

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

In the matter of an Appeal from the High Court in terms of Section 331 of the Code of Criminal Procedure Act No.15 of 1979.

C.A. No. HCC 484/2017
H.C. Kuliyapitiya No. HC 04/2016

Arachchige Mahinda Dharma Sri Muthuarachchi

Accused-Appellant

Vs.

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

Complainant- Respondent

BEFORE : **ACHALA WENGAPPULI, J.**
K.PRIYANTHA FERNANDO, J.

COUNSEL : Shanaka Ranasinghe P.C. with Niroshan Minhindukulasuriya, Anushika Ranasinghe, Thevaka Manchanayake for the Accused-Appellant.
A. Navavi D.S.G. for the respondent.

ARGUED ON : 02nd July, 2020

DECIDED ON : 24th July, 2020

ACHALA WENGAPPULI, J.

The accused-appellant (hereinafter referred to as the Appellant) was indicted by the Hon Attorney General, before the High Court of *Kuliyapitiya*, under two counts of attempted murder for causing injuries to *Ezra Dishan Alexander* and *Hettiarachchilage Nandana Pradeep Kumara*, by attacking them with a *manna* knife on 25.03.2009 at *Makandura*.

Upon being elected to be tried without a jury, the trial against the Appellant proceeded. He offered evidence under oath when the High Court ruled that he had a case to answer at the end of the prosecution case. The prosecution called a witness in rebuttal and at the conclusion of the trial, the High Court found the Appellant guilty to both counts and was sentenced to seven year term of imprisonment each on the two counts of attempted murder. In respect of the 1st count, the Appellant was imposed a fine of Rs. 10,000.00 with a default term of six months. He was also ordered to pay Rs. 300,000.00 to the PW1 as compensation and in default a twelve-month imprisonment for the said count. In respect of the 2nd count, the Appellant was imposed a fine of Rs. 10,000.00 with a three-month default term of imprisonment. The High Court also ordered to pay Rs. 200,000.00 as compensation to PW2 which carried a default term of imprisonment for eight months.

Being aggrieved by the said conviction and sentence, the Appellant sought to have them set aside on the basis that the trial Court had failed to properly analyse the infirmities of the evidence of prosecution witnesses and therefore

arrived at an erroneous conclusion that their evidence is truthful and reliable, contrary to the accepted principles in evaluating such evidence.

Learned President's Counsel for the Appellant contended that the trial Court had failed to give due weightage to the fact that none of the two injured persons have implicated the Appellant, until their statements were recorded after 25 days since the incident. It also failed to consider the several *inter se* and *per se* contradictions in the testimonies of the two injured persons. He further contended that the trial Court had imposed an undue burden on the Appellant to raise reasonable doubt in the prosecution case.

Proper consideration of these contentions advanced by the Appellant require an examination of the correctness of the reasoning of the trial Court in arriving at its conclusion; that the evidence of the two injured persons reflect a truthful and reliable account of the circumstances under which they were attacked, when viewed against the backdrop of the prosecution version of events.

The prosecution case was naturally reliant on the evidence of the two injured persons, namely Rev. *Ezra Dishan Alexander* and *Hettiarachchilage Nandana Pradeep Kumara*. Rev. *Ezra Dishan Alexander* is a priest of *Vineyard Community Church*, which offered religious services to its congregation in a prayer centre in *Makandura*. He used to travel regularly to the said payer hall from Kandy on Sundays to conduct religious services to the faithful, but would also visit the

centre on Wednesdays occasionally. A person called *Akila* used to reside at the prayer centre.

The prayer hall, which was housed in a long building, consisted of a hall for the congregation and also of living quarters, adjacent to the hall, meant for the visiting priest. It is in this section that the attack on the two injured had taken place. The prayer centre was built on a land where a developer had blocked out several plots of land which are in extent of about 25 perches each. Majority of the residents in this scheme belonged to a different religious order. Only about 5 or 6 families lived in and around *Makandura* area, belong to the said Church, which conducted regular religious services from the said prayer centre.

