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

Officer-in-charge,
Police Station, Rambukkana
Plaintiff

SC APPEAL NO: SC/APPEAL/61/2023
PHC KEGALLE NO: 5626/APPEAL/2020
MC MAWANELLA NO: 45778

Vs.

Nandana Kumarage Sujeewa
Nishanka Karunarathna,
Near Kadigamuwa Temple,
Kadigamuwa.
Accused

AND

Nandana Kumarage Sujeewa
Nishanka Karunarathna,
Near Kadigamuwa Temple,
Kadigamuwa.
Accused-Appellant

Vs.

1. Officer-in-charge,
   Police Station, Rambukkana
   Plaintiff-Respondent

2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.
   2nd Respondent

AND NOW BETWEEN

Nandana Kumarage Sujeewa
Nishanka Karunarathna,
Near Kadigamuwa Temple,
Kadigamuwa
Accused-Appellant-Appellant

Vs.

1. Officer-in-charge,
   Police Station,
   Rambukkana
   Plaintiff-Respondent-Respondent

2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.
   2nd Respondent-Respondent-Respondent

Before: Hon. Justice P. Padman Surasena
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: Dr. Sunil Abeyratne with Sanduni Walawege and Hasala Gunathilake for the Accused-Appellant-Appellant.

Lakmali Karunanayake, Senior Deputy Solicitor General for the Attorney General.

Argued on: 20.06.2024

Written Submissions:

By the Accused-Appellant-Appellant on 20.06.2023 and 22.08.2024

By the 2nd Respondent-Respondent on 10.11.2023

Decided on: 09.10.2024

Samayawardhena, J.

Introduction

The accused-appellant (accused) was charged in the Magistrate's Court of Mawanella with voluntarily causing grievous hurt to his uncle (the younger brother of the accused's father) on 15.01.2013 by assaulting him with a club, an offence punishable under section 316 of the Penal Code. At the trial, in addition to the injured person, five other witnesses testified for the prosecution. For the defence, the accused, his parents, and one Kapila gave evidence. The accused denied the assault and took up the defence of alibi. He stated that he was at Warakapola at the material time and that his uncle's injuries were caused by his father, not by him. The learned Magistrate rejected the defence of alibi and convicted the accused. On appeal, the High Court affirmed the conviction. Hence this appeal by the accused.

The two questions of law on which leave to appeal was granted are as follows:

(a) Did the learned High Court Judge erroneously exclude the defence of alibi?

(b) Did the learned High Court Judge erroneously conclude that the accused committed the offence despite insufficient evidence?

Insufficient evidence

The question (b) above is primarily based on identification. There are no other eye-witnesses who saw the accused assaulting the injured person. The injured person identified the accused as his assailant. He was assaulted with an object, which he thinks was an iron rod, resulting in grievous injury to his right hand. The Medico-Legal Report supports this version. Since he is the son of his brother, there could not have been a difficulty in identification although the incident took place around 7.00 pm. All were living on the same land. The evidence of the wife of the injured person was that she ran to the place where her injured husband was lying fallen after hearing him shouting that Sujeewa had assaulted him. Sujeewa is the accused.

There was a motive behind this assault. On the same day, prior to the incident in question, the injured person, while under the influence of alcohol, had committed house trespass and attempted to stab the accused's father with a knife. The evidence of the accused's parents in the instant case was that, during that incident, the accused's father who is visually impaired (a blind person) had defended himself by striking the injured person with his walking stick. This has not been believed by the learned Magistrate. It is improbable that a grievous injury, such as an open fracture of the distal humerus above the elbow joint of the right arm as described in the Medico-Legal Report, could have been inflicted by a walking stick, particularly by a person who is visually impaired. In relation to the previous incident, the police had filed a separate case, which resulted in the conviction of the injured person in this case. He

was ordered, among other penalties, to pay a sum of Rs. 15,000 as compensation to the accused's father.

There had been long-standing enmity between the accused's father and the injured person (two brothers) over some land disputes. As the learned Magistrate correctly points out, when enmity exists between the two brothers, there is no reason for the injured person to falsely implicate his nephew for the assault instead of his brother.

I am not inclined to think that the Magistrate's Court convicted the accused on insufficient evidence.

Defence of alibi

The main contention of learned counsel for the accused before this Court is that the learned Magistrate and the learned High Court Judge who affirmed the conviction erred in rejecting the defence of alibi. An "alibi", originating from the Latin word for "elsewhere", typically serves as a defence whereby the accused contends that he was not present at the scene of the crime during the material time but was instead at a specific other location, thus rendering his participation in the offence certainly impossible. Section 126A(3) of our Code of Criminal Procedure Act No. 15 of 1979 and section 6A(3) of the UK Criminal Procedure and Investigations Act 1996 provides a comparable definition.

