

**SARATH  
VS  
ATTORNEY GENERAL**

COURT OF APPEAL.  
BALAPATABENDI, J.,  
BASNAYAKE J.,  
C. A. No. 99/2001.  
HIGH COURT KANDY 1809/9.  
SEPTEMBER 7, 2005.

*Penal Code - Sections 296, 300 - Convicted - Criminal Procedure Code, Section 283-Dock Statement considered before considering the evidence of the prosecution- Would it affect the presumption of innocence - Prejudiced?*

**HELD:**

1. While writing a judgment a judge must have in his mind the principle of law relating to presumption of innocence, the accused's right to remain silent, burden cast on the prosecution to prove the case beyond reasonable doubt which stays throughout the case.
2. There is no rule that a particular item/evidence should be considered first in the judgment. There is no prescribed sequence in analyzing evidence. The judgment analysed the entire evidence at the same time. Therefore the fact of considering the dock statement at the beginning of the judgment would not make any difference as the prosecution evidence was considered at the same time.
3. One must bear in mind that when a dock statement is considered anywhere in the judgment, the judge who heard the evidence is aware of the prosecution case and would always consider the dock statement while considering the prosecution story. One cannot consider the dock statement in isolation.

**Per Eric Basnayake J.,**

"There is no rule to say what a judge should consider first and what should be considered last.. judges use their inimitable styles in their judgment writing."

An appeal from the Judgment of the High Court of Kandy

**Cases referred to:-**

1. *R vs Piyadasa* - 72 NLR 434
2. *Gunapala and others vs the Republic* - 1994 3 Sri LR 180
3. *James Silva vs The Republic* - 1980 2 Sri LR 167
4. *Queen vs Jayasena* - 72 NLR 313 PC
5. *Queen vs Kularatne* - 71 NLR 551

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6. *Somasiri vs Attorney General - 1983 2 SriLR 225 at 235*

*Dr. Ranjith Fernando with Ms D. Jayatilake, Ms, R. A. Udayangani for Accused Appellant*

*W. P. G. Dep P. C., Addl. Solicitor General with Ms. Anoop de Silva, S. C. for the Respondent.*

*Cur. adv. vult.*

March 9, 2006.

**ERIC BASNAYAKE J.**

The accused appellant (accused) was indicted under section 296 of the Penal Code for causing the death by shooting of the following persons, namely :

1. A. K. Hemawathie Perera
2. S. M. Chitrananda Guruge
3. K. Violet
4. Lilynona
5. Padma Gunawardene.

He was also charged under section 300 of the Penal Code for causing the attempted murder of :

1. K. Simian,
2. Sheila Gunawardena and
3. Kalpani Bandara.

After trial before a High Court Judge the accused was found guilty of the 1st, 2nd, 4th, 5th, 6th, 7th, and 8th charges. He was sentenced to 45 years R. I. on the 6th, 7th and 8th charges (15 years each to run consecutively.) Death sentence was passed on charges 1, 2, 3 and 5. He was acquitted on the 3rd charge due to lack of evidence. This is an appeal against the said conviction and the sentence.

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## **The Unchallenged Evidence.**

On 06.04.1996 at about 7 p.m. the accused, a policeman, had gone to Gilbert's house. Gilbert's father-in law, Simian and mother - in- Law, Lily Nona, were in the habit of going to Gilbert's house in the night to watch television. When the accused went to Gilbert's at 7 p.m., Simion had also been there. The accused was in uniform. He was armed with a rifle. The accused had told them that a terrorist was caught armed with a bomb in Nawalapitiya town and the police needed to conduct a search in houses. The accused had chosen Gilbert's house for that purpose.

### **1st Incident**

The accused had wanted the names of the people written on a sheet of paper. This was done. Then the accused had wanted Simian to send for the others. Simian had sent a message and got down his wife Lily Nona, daughter Violet, and son-in-Law Chitrananda. Then the accused had wanted their signatures placed on the sheet of paper. While the signatures were being placed, the accused had opened fire. Chitrananda, Simian and Lily Nona had been shot. Chitrananda and Lily Nona succumbed to their injuries. Simian survived to relate the story. That was the 1st incident.

