LIONEL *alias* HITCHIKOLLA AND ANOTHER
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL.
G. P. S. DE SILVA, J. (PRESIDENT, C.A.), RAMANATHAN, J. AND PERERA, J.
CA 232-233/85.
H. C. GALLE 673.
OCTOBER 19, 1987.

Criminal Law–Charge of murder–Dock statement–Alibi–Direction to jury re alibi

Where one of two accused had made a dock statement in which an alibi was implied, the failure of the judge in his directions to the jury to refer directly to the plea of alibi will not vitiate a conviction for murder where the judge in fact read the entire dock statement to the jury and told them it should be considered as substantive evidence in the case and irrespective of whether they can or cannot decide whether it is true or not, if it raises a reasonable doubt as to the truth of the prosecution case, a verdict of acquittal must be returned. In such circumstances the failure of the Judge to tell the jury that the 1st appellant has set up a defence of alibi cannot reasonably be said to have resulted in actual prejudice or caused a miscarriage of justice.

An alibi may broadly be described as a plea of an accused person that he was elsewhere at the time of the alleged criminal act. It is a plea which casts a doubt on the prosecution case. It is an evidentiary fact creating a doubt as to whether the accused was present at the scene at the time the offence was committed.

Cases referred to:

(1) *King v. Marshall (1948) 51 NLR 157, 159.*
(2) *King v. Chandrasekera (1942) 44 NLR 97, 126.*
(3) *Damayasena v. The Queen (1969) 73 NLR 61*

APPEALS from High Court, Galle.

Dr. Colvin R. de Silva with *Miss Chamantha Weerakoon* for accused-appellant.
S. J. Gunasekera, State Counsel for the Attorney-General.

Cur adv. vult.

November 06, 1987.

G. P. S. DE SILVA, J.

The 1st and 2nd accused-appellants stood indicted on the charge of having committed the murder of one Jayasena Mendis on 4th December, 1978. By the unanimous verdict of the jury both accused-appellants were found guilty of murder.

The case for the prosecution rested on the testimony of a single eye-witness named Jayantha who was at the time of the incident a boy 12 years of age. The deceased was a watcher employed in an estate belonging to one Abeysekera. It was his practice to leave home at about 6 or 6.30 in the morning for work on the estate. The boy Jayantha was a frequent visitor to the house of the deceased for about 4 or 5 months prior to the incident. When questioned as to why he visited the house of the deceased his answer was "there is a cow. I come to take the cow". It was his evidence that he usually accompanied the deceased to the estate in the morning taking the cow with him for the purpose of grazing the cow on the estate.

Jayantha testified that on the day prior to the date of the incident he had stayed overnight at the house of the deceased. The following morning at about 6.30 a.m. Jayantha and the deceased were on their way to the estate, Jayantha walking ahead, leading the cow, and the deceased was following him about 16 feet behind. The deceased was carrying with him a packet of tea, jaggery, a bunch of keys and a check-roll book. They were on a footpath on either side of which were rubber trees and a cinnamon plantation. As they were thus proceeding Jayantha heard a voice from behind " මෙතන හිටපන්. " (stop there). He looked back and saw the 1st appellant jump on to the footpath from behind the cinnamon bushes. He then saw the 2nd appellant also jump on to the footpath from behind two 'hik' trees and strike the deceased with a sword. That blow alighted on the shoulder of the deceased. One of the injuries the deceased had according to the medical evidence, was a non-grievous cut injury on the shoulder. Thereafter the 1st appellant who was also armed with a sword attacked the deceased. Jayantha had then crept through the barbed wire fence, run back to the house of the deceased, and had promptly informed the widow, Asilin Nona, that her husband is being attacked by both appellants. Asilin Nona in her evidence says that it was Jayantha who gave her the information. It was the evidence of

Jayantha that he knew both appellants prior to the date of the incident. Upon receipt of the information, Asilin Nona had gone to the spot where the body of the husband lay and thereafter to the Meetiyagoda police station along with Jayantha. According to the evidence of the police officer, Asilin Nona and Jayantha were at the police station by 8.40 that morning. The statements of both Asilin Nona and Jayantha were recorded at the police station. The police were at the scene by 9.45 a.m. The investigations of the police clearly establish that the attack upon the deceased took place at the spot spoken to by Jayantha. The police found at the scene a bunch of keys, a packet of sugar and jaggery and a check-roll book, which were the articles the deceased was carrying with him that morning on his way to the estate for work. The medical evidence reveals that the deceased had 8 external injuries which could have been caused by sharp cutting instruments.

