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

In the matter of an application for Special Leave to Appeal under Article 128 (2) of the Constitution.

1. Hakkini Asela De Silva
2. Hakkini Asanga De Silva
3. Kirimadura Kumudu Gunawardene

SC APPEAL No. 14/2011

C.A. Appeal 114/07

HC Balapitiya 478/02

Accused-Appellants-Petitioners-Appellants

Vs.

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

Complainant-Respondent-Respondent-Respondent

BEFORE	:	Hon. Saleem Marsoof, PC. J, Hon. Chandra Ekanayake, J, and Hon. Sathyaa Hettige, PC. J.
COUNSEL	:	C.R. De Silva, PC, with S.J. Gunasekara and R.J. De Silva for Accused - Appellants - Petitioners. Palitha Fernando, PC, Solicitor General, with Sarath Jayamanne, DSG for the Complainant - Respondent - Respondent.
Argued on	:	04.07.2011, 27.09.2011, 06.06.2012 and 27.09.2012
Written Submissions on	:	30.10.2012
Decided on	:	17.01.2014

SALEEM MARSOOF, PC. J,

This is an appeal against conviction and sentence in a case of murder. The Accused-Appellants-Petitioners-Appellants (hereinafter sometimes referred to as the "appellants") were indicted in the High Court of Balapitiya for the murder of Patabandige Hiran Sanjeewa Perera of Ambalangoda (hereinafter sometimes referred to as the "deceased") in terms of Section 296 read with Section 32 of the Penal Code, and upon being found guilty by the High Court, sentenced to death. The Court of Appeal, by its impugned judgment dated 6th August 2010, affirmed the conviction and sentence, and dismissed the appeal.

Salient Facts relating to the Trial before the High Court

Briefly stated, the prosecution case at the trial was that on 4th January 1997 at about 5.30 pm, when one Nishshanka Rasika de Silva, was riding a bicycle which had been borrowed from a friend, towards

the residence of the deceased in Ambalangoda, with the deceased seated on its cross-bar, they were pursued by the three appellants and another unidentified person on two other bicycles. According to the testimony of Rasika, having heard something similar to the sound of crackers being lit, the deceased alighted from the cross-bar, and ran forward with all four assailants on hot pursuit of the deceased, when the third appellant, who was ahead of the rest, dealt him a blow with a sword, subsequent to which the first appellant shot at the deceased, causing him to fall on his face. While the all four assailants fled away from the crime scene, Rasika rushed to the Ambalangoda police station, which was about a kilometre away.

Six witnesses including Rasika, before whom the whole drama was enacted, were called to give evidence at the trial on behalf of the prosecution. While Rasika identified the appellants as the persons who had, along with another unidentified person, pursued the deceased and caused his death, Reserve Police Constable Karunasena, testified that just after 5 pm on the day of the incident, he encountered four persons at Kande Road, Amabalangoda, when he was returning to the police station after collecting a television booster that had been given for repairs, and that when he initially saw them, the first and second appellants were pushing their bicycles and the third appellant and another person were with them on foot carrying swords, and that when he signalled them to stop, the first and second appellants got on to their bicycles and took the other two carrying the swords on the cross-bar and went out of his sight. The testimony of Dr. Athula Piyaratne, District Medical Officer, District Hospital, Balapitiya, revealed that the deceased had died instantly on being shot, and the gun shot injuries and the other injuries found on the body of the deceased were consistent with the testimony of Rasika in all material aspects.

On behalf of the defence, the first appellant gave evidence denying altogether his, and the second appellant's, presence at the scene of the crime. The second and third appellants made dock statements. The position of the first appellant, who testified in court, was that he and his brother, the second appellant, had been engaged together in the business of selling tea in three *polas* (fairs), namely, the Saturday Pola in Horawpathana, the Sunday Pola in Anuradhapura town and the Monday Pola in Kahatagasdigiliya, during which period they were in the habit of taking temporary abode in the Abhinawaraama Temple in Anuradhapura town, with the permission of Rev. Rahula Thera, who was the chief incumbent of the temple. He stated in evidence that on this particular occasion, they left from Ambalangoda, their home town, on Friday, 3rd January 1997 and took up temporary residence in the said temple, and returned to Ambalangoda only on Tuesday, 7th January 1997, and could not therefore have been at the scene of the crime in Ambalangoda on 4th January 1997. The second appellant set up a similar alibi in his dock statement, and stated that he left with his brother to Anuradhapura on 3rd January 1997 and returned to Ambalangoda only on 7th January 1997. The third appellant, in his dock statement, denied his presence at the scene or any knowledge of the incident.