### **2nd Incident**

Violet the daughter of Simian who was at Gilbert's had run towards the road after the 1st incident. The accused too had disappeared by this time. Thereafter a report of a gun as heard. Later on, the police had found Violet with gun shot injuries on the road leading to Gilbert's house. Violet succumbed to her injuries.

### **3rd Incident**

Padma Gunawardene's house is about 15 yards from Gilbert's house. In the night they had heard the sound of something similar in nature to lit fire -crackers. This incident occurred on 06.04.1996. Being a date close to

the Sinhala Tamil New Year it is reasonable to have had such belief. Hence they had not taken much notice of it. Then they had heard someone knocking at the door. The lights were switched on and the door was opened to find the accused armed with a gun at the door step. It was the daughter of Padma, Sachini who opened the door. The accused opened fire and she got injured. When she raised cries, her mother Padma had come and the accused shot her dead. Thereafter the accused and gone off.

#### **4th Incident**

Responding to the cries at Gilbert's house, Padma's sister Sheila had gone to Gilbert's house and when she saw several people injured on the ground, had raised cries. Then she had seen the accused coming and thought that the accused was coming to help them. The accused had told her not to make a noise and opened fire at her and Hemawathie. Hemawathie died of the injuries but Sheila survived to tell the story.

#### **5th Incident**

The accused had gone to Padma's house a second time and opened fire again.

#### **The other evidence**

The Police have recovered 20 bullet casings among other things from the scene of the crime (12 at Gilbert's house and 8 at Padma's house). The accused was arrested while hiding in his house with the gun. The doctors found injuries on the head, chest and the stomach of the deceased persons. Several important organs of the bodies were found damaged.

#### **Well Planned**

The accused finished his beat duty at 2 p.m. that day. He finished his duties and wrongfully kept the gun with him with ammunition. He was off

duty, but dressed in uniform. He had no business going to Gilbert's house in uniform, armed with a gun. He made up a story about the arrest of a terrorist with a bomb in order to gather everyone to one place so that he could exterminate them all. Then he wanted the names written in a sheet of paper. He wanted to show that he was doing something official at a time of crisis. The accused being a relation and a policeman, no one had been suspicious of what was about to take place. When the names were listed out he wanted everyone to be at the same place, presumably making things easier for him to carry out his plan. Then he opened fire.

### Submission of the Counsel for the Appellant

When this case was taken up for argument the learned counsel for the accused admitted the *actus reus*. The learned counsel did not dispute the evidence elicited. He complained that the learned trial judge had considered the dock statement before considering the evidence of the prosecution.

The learned trial judge had rejected the dock statement. As the dock statement was rejected before considering the prosecution case, he submitted that there is no room to consider any doubt that would arise from the dock statement. The learned counsel submitted that if a dock statement is considered prematurely and rejected, it would necessarily affect the presumption of innocence although the burden continues to rest on the prosecution to establish throughout the case beyond reasonable doubt notwithstanding the rejection of the dock statement. The prejudice caused to the accused by the consideration of a dock statement prior to the evaluation of the case for the prosecution is that the question of whether it raises any doubt in the prosecution case or not, fully, partly or in an intermediary fashion cannot be applied if the dock statement has already been rejected before the consideration of the prosecution case.

In support of his submission Dr. Fernando, Counsel for the accused relies on *R. Vs. Piyadasa*,<sup>(1)</sup> *Gunapala and Others vs. The Republic*<sup>(2)</sup> *James Silva Vs. The Republic*<sup>(3)</sup> *Jayasena v. Queen In Piyadasa's case*<sup>(4)</sup> the trial judge in his charge said with regard to the dock statement that "if you think it is true or probably true, then you must acquit him

because it casts a reasonable doubt on the crown's case". T. S. Fernando J with Abeysondera and Alles JJ agreeing held that even if the jury did not consider the appellant's statement to be true or probably true, yet if the statement could have caused them to entertain a reasonable doubt as to the truth of the Crown case the appellant was entitled to claim a verdict of acquittal.

In *James Silva Rodrigo J* with Ranasinghe J (as he then was) agreeing was critical with regard to a statement of the trial judge where he states that he had considered the defence of the accused in the light of the evidence led by the prosecution. Rodrigo J states that to examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence.

Having considered the Privy Council Judgment in *Queen vs. Jayasena* (Supra) Rodrigo J states thus "a satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the court adduced whether by the prosecution or by the defense in its totality without compartmentalizing and ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty".