On the day of the incident (25.03.2009), *Rev. Alexander* had arrived at the prayer centre towards the evening. The priest was thereafter having a long conversation with *Kumara*, whose wife was trained by the Church as a clerk. At about 6.30 p.m. they heard the voice of a male shouting "I will kill all of you" (තොරි ඔක්කොම මරනවා) just outside the door of the living quarters. *Rev. Alexander* had recognised the voice of the Appellant. Immediately after the shouting, the Appellant appeared at the door to the room, in which the two injured were. The door was ajar and the Appellant entered through the doorway and struck with his *manna* knife on the witness's head. The witness attempted to defend himself with the next attack, during which he sustained a cut injury to his hand. He then fell on to his bed while *Kumara* grappled with the Appellant. The Appellant then struck twice on the head of *Kumara* who pleaded with him to go without causing

any trouble. The witness also saw a part of the blade of *manna* knife was broken after the attack.

The witness knew the Appellant prior to this incident over his protests for the religious practices conducted at the prayer centre. He is the immediate neighbour of the prayer centre and had a common boundary wall separating his property from the prayer centre.

Witness *Kumara* too gave evidence on same lines as his priest. As he heard the shouting by the Appellant, the witness saw him enter the room. He intervened to prevent attack on the priest but was pushed aside by the Appellant who thereafter struck twice on the head of the priest before turning to him. The witness was also struck twice on his head. Before the Appellant went away, he had again approached Rev *Alexander* and cut his mouth.

The two injured were rushed initially to *Sandalankawa* Hospital and then transferred to *Negombo* General Hospital. They were thereafter transferred to the National Hospital upon their request, where they were examined and treated.

Dr *Hewamadduma* had examined *Kumara* at ward No. 64 of National Hospital and his bed-head ticket No. 736367 indicated that he was admitted on 26.03.2009 at 11.10 a.m. *Kumara* complained that he was attacked with a cutting weapon in the night of 25th by a "known person". At the time of medical examination, he has already undergone an operation in relation to the head

injury, which had resulted in the fracture of skull bone and extradural haemorrhage. This injury is sufficient in the ordinary course of nature to cause death as opined by the medical witness.

The Medico Legal Report concerning Rev. *Alexander* was admitted under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979 and without calling the medical officer who examined the said injured. In relation to the contents of short history as admitted by the parties, the Appellant made a specific denial in the said admission of the short history to the effect that he had not inflicted any injury on the said injured.

It is revealed that the Police had visited the scene in the absence of both injured and recovered a broken part of a blade of a cutting weapon.

In view of the above evidence, this Court now ventures to consider the submissions of the Appellant in relation to the several grounds of appeal.

It was submitted that the Appellant had totally denied of any involvement with causing injuries to any of the injured and he contends that the two injured have falsely implicated him due to his resentment shown for the prayer services conducted in the prayer centre, given the fact that the Appellant, being the immediate neighbour of the prayer centre.

In view of those circumstances, learned President's Counsel contended, that the failure to name the Appellant that very night they sustained injuries, upon being questioned by the examining medical officer at the National Hospital and the unexplainable delay of 25 days to name the Appellant as the attacker, militate against the core prosecution allegation against him.

Learned Deputy Solicitor General, in his reply contended that the identity of the Appellant is well known to the two injured and the failure to name the appellant to the medical officers causes no dent in the truthfulness in their evidence and it could well be that the injury on the mouth of Rev *Alexander* prevented him from making a detailed account of what transpired that evening. He added that there was no motive for any of the injured to falsely implicate the Appellant and the subsequent conduct of the Appellant, who had gone missing after the incident, indicate that he was promptly accused of causing the injuries and was wanted by the Police.

It is clear that the challenge made on the validity of the conviction entered against the Appellant is in turn based on the correctness of the conclusion reached by the trial Court after applying the Test of Spontaneity or the Test of Contemporaneity on the evidence of the two injured persons. It is evident from the submissions of the learned President's Counsel that he challenges the testimonial trustworthiness of the injured, firstly, on their failure to name the Appellant on the first available opportunity at the National Hospital and, secondly, on their implication of him only after a lapse of 25 days. Hence, it is appropriate that the said contention of the Appellant is considered by this Court under these two aspects, although they are conceptually intertwined. The evidence relating to them are somewhat distinguishable in relation to each of these aspects.

