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

In the matter of an Appeal

Honourable Attorney General
Attorney General's Department,
Colombo 12

Complainant

SC Appeal 15/2018
SC/SPL 120/2017
CA Case No.59/2011
HC Rathnapura No.169/2017

Vs

1. Anandappan Vishawanadan alias Alli
2. Rajarathnam Weeramani
3. Maadasamy Loganandan alias Ukkum
4. Muthumala Kanagaraj

Accused

AND

1. Anandappan Vishawanadan alias Alli
2. Rajarathnam Weeramani
3. Maadasamy Loganandan alias Ukkum
4. Muthumala Kanagaraj

Accused Appellants

Vs

Honourable Attorney General
Attorney General's Department,

Colombo 12

Complainant-Respondent

AND NOW BETWEEN

1. Anandappan Vishawanadan alias Alli
2. Rajarathnam Weeramani
3. Maadasamy Loganandan alias Ukkum

Accused Appellant-Petitioner-Appellants

Vs

Honourable Attorney General
Attorney General's Department,
Colombo 12

Complainant-Respondent-Respondent-Respondent

Before: Sisira. J. de Abrew J
L.T.B. Dehideniya J
P.Padman Surasena J

Counsel: Darshan Kuruppu with Aruna Gamage for the
Accused Appellant-Petitioner-Appellants
DSG Dilan Ratnayake the Attorney General

Written submission
tendered on : 26.3. 2018by the Accused Appellant-Petitioner-Appellants
14.7.2017 by the Attorney General
Argued on : 30.7.2020

Decided on: 12.2.2021

Sisira. J. de Abrew, J
The Accused-Appellant-Petitioner-Appellants (hereinafter referred to as the Accused-Appellants) in this case were convicted for the murder of a man named

Madavan Sadanandan and were sentenced to death by the judgment of the High Court dated 24.1.2011. Being aggrieved by the said conviction and the sentence, the Accused-Appellants appealed to the Court of Appeal and the Court of Appeal by its judgment dated 7.4.2017 dismissed the appeal and affirmed the conviction and the sentence. Being aggrieved by the said judgment of the Court of Appeal, the Accused-Appellants have appealed to this court. The 4th accused, at the end of the trial, was acquitted by the learned High Court Judge. This court by its order dated 12.2.2018 granted leave to appeal on questions of law set out in paragraph 16(i) and 16(v) of the Petition of Appeal dated 16.5.2017 which are set out below.

1. Whether their Lordships of the Court of Appeal erred in failing to evaluate the evidence in the case in its totality and failed to appreciate the same on an impartial and objective evaluation of the evidence whether there was clearly, at the very least a reasonable doubt as to the participation of the 2nd and 3rd Petitioners to the alleged offences?

2. Have their Lordships of the Court of Appeal failed to apply the test of probability in evaluating the testimonial trustworthiness of PW2's evidence and thereby deprived the Petitioners the substance of a fair trial guaranteed under Article 13 of the Constitution?

3. Whether the learned High Court Judge erred in law on the principles relating to burden of proof on the defence of alibi.

The 3rd question of law which was raised by learned counsel for the Accused-Appellants was permitted by this court at the hearing of granting of leave to appeal on 12.2.2018.

Facts of this case may be briefly summarized as follows.

On the day of the incident (9.2.2003) when the deceased person Madavan Sadanandan and Murugasu Ravindran were going to cut firewood, they met the Accused-Appellants and the 4th Accused near the Kovil and they asked the deceased person whether he was a big person to which the deceased person replied that he was going to work. At this stage, there was an exchange of words between the deceased person and the accused persons. The accused persons then started attacking the deceased person. The 1st Accused-Appellant attacked the deceased person with a knife. The 2nd and the 3rd Accused-Appellants attacked the deceased person with two clubs. The 4th Accused attacked the deceased person with his hands. When the deceased person was being attacked, he ran away towards his house and all four accused chased after him. Murugase Ravindran who was watching the incident says in his evidence that the deceased person ran for about 20 feet. The 1st Accused-Appellant threatened Murugase Ravindran not to give evidence on the incident. Thereafter Murugase Ravindran went home. The above facts have been stated by Murugase Ravindran in his evidence. Later the people found that the deceased person lying fallen near the Kovil. According to the evidence of wife of the deceased person Weeranan Erulai, the distance between the Kovil and the place where the deceased person was lying fallen was 30 feet. But according to the evidence of the investigating officer, this distance was about 100 meters.