An alibi is a strong defence that, if accepted, entirely destroys the prosecution case. By demonstrating that the accused was elsewhere, the alibi conclusively negates the prosecution's ability to prove the accused's participation in the alleged offence.

However, the defence of alibi taken up by the accused in this case is not entitled to succeed primarily because the accused disclosed this defence for the first time in his evidence. This defence was never suggested to any

of the prosecution witnesses including the two police witnesses who investigated this incident. There is no evidence that the accused disclosed such a defence in his statement to the police or at any time during the police investigation.

Section 126A of the Code of Criminal Procedure Act

The defence of alibi is now governed by statutory provisions, not by common law. The Code of Criminal Procedure Act No. 15 of 1979 was amended by the Code of Criminal Procedure (Amendment) Act No. 14 of 2005 by which section 126A was introduced.

> *126A (1) No person shall be entitled during a trial on indictment in the High Court to adduce evidence in support of the defence of an alibi, unless he has—*
>
> *(a) stated such fact to the police at the time of his making his statement during the investigation; or*
> *(b) stated such fact at any time during the preliminary inquiry; or*
> *(c) raised such defence, after indictment has been served, with notice to the Attorney-General at any time prior to fourteen days of the date of commencement of the trial:*
>
> *Provided however, the Court may, if it is of opinion that the accused has adduced reasons which are sufficient to show why he delayed to raise the defence of alibi within the period set out above, permit the accused at any time thereafter but prior to the conclusion of the case for the prosecution, to raise the defence of alibi.*
>
> *(2) The original statement should contain all such information as to the time and place at which such person claims he was and details as to the persons if any, who may furnish evidence in support of his alibi.*

> *(3) For the purposes of this section "evidence in support of an alibi" means evidence tending to show that by reason of the presence of the defendant at a particular place or in particular area at a particular time he was not, or was not likely to have been, at the place where the offence is alleged to have been committed at the time of the alleged commission.*

In terms of section 126A(1) of the Code of Criminal Procedure Act, no person on trial in the High Court may raise the defence of alibi unless he had raised it during the investigation, providing all relevant details in support of the alibi, or has notified the Attorney General at least 14 days prior to the trial. The legislature now places an onus on the accused to give prior notice of the defence of alibi. If the accused fails to do so, it does not merely weaken the alibi but renders it inadmissible. This principle should apply not only to trials before the High Court but also to those before the Magistrate's Court.

In terms of section 126A(2) and (3), a mere statement by the accused claiming that he was not present at the scene of the offence is insufficient. The disclosure of an alibi should be given with sufficient particularity to enable the police to meaningfully investigate the defence of alibi. Hence, such disclosure of an alibi must not only state that the accused was not present at the location of the crime when it was committed, but also specify where he was at that time, and the names of any witnesses supporting the alibi. Section 6A(2) and (3) of the UK Criminal Procedure and Investigations Act 1996, which cover the same, are couched in stronger terms.

However, according to the proviso to section 126A(1), the Court may permit the defence of alibi to be raised later, but before the conclusion of the prosecution case, if sufficient and satisfactory reasons for the delay are provided. In this regard, the Court should exercise its discretion

judicially, not arbitrarily. In Sri Lanka, as the law stands today, the defence of alibi cannot be raised for the first time during the defence case as was done in the instant case. If the Court permits, it must be before the conclusion of the prosecution case.

The failure to disclose an alibi timeously is a factor which can properly be taken into account in the evaluation of the evidence as a whole. Alibi evidence presented for the first time at trial does not carry the same weight or persuasive force as it would if it was raised promptly at the outset of the accusation and consistently upheld throughout. If the alibi is genuine, the accused could easily refute the baseless accusations by disclosing his whereabouts to the police at the time of the incident. He should be able to provide full details timeously, enabling further investigation and potentially preventing charges from being filed against him. It would be unlikely, if not improbable, for an accused who was genuinely elsewhere at the time of the offence to withhold such a defence and wait until criminal proceedings are instituted to disclose it for the first time during trial.

However, I must hasten to add that the pre-trial silence of an accused person should not be construed as an inference of guilt. As will be discussed further in this judgment, there may be several reasons for withholding information or making false statements during investigation.

In *Williams v. Florida*, 399 U.S. 78 (1970), the U.S. Supreme Court upheld a Florida statute requiring a defendant intending to rely on an alibi to disclose the names of his alibi witnesses to the prosecution, which failure could result in the exclusion of such evidence at trial. The Supreme Court held that the notice-of-alibi rule does not violate the defendant's rights to due process, a fair trial or the privilege against self-incrimination. Delivering the opinion of the Court, Justice White, at pages 81-82, observed that the administration of justice is not akin to a "*poker game*

in which players enjoy an absolute right always to conceal their cards until played" but rather a serious proceeding aimed at uncovering the truth.

