THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 1 SRI L.R. - PART 14**

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having a violent disposition and being branded as a notorious

criminal.

(3) The trial Judge has made no effort to make a genuine judicial

analysis of the contents of the dock statement and give cogent

reasons for rejecting same in his endeavour to determine whether it

it would create a reasonable doubt in the prosecution case.

(4) The trial Judge has failed to elicit from the Doctor whether the

injuries on the complainant constituted a very great antecedent

probability of death as opposed to a mere likelihood of causing

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**AppeAl** from the judgment of the High Court of Gampaha.

**Cases referred to:-**

*1. A.G. vs. Viraj Apponso -* SC 24/2001

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*5. Regina vs. Turnbull and another -* 197- QB 224 at 228

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*7. Wijepala vs. A.G.-* 2001 (1) Sri LR 46

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*11. Perera vs. Naganathan 66 NLR 438*

*12. Coomaraswamy vs. Meera Saibo - 1940 SLLJ 68*

*13. R vs. Ranasinghe- Sc 45/1975- SCM 14.8.1975*

*14. Gunapala and others vs. Republic of Sri Lanka- CA 23/26-92*

*15. AG vs. Somadasa- CA 32/78*

*16. J.P.A. Sri Kantha and 5 others vs. A.G.- CA 42-47/97*

*17. Wickramaratne vs. Chandradasa - 67 NLR 150*

*18. L.C. Fernando vs. Republic of Sri Lanka - 79 (2) NLR 313 at 377*

*Rienzie Arsecularatne* PC for accused-appellant

*Vijith Malalgoda* DSG for respondent.

September 14th 2011

**SArAth De Abrew, J.**

The accused-appellant was indicted in the High Court of

Gampaha on the following counts:

(1) Causing injury to P.P. Amarasena which is suffcient

to cause death in the ordinary course of nature on or

before 11th March 1998 and thereby committed an offence

punishable under section 300 of the Penal Code.

(2) Robbery of a van bearing Registration No.56-5591 from

the custody of P.P. Amarasena whilst being armed with

a deadly weapon and thereby committed an offence

punishable under section 383 of the Penal Code. After

trial without a jury the learned trial Judge had con-

victed the appellant on both counts on 28.10.2004 and

sentenced him to 20 years rigorous imprisonment and

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a fne of Rs. 10,000 on each count. Being aggrieved of

the aforesaid conviction and sentence, the appellant had

preferred this appeal to this Court.

The prosecution case rested mainly on the evidence of

the complainant, the only eyewitness, and his identifca-

tion of the accused. The medical offcer who attended to the

injuries on the complainant was not called, but the DMO,

Wathupitiwela Hospital, who subsequently examined the

injured and submitted the medico-legal Report (P5) was called

to give evidence. This was followed by offcial witnesses who

conducted and participated at the Identifcation Parade held

on 06.08.98 exactly 50 days after the incident. Police wit-

ness who conducted investigations, arrested the accused and

recovered the van have given evidence for the prosecution

followed by the evidence of the owner of the van and that of

the interpreter mudaliyar of the Attanagalle Magistrate Court

with regard to the non-summary inquiry. After the conclu-

sion of the prosecution case the accused had not called evi-

dence but confned his defence to lengthy exculpatory dock-

statement where he has taken up the position that he was

arrested by the Mirigama Police on 15.03.98, before the date

of the alleged offence, and kept in Police custody till 24.03.98

without being produced before a Magistrate and that he was

pointed out to the complainant whilst in custody before the

identifcation parade.

The facts pertaining to this case are briefy as follows:

The complainant Amarasena was a hiring driver of van

bearing registered No. 56-5591 belonging to one Jayaratne.

On the day in question, 17th March 1998 morning, as usual,

he had taken the van to the vehicle park in Giriulla town

where the alleged accused and another person had hired his

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vehicle and gone from place to place to several houses till

afternoon. They had appeared to the complainant to be men

collecting money from houses to send people abroad. A third

person too had joined them later and around 3 p.m. that

afternoon, the other two persons had alighted from the van

leaving only the alleged accused with the complainant driver.

On the request of his assailant, the complainant had driven

the van to a desolate area in a coconut estate close to the

Wathupitiwela Hospital. On the request of his assailant, who

was then seated in the front seat to stop the van to answer a

call of nature, the complainant had responded and stopped

the van. Whereupon, the assailant had suddenly started

stabbing the driver repeatedly with a knife. The complainant

had grabbed the blade of the knife and struggled with

his assailant to ward off the blows. The assailant had jumped

out from the left front door of the van and run round the

vehicle followed by the complainant to escape further injury.

Thereupon the assailant had got into the van to the drivers

seat and driven the van away leaving the bleeding complainant

stranded. The complainant had staggered off to an offcer near

a water tank in close proximity and sought help whereupon he

was rushed to Wathupitiwala Hospital for treatment where the

bleeding was arrested and his wounds sutured by the medical

staff. The complainant had been later examined by the

D.M.O, Wathupitiwala who had submitted the medico-legal

report (P5) based on the notes of the medical staff without

reopening the sutures and described 09 non-grievous stab

injuries on the front, left and right side of the body while

stating that injuries Nos. 1 and 2 were suffcient in the

ordinary course of nature to cause death if medical treatment

was not made available speedily. While at the Hospital, the

complainant had made a statement to Nittambuwa Police

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describing his assailant as a fair person with curly hair, of

around 5 feet 4 inches in height and of normal build.