The date of offence as specified in the indictment is 25.03.2009. The Statements of Rev *Alexander* and *Pradeep Kumara* were recorded by PS 31575 *Jayasuriya* on 20.04.2009 at *Pannala* Police Station. The Appellant was arrested on 03.05.2009 at about 5.20 a.m. by the said witness, near *Pannala* bus stand.

The evidence as to the short history as recorded in the Medico Legal Reports of the two injured are as reproduced below;

- a. the two injured were admitted and treated at National Hospital in Ward No. 64 and they occupied adjoining beds,
- b. they were examined by two different medical officers. Witness *Pradeep Kumara* was examined on 26.03.2009 at 11.10 a.m. by Dr.*Hewamadduma* while Rev *Alexander* was examined by Dr *Sufine* on 27.03.2009,
- c. none of the two injured have implicated the Appellant in the short history, upon being questioned by the medical officer,
- d. Dr *Hewamadduma* was emphatic that *Pradeep Kumara* only said that he was attacked by a "known person",
- e. Rev *Alexander* claimed in evidence that, upon being questioned by the medical officer as to how he sustained injuries, he replied "මහින්ද කිල කෙනෙක කෙටුව", contrary to the recorded version of the history as given by him.

The evidence in relation to the reasons for the delay in making a statement to Police are summarise below.

In his evidence, Rev *Alexander* sought to explain the delay in making the statement to Police was due to him acting on the advice to rest for some time. He maintains that he had mentioned the Appellant's name as the attacker to

everyone who questioned him as to the cause of the injuries. It is not clear as to why his statement was not recorded by the Police post of the National Hospital since he was admitted to that hospital with a clear history of attack by a known person. It is also not known which Police issued Medico Legal Examination form requesting that the two injured be examined by a Judicial Medical Officer.

Similarly, witness *Kumara* too made a bleated statement. He was treated at the National Hospital for two days and was discharged. He then continued with treatment of his injuries at *Makandura* Hospital. He candidly admitted that he never made a complaint since his Church had already initiated action. He also claims the delay in making a statement to Police was due to medical advice to rest for a while.

It is during cross-examination, witness *Kumara* admitted that soon after the incident a person called *Upul* had rushed to the scene. The witness said that he told *Upul* what transpired at the prayer centre.

In the judgment of *Haramanis v Somalatha* (1998) 3 Sri L.R. 365, Jayasuriya J described the applicable consideration in the Tests of Spontaneity and Contemporaneity are as follows;

"The law in its wisdom requires that the statement should be made within a reasonable time. The test is whether it was made as early as could reasonably be expected in the circumstances and whether there was or was not time for tutoring and concoction. It is a

question of fact depending on the attendant circumstances of the case. No hard and fast rule can be laid down as to when a statement is sufficiently contemporaneous."

It is thus apparent from the wording that longer the delay in making a statement turn results in a greater probability of "*tutoring and concoction*". If a particular witness's testimony fails to satisfy the Tests of Spontaneity and Contemporaneity, the resultant position was considered in *Jayawardena & Others v The State* (2000) 3 Sri L.R. 192, where it was held;

"It is needless to say that such a long delay without reasonable grounds would make the evidence of the complainant, who is the only witness to the robbery suspicious and unsatisfactory having regard to the test of spontaneity and contemporaneity. It is common knowledge that, when complaints are not made promptly after an incident, there is always room for false implication motivated by ill will or on hearsay material. Therefore, in our view there is merit in this argument advanced by learned Counsel that it would be dangerous to act on the evidence of the complainant in view of the long delay which has not been satisfactorily explained."

If there is sufficient explanation to the delay in making a statement, then the mere belatedness of a witness in making an accusation will not for that reason alone be susceptible to be rejected as an afterthought. In *Paulin de Croos v The Queen* 71 NLR 169 and *Bandaranaike v Jagathseña* (1984) 2 Sri L.R. 397, this approach was recognised. The position is clearly spelt out in the judgment of *Bandara v The State* (2001) 2 Sri L.R. 63, as it was held that;

"If there is a valid reason or explanation for the delay and if the trial Judge is satisfied with the reasons or explanation given, no trial Judge would apply the Test of Spontaneity and Contemporaneity and reject the testimony of a witness in such circumstances."