The learned trial Judge in the course of his summing-up emphasized that the case for the prosecution depended on the sole testimony of Jayantha, and that if they had a reasonable doubt as to the truth of his evidence both accused must be acquitted. He referred in detail to the weaknesses in the evidence of Jayantha as alleged by the defence and in particular to contradictions between his evidence at the present trial and in the previous trial. The learned trial Judge went to the extent of telling the jury that there is a principle that if a witness utters a falsehood on one matter his evidence is false on all other matters. State Counsel complained that this was a direction unduly favourable to the appellants. Dr. de Silva made no complaint in regard to the manner in which the learned trial Judge dealt with the evidence of Jayantha in his charge to the jury. Indeed the summing-up contained a careful summary of Jayantha's evidence. We are satisfied that his directions to the jury in this regard were accurate, comprehensive and very fair by the appellants. Having regard to the verdict, it may fairly be presumed that the jury has accepted the evidence of Jayantha, evidence which clearly implicated the appellants in an altogether unprovoked and sudden attack with swords upon the deceased. It is proper to add that it was open to a reasonable jury to have acted with confidence on the testimony of Jayantha. The medical evidence shows that the deceased was subjected to a severe attack. He had 3 cut injuries on the head and one on the neck which was a necessarily fatal injury.

The principal submission of Dr. de Silva for the appellants was that the conviction of the 1st appellant cannot stand in view of a non-direction amounting in law to a mis-direction in respect of the statement made from the dock by the 1st appellant. Dr. de Silva contended that what the 1st appellant pleaded in his dock statement was not merely a denial but also an alibi. The learned trial Judge, however, failed to point out to the jury that the defence of the 1st appellant was an alibi. There was thus a failure, Counsel submitted, to accurately, properly and adequately place before the jury the defence of the 1st appellant. Dr. de Silva further argued that if the 1st appellant's conviction has to be quashed on account of the non-direction complained of, then the 2nd appellant's conviction for murder also cannot stand because the charge was on the basis that they both shared a 'common intention'. In that event, Dr. de Silva maintained that the 2nd appellant will be liable only for his own act, namely causing hurt, an offence punishable under section 315 of the Penal Code.

In considering the above submissions, there is an important fact to be borne in mind, namely that the entirety of the statement made from the dock by the 1st appellant was read to the jury by the learned trial Judge in the course of his summing-up. The 2nd appellant too made a statement from the dock and likewise the whole of that statement too was read to the jury by the learned trial judge. In other words, the jury was made fully aware by the learned judge in the course of his summing-up of the actual terms and content of the statements made from the dock by both appellants.

At this point, it is relevant to set out the dock statement of the 1st appellant. It reads thus:

"මේ සම්බන්ධයෙන් මම කිසිම දෙයක් දන්නේ නෑ. මම ගෙදර ඉඳලා ලෙලි වගයක් ගේන්න යනවිට මට ආරංචි වුණා ලෙලි ගේන්න තියෙන ලෙලි හොඳ දලා නෑ. පස්සේ මං ඇවිල්ලා කුරක්කය ගෙදර ලිහා දලා අස්සලා අහට තියා. යනවිට මට අස්සා නමක වී කිව්වා ජයසේන මාමා මරලා එනට පාලයි මමයි සැක කරනවා කියා. පස්සේ මම තොටගමුවේ.ඉන්න රතුඅම්මාගේ අහට තිබිල්ලා එහේ ඉඳලා. පොලිසියෙන් එම ගෙදරට ඇවිත් තිබුණා. පස්සේ මම මැදිනා එක්ක තියා. මැදිනා කිව්වා බාරවෙන්න කියා. එමනිසා මම උසාවියට තියා බාරවුණා. එපමණයි මට කියන්න තියෙන්නේ."

(I know nothing about this matter. When I was going from home to bring some husks I got the information that the husks have not been taken out. Later I came and untied the cart and went to my elder sister's house. On my way I met my elder sister who told me that Jayasena mama has been killed and for that Pala and I are suspected. Later I went to Ratu Amma's house at Totagamuwa and

stayed there and the police had come to that house. Later my brother-in-law asked me to surrender and I went to court and surrendered. This is all I have to say)

While it is implicit in the above statement that the 1st appellant was not at the scene but elsewhere, yet it is not without significance that he makes no precise reference by name to the place where he was at the relevant time. There is therefore substance in State Counsel's submission that the 1st appellant has pleaded an 'implied alibi' as opposed to an 'express alibi'. Admittedly, the learned trial judge did not direct the jury that the 1st appellant has pleaded an alibi. The crucial question then is, was this non-direction of such a grave nature as to vitiate the conviction of the 1st appellant?