According to the prosecution, the accused had been

arrested by the Mirigama police on 20.03.98 in connec-

tion with other matters and on recording his statement

subsequently on 24.03.98, the knife (P2) allegedly used to

commit the offence was recovered on an Evidence Ordinance

section 27 statement. The ash coloured dolphin van 58-5591

was recovered in Pannala police area on 18.03.98 afternoon,

the day after the incident, having gone off the road and

turned turtle, with no occupants. The accused was produced

before an Identifcation parade 50 days after the incident on

06.05.98 conducted by the Attanagalle acting Magistrate and

was identifed by the complainant, followed by dock identif-

cations at the non-summary inquiry on 04.07.2000 and at

the High court trial on 22.09.2004.

The accused made a lengthy 12 page detailed dock

statement denying complicity. The accused took up the

position that on 15.03.98 when he went to a shop close

to the Mirigama Police Station to meet his girl friend, he

was dragged inside the Police Station by one P.S. Sujeewa

whereupon he was beaten up and kept in police custody,

statements forcibly obtained from him and taken to Nittam-

buwa and Negombo police stations and pointed out to several

complainants with regard to other offences. The complainant

van driver too, with injuries on his hand and forehead, was

brought to the Mirigama Police Station by a sub-inspector of

Nittambuwa Police and was shown the accused and questioned

whether he could identify the accused to which the complainant

replied “fï jf.a ;uhs ” thereafter the police took the accused to

his residence and spent half an hour there and returned the

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accused to the police station. Finally, according to the

accused he was produced before a doctor and produced in

courts. On a proper evaluation, the main features of the dock

statement of the accused were that the accused could not

have committed the alleged offence on 17.03.98 as he was by

then already in police custody, which in effect tantamount to

a defence of alibi, and also that the accused was pointed out

to the complainant at the Mirigama police station well before

the identifcation parade held on 05.06.98.

The learned Counsel for the appellant has raised 13

grounds of appeal listed (a) to (m) in the written submissions

adduced on behalf of the appellant, which could be broadly

categorized as follows:

(1) The long delay in holding the Identifcation Parade and

the improper constitution of the parade itself generating

a reasonable doubt as to the question of proper identif-

cation.

(2) The unlawful detention in police custody of the accused

from 20.03.98 to 24.03.98 and its legal implications as to

the production of a valid detention order.

(3) Improper admission of inadmissible evidence of bad

character and its legal implications impacting on the

propriety of the conviction and the right to a fair trial.

(4) Legal implications of the Evidence Ordinance Section 27

recovery of the knife and its evidentiary value on failure

to make written notes regarding the recovery.

(5) Legal implications arising out of the failure to call in

evidence the doctor who attended on the injuries of

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the complainant as regards the best evidence rule and

the assessment whether the injuries constituted a very

great antecedent probability of death resulting from the

injuries as opposed to a mere likelihood of causing

death.

(6) Legal implications of improper evaluation of the dock

statement and consequent misdirection on the part of the

trial Judge.

(7) Misdirection in the evaluation of absence of fngerprints

or failure to obtain fngerprints from the van recovered.

(8) Legal implications of the defective count 02 under

section 383 of the Penal Code whether a conviction can be

sustained under a section which does not create an

offence.

(9) This is not a ft and proper case to order a retrial, in view

of *Attorney General Vs Viraj Aponso* (1)

The learned Deputy Solicitor General for the Respon-

dent sought to counter the aforesaid arguments adduced on

behalf of the appellant by submitting oral and written

submissions relying on *Nissanka Vs State*(2).

Having perused the entirety of the proceedings, the

impugned judgment of 28.10.2004 of the learned trial

judge and written submissions of Counsel I now proceed to

examine the several grounds of appeal urged on behalf of the

appellant.

The frst ground of appeal is the question of proper

identifcation of the accused by the complainant as the

assailant who stabbed him and robbed his van. The

incident took place on 17.03.98 and the 1st identifcation

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parade held belatedly on 06.05.98 (P1) was effected 50 days

later. The 2nd identifcation was a dock identifcation at the

non-summary inquiry over two years later on 04.07.2000.

The 3rd identifcation too was the dock identifcation at the

High Court trial 6 ½ years later on 22.09.2004. The assailant

was a total stranger with whom the complainant had only

about 04 hours contact while driving the van on the day of

the incident. The complainant has admitted in evidence that

he had described the assailant to the police as a person of fair

complexion with curly hair and of normal build around 5 feet

4 inches in height. The evidence given by the only eyewitness

at the trial relating to his identifcation of the accused at the

parade is substantive evidence establishing identity in terms

of section 9 of the Evidence Ordinance. (Vide *Keerthi Bandara*

*Vs. Attorney General* (3)) The acting Magistrate, Attanagalle,

who conducted the identifcation parade has given evidence

and produced the parade notes. (P1).