A similar view was expressed in *Samarakoon v The Republic* (2004) 2 Sri L.R. 20, where Jayasuriya J observed thus;

"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.

In considering the failure of the two injured to make the accusation against the Appellant in the first available opportunity and thereafter taking an unusually long period in making their accusation for the first time, this Court must "*scrupulously proceed to examine the reasons for the delay*".

In fact, Rev Alexander said in evidence that due to his injury on the mouth it was difficult for him to make a descriptive version of events, when the medical officer inquired as to the incident. However, this claim is not supported by the

medical officer, who noted only a superficial cut near his mouth, which did not offer any difficulty to the injured in speaking. On the other hand, even if he had such a difficulty, it was easier for him to merely mention the Appellant's name as the offender, rather than making a long statement that a known person had caused the injuries.

It is evident that Rev *Alexander* is not familiar with the area while *Pradeep Kumara* was being a resident of the area, who could be expected to know the identity of the attacker. Although Rev *Alexander* said in his evidence that he recognised the Appellant's voice when the death threat was uttered, during cross-examination he admitted that the witness had not spoken to the Appellant. Then a question arises, how is that he made the voice identification as he claims, which the prosecution failed to clarify.

Whilst at the National Hospital, the two injured were placed on adjoining beds, providing an opportunity for the two to compare notes as to the details of the attack. Rev *Alexander* had the advantage of a 48 hour duration, awaiting to be examined by the medical officer, since his admission to the Hospital in the same evening to clearly remind himself of the incident. *Pradeep Kumara* also had 24 hours to recollect his thoughts and to make an accurate description of the attacker.

However, none of them did that. They waited 25 days to come to the Police. It is not clear as to what prompted Rev *Alexander* to come to *Pannala*

Police after more than three weeks. He was only treated at National Hospital for two days. They made their statement one after the other and had the opportunity of hearing what the other had stated to Police. Having had all these opportunities to clearly comprehend and remind themselves of the details of the attack, why is only Rev *Alexander* implicated the Appellant in his statement, while *Pradeep Kumara* admitted in his cross-examination that he did not. Rev. *Alexander* had no answer to the question put to him that he had implicated the Appellant for the first time only in his statement to Police.

Testimony of witness *Pradeep Kumara* provides a clue to this disparity. According to this witness, he did not make a statement to Police because his Church did initiate action. He made his statement when Rev *Alexander* wanted him to make one. He further admitted that he did not mention that they were attacked by the Appellant even in that belated statement, although they had the opportunity to discuss the manner in which they should make their statements. No clarification was elicited by the prosecution during its re-examination. The relevant question and answer are as follows;

“ප්‍ර: එමෙන්ම එක හා සමාන කට උත්තර දෙන්න සහ අපරාධය කෙරුවේ මහින්ද මුඩ ආරච්චි කියලා තමුන්ලා කිවාද?

ස: පොලීඩියට කට උත්තරයක් දැන්නා.

ප්‍ර: කට උත්තරයේ තමුන්ලා කිවාද තමුන්ලා දෙන්නාට තුවාල කළා කියලා?

ස: නැහැ.”

The witness admitted that *Akila* was the first person to whom he disclosed that it was the Appellant who attacked them. According to Rev *Alexander*, witness *Pradeep Kumara* contacted *Akila* by phone and got his assistance for them to be rushed to a nearby hospital. But the prosecution did not call *Akila*, although he was listed as the 3rd prosecution witness, depriving the trial Court of an opportunity of assessing the consistency of the version given by the witnesses.

It is therefore evident that none of the injured have implicated the Appellant in the first available opportunity, having had a reasonable opportunity to do so. Then they waited for 25 days for no justifiable reason to make a delayed statement to *Pannala* Police. It appears that *Pradeep Kumara* made statement to Police only upon being persuaded by Rev. *Alexander*, and on his own admission, did not implicate the Appellant, even after 25 days since the incident.

