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

In the matter of an Appeal in terms of Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979 and in terms of the High Court of the Provinces (special Provinces) Section 19 of 1990.

Court of Appeal No:

CA/HCC/0006/23

High Court of Gampaha

Case No: HC/75/05

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Mayadunna Appuhamilage Hemantha Priyantha Mayadunna
2. Bulathsinhala Cooray Appuhamilage Nishantha Cooray *alias* Raja
3. Kandana Arachchige Nalin Sampath Pushpakumara

ACCUSED

AND NOW BETWEEN

Kandana Arachchige Nalin Sampath

Pushpakumara

3RD ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department

Colombo 12.

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Niranjan Jayasinghe for the Accused-Appellant
	: Hiranjan Pieris, S.D.S.G for the Complainant-Respondent
Argued on	: 24-11-2023
Written Submissions	: 22-11-2023 (By the Complainant-Respondent)
	: 06-04-2023 (By the Accused-Appellant)
Decided on	: 27-03-2024

Sampath B. Abayakoon, J.

This is an appeal preferred by the 3rd accused-appellant, namely Kandana Arachchige Nalin Sampath Pushpakumara (hereinafter referred to as the appellant), who was the 3rd accused in the High Court of Gampaha Case Number HC/75/2005.

The appellant, along with two other accused were indicted before the High Court of Gampaha for causing the death of one Nimal Indrasiri Rohana Mayadunna on 11-07-2000, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

The said three accused were also indicted for causing the death of one Jayasundera Mudiyanselage Shelton at the same time and at the same transaction, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

After the indictment was filed before the High Court, it has been reported that the 2nd accused indicted has passed away. Accordingly, the indictment had been amended to reflect that fact on the two charges against the remaining accused. The two charges have also been amended to include section 32 of the Penal Code to be read along with section 296.

The trial has proceeded without a jury against the two remaining accused including the appellant. After the conclusion of the prosecution case, it has been reported to the Court that the 1st accused indicted has also been deceased. Accordingly, the case has proceeded to a conclusion only against the appellant, who was the third accused indicted.

The learned High Court Judge of Gampaha of his judgement dated 15-12-2022 had found the appellant guilty to the 1st count preferred against him. The appellant had been acquitted on the 2nd count due to lack of evidence.

Accordingly, the appellant had been sentenced to death.

Being aggrieved by the said conviction and the sentence, the appellant has preferred this appeal.

Facts in Brief

PW-01 was the wife of the deceased Nimal Indrasiri Rohana Mayadunna, the deceased person mentioned in the 1st count preferred against the appellant. Although this was an incident which was said to have occurred on 11-07-2000, PW-01 has given evidence at the trial almost 19 years after the incident. At the time she was giving evidence, she was a person of ailing health, and the trial Court was unable to conclude her evidence on the day she gave evidence initially, and for that reason, her evidence has been concluded sometime thereafter.

On the day of the incident, her husband has gone to his brother's house which was nearby, to help him with some building construction work. The other person who died in this incident, namely Shelton, was a friend of her husband. The said Shelton has also helped in the construction work. After finishing the work for the day, both her husband and Shelton have returned home and had their dinner. After dinner, both of them had left the house between 9.00 and 10.00 p.m. to buy cigarettes from a shop situated near his brother's house.

While seated on a bench in front of their house expecting her husband to return, she has heard the voice of her husband screaming 'ඛුදු අම්මෙ' from the direction of the paddy field adjoining their house. After recognizing her husband's voice, the witness has run towards the direction of the cry. She has stated that there was bright moonlight on that day.

She has found her husband fallen near the well located on the paddy field, which belongs to a person called Jinadasa, who was a neighbour. When she reached her husband, she has seen him in pain, but he has stated to her that Heman cut him, and that Raja and Nalin were also present.

She has identified the person whom her husband referred to as Heman, who was a relative, as the 1st accused, while the person mentioned as Raja as the then

deceased 2nd accused. She has identified the person mentioned as Nalin as the 3rd accused who was the brother-in-law of the 1st accused.