Before evaluating the approach of the learned trial Judge

to the question whether the accused had been properly iden-

tifed as the perpetrator beyond reasonable doubt, the follow-

ing salient features have to be noted.

(a) The identifcation parade, if it is to be of value,

must be held at the earliest opportunity, so that the

impression of the witness remains fresh in his mind

and he does not have the chance of comparing notes

with others.

(b) The accused should not be pointed out to the witness

nor his photograph be shown before the parade.

(c) The accused should be afforded the right to be rep-

resented by Counsel to safeguard his interests at the

parade.

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(d) The identifcation parade itself should be properly and

fairly constituted with regard to the age, sex, number

of participants and mode of dress in order to obvi-

ate any unfair disadvantage to the accused and an

unfair advantage to the witness, the responsibility for

which devolves on the Magistrate or acting Magistrate

who conducts the parade and not on the court police

offcer who selects and hustles in the frst available

persons at random as participants at the parade.

(e) The witness must be questioned and his descrip-

tion according to his recollection of the perpetrator

extracted and recorded before he is invited to examine

the parade and point out the perpetrator.

(f) In view of the provisions in Article 13(3) of the

Constitution recognizing the right of an accused

person to a fair trial by a competent court, evidence

of improper identifcation must be excluded if court is

of the view that its admission would have an adverse

effect on the fairness of the proceedings.

 (Vide: *The Attorney-General Vs. W.J. Aloysius and*

*others*(4), Even though an identifcation parade is

held at a pre-trial stage, the admission of evidence of

identifcation as substantive evidence at the trial

would enable such proceedings to come within the

ambit of Article 13(3) of the Constitution.

In the backdrop of the above requirements to ensure

fairness to the accused, it is now left to examine the ground

situation on the question of identity with regard to the facts

of this case.

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(1) The parade had been held belatedly 50 days after the

event. As the accused had been arrested on 20.03.98

and his statement recorded on 24.03.98, there is

no plausible reason adduced to delay the holding of

the parade till 05.06.98. The learned trial Judge had

failed to consider the impact of this unreasonable

delay on the ability of the complainant to make a

genuine identifcation.

(2) No proper weightage had been given to the consistent

allegation by the accused at the parade itself and his

subsequent detailed dock-statement of 04.10.2004

that he was pointed out to the complainant whilst

being in the custody of Mirigama police before the

parade.

(3) The accused had not been afforded the opportunity to

be represented by Counsel at the parade. (Page 123 of

the Record).

(4) The parade had been improperly and unfairly

constituted as to the age and mode of dress of the

seven participants who were 10 years to 47 years

in age and wearing either sarongs or long trousers

where the accused was easily distinguishable in a

pair of white shorts and blue long sleeve shirt. The

complainant could very well have been assisted in

his identifcation by being prompted to identify the

person in shorts.

(5) The acting Magistrate has not taken the precaution to

question and extract the description of his assailant

according to his recollection from the witness before

being invited to point out the assailant, in order to

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test whether the appearance of his assailant was still

fresh in his mind.

Due to the above circumstances I am frmly of the view

that the learned trial Judge has misdirected himself in

admitting the evidence of identifcation at the parade which

would create a grossly adverse effect on the fairness pro-

ceedings in violation of the right to a fair trial enshrined in

Article 13(3) of the Constitution. The learned trial Judge has

called the Identifcation Parade a farce and still admitted this

improper evidence, while stating that an identifcation parade

was not at all necessary in view of the dock identifcations 02

years later at the non-summary inquiry and 6 ½ years later

at the High Court trial. However the learned trial Judge has

not endeavoured to reconcile the disparity in description of

the assailant initially by the complainant as a fair person

with curly hair, of normal build and around 5 feet 4 inches in

height as against the stark facts of the accused in the dock

being a taller person, darker in complexion and lacking curly

hair.

In this context the following may be noted. In the case of

*Regina Vs. Turnbull and Another*(5) one of the important guide-

lines set out was whether there was any material discrepancy

between the description of the accused given to the police

by the witness when frst seen by him and his actual

appearance. In *Keerthi Bandara Vs Attorney General at 261*

*(supra*) the right of the appellate court was recognized to

look into the statement of the witness to the police, not to

use it as substantive evidence, but to test the veracity of the

witness. The complainant too under cross-examination has

not only admitted the description given by him of his assailant

to the police, but also conceded the difference in appearance

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and complexion to some extent of the accused in the dock.

In *W.A. Fernando Vs The Queen*(*6)* it has been held that there

is a duty cast on the prosecution to draw the attention of the

trial Judge to an item of evidence which would cast serious

doubts as to the guilt or proper identifcation of an accused

person. This ancilliary right to information to prepare his

defence was one of the ingredients of a fair trial as recognized

by Mark Fernando J in *Wijepala Vs Attorney Genera*l(7). Under

the above circumstances, the learned trial judge has misdi-

rected himself in not attaching proper weightage to this all

important discrepancy in appearance of the accused in the

dock and the appearance of the assailant described by the

complainant to the police.

