

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an application for special leave to Appeal against the judgement of the High Court of Province, Kegalle dated 08.12.2010.

1. Dissanayake Rallage Ranasingha
Karuppattiya, Nelundeniya

2. Dissanayake Rallage Wijesinghe
Karuppattiya, Warakapola

SC Appeal No. 39/2011 & 39^A/11
HC, Kegalle Case No. 3452/Appeal
MC. Warakapola Case No. 28467

1st and 3rd Accused-Appellant-Appellant

Vs.

1. Officer-in-Charge
Police Station,
Warakapola

Complainant 1st Respondent-Respondent

2. Hon. Attorney General
Attorney General's Department
Colombo 12.

2nd Respondent-Respondent

Before : Tilakawardane, J
Dep, PC J &
Wanasundera, PC, J

Counsel : Sunil Abeyrathne for the 1st Accused-Appellant-
Petitioner

Shanaka Wijesinghe, SSC for AG

Argued on : 05.07.2013

Decided on : 02-04.2014

Priyasath Dep, PC, J

This appeal is against the judgment of the Provincial High Court of Sabaragamuwa holden in Kegalle which affirmed the conviction and sentence imposed by Magistrate Court of Warakapola in Case No. 28467.

The Accused-Appellants namely (1) D.R. Ranasinghe alias Ukkun , (2). D.R. Amarasinghe alias Bandara and (3). D.R. Wijesinghe were charged in Magistrate's Court of Warakapola for committing the following offences:

1. That on or about 7th December 2003 at Nelundeniya you did cause grievous hurt to Lal Anura Kumara by cutting him with a sword an offence punishable under section 317 read with section 32 of the Penal Code.
2. That at the time and place aforesaid and in the course of the same transaction you did cause hurt to A.R. Rathnasena by assaulting with a club an offence punishable under Section 314 read with section 32 of the Penal code.
3. That at the time and place aforesaid and in the course of the same transaction did cause injury to A.R. Rathnasena by stabbing him, an offence punishable under section 315 read with 32 of the Penal Code.
4. That at the time and place aforesaid and in the course of the same transaction you did commit robbery of a gold chain worth Rs. 23,000/- in the possession of A.R. Rathnasena an offence punishable under section 380 read with 32 of the Penal Code.

The prosecution led the evidence of the injured Anura kumara and Rathnasena who are two brothers. According to them on the day in question at about 5.30p.m. both of them with one Susantha Pieris went towards the house of Jagath to call him to repair their house which was destroyed by fire. Susantha went to Jagath's house to bring Jagath. These two witnesses were staying near a rock waiting for Jagath. This place is about 30-40-meters from the house of the 2nd Accused Amarasinghe alias Bandara. Susantha returned stating that Jagath is not at home. These witnesses then decided to go to their homes along the road passing the house of Amerasinghe alias Bandara when this incident took place.

Witness Anura Kumara in his evidence stated that 2nd Accused Amerasinghe (Bandara) came running towards them and threw stones at them. Thereafter Bandara stabbed his brother Rathnasena and the 3rd Accused cut him with a sword. When the commotion was taking place neighbours rushed to the scene and took the witness to their homes and thereafter dispatched them to the hospital .He was in hospital for five days. In his evidence this witness did not refer to the presence of the 1st accused Ranasinghe. His medical legal report was maked as P2. According to the medical legal report of A.R. Lal Anurakumara he had an incised wound on the left side of the forehead which had fractured the frontal bone of the skull. Injury was regarded as a grievous injury caused by the sharp cutting weapon.

Witness Ratnasena while giving evidence stated that the 2A Amerasinghe alias Bandara stabbed him and robbed his gold chain. He stated that 1A assaulted him with a pole.

3rd Accused cut his brother Anura kumara with a sword. According to the medical report which was marked as P2, he had a lacerated wound located on the left side of the forehead which was caused by a blunt weapon and an incised wound located on the left side of the chest caused by a sharp cutting weapon

Prosecution thereafter led the evidence of the investigating officer Inspector Karunathileke who gave evidence regarding the visit to the scene of the crime, recording of statements and investigations carried out by him. The defence suggested to this witness that he was a partial witness and did not carry out the investigations properly and he did not inquire into the complaint made by 2nd Accused Amerasinghe against the prosecution witnesses.

The prosecution did not call witness Susantha Pieris who was with the injured at the time of the incident. Susantha Pieris is a person of criminal disposition and his evidence will not add any weight to the evidence given by the other prosecution witness. According to section 134 of the Evidence Ordinance particular number of witnesses are not required to establish a fact. Therefore it is not possible to draw an adverse inference under section 114 (F) of the Evidence Ordinance for the failure on the part of the prosecution to call Susantha Peiris as a witness. This question was considered in *Walimunage John v. The State* 76 NLR 488.

When the trial was proceeding the 2nd Accused Amarasinghe alias Bandara died and the case proceeded against 1st and 3rd Accused.

After the close of the case for the prosecution, the learned Magistrate called upon the Accused for their defence. 1st and 3rd Accused gave a evidence under oath and they were cross examined at length by the learned Counsel appearing for the prosecution. The 1st Accused stated that on the day of the incident he went to see his father-in-law who had an eye surgery and when he returned home he came to know that an incident had taken place near his brother's (Bandara's) house. He stated that he was falsely implicated because he took his brother to the hospital.

