BANDA AND OTHERS
v.
ATTORNEY-GENERAL

COURT OF APPEAL.
JAYASURIYA, J.,
KULATILAKE, J.
C.A. NO. 64-68/97.
H.C. MATARA NO. 93/95.
MARCH 24, 29, 1999.

Murder – Common intention – Plea of Alibi – Contradictions, discrepancies and omissions – Retrial – In what circumstances?

Held:

1. The learned trial Judge has used the term common intention only in one solitary passage in his judgment. He has culpably failed to consider the acts of participation on the part of each one of those accused separately to analyse those acts and relate them to the principles of law relating to common intention and having regard to their respective acts to determine whether they were actuated by a common intention.

2. The trial Judge has not given his mind in regard to counts 6 and 7 and considered whether the accused were actuated by a common *murderous* intention to commit the offence set out in counts 6 and 7.

3. There is no burden whatsoever on an accused who puts forward a plea of *alibi* and the burden is always on the prosecution to establish beyond reasonable doubt that the accused was not elsewhere but present at the time of the commission of the criminal offence.

4. The right to mark omissions and proof of omissions is related to the right of the Judge to use the Information Book to ensure that the interests of justice are satisfied. Omissions do not stand in the same position as contradictions and discrepancies. The rule in regard to consistency and inconsistency is not strictly applicable to omissions. Judge who has the care of the information ought to use this Book to elicit any material and

prove any flagrant omissions between the testimony of the witness at the trial and his Police statement in the discharge of his judicial duty and function.

5. The issue whether a retrial should be ordered or not would depend on whether there is testimonially trustworthy and credible evidence given before the High Court.

APPEAL from the judgment of the High Court of Matara.

Cases referred to:

1. *K. v. Assappu* – 50 NLR 324.
2. *Punchi Banda v. Q* – 74 NLR 494.
3. *K. v. Marshal* – 51 NLR 157.
4. *K. v. H. S. R. Fernando* – 48 NLR 251.
5. *Republic v. Damayanu* – 73 NLR 61.
6. *Yahonis v. State* – 67 NLR 8.
7. *Gunasiri v. State* – [1990] 2 Sri L.R. 265.
8. *Punchi Banda v. State* – 76 NLR 293 at 307.
9. *Mutukuttige Siriwardena v. A. G.* – CA 70-97 – HC Kalutara No. 998/97.
10. *Q. v. Muthu Banda* – 73 NLR 8.
11. *Jagathsena v. Bandaranayake* – [1984] 2 Sri L.R. 397.

Ranjith Abeysuriya, PC with *Harshika de Silva* for first, second, third accused-appellants.

Dr. Ranjith Fernando with *S. Munasinghe* for 4th accused-appellant.

No appearance for 5th accused-appellant.

Dappula de Livera for Attorney-General.

Cur. adv. vult.

March 29, 1999.

JAYASURIYA, J.

We have heard learned President's Counsel, learned counsel for the fourth accused-appellant and learned Senior State Counsel fully in this matter.

It is manifest that learned trial Judge has used the term common intention only in one solitary passage in his judgment at page 181, He has culpably failed to consider the acts of participation on the part of each one of those accused separately, to analyse these acts and relate them to the principles of law relating to common intention and having regard to their respective acts to determine whether they were actuated by a common intention. Justice Dias in *King v. Asappu*[1] laid down the principles that it is the bounden duty of the trial Judge to indulge in this process and that the same duty prevails even when the accused is tried without a Jury. Further, the trial Judge has not given his mind in regard to counts six and seven and considered whether the accused were actuated by a common *murderous* intention to commit the offence set out in counts six and seven. Justice Sirimane in *Punchi Banda v. Queen*[2] set aside the conviction in a situation where the trial Judge had not distinguished between the required common murderous intention and any other common intention entertained by the accused. This is an error made by the instant Judge when he failed to consider whether the accused were actuated by a common *murderous* intention. These non-directions and misdirections are in regard to vital aspects of the prosecution case and related to the ingredients of the offence and therefore the findings, convictions and sentences pronounced cannot be sustained.