Subsequently, hearing her cries, the neighbours have come. The brother of the deceased had also come and had taken steps to admit the deceased to the hospital. She has stated that she did not see where the other deceased, namely Shelton, was at that time, but later, he was found in the paddy field further down the place where her husband was found fallen.

It has been her evidence that when she was running towards her husband, she saw the three accused persons running away from the place where her husband was found fallen. She has stated that she was able to recognize them because of the bright moonlight available.

When she was subjected to cross-examination, she has stated that she cannot remember whether she told at the non-summary inquiry, that her husband went out to buy cigarettes at 10.30 p.m., but has stated she heard the screaming of her husband after about 45 minutes of his leaving the house. She has stated further that she was waiting outside of her house as the husband was getting late.

At the non-summary inquiry, the witness has stated that she saw the other deceased person fallen near where her husband was, when she reached the place.

Since the witness has maintained the position that she only saw Shelton subsequently, the said portion of the evidence has been marked as the contradiction marked 1V1, and a similar contradiction in that regard has also been marked as 1V2.

PW-01 has testified that when she reached the place where her husband was found, her neighbour Jinadasa was not there, and he and his family members came only after hearing her cries. She has told the son of Jinadasa to inform the

incident to her husband's brother. She has denied the claim that it was Shammi Kumara, the son of Jinadasa, who informed her about her husband.

The brother of the deceased, namely Sunil Shantha Mayadunna (PW-02), also has given evidence in this case. He has confirmed that on 11-07-2000, his brother and the other deceased, namely Shelton, came to his house to assist in his construction work. It was his evidence that after finishing the work, both of them left, and later, he met his brother and Shelton around 9.00 p.m. near the boutique situated close to his house. The deceased has informed him that he came to buy cigarettes, and has left with Shelton.

The witness has stated that his brother lived about 150 meters away from his house. The witness had been watching TV when Jinadasa's son Shammi, who was a neighbor of his brother, came and informed him that his brother had been attacked. After informing his other brother to bring a van to take him to the hospital, he and his mother, who was living with him, has run towards the place where his brother had been fallen.

When he reached the place, he has not seen the injuries suffered by his brother initially and he was conscious. When inquired as to what happened from his brother, he has informed that Heman, Raja and Nalin attacked and cut them. When he asked from his brother where Shelton is, he has been told that he is fallen in the paddy field. When he reached the place where Shelton was fallen, he has observed cut injuries all over his body and had realized that he was already dead.

Thereafter, he has taken steps to take his brother, as well as the body of Shelton, to the hospital. He has identified Heman as the 1st accused, who was also a relative. He has mentioned the person named Raja as deceased and has identified the person mentioned as Nalin by his brother as the appellant. He has stated further that when he was taking his brother to the hospital in the van, he stopped near his house to wear a shirt and at that point, his brother told him to hurry up as his body is getting cold.

After admitting the brother to the hospital, he has gone to the Kadawata police around 1.00 a.m. on the 12th and has lodged a complaint. Later, he has come to know that his brother has succumbed to his injuries.

Under cross-examination, he has re-confirmed that the distance from his house to the place where the deceased was found fallen was about 150 meters. He has also stated that the distance from his brother's house to the place whether his brother was found fallen was about 10-12 meters and the earlier mentioned Jinadasa's house was the closest house to the place where his brother was found.

It has been suggested to the witness that he was lying about what his brother told him. The witness has denied the suggestion and has stated that there were about 20-25 persons at that time, and all of them heard what his brother said. He has stated that it took about 15 minutes for them to take the deceased Shelton and his brother to the van to be transported to the hospital, and has stated his brother spoke until then, although he was in pain due to the injuries suffered by him. When questioned about what he has stated at the inquest held two days after to the effect that his brother did not speak while he was being taken to the hospital, he has clarified that his brother was conscious until the vehicle stopped near his house and did not say anything after that.