> *Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.*

The Constitutional Court of South Africa in the case of *Thebus and Another v. The State* [2003] ZACC 12 at para 68 stated:

> *The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole.*

The European Court of Human Rights in the case of *John Murray v. The United Kingdom* (Application No. 18731/91, decided on 8 February 1996, at para 47) held:

> *On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly*

on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.

Wherever the line between these two extremes is to be drawn, it follows from this understanding of "the right to silence" that the question whether the right is absolute must be answered in the negative.

It cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him. In particular, as the Government have pointed out, established international standards in this area, while providing for the right to silence and the privilege against self-incrimination, are silent on this point.

Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.

Burden of proof of alibi

Under Section 5 of the Evidence Ordinance, evidence may be given only regarding facts in issue and relevant facts. Evidence admitted in disregard of this provision is deemed improperly admitted, and a conviction may be quashed if such evidence results in a miscarriage of

justice (*The Queen v. Sodige Singho Appu* (1959) 62 NLR 112). Section 5 of the Evidence Ordinance enacts:

> *Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant and of no others.*

According to section 11 of the Evidence Ordinance, facts that are inconsistent with the fact in issue are deemed relevant. Alibi evidence can be led on this basis. Section 11 of the Evidence Ordinance states:

> *Facts not otherwise relevant are relevant—*
>
> *(a) if they are inconsistent with any fact in issue or relevant fact;*
> *(b) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.*
>
> *Illustration*
>
> *(a) The question is, whether A committed a crime at Colombo on a certain day. The fact that on that day A was at Galle is relevant. The fact that near the time when the crime was committed A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.*

According to section 103 of the Evidence Ordinance the burden is on the accused to prove alibi.

> *The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

Illustration

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

Quoting this illustration, Prof. G.L. Peiris in his book *The Law of Evidence in Sri Lanka*, 1st Edition (1974), page 411 states "*The particular fact is one in the existence of which he wishes the court to believe. Accordingly, in keeping with the principle recognized by section 103, the burden of proof as to the particular fact lies upon B.*"

Section 3 of the Evidence Ordinance defines what is meant by proved and disproved:

A fact is said to be proved when, after considering all the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

A fact is said not to be proved when it is neither proved nor disproved.

The Penal Code recognizes both general and special exceptions to criminal liability, and in such cases also, the burden falls on the accused to establish these exceptions. The accused should prove any general or special exception on a balance of probability (*The King v. Don Nikulas Buiya* (1942) 43 NLR 385, *Perera v. Republic of Sri Lanka* [1978-79] 2 Sri LR 84, *Chaminda v. Attorney General* (SC/APPEAL/97/2012, SC Minutes

of 13.09.2023). The burden of proof in relation to general and special exceptions are dealt with under section 105 of the Evidence Ordinance:

> *When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.*

Section 4(2) of the Evidence Ordinance states that "*Whenever it is directed by this Ordinance that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved.*"

The Court of Criminal Appeal in *The King v. James Chandrasekera* (1942) 44 NLR 97 acknowledged the fact that the burden rests on the accused to prove exceptions to criminal liability:

> *Where, in a case in which any general or special exception under the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the Jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is not entitled to be acquitted if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the minds of the Jury as to whether he is entitled to the benefit of the exception pleaded.*

The fundamental principle in criminal law is that the burden of proving the charge beyond a reasonable doubt lies solely with the prosecution and never shifts to the accused. That refers to the overall burden of proof or legal burden contemplated in section 101 of the Evidence Ordinance. Therefore, the shifting of the burden referred to previously does not diminish the prosecution's responsibility to prove the case beyond a

reasonable doubt. The burden shifts only after the prosecution has established its case, not before that stage is reached. In *James Chandrasekera's* case, Howard C.J. at page 112 explained this as follows:

> *Section 105 of our Evidence Ordinance in no way lessens the onus which always remains upon the prosecution. All that section lays down is that:- "When a person is accused of any offence, the burden of proving the existence of circumstances, bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances", and illustration (b) to that section shows that, inter alia, the burden of proving sudden provocation (which would reduce the offence, in accordance with the terms of Exception 1 to section 300 of the Penal Code, to one of culpable homicide not amounting to murder) is a burden which is on the accused. This burden, however, can never arise unless the Crown has already produced evidence sufficient in law to satisfy the Jury, in the absence of evidence from the defence, that the killing amounted to culpable homicide committed with one of the intentions or with the knowledge described in section 300 of the Penal Code.*

It may be relevant to refer to the Indian jurisprudence regarding the burden of proof of alibi as the statutory provisions in Sri Lanka and India are analogous. While our Courts are hesitant to declare that the accused must prove an alibi, the Supreme Court of India has consistently held that the onus is on the accused to prove an alibi with affirmative evidence.