In addition, there is a serious grave misdirection entertained by the trial Judge in regard to the fourth accused-appellant and the sixth accused at the trial in regard to the plea of *alibi* preferred. The learned trial Judge has stated thus in Sinhala: හය වැනි චුදිත විසින්, ඔහු සිද්ධිය වූ අවස්ථාවේදී ඔහුගේ නිවසේ ගෙඩාල් කපමින් සිටි බව කියා සිටි නමුත් එය තහවුරු කිරීමට වෙනත් සාක්ෂියක් නැත. Clearly this statement presupposes and assumes that there is a burden of proof on the sixth accused-appellant to establish his pleas of *alibi* and prove affirmatively that he was elsewhere and not at the scene of the crime at the time of commission of the offence. This is clearly a misdirection on the law. In *King v. Marshal*[3] and in *King v. H. S. R. Fernando*[4] the principle was laid down that there is no burden whatsoever on an accused person who puts forward a plea of *alibi* and the burden is always on the prosecution to establish beyond reasonable doubt that the accused was not elsewhere but present at the time of the commission of the criminal offence.

There is a *cursus curiae* which has firmly laid down this principle. See the decisions in *Republic v. Damayanu*[5]; *Yahonis v. State*[6]; *Gunasiri v. State*[7]; *Punchi Banda v. State*[8] and *Muthukuttige Siriwardena v. A. G.*[9] per Justice Ameer Ismail.

In the circumstances in view of these grave misdirections and non-directions we set aside the findings, conviction and sentence imposed on all the four accused-appellants, excluding the finding, conviction and sentence imposed on the fifth accused-appellant who was not present at the hearing of this argument and who was also not represented at the hearing of this argument by counsel. The learned trial Judge has found her guilty of perjury and imposed a conviction and sentence on her.

In this state of the appeal, both President's Counsel and learned counsel for the fourth accused-appellant strenuously urged that the Court ought not to order a retrial in respect of their respective clients. But, learned Senior State Counsel contended that the evidence of witness Andrayas who was believed at the trial was creditworthy and entitled to testimonial trustworthiness notwithstanding the several omissions proved in relation to the evidence given by witness Andrayas at the non-summary Magisterial inquiry.

The issue whether we ought to order retrial or not would depend on whether there is testimonially trustworthy and credible evidence given before the High Court by witness Andrayas. The learned High Court Judge in his judgment has referred to this issue and given his anxious consideration to the omissions which were proved to assail the trustworthiness of witness Andrayas, only in regard to the testimony he has adduced in the Magistrate's Court. Learned trial Judge has stated thus : මහෙස්ත්‍රාත් අධිකරණයේ මෙහෙයවන විට මහුගෙන් විස්තරාත්මක ව ප්‍රශ්න නොකිරීම නිසාත් විය හැකිය. Learned High Court Judge has referred to witness Andrayas' evidence before the learned Magistrate and to the omissions proved and has stated in Sinhala a reason for such omissions. When we perused the non-summary record of his evidence we observed that this evidence runs into just nine lines of evidence. This circum-

stance strengthens and supports the trial Judge's surmise. The issue is – on an evaluation of his evidence could we hold that his evidence is totally unworthy of credit and not entitled to any testimonial trustworthiness? Having regard to the omission proved, in evaluating the testimony of a witness, a Court would be guided by principles of common sense and by certain tests of credibility that are employed to assess credibility. When one goes through proceedings, it is evident that the learned defence counsel had closely looked at the statement made by Andrayas to the Police and also looked at the inquest evidence Andrayas had given before the Magistrate and had attempted to mark contradictions in relation to that statement and the inquest evidence. Vide pages 126 and 129 of the record, where there is a specific reference to contradictions marked 5V1 and 5V2. These contradictions certainly do not cause any dent whatsoever on the testimonial trustworthiness of witness Andrayas. Thus, after the aforesaid attempt failed the resulting position in regard to the Police statement and inquest evidence is that the test of inconsistency and consistency echoes in favour of the witness' credibility. Besides, there are no contradictions and inconsistencies in his evidence *per se* or *inter se*. It has been brought to our notice that Andrayas had made statement to the Police *though he was injured* on the day of the incident itself at 8.00 o'clock in the night. The incident had taken place at about 8.30 in the morning. Further, he had given evidence at the inquest held on the very same day before Magistrate who inquired into this violent death. Thus, it is in evidence that witness Andrayas had made his statement at the earliest opportunity which presented itself and therefore the test of spontaneity and contemporaneity is in his favour. By proving omissions is another method of assailing the testimonial trustworthiness of a witness. This right accrued as a result of the judicial decision pronounced by Justice Alles in *Queen v. Muthu Banda*[10] particularly at page 11. Justice Alles related the right to mark omissions and proof of omissions to the right of the Judge to use the Information Book to ensure that the interests of justice are satisfied. Omissions do not stand in the same position as contradictions and discrepancies. Thus, the rule in regard to consistency and inconsistency is not strictly applicable to omissions. His Lordship remarked