The Judicial Medical Officer (JMO) who conducted the post-mortem on both the deceased persons has given evidence in this action. He has marked the Post-Mortem Report in relation to Shelton Jayasundera, who was the deceased mentioned in the 2nd count preferred against the appellant as P-01. The JMO has observed 19 cut injuries on his body. He has described the cut injuries and has opined that the injuries are necessarily fatal injuries.

The JMO has marked the Post-Mortem Report regarding Indrasiri Rohana Mayadunna, the deceased person in relation to the 1st count preferred against the appellant as P-02. He has observed two cut injuries and a linear abrasion on his body. The first cut injury was 15 inches long, caused to the heart cavity and

the lung cavity on the right side of the heart, and the stomach, which has caused cut injuries to the liver, several ribs, and other internal organs. The second cut injury was to the right hand, where the JMO has opined as a defensive injury. He has described the first injury as a necessarily fatal injury, and has opined that when a person receives injuries of this nature, death occurs due to the shock and such a person will be able to talk until that shock occurs. He has opined that a person with injuries of this nature can be conscious and will be able to talk for about half an hour to one hour depending on the physical strength of the said person.

When it was suggested to him under cross-examination that a person with this type of injuries will suffer shock earlier than half an hour, the JMO has opined that the deceased person was a healthy 32-year-old and it takes more than half an hour for such a person to come to a state of shock. The JMO has well explained what he meant by the cut he observed in the diaphragm of the deceased, stating that it was only a superficial cut which has not prevented the deceased's ability to talk. He has explained that only if the diaphragm was fully cut, a person cannot breathe, and as a result will not be able to speak.

The police officers who conducted the investigation relating to the incident has given their evidence.

PW-06 who was the other brother of the deceased, who came later to the scene and transported the deceased to the hospital, has been treated as an adverse witness to the prosecution due to the fact of him stating that he did not hear what his brother said, contrary to what he has stated to the police in his statement.

At the conclusion of the prosecution case, when the appellant as well as the 1st accused indicted was called upon for their defence, both of them had made dock statements.

The appellant has claimed in his dock statement that on the date of the incident and around the time of the alleged attack to the deceased, he was having liquor

at a shop belonging to one Sisira and went home around 11.00 p.m. When he reached home, he met his mother in his house and the mother informed him that the deceased persons have been attacked, and Heman is also not at home and to go and bring him. Since he could not do that, he left the area in his three-wheeler and went to his wife's house. Since there was insufficient space in the house, he went to a neighbour's house and slept.

According to him, he has come to know that he is a suspect in the case where the deceased were killed, and later surrendered to the police. He has claimed that the evidence given by the PW-01 stating that she saw him running away was a lie, and has claimed that he was unaware of this incident and had no connection whatsoever.

On behalf of the appellant, the person called Sisira mentioned by him in his dock statement has been called to give evidence. He has claimed that on the day of the incident, the 3rd appellant came to his shop around 8.30 in the night and inquired whether he is attending the funeral at the village, for which he stated he would do so after closing his shop. He has claimed that thereafter, the appellant went and brought some liquor and consumed it in his shop. He has stated that around 10.00 - 10.30 in the night, the appellant's mother came to the shop and wanted him to come with her, at which point the appellant left his shop. Under cross-examination, he has claimed that he did not know about the incident where two persons have died in his village.

It appears from what the appellant had stated in his dock statement and the evidence of the witness called on his behalf that the appellant has attempted to claim an alibi.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant urged the following two grounds of appeal for the consideration of the Court.

1. The learned High Court Judge has convicted the accused-appellant on insufficient and doubtful evidence of the prosecution.
2. Defence evidence has been rejected on unreasonable grounds.

As the two grounds of appeal urged are different to each other, I will now proceed to consider the said grounds of appeal separately.

The First Ground of Appeal:-

This is a matter where there were no eyewitnesses to the actual incident where the deceased had received cut injuries. Therefore, the prosecution has relied on the dying declarations alleged to have been made by the deceased Nimal Rohana Mayadunne to his wife, who reached the place of the incident soon after it occurred, and to his elder brother PW-02, few minutes thereafter.

