statement which he had made to the police were false. At the end of his re-examination, and before two other eye-witnesses K and N were called, the trial judge addressing him said, *"You will stand down and remain in fiscal's custody. I shall deal with you thereafter."* He was in fiscal custody until the conclusion of the trial.

Held: the treatment meted out to the witness P was premature, and that the witnesses K and N might have been influenced thereby when it came to their turn to give evidence.

Per Sansoni, C.J.

"We think it would have been better if the learned Judge has followed the views expressed by De Sampayo J. in ***Cooray Vs. Ceylon Para Rubber Co. Ltd. (1922) 23 NLR 321 at 326.***

De Sampayo J. said this: "The proceeding has, however, a serious aspect about which I wish to add a word. The appellant was dealt with for contempt of Court, while he was still under examination and before the conclusion of the case of the defendant company which had called him. In my opinion, a proceeding such as this is apt to intimidate the witness with regard to the rest of his evidence, and the other witnesses who are still to be called, and generally to prejudice the course of justice. Section 440 of the Criminal Procedure Code no doubt provides that it shall be lawful for the Court to sentence a witness 'summarily'. But that expression refers not to the time at which a witness should be dealt with, but to the nature of the proceedings. I think that it should be laid down, as a general

rule, that proper time for dealing with a witness under section 440 is after the conclusion of his own evidence and after the close of the case of the party who calls him, or of the whole case if the completion of the trial is likely to render more apparent the falsehood of any statement." In this case, it is possible that the witnesses Dharmadasa Kodikara and Jothipala Nanayakkara might have been influenced, when it came to their turn to give evidence, by the treatment meted out to Wanni Achchige Piyadasa."

In the case of **R.M.S. Rathnayake Vs. The Attorney General C.A. 41/2012 decided on 30-05-2014,** Anil Gooneratne, J. after considering a similar situation and ordering a retrial, observed the following;

"It is the view of this Court that it is irregular and it amounts to a miscarriage of justice for the witness to be remanded for the reasons adduced as above by the trial judge. This act of remanding would have a serious impact not only to the witness No-06, but on all other prosecution witnesses who gave evidence subsequently at the trial. On this aspect the trial judge at page 190 also observes that witness No-05 and 07 appears to be giving evidence not according to their free will and they appear to be scared. This is more than sufficient material enable me to address my mind that a fair trial had nor been conducted and that it amounts to a miscarriage of justice."

For the reasons as considered above, I am of the view that the procedure adopted by the learned High Court Judge during the trial was a total misdirection, and it had created a situation where a miscarriage of justice has occasioned not only towards appellant but also towards the witnesses. I am of the view that this ground alone is a sufficient basis to vitiate the judgment of the learned High Court Judge.

Be that as it may, I would now like to draw the attention of the learned Attorney General to the plight of the witness No-09 may be enduring since his release on bail. He has been ordered Rs.10000/- cash bail with a directive that he should personally deposit that amount. In addition, he has been ordered Rs. 100000/- surety bail, with the conditions that the surety should be a close relative, with a Grama Sevaka report on his residency, another report to establish that the surety has sufficient assets. The surety has also been required to produce a police clearance report to establish that he has no previous or pending cases. The witness has also been required to produce a certificate to prove his residency before he is allowed bail, and has prevented him from changing his residency without informing the Court.

The original case record does not provide any information whether he was charged for giving false evidence or whether he was informed that no charges will be filed against him.

I am of the view that it is now the responsibility of the learned Attorney General to decide on this matter if it has not been decided yet, without keeping the witness under bail conditions as shown above with no end in sight. It is also important for the learned Attorney General to take steps to ensure to prevent any detrimental effect that will be on any potential witnesses in criminal cases, where the witnesses will be very much reluctant or will not come forward and give evidence, since the underline message is a discouraging one.

Having said that, I will now turn my attention to the argument that the learned High Court Judge was misdirected as to the relevant law in relation to the defence of alibi put forward by the appellant.

It is abundantly clear that the learned High Court Judge has gone on the basis that it is the appellant who has to prove his defence of alibi by establishing that he was elsewhere at the time of the committing of the crime and he has failed to lead sufficient evidence in that regard. I am in agreement that this was a

total misdirection as to the relevant legal principles that govern the defence of alibi.

In the case of **Banda and Others Vs. The Attorney General (1999) 3 SLR 168**, it was held that:

> 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 the criminal offence.