that the Judge who has the use of the Information Book, ought to use this book to elicit any material and prove any flagrant omissions between the testimony of the witness at the trial and his police statement in the discharge of his judicial duty and function in terms of section 122 (3) of the Criminal Procedure Code. When the aforesaid omissions were marked before High Court Judge of Matara, we ought to presume that the High Court Judge would have used the Information Book to assist him at that trial and possibly to evaluate the omissions which have been marked since there were no material contradictions and discrepancies marked by the defence in regard to the Police statement and the inquest evidence given by witness Andrayas. The learned trial Judge has arrived at the conclusion that these omissions are referable to the reason that the witness was not examined adequately at the non-summary inquiry.

The learned trial Judge, who no doubt had the benefit of observing witness Andrayas particularaly in regard to his manner of giving evidence, his inflection, the delivery and the conduct of the witness, both under examination in chief and under cross-examination, would necessarily have had that all important factor of demeanour and deportment to assist him. This Court has only the typescript record and does not have that benefit. Having had that benefit the learned trial Judge having observed the demeanour of the witness has arrived at the favourable findings in regard to Andrayas' demeanour and deportment and observed thus: වැදගත් කරුණු උඩ වූ පරස්පරතාවයන් ලෙස සැලකීමට ඉඩ නොමැත්තේ අත්දුයාස් නැමැත්තා මෙම අධිකරණයේ සාක්ෂි දෙන විට ඔහුගේ හැසිරීම සළකා බලන විටද කිසිසේත් ඔහු බොරු සාක්ෂි කියන්නකු ලෙස සැළකිය නොහැකි බැවිනි. කෙසේ වෙතත් මූලික වශයෙන් ඔහු සත්‍ය කතා කරන සාක්ෂිකරුවෙක් ලෙස ඔහුගේ හැසිරීම අනුව පිළිගැනීමට සිදුවී.

Thus, as Justice Collin Thomé in *Jagathsena v. Bandaranayake*[11] observed the all important factor in the evaluation of evidence, this operates in favour of the testimonial trustworthiness of witness Andrayas. Then, Justice Collin Thomé was dealing with a situation where there were contradictions in the testimony of that witness. Further, there was no impugnment of the fact that witness Andrayas was present

at the scene of the incident. In these attendant circumstances, it is manifest that he had means of knowledge in regard to what he has testified. Thus, test of "means of knowledge" also echoes in his favour. In the circumstances, we are unable to accept the submission that there is no acceptable evidence placed against the first, second, third and fourth accused-appellants before the High Court. However, we wish to emphasise that the sixth accused at the trial who was the fourth accused-appellant in the appeal had given evidence setting up a plea of *alibi* and his evidence has not been seriously impugned or assailed by the prosecution. In the circumstances, we think it would be an injustice to order a retrial against him. Therefore, we proceed to acquit the fourth accused-appellant. We direct that the first, second and third accused-appellants be retried again before another High Court Judge. The appeal of the fourth accused-appellant is allowed. The appeals of the first, second and third accused-appellants are partly allowed. The appeal of the fifth accused-appellant is dismissed.

KULATILAKE, J. – I agree.

Appeal of fourth accused-appellant allowed.
Appeal of first, second and third accused-appellants partly allowed.
Appeal of fifth accused-appellant dismissed.