# 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 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist
Republic of Sri Lanka

**C.A. Case No. HCC-02/2019**
**Complainant**

**High Court of Hambanthota**

**Case No. 61/1999**

**Vs.**

Shek Marsook alias Chutta

**Accused**

**AND NOW BETWEEN**

Shek Marsook alias Chutta

**Accused –Appellant**

**Vs.**

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

**Respondent**

**BEFORE :** **K. PRIYANTHA FERNANDO, J (P/CA)**
**WICKUM A. KALUARACHCHI, J**

**COUNSEL :** U.R. De Silva, PC with Savithri Fernando
for the Accused-Appellant.
Janaka Bandara, DSG for the Respondent.

**WRITTEN SUBMISSIONS**

**TENDERED ON :** 09.09.2019 (On behalf of the Accused-Appellant)

25.08.2020 (On behalf of the Respondent)

**ARGUED ON :** 14.11.2022

**DECIDED ON :** 08.12.2022

**WICKUM A. KALUARACHCHI, J.**

The accused-appellant was indicted in the High Court of Hambanthota on the first count for committing the Murder of Mohommed Sidik Fauz on or about 02.03.1987, an offence punishable under section 296 of the Penal Code, and on the second count for attempting to commit the murder of Mohammed Sidik Mohammed Arus by causing injuries by shooting, an offence punishable under section 300 of the Penal Code. After the trial, the learned High Court Judge convicted the appellant for both counts, and imposed death sentence for the first count and imposed a sentence of 05 years rigorous imprisonment and a fine of Rs.5000/- carrying a default sentence of 06 months simple imprisonment for the second count by his judgment dated 11.01.2019. This appeal is preferred against the said convictions and sentences.

In brief, the prosecution case is as follows:

On the day of the incident, around 7 p.m., the appellant and some witnesses to the incident were drinking alcohol at the deceased's house in Weerawila. Then, they got into a heated argument. The appellant shouted at them in derogatory terms. After a while, the appellant left and returned with a gun. The appellant fired the gun at PW-2, the victim of the attempted murder, in front of PW-1's house, injuring his left shoulder. PW-5 witnessed the accused-appellant shooting the deceased Mohommed Sidik Fauz, the brother of PW-2, around 9.15 p.m.

The accused-appellant has given evidence under oath and stated that he went with the deceased to load cattle on his request, and when he realized that it was an illegal loading, he left the place and came to Hambanthota. Accordingly, the appellant has taken an alibi, claiming that he was not at the place where the crime occurred.

Both parties have tendered their written submissions, prior to the hearing. At the hearing of this appeal, the learned President's Counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions.

The learned President's Counsel for the appellant advanced his arguments on the following three grounds.

I. The identification of the accused-appellant as far as the death of the deceased is concerned was not satisfactory.
II. No evidence has been led as to the identification of the dead body.
III. The learned trial Judge has concluded the guilt of the accused-appellant prior to assessing the defence case.

First, I wish to deal with the third ground of appeal. Citing the judgment of Ampagoda Liyanage Vijitha Mahindasena V. The Hon. Attorney General- CA 163/2015 decided on 02.03.2017, the learned President's

Counsel contended that it is repugnant to law and against all principles and norms to decide at the end of the prosecution case without considering the evidence for the defence that the charges have been proved against the accused beyond a reasonable doubt. The learned Deputy Solicitor General (DSG) contended in reply that the learned Judge, after hearing all the evidence in the case, has written the judgment setting out the reasons for his finding. Therefore, the learned DSG contended that the learned Judge has reached his conclusions after evaluating the prosecution evidence as well as the defence evidence.

The learned President's Counsel raised the aforesaid argument based on the following observation of the learned High Court Judge:
"ඉහත කී ආකාරයට පැමිණිල්ලේ සාක්ෂි සළකා බැලීමේදී පැමිණිල්ල විසින් පළමුවන හා දෙවන චෝදනාවන් චූදිතට එරෙහිව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු කිරීමට ප්‍රමාණවත් වන්නා වූ ප්‍රභල සාක්ෂි ඉදිරිපත් කරනු ලැබ ඇති බවට නිගමනය කළ හැකිය".

Firstly, it is to be noted that the aforesaid Court of Appeal decision has no binding effect to this court. It has only a persuasive value. However, it is needless to say that the prosecution evidence as well as the defence evidence has to be analyzed to decide whether a charge has been proved beyond a reasonable doubt. In the case at hand, nowhere it is stated before analyzing defence evidence, that the charges have been proved beyond a reasonable doubt. In the aforesaid portion of the judgment, what the learned judge stated was that when considering the prosecution evidence, sufficient evidence had been adduced to prove the first and second charges beyond a reasonable doubt. It appears that the learned trial Judge was mindful that it is the duty of the prosecution to adduce evidence to prove charges beyond a reasonable doubt. Although, the prosecution adduces sufficient evidence to prove charges, it should be considered whether the defence evidence casts reasonable doubt on the prosecution case. Very correctly, the learned High Court Judge has evaluated the defence case to see if the defence evidence cast

any reasonable doubt on the prosecution case. He rejected the appellant's alibi for the reasons stated in the judgment (Next, in this judgment, it has been considered whether the decision to reject the alibi was correct), and only then did he decide that the charges have been proved beyond a reasonable doubt. Therefore, it is apparent that the learned trial Judge has not concluded the guilt of the appellant prior to assessing the defence case. Hence, the third ground of appeal is devoid of merit.

