

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

In the matter of an appeal  
against the order of High  
Court of the Provinces (Special  
Provisions) Act No. 19 of 1990  
read with Article 154P(3)(b) of  
the Constitution of Republic of  
Sri Lanka.

**C.A.(PHC) NO. 178/2014**

**H.C. Kurunegala**

**Case No. HCR 42/2012**

Ratnayake Mudiyanse  
Kumarathilaka Bandara  
69, Dunigamuwa,  
Kurunegala

**Accused-Petitioner-  
Appellant**

**Vs.**

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

**Complainant-Respondent-  
Respondent**

**Before** : Achala Wengappuli, J.

**Devika Abeyratne, J.**

**Counsel** : Dimuthu Senarath Bandara with  
Savithri Fernando for the Accused-  
Petitioner-Appellant

**Written**

**Submissions on** : 24.01.2019 (by the Appellant)  
24.01.2019 (by the Respondent)

**Decided On** : 06<sup>th</sup> March 2020

**Devika Abeyratne, J.**

This is an appeal by the accused appellant who was found guilty by the learned Magistrate of *Kurunegala* for causing grievous hurt to one *Wijesooriya Mudiyanseelage Niroshan Jayashantha Wijesooriya* by attacking him with a sword.

The appeal preferred by the appellant against his conviction was dismissed by the High Court of *Kurunegala*, on the preliminary objection, that the appeal had been filed prior to the sentence being pronounced in contravention of section 283(2) of the code of criminal procedure.

Upon the revision application canvassing the findings of the same order being dismissed, the appellant has preferred the instant appeal. Counsel for both parties have

invited this court to pronounce judgment on the written submission submitted.

The grounds of appeal advanced by the appellant is that the learned High Court judge and the learned magistrate have failed to constructively appreciate the evidence favorable to a plea of alibi; that the learned judges' have failed to consider the infirmities on the evidence relating to the identification of the appellant; that the learned judges' have overlooked the patent inconsistency *interse* among the lay witnesses; that the appellant has been denied a fair trial in as much as he had not been explained of his rights at the end of the prosecution case.

At the trial the prosecution has led evidence of six witnesses, including the victim PW1 and another eye witness PW2. The appellant has taken up the plea of alibi that he was in *Colombo* on the night of the incident. The learned Magistrate has held that the prosecution had made out a strong case against the appellant and the appellant's position that he was elsewhere when the incident occurred has failed to create a doubt in the prosecution case.

It has been the learned High Court Judge's view that the appellant has failed to establish that he was in Colombo on the night of the incident.

Briefly the facts pertaining to this case and the background to the incident is as follows;

*Nimal Abeyrathne* PW2 is a neighbor of the victim PW1 as well as the accused-appellant. The incident has occurred between 9 and 10 p.m. on 3.9.2005. PW2 has gone to sleep early that night when he was woken up by one *Nilmini*, the mother-in-law of PW1, who has asked him to check on *PW1 (Niroshan)*, who was shouting at home alleging that *Rathnayake (appellant)* has tried to obstruct his application to obtain electricity. PW2 has gone to the house of PW1 which is about 100 meters from his house and brought him

home and was talking with him for about half an hour, when they heard a sound of breaking glass and someone shouting out the name of *Niroshan*. It was around 9.00 and 10.00pm that night.

Hearing the sounds, *Niroshan* has started to run towards his house saying "my wife and children". When PW2's attempt to stop *Niroshan* running towards the sound was unsuccessful, then PW2 also has run with PW1. About 10 to 20 meters from the house PW1, PW2 has witnessed *Rathnayake* the accused wearing only underwear striking *Niroshan* PW1 on his shoulder with a sword. PW2 has identified the appellant by the light of the moonlight. After being struck by the sword, PW1 has come back to the house of PW2 and was attended by the wife of PW2 and afterwards taken to the hospital by the police.

PW1 has evidenced admitting that there was a land dispute between his family and the appellant's and as there has been an objection to his application to obtain electricity, around 8 p.m. that night he had been chastising the appellant, although he was not to be seen at that time. It has transpired that *Ranbanda* the brother of the appellant has been there. PW1 corroborated that PW 2 *Nimal* took him to his place and while they were talking they heard someone shouting out his name and the sound of breaking glass.

He has run towards his house with *Nimal* following him and then overtaking him, at which point the appellant has come wearing only underwear, brandishing a sword threatening to kill him and has struck him on the shoulder with the sword and when he turned back has struck him again. He has then run back to *Nimal*'s house bleeding and

was attended by *Nimal's* wife until he was taken to the hospital. His evidence is that he identified the appellant from the light that fell from an electric bulb from *Nimal's* house.

Although no doubt was created about the place of the incident, the appellant sought to challenge that there was no moon light that night and that without sufficient light, the witnesses could not have identified him or witnessed the incident.

It is noted that in the evidence in chief of PW2 he has stated that he saw the incident with the help of moonlight, but when cross examined, without any hesitation has stated that there was electric light as well as moonlight, which enabled him to witness the incident. PW1 has evidenced that he identified the appellant from the light that came from *Nimal's* house, he has not mentioned any moon light.

The appellant has also argued regarding the somewhat conflicting evidence given by PW1 and PW2, that when they were running towards the house of PW1, whether PW1 was 3 or 4 feet ahead of PW2 at one point or whether PW2 was behind PW1. It appears that when PW2 failed to stop PW1 from running towards his house, initially PW2 may have run behind PW1, and later overtaken him.

However, when considering the evidence in totality, these minor discrepancies had no adverse impact on the evidence and the credibility of the witnesses. The fact that PW2 ran ahead of PW1 or whether he was behind PW1 has not affected witnessing of the incident. According to the

evidence of PW1 and PW2 they have been in close proximity, and the fact that one person was ahead of the other, has not affected their identifying the assailant.