It was the position of the learned Counsel for the appellant that the alleged dying declarations made by the deceased to PW-01 and PW-02 are different to each other and cannot be accepted without any doubt. It was his position that the said alleged dying declarations are not cogent enough to be believed.

It was also his position that the claim made by PW-01, that she saw the appellant running away from the place of the incident along with the other two accused was also doubtful and cannot be believed in view of the discrepancies in that regard.

He pointed out that there was insufficient light for her to make a positive identification, even she may have seen somebody running away. It was his position that there was insufficient evidence to establish whether the witnesses knew the 3rd accused and has identified him properly at the trial.

In this regard, it was the submission of the learned Senior Deputy Solicitor General (SDSG) on behalf of the respondent that the evidence of a person treated as an adverse witness cannot be taken advantage of by either party in a trial. He cited several cases to support his contention. It was his position that the two dying declarations made by the deceased can be relied upon. He submitted to

the Court that the full moon Poya day of July in the year 2000 was the 16th, whereas the incident has occurred on the 11th, to show that the evidence of PW-01 can be believed when she said that she was able identify the persons fleeing the scene of the crime. He submitted further that the differences in the two dying declarations can be well explained, since the said declarations had been made on two occasions where it can have slight differences. It was his position that the JMO has clearly established the fact that the deceased was able to talk after the incident, which substantiates the evidence of PW-01 and that of PW-02. He contended further that there was no issue as to the identity of the appellant as the evidence had been to the effect that both the witnesses knew him well, although they had no close connection with him.

Since it was argued that the two dying declarations alleged to have been made by the deceased to PW-01 and PW-02 should not have been accepted by the trial Judge, I find it necessary to consider whether that argument has any merit.

Dying Declarations can be admitted as evidence in terms of Section 32(1) of the Evidence Ordinance, which reads thus;

> **32. Statements, written or verbal, of relevant facts made by a person who is dead, who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without any amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases.**
>
> > **(1) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.**

Such statements are relevant whether the person who made them was or was not, at the time when they were made under expectation of death, and whatever

may be the nature of the proceedings in which the cause of his death comes into question.

E.R.S.R Coomaraswamy in his book ***The Law of Evidence*** **Volume 1 at page 466** summarizes the conditions of admissibility of a dying declaration in Sri Lanka with reference to several decided cases of our Superior Courts in the following manner.

1. Death of the declarant before the proceedings.
2. The statement must relate to the cause of his death or any of the circumstances of the transaction in which resulted in his death.
3. The case must be such that the cause of the declarant's death must come into question.
4. The competency of the declarant to testify may have to be established depending upon the circumstances of each case, but strict rules of competency do not apply.
5. The statement must be a complete verbal statement, though it may take the form of question and answers or appropriate gestures it must be complete in itself and capable of a definite meaning. Although there is authority in Sri Lanka for the view that the very words of the deceased person must be given in evidence, there is South African authority to the contrary. The Indian Supreme Court has insisted on the exact words which must be complete in meaning.

In the case of **Ranasinghe Vs. The Attorney General (2007) 1 SLR 218,** it was held:

> *"i. When a dying declaration is considered as an item of evidence against an accused person in a criminal trial the trial Judge/jury must bear in mind the following weaknesses;*
>
> *a. The statement of the deceased person was not made under oath.*
> *b. The statement of the deceased has not been tested by cross-examination.*

ii. The trial Judge/jury must be satisfied beyond reasonable doubt on the following matters;

a. *Whether the deceased in fact made such a statement.*
b. *Whether the statement made by the deceased is true and accurate.*
c. *Whether the statement made by the deceased could be accepted beyond reasonable doubt.*
d. *Whether the evidence of the witness who testifies about the dying declaration could be accepted beyond reasonable doubt.*
e. *Whether the witness is telling the truth*
f. *Whether the deceased was able to speak at the time the alleged declaration was made."*

The above guidelines clearly provide that when a trial Court is considering a dying declaration, it has to take the evidence of the person or persons to whom the alleged dying declaration has been made by the deceased along with other relevant evidence to satisfy itself whether such a declaration can be accepted as evidence.