With regard to the defence of alibi, the learned President's Counsel contended that the learned High Court Judge has made an erroneous observation that the appellant did not state in his evidence in chief that he had mentioned about the alibi in the statement he made while in prison.

It is to be noted that presenting the alibi is a duty of the accused. Section 126A (1) of the Code of Criminal Procedure Act as amended by the Act No. 14 of 2005, states as follows:

126A (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.*

(Emphasis added)

The requirement (a) specified in the above section in taking the defence of alibi may have prompted the learned Judge to make the aforesaid observation. Anyhow, I agree with the contention of the learned President's Counsel that if the appellant had not mentioned the alibi in

his statement, the learned State Counsel who prosecuted the High Court case could have brought that matter to the notice of the court as an omission when the appellant was cross-examined.

It should also be mentioned that when taking the defence of alibi, the accused has no burden to establish any fact to any degree of probability as decided in K.M. Punchi Banda V. The State – 76 NLR 293. The accused-appellant is entitled to be acquitted if his alibi casts reasonable doubt on the prosecution case. The learned High Court Judge has explained in his judgment the inconsistency between the defence position taken up in cross-examining the prosecution witnesses and the position taken up in the alibi. Especially, not mentioning the alibi to the prosecution witnesses is a strong reason to reject the alibi. For these two reasons, I hold that the learned High Court Judge's decision to reject the alibi is correct.

Now, I proceed to consider the second ground of appeal. The learned President's Counsel for the appellant contended that the dead body has not been identified, as none of the witnesses who identified the body before the doctor was called in evidence. The learned DSG submitted that the doctor who conducted the post-mortem examination proved the identity of the deceased in his evidence.

The second ground of appeal that "no evidence has been led as to the identification of the dead body" is incorrect. PW-6, the doctor who conducted the post-mortem examination has given evidence regarding the identification of the dead body. The only issue is whether the doctor's evidence is sufficient to prove the identity of the deceased. The doctor stated the names of two persons who identified the deceased before him prior to the post-mortem examination. No single question has been asked from the doctor in cross-examination. Although two witnesses who identified the deceased could not be called in evidence, the aforesaid unchallenged evidence of the doctor establishes the

identity of the deceased without reasonable doubt. Therefore, the second ground of appeal also fails.

Next, I proceed to consider the other main ground of appeal, the identification of the accused-appellant. There were two incidents pertaining to two charges; attempted murder and murder. The victim of the attempted murder is the second prosecution witness of this case. PW-5 has given evidence as the eyewitness to the murder. The main contentions of the Learned President's Counsel for the appellant were that there was no medical evidence to prove the attempted murder and with regard to the murder, PW-5's identification in respect of the shooter could not be accepted. The learned Deputy Solicitor General for the respondent contended that although medical evidence is not available, the attempted murder charge could be proved. Furthermore, he contended that not only PW-5's testimony, but the other circumstantial evidence of the case demonstrates that the appellant and no one else shot at the deceased.

In proving an attempted murder charge, medical evidence helps to establish the nature of the injuries. If an injury was caused by an act such as stabbing, it should be proved by medical evidence that the injury endangers the life of the victim to convict the accused for attempted murder. However, in an incident of shooting, even without a single injury, the charge of attempted murder could be proved because the murderous intention of the shooter is clear when a gun is pointed at the victim and the trigger is pulled. In the instant action, PW-2 has stated in his evidence that he was injured as a result of the gunshot and hospitalized. However, there is no medical evidence to prove those injuries. As stated previously, what is required to establish the charge of attempted murder is that the accused-appellant fired at PW-2.

According to the evidence of PW-2, it is apparent that he had no difficulty in identifying the appellant because when he was in the yard

of the PW-1's house, the appellant came closer to him in front and threatened "not to move" and shot at him. When PW-2 was cross-examined about the way of identifying the appellant, he stated that he saw the appellant's face in the moonlight. (Page 105 of the appeal brief). Even PW-3 has testified that he heard the appellant came in front of PW-1's house and threatened everybody to come out. PW-1 has also stated that PW-2, the brother of the deceased was shot in front of his house around 7.00 – 7.30 p.m. (Page 164 of the appeal brief). In addition, PW-5 has stated that he heard a gunshot and then saw PW-2 falling on the ground near the stile (කඩුල්ල). Although there was no medical evidence, it is apparent that the PW-2 was shot and injured. Since the appellant came in front of PW-2 and shot at him, there is no question about his identity, especially since they knew each other very well. Hence, the attempted murder charge has been proved beyond a reasonable doubt.