Furthermore, while admitting the evidence of identifca-

tion at the parade, in the same breath, the learned trial judge

has remarked that the parade was not necessary due to the

subsequent dock identifcations at the non-summary

inquiry and the High Court trial. In *Attorney General Vs K.M.*

*Premachandra and 2 others*(8) F.N.D. Jayasuriya, J, citing the

unreported case of *Gunaratne Banda*(9) has endorsed the

view taken by Justice Wijesundera in that case against the

prudence and wisdom in proceeding against an accused

person in a criminal case on mere dock identifcation. Apply-

ing this dictum to the facts of this case, if there is a genuine

doubt whether the complaint could effect a valid identifca-

tion at a parade held 50 days after the incident, it would

be nothing but reasonable to assume that subsequent dock

identifcations several years later too would be impregnated

with serious doubts as to the genuiness of the identifcation

in the backdrop of the disparity in appearance of the descrip-

tion given to the police and the accused in the dock.

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In all the circumstances in this case, I am of the view,

that in the absence of substantive evidence of identifcation

at a fair and properly constituted identifcation prarade held

without delay, in the backdrop of an acknowledged disparity

in the complexion and appearance of the accused at the trial

stage, the assailant being a total stranger to the complainant

who had a mere 04 hour visual contact with the assailant,

the evidence of subsequent dock identifcation several years

later would not eliminate the generation of a reasonable and

justifable doubt as to the veracity and genuiness of the

identifcation, unless there are other supervening and

compelling reasons to justify the contrary. In the event I

am inclined to uphold the 1st ground of appeal that it would

be unsafe to base a conviction on the aforesaid evidence of

identifcation in the absence of other independent evidence to

connect the accused to the crime. The situation would have

been possibly different if the investigating police offcers had

taken the trouble to obtain possible fnger prints from the van

when it was recovered and compared them with that of the

accused. In this context it must be added that the recovery

of the knife on a section 27 Evidence Ordinance statement

would not conclusively connect the accused to the crime.

Vide: *Heenbanda Vs The Queen*(10).

With regard to the 2nd ground of appeal as to the produc-

tion of a valid detention order, it would suffce to draw atten-

tion to the presumption under section 114(d) and the burden

of proof under section 106 of the Evidence Ordinance.

The 3rd ground of appeal is the legal implications of the

improper admission of inadmissible evidence with regard to

bad character under section 54 of the Evidence Ordinance.

At page 304 of the record, in his judgment, the learned

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trial Judge has stated “some evidence in regard to the bad

character of the accused has gone to the record. This evidence

was led by the defence lawyer himself and not the prosecu-

tion. In any case this court will not consider such evidence

to the prejudice or detriment of the accused.” On a perusal

of the evidence of S.I. Hemasundera, it would appear that

unrestrained bad character evidence had been inadvertently

admitted by the learned trial Judge on several occasions both

during the evidence in chief conducted by the prosecution

and also cross-examination by the defence counsel.

 Page 169 – (Evidence in chief) —fuu ;eke;a;d oreKq .kfha

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 Page 177 – (cross-emamination) —ud by; lS mßÈ m%foaYfha

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jYfhka lreKq wkdjrKh jqKd'˜

 Page 190 - —fujka wmrdOlrejl= lsisÈkl nia tll f.k hkafka

keye' /ljrKh we;sjhs f.khkafka˜'

Page 191 – 192 - In cross-examination, in response to

questions by the defence counsel, S.I. Premasundera has

adduced evidence regarding cases fled against the accused

by Mirigama, Divulapitiya and Veyangoda police stations.

Therefore it would appear, the learned trial Judge in

his judgment, confnes himself to evidence of bad charac-

ter led by the defence counsel in cross-examination and ig-

nores such evidence led by the prosecution in the evidence in

chief. Therefore the statement that such evidence will not be

considered is not exhaustive and there is no guarantee that

the totality of the offending evidence of bad character has

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been disregarded by the learned trial judge in arriving at his

conclusions. There is a paramount duty cast on a trial judge

to exclude inadmissible evidence and prevent such evidence

creeping into the record. The resultant situation is such that,

these offending items of bad character evidence has now crept

into the record and formed part of the proceedings. This is

extremely prejudicial to the interests of the accused and

would adversely affect the right of an accused to a fair trial.

The nature of the bad character evidence thus admitted too

have a direct bearing on the question of the accused having

a violent disposition and being branded as a notorious crimi-

nal. In the context Article 13(3) of the Constitution, to ensure

that justice is not only done but should appear to be done,

the trial concerned should not only be fair but should mani-

festly appear to be fair.

In cases where there were no express statements by

the judge as to disregarding the bad character evidence, the

Appellate Court, in some cases have acquitted the accused (eg;

*Perera Vs Naganathan*(11) or ordered a retrial (eg; *Coomaras-*

*wamy vs Meera Saibo*(12). In trials by a Judge without a

jury, there have been acquittals even where the Judge has

positively stated that he was not considering the evidence of

bad character.

