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DIGEST

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(2) Offending item of bad character evidence has crept into the record and formed part of the proceedings. This is extremely prejudicial to the interest of the accused, and would adversely affect the right of an accused to a fair trial. The nature of the bad character evidence admitted has a direct bearing on the question of the accused 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 death, which is a *sine qua non* in maintaining a charge of attempted murder under Section 300.

Per Sarath de Abrew.J

> "The robbery charge is defective as Section 383 is not a section that creates an offence. The State Counsel and the learned trial Judge have neglected to amend this charge appropriately to be read with Section 380".

APPEAL from the judgment of the High Court of Gampaha.

Cases referred to:-

1. *A.G. vs. Viraj Apponso* - SC 24/2001
2. *Nissanka v. State* - 2001 - 1 Sri LR 78
3. *Keerthi Bandara v. A.G.* – 2002- 2 Sri LR 245
4. *AG vs. W.J. Aloysius and others* – CA 1700/84- CAM 3.9.1992
5. *Regina vs. Turnbull and another* - 197- QB 224 at 228
6. *W.A. Fernando vs. Queen* 76 NLR 265
7. *Wijepala vs. A.G.*- 2001 (1) Sri LR 46
8. *A.G. vs. K.M. Premachandra and two others*- CA 39-41/97
9. *In Re Gunarathna Banda* - Law of Evidence E.R.S.R. Coomaraswamy Vol.1

10. Heenbanda vs. Queen - 1969 SC - 113/68

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 sufficient 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 convicted the appellant on both counts on 28.10.2004 and sentenced him to 20 years rigorous imprisonment and

a fine 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 identification of the accused. The medical officer 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 official witnesses who conducted and participated at the Identification Parade held on 06.08.98 exactly 50 days after the incident. Police witness 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 conclusion of the prosecution case the accused had not called evidence but confined 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 identification parade.

The facts pertaining to this case are briefly 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

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 officer 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 sufficient 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

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 connection 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 Identification parade 50 days after the incident on 06.05.98 conducted by the Attanagalle acting Magistrate and was identified by the complainant, followed by dock identifications 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 Nittambuwa 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 "මේ වගේ තමයි " thereafter the police took the accused to his residence and spent half an hour there and returned the

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 identification 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 Identification Parade and the improper constitution of the parade itself generating a reasonable doubt as to the question of proper identification.

(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

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 fingerprints or failure to obtain fingerprints 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 fit and proper case to order a retrial, in view of *Attorney General Vs Viraj Aponso* [1]

The learned Deputy Solicitor General for the Respondent 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 first ground of appeal is the question of proper identification 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 identification

parade held belatedly on 06.05.98 (P1) was effected 50 days later. The 2nd identification was a dock identification at the non-summary inquiry over two years later on 04.07.2000. The 3rd identification too was the dock identification 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 identification 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 identification 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 identified as the perpetrator beyond reasonable doubt, the following salient features have to be noted.

(a) The identification 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 represented by Counsel to safeguard his interests at the parade.

(d) The identification parade itself should be properly and fairly constituted with regard to the age, sex, number of participants and mode of dress in order to obviate 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 officer who selects and hustles in the first available persons at random as participants at the parade.

(e) The witness must be questioned and his description 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 identification 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 identification parade is held at a pre-trial stage, the admission of evidence of identification 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.

(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 identification.

(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 identification 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

test whether the appearance of his assailant was still fresh in his mind.

Due to the above circumstances I am firmly of the view that the learned trial Judge has misdirected himself in admitting the evidence of identification at the parade which would create a grossly adverse effect on the fairness proceedings in violation of the right to a fair trial enshrined in Article 13(3) of the Constitution. The learned trial Judge has called the Identification Parade a farce and still admitted this improper evidence, while stating that an identification parade was not at all necessary in view of the dock identifications 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 guidelines set out was whether there was any material discrepancy between the description of the accused given to the police by the witness when first 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

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 identification 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 General*[7]. Under the above circumstances, the learned trial judge has misdirected 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 identification at the parade, in the same breath, the learned trial judge has remarked that the parade was not necessary due to the subsequent dock identifications 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 identification. Applying this dictum to the facts of this case, if there is a genuine doubt whether the complaint could effect a valid identification at a parade held 50 days after the incident, it would be nothing but reasonable to assume that subsequent dock identifications several years later too would be impregnated with serious doubts as to the genuiness of the identification in the backdrop of the disparity in appearance of the description given to the police and the accused in the dock.

In all the circumstances in this case, I am of the view, that in the absence of substantive evidence of identification at a fair and properly constituted identification 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 identification several years later would not eliminate the generation of a reasonable and justifiable doubt as to the veracity and genuiness of the identification, 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 identification 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 officers had taken the trouble to obtain possible finger 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 production of a valid detention order, it would suffice to draw attention 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

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 prosecution. 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) "මෙම තැනැත්තා දරුණු ගනයේ අපරාධකරුවෙක් බවට ලැබුණු තොරතුරු මත අත්අඩංගුවට ගැනීමට ගියේ."

Page 177 – (cross-emamination) "මා ඉහත කී පරිදි ප්‍රදේශයේ මංකොල්ල හා මිනීමැරුම් සම්බන්ධයෙන් කණ්ඩායමක නායකයකු වශයෙන් කරුණු අනාවරණය වුණා."

Page 190 - "මෙවන් අපරාධකරුවකු කිසිදිනක බස් එකක ගෙන යන්නේ නැහැ. රැකවරණය ඇතිවයි ගෙනයන්නේ".

Page 191 – 192 - In cross-examination, in response to questions by the defence counsel, S.I. Premasundera has adduced evidence regarding cases filed against the accused by Mirigama, Divulapitiya and Veyangoda police stations.

Therefore it would appear, the learned trial Judge in his judgment, confines himself to evidence of bad character led by the defence counsel in cross-examination and ignores 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

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 criminal. 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 manifestly 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; *Coomaraswamy 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

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 findings 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 whether 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 maintaining a charge of attempted murder under section 300 of the Penal Code. (Count 01).

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

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 infirmities in the visual identification and influx 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 circumstances, 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 consideration other deficiencies enumerated above, and the fact that no purpose would be served in the complainant making another dock identification 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.

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 Importation – trafficking – 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, trafficking 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.

(3) 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. 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 justifiable 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 180
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

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 traffick 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

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 officers 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 platform 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. Thereafter 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 officers 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 fire at the boat and arrested it with 4th, 5th and 6th Appellants who were in the

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 position. 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 testified 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 1st appellant's father and his complaint to the gramasevaka on the following afternoon give credence to the defence story that the arrest

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 benefit 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 statement 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 proceeded 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 testified that there was no ice in the cold room of the boat and no fish in the boat. There was a unused fishing 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

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 record a verdict of not guilty if the court finds 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 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."

In the case of *Gunapala and Others vs. The Republic 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

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 find 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 trafficking?
- The improbabilities of the defence version as stated by the learned Deputy Solicitor General.
- Items of circumstantial evidence favourable to the the 2nd Appellant.

- 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 Fernando. 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 testified 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.

With regard to the fact that whether the 1st and 2nd accused appellants went to the boatyard on 18.04.2001 it is my firm 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 premise 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 evidence where he has taken it verbatim from the written submissions 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 evaluating 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.

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 unreasonable 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 submitted that the learned trial judge has misapplied the presumption 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 judgment clearly reveals that although the learned trial judge has referred to the section 114(f) of the Ordinance he has not