The learned High Court Judge, who sat without a jury, rejected the alibi set up by the first and second appellants, and found the Appellants guilty for murder as charged, and sentenced them to death.

The Appeal to the Court of Appeal

In the Court of Appeal, the grounds of appeal pleaded by the appellants mainly focused on the manner in which the trial judge had applied the doctrine of common intention embodied in Section 32 of the Penal Code, particularly in the context that there was no evidence that the second appellant had committed any positive act. The appeal also raised the question of the adequacy of the identification of

the third appellant. The Court of Appeal held with the prosecution and affirmed the conviction and sentence. On the question of identity of the accused, the Court of Appeal observed as follows:-

> "When the evidence of Rasika and Karunasena is taken in conjunction, there remains no doubt that these are the four persons who committed the crime. Therefore, identification of the third accused by Karunasena is in itself sufficient for the purpose of this case."

It is significant that no argument was addressed to the Court of Appeal on the question of the alibi set up by the first appellant in his evidence before the High Court on behalf of his brother and on his own behalf, which was also reiterated by the second appellant in his dock statement.

Special Leave to Appeal

Although special leave to appeal was sought on the basis of several grounds including those considered by the Court of Appeal in the impugned judgment, this Court has on 31st January 2011, granted special leave to appeal only on the question set out in paragraph 16(c) of the petition dated 15th September 2010 filed by the Petitioner to invoke the appellate jurisdiction of this Court, which is as follows:-

> "Did the Court of Appeal fail to appreciate that the observations / findings of the learned Trial Judge referred to at paragraphs 12.2 (a) to (e) above, clearly showed that the learned Trial Judge had misdirected himself on the law and proceeded on the erroneous premise that there was a burden on an accused to prove the defence of alibi and, further, that the learned trial judge had unreasonably – and therefore erroneously – rejected the said defence?"

The observations / findings referred to in paragraph 16(c) quoted above, admittedly occur in the following passage in the judgment of the High Court in which the learned trial judge has considered the alibi set up by these appellants:-

> "1, 2 විත්තිකරුවන් නිවසට පැමිණ ඇතැයි කියනු ලබන්නේ 1997.01.07 වෙනි දිනය. ඔවුන්ට එදින මෙම සිද්ධිය සම්බන්ධයෙන් ඔවුන්ගේ පවුලේ අයගෙන් දැන ගැනීමට ලැබී ඇති බව 1 වන විත්තිකරු කියා සිටි. ඔවුන් නිවැරදිකරුවන් නම්, එදිනම පොලිස් ස්ථානයට ගොස් ඔවුන් එදින පැමිණි බවත්, සිද්ධිය සිදුවූ දිනයේ නිවසේ නොසිටි බවට ප්‍රකාශකොට, පොලිසියේ සහය ඇතිව දුම්රිය ටිකටපත් පරීක්ෂා කරවා ඔවුන්ගේ නිර්දෝශිභාවය ඔප්පු කරන්නට ඉඩකඩ තිබිණි. එහෙත් ඔවුන් එලෙස නොකර අධිකරණයට භාරවී ඇත්තේ 1997.01.15 වෙනි දිනය. එතෙක් ඔවුන් නිහඬව සිට ඇත. පැමිණිල්ලේ උගත් රජයේ අධිනීතිඥ තුමාගේ හරස් ප්‍රශ්ණ වලට පිළිතුරු දෙමින් 1 වන විත්තිකරු පසුව කියා සිටියේ, මූලික සාක්ෂියට අමතර දෙයකි. ඔවුන් අනුරාධපුරයේ සිට දුම්රියෙන් පැමිණ කොළඹින් බැස, කොළඹ සිට බස් රථයේ පැමිණි බවත්, එසේ පැමිණියේ දුම්රියට වඩා ඉක්මණින් බස් රථයෙන් පැමිණීමට හැකි බැවින් බවත්ය. එම ප්‍රකාශය ඔහු විසින් කරනු ලබන්නේ ප්‍රථම වරටය. ඒ අනුව ඔහුගේ ප්‍රකාශය පිළිගත නොහැකිය. ඔවුන් විසින් ජනවාරි 07 වෙනිදා සිට ජනවාරි 15 වෙනිදා තෙක් විත්ති වාචිකයක් නිර්මාණය කොට, අධිකරණය වෙත ඉදිරිපත් වී ඇති බවට නිගමනය කළ යුතුව ඇත. ඔවුන් නිර්දෝශිභාවය සඳහා ඉදිරිපත් කරන මෙම නිර්මාණය

