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

In the matter of an application for Special Leave to Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Complainant

SC Appeal No. 36/2020
SC (SPL) LA No. 189/2018
CA Appeal No. CA/294-296/2015
HC Colombo No.7433/2014

Vs.

1. Meboob Kumar
2. Wanniarachchige Ranga Sampath Fonseka
3. Fazad Masar

Accused

AND THEN BETWEEN

1. Meboob Kumar
2. Wanniarachchige Ranga Sampath Fonseka
3. Fazad Masar

Accused- Appellants

Vs.

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

Complainant- Respondent

AND NOW BETWEEN

1. Wanniarachchige Ranga Sampath Fonseka

Presently at:
Welikada (Male Unit).

Accused-Appellant-Petitioner

Vs.

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

Complainant-Respondent-Respondent

Before : Achala Wengappuli, J.
K. Priyantha Fernando, J.
Menaka Wijesundera, J.

Counsel : Shavindra Fernando, PC with Nipun Samaratunga instructed by Mrs. Eliza Chandappa for the Accused-Appellant-Appellant.
Sudharshana De Silva, ASG instructed by State Attorneys for the Complainant-Respondent-Respondent.

Written Submissions : Latest written submissions on behalf of the Accused-Appellant-Appellant on 19th April, 2021.
Latest written submissions on behalf of the Complainant-Respondent-Respondent on 24th February, 2025.

Argued on : 18.09.2025

Decided on : 24.10.2025

MENAKA WIJESUNDERA J.

The instant appeal has been lodged by the Accused-Appellant-Appellant, hereinafter referred to as the 'Accused-Appellant', to set aside the judgment dated 31st May 2018 of the Court of Appeal.

The Accused-Appellant had been indicted for being in possession and trafficking of 246.14 grams of heroin under the provisions of the Poisons, Opium and Dangerous drugs (Amendment) Act No. 13 of 1984.

Section 54A of the Act states as follows: *Prohibition against manufacture, trafficking, import or export and possession of dangerous drugs.*

(1) Any person who

(a) manufactures any of the following dangerous drugs, namely heroin or cocaine or morphine or opium shall be guilty of an offence against this Ordinance and shall on conviction by the High Court without a jury be liable to a sentence of death or life imprisonment;

(b) except as permitted by or otherwise than in accordance with the provisions of this Chapter or a licence of the Director, traffics in any dangerous drug set out in Column II of Part III of the Third Schedule in excess of the amount set out in the said Column II shall be guilty of an offence against this Ordinance and shall on conviction by the High Court without a jury be liable to the penalty set out in the corresponding entry in Column III of that Part;

(c) except as permitted by or otherwise than in accordance with the provisions of this Chapter or a license of the Director, imports or exports any dangerous drug let out in Column II of Part III of the Third Schedule in excess

of the amount set out in the said Column II shall be guilty of an offence against this Ordinance and shall on conviction by the High Court without a jury he liable to the penalty set out in the corresponding entry in Column III of that Part;

(d) except as permitted by or otherwise than in accordance with the provisions of this Chapter or a license of the Director, possesses any dangerous drug set Out in Column II of Part III of the Third Schedule in excess of the amount set out in the said Column II shall be guilty of an offence against this Ordinance and shall on conviction by the High Court without a jury be liable to the penalty set out in the corresponding entry in Column III of that Part.

As such the appellant was indicted and convicted under 54A (a) and (d) of the relevant act.

Two other accused had also been indicted in the same indictment for the same offences in the High Court and both of them had pleaded guilty to the charges and had been sentenced accordingly. The Accused-Appellant had pleaded not guilty and the trial had proceeded against him.

The prosecution had led evidence of PW1, PW2, PW5, PW8 and the evidence of the Government Analyst.

When the defense was called the Accused-Appellant had made a dock statement and, on the material, revealed in the dock statement the prosecution had made an application to lead evidence in rebuttal and PW1 had been recalled.

Thereafter, the defense had led witnesses from Dialog and Etisalat private companies. At the end of the trial, the learned Trial Judge had found the Accused-Appellant guilty of both possession and trafficking of heroin and had sentenced him accordingly.