An alibi may broadly be described as a plea of an accused person that he was elsewhere at the time of the alleged criminal act. What is important for present purposes and what needs to be stressed is that it is a plea which casts doubt on an essential element of the case for the prosecution, namely that it was the 1st appellant who committed the criminal act charged. In other words, if the jury entertained a reasonable doubt in regard to a constituent element of the offence, namely the criminal act (factum) then the 1st appellant is entitled to an acquittal. This aspect of the plea of alibi was well explained in an illuminating passage which occurs in the judgment of Dias J. in *King v. Marshall* (1)

> "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 for the prosecution. In a case where an alibi is pleaded, if the prisoner succeeds thereby *in creating a sufficient doubt in the minds of the jury as to whether he was present at the scene at the time the offence was committed,* then the prosecution has not established its case beyond all reasonable doubt, and the accused is entitled to be acquitted". (The emphasis is mine)

Again, Soertsz J. in *The King v. Chandrasekera,* (2) expressed himself thus:

> ".....in a case in which the accused's plea is *simply that he is not guilty, or in a case in which he pleads an alibi,* if he creates a sufficient doubt in the minds of the jury as to *whether he was present or not,* or as to whether he did the act or not, or as to

whether he had the necessary mens rea or not the accused is entitled to be acquitted because, in such an event, the prosecution has not sufficiently proved its case" (The emphasis is mine)

The above dicta are very relevant for they show that a denial or an alibi has this important feature in common, namely they both cast a doubt on an essential element in the prosecution case.

There is one other decision which throws some light on the point at issue. That is the case of *Damayanu v. The Queen* (3) where the defence was to the effect that some person or persons other than the accused committed the criminal act. Fernando C. J. expressed the opinion that the principle which governs an alibi applies where such a defence is pleaded. And the necessary direction that must be given to the jury is that if the defence pleaded raises a reasonable doubt as to the participation of the accused in the criminal act, then the accused must be acquitted. It is implicit here that this is the vital direction that has to be given to the jury even where an accused sets up an alibi.

On a consideration of the principle that emerges from the above decisions, it is clear that the one essential direction that must be given to the jury is that if the statement from the dock made by the 1st appellant creates a reasonable doubt as to the truth of the case for the prosecution, then the appellant is entitled to be acquitted. What then were the directions given in this regard? The learned trial Judge having emphasized that a statement made from the dock is substantive evidence in the case which the jury must consider, he directed the jury in the following terms, immediately before he read out in full the dock statement of the 1st appellant:

"විත්තිකරුවෙක් ප්‍රකාශයක් කරන විට, ප්‍රශ්න ඇසීම විරුද්ධ පාර්ශවයෙන් කළ නොහැකිය. ඒ ප්‍රකාශයත් සම්බන්ධයෙන් නඩුව විනිශ්චය කරන ජූරි සභාවකට හෝ නඩු විභාගය පවත්වන විනිශ්චයකරුට විත්තිකරුවන්ගෙන් ප්‍රශ්න ඇසීමේ අයිතියක් නැත. එම දුබලතාවයත් දෙකට යටත්ව, ඔවුන්ගේ ප්‍රකාශයත් නඩුවේ ක්‍රියාකාරී සාක්ෂියක් වශයෙන් සලකා ගැනෙනවා. නීතියෙන් විත්තිකරුවෙක් සලකන්නේ නිර්දෝෂ පුද්ගලයෙක් වශයෙන්. ඔවුන් විත්ති කූඩුවේ සිට කරනු ලබන ප්‍රකාශය සත්‍ය යයි ඔබලා විශ්වාස කරන්නේ නම්, එවිට විත්තිකරුවන් වහාම නිදහස් කළ යුතුය. එය සත්‍ය යයි ඔබලාට තීරණය කරන්න බැරිනම්, නමුත් ඒ ප්‍රකාශය නිසා පැමිණිල්ලේ සාක්ෂි පිළිබඳව සාධාරණ සැකයක් ඇතිවන්නේ නම් එවිටත් විත්තිකරුවන් නිදහස් කළ යුතුය. එය සත්‍ය යයි ඔබලාට තීරණය කරන්න බැරිනම්, නමුත් ඒ ප්‍රකාශය නිසා පැමිණිල්ලේ සාක්ෂි පිළිබඳව සාධාරණ සැකයක් ඇතිවන්නේ නම් එවිටත් විත්තිකරුවන් නිදහස් කළ යුතුය. ඔවුන්ගේ එම ප්‍රකාශයේම සාධාරණ සැකයක් ඇතිවන නිසා ඇත්ත වෙන්නත් පුළුවන්, ඇත්ත නොවෙන්නත් පුළුවන්, ඇත්ත නොවෙන්නත් පුළුවන් කියා සාධාරණ සැකයක් ඇතිවන්නේ නම් විත්තිකරුවන් නිදහස් කළ යුතුය. ඔවුන්ගේ සාක්ෂි ප්‍රතික්ෂේප කළා වුවත් එයින් අදහස් වන්නේ නෑ එම නිසා පැමිණිල්ලේ නඩුව සාක්ෂි මඟ ඔප්පු වුණා කියා. පැමිණිල්ලේ නඩුව සාධාරණ සහේතුක සැකයෙන් තොරව ඔප්පු වී තිබේද කියා පැමිණිල්ලේ සාක්ෂි සමස්ථයක් ලෙස සලකා බැලිය යුතුය."