පිළිගැනීමට මම මැළිවෙමි. එබැවින් ඔවුනගේ අන්‍යස්ථානික භාවය පිළිබඳව 1 වන චිත්තිකරු විසින් දෙන ලද සාක්ෂිය පිළිනොගනිමින් ප්‍රතික්ෂේප කරමි." *(page 287)*

These observations and findings of the learned Trial Judge have been summarised in English in paragraphs 12.2(a) to (e) of the petition of appeal dated 15th September 2010, in the following manner:-

"12.2 In the course of his aforesaid judgement the learned Trial Judge held *inter alia* as follows:-

a) That on learning of the incident on 07.01.1997 upon their return from Anuradhapura, the 1st and 2nd Appellants could have gone to the police station, stated the facts, obtained the assistance of the Police to recover their train tickets and 'shown/demonstrate' [i.e. proved] their innocence.

b) That, however, they had not done so but had surrendered to Court to 15.01.1997, having remained silent until then.

c) That the first Appellant has stated that, on their return from Anuradhapura they [he and the 2nd Appellant] alighted from the train at Colombo and returned [home] by bus from there and that this was stated for the first time only in cross examination and therefore his statement could not be accepted.

d) That it should be inferred that they [i.e. the 1st and 2nd Appellants] had 'constructed a defence' from 7th to 15th January and surrendered to court.

e) That [accordingly] he - the learned Trial Judge – was reluctant to accept this 'construction' and, therefore, while not accepting the evidence of alibi given by the 1st Appellant, he was rejecting the same."

The question raised on behalf of the first and second appellants in paragraph 16(c) of the petition filed in this court, relates to the alibi setup by these two appellants, who as noted already, are brothers. Learned President's Counsel for the first and second appellants has submitted that the said observations / findings of the learned trial judge clearly demonstrate that he had misdirected himself in regard to the law applicable to the proof of alibi in a criminal case. Since this is the only question on which special leave to appeal was granted by this Court, the question will now be considered, but it may be noted at the outset that since special leave to appeal was granted only in regard to this question, which does not involve the third appellant, as far as he is concerned, his application for special leave to appeal would stands dismissed.

Proof of Alibi

The primary question that arises for determination on this appeal is whether the Court of Appeal, in affirming the decision of the High Court, failed to appreciate the fact that the learned trial judge had misdirected himself on the law and erroneously placed a burden on the first and second appellants to prove the alibi setup by them, in the context of the observations of the trial judge as summarized in paragraphs 12.2 (a) to (e) of the petition of appeal.

Learned President's Counsel for the Appellant has submitted with great force that the High Court erred in assuming that the law placed a burden on the accused person or persons to establish the truth of the alibi set up by them and thereby prove their innocence. In particular, learned President's Counsel relied on the decisions in *K.D Yahonis Singho v The Queen* 67 NLR 8 and *K.M. Punchi Banda and 2 others v. The State* 76 NLR 293 for the proposition that the burden was on the prosecution to disprove or discredit the alibi, and that if an alibi is neither believed or disbelieved, there arises a reasonable doubt in the prosecution story, and the first and second appellants must be necessarily acquitted.

While the Learned Solicitor General has not disputed the contention of the learned President's Counsel for the appellants on the burden of proof, he has stressed that an alibi is not a defence by itself and that at best it can in the context of the totality of the evidence of the case cast a reasonable doubt about the guilt of the accused. He has placed reliance on the decisions of this court in *Lafeer v Queen* 74 NLR 246, *Mannan Mannan v The Republic of Sri Lanka* 1990 (1) SLR 280 and *Lurdu Nelson Fernando and Others v The Attorney General* (1998) 2 SLR 329 to argue that even if the learned trial Judge had misdirected himself with respect to the plea of alibi, the conviction should stand if it can be reasonably concluded that the accused persons were guilty of the offence beyond any reasonable doubt.

Before examining the question as to whether there has been in the context of this case a failure to discharge the evidentiary burden relating to the alibi, it might be useful to explain the meaning of the term "alibi". As G.P.S de Silva J observed (with Ramanathan J and Perera J concurring) in *Lionel alias Hitchikolla and Another v. Attorney General* (1988) 1 SLR 4 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."

The same principle would apply to a trial without a jury, where an alibi is set up, and it is for the trial judge to consider the plea in the context of all the evidence led at the trial.

It is trite that, in criminal proceedings, the burden of proof is always on the prosecution to establish the guilt of the accused person beyond reasonable doubt, and the burden never shifts to the defence. The prosecution has the duty to prove all, and not merely some, of the ingredients of the offence charged beyond reasonable doubt. Section 5 of the Evidence Ordinance provides that 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*."

Section 3 defines 'facts in issue' as "any facts from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows." Thus, as shown in the illustration to Section 5, where A is accused of the murder of B by beating him with a club with the intention of causing his death, whether (a) A beat B with a club; (b) such beating caused B 's death; and (c) A intended to cause B's death, are all facts in issue. Generally, in terms of section 5 only evidence relating to these facts in issue can be led in a murder trial. However, the Evidence Ordinance embodies a number of exceptions

to this general rule of relevance, and particularly section 11 provides that "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."

The question that has been raised in appeal by the Appellants is whether the same principle applies with respect to an alibi set up by the defence, and if so, whether the conviction and sentence of the first and second appellants ought to be quashed in appeal. It is noteworthy that illustration (a) to section 11 of the Evidence Ordinance shows that where 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. This in fact is the type of alibi that has been sought to be established by the first and second appellants in this case.

Learned President's Counsel for the first and second appellants, in the course of his submission at the hearing, stressed the evidence of the first appellant to the effect that he and the second appellant had been in Anuradhapura between 3rd and 7th January 1997, and could therefore not have been in Ambalangoda where the deceased was murdered on 4th January 1997. Admittedly, the first and second appellants disclosed their alibi in the statement made by them to the police on 18th February 1997 at the Galle remand prison, and the first appellant has in the course of his testimony named Rev. Rahula Thera, who was the chief incumbent of the Abhinawaraama Temple in Anuradhapura within the precincts of which he had allegedly taken temporary abode between 3rd to 7th January 1997. It is in evidence that Rev. Rahula Thera had passed away in May 1998, long before the case was taken up for trial, and could not be called upon to testify in court.

Learned President's Counsel, has in these circumstances, invited the attention of court to the matters set out in paragraphs 12.2 (a) to (e) of the petitioner of appeal in support of his argument that the learned High Court judge had misdirected himself on the question of the burden of proof in a case involving an alibi. In particular, he stressed that the observation of the learned trial judge in the above quoted passage at page 287 of the judgment of the High Court to the effect that had the first and second appellants been innocent, they could have gone to the police as soon as they arrived in Ambalangoda on 7th January itself, and proved their innocence (ඔවුන්ගේ නිර්දෝශිභාවය ඔප්පු කරන්නට), showed that he had clearly misdirected himself on the question of the burden of proof of alibi.

However, the observation of the learned trial judge has to be understood in the context of the evidence in this case that the first and second appellants, had on their return to Ambalangoda on 7th January 1997, heard of the murder and the fact that the police were looking for them, and chose not to surrender to the police and explain their absence from Ambalangoda during the time of the murder, but instead admittedly left to Colombo where they allegedly stayed till 15th January, 1997 in their sister's house. In my opinion, the quoted observation did demonstrate the ignorance of the trial judge regarding the procedure adopted at railway stations of collecting the tickets of all passengers at their final destination, but certainly cannot be understood as a misdirection on the burden of proof of alibi, as he was entitled to draw an adverse inference from the unwillingness of the first and second appellants to keep the police informed of their alleged alibi at the earliest opportunity at least to prevent the police being mislead. The conduct of the two appellants, certainly was consistent with their guilt rather than of their innocence, and there can be no doubt that had the appellants gone to the

police on 7th January and explained their position, that would certainly have been of assistance to the police in their investigations.

It is clear from a fuller reading of the judgment of the High Court that the learned High Court judge was conscious of the fact that the burden of proof was on the prosecution to prove its case beyond reasonable doubt and that in particular the judge was mindful of the principles of law applicable to the proof of alibi. It is trite law that in a case where an alibi has been pleaded, the court has to arrive at its finding on a consideration of all evidence led at the trial and on a full assessment of all the evidence. This principle was expounded by Dias J. in *The King v. Marshall* 51 NLR 157 at page 159, where his Lordship stressed that an alibi "is not an exception to criminal liability, like a plea of private defence or grave and sudden provocation" and 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." As his Lordship observed, if sufficient doubt is created in the minds of the jury, or in a trial by a judge without a jury, in the mind of the trial judge, "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." It is therefore necessary to examine whether in the totality of all evidence led at the trial, a reasonable doubt arises as to the guilt of the first and second appellants in the face of the plea of alibi taken up by them.

Analysis of Evidence

It is in this backdrop that the learned President's Counsel for the first and second appellants sought to assail the testimony of Nishshanka Rasika de Silva and RPC Karunasena, who have stated in evidence that they saw the first and second accused in Ambalangoda on the day of the murder at or in close proximity to the crime scene. In this regard, he has stressed two matters which he described as serious infirmities in the testimony of witness Rasika. Both these matters related to the testimony of Rasika in regard to what happened between 5 and 6 pm on the day of the murder.

The first of these involved the testimony of Rasika as to whether or not the four assailants came to the murder scene on bicycles, and the second matter was the manner in which Raskia proceeded to the Ambalangoda police station after allegedly witnessing the murder at very close range. Before adverting to these alleged infirmities, it may be useful to refer to the testimony of Rasika as to what happened on that fateful evening. It was the testimony of Rasika that when he was in Sampson's shop, which at that time was being looked after by Hasantha Gayan, the deceased met him and asked him to come along with him to go to his house to ask the deceased's father for his motor cycle. When Rasika agreed to join the deceased to go to his house, they borrowed a bicycle from Hasantha Gayan to go to the deceased's house, which bicycle Rasika peddled towards the deceased's residence with the deceased seated on the cross-bar. The testimony of Rasika in regard to the incident was that when he and the deceased were passing the co-operative store near the Ambalangoda Urban Council, suddenly they heard sounds similar to the lighting of crackers, and when Rasika turned back to see, the deceased suddenly jumped off the cross-bar and started running forward. At that point Rasika stopped the bicycle and saw Asela and Asanka, who are respectively the first and second appellants, along with two others, pursue the deceased, and the third appellant, who was ahead of the rest, deal a blow with a sword, which caused the deceased to fall. Rasika has further testified that he also saw Asela shoot the deceased twice on the head. Rasika has stated in evidence that having witnessed this terrible incident, he was terrified, and he proceeded to the Ambalangoda police station as fast as he could.

The first of the two matters stressed by learned President's Counsel for the first and second appellants, related to the manner in which the four assailants came to the murder scene. Rasika's testimony in this regard in the course of his examination-in-chief was as follows:-

ප්‍ර: කොහේ ඉඳලද ඒ අය ආවේ?
උ: හිනටයේ ඉඳලා බයිසිකල් වලින් ආවේ.
ප්‍ර: මොන බයිසිකල් වලින්ද ආවේ?
උ: පුස් බයිසිකල් වලින් ආවේ.
(Page 54-55)

When the witness was confronted under cross-examination by learned Counsel for the appellants with his testimony in the non-summary inquiry in the Magistrates Court to the effect that only two of the assailants came on bicycles, he responded to the questions under cross-examination as follows:-

ප්‍ර: මීට පෙර අධිකරණයට දිවුරුම් දී 4 දෙනෙක් බයිසිකල් වලින් ආවා කිව්ව එක වැරදියි?
උ: හරි
ප්‍ර: එහෙම නම් මහේස්ත්‍රාත් අධිකරණයේදි "මම අද කිව්වා දෙන්නා විතරයි බයිසිකලයකින් ආවේ අනිත් දෙන්නා ආව විදිය දන්නේ නැහැ" කියලා කිව්වාද?
උ: කිව්වා
ප්‍ර: ඒක හරිද?
උ: හරි
ප්‍ර: මේ අධිකරණයට කිව්වා 4 දෙනෙක් බයිසිකල් වලින් ආවා දැක්කා කියලා?
උ: මම කිව්වා බයිසිකල් වලින් 4 දෙනෙක් ආවා කියලා.
ප්‍ර: එහෙම නම් මහේස්ත්‍රාත් අධිකරණයේදි "අනිත් දෙන්නා බයිසිකල් වලින් ආව විදිය දන්නේ නැහැ" කියලා කිව්ව එක හරිද?
උ: ඒක හරි
ප්‍ර: 4 දෙනෙක් බයිසිකල් වලින් ආවා දැක්කා කියන එකත් හරිද?
උ: ඔව්
ප්‍ර: කොයි එකද හරි?
උ: දෙන්නෙක් බයිසිකල් වලින් ආවා.
ප්‍ර: අනිත් දෙන්නා?
උ: දැක්කේ නැහැ බයිසිකලයෙන් ආවාද කියලා.
(page 71-72)

The Learned President's Counsel for the first and second appellants has submitted that witness Rasika has contradicted himself in regard to how two out of the four assailants had arrived at the scene of the murder, in that while testifying at the High Court trial he had said that all four assailants had come on bicycles whereas at the non-summary inquiry he had said that he did not know how two of them came to the scene.

However, I do not see any material contradiction in the testimony of Rasika, as it is clear from his responses at pages 54-55 of the High Court record that Rasika had simply responded in the affirmative to a question of learned State Counsel in the course of his examination-in-chief as to whether the assailants had come on bicycles, but under cross-examination at pages 71-72, he has explained that only two bicycles were used by the assailants, but he was not very sure as to whether all four of the assailants had come on the two bicycles.

In fact, the learned trial Judge has in the course of his Judgment at page 279, expressed the view that this was not a deficiency that affected the essence of the prosecution case (**එම ඌණතාවය මෙම නඩුවේ හරයට කිඳා බසින ඌණතාවයක් නොවන්නේය**), and in my view, the learned trial Judge was quite right, as it is evident that the assailants had come from behind Rasika and the deceased, and Rasika had very little opportunity of observing clearly how they had arrived at the murder scene. Even if, as one would surmise, two of them had come on the cross-bars of the two bicycles, Rasika was unlikely to have seen or noted this through one momentary glance backward when he had heard some sound like crackers being lit, at a time of extreme excitement. The witness was therefore, in my opinion, extremely honest in conceding that he did not know how the other two assailants came to the scene of the murder, although he may have taken it for granted that they were carried on the bicycles by the other two. It appears from the testimony of Reserve Police Constable Karunasena that two of them had intermittently been on foot when they were not riding on the cross-bars of the two bicycles.

ප්‍ර: දැන් ඒ බයිසිකල් වල ආවේ කොහොමද පැදගෙනද? තල්ලුකරගෙනද?

උ: තල්ලුකරගෙන ඉස්සරහට ආවා. ඇවිල්ලා මම ඉන්න තැනට ආවේ නැහැ. බයිසිකල් වලට නැගලා ගියා.

ප්‍ර: එතකොට?

උ: දෙන්නෙක් බැහැලා යනවා. දෙන්නෙක් වාඩිවෙලා යනවා. ඒ නගින අවස්ථාවේදි සංඥාවක් දුන්නා නවත්තන්න කියලා. එතන හිටපු එක්කෙනෙක් මම අඳුරනවා.

(page 108)

The second matter that has been stressed by learned President's Counsel for the first and second appellants was the inconsistency in the testimony of Rasika as to how he proceeded to the Ambalangoda Police Station to report the murder. In the course of his examination in chief, Rasika testified that he dropped the bicycle and ran all the way to the police station. He stated:-

ප්‍ර: ඒ සැරේ තමා මොකද කළේ?

උ: මම පොලිසියට දිව්වා.

ප්‍ර: තමා පොලිසියට බයිසිකලයෙන් ගියේ?

උ: මම බයිසිකලය දාලා ගියා කියලා මම හිතන්නේ.

(page 55)

However, learned President's Counsel for the appellants has submitted that under cross-examination, Rasika was not too certain as to how he went to the police station. Learned President's Counsel relied submitted that in the following responses of the witness, he conceded that he went to the police station by bicycle:-

ප්‍ර: තමා ගියේ වෙඩි තියනවත් එක්කම නම් හරිද? වැරදිද?

උ: වෙඩි තියනවත් එක්කම පාපැදියෙන් මම ආවා.

ප්‍ර: තමා පොලිසියට ගියා කිව්වා නේද?

උ: ඔව්.

(page 77-78)

The Learned President's Counsel for the first and second appellants has stressed that this is a vital contradiction in the testimony of the only eye witness of the murder, which made his testimony totally

unreliable. However, I am satisfied that the cause of the confusion in the mind of the witness was satisfactorily explained by him at the commencement of his testimony, when he stated as follows:-

ප්‍ර: තමන් හැම වෙලාවෙම කියනවා මම හිතන්නේ කියලා. ඇයි එහෙම උත්තර දෙන්නේ?
උ: ඊට පස්සේ වෙච්ච දේවල් මතක නැහැ.
ප්‍ර: දැක්ක දෙයක් ඇයි හිතන්නේ කියලා කියන්නේ සිද්ධිය දැක්කා නම්?
උ: මට මතක නැහැ ඊට පස්සේ වුන දේවල්.
ප්‍ර: තමන්ගෙන් මම මුලින්ම අහනකොට කිව්වා සිද්ධිය තමන් දන්නවා කියලා?
උ: සිද්ධියෙන් පස්සේ වූ දේවල් මට මතක නැහැ.
ප්‍ර: තමන්ට මතක කොයි අවස්ථාවේ වූ දේවල්ද?
උ: වෙඩි තියපු අවස්ථාව වෙනකල් මට මතකයි.
(page 55)

In these responses, witness Rasika has explained that due to the sudden and terrifying nature of the incident, he could not remember clearly what happened after the shooting, although he remembers very well what transpired prior to the shooting. The witness has stated in evidence that he was overcome with fear and he simply wanted to get away from the scene and get to the police station, and to comparative safety. He explained this clearly in responding to cross-examination as follows:-

ප්‍ර: කොයි වෙලාවේද ඔය ස්ථානයේ සිට දුවන්න ගත්තේ?
උ: වෙඩි තියනවත් එක්කම දුවන්න ගත්තා.
ප්‍ර: හිරාන්ට වෙඩි තබනවත් සමගම තමා පැනලා දිව්වා?
උ: ඔව්.
ප්‍ර: ඒ වෙලාවේ තමාට මොන වගේ හැඟීමක්ද ඇති වුනේ?
උ: බයක් වගේ.
ප්‍ර: තමා කොහේටද ගියේ?
උ: කෙලින්ම පොලිසියට ගියා.
ප්‍ර: ඇයි අතරමග නතර නොවුනේ?
උ: මගේ මානසික තත්ත්වය කියන්න බැහැ.
ප්‍ර: තමාට උවමනා වුනේ කොහේට යන්නද?
උ: පොලිසියට.
ප්‍ර: පොලිසියට දිව්වා කියලා කිව්වා තමා?
උ: ඔව්.
(page 82-83)

I am of the view that the trial judge was justified, in all the circumstances of the case, in rejecting the submissions of the learned President's Counsel in regard to the credibility of Rasika, the sole eye witness to the murder, whose testimony has in many material particulars been corroborated by the testimony of other witnesses including Reserve Police Constable Karunasena, who identified the assailants he encountered at Kande Road, and Dr. Athula Piyaratne, who testified as to the nature of the injuries sustained by the deceased.

As Dias J. observed in *The King v Marshall* (1948) 51 NLR 157 at page 159, 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 my opinion, there is overwhelming evidence in this case of the presence of the first and second appellants at the scene of the crime at the time of the murder, and neither the trial judge, who considered the plea of alibi in the context of the totality of the evidence, nor the Court of Appeal, which had affirmed his decision, had entertained any reasonable doubt as to their guilt.

The question of the alibi set up by the first and second appellants was not one of the grounds of appeal to the Court of Appeal in this case, nor were any submissions advanced on behalf of the appellants to that court or any observations made by that court in that regard in its impugned judgment. In these circumstances, I am of the opinion that the question on which special leave to appeal was granted in this case, has to be answered in the negative and against the first and second appellants. I see no reason to interfere with the decision of the Court of Appeal as in my view, on the totality of the evidence led at the trial, the guilt of the first and second appellants has been established beyond any reasonable doubt in the face of the plea of alibi taken up by them.

Conclusions

For all these reasons the conviction of all three appellants is affirmed. No submissions were made in the course of the hearing in regard to the sentence, and hence the mandatory sentence imposed by the trial judge on the appellants in terms of section 296 of the Penal Code will stand.

The appeal is dismissed with costs.

JUDGE OF THE SUPREME COURT

CHANDRA EKANAYAKE, J,

JUDGE OF THE SUPREME COURT

SATHYAA HETTIGE, PC. J.

JUDGE OF THE SUPREME COURT