Sarkar's Law of Evidence, Vol I, 15th Edition (1993), page 210 states:

> *A plea of alibi must be proved with absolute certainty so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence (State of Maharashtra v. Narsingrao Gangaram Pimple, AIR 1984 SC 63, 67: 1984 Cri LJ 4; Mukter Ahmed v. State, 1983 Cri LJ NOC 221 (Cal) (DB); Dalel Singh v. Jag Mohan Singh, 1981 Cri LJ 667 (Del): 1981 Rajdhani LR 68).*

In *Binay Kumar Singh v. The State of Bihar* (AIR 1997 SC 322), speaking on behalf of the Supreme Court of India, Thomas J. held at page 328:

> *We must bear in mind that alibi not an exception (special or general) envisaged in the Indian Penal code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (A) given under the provision is worth reproducing in this context:*
>
> *"The question is whether A committed a crime at Calcutta on a certain date; the fact that on that date, A was at Lahore is relevant."*
>
> *The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on*

> *the accused, who adopts the plea of alibi to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide Dudh Nath Pandey v. State of Utter Pradesh (1981) 2 SCC 166; state of Maharashtra v. Narsingrao Gangaram Pimple AIR 1984 SC 63).*

In the Supreme Court case of *Rajindra Singh v. State of U.P. and Another* (AIR 2007 SC 2786 at 2790), Mathur J. declared:

> *That apart, the plea taken by the respondent Kapil Dev Singh in his petition under Section 482 Cr.P.C. was that of alibi. Section 103 of the Evidence Act says that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is proved by any law that the proof of that fact lies on any particular person. The second illustration to section 103 reads as under:*
>
> *"B wishes the Court to believe that at the time in question, he was elsewhere. He must prove it."*

> *This provision makes it obvious that the burden of establishing the plea of alibi set up by the respondent No. 2 in the petition filed by him under Section 482 Cr.P.C. before the High Court lay squarely upon him. There is hardly any doubt regarding this legal proposition. See Gurcharan Singh v. State of Punjab AIR 1956 SC 460, Chandrika Prasad Singh v. State of Bihar AIR 1972 SC 109 and State of Haryana v. Sher Singh AIR 1981 SC 1021.*

In *State of Maharashtra v. Narsingrao Gangaram Pimple* (AIR 1984 SC 63 at 67), Fazal Ali J. stated that alibi must be proved with absolute certainty:

> *It is well settled that a plea of alibi must be proved with absolute certainty so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence.*

In a similar vein, in *Dhananjoy Chaterjee v. State of West Bengal* (1994 (2) SCC 220), the Supreme Court of India emphasized the necessity of proving alibi by cogent and satisfactory evidence:

> *Though it is not necessary for an accused to render an explanation to prove his innocence and even if he renders a false explanation, it cannot be used to support the prosecution case against him and that the entire case must be proved by the prosecution itself but it is well settled that a plea of alibi, if raised by an accused is required to be proved by him by cogent and satisfactory evidence so as to completely exclude the possibility of the presence of the accused at the place of occurrence at the relevant time. The belated and vague plea of alibi of which we find no whisper during the cross-examination of any of the prosecution witnesses and which has not been sought to be established by leading any evidence is only an afterthought and a plea of despair.*

The Supreme Court of India in *Jayantibhai Bhenkarbhai v. State of Gujarat* (AIR 2002 SC 3569) made it clear that the burden shifts to the accused to establish the alibi with certainty only after the prosecution has proved the accused's guilt beyond a reasonable doubt.

> *The burden of proving commission of offence by the accused so as to fasten the liability of guilty on him remains on the prosecution and would not be lessened by the mere fact that the accused had adopted the defence of alibi. The plead of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has been discharged satisfactorily. If the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving of the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the Court would evaluate the prosecution evidence to the see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the*

> *defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court.*

The same view was expressed by Dias J. in the oft-quoted case of *The King v. Marshall* (1948) 51 NLR 157 at 159:

> *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—Rex v. Chandrasekera (1942) 44 NLR at 126 and Rex v. Fernando (1947) 48 NLR at 251.*

In view of the provisions of section 103 of the Evidence Ordinance, together with the interpretation given by the Supreme Court of India, the judgment in *Marshall's* case should not be misinterpreted to suggest that the accused bears no burden of proving an alibi. However, in practical terms, if the accused, through the defence of alibi, creates a reasonable doubt about the prosecution case, it is considered that the accused has discharged this burden.