As I have stated previously, this is not a case where a single dying declaration heard by two persons when it was made, but a case where the deceased has made two separate statements on two occasions to his wife and the elder brother.

The wife has come to the scene of the incident soon after hearing the cries of her husband. When questioned as to what happened, he has stated to her that Heman cut him and Raja and Nalin were also present.

For matters of clarity, I would now reproduce the relevant portion of the evidence of PW-01 (at page 148 of the Appeal brief).

උ: එයා කිව්වා හෙමන් කෙටුවා කියලා.

ප්‍ර: හෙමන් විතරද?

උ: මම අහන කොට එයා කෑ ගහ ගහ කිව්වා හෙමනුත් හිටියා රාජාත් හිටියා, නලිනුත් හිටියා කියලා.

The evidence of PW-02, the elder brother of the deceased in that regard reads as follows (at page 159 of the brief).

ප්‍ර: මල්ලිට තුවාල වෙලා තිබුණද?

උ: ගිය ගමන් දැක්කේ නැහැ තුවාල තියෙනවා. මල්ලිගේ නෝනා එතන සිටියා ඊට පස්සේ මම ඇහුවා මොකද වුණේ කියලා

ප්‍ර: කාගෙන්ද අහුවේ?

උ: මල්ලිගෙන්. හෙමනුයි, රාජායි, නලිනුයි අපිට කෙටුවා කියලා කිවුවා.

ප්‍ර: තමුන්ටද කිවුවේ?

උ: මම සිටියා මල්ලිගේ පවුල සිටියා, අම්මා සිටියා. තවත් අය සිටියා.

ප්‍ර: මල්ලි තව මොනවහරි කිවුවද ඒ වෙලාවේ?

උ: මම අහුවා ෂෙල්ටන් කෝ කියලා. ෂෙල්ටන් වෙලේ ඉන්නවා කිවුවා.

I am in no position to agree with the contention that the two statements made are different to each other. I find that what the deceased had told PW-01 was similar to what he has told PW-02. He has informed both of them that it was Heman, Raja and Nalin who attacked and caused cut injuries to them. He has told specifically to PW-01 who came soon after the incident that it was Heman, the now deceased 1st accused who caused the cut injuries. When asked by PW-02 subsequently, he has made a general statement in that regard involving all 3 accused indicted before the High Court. That does not mean the statements made by the deceased are different to each other. I find that the deceased has accurately stated the transaction, which resulted in his death, to the two witnesses.

In this regard, I find it necessary to examine whether the deceased had the capacity to talk due to the injuries sustained by him. The evidence of PW-01 and PW-02 is clear that he spoke to them as well as others who were present until

he was taken in the van to the hospital. PW-02 has been specific that he spoke to him until the van was stopped near his house for him to wear a shirt. The JMO who testified before the Court as to the ability of the deceased to talk after receiving injuries that led to his death, and has given clear evidence that a person of physical strength and age such as the deceased, could have spoken up to half an hour or one hour after the injuries caused to him. He has been specific as to the injuries that had been caused to the diaphragm of the deceased explaining that the injuries in that area were superficial and the deceased had the ability to speak with such injuries.

I do not find any reason to believe that the witnesses were not telling the truth about what they heard from the deceased. When considering the evidence of the JMO and the two Post-Mortem Reports relating to the two deceased persons, it becomes clear that the cut injuries have been caused using a heavy sharp cutting instrument. It is clear that all the injuries caused to the two persons had been caused by using a single weapon, which clearly allies with the dying declaration to the effect that only one person caused cut inures to him and the other two were present along with him.

Since the indictment has been preferred on the basis of Section 32 of the Penal Code where, when a criminal act is done by several persons in furtherance of the common intention of all, each of such person is liable for that act in the same manner as if it were done by him alone. I find that, if not for the common intention of causing injuries to the deceased persons, there was no other reason for the 2nd and 3rd accused indicted which includes the appellant, to be present at that time of the day along with the 1st accused indicted.