The distance from PW2's house to PW1's house is about 100 meters and the incident occurred before PW1 reached his house. Then it stands to reason that they did not have to run far before the incident occurred. The above mentioned so called contradictory evidence, according to the appellant is also a ground of appeal where the learned Magistrate is alleged to have failed to consider the infirmities on the evidence relating to identification of the appellant.

PW2 has clearly evidenced that he saw the appellant attacking PW1 and that the appellant addressed him as "*Sudu*" which is the name he is addressed by the villagers. This fact was not challenged when PW2 was cross examined. Therefore, there was no doubt created about PW2 identifying the appellant who is a neighbor known to him for a long time.

In cross examination PW2 has admitted that he has not seen the appellant when he went to *Niroshan's* house earlier in the evening. However, he has unequivocally evidenced that it was the appellant who attacked PW1. Nothing has been elicited from PW2, that he was either hostile to the accused or actuated by a private grudge to give evidence against the appellant. There is not an iota of evidence to the contrary that either PW1 or PW2 were not in a position to identify the assailant. It is established that PW2 was very close to PW1 and also to the appellant and with the moonlight and electric light he has identified the



appellant as the person who assaulted PW1. The above cited minor discrepancies do not affect the facts and occurrence stated by PW1 and PW2.

It was argued on behalf of the appellant that he was in Colombo that night and anyway there was no sufficient light to identify anyone as it was not a poya day.

Apart from PW1 and PW2, the police witness PW 5 IP *Nishantha Jayalath* has given evidence that when he recorded a statement from PW2 on the night of the incident he has observed a beam of electric light from *Nimal's* house spread across to the crime scene. This fact has not been challenged.

In the above circumstance, when the evidence of PW1 and PW2 is considered in totality together with the evidence of PW5, it has been established that the light from the house of PW2 has fallen on the place of incident and that they have witnessed the incident clearly. Therefore, this court cannot accept the submission of the appellant that the learned magistrate has overlooked the patent inconsistencies *interse* among the lay witnesses.

It is also the appellant's contention that he was denied a fair trial in as much as he has not been explained his rights at the end of the prosecution case. On 02.08.2006 the accused has been explained of his charge and he has pleaded not guilty. This establishes that the accused was informed promptly and in detail in a language that he understands the nature and the cause of the charge against him.

The case record bears testimony to the fact that the appellant was represented by Counsel throughout the case. He has had an opportunity to examine the witnesses against him. He too has given evidence and his plea of alibi has been considered by the learned Magistrate. These facts clearly indicate that he was informed of his rights and that he has exercised that right and no substantial prejudice was caused to the appellant. Thus, the appellant's contention that he was denied a fair trial , fails.

It is submitted by the Counsel for the appellant that the magistrate has failed to constructively appreciate the evidence favorable to a plea of alibi raised by the appellant. He has cited several case laws to substantiate his position.

The appellant has testified that he, on the night of the incident was in Colombo and that his sister informed him by telephone that PW1 has come alone to his house and broken one of their windows and that there was a crowd of people on the road. He has advised her not to intervene and that he will come and do something. When cross examined he has admitted having a land dispute, but denied that he assaulted PW1.

It is trite law that when the accused put forward a plea of alibi that the burden is on the prosecution to establish beyond reasonable doubt that the accused was not elsewhere but present at the place of the commission of the crime.



In **Lionel alias Hichchikolla and Another v. Attorney General** (1988) 1 SLR 4 at page 8, G.P.S de Silva J. has observed.

*“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 1<sup>st</sup> 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 1<sup>st</sup> appellant is entitled to an acquittal.”*

In, **The King v. Marshall 51 NLR 157 at page 159**, it is stated that an alibi *“is not an exception to criminal liability, like a plea of private defense 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.”*

In **Banda Vs AG 1999 (3) SLR 168** it was held *“there is no burden whatsoever on an accused who put 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 offence” .*

In **CA 166 of 991 decided on 5.7.2007 Justice Sisira de Abrew** after considering the principal laid down regarding the plea of alibi in several judicial decisions , has held that there is no burden whatsoever on an accused person who puts forward a plea of *alibi* to prove any fact to any degree of probability.

It is therefore necessary to examine whether in the totality of all the evidence led at the trial in the instant case, a reasonable doubt arises as to the guilt of the appellant in the face of the plea of alibi taken up by him. 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.

As explained above, from the evidence of PW2 it is established that the appellant has called him *Sudu* and was in close proximity to him when he attacked PW1 with the sword. Thus, there is no doubt created about PW2 identifying the appellant or witnessing the incident. PW 1 has clearly identified that it is the appellant who has assaulted him. The other lay witnesses although they are not eyewitnesses, have evidenced that soon after the incident that they were informed by the victim that it was the appellant who assaulted him, but that position was not contradicted in any manner in cross examination.

Therefore, it has been established by evidence on a balance of probability in this case of the presence of the

appellant at the scene of the incident and his attack on PW1 .The learned Magistrate has considered the plea of alibi in the context of the totality of the evidence. The High Court which had affirmed the Magistrate's decision has further stated that the appellant has not discharged his burden proving his alibi, which statement this court is not in agreement with. However, the learned Magistrate has considered the evidence of both the prosecution and defense case, and held that the prosecution had made out a strong case against the appellant and that the plea of alibi of the appellant has not created a doubt in the prosecution case and that the appellant has nothing to prove but only to create a doubt, which he had failed to accomplish.

Considering all of the above, we are not inclined to disturb the findings of the learned Magistrate. We affirm the conviction and the sentence.

The appeal is dismissed.

**JUDGE OF THE COURT OF APPEAL**

**ACHALA WENGAPPULI, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**