Interestingly, when Rev *Alexander* was suggested by the Appellant during his cross examination that the Appellant was falsely implicated, the witness claimed that he saw him striking. The relevant question and answer are reproduced below;

“ප්‍ර: මම යෝජනා කරනවා, තමාට කියීම කරදරයක් කලේ නෑ, ඔහු ඕස්ථිය ආවේ නෑ, ඔහු කියීම කරදරයක් කලේ නෑ, නමුත් මෙම විත්තිකරුව සම්බන්ධ කරලා ඔහුගේ නම සඳහන් කරලා මෙම විත්තිකරු අත් අඩංගුවට ගන්න කටයුතු කළා කියලා?

ර: මම දැක්කා කොටනවා.”

But, when questioned by Court, the witness almost conceded to the Appellant's suggestion referred to above, by admitting that he "thought" it was the Appellant who did it because of his prior acts of protest. Strangely, the Court did not ask the witness why he implicated the Appellant. The Court, merely wanted to clarify from the witness as to why would the Appellant mount such an attack on them without any provocative act. But the witness, quite unwittingly, made this important revelation. The relevant question by Court and the witnesses' answer are reproduced below for clarity.

" ප්‍ර: තමාට තේරෙන විදියට කියන්න පුලුවන්ද කිසිම දෙයක් නැතිව මෙම විත්තිකරු එක පාරටම ඇවිත් පහර දුන්නේ ඇය කියලා?

උ: රට කළින් යම් යම් විරෝධතා තිබූණ නිසා මට නිතෙන විදියට මෙම පුද්ගලයා කරන්න ඇති කියලා."

This answer clearly indicates that as far as this particular witness is concerned, the Appellant was implicated in the attack simply on suspicion, and not because he was necessarily seen and identified that evening but due to "*tutoring and concoction*" by a third party. Perhaps, this is the reason as to why, witness *Pradeep Kumara*, although he knew the Appellant as a fellow villager, did not mention the Appellant's name to the examining doctor on the day of the incident and even in making his statement after 25 days.

In the impugned judgment of the trial Court, it appears that the Court had considered the evidence of the prosecution evidence only in one paragraph. In its 11 page Judgment the 1st to 8th pages were mere narration of the evidence. The only paragraph which dealt with the prosecution case is found on page 9. The

said paragraph is consisting of four sentences. The relevant paragraph is reproduced below;

“ ඉන් අනතුරුව වුදින වෙනුවෙන් යාක්ම් ඉදිරිපත් කර ඇති නමුත් වුදිතගේ යාක්මීය සලකා බැලීමට පෙරානුව පැමිණිල්ල විධින ප්‍රමාණවත් නඩුකරයක් වුදිතට එරෙහිව ඉදිරිපත් කර ඇදුයි මම සලකා බලමි. මෙහිදී වුදිතගේ ද්‍රාවරත්වය රි ඇත්තේ වුදින මෙම සිද්ධිය වූ අවස්ථාවේ තොයිරී බවත්, ඔහු මෙම සිද්ධියට කිහිද සම්බන්ධයක් තොමැති බවත් යන්න වේ. පැමිණිල්ලේ යාක්ම් අංක 01 හා පැමිණිල්ලේ යාක්ම් අංක 02 වුදිතට පෙර දැක හඳුනන පුද්ගලයන් වන අතර ඔවුන් විධින පැහැදිලිව මෙම සිද්ධිය අවස්ථාවේදී වුදිතට හඳුනාගෙන ඇත. එ අනුව පැමිණිල්ල විධින ප්‍රමාණවත් නඩුකරයක් ඉදිරිපත් කර ඇති බවට දැනීමට පත් වෙමින් වුදින වෙනුවෙන් ඉදිරිපත් යාක්ම් මම සලකා බලමි.”

The trial Court had accepted the prosecution version simply on the premise that the Appellant was known to the injured prior to the incident in that one sentence. There was absolutely no analysis undertaken by the trial Court at all for evaluating the testimonial trustworthiness of the prosecution witness for their failure to name the Appellant in the first available opportunity and to make their statements to Police only after 25 days. In doing so the trial Court had abdicated its judicial duty as recognised in *Samarakoon v The Republic* (supra).