E.R.S.R. Coomaraswamy in his book **The Law of Evidence- Volume 01 at page 278,** discusses the defence of alibi with reference to the relevant case law. At page 279 it has been stated that;

> *"An alibi is not an exception to penal liability like the general exceptions and special exceptions laid down in the Penal Code. When the defence of alibi is taken, there in no burden of proof on the accused. The defence evidence on alibi has merely to be weighed in the balance with the prosecution evidence. If the evidence of alibi is not believed, it fails. If it is believed, it succeeds. But if it is neither believed nor disbelieved but creates a reasonable doubt as to the prosecution case on identity, the accused is entitled to be acquitted."* **(See- Pollock C.B. in Rex Vs. Muller (1864) 60 C.C.C. Sess. Pap. 461, and Punchi Banda Vs. The State (1973) 76 NLR 293 at 307-309)**

I am of the view that the judgment of the learned High Court Judge cannot be allowed to stand on the considered ground of appeal as well.

I find that at the commencement of this trial, evidence has been led in order to establish that the PW-01 is unavailable to give evidence and his presence cannot be secured before it was decided to admit his deposition in the Magistrate Court Non-summary inquiry. An order in this regard has been pronounced on 06-08-2015 by the learned High Court judge who heard the

matter then. However, his deposition has only been adopted on 30-10-2018, more than three years after the relevant order, at the end of the trial. It is my considered view that it is always prudent for trial judges to allow leading in evidence the relevant deposition soon after it was decided to adopt such evidence in terms of section 33 of the Evidence Ordinance. If such evidence is adopted after a long delay from the order, it may well be possible that the circumstances that led to the order for the adoption of such evidence may have changed by the time of the actual adoption of evidence in the Court without the witness being called to give evidence.

If I am to take an example from the case under consideration, it has been decided to accept as evidence the deposition of PW-01 on the basis that the witness has left the country to Italy and not available to give evidence. Although it may be correct when it was so decided in 2015, he may well have returned to the country by the time his deposition was adopted in 2018.

For the reasons aforementioned, I set aside the conviction and the sentence of the appellant as it cannot be allowed to stand.

The next matter to be considered is whether this is a fit and proper case to order a retrial.

In the case of **Nandana Vs. Attorney General (2008) 1 SLR 51,** it was held:

> A discretion is vested in the Court whether or not to order a retrial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice taking into consideration the nature of the evidence available, the time duration since the date of the appeal, the period of incarceration the accused had already suffered, the trauma and hazards an accused person would have to suffer on being subjected to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime, should be considered.

However, it is not only the interests of an accused person that need to be considered in deciding whether or not to order a retrial, but also the interests of justice.

In the case of **L.C. Fernando Vs. The Republic of Sri Lanka 79-II NLR 313 at 374** it was held:

> *"It is a basic principle of the criminal law of our land, that a retrial is to be ordered only, if it appears to the Court that the interests of justice so require.*
>
> *The charge laid against the accused is of serious nature, and it may be, a trial Court may find the accused guilty at a retrial upon relevant and admissible evidence. But it must be remembered that the acquisitions have been made about seven years ago.*
>
> *…Further, the trial had been long and protracted. There have been no less than thirty-five trial dates. The accused would have to bear undue hardship and heavy expense to defend himself again. I must also state that the defence in no way contributed to the reception of inadmissible and irrelevant evidence, which prejudice the trial.*
>
> *Under the circumstances, it seems to me to be harsh and unjust to order a retrial. It does not appear to me that the interests of justice require a retrial."*

In the case of **K. P. Peter Singho Vs. M. B. Werapitiya (1953) 55 NLR 155, Gratian, J.** in considering the question of retrial, held:

> *"I have anxiously considered whether I should send the case back for retrial before another Magistrate. The charges against the accused are serious nature and it may be that, upon relevant and admissible evidence, his conviction would have been justified. But we are here concerned with offences alleged to have been committed over four years ago, and it does*

not seem to me just to call upon him to defend himself a second time after such an unconscionable lapse of time, I therefore, set aside the convictions and acquit the accused."

This is an incident that has happened nineteen years ago on 25th December 2003. The appellant has been a nineteen-year-old at that time and almost all of the witnesses have been teenagers. At the trial, none of the three injured have given evidence as they have left the country. If a retrial is ordered the evidence of PW-09 will be of no value due to the fact of he been treated as an adverse witness. There is no guarantee that even the remaining witnesses are available to give evidence in a new trail. The evidence of PW-14, if called again, will be of questionable nature due to what he has stated at the Magistrate Court Non-summary inquiry. The recovery of a gun from the custody of the father-in-law of the appellant, and the evidence of the Government Analyst will not connect the appellant to the crime as the evidence led in that regard shows. The appellant has been in remand custody for over three and half years before he was convicted and in incarceration for three years and eight months as a result of this appeal. If a retrial is to be ordered, it will be due to no fault on his part.

Having taken into consideration all the attendant circumstances, I am of the view that this is not a fit and proper case to order a retrial.

Therefore, I acquit the appellant from the charges preferred against him.

In view of the acquittal of the appellant of the charges, consideration of the fourth ground of appeal will not arise.

Appeal allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal