

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

**In the matter of an Appeal under and in terms of
Section 331 of the Code of Criminal Procedure
Act No. 15 of 1979.**

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

Complainant

Court of Appeal
Case No. CA 72-73/20

Vs.

High Court of Balapitiya
Case No. HCB 1779/15

1. Kaluduru Wisaka Thabrew,
'Wilochana', Madombe,
Kosgoda.
2. Agampodi Upul Susantha De Zoysa alias Loku
Raja,
Duwemodara,
Kosgoda.

Accused

AND NOW BETWEEN

1. Kaluduru Wisaka Thabrew,
'Wilochana', Madombe,
Kosgoda.

1st Accused-Appellant

2. Agampodi Upul Susantha De Zoysa alias Loku Raja,
Duwemodara,
Kosgoda.

2nd Accused-Appellant

Vs.

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

Complainant-Respondent

Before: **B. Sasi Mahendran, J.**
 Amal Ranaraja, J.

Counsel: Anuja Premaratna, P.C. with Nayana Dissanayake, Senal Madugama, R.
 Durusinghe, V. Rathnayake, Natasha De Alwis and Hashan Bhanu for
 the 1st Accused-Appellant.

Kapila Waidyaratne P.C. with Akkila Jayasundara and Akhila Mathushi
for the 2nd Accused-Appellant.

Hiranjana Pieris, S.D.S.G. for the Respondent.

Argued on: 10.03.2025

Decided on: 26.03.2025

JUDGMENT

AMAL RANARAJA, J.

1. The Accused-Appellants (hereinafter referred to as the “appellants”) have been indicted in the *High Court of Balapitiya* in High Court Case No. HCB/1779/15.

2. The charge in the indictment is as follows;

That on or about 12.10.2001, at *Duwemodara*, within the jurisdiction of this Court, the first accused-appellant and the second accused-appellant caused the death of one *Appuwadura Rohana Kumara De Zoysa*, thereby committed the offence of murder punishable in terms of section 296 of the Penal Code read with section 32 of the Penal Code.

3. The Learned High Court Judge has caused the indictment and the annexures to be served on the appellants. The appellants thereafter have pleaded not guilty to the charge and the matter has been taken up for trial before the Learned High Court Judge without a jury. At the conclusion of the trial, the Learned High Court Judge has found the appellants guilty of the charge, convicted and sentenced the appellants to death.

4. The appellants being aggrieved by the disputed judgment and the sentencing order has preferred the instant appeal to this Court.

Grounds of appeal:

5. The Learned President's Counsel for the first accused-appellant urged the following grounds of appeal when the matter was taken up for argument:

- i. The Learned High Court Judge has not taken the infirmities of the prosecution's case in favour of the accused.
- ii. The learned High Court Judge erred in not considering the probability of the prosecution witnesses.
- iii. The Learned High Court Judge erred in concluding that an alibi has to be proved by an accused.

- iv. The Learned High Court Judge erred in not considering that the accused has lost a right to a fair trial in that the investigators have failed to record the statements of purported witnesses who refused to make statements.
6. The Learned President's Counsel for the second accused-appellant urged the following grounds of appeal when the matter was taken up for argument:
- i. The Learned High Court Judge has failed to judicially determine whether the prosecution has proved its case beyond a reasonable doubt.
 - ii. The Learned High Court Judge has not legally considered the improbable evidence of prosecution witness No.1.
 - iii. The Learned High Court Judge has failed to consider the dock statement made by the second accused-appellant.
 - iv. The Learned High Court Judge has failed to judicially evaluate the contradictions and omissions which cast a doubt in the prosecution's case.

The case of the prosecution

7. At about 09.00 hrs, on 13.10.2001, PW1 has gone in his bicycle with a friend of his named *Subash* to purchase groceries for his eatery. When PW1 had proceeded about 200 metres he had heard two or three gunshots being fired. Thereafter, PW1 has stopped on the side of the road and seen the first and the second appellants chasing behind a person named *Jayantha*. The first appellant had been armed with a gun and the second appellant with a knife. The second appellant upon seeing PW1 on the side of the road has stopped giving chase to the person named *Jayantha*, moved towards PW1 and stabbed him. PW1 has thereafter started running in the direction of

Galle on the *Old Colombo-Galle Highway*. While running in the direction of *Galle*, PW1 has seen the deceased lying on the ground near a boutique. PW1 has also seen the first appellant handing over his gun to the second appellant and the second appellant firing the gun in the direction of PW1. PW1 has however not suffered gunshot injuries, though he had sustained a stab injury previously. PW1 has also seen the second appellant getting on top of the body of the deceased, who was lying on the ground and allegedly stabbing the deceased.

8. Upon receiving the distressing news that her son had been shot, PW3 has rushed to the scene. She has arrived to find her son lying on the ground, where he was being stabbed by the second appellant.
9. A person named *Kasun* has informed PW9 (IP Gnanasiri), the Officer-in-Charge of the crime branch of the *Kosgoda Police Station* about the incident involving the stabbing of the deceased and another person. The information has been provided to PW9 at 09.20 hrs on 13.10.2001. PW9 has thereafter visited the scene of the incident. PW9 has observed the deceased lying by the side of the road on the *Old Galle-Colombo Highway*. PW9 has also observed five stab injuries on the back of the chest of the deceased and one other injury which could have been caused from a firearm.
10. *Dr. S. N. K. W. Samarasinghe* has conducted the post-mortem examination of the deceased and prepared a post-mortem report. The post-mortem report has been marked “ඡූ-8”.

The case of the accused

11. The first appellant has maintained that he was not present at the scene of the incident. However, upon learning that he was suspected of being involved, he had voluntarily surrendered himself to Court.

12. The second appellant has made a statement from the dock denying the allegation and has maintained that he has been falsely implicated to the incident.
13. When PW1 had stopped on the side of the road the first and the second appellants have approached him. Thereafter, the second appellant had allegedly stabbed PW1 with a knife that was in his possession. The first appellant has had in his possession a gun. Upon purportedly being stabbed by the second appellant, PW1 has started running in the direction of *Galle*. The first and the second appellants have chased after him. PW1 has seen the first appellant, hand over the gun which was in his possession to the second appellant. The second appellant has fired the gun in the direction of PW1. PW1 has also supposedly seen the second appellant stop at the place the deceased was lying and stabbed the deceased.
14. In a setting where the second appellant was supposedly in possession of the gun of the first appellant, it is unclear as to how the second appellant instantaneously proceeded to stab the deceased with a knife. No evidence has been led to explain such disparity. Further, on an occasion, PW1 has testified, that he saw both, the first and the second appellants, stabbing the deceased in his neck. The post-mortem report does not disclose that the deceased had suffered stab injuries to his neck. The attention of this Court has been drawn to the same as an omission. Further, though PW1 had suffered a stab injury and purportedly hospitalised for treatment, no medico-legal report has been produced to corroborate the same. PW3 has stated that two other people also fled the scene of the incident with the first and the second appellants, though PW1 has stated that only the first and second appellants were present at the scene of the incident. Additionally, though PW3 has stated that she saw a gun in the possession of the first appellant in her examination-in-chief, she has failed to state the same in the statement given to the investigating officer. Such detail has been brought to the attention of Court and an omission recorded in that regard. PW3 has also not seen

PW1 being chased after by the appellants. Further, when a person named *Jayantha* testified on being listed as a witness by the second appellant, he has not mentioned about an incident of being chased by the appellants on *Galle* road on the date of the incident.

15. The irreconcilable difference in the testimony of PW1 and PW3 being as referred to above, it makes this Court query as to whether PW1 and PW3 were actually present at the scene of the incident as stated by them. The discrepancies being material, the benefit of the doubt need to be given to the appellants. PW1 and PW3 lack creditworthiness, hence, it would be unsafe to act on the evidence of those witnesses.

16. Chapter XI of the Code of Criminal Procedure Act No. 15 of 1979 provide for the investigation of offences.

Section 109(6) of the Code of Criminal Procedure Act No. 15 of 1979 provides as follows,

“Any police officer or inquirer making an investigation under this Chapter may by order in writing require the attendance before himself of any person being within the limits of the station of such police officer or any adjoining station or within the local limits of the jurisdiction of such inquirer who, from the information given or otherwise, appears to be acquainted with the circumstances of the case, and such person shall attend as so required.

If any person when required to attend by an inquirer refuses or fails to do so, the inquirer may thereupon in his discretion issue a warrant to secure the attendance of such person as required by such order as aforesaid.”

17. A person by the name of *Kasun* has informed PW9 about the incident referred to in the charge in the indictment. The person who provided the first information however has not been listed as a witness. Such a move demonstrates the fact that the inquiring officer has not questioned the person named *Kasun* but has only proceeded to reduce into writing the statement made by him. The evidence presented indicate that the shop of *Lewis* located near the site of the alleged attack was closed at that time. Further, *Regina Gunasekara's* house has had a hedge in front of it. The hedge had obstructed the view of the site of the alleged incident. Hence, resulted in *Regina Gunasekara's* inability to see the incident. In those circumstances, the said *Lewis* and *Regina Gunasekara* were unlikely to be able to give worthwhile evidence with regard to the incident stated in the charge.

18. Further, the Learned High Court Judge in the disputed judgment has stated as follows,

" ඒ අනුවම 1 වන විත්තිකරු විසින් තමාට එරෙහිව ඇති සියලු පොලිස් ප්‍රකාශ, සාක්ෂි පිටපත් ලබා ගෙන ඒවා කියවා බැලීමෙන් අනතුරුව සාක්ෂි දෙන බව කියා සිටී. ඔහුට ඒ සඳහා තහනමක් නොමැති නමුත් ඔහු විසින් ගෙන හැර ඇති විත්තිවාචකයේ ස්වභාවයත්, එහි ඔප්පු කිරීම සම්බන්ධයෙන් පවතින්නා වූ සාක්ෂි ආඥා පනතේ 105 වගන්තියේ විධි විධාන සලකා බැලීමේ දී 1 වන විත්තිකරුගේ අන්‍යස්ථානයක සිටියේ යැයි කියනු ලබන කරුණ ප්‍රතික්ෂේප වනවා පමණක් නොව ඒ සම්බන්ධයෙන් සැලසුම් සහගත අසත්‍යයක් කියන බව පැහැදිලිව පෙනී යයි. "

[Vide page 19 of the High Court judgment and page 292 of the Brief]

19. The Learned High Court Judge thereby has placed a burden on the first appellant to prove his defence of alibi.

20. An alibi is not an exception of penal liability like the general and special exceptions laid down in the Penal Code. When an alibi is raised, there is

no burden of proof on the appellant. The evidence on alibi has merely to be weighted in the balance with the prosecution evidence. If the evidence of alibi is not believed, it fails. If it is believed, it succeeds, but if it is neither believed nor disbelieved but creates a reasonable doubt to the prosecution's case, the appellant is entitled to be acquitted.

In **Punchi Banda vs. The State [1973] 76 NLR 293** the following were held to be indispensable directions required to be given to the jury whenever an alibi is raised,

“(i) even if they (the jury) fully disbelieved the defence of alibi that had been set up, the prosecution was not absolved from the duty of proving its case beyond reasonable doubt;

(ii) the falsity of an alibi does not strengthen the case for the prosecution.”

21. The Learned High Court Judge has also failed to evaluate the dock statement of the second appellant. I now consider the principles relevant to the evaluation of a dock statement. When evaluating a dock statement, the following guidelines must be considered;

- i. A dock statement should be considered as evidence subject to infirmities that it was not a sworn statement and not tested by cross-examination.
- ii. If the dock statement is believed, it must be acted upon.
- iii. If the dock statement creates a reasonable doubt in the prosecution's case, the defence of the accused must succeed.
- iv. The dock statement of one accused person should not be considered against the other accused.

22. Further, a period of twenty-three years has lapsed since the offence has been purportedly committed. Therefore, it does not seem just to call upon

the appellants to defend themselves again after such an unconscionable lapse of time.

In ***The Queen vs. G.K.Jayasinghe*** 69 NLR 314 at page 328, Sansoni, J, has stated,

“...we have considered whether we should order a new trial in this case. We do not take that course, because there has been a lapse of three years since the commission of the offences, and

because of our own view of the unreliable nature of the accomplice’s evidence on which alone the prosecution case rests.

We accordingly direct that the judgment of acquittal be entered.”

23. Having considered the above matters of fact and law, I am of the view that this is not a fit case to order a re-trial.

Hence, I proceed to set aside the disputed judgment along with the sentence and acquit the first and second appellants of the charge preferred against them.

Appeal allowed.

24. The Registrar of this Court is directed to communicate the judgment to the *High Court of Balapitiya* for compliance.

Judge of the Court of Appeal

B. SASI MAHENDRAN, J.

I agree.

Judge of the Court of Appeal