Learned counsel who appeared for the Accused-Appellants submitted that the incident described by witness Murugase Ravindran was an incident which had taken place prior to the main incident. But Murugase Ravindran, in his evidence, clearly says that when the deceased person was being attacked, he (the deceased person) ran away and the four accused persons chased after him (the deceased person). Thus, according to the evidence of Murugase Ravindran, this was the

main incident. There was no evidence led at the trial to establish that the deceased person was attacked at the place where he was lying fallen. For the above reasons, I am unable to agree with the above submission of learned counsel for the Accused-Appellants.

Learned counsel for the Accused-Appellants contended that no reliance can be placed on Murugase Ravindran's evidence as he has made a belated statement. I now advert to this contention. It is true that he has made a statement ten days after the incident. There were reasons for this delay. Murugase Ravindran who was only fifteen (15) years old at the time of the incident was threatened by the 1st Accused-Appellant not to give evidence in this case. According to the evidence of Murugase Ravindran, this was the reason for the delay in making the statement. When considering the contention whether the evidence of a belated witness can be accepted or not, I would like to consider certain judicial decisions.

In SumanasenaVs Attorney General[1999] 3 SLR 137 at page 140, His Lordship Justice Jayasuriya held as follows.

"just because the witness is a belated witness the Court ought not to reject his testimony on that score alone and that a Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness.

In Ajith Samarakoon Vs the Republic [2004] 2 SLR 209 at page 220 His Lordship Justice Jayasuriya held as follows. His Lordship Justice Jayasuriya held as follows. *Just because the statement of a witness is belated the Court is not entitled to reject such testimony. In applying the Test of Spontaneity the Test of Contemporaneity and the Test of Promptness the Court ought to scrupulously proceed to examine the reasons for the delay. If the reasons for the delay adduced by the witness are*

justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a belated statement.

Considering the above legal literature, I hold that court should not reject the evidence of a witness who has made a belated statement to the Police if the delay has been explained. In the present case the delay in making the statement to the Police has been explained. Thus the decision of the learned trial Judge to accept the evidence of witness Murugase Ravindran cannot be found fault with.

According to the evidence of Dr. Manjula who conducted the Post Mortem Examination, there were cut injuries, lacerations and a contusion on the body of the deceased person. Thus, it is seen that the evidence of Murugase Ravindran has been corroborated by medical evidence. When the above matters are considered, the evidence of Murugase Ravindran can be accepted beyond reasonable doubt. The learned trial Judge and the learned Judges of the Court of Appeal were, in my view, correct when they decided to act on the evidence of Murugase Ravindran. For the above reasons, I reject the above contention of learned counsel for the Accused-Appellant.

Prosecution has relied on a dying declaration made by the deceased person to his wife Weeranan Irulai. According to Weeranan Irulai, she, on hearing that her husband had been attacked, went to the place where the deceased person was lying fallen. On being questioned as to who cut him, he (the deceased person) replied that Alli cut him, Ukkun and Weeraman assaulted him with a club. She has identified Alli as the 1st Accused, Ukkun as the 3rd Accused and Weeraman as the 2nd Accused. Thereafter she has gone to the Police Station and made a statement. Question was raised as to why she did not take the deceased person to the hospital in the same van. It has to be noted here that she had had no control over the

vehicle. No one knows whether the van driver refused to take the injured person in the van to the hospital. However, what is important here is to consider whether the deceased person could have spoken when she spoke to him. Dr Manjula says in his evidence that the deceased person could have spoken for about one hour after receiving injuries and he had the capacity to move.

According to the evidence of Weeranan Irulai, the deceased person in his dying declaration had mentioned that all three Accused-Appellants had attacked him. Although the deceased person had referred to all three accused persons in his dying declaration, Weeranan Irulai, in her first statement made to the Police, has failed to mention the attack on the deceased person by the 2nd and 3rd Accused persons. She has mentioned this fact only in her 2nd statement made to the Police. According to Dr Manjula, the deceased person could have spoken for about one hour after receiving injuries. Further, according to the evidence of Dr. Manjula who conducted the Post Mortem Examination, there were cut injuries, lacerations and a contusion on the body of the deceased person. Thus, it is seen that the evidence of Weeranan Irulai is corroborated by the evidence of Dr Manjula. Weeranan Irulai has also said in her evidence that the 1st,2nd,3rd and 4th accused persons were ten feet away from place where the deceased person was lying fallen when she went to this place and the 1st accused person was having a knife. When I consider all the above matters, I am unable to find fault with the decisions of the learned trial Judge and the learned judges of the Court of Appeal in accepting the evidence of Weeranan Irulai.