At this stage, it may not be inappropriate to clarify the meaning of proof beyond reasonable doubt. In *Miller v. Minister of Pensions* [1947] 2 All ER 372, Lord Denning declared at page 373:

> *Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.*

The prosecution must prove the accused's guilt beyond a "reasonable doubt", not beyond "any doubt". A reasonable doubt refers to a doubt based on logical reasoning through proper evaluation of evidence. This requires the trier of fact to weigh all evidence supporting guilt against evidence suggesting innocence, considering the strengths and weaknesses on both sides. If, after this evaluation, the evidence overwhelmingly favors the prosecution and eliminates any reasonable doubt about the guilt of the accused, the case can be deemed proven beyond a reasonable doubt. This standard applies to the totality of the evidence as a whole, not to each individual piece of evidence the prosecution relies on to prove the guilt of the accused.

In the celebrated House of Lord decision of *Woolmington v. DPP* [1935] AC 462 at 481-482 Viscount Sankey L.C. with the concurrence of Lord Hewart L.C.J., Lord Atkin, Lord Tomlin and Lord Wright stated:

> *Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a*

> *malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.*

As Granville Williams states in *The Proof of Guilt* (2nd Edition, London Stevens & Sons Limited, 1958) page 153:

> *What lies at the bottom of the various rules shifting the burden of proof is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand, and it is therefore for the accused to give evidence on them if he wishes to escape. This idea is perfectly defensible and needs to be expressed in legal rules, but it is not the same as the burden of proof.*

As T.S. Fernando J. in *Yahonis Singho v. The Queen* (1964) 67 NLR 8 and H.N.G. Fernando C.J. in *Damayanu v. The Queen* (1969) 73 NLR 61 pointed out, if the evidence concerning the alibi is neither accepted nor rejected but remains inconclusive, this uncertainty would create a reasonable doubt about the prosecution case, thereby warranting the acquittal of the accused.

In *Asela De Silva v. Attorney General* (SC/APPEAL/14/2011, SC Minutes of 17.01.2014), Marsoof J. stated at page 7 that in a case where an alibi has been pleaded, it is necessary to examine whether in the totality of all evidence led at the trial, a reasonable doubt arises as to the guilt of the accused in the face of the plea of alibi taken up by him.

In *Tshiki v. The State* [2020] ZASCA 92, the Supreme Court of Appeal of South Africa at para 32 observed that "*It is trite that there is no onus on the accused person to establish their alibi. If it might be reasonably true they must be acquitted and it does not have to be considered in isolation*

from other evidence. The correct approach is to consider it in the light of the totality of the evidence presented before court."

In *R v. Hlongwane* [1959] (3) SA 337 (A) at 339, Holmes JA declared:

> *At the conclusion of the whole case the issues were (a) whether the alibi might reasonably be true and (b) whether the denial of complicity might reasonably be true. An affirmative answer to either (a) or (b) would mean that the Crown failed to prove beyond reasonable doubt that the accused was one of the robbers.*

In Australia and the UK, the approach to the burden of proof concerning alibi is more favorable to the accused compared to India. Australian Courts expect the prosecution to disprove the alibi beyond a reasonable doubt. However, "disprove" does not imply a separate or distinct exercise. It aligns with the general burden on the prosecution, which is to prove its case beyond reasonable doubt.

In *Wark v. The State of Western Australia* [2020] WASCA 19 at para 364, Buss J. had this to say:

> *Where an accused gives, adduces or points to evidence of an alibi, no onus of proving the alibi rests on the accused. The burden of proving the accused's guilt beyond reasonable doubt remains upon the State. It is necessary for the State to remove any reasonable doubt which the alibi may create. If the State fails to satisfy the tribunal of fact beyond reasonable doubt that the alibi evidence should be rejected, then the accused must be found not guilty. The State must eliminate any reasonable possibility that the alibi is true before the accused can be convicted. If the State satisfies the tribunal of fact beyond reasonable doubt that the alibi evidence should be rejected, it does not follow that the tribunal of fact must necessarily*

> *find the accused guilty. The burden remains upon the State to prove beyond reasonable doubt each element of the charged offence.*

In the same case, at para 618, Beech J. added:

> *I accept that there are many cases, including some cited by Buss P at [364], holding that an alibi must be disproved beyond reasonable doubt. As I have said, I accept that the State must disprove alibi beyond reasonable doubt. However, that does not mean that disproof of the alibi is a separate or intermediate step in reasoning to guilt. Often, as here, the circumstantial evidence pointing to guilt is the evidence to be used to rebut the alibi defence.*

In *Killick v. The Queen* [1981] HCA 63, Gibbs C.J., Murphy, and Aickin JJ. in the High Court of Australia held that once a plea of alibi is raised, it is the prosecution's responsibility to disprove it.