Being aggrieved by the said judgment, an appeal had been lodged to the Court of Appeal. The Court of Appeal had affirmed the conviction and the sentence imposed by the High Court. The instant appeal has been lodged against the said judgment of the Court of Appeal.

At the time of leave, this Court had granted leave on the following two questions of law.

(i) Did the Learned Judges of the Court of Appeal err in law by failing to consider the defence ground of appeal "that the Learned HCJ

erred in law by failing to consider of the defence case caused a reasonable doubt"?

(ii) Did the Learned Judges of the Court of Appeal err in not holding that the Learned Trial Judges rejection of the dock statement and the defence witnesses created a reasonable doubt in the prosecution case?

Upon considering the above two questions of law, I am of the opinion that they are very much similar in nature and it is in relation to the fact that whether the learned Judges of the Court of Appeal have failed to consider whether the trial Judge has failed to the consider the defence taken up by the Accused-Appellant.

The facts pertaining to the instant matter is that on the 11th of November 2012, the Police Narcotics Bureau (PNB), on an information received, had gone in search of two Pakistani nationals to Bambalapitiya.

Upon sighting them, they had also observed that at the same time a motor cyclist approaching the two foreigners and the said motor cycle had been ridden by the Accused-Appellant and he had been given a bag by the two Pakistani nationals, who had been the above-mentioned 1st and the 3rd Accused.

Thereafter, the PNB officers had stopped the motor cyclist and on inspection they had found the bag given by the two Pakistani nationals hanging from the handle of the motor cycle. In the said bag they had identified the alleged heroin and thereafter, he along with the other two had been arrested.

According to the evidence of the prosecution witnesses, the said Accused-Appellant had been arrested around 1.00 pm on that day.

The prosecution had led the evidence of the team of Police Narcotics Bureau officers and they had been lengthily cross examined by the Counsel defending the Accused-Appellant.

Upon the closure of the prosecution case, the defence had been called and the Accused-Appellant had made a dock statement. In the dock statement he had said that he was never arrested at Bambalapitiya, as alleged by the PNB officers, but he says that he was taken into custody when he had been going from Kalubowila to Boralesgamuwa and he asserts that he was not in possession of any illegal substances at that time. He further contends that around 1.00 p.m. , he received phone calls on his phone and that the narcotics officers had taken his phone in to custody while he was at home.

He further denies of having anything to do with the 1st and the 2nd accused.

The law pertaining to dock statements is that it should be considered as evidence subject to two infirmities,

(i) Dock statement is not tested by cross examination.
(ii) Dock statement is not made under oath.

This view has been taken up in the decision of ***Queen v Buddarakkitha Thera 63 N.L.R page 433*** where Basnayake CJ has held that,

"The right of an accused person to make an unsworn statement from the dock is recognized in our law. That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross examination."

In the case of ***Queen vs Kularatne 71 N.L.R 529*** it has been held that,

"In Buddarakkitha case it was held that the 'right of an accused person to make an unsworn statement from the dock is recognized in our law. That right would be of no value unless such statement is treated as evidence on behalf of the accused, subject, however, to the infirmity which attaches to statements that are unsworn and have not been tested by cross examination'. We are in respectful agreement and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury 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 for the prosecution, the defence must succeed, and
(c) That should not be used against another accused."

Therefore, the material revealed in a statement from the dock by an accused person should be considered as evidence subject to the infirmities that it has not been cross-examined and that it was not made under oath. But nevertheless, it can be considered as evidence and be acted upon.

As such immediately after the appellant made the dock statement, the prosecution had made an application to call evidence in rebuttal under Section 202 of the Code of Criminal Procedure Act No. 15 of 1979.

Section 202 of the Code of Criminal Procedure Act states;

> "If any evidence is adduced on behalf of the accused the prosecuting Counsel may with the leave of the Judge call witnesses in rebuttal."

The position that taken up in the dock statement had not been taken up before and even the witnesses had not been cross-examined on the issue of the Appellant receiving phone calls to his phone.

The learned Counsel for the Accused-Appellant had not objected to this application.

