Formulating A Defence In A Criminal Case – A Word of Advice to Young Counsel

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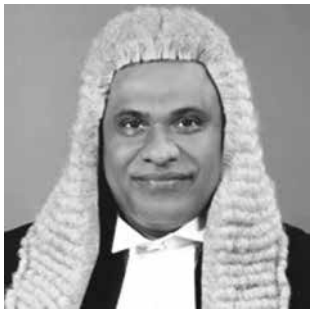

Having served the official bar for a period of around 35 years and the unofficial bar for over 6 years, I thought it appropriate to give some thought to the issue of formulating a defence in a criminal case so that it may, at least to some degree, assist young counsel defending accused. I thought of this topic as I have observed that when defending an accused, sometimes, attention is not paid to what should be the most appropriate defence. It is the duty of counsel, after a careful study of the facts of the case and consultations with the accused to advise his client on what defence is legitimately available to him. I strongly believe that no counsel should give any assurance to an accused as to what the ultimate verdict would be. This, I learnt when I was an apprentice in the Chambers of Mr. Eardley Perera, one of the best Criminal Lawyers of our times. Nothing would annoy Mr. Perera more than when a client seeks an assurance about the ultimate result of the case. His advice to us was that even when you were very confident of an acquittal, you should not tell that to the client.

I thought of mentioning this at the very beginning, as during my short period in the unofficial bar, I have met many clients who had told me that the counsel who defended them in the original court gave them an assurance of an acquittal and also that the counsel did a good job, but they were disappointed as the case ended up in a conviction. I, myself, would never give any assurance to any client.

Once a lady with three young children told me a pathetic story. She told me that her husband had got involved in the incident long before she married him, and he told her about the pending case before marriage. He had taken her to the counsel who defended him and counsel had told her that there was nothing to worry about the case as an acquittal was definite. On that she had proceeded with the marriage and ultimately when the man was convicted and sentenced to death at the end of the protracted trial she was the mother of 3 children by him. " Sir, if I was told this earlier, I would have yet gone ahead with the marriage but would not have put three innocent children to this plight she told me." The members of the family of a convicted accused once told me that on the date of the judgment, their counsel told them that he was more than 200 per cent sure of an acquittal and they along with all their relatives went to court in several vehicles to ascot the man back home, only to be told that he was convicted and sentenced to death.

My personal view is that counsel should explain to the client the strength and weaknesses of his case. One should never try to give opinions that would please the client if he is of the view that the case is a bad one. From what I have seen, clients appreciate and understand when this is told to them. Once when I explained to a client about the case against the accused, when the appeal brief was given to me, he said, "just if our counsel had explained this to us we would not have entertained false hopes and be disappointed at the end". They said, "we now understand why the verdict was against us". Whenever a client sought an assurance from Mr. Eardley Perera, he used to say, " I cannot give any such assurance, if any counsel is able to give you an assurance please take the brief and retain him. All that I can tell you is that I will do my best, but I do not know what the outcome of the case would be." I have heard that once when Dr. Colvin R de Silva, another giant in the field of criminal law in our times, explained to the client how bad his case was, the client had said, " Sir I am confident you can make it a good case for me". Dr. de Silva, in his inimitable style has replied, " I cannot make it a good case for you, but I will make it a better case for you."

By the time counsel enters court to defend an accused, he should well be aware what his defence is. During cross examination the defence should be put to the prosecution witnesses. There have been numerous occasions where the accused makes a dock statement or gives evidence and takes up a position not put to the prosecution witnesses. Our courts have held in such instances that it is an afterthought and is not credible.