(Vide: *R vs Ranasinghe*(13))

In the present case as the express statement of the

learned trial judge apparently refers to the bad character

evidence that has surfaced under cross-examination and

there is no reference to such evidence led in evidence in

chief, I am of the view that, considering the nature of the bad

character evidence led in this case, and in the light of the

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right to a fair trial on admissible evidence, it would be more

appropriate to quash the conviction without ordering a re-

trial. Therefore the 3rd ground of appeal too would succeed.

In view of the above fndings with regard to the 1st and

3rd grounds of appeal stated above it may not be necessary to

deal with in detail the several other grounds of appeal urged

on behalf of the appellant. Dealing with the 6th ground of

appeal with regard to the dock statement, it would appear

that the learned trial Judge has made no effort to make a

genuine judicial analysis of its contents and give cogent

reasons for rejecting same in his endeavour to determine

whether it would create a reasonable doubt in the prosecution

case.(Vide *Gunapala and others Vs Republic of Sri Lanka*(14))

However in passing, it would be appropriate to deal with

the 5th ground appeal where the prosecution has failed to call

the doctor who treated the injuries on the complainant but

has relied on the evidence of the DMO, Wathupitiwela who

has based his evidence on the notes of the former doctor. The

learned trial Judge has failed to elicit from the doctor wheth-

er the injuries on the complainant constituted a very great

antecedent probability of death as opposed to a mere

likelihood of causing death, which is a sine qua non in main-

taining a charge of attempted murder under section 300 of

the Penal Code. (Count 01).

 (Eg: *Attorney General Vs Somadasa(*15) and *J.P.A. Srikan-*

*tha and 05 others Vs. Attorney General*(16). In view of the

above too, the conviction on count 1 on the charge of

attempted murder too would be set aside.

The robbery charge in Count No. 02 too is defective as

section 383 of the Penal Code is not a section that creates an

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offence. Both the learned State Counsel and the learned trial

Judge have neglected to amend this charge appropriately to

be read with section 380 of the Penal Code.

(Vide *Wickremasekera Vs Chandradasa*(17))

The infrmities in the visual identifcation and infux of

bad character evidence, the inadequacy of medical evidence

and the analysis of the dock statement are all circumstances

in favour of the accused. In a nutshell, where the learned

trial Judge emphasizes only the circumstances against the

accused and fails to grasp and evaluate material in favour of

the accused but prefers to turn a blind eye on such circum-

stances, the accused is deprived of substance of a fair trial.

The date of offence being 17th March 1998, almost 13

years have elapsed hence, and therefore, taking into consid-

eration other defciencies enumerated above, and the fact

that no purpose would be served in the complainant mak-

ing another dock identifcation of the accused, at a future

re-trial, I am of the view that there is no purpose in ordering a

re-trial. It is a basic principle of our criminal law that a retrial

is ordered only if it appears to court that justice so requires.

(Vide : *L.C. Fernando Vs. Republic of Sri Lanka*.(18)

Therefore, for the aforesaid reasons, I set aside the

conviction and sentence dated 28.10.2004 of the learned

High Court Judge of Gampaha on counts 1 and 2 and acquit

the accused.

Appeal is therefore allowed.

**MArASinghe, J.**- I agree.

*Appeal allowed.*

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**FERNANDO AND 5 OTHERS VS. STATE**

COURT OF APPEAL

RANJIT SILVA. J

ABEyRATNE. J.

CA 168-173/2006

HC NEGOMBO 105/2002

SEPTEMBER 30, 2010

OCTOBER 7, 13, 18, 19, 21, 27, 2010

NOVEMBER 3, 8, 2010

JANUARy 12, 2011

***Penal Code Section 102, 113a – Opium and Dangerous Drugs***

***Ordinance Section 54 (A) d – amended by Act 13 of 1984 Importa-***

***tion – traffcking – Heroin – Defence of Alibi – Dock statement –***

***Assessment of evidence on a wrong premise? – Ellenborough***

***principle – Applicability – Evidence ordinance – Section 114(f)***

The accused – appellants were indicted on 4 charges – possession of pure

heroin – (Section 54 (A)(d) – importation – Section 54 (A) c, traffcking

Section 54 A (b) – abetting and/ or conspiracy to import – Section 54 (A)

(b) read with Section 102, 113A Penal Code. All accused were found

guilty.

**held**

(1) Evidence in support of the defence of Alibi is evidence that tends

to show that by reason of the presence of an accused (1) at a

particular place (2) in a particular area at a particular time the

accused was not or was unlikely to have been at the place where the

offence is alleged to have been committed at the time of the alleged

commission.

(2) An alibi is not an exception to criminal lability, like a plea of private

defence or grave and sudden provocation. An alibi is nothing more

than an evidentiary fact which, like other facts relied on by an

accused must be weighted in the scale against the case of the

prosecution. The trial Judge has correctly analyzed the evidence

adduced on the defence of alibi.