As the learned President's Counsel contended, the learned High Court Judge relied on PW-5's evidence in determining the murder charge. The learned President's Counsel contended that there was no sufficient light for PW-5 to identify the appellant and that if the appellant was hiding in a culvert and shooting at the deceased, PW-5 could not see the things that he explained in evidence. Furthermore, the learned President's Counsel pointed out that in the High Court, the distance between the appellant and the deceased was mentioned as 15 feet, whereas in the Magistrate's Court, a distance of 30 feet was mentioned.

However, during the re-examination, PW-5 has explained that he saw the incident of shooting at a distance of 15 feet from the place where he was and 30 feet is the distance from his house to the house of the deceased. He explained further that the incident took place between his house and the house of the deceased (Pages 226 and 227 of the appeal brief). Therefore, there is no contradiction in respect of the distance.

According to the doctor's evidence, the shooting could have taken place from a distance of 3 to 10 feet. Therefore, when the PW-5 says that the appellant shot at the deceased from a distance of about 15 feet, it tallies with the doctor's evidence. Also, the doctor has expressed his opinion that, most probably, the person who shot the deceased was on the left side of the deceased. He has also stated that it was possible that the firearm was in a higher position than the position of the deceased. PW-5's testimony about the place from which the appellant fired at the deceased is also consistent with the expert opinion that the JMO expressed as more probable because the appellant could have shot at the deceased from his left when the appellant was hiding in the culvert as described by PW-5. Hence, the eyewitness's evidence has been corroborated by the medical evidence.

With regard to the identification of the appellant, PW-5 has stated that he clearly identified the appellant. Undoubtedly, they have known each other since long before the incident, as transpired in the evidence. The appellant's house was situated in front of the house of PW-5. Hence, it is apparent that there could not be any difficulty for PW-5 to identify the appellant. As the land where the incident occurred was newly allocated land, PW-5 stated that there were no trees on the land and he could see the appellant clearly and identify him, although he was hiding in a culvert. However, in explaining the identification, he stated that he saw the shadow clearly (ඡායාව හොඳට පෙනුනා). Anyhow, no issue has arisen on the identification of the appellant because all other circumstances of the case establish that the appellant and no one else shot the deceased as contended by the learned DSG. The appellant was the only person armed with a firearm. It is apparent that there was no possibility for a third person to come and shoot the deceased after PW-2 was shot by the appellant a short while ago. Hence, it is clear from the entirety of the evidence of the case that the appellant shot at the deceased after his brother, PW-2, was shot. Therefore, not only the eyewitness's evidence but also the other circumstantial evidence invites

to come to the only inference of the guilt of the appellant for the offence of murder as well.

The learned President's Counsel for the appellant also raised an argument that according to PW-2, when he was shot at the yard of PW-1, his brother, the deceased was also there. Therefore, the learned President's Counsel argued, if the appellant wanted to kill the deceased, he could have shot him at that time. Therefore, he argued that subsequent shooting while hiding in a culvert is improbable.

PW-2 has clearly stated that the appellant came there, threatened them, pointed out the gun, and fired. PW-2 stated that he was injured due to the said gunshot. His further evidence provides the answer to the argument raised by the learned President's Counsel. When PW-2 fell down due to the gunshot injury, his brother (the deceased) rushed towards his house to bring water lamenting that his brother was shot (page 93 of the appeal brief). Therefore, there was no opportunity to shot at the deceased at that time. Thereafter, somehow PW-2 managed to come to his house with his injuries. Then, he was taken to the hospital. According to PW-5, he had seen PW-2 fell on the ground and thereafter he went towards the road to see PW-2's brother, Fauz (sometimes called as "Fauci"). Then he saw the appellant firing at the deceased as the deceased was coming from PW-1's house. Therefore, it is apparent that the appellant could not shoot at the deceased in the very short time that he was with PW-2. After shooting PW-2, the appellant shot at the deceased also, hiding in the culvert. Hence, there is no improbability whatsoever in the prosecution story. Also, for the reasons stated above, the accused-appellant's identity has been established beyond a reasonable doubt. Thus, I regret that I am unable to agree with the contentions of the learned President's Counsel in relation to the first ground of appeal, that the identity of the appellant was not satisfactory.

Accordingly, I find no reason to interfere with the judgment of the learned High Court Judge. The judgment dated 11.01.2019, the convictions, and the sentences are affirmed.

The appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

K. Priyantha Fernando, J (P/CA)

I agree.

**JUDGE OF THE COURT OF APPEAL**