The learned President's Counsel contended that there was insufficient light conditions for the wife of the deceased to positively identify the assailants as claimed by her in her evidence, although she may have seen somebody running away. It was also contended that there was a doubt as to whether the PW-01 knew the appellant sufficiently for her to identify him in such light conditions.

At the hearing of this appeal, it was established before this Court that the date of the incident was few days prior to the full moon Poya day of the month. The evidence shows that, the place of the incident was just in front of the deceased Nimal Mayadunne's house and was a paddy field adjacent to the house. There was undisputed evidence that the distance between the house and the place where the deceased was found fallen was about 10-12 meters. The evidence of the wife shows that she had been waiting outside of the house when she heard her husband's voice, which had prompted her to run towards the direction where it emanated. Her evidence has been that she saw the 3 accused persons indicted running away when she was approaching the place. This evidence goes on to show that the PW-01 has been able to reach the place where she heard her husband shouting within few seconds of her hearing his voice. She does not say that she saw the persons attacking her husband or the other person who died in this incident, but only the fact that the accused persons were seen moving away from the direction of the place of the incident.

All the accused persons indicted are well known to the witness. The 1st accused being a relative, I find no basis to accept that the appellant was a person not properly known to her. In fact, the appellant was the brother-in-law of the 1st accused indicted. And also, the house of the 1st accused was in the neighbourhood of the place of the incident. I am of the view that there was sufficient light, given the possible distance from where PW-01 had seen the accused persons when she saw them running away, and PW-01 had positively identified the three persons.

The two contradictions marked when PW-01 was giving evidence were in relation to the fact that whether she saw the other deceased person, namely Shelton, before she saw her husband. In her evidence before the Court, she has stated that it was her husband that she saw and only after going near him, she came to know that the other deceased person was injured and fallen into the nearby paddy field. I am of the view that this question of fact has not created any doubt in relation to the evidence PW-01.

As considered correctly by the learned High Court Judge, the witness has given evidence nearly 20 years after the incident. Such a witness can very well forget details of that nature when giving evidence after a lapse of such a long period.

I am in no position to agree that the learned High Court Judge has considered insufficient and doubtful evidence of the prosecution to convict the appellant.

It is abundantly clear from the judgement that the learned High Court Judge has been well aware of the evaluation of evidence and the necessary legal principles he needs to be mindful in his task. The learned High Court Judge has considered all aspects of the relevant evidence in coming to his findings; therefore, I find no merit in the first ground of appeal urged by the learned Counsel.

The Second Ground of Appeal:-

In the second ground of appeal, the learned Counsel for the appellant contended that the learned High Court Judge has rejected the defence evidence on unreasonable grounds.

After the conclusion of the prosecution evidence, and when the appellant was called upon for a defence, he has chosen to make a dock statement. In analyzing the defence case, the learned High Court Judge has well considered the weight that can be attached to a dock statement made by an accused person.

It is well settled law that a dock statement also can be considered as a form of evidence subjected to infirmities attached to it, being an unsworn statement not tested by cross-examination.

In the case of **Gunapala and Others Vs. The Republic of Sri Lanka (1994) 3 SLR 180,** it was held:

> *"The jury must not only be informed that a statement from the dock must be looked upon as evidence subject to the infirmities which attached to statements that are unsworn and not tested by cross-examination, but they must also be directed that,*

a. *If they believe the unsworn statement, it must be acted upon,*
b. *If it raised a reasonable doubt in their minds about the case of the prosecution, the defence must succeed; and*
c. *It should not be used against another accused."*

It is clear from the judgement that the learned High Court Judge has looked at the dock statement of the appellant with the above legal principles in mind.

In his dock statement, the appellant has taken up an alibi to the effect that he was elsewhere and consuming liquor at a shop situated in the village to suggest that he was not at the place of the incident. He has called a witness to substantiate that fact.

The contention of the learned Counsel for the appellant is that the learned High Court Judge has failed to consider the alibi taken up by the appellant in its correct perspective. However, I am not in a position to agree with the said submission.