In *Gunapala's* case the conviction was set aside and a retrial was ordered due to the failure of the trial judge as to how a dock statement is to be considered. Ismail J held that "the jury must not only be informed that a statement from the dock must be looked upon as evidence subject to the infirmities attaching to it, 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) that it should not be used against another accused" *Queen vs Kularatne* <sup>(5)</sup> *Somasiri's Vs. Attorney General* <sup>(6)</sup>

The trial judge had directed the jury that the plea of alibi which impliedly arose on the unsworn statements made by the 2nd and 3rd accused had to be proved by them on a balance of probability. The court held that imposing such a burden on the accused to prove the defense of alibi constituted a misdirection on the law in regard to the burden of proof.

Dr. Fernando submitted that a long line of cases, texts and authorities relating to the law applicable to the evaluation of a dock statement suggest that a trial court is expected to follow a sequence of events in the ultimate consideration of his findings as otherwise it would tend to defeat the achievement of the eventual judicial evaluation expected of a trial court. He submits that otherwise it would cut across the presumption of innocence. He further submits that if a dock statement is considered prematurely and rejected, it would necessarily affect the presumption of innocence.

I cannot concede the argument of Dr. Fernando. The cases mentioned do not support such a contention. There is no rule to say what a judge should consider first and what should be considered last. Judges use their inimitable styles in their judgment writing. Section 283 of the Criminal Procedure Code is as follows :-

- 1. The judgment shall be written by the judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision.*
- 2. It shall specify the offence if any of which and the section of the law under which the accused is convicted and the punishment to which he is sentenced.*
- 3. If it be a judgment of acquittal it shall state the offence of which the accused is acquitted.*

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4. *When a judgment has been so signed it cannot be altered or reviewed by the court which gives such judgment :*

*Provided that a clerical error may be rectified at any time and that any other error may be rectified at any time before the court rises for the day.*

5. *The judgment shall be explained to the accused thereby and a copy thereof shall be given to him without delay if he applies for it.*
6. *The original shall be filed with the record of the proceedings.*

While writing a judgment a judge must have in his mind the principles of law for example the principle relating to presumption of innocence, the accused's right to remain silent, the burden cast on the prosecution to prove the case beyond reasonable doubt which stays throughout the case etc. I find the learned trial judge has in fact referred to some of these principles in the judgment.

One has to consider all these arguments in the light of the evidence which I find is unique in this case. The accused in this case is a policeman. He was charged for causing the death of five of his relations and also attempting to cause the death of three others. On the day of the incident the accused was engaged in beat duty from 10 a.m. till 2 p.m. He was entrusted with a rifle which is a T-56. After discharging his duties the accused should have returned the rifle. He had not done that. The accused had other plans.

### **The judgment**

The accused raised a defence of accident in his dock statement. He said that he went to this house on invitation. According to the prosecution evidence the accused had come to check the inmates. The accused also said that the gun went off when Chitrananda tried to get the gun from the accused. According to the evidence, while Chitrananda was placing his

signature as required by the accused, the accused had opened fire at Chitrananda. Chitrananda was a soldier. It may be that the accused wanted to fell him first.

The learned Judge considered the dock statement while having a picture of the unchallenged evidence adduced for the prosecution. If the shooting took place only at a single place, the defense raised at the dock statement would have attracted a closer examination. Considering the fact that the shooting took place in more than one place which made the dock statement unworthy of credit, it left the Judge with only one choice, namely, to reject it. The Judge stated that the dock statement does not create doubt in the prosecution case. Thereafter the learned judge began to analyse the prosecution evidence.

There is no rule that a particular item of evidence should be considered first in the judgment. There is no prescribed sequence in analyzing evidence. The learned judge had analysed the entire evidence at the same time. Therefore the fact of considering the dock statement at the beginning of the judgment would not make any difference as the prosecution evidence was considered at the same time. There was no interval between the two. One must bear in mind that when a dock statement is considered anywhere in the judgment, the judge who heard the evidence is aware of the prosecution case and would always consider the dock statement while considering the prosecution story. One cannot consider the dock statement in isolation. How can one accept or reject the dock statement without knowing the other side of the story?

Hence I see no merit in this appeal. The appeal is dismissed

**BALAPATABENDI, J., — I agree**

*Appeal dismissed.*