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(3) It is only where upon the facts the order is manifestly unreason-

able or plainly unjust that the appellate Court may infer that in

some way there has been a failure to exercise the discretion vested

in the trial judge. So long as the Court has exercised its discretion

judicially an appellate Court cannot and will not disturb and

interfere with such an order.

 There is no substantial miscarriage of justice that had occurred by

mistakes made by the trial Judge.

(4) No person accused of crime is bound to offer any explanation

of his conduct or of circumstances of suspicion which attach to

him, but, nevertheless if he refuses to do so where a strong prima

facie case has been made out, and when it is in his own power to

offer evidence – if such exist, in explanation of such suspicious

circumstances which would show them to be fallacies and

explicable consistently with his innocence it is a reasonable and

justifable conclusion that he refrains from doing so only from the

conviction that the evidence so suppressed or not adduced could

interfere adversely to his interest – Ellenborough Principles – the

5th and 6th appellants did not offer any explanation.

**AppeAl** from the judgment of the High Court of Negombo.

**Cases referred to:-**

1. *King vs. Marshal* 51 NLR 157.

2. *Gunapala and others vs. The Republic of Sri Lanka* 1994 2 Sri LR

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3. *Wijewardane vs. Lenora* 60 NLR 457 at 463.

4. *Rohana vs. Shayama Attanayake & others* 1990 3 Sri LR 381

5. *R. Vs. Lord Cochrane and others* 1814 Gurneys Reports 479

6. *R. vs. Burdett* 1820 4 B & Ald 161 at 162

7. *Rajapaksa Devaga Somarathna Rajapakse and others vs. A. G.*

SC 2/2002 TAB

*K. Kulatunga* for 1st and 3rd accused appellants

*Anil Silva PC* with *Tony Fernando* for 2nd accused appellant

*W. Dayaratne PC* for 4th accused appellant

*Shanaka Ranasinghe* for 6th accused – appellant

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June 02nd 2011

**UpAli AbeyrAthne, J.**

The Accused Appellants (hereinafter referred to as the

1st, 2nd, 3rd, 4th, 5th and 6th Appellant) were indicted in the High

Court of Negombo on 04 charges namely;

1. That 1st, 2nd and 3rd Appellants had in their possession

14.071 kilograms of pure heroin in contravention of

section 54(A)(d) of the Poisons, Opium and Dangerous

Drugs Ordinance as amended by Act No 13 of 1984.

2. That 1st to 6th Appellants did import the said quantity

of heroin in contravention of section 54(A)(c) of the

said Ordinance.

3. That 1st to 6th Appellants did traffck the said

quantity of heroin in contravention of section 54(A) (b)

of the said Ordinance.

4. That 1st to 6th Appellants did the offense of abetting

and/or conspiracy to import the said quantity of

heroin in contravention of section 54(A)(b) of the said

Ordinance to be read with section 102 and 113A of

the Penal Code.

After trial the Appellants were found guilty for the said

charges and sentenced to life imprisonment. Being aggrieved

by the said judgment dated 03.05.2006 the Appellants

preferred the instant appeal to this court.

The case for the prosecution is that on 10.04.2001

witness SI Jayalath had received information that the 1st

Appellant was bringing a quantity of heroin from India in

a trawler named Ave Maria or Christopher. Also the police

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had received further information that importation would take

place on 18.04.2001. Accordingly a raid was organized on

the instructions of ASP Priyantha Jayakodi. Four groups

consisting of police offcers were deployed for the raid. On

21.04.2001 at about 1.45 am one of the police groups had

noticed a small green colour Suzuki Escudo jeep which

arrived from the direction of Negombo town parked on the

road near the Negombo lagoon close to the 92nd mile post.

Thereafter the 1st and 2nd Appellant got down from the jeep,

went near a boat which had stopped near the wooden plat-

form erected in the lagoon, looked at the sea and came back

and parked on the road near the Negombo lagoon and was

seen waiting. At about 2.30 am the trawler named Ave Maria

which arrived from deep sea had stopped near the wooden

platform. Thereafter the 1st and 2nd Appellants who were in

the jeep had proceeded near the boat Ave Maria. Thereaf-

ter the 3rd Appellant who was in the boat gave a parcel to

the 1st Appellant. The 1st Appellant took the parcel and came

to the jeep. The 3rd Appellant gave another parcel to the 2nd

Appellant. Thereafter the 3rd Appellant got down to the

wooden platform from the boat and held the parcel with the

2nd Appellant and came to the jeep. At that time IP Nimal

Fernando ordered IP Jayalath and other police offcers to

arrest the three Appellants. The two parcels which had been

brought to the jeep from the boat were found in the jeep.

At that time they noticed that the boat Ave Maria was

going back to deep sea. At that moment ASP Jayakodi had

ordered the police groups who were waiting at sea to arrest

the boat. Since the inmates of Ave Maria failed to obey the

orders of the police they had opened fre at the boat and

arrested it with 4th, 5th and 6th Appellants who were in the

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boat. Thereafter at about 4 am a police team headed by ASP

Priyantha Jayakodi had gone to the residences of the 1st and

2nd Appellants and had conducted a search operation of the

two residences.