It has been led in the case of ***Hildon v Munaweera 3 Sri LR 220*** that,

> *"A party cannot lead evidence in rebuttal as a matter of right. It is only permitted to counter unexpected or decisive evidence introduced by the opposing party."*

Therefore, the learned trial Judge has allowed the application as the defense also had not objected to the said application.

The prosecution has recalled witness no 01. He had been questioned by the prosecution as to how the Accused-Appellant had received calls around 1:27 pm and 3:00 pm to his phone, if he had been arrested as alleged and how the phone had been in the custody of the Appellant.

The explanation given by PW1, was that once the Accused-Appellant was arrested the phone was given back to him to make any call if he wants as a means of further surveillance of the suspect. But the said witness has admitted in cross-examination that he never made any note with regard to the handing back of the phone to the Appellant, because he had in fact recorded the phone was taken over as a personal belonging of the Accused-Appellant.

The Accused-Appellant had led in evidence, officials from the Dialog and Etisalat service providers who had said that the service provider of the Accused-Appellant has been the Dialog PLC but they had not been able to provide any information with regard to his phone records because they had been requested three months after his arrest and according to him after 03 months, all telephone records get deleted if not saved.

The representative from the Etisalat company had said that at 1:27 pm and at 3:00 pm there were two calls received by the Accused-Appellant from their service and one had been in the location of Boralesgamuwa and the second in

the location of Katuwawala. But the said callers had not been called as witnesses.

Thereafter, the Accused-Appellant had closed his case and the learned Trial Judge had found him guilty of the two charges he was accused of.

The main ground of the learned President's Counsel for the Accused-Appellant was that the learned trial Judge had failed to consider the case of the defence and that the evidence led in rebuttal should have been rejected.

But Counsel for the respondent vehemently objected to the submissions of the learned President Counsel and said that the learned trial Judge had considered the defence case extensively.

Upon considering the submissions of both parties it had to be noted that the Accused-Appellant had taken up the position that at the time of arrest, he was in a different location and not in the location put forward by the prosecution, only in his statement from the dock, which is invariably a belated defense.

The defence of an *alibi* has been provided for under the provisions of the Code of Criminal Procedure Code Section 126A, according to which, if a defence of an *alibi* is going to be taken it has to be done at the very outset and if not, he must state before Court the reason for the delay.

In the instant matter, the learned Counsel for the respondents have cited ***SC/APPEAL/61/2023*** dated 09th October 2024 by **Justice Mahinda Samayawardhana** in which he has analyzed the principle of defence of an alibi by an accused person. It states as follows;

> *"An "alibi" originating from the Latin word for "elsewhere", typically serves as a defence whereby the accused contends that he was not present at the scene of the crime during the material time but was instead at a specific other location, thus rendering his participation of the offence certainly impossible. Section 126A (3) of our Code of Criminal Procedure Act No.15 of 1979 and Section 64(3) of the UK Criminal Procedure and Investigations Act 1996 provides a comparable definition.*
>
> *An alibi is a strong defence that, if accepted, entirely destroys the prosecution case. By demonstrating that the accused was elsewhere, the alibi conclusively negates the prosecution's ability to prove the accused's participation in the alleged offence.*
>
> *However, the defence of alibi taken up by the accused in this case is not entitles to succeed primarily because the accused disclosed this defence for*

the first time in his evidence. This defence was never suggested to any of the prosecution witnesses including the two police witnesses who investigated this incident. There is no evidence that the accused disclosed such a defence in his statement to the police or at any time during the police investigation."

If that is so the question arises whether in a case when the accused had taken the defense of an *alibi* and when he is required to divulge it at the very first time violates the rights of an accused person.

The idea of a statement made by an accused person is to ensure that the prosecution to be aware as to what type of a defense had been taken by the accused so that a proper investigation is done and also a proper prosecution is also carried out which is quite relevant to conduct a fair trial.

In the context of having to ensure a fair trial is not an exparte affairs where only the prosecution has to lay its cards on the table, although the prosecution has the burden of proving in a criminal case, the accused person by divulging his defense at the earliest opportunity ensures that the entire investigation and the trial are conducted without delay.

