

## JAYATISSA V. HON ATTORNEY GENERAL

SUPREME COURT

J. A. N. DE SILVA, C. J.,

SRIPAVAN, J. AND

IMAM, J.

S.C. (SPL) L.A. NO. 229/2009

H.C. (CHILAW) NO. 6/2000

C. A. NO. 27/2004

FEBRUARY 9<sup>TH</sup>, 2010

***Evidence Ordinance - Section 11 Section 105 - When facts not otherwise relevant are relevant?- relevancy of facts which is inconsistent with a fact in issue or relevant fact - defence of alibi - facts which make the existence or non-existence of any fact in issue or relevant fact highly improbable or highly probable***

The Appellant, with two others, were indicted before the High Court on a charge of attempted murder. After trial, the 2<sup>nd</sup> and 3<sup>rd</sup> Accused were acquitted and the Appellant was convicted. The Appellant appealed against the judgment of the High Court and the Court of Appeal dismissed the appeal.

The Appellant thereafter appealed to the Supreme Court mainly on the ground that the Judge of the High Court acted on the premise that the defence of alibi raised by the Appellant must be proved by the Appellant. The learned High Court Judge had held that the burden of proof of the defence of alibi is always with the Accused.

### **Held**

- (1) The word 'inconsistence' referred to in Section 11 of the Evidence Ordinance indicates the physical impossibility of the co-existence of two facts at any given time.
- (2) Plea of alibi is not an exception to penal liability. Hence there is no burden of proof on the Accused to prove a plea of alibi section 105 of the Evidence Ordinance has no application Evidence of alibi has merely to be weighted in the balance with the prosecution evidence.
- (3) When the defence sets up an alibi, the prosecution is entitled to lead evidence in rebuttal.

- (4) When an Accused takes up an alibi as a defence, three positions could arise;
- (a) If the evidence is not believed the alibi fails,
  - (b) If the evidence is believed, it succeeds,
  - (c) If the alibi evidence is neither believed nor disbelieved, but would create a reasonable doubt as to the prosecution case on identity, the Accused is entitled to get the benefit of the doubt.
- (5) There are certain fundamentals to be observed when an alibi is set up as a defence –
- (a) If an alibi is established by unsuspected testimony, that will be satisfactory and conclusive.
  - (b) An alibi should cover the time of the alleged offence so as to exclude the Accused's presence at the crime scene at the relevant time.
  - (c) The credibility of an alibi is greatly enhanced, if it was set up at the time the accusation was first made and was constantly maintained. If it is taken up belatedly-the effect of the alibi will be less.
  - (d) An alibi can be falsified by mistaken identity and the difference of time in the clocks. A few minutes will make all the difference.
- (6) A false alibi will weaken the defence case and strengthen the prosecution case.

Held further –

Per J. A. N. De Silva, C. J., -

“ . . . the trial judge has gone on the wrong assumption that burden of proof of alibi is on the defence. Having considered the evidence relating to alibi we are of the view that if proper evaluation was carried out by the trial judge she could have rejected this defence and still convicted the appellant.”

**Cases referred to:**

1. *King v. Marshall* – 51 N.L.R. 157
2. *Yahonis Singh v. Queen* – 67 N.L.R. 8
3. *Punchi Banda v. State* – 76 N.L.R. 293

**APPEAL** from the Court of Appeal.

*Dr. Ranjith Fernando* for the Petitioner-Appellant

*Ms. Ayesha Jinasena* S.S.C. for the Respondent.

February 9<sup>th</sup>, 2010

**J.A.N. DE SILVA, C.J.**

The learned counsel for the petitioner heard in support of this application. We formerly granted leave to proceed on the questions set out in paragraph 7 (a) (b) and (c) of the petition. Thereafter the court decided to proceed with the appeal with the consent of both parties.

Dr. Ranjith Fernando senior counsel for the appellant submitted that in the Court of Appeal judgment too the court has recognized the fact that there are certain infirmities with regard to the identity of the appellant.

The appellant together with two others were indicted before the Chilaw High Court on a charge of attempted murder of one Herathge Don Nandasena on the 11<sup>th</sup> of November 1991. After trial the 2<sup>nd</sup> and 3<sup>rd</sup> accused were acquitted. The appellant was found guilty and sentenced to 3 years R.I. together with a fine of Rs. 25,000/=

After the conviction and sentence the appellant lodged an appeal to the Court of Appeal. This appeal was heard and by its order dated 8 September 2009 dismissed the appeal.