At the hearing of this appeal the learned counsel for the

1st and 3rd Appellants submitted that the 1st Appellant was

taken into custody whilst he was sleeping in his residence

with his family at Thoduwawa. I now advert to the said

submission of the learned counsel. The 1st Appellant gave

evidence and called his wife, daughter, father and the

gramasewaka of the area as witnesses in support of his posi-

tion. It is apparent from the said evidence that the wife of the

1st appellant had informed her father in law Norbert on the

same night that her husband and the vehicle was taken away

by a person called Priyantha Jayakodi. In contrast to this

position the Gramasewaka who was called as a witness on

behalf of the 1st Appellant had testifed that Norbert who was

the father of the 1st Appellant complained to him that his son

had been abducted by an unknown group at about 4 am and

his vehicle too had been taken away by the same group. It is

also apparent from the said evidence that the said complaint

to the Gramasewaka has been made for future reference only.

Norbert in his evidence had stated that he did not reveal the

name of Priyantha Jayakodi to the Gramasewaka although

he was informed by the wife of the 1st Appellant that her

husband had been taken away by Priyantha Jayakodi. It is

very strange to note that none of the said witnesses has made

any complaint to the police.

The learned counsel for the 1st and 3rd Appellants

further contended that reporting the matter to the 1stappellant’s

father and his complaint to the gramasevaka on the following

afternoon give credence to the defence story that the arrest

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was made not in Negombo but at Thoduwawa from the 1st

Appellant’s residence. He further contended that the defence

of alibi is well and truly corroborated by the evidence of the

1st Appellant’s wife daughter and father.

On behalf of the 3rd appellant the learned counsel

submitted that if the evidence of alibi is accepted it ensures

to the beneft of the 3rd appellant as there is no divisibility of

credibility.

The 3rd Appellant made a very short dock statement. He

did not call any witnesses on his behalf. In his dock state-

ment he stated that he came to Negombo with the other three

persons on 20.04.2001 in order to leave for the job. They got

some ice, a few provisions for their meals and fuel and pro-

ceeded to deep sea in the night on 20.04.2001. He further said

that while they were sailing in the deep sea the police arrested

them. Thereafter they were taken to Colombo. They did not

go to the job on 18.04.2001. On the contrary the prosecution

witnesses testifed that there was no ice in the cold room of

the boat and no fsh in the boat. There was a unused fsh-

ing net in packing in the boat. There were no contradictions

marked or omissions highlighted in the said evidence of the

prosecution.

I have carefully considered the evidence led on behalf of

the 1st and 3rd appellants and also the submission made by

the learned counsel. I am also mindful of the nature of the

defence of alibi. Evidence in support of the defence of alibi is

evidence that tends to show that by reason of the presence of

an accused;

• at a particular place or

• In a particular area at a particular time

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the accused was not, or was unlikely to have been, at the

place where the offence is alleged to have been committed

at the time of its alleged commission. Hence in its essence

a defence of alibi is nothing more than a plea of *not guilty*,

because the accused was not present at the place where the

offence was committed on the occasion indicated.

In considering the evidence in support of the defence of

alibi on the above premise, if the court accepts the evidence

in support of the defence of alibi, then the court must re-

cord a verdict of not guilty if the court fnds that these times

just do not allow for this accused to have committed the acts

alleged.

Also if the court does not accept the evidence in support

of the defence of alibi, but it creates a reasonable doubt about

the prosecution case, then the court must record a verdict of

not guilty.

In the case of the *King vs. Marshal* (1) Dias J. stated that

“An alibi is not an exception to criminal liability, like a plea of

private defence or grave and sudden provocation. An alibi is

nothing more than an evidentiary fact, which, like other facts

relied on by an accused, must be weighed in the scale against

the case of the prosecution. If suffcient doubt is created in

the minds of the jury as to whether the accused was present

at the scene at the time the offence was committed, then the

prosecution has not established its case beyond reasonable

doubt and the accused is entitled to be acquitted.”

In the case of *Gunapala and Others vs. The Repub-*

*lic of Sri Lanka*(2) it was held that “an alibi is the plea of an

accused person that he was elsewhere at the time of the alleged

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criminal act. It is an evidentiary fact by which it is sought to

create a doubt whether the accused was present at the time

the offence was committed. In a case where the defence is

that of an alibi an accused person has no burden as such

of establishing any fact to any degree of probability. An alibi

is not an exception to criminal liability like a plea of private

defence or grave and sudden provocation. A direction to the

jury that an alibi must be proved on a balance of probability

is a misdirection on the law in regard to the burden of proof

and an error in law causing grave prejudice to the accused."

In the light of the said judicial pronouncements when I

consider the said evidence I am of the view that the learned

trial Judge has correctly analysed the evidence adduced on

behalf of the 1st and 3rd appellants and has reached a right

conclusion rejecting the defence of alibi.