> *Although an alibi is not uncommonly referred to as a defence, no onus of proving an alibi rests on the accused; the prosecution must negative an alibi if one is put forward as it must negative a claim that the accused acted in self-defence or as a result of provocation: see Reg v. Johnson (1961) 46 Cr App R 55; Reg v. Taylor [1968] NZLR 981 at pp 985-986.*

The requirement for the prosecution to negate the alibi was upheld by the Court of Appeal in the UK in *R v. Hayward* [2000] EWCA Crim 32, where Henry L.J. stated:

> *We deal first with the criticism that no direction on the burden of proof specific to the alibi was given. The Notes to the Alibi Direction urge the judge to be sure to spell out that the Prosecution must disprove the alibi, even in a short summing-up, in addition to giving the general direction on the burden of proof. That undoubtedly*

> *reflects good practice. But in the case of R v. Wood [1967] 52 Cr App R 74, it was submitted on behalf of the appellant that:*
>
> *"It is a rule of law that when an alibi is raised a particular direction should be given to the jury in regard to the burden of proof, and that in every case when an alibi is raised the judge should tell the jury, quite apart from the general direction of the burden and standard of proof, that it is for the Prosecution to negative the alibi."*

Henry L.J. in *R v. Oluyomi Ogundipe* [2001] EWCA Crim 2576 also stated that "*the onus of disproving the alibi remained with the prosecution.*"

With regard to the proof of alibi, the law can be summarized as follows: Under section 101 of the Evidence Ordinance, the prosecution has the overall burden of proving the charge against the accused and must do so beyond a reasonable doubt. Under section 103 of the Evidence Ordinance, the burden of proving an alibi falls on the accused. However, the burden shifts to the accused only after the prosecution has established its case beyond a reasonable doubt. If the evidence presented by the accused creates a reasonable doubt regarding his presence at the scene of the crime, the accused is entitled to the benefit of that doubt and, consequently, to an acquittal, for the overall burden of proof remains on the prosecution. In this process, the Court must evaluate the evidence from both parties holistically to reach the correct conclusion.

Belated alibi

In any democratic criminal justice system, there is an inherent tension between the public interest in prosecuting offenders and the duty to ensure a fair trial to the accused. The administration of justice is not a one-way street. It is often said that it is better to let ten guilty persons go unpunished than to convict one innocent. Conversely, releasing actual offenders amounts to punishing the innocent. The Supreme Court of

India in *Sadhanantham v. Arunanchanalam* (AIR 1980 SC 856) observed that "*justice is functionally outraged not only when an innocent person is punished but also when a guilty criminal gets away with it stultifying the legal system.*"

Sri Lankan jurisprudence consistently rejects belated alibi pleas that are not raised in a timely manner. In the Supreme Court case of *Vishawanadan v. Attorney General* [2021] 1 Sri LR 14, De Abrew J. stated that if the accused takes up a plea of alibi, he shall put it to the prosecution witnesses during cross-examination. If the plea of alibi is presented for the first time in the dock statement, the Court can reject it as false. In *Gunasiri v. Republic of Sri Lanka* [2009] 1 Sri LR 39 at 46, De Abrew J. held that the failure to suggest the defence of alibi to the prosecution witnesses who implicated the accused implies that the plea is a false one. In the case of *The Republic of Sri Lanka v. Marsook alias Chutta* (CA/HCC/2/2019, CA Minutes of 08.12.2022), Kaluarachchi J. at page 6 took the view that the failure to suggest the defence of alibi to the prosecution witnesses provides a strong basis for rejecting the alibi.

The importance of furnishing the details regarding the alibi at the first opportunity was highlighted by Tilakawardane J. in *Silva v. Silva* [2002] 2 Sri LR 29 at 33:

> *The plaintiff-appellant who gave evidence at the trial in the District Court, denied his presence at the scene of the alleged incident and stated that at the relevant time he was at the house of his brother which was situated some considerable distance away. He averred that the defendant knowing this had falsely implicated him deliberately and maliciously. The learned District Judge had rejected this submission. Several reasons have been cited. He had failed to set up this alibi promptly and it was therefore belated. In his statement given to the Balapitiya Police on 24. 09. 1984 (P15),*