The learned High Court Judge has decided to consider the alibi taken up by the appellant on the basis that he has taken up that position when he made his statement to the police after his arrest. He has determined that, hence, it becomes relevant in terms of Section 126A(1)(a) of the Code of Criminal Procedure Act. Thereafter, the learned High Court Judge has considered his alibi and the fact that he was evading arrest for over a month as relevant facts, and has determined that the prosecution evidence has proved the appellant's presence in the place of the crime beyond reasonable doubt.

The learned High Court Judge has also considered whether his presence at the scene of the crime constitutes common intention in terms of Section 32 of the Penal Code.

It has been determined that no doubt has been created or a reasonable explanation has been provided which can be considered in favour of the

appellant. The learned High Court Judge has come to the finding that the prosecution has proved the case beyond reasonable doubt, only after well considering the evidence placed before him as a whole, which was the correct way to come to a finding in a criminal case.

It appears that although the learned High Court Judge has referred to the alibi taken up by the appellant as a defence of alibi, in fact, it is clear that the learned High Court Judge was mindful of the legal principles in relation to an alibi.

It needs to be mentioned that because of the fact that most of the legal texts and judgements refer to an alibi as a defence of an alibi, such inadvertent misdirection may occur. However, in fact, an alibi is a question of fact.

Once an alibi is taken up, it becomes imperative for a trial Judge to consider that fact in relation to the other evidence led before him and decide whether a doubt arises as to the prosecution case because of the alibi.

Considering an alibi which is not a general or special exception, **T.S. Fernando, J.** in the case of **Martin Singho Vs. Queen 69 CLW 21 at page 22**, remarked as follows;

> "*As this Court has pointed out on many occasions in the past, where an accused person is not relying on a general or special exception contained in the Penal Code, there is no burden on him to establish any fact. In this case, the appellant not relying on any such exception; even if the Jury declined to believe the appellant's version, he was yet entitled to be acquitted on the charge if his version raised in the mind of the Jury a reasonable doubt as to the truth of the prosecution case.*"

At this juncture, I must emphasize that any alibi taken up by an accused must be to the effect that there was no possibility, given the facts of the matter, for him to be present at the scene of the crime or participate in the crime. Mere saying that he was not there would not do.

In the instant case, the position taken up by the appellant had been not an impossibility, but to say that he was elsewhere in the same village having liquor at a store. That does not speak about an impossibility for him to be at the scene of the crime when it was committed.

Although a witness has been called to say that he was at his shop which was situated in the village itself, and was consuming liquor, that in itself does not establish that fact to create a doubt in the prosecution evidence.

In the case of **The King Vs. Marshall (1948) 51 NLR 157 at 159, Dias, J.** having considered several legal principles and judgements in relation to how the trial Court should test an alibi observed as follows;

> *"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 vs. Chandrasekera (1942) 44 NLR at page 126*** *and* ***Rex vs. Fernando (1947) 48 NLR at page 251.*** *Although the learned Judge did not deal with the alibi in this way, a study of the evidence shows that no miscarriage of justice resulted thereby. There are contradictions between the evidence of the second accused and his witness Premasiri which may have induced the Jury to reject the alibi. In regard to the case against the second accused there was ample evidence before the Jury, which, if believed, justified the verdict which they returned. We therefore think the conviction of the second accused is justified and we dismiss his application."*

I find that the learned High Court Judge has well considered whether this question of fact of an alibi raised by the appellant has created any doubt in the prosecution case and had determined that it was not so. That determination had been reached after evaluating the relevant evidence in its correct perspective. Hence, I am in no reason to disagree with the reasons given by the learned High Court Judge in that regard.

For the reasons as considered above, I find no merit in the second ground of appeal urged on behalf of the accused-appellant.

Accordingly, the appeal is dismissed for want of merit.

The conviction and the sentence dated 15-12-2022 by the learned High Court Judge of Gampaha affirmed.

Judge of the Court of Appeal

P.Kumararathnam,J.

I Agree.

Judge of the Court of Appeal