GUNAPALA AND OTHERS
v.
THE REPUBLIC OF SRI LANKA

COURT OF APPEAL.
A. DE Z. GUNAWARDENA, J. &
ISMAIL, J.
C.A. 23 - 26/29
H.C. RATNAPURA NO. 23/88
FEBRUARY 15 AND MARCH 11,1993.

Criminal law - Dock statements - Alibi - Burden and degree of proof - Evaluation of dock statement.

Held:

(1) (i) The jury must not only be informed that a statement from the dock must be looked upon as evidence subject to the infirmities which attach to statements that are unsworn and not tested by cross-examination, but they must also be directed that -

(a) if they believe the unsworn statement it must be acted upon;
(b) if it raised a reasonable doubt in their minds about the case of the prosecution, the defence must succeed; and
(c) it should not be used against another accused.

(ii) Failure to give the jury such directions constitute a non-direction on an important aspect of the law relating to the evaluation of the evidence given by an accused in the form of an unsworn statement from the dock.

2. An *alibi* is the plea of an accused person that he was elsewhere at the time of the alleged 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.

Cases referred to:

1. *The Queen v. Kularatne* (1968) 71 NLR 529, 551.
2. *Somasiri v. A.G.* (1983) 2 Sri L.R. 225, 235.
3. *The King v. Marshall* (1948) 51 NLR 157, 159.

APPEAL from conviction by the High Court of Ratnapura.

Ranjit Abeysuriya, P.C. with *Lasantha Wickrematunga* and *Miss. S. de Silva* for accused-appellants.

R. Arsakularatne, S.S.C. for Attorney-General.

Cur adv vult.

March 23, 1993.
ISMAIL, J.

The accused-appellants were charged on count one with having been members of an unlawful assembly with Subasinghe Pathiranage Babyhamy, at Thelbaduara, on 2nd September 1983, the common object of which was to cause hurt to Kattadigamage Dayaratne. On the second count they were charged with having committed the murder of the said Kattadigamage Dayaratne on the basis of vicarious criminal liability for the acts of one or more members of the said unlawful assembly and on the third count for having committed the said offence acting in furtherance of the common intention of all of them.

The 2nd and 3rd accused-appellants are the brothers of the 1st accused-appellant. Babyhamy who is referred to in the charges and together with whom they are alleged to have committed the said offences is their mother. She was listed as an accused in the original indictment but as she had died before the commencement of the trial

the charges were thus amended. The 4th accused-appellant is not related to them and does not reside in the area.

The widow of the deceased, Kusumawathie, was the only eye-witness to the incident. Her evidence briefly was that while she was returning home at about 3 or 3.30 p.m. with her husband on a bicycle, the 2nd accused who was walking ahead of them on the road, near his house, dealt a blow with a club as they passed him. The blow struck the deceased and both of them fell off the bicycle. The deceased started running in the direction of his house. The accused-appellants had chased after him and when the deceased had fallen down, she saw from some distance away, the 1st accused-appellant strike the deceased with a sword. At this stage the other accused-appellants who were armed were collected around the deceased who was lying fallen on the ground. They then dragged the deceased from the place where the injuries had been inflicted on him to the verandah of the house of the first three accused-appellants.

According to the medical evidence the deceased had sustained a deep 4 1/2" long incised injury on the back of his head. This injury had caused a fracture of the skull exposing the brain and was a necessarily fatal injury. There was also an 8" long incised wound on the back of his chest, and another incised injury which had almost severed the left leg 1" below the knee. There were also several abrasions on the chest and on the right upper and lower limbs which could have been sustained while the deceased was being dragged along the ground. The cause of death was shock and haemorrhage following the incised injuries.

The 1st accused-appellant was tried *in absentia*. No evidence was led on behalf of the other accused but the 2nd and 3rd accused-appellants, however, made statements from the dock. The 2nd accused-appellant stated that while he was working with his brother Piyadasa in his plot of land they had received information at about 4 p.m. that the deceased Dayaratne had been assaulted and that when they had come home to see what had taken place they saw the deceased lying dead with injuries at the entrance to their house.

Similarly, the 3rd accused-appellant stated that while he was working in a plot of land, a quarter mile away, with his brother, he

received information that there was a "goriya" at their house and that he ran home with his brother. When he went there he saw the deceased Dayaratne lying dead, face upwards with injuries, at the entrance to their house.

Thus the 2nd and 3rd accused-appellants in their unsworn statements, had in effect denied their participation in the attack on the deceased and even their presence at the scene at the time the deceased had sustained injuries. They had come home after the event and had seen the body of the deceased lying with injuries at the entrance to their house. Each of them had thus set up a plea of *alibi* and a denial.

Learned Counsel for the accused-appellants submitted that the accused were prejudiced at the trial by the failure of the trial judge to give the jury necessary directions relating to impact of the dock statements made by them.

Having explained to the jury that the statements made from the dock constituted evidence in the case subject to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination, the trial judge failed to give the jury further directions as to how they should proceed to consider such evidence.

The jury must not only be informed that a statement from the dock must be looked upon as evidence subject to the infirmities attaching to it, but "they must also be directed that, (a) if they believe the unsworn statement it must be acted upon, (b) if it raised a reasonable doubt in their minds about the case of the prosecution, the defence must succeed, and (c) that if should not be used against another accused". – *The Queen v. Kularatne*[1], *Somasiri v. A.G.*[2]. The failure of the trial judge to give the jury such directions constituted a non-direction on an important aspect of the law relating to the evaluation of the evidence given by an accused in the form of an unsworn statement from the dock.

It was further submitted that the trial judge had misdirected the jury on the burden of proof in regard to the plea of *alibi*.

The trial judge had directed the jury that the plea of *alibi* which impliedly arose on the unsworn statements made by the 2nd and 3rd accused appellants had to be proved by them on a balance of probability. Imposing such a burden on the accused to prove the defence of *alibi* constituted a misdirection on the law in regard to the burden of proof.

He informed them further that no other evidence had been placed before them to show that the 2nd and 3rd accused-appellants were not present at the scene. Implicit in this direction is that there is a burden on the accused to adduce evidence that they were elsewhere at the time of the commission of the offence.

An *alibi* is the plea of an accused person that he was elsewhere at the time of the alleged 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. This aspect of the plea of *alibi* was explained by Dias, J. in *The King v. Marshall* [3] as follows;

> "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 sufficient 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."

Having regard to the non-direction relating to the dock statement which amounted to a misdirection, and the misdirection in regard to the burden of proof when a plea of *alibi* is set up, we are of the view that the learned trial judge erred in law and grave prejudice had been caused to the accused at their trial. We are therefore of the view that the verdict of the jury should be set aside. We therefore quash the convictions and set aside the sentences imposed upon the accused-appellants and allow the appeals.

However, we order that a fresh trial be held in this case, as we are of the view that there was sufficient evidence before the jury upon which the accused-appellants might reasonably have been convicted if the jury were properly directed.

DR. A. DE Z. GUNAWARDENA, J. – I agree.

Conviction set aside.
Re-trial ordered .