In the instant matter too, the defence of an alibi had not been taken during the investigations and neither when cross examining the witnesses for the prosecution. The Accused-Appellant, has taken the defence of an alibi only in the dock statement.

Therefore, the trial judge very correctly had held that it cannot be relied upon.

In the case of ***Vishvanadan v Attorney General (2021) 1 Sri LR 14*** **Justice de Abrew** had held that,

"If the accused takes up the plea of an alibi, he shall put it to the prosecution witnesses during cross-examination. If the plea has been out forward in the dock statement for the first time Court can reject it as false".

The learned trial Judge in his judgment has very clearly analyzed the impact of the dock statement by the Accused-Appellant and the contents of it and has stated that, although the Accused-Appellant had pleaded the defence of an *alibi*, the defence witnesses he called had not been able to substantiate this position.

The main point revealed by the Accused-Appellant in the dock statement was that he had received telephone calls to his mobile at 1:27 pm and at 3:00 pm when the prosecution had alleged that he had been arrested raises the doubt

that is had the phone to receive the calls that he could not have been in custody but in a different location as alleged in the dock statement.

Out of the defense witnesses called by the Accused-Appellant to establish the above position taken up in the dock statement, the two employees of the Etisalat company, could only say that two calls from the Accused-Appellant's dialog number had been generated to an Etisalat number at 1:27 pm and 3:00 pm, through a transmission tower at Katuwawala. However, this does not confirm the fact that the Accused-Appellant was within the location of Katuwawala. The witness from the Dialog Axiata Company could not indicate the location from where the above-mentioned calls were generated from the Accused-Appellant's phone.

Therefore, the trial Judge has carefully analyzed the evidence of defence witnesses along with the contents of the dock statement and had come to the conclusion that it has not by any means created a reasonable doubt in the case for the prosecution.

The learned President Counsel made a very strong submission with regard to the non-availability of the notes of PW1 with regard to the mobile phone being handed over to the Appellant after his arrest.

When this witness was recalled by the prosecution, the witness has very carefully explained his position. He had said that the phone was taken into custody as one of the personal belongings of the Accused-Appellant and therefore, it was registered in a different document.

Therefore, we see no merit in the said contention of the President Counsel. The learned President Counsel submitted to Court that the entirety of the evidence of PW1 should be rejected. However, it has to be noted that the evidence of rebuttal had been led after the defence Counsel had conceded to the said application.

Therefore, the evidence of PW1 in rebuttal has been led after following the relevant provisions of the law and with the consent of the Counsel for the defence. Therefore, I see no reason as to why the learned trial judge should have rejected the evidence led in rebuttal as suggested by the learned Counsel for the Appellant.

Therefore, the conclusion of the trial Judge in deciding that the defence of an *alibi* taken up in the dock statement for the first time should be rejected is factually and legally correct, when considering the above-mentioned facts.

It is well settled in law that evidence led in rebuttal is admissible when it is brought within the proper procedural framework. In the instant case, the learned Trial Judge permitted the rebuttal evidence of PW1 after an application was made by the prosecution and no objection was raised by the defence at the time. The procedural fairness of this process is thus unimpeachable.

Furthermore, the attempt by the defence to later reject the entirety of the testimony of PW1 after having initially consented to the rebuttal, which is contrary to the principles of estoppel and waiver. Once the defence acquiesced to the rebuttal evidence, they are estopped from later challenging its admissibility on grounds of fairness.

The rejection of the *alibi*, which was raised for the first time in the dock statement without prior notice or supporting evidence, was a decision clearly grounded in established jurisprudence. The Courts have repeatedly held that such uncorroborated late stage defenses carry little evidentiary value, particularly when they are countered by credible and lawfully admitted rebuttal testimony.

As such, I answer the questions of law raised by the Appellants in the negative and affirm the judgement of the Court of Appeal.

As such, the instant appeal is dismissed.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J.
I agree.

JUDGE OF THE SUPREME COURT

K. Priyantha Fernando, J.
I agree.

JUDGE OF THE SUPREME COURT