> *though he denied being at home at the time of the incident, he never made mention of the fact that he was at the relevant time at his brother's house. Therefore, in the absence of these facts being furnished to the Police, no contemporaneous statement of his brother was recorded. The statement to the Balapitiya Police was the first available opportunity given to the plaintiff to record his alibi, and he had failed to do so. Even at the trial though his brother was a listed witness he was not called to give evidence. Instead, he called his father who did not even mention his alibi in his examination in chief, despite referring to the Magistrate's Court case. He only adverted to it under cross-examination. The evidence of the father is pertinent in that whilst he corroborated the case of the prosecution that an incident did occur on the date as alleged by them, his testimony was only that his son the plaintiff was not involved. He does not corroborate the alibi, that his son the plaintiff was at his brother's house during the relevant time. In all the circumstances there appeared clearly a basis for the rejection of the evidence pertaining to alibi by the District Judge.*

False alibi

The fabrication of alibi evidence is relatively easy. Due to the potential for such evidence being contrived, it necessitates meticulous scrutiny. The complexities of the alibi defence were explored in *R v. Cleghorn* [1995] 3 SCR 175 at 188-189, where Major J. in the Supreme Court of Canada referred to R.N. Gooderson's work, *Alibi* (London: Heinemann Educational Books Ltd., 1977) at pages 29-30:

> *"[T]here is good reason to look at alibi evidence with care. It is a defence entirely divorced from the main factual issue surrounding the corpus delicti, as it rests upon extraneous facts, not arising from the res gestae. The essential facts of the alleged crime may well be*

> *to a large extent incontrovertible, leaving but limited room for manoeuvre whether the defendant be innocent or guilty. Alibi evidence, by its very nature, takes the focus right away from the area of the main facts, and gives the defence a fresh and untrammelled start. It is easy to prepare perjured evidence to support it in advance."*
>
> *The potential for the fabrication of alibi evidence requires that a negative inference may be drawn against such evidence where the alibi defence is not disclosed in sufficient time to permit investigation.*

A false alibi strengthens the prosecution case, as it suggests that the accused has lied to escape conviction. A deliberately concocted or fabricated alibi substantiated by independent evidence provides potential evidence of the accused's guilt. The Judge may only use the fabrication of an alibi against the accused if there is evidence proving that it was deliberately fabricated to deceive, rather than arising from mistake or negligence.

An alibi that is merely disbelieved or rejected cannot serve to corroborate or complement the prosecution case but something more is necessary. As noted by the Supreme Court of Canada in *R v. Hibbert* [2002] 2 SCR 445 at paras 62–63:

> *Even if an alibi is advanced by the accused himself and is rejected, the finding that the alibi is untrue cannot serve to corroborate or complement the case for the prosecution, let alone permit an inference that the accused is guilty.*
>
> *If the alibi witnesses were found to be deliberately untruthful, their attempt at deceiving the jury could not be visited upon the accused unless he or she participated in the deceit. If, on the other hand,*

> *there was evidence that the accused attempted to put forward a fabricated defence, that effort, akin to an effort to bribe or threaten a witness or a juror, could be tendered as evidence of consciousness of guilt.*

The Supreme Court of Canada in *R v. Trochym* [2007] 1 SCR 239 at para 172 and the Court of Appeal for Ontario in *R. v. O'Connor* [2002] 62 OR (3d) 263 reached similar conclusions.

In *Tshiki v. The State* [2020] ZASCA 92 the Supreme Court of Appeal of South Africa at para 34 stated that "*where an alibi is presented and it contradicts evidence presented before the court, and the alibi later turns out to be a lie (or falsehood), the lie together with the other evidence of the accused as a whole may point towards his or her guilt in certain cases.*"

Nevertheless, a false alibi in itself will not decide the case. Its significance depends on the overall nature of the case. In *Dearman v. Dearman* [1908] HCA 84, Griffith C.J. for the High Court of Australia did not think that evidence to set up a false alibi should have been admitted in proof of adultery in divorce proceedings.

> *There was another point in the case, that the respondent and co-respondent had endeavoured to prove a false alibi. I may remark that the whole of the evidence given on that point was in my opinion inadmissible. The learned Judge very properly pointed out that even innocent persons who have foolishly placed themselves in a compromising position may endeavour to establish a false alibi, though if that defence fails it may seriously injure their case, being sometimes sufficient to turn the scale against them in a doubtful case, and convert what would otherwise have been insufficient into sufficient evidence of guilt.*

Innocent people sometimes tell lies due to various reasons, not necessarily in fear of guilt. In *R v. Middleton* [2001] Cr LR 251, Judge L.J. observed:

> *People do not always tell the truth. Laudable as it may be to do so, whatever the circumstances, they do not, or cannot, always bring themselves to face up to reality. Innocent people sometimes tell lies even when by doing so they create or reinforce the suspicion of guilt. In short, therefore, while lying is often resorted to by the guilty to hide and conceal the truth, the innocent can sometimes misguidedly react to a problem, or postpone facing up to it, or attempt to deflect ill-founded suspicion, or fortify their defence by telling lies.*

The Lucas principle established in the landmark case of *R v. Lucas* [1981] QB 720 provides that lies told by an accused both in and out of Court may be treated as corroborative evidence indicative of the accused's guilt, subject to certain safeguards. Accordingly, for a lie to be considered corroborative, (a) it must be unequivocally proven to be false, either by admission or through independent evidence. Moreover, (b) the lie must be deliberate, (c) relate to a material issue in the case, and (d) stem from the realization of guilt, not for any other reason. This principle ensures that not every falsehood told by the accused automatically leads to an inference of guilt, and it must be carefully assessed in the context of the case.