The learned counsel for the 2nd Appellant made his

submission on the following basis:

• The learned trial Judge did not analyze the evidence

to fnd whether the 1st and 2nd Appellants went to the

boatyard on 18.04.2001.

• From whom was the information received.

• Was the raiding party acting on the basis that the 1st

and 2nd Appellants were the master minds behind this

alleged traffcking?

• The improbabilities of the defence version as stated

by the learned Deputy Solicitor General.

• Items of circumstantial evidence favourable to the

the 2nd Appellant.

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• Has there been an abdication of the learned trial

judge’s duties to the prosecuting state counsel.

• The learned trial judge has failed to consider the

dock statement of the 2nd Appellant and the evidence

adduced on his behalf.

I have carefully considered the dock statement of the 2nd

appellant and also the evidence of his wife Jacqueline Fer-

nando. It is important to note that at the time of taking her

oath before the commencement of her evidence Jacqueline

Fernando had declared she is unmarried. In his short dock

statement the 2nd Appellant had stated that on 20.04.2001

whilst he was sleeping with his son and daughter, on 21st

morning his son informed him that somebody wants to speak

to him. When he opened the door he saw two persons were

standing there. They asked are you Vernon? We want to

record a statement. Thereafter he was taken to Colombo in a

van. He further said that I did not go on that particular day. I

was sleeping. Nimal and Jayalath are lying. I was taken away

by some other two persons. That is all the 2nd Appellant had

stated in his dock statement.

Although the wife of the 2nd Appellant Jacqueline

Fernando had testifed that on 20.04.2001 she was at home

with her husband the 2nd Appellant and son and daughter

Munnakkaraya, the 2nd Appellant in his dock statement did

not reveal that his wife was at home. What he said was that

on 20.04.2001 he was sleeping with his son and daughter.

Can a court of law believe this type of unsupporting

evidence? The answer is ‘no’ . Therefore it is safe to conclude

that the 2nd Appellant has failed to create a doubt in the

evidence of the prosecution.

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With regard to the fact that whether the 1st and 2nd

accused appellants went to the boatyard on 18.04.2001

it is my frm view that the prosecution has proved beyond

reasonable doubt that the 1st and 2nd Appellant went to the

boatyard near Negombo lagoon on 18.04.2001. No doubt has

been created on the evidence that the 1st and the 2nd appellants

who arrived at Negombo lagoon by a Suzuki Escudo jeep went

near the Ave Maria boat and with the help of the 3rd appellant

carried the two parcels of heroin to the jeep. There were no

contradictions marked or omissions highlighted in the said

evidence of the prosecution. Therefore it is crystal clear that

the 1st, 2nd, and 3rd Appellants were present at the crime scene

and were active participants in committing the crime. Hence I

reject the said submission of the learned counsel.

The learned counsel further submitted that the learned

trial judge had assessed the evidence on a wrong prem-

ise and there by a miscarriage of justice had occurred. He

further submitted that the learned trial judge has not read

the evidence at all. The trial judge in his narration of the evi-

dence where he has taken it verbatim from the written sub-

missions of the learned state counsel he does not mention

anything at all as to what was asked in cross examination.

The learned counsel further submitted that the learned trial

judge has failed to consider the dock statement of the 2nd

Appellant and to decide whether he is going to accept or reject

the dock statement. I am not in total agreement with the said

submissions of the learned counsel. I do not think that the

learned trial judge had made any glaring mistake in evaluat-

ing the evidence of the case. I must place on record that in

an appeal the Appellate Courts have to consider whether a

substantial miscarriage of justice has actually occurred by

such mistakes of the learned trial judge.

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In the case of *Wijewardene vs. Lenora*(3) at 463 Basnayake

C.J. stated that “ It is true that the learned Judge has not

discussed in his judgment the reason for not imposing a term

as to postponement of the trial when making the amendment.

Although it does not appear from the judgment or order of the

trial Judge how he has reached the result embodied in his

order, upon the facts the order is not manifestly unreason-

able or plainly unjust. It is only where upon the facts the

order is manifestly unreasonable or plainly unjust that the

appellate Court may infer that in some way there has been a

failure to exercise the discretion vested in the trial Judge”

In the case of *Rohana vs. Shyama Attygala & Others*(4)

Kulatilaka J stated that “ So long as the court has exercised

its discretion judicially this court sitting in appeal cannot

and will not disturb and interfere with such an order. On

the other hand, this court may do so if it appears that some

error has been made in exercising the discretion and that

the Judge has acted illegally, arbitrarily or upon a wrong

principle of law.”

When I consider the said several mistakes on which the

learned counsel drew our attention I am of the view that there

is no substantial miscarriage of justice which has actually

occurred by the said mistakes of the learned trial judge.

The learned counsel for the 2nd Appellant further submit-

ted that the learned trial judge has misapplied the presump-

tion under section 114(f) of the Evidence Ordinance. I have

carefully considered the relevant portion of the judgment in

this regard. A careful reading of the said portion of the judg-

ment clearly reveals that although the learned trial judge has

referred to the section 114(f) of the Ordinance he has not