(When an accused makes a statement the prosecution cannot put questions. Neither the Judge nor the jury is entitled to question the accused. who makes the statement. Subject to these two weaknesses; their statements must be considered substantive evidence in the case. The law considers an accused as an innocent person. If you hold that the statements made by the accused persons from the dock are true then the accused persons must be acquitted immediately. If you cannot decide whether it is true but as a result of that statement there arises a reasonable doubt regarding the prosecution case, then also you must acquit the accused. If you cannot decide whether it is true but as a result of that statement there arises a reasonable doubt regarding the prosecution case then also the accused persons must be acquitted. By reason of their statements, a reasonable doubt arises, it may be true or it may not be true, and thus if a reasonable doubt arises, the accused persons must be acquitted. Even if their evidence is rejected it does not mean that upon the evidence the prosecution has proved its case. You have to take the evidence as a whole and see whether the prosecution has proved its case beyond reasonable doubt.)

Towards the concluding stages of the charge there occurs another relevant passage which reads thus:

"මෙම නඩුවේ ඉදිරිපත් කරන ලද සාක්ෂි සියල්ලම සලකා බැලීමෙන් පසුව ජයන්ත නැමැති සාක්ෂිකරුගේ සාක්ෂිය ඔබලා ප්‍රතික්ෂේප කරන්නේ නම් විත්තිකරුවන් නිදහස් කළ යුතුයි. මෙම නඩුවේ සාක්ෂි විග්‍රහ කොට විශ්ලේෂණය කිරීමේදී ජයන්ත නැමැති සාක්ෂිකරුගේ සාක්ෂිය සම්බන්ධයෙන් සාධාරණ සහේතුක සැකයක් හට ගන්නේ නම් ඒත් විත්තිකරුවන් නිදහස් කළ යුතුයි. මන්ද ජයන්ත තමයි පැමිණිල්ල කියන අන්දමට විත්තිකරුවන් ගේ අනන්‍යතාවය හුවා දක්වන එකම සාක්ෂිකරු. ඒ නිසා පැමිණිල්ලේ නඩුව සාධාරණ සහේතුක සැකයෙන් තොරව ඔප්පු කිරීමේ භාරය රඳා පවතින්නේ පැමිණිල්ල වෙතයි. ඒ කිරීමේදී පැමිණිල්ල විසින් ඉදිරිපත් කරන ලද ජයන්ත නමැති ඇසදුටු සාක්ෂිකරුගේ සාක්ෂිය විශ්වාස නොකරන්නේ නම් හෝ ඒ පිළිබඳව සාධාරණ සහේතුක සැකයක් මතුවන්නේ නම් එවිට පැමිණිල්ලේ නඩුව එකහෙළම බිඳ වැටෙනවා."

(When you consider all the evidence in this case if you reject the evidence of witness Jayantha then you should acquit the accused persons. When you analyse the evidence in this case if you have a reasonable doubt regarding the evidence of witness Jayantha then the accused persons must be acquitted. The reason is Jayantha is the only witness who speaks to the identity of the accused persons. Therefore the burden of proving the case for the prosecution beyond reasonable doubt rests on the prosecution. If you do not believe the evidence of the eye-witness, Jayantha, or if there arises a reasonable doubt regarding his evidence, then the prosecution case immediately collapses.)

As rightly submitted by State Counsel, the learned trial Judge in his directions to the jury has made it abundantly clear (*a*) that the case for the prosecution stands or falls upon the testimony of Jayantha; (*b*) that if they reject the evidence of Jayantha or entertain a reasonable doubt as to its truth, the case for the prosecution collapses; (*c*) that they must consider the statement made from the dock; (*d*) that they must consider the statement as substantive evidence in the case; (*e*) that upon such consideration if it raises a reasonable doubt as to the truth of the prosecution case, the accused must be acquitted. Thus the failure of the learned trial Judge to point out to the jury that the 1st appellant has set up an alibi is not a non-direction of a kind which could reasonably be said to have resulted in actual prejudice or caused a miscarriage of justice in so far as the 1st appellant is concerned. Having regard to the correct directions given and the fact that the entire statement was read to the jury by the learned trial Judge, there is merit in State Counsel's contention that "there is no magic in the use of the word alibi". I wish to add that Dr. de Silva made no complaint in regard to the directions of the learned Judge relating to the dock statement of the 2nd appellant.

In the result, the unanimous verdict of the jury as against the 1st and 2nd appellants is affirmed and the appeals are dismissed.

RAMANATHAN, J.—I agree.

PERERA, J.—I agree.

Appeals dismissed.