The 2nd and the 3rd Accused-Appellants in their dock statements have taken up the position that they went to work in the morning and came back in evening. Thus, they have taken the defence of alibi. However, the learned Judge has placed a

burden on the accused persons to prove the defence of alibi. I will now consider whether the learned trial Judge was correct when he took the above decision. When an accused person takes up the defence an alibi, the burden is on the prosecution to establish that he was present at the place where the offence was committed. I would like to consider certain judicial decisions on this point. In Banda and Others Vs Attorney General [1999] 3 SLR 169 Justice FND Jayasuriya at page 170 held as follows.

> *"There is no burden whatsoever on an accused person who puts forward a plea of alibi and the burden is always on the prosecution to establish beyond reasonable doubt that the accused was not elsewhere but present at the time of the commission of the criminal offence."*

In Punchi Banda Vs The State 76 NLR 293 at page 308 His Lordship Justice GPA Silva held as follows.

> *"Where the defence was that of an alibi and an accused person had no burden as such of establishing any fact to any degree of probability."*

Considering the above matters, I hold that when an alibi is pleaded by an accused person, there is no burden on the accused person to prove it. Therefore, I hold that the learned trial Judge has committed misdirection in law when he placed a burden on the 2nd and 3rd Accused-Appellants to prove the defence of alibi.

Although the2nd and 3rd Accused-Appellants raised a defence of alibi in their dock statements, they failed to suggest this position to witness Murugase Ravindran.

In the case of Sarwan Singh Vs State of Punjab [2002] AIR SC (iii)3652 at 3656 the Indian Supreme Court held as follows. *"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his*

case in cross examination it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in Bobby Mathew vs. State of Karnatake 2004 Cr. LJ Vol iii page 3003.

Applying the principles laid down in the above judicial decisions, I hold that failure on the part of the 2nd and 3rd Accused-Appellants to suggest to the prosecution witness Murugase Ravindran their position (defence of alibi) indicates that the defence of alibi is a false one.

Further I would like to consider the proviso to Section 334 of the Criminal Procedure Code which reads as follows. *"Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."*

I have earlier pointed out that the learned trial Judge has committed misdirection in law when he placed a burden on the 2nd and 3rd Accused-Appellants to prove the defence of alibi. Although the learned trial Judge has committed the above misdirection in law, when the evidence led at the trial is considered, I hold that no substantial miscarriage of justice has actually occurred to the accused. In this connection I would like to consider the judgment of this court in the case of MHM Lafeer Vs The Queen 74 NLR 246 wherein this court at page 248 held as follows.

> *"There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."*

The next question that I would like to consider is whether the conviction of murder can be maintained. I now advert to this question. Witness Murugase Ravindran, in his evidence, stated the following matters.

1. There was an exchange of words between the deceased person and the accused persons.

2. The deceased person was using filthy language when both parties were exchanging words.

3. At the time of the attack on the deceased person, there was a fight between two parties. [pages 50 to 51].

When I consider the above evidence, I feel that the conviction of murder cannot be maintained and the Accused-Appellants should have been convicted on the offence of culpable homicide not amounting to murder which is an offence punishable under Section 297 of the Penal Code on the basis of sudden fight. For the above reasons, I set aside the conviction of murder and the sentence of death imposed on the Accused-Appellants and convict them for the offence of culpable homicide not amounting to murder on the basis of sudden fight which is an offence punishable under Section 297 of the Penal Code. I sentence each of the Accused-Appellants to a term of 16 (sixteen) years rigorous imprisonment. I further direct that this term of imprisonment should be implemented from the date of sentence of death (24.1.2011).

In view of the conclusion reached above, I answer the 1st and the 2nd questions of law in the negative. I answer the 3rd question of law as follows. The learned trial Judge (High Court Judge) erred in law on the principles relating to the burden of proof on the defence of alibi. The learned High Court Judge of Colombo is directed

to issue a fresh committal in accordance with the sentence imposed by this court. Subject to the above variation of the conviction and the sentence, the appeal of the Accused-Appellants is dismissed.

Appeal dismissed.

Judge of the Supreme Court.

L.T.B. Dehideniya J

I agree.

Judge of the Supreme Court.

P. Padman. Surasena J

I agree.

Judge of the Supreme Court.