In any criminal case, there are only 3 defences possible:

Total denial of the position of the prosecution;

The defence that the prosecution has not established the ingredients of the offence and hence the accused cannot be convicted;

That the accused comes within an exculpatory or mitigatory plea

Total denial is where the defence takes up the position that the prosecution witnesses are not trustworthy or that they are speaking falsehood. The allegation is that there is false implication. In such instances, it would be for the defence to give a plausible reason as to why the witnesses should falsely implicate the accused. It would not be advisable to take up the defence of total denial where several witnesses implicate the accused as the person who committed the act and the incident had taken place in broad daylight. Even if an accused wishes to take up such a defence, it would be the duty of counsel to tell the accused the danger of such a defence. Total denial is possible where the case depends on circumstantial evidence and the circumstances are capable of an innocent explanation. If the evidence implicating the accused is only evidence of identification at an identification parade, the defence of total denial is possible, if the accused says that he was shown to the

prosecution witnesses, and only if he says so and gives specific instructions should that position be put to prosecution witnesses. It would be of no value if that position was not put to the witnesses for the prosecution and the accused subsequently gives evidence to that effect.

In a case in which I handled the appeal brief recently, whilst making the dock statement the accused had stated that he was shown to the prosecution witnesses before the identification parade. However, this position had not been put to the witnesses for the prosecution when they gave evidence. Court had correctly rejected that position as an afterthought. However, the parade notes disclosed that when the suspect had been produced for the identification parade, the undefended suspect had told the Magistrate that he was shown to the prosecution witnesses even before the witnesses identified him and that had been recorded by the Magistrate. If the parade notes were not considered, it would have been a travesty of justice, as the suspect had, at the earliest opportunity during investigations and at the first opportunity he got to speak at the trial, stated that he was shown to the witnesses for the prosecution.

Counsel for the defence need to be mindful of the defence he is relying upon when cross examining the witnesses for the prosecution. An aimless cross examination not focused on a defence is not what is expected of a counsel defending an accused. It is a misconception that marking of contradictions and omissions is what is expected of Counsel. No contradiction or omission should be marked unless it is an important contradiction that shakes the credibility of the witnesses. Where a witness contradicts his own statement and takes up a different position, if that could be attributed to forgetfulness, it is of no use. Clever defence Counsel we have watched as juniors like Mr. Eardley Perera Mr. Daya Perera and Mr. A.C. de Zoysa, would always, wherever possible, suggest to the witness why he is contradicting his previous statement.

There is no doubt that an accused has a right to silence. It is also true that the accused need not disprove any ingredient of the offence. However it should be noted that a burden is sometimes cast upon an accused, and if that burden is not discharged, an inference adverse to the accused may be drawn by court. Once the prosecution has established a strong prima facie case of circumstantial evidence, the accused may have a burden of explaining the circumstances. Remaining silent under those circumstances would leave room for court to come to an adverse finding against the accused. [1] It should be noted that the duty to explain arises only where the circumstantial evidence led by the prosecution could lead to an inference that is consistent with the guilt of the accused, and that inference is irresistible.[2]

The accused should always give evidence before he calls any witness on his behalf. Even if he opts to make a dock statement, he should do so before calling any other witness to testify to on his behalf. However this does not mean that an accused cannot give evidence after the witnesses for the defence have testified. This however is possible, only on very special circumstances. Though there was no necessity for the accused to give evidence at the close of the case for the prosecution, while some witness for the defence was testifying an issue could arise where an explanation is necessary from the accused. In those circumstances, court should always permit an accused to testify after the witnesses for the defence have concluded their evidence. It should however be noted that in such instances, when evaluating the evidence of the accused, court would always evaluate the evidence having in mind that the accused had been present in court when his witnesses for the defence were testifying.[3]

1 King v. Duraiswamy 43 NLR 141, Queen v. Chandradasa 72 NLR 160, Queen v. Seetin 68 NLR 316, Sumanasena v. Attorney General 1999 3 SLR 127