The following two grounds were urged by the appellant before us (a) Non consideration of material infirmities in the prosecution case (b) The High Court Judge misdirected herself by acting on the premise that the alibi defence must be proved by the accused.

The evidence of the victim Nandasena was that he was watching a television program with his family members on 11<sup>th</sup> November 1991 around 8.30 P.M. and when he heard the noise of dogs barking, through the door he saw the

accused with gun in hand. Soon thereafter he fired the gun at him injuring him on his thigh and genital area. He testified that he did not know the name of the appellant but knew him as "Hamuda Karaya" (army man or soldier). He further stated that the 2 and 3 accused too were there armed with clubs. According to Nandasena's testimony when the incident happened he shouted "Hamuda Karaya" fired at him as he did not know his name. When he was taken to the hospital doctor has recorded the short history given by the patient. It reads as "Kerthi or Keerthi B-in law". MLR had been recorded the very next day i.e. on 12.11.1991. Keerthi was the 2<sup>nd</sup> accused and he was acquitted at the High Court. 1<sup>st</sup> information to the police had been provided by one Wimalasiri, brother of the victim at 7 AM on 12.11.1991. According to Wimalasiri victim told him Jayatissa fired and he mentioned that name in the police complaint.

Udulawathie the sister of the victim who is also an eye witness relates the same story but says that she saw only the appellant and also states that her brother soon after the incident shouted that Jayatissa (appellant) fired and also said that appellant was known to her family and they knew his name. The above evidence creates a problem with regard to the credibility of Nandasena's evidence regarding the identity of the appellant. However Udawalawathie's evidence had not been shaken by the defence at the trial. Therefore the conviction of the appellant could be sustained solely on her evidence if properly considered by the High Court Judge.

The learned counsel for the appellant contended that the approach taken by the High Court Judge relating to the defence of alibi and the burden of proof is totally erroneous. In the judgement High Court Judge has noted that the burden of proof of the defence of alibi is on the accused.

The defence in a criminal case is entitled to plead alibi as a defence. Section 11 of the Evidence Ordinance provide for such a plea. The word “inconsistence” referred to therein denotes the physical impossibility of the co existence of two facts-see also illustration in section 11 (a).

Plea of alibi is not an exception to penal liability. Hence there is no burden of proof on the accused. Section 105 of the Evidence Ordinance has no application. Evidence of alibi has merely to be weighted in the balance with the prosecution evidence. When the defence set 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. These principles have been discussed in the following cases:

- *King vs Marshall*<sup>(1)</sup>
- *Yahonis Singh vs. Queen*<sup>(2)</sup>
- *Punchi Banda vs. State*<sup>(3)</sup>

It is to be noted that these are certain fundamentals to be observed when an alibi is set up as a defence.

1. If an alibi is established by unsuspected testimony that will be satisfactory and conclusive
2. It should cover the time of the alleged offence so as to exclude accused presence at the crime scene at the relevant time.

3. If the alibi was set up at the time the accusation was first made and was constantly maintained, credibility of alibi will be enhanced. If it is taken up belatedly the effect will be less.
4. Evidence of alibi can be falsified by mistaken identity and the difference of the times in the clocks. A few minutes will make all the difference.

It is also to be noted that false alibi will weaken the defence case and strengthen the prosecution case.

In this case of course the trial judge has gone on the wrong assumption that burden of proof of alibi is on the defence. Having considered the evidence relating to alibi we are of the view that if proper evaluation was carried out by the trial judge she could have rejected this defence and still convict the appellant. We have also given due consideration to the fact that the offence had taken place 19 years ago and the appellant had been in custody for considerable length of time before the trial. We are of the view that interest of justice would be met if a non custodial sentence is imposed and by increasing the fine. We affirm the conviction. However, considering the circumstances of this case we reduce the 3 R. I. imposed on the accused to 2 years and suspend it for 7 years. The fine imposed is increased to Rs. 50,000/= and that should be given to the victim as compensation. Subject to the above variation of the sentence this appeal is dismissed. The High Court judge is directed to act in terms of Section 303 of the Criminal Procedure Code.

**SRIPAVAN J.** – I agree

**IMAM, J.** – I agree.

*Sentence Varied.*

*Appeal dismissed.*