The 3rd Accused in his evidence stated that he was in the village but was not involved in the incident. 2nd accused Amarasinghe's wife Podi Menike gave evidence. She stated that witnesses Anura kumar, Rathnasena and Susantha Pieris who were passing her house inquired about her husband Amarasinghe. She had stated that Amarasinghe had gone to Society Hall which is about 100 meters from her house. After about half an hour her husband returned home. Susantha Pieris Rathnasena and Anurakumar came to the compound of their house. Susantha Pieris had a knife and Rathnasekera carried a club. A person whom she could not identify attacked Amarasinghe with a club. Amarasinghe had bleeding injuries. She raised cries and thereafter she took Amarasinghe to the Police station in a three wheeler. On the way they met 1st Accused Ranasinghe who also came along with them to the Police station. Amerasinghe made a statement to the Police and he was admitted to the hospital and was in the hospital for two days. She stated that at the time of the incident 1st Accused and the 3rd Accused were not there. She stated that Susantha Pieris is angry with her family because they made a complaint against Susantha Pieris for stealing goods worth Rs. 23,000/- from her mother's house. After

leading the evidence of 1st and 3rd Accused and of Podimenike the defence closed its case.

The learned Magistrate convicted the accused on all four counts. The learned Magistrate imposed a sentence of 2 years rigorous imprisonment and a payment of Rs. 3000/- as compensation on count one. On count 2 and 3 six months rigorous imprisonment was imposed which was suspended and the Accused were ordered to pay a fine of Rs. 1500/- as compensation in respect of each count. On count 4, 2 years rigorous imprisonment and a fine of Rs. 1500/- was imposed.

Being aggrieved by the judgment of the learned Magistrate, the accused filed an appeal to the High Court. The High Court dismissed the appeal and affirmed the conviction and sentence. The accused filed a Special leave to Appeal application and obtained leave.

The main grounds of appeal are:

1. Whether the learned Magistrate and the Hon Judge of the High Court failed to properly evaluate the evidence led in the trial ?
2. Did the learned Magistrate and Hon. Judge of the High Court fail to give reasons for rejecting the defence evidence. ?
3. Did the learned Magistrate and the Hon. Judge of the High court had erroneously apply the Ellenborough dictum in the absence of a strong prima facie case ?

The main issue in this case is whether the learned Magistrate properly considered the evidence against 1st and 3rd accused or not. The 2nd accused Amarasinghe's involvement is established. The question is whether the 1st and 3rd accused were involved in the incident or not, or whether they were falsely implicated because of the involvement of their brother Amerasinghe. Witness Anura Kumara in his evidence did not refer to the 1st Accused. There are several infirmities and contradictions in the prosecution case.

The evidence indicates that that injured Anura kumara, Rathnasena, Susantha Pieris and Chamida gathered near the house of Amarasinghe and went in front of Amerasinghe's house to confront him and a fight ensued and in the course of which 2nd accused Amarasinghe and two prosecution witnesses received injuries.

1st accused and the 3rd accused gave evidence under oath and stated that they were elsewhere at the time of the incident. This plea of alibi was supported by the wife of Amarasinghe. The question is whether the learned Magistrate examined their evidence carefully. In a long line of authorities starting from Yehonis Singho v. Queen 67 NLR8, followed by Chandradasa vs Queen 72 NLR 160, Puchi Banda v.State 76 NLR 293, the Supreme Court referred to the matters that should be considered by a trial judge when dealing with a plea of alibi. They are:

1. If the alibi is true the accused is entitled to an acquittal
2. If it is probably true or probably untrue it raises a reasonable doubt in the prosecution case and the accused is entitled to an acquittal.

3 Even if the alibi is rejected, the prosecution has to establish its case beyond reasonable doubt.

The learned Magistrate and the learned High Court judge failed to properly evaluate the plea of alibi put forward by the Accused. I am of the view that the evidence of the accused raises a reasonable doubt in the prosecution case. Therefore they should be acquitted of all charges.

Learned Magistrate applied the dictum of Lord Ellenborough in *Rex v. Cochrane, Garney's Reports*, page 479. Ellenborough's dictum states:

“ 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 fallacious 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 would operate adversely to his interest”.

This dictum was applied in several cases including *The King Vs. L. Seeder de Silva* 41 NLR page 337, *The King Vs. Geekiyanage John Silva* 46 NLR 73, *Queen Vs. Seetin* 68NLR 316, *Republic Vs. Illangathilaka* 1984 2 SLR page 38, *Chadradasa Vs. Queen* 72 NLR page 160.

This dictum could be applied in cases where there is a strong prima facie case made out against the Accused and if he refrains from explaining suspicious circumstances attach to him when it is in his own power to offer evidence. In such a situation an adverse inference can be drawn against him,

In this case one cannot say that there is a strong prima facie case for the accused to offer any evidence. However 1st and 3rd Accused gave evidence and put forward a plea of alibi which raises a reasonable doubt in the prosecution case. There is a reasonable doubt regarding the involvement of the 1st and 3rd Accused as there is a possibility of falsely implicating them in view of the involvement of their brother Amerasighe who is the 2nd Accused.

In *James Silva v. the Republic of Sri Lanka* (1980) 2 Sri.l R p167 at176 following the Privy Council case of *Jayasena v. The Queen* 72 NLR 313 (PC) stated;

A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty.

I am of the view that the learned Magistrate had failed to properly evaluate the evidence led in the trial and erroneously applied the Ellenborough Dictum to the facts of this case which was unwarranted. Therefore the Accused –Appellants are entitled to an acquittal.

For the reasons set out above, I quash the conviction and the sentence imposed on 1st and 3rd accused and acquit them of all charges.

Judge of the Supreme Court

Shiranee Tilakawardena, J.
I agree.

Judge of the Supreme Court

Eva Wanasundera , PC. J
I agree.

Judge of the Supreme Court