Learned High Court Judge who delivered the impugned judgment had no opportunity of observing the demeanour and deportment of the two injured persons, as he had succeeded his predecessor only at the stage of defence case. It is therefore incumbent upon the learned trial Judge to properly evaluate the evidence, taking extra care, while keeping in mind of the fact that he did not

have the advantage of observing the witnesses. However, since the trial Court had acted on the transcript of the evidence for determining the truthfulness and reliability of the evidence, this Court too is placed in the same position in evaluation as the trial Court by examining the transcript of the evidence, since the trial Court had no advantage of seeing the witnesses over this Court.

Certainly there is merit in the contention advanced by the learned President's Counsel that the Appellant was falsely implicated owing to his prior acts of protest for the religious activities conducted in the said prayer centre.

In view of these infirmities in the evidence of the two injured persons, this Court entertains a reasonable doubt as to the truthfulness and reliability of the version of events as related to by the two injured persons. This ground of appeal therefore is entitle to succeed.

The other contention of the learned President's Counsel was that the trial Court had shifted the burden of proof on the Appellant as it is stated in the judgment that he had failed to raise a reasonable doubt in the prosecution case.

It appears that this too is a valid contention as the words used by the trial Court, in its judgment did in fact indicate adoption of such an approach in considering the evidence. The relevant segment of the judgment is worded as follows;

“ ඉහත සියලු කරුණු සලකා බැලීමේදී පැමිණිල්ල විසින් ඉදිරිපත් කරුණු සම්බන්ධයෙන් සංඝරණ සැකයක් ඇති කිරීමට වුදින අපොහොසත් රි ඇති බැවි නිගමනය කරමි. එම අනුව මෙම නඩුවේ පැමිණිල්ල සාඝරණ සැකයෙන් ඔබබත තහවුරු කර ඇති බවත්, වෝද්‍යාවේ අභ්‍යු සියලු කරුණු එයේ සාඝරණ සැකයෙන් ඔබබත තහවුරු කර ඇති බවත්, වුදින වෙනුවෙන් ඉදිරිපත් සාක්ෂි මහින් එම අවකාශ හා වැදගත් කරුණු කෙරෙහි සාඝරණ සැකයක් ඇති කිරීමට අපොහොසත්ට ඇති බව නීරණය කරමින් මෙම ඉදිරිපත් ඇති 01, 02 එක එක වෝද්‍යාවන්ට වුදින වරදකරු බව නීරණය කර තීන්ද කරමි.”

The words “සාඝරණ සැකයක් ඇති කිරීමට වුදින අපොහොසත් රි ඇති බව” indicate that the trial Court expected the Appellant to create a reasonable doubt in the prosecution case. This mistaken notion is once more repeated by the trial Court in its final sentence, eliminating any doubt as to the perception of the burden of proof as entertained by the trial Court. When it used the words “වුදින අපොහොසත් රි ඇති බව” it is obvious that the trial Court expected the Appellant to create a doubt in the prosecution case, by casting a positive obligation, rather than the prosecution on its own proving its case beyond reasonable doubt. If the trial Court had used the words “සාඝරණ සැකයක් මත වුයේ නැත”, instead of the words “වුදින අපොහොසත් රි ඇති බව” then, it is not possible interpret as to what the trial Court had intended was that it is up to the accused to raise a reasonable doubt in the prosecution case.

What the trial Court should have considered at the conclusion of the trial is, after taking the evidence presented before the Court into its consideration as a whole, it should proceed to decide the fundamental question whether the prosecution has proved its case beyond reasonable doubt or not.

This Court therefore inclined to accept the submissions of the learned President's Counsel that the trial Court had in fact shifted burden of proof on to

the Appellant by expecting him to raise a reasonable doubt in the prosecution case.

Therefore, the conviction and sentence of the Appellant in respect of the two attempted murder counts are set aside.

The appeal of the Appellant is accordingly allowed.

JUDGE OF THE COURT OF APPEAL

K. PRIYANCHA FERNANDO, J.

I agree.

JUDGE OF THE COURT OF APPEAL