Lord Lane C.J. at 724 explained this as follows:

> *To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a*

> *just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.*
>
> *As a matter of good sense it is difficult to see why, subject to the same safeguards, lies proved to have been told in court by a defendant should not equally be capable of providing corroboration. In other common law jurisdictions they are so treated.*

Presumption of innocence

The accused need not prove his innocence. The prosecution shall prove his guilt. His innocence is presumed and guaranteed under Article 13(5) of the Constitution as a fundamental right, subject to the condition that "*the burden of proving particular facts may, by law, be placed on an accused person.*" This framework aims to secure a "fair trial", which itself is a fundamental right guaranteed under Article 13(3) of the Constitution. This protection is vital in a democratic society that upholds the values of human dignity, freedom and equality.

In *S v. Sithole and Others* 1999 (1) SACR 585 (W) at 590 the test applicable to criminal trials was explained as follows:

> *There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if*

> *there is at the same time no reasonable possibility that the evidence exculpating him is true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.*

In *Gunapala v. The Republic of Sri Lanka* [1994] 3 Sri LR 180 at 184, it was held that the Court cannot refuse to consider a plea of alibi on the basis that the evidence of the accused on alibi was not corroborated by other evidence.

In *Lionel alias Hitchikolla v. The Attorney General* [1988] 1 Sri LR 4, G.P.S. De Silva J. (as he then was) stated at page 8:

> *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.*

An alibi cannot be rejected on the ground that the prosecution has led cogent and compelling evidence. The Supreme Court of Appeal of South Africa in *S v. Liebenberg* 2005 (2) SACR 355 at para 14 stated:

> *Once the trial court accepted that the alibi evidence could not be rejected as false, it was not entitled to reject it on the basis that the prosecution had placed before it strong evidence linking the*

> *appellant to the offences. The acceptance of the prosecution's evidence could not, by itself alone, be a sufficient basis for rejecting the alibi evidence. Something more was required. The evidence must have been, when considered in its totality, of the nature that proved the alibi evidence to be false.*

When the accused sets up a defence of alibi, J.A.N. De Silva C.J. in *Jayatissa v. Attorney General* [2010] 1 Sri LR 279 at 283 suggested three postulates:

- *(i) if the evidence is not believed the alibi fails*
- *(ii) if the evidence is believed the alibi succeeds*
- *(iii) if the alibi evidence is neither believed nor disbelieved but would create a reasonable doubt the accused should get the benefit of the doubt.*

In *Ranasinghe v. O.I.C, Warakapola Police Station* (SC/APPEAL/39/2011, SC Minutes of 02.04.2014), Dep J. (as he then was) articulated the same at pages 4-5 as follows:

- *(i) if the alibi is true the accused is entitled to an acquittal*
- *(ii) it is probably true or probably untrue it raises a reasonable doubt in the prosecution case and the accused is entitled to an acquittal*
- *(iii) even if the alibi is rejected, the prosecution has to establish its case beyond reasonable doubt.*

These general principles have been examined and applied in numerous cases, forming a significant body of case law, including *Banda and Others v. Attorney General* [1999] 3 Sri LR 168 at 170-171, *Premasiri v. The Republic of Sri Lanka* [2012] 1 Sri LR 43 at 49-50, *Fernando v. The State* [2011] 1 Sri LR 382 at 388-389, *Samantha v. Attorney General* [2019] 2 Sri LR 24 at 33-34.

Conclusion

In this case, the rejection of the belated defence of alibi, introduced for the first time during the accused's evidence, is correct.

I answer the two questions of law on which leave to appeal was granted in the negative.

In addition to the suspended jail sentence and the fine, the Magistrate's Court ordered the accused to pay a sum of Rs. 40,000 as compensation to the injured person. While dismissing the appeal, the High Court imposed an additional sum of Rs. 40,000 as state costs. Given the facts and circumstances of the case, particularly the conduct of the injured person just prior to the incident, which resulted in the injured person being convicted, I quash the order for state costs imposed by the High Court. Subject to that variation, the appeal is dismissed.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court