2 Badrudeen v. The Attorney General 2011 Bar Association Law Reports 116

3 Queen v. Don Wilbert 64 NLR 83 , Queen v. Tennekoon Mudiyanselage Appuhamy 60 NLR 313

There is no doubt that a confession made by one accused implicating himself and the other co-accused is only admissible against the accused who makes the confession.[4] If however a co-accused testifies on oath and implicates himself and a co-accused, that evidence would be admissible against the co-accused as well.[5] In those circumstances, Counsel, for the accused who is implicated by a co-accused testifying on oath should cross examine the witness. Counsel who undertakes the defence of several accused tried together should be mindful of this fact. If it is apparent that one accused implicates the others in a confession or takes up a position that is adverse to the others, Counsel should not undertake the defence of all accused as a position of conflicting interests may arise.

If an accused could legitimately take up a mitigatory or exculpatory plea, Counsel should advise the accused as regards that possibility. Totally abandoning that process and proceeding to attempt a total acquittal may prove disastrous to the interests of the accused. I have come across many instances where I thought that the accused who had been convicted of murder and sentenced to death had the legitimate opportunity of getting a verdict on the basis of a mitigatory plea, if the accused had not testified and taken up a position not supporting a mitigatory plea. One case I remember very well is where an accused had been provoked and had committed the offence, the accused testifying had taken up the defence of total denial. The trial judge taking the totality of the evidence into consideration and having rejected the evidence of the accused convicted him of murder.

If on the evidence of the prosecution, circumstances that showed that a mitigatory plea was available to the accused existed, notwithstanding the position taken up by the accused, it is open to the trial judge to convict him on the lesser offence. Our courts have held that even where a mitigatory plea of provocation or sudden fight was not taken up court should consider it if it arises out of the evidence of the prosecution. [6]

Where a general or special exception is taken up as a defence, a duty is cast upon the accused to establish those circumstance on a balance of probability.[7] Counsel for the defence should be aware and mindful of this burden cast on the accused when conducting a defence. It would be necessary to lead sufficient evidence to discharge this burden. It should be noted that where an alibi or accident is taken up as a defence, since they are not general exceptions, there is no burden of proof cast on the accused. By taking up an alibi, all that the defence should do is to raise a doubt in the case for the prosecution. When a charge is preferred against an accused, the position of the prosecution is that the accused and no one else committed the actus reus. The issue as to who committed the offence is a matter that has to be resolved during the course of the investigations. Therefore, it is for the prosecution to establish beyond a reasonable doubt that the accused was the person who was present at the scene and committed the offences. The defence need not establish that the accused was somewhere else at the time of the commission of the offence. Criminal liability could be imposed on an accused who was not present at the scene only on the basis of abetment or conspiracy. No liability can be imposed on an accused not present at the scene at the time of committing the offence on the basis of common intention as participatory presence is an essential ingredient of the offence where liability is sought to be imposed on the basis of common intention.[8]

One matter that should be noted is that new provisions have now been brought in to the Code of Criminal Procedure Act regarding the manner in which the defence of alibi can

4 Section 30 of the Evidence Ordinance.

5 Karuppaiah v. Servai 52 NLR 227

6 Louis v. The Queen 56 NLR 442, Lafeer v. The Queen 74 NLR 296,

7 King v. James Chandrasekera 44 NLR 97

8 King v. Asappu 50 NLR 324,Wijithasiri and another v. Attorney General 1990 1 SLR 56

be taken up.[9] In terms of these provisions alibi cannot be taken up before the High Court unless the accused has taken up that position when making his statement to the police during the course of investigations or that position has been disclosed during the course of the Non-Summary Inquiry. Provided if, after the service of the indictment, 14 days before the trial commences, with notice to the prosecution the accused informs court of his intention to take up the defence of alibi, or if he gives sufficient reasons for his failure to give prior notice, in the discretion of court, an accused may be permitted to take the defence of alibi. Therefore, counsel for the defence has a responsibility to inform the accused of this position and take steps wherever appropriate. Long years ago in the Attorney General's Department we were instructed that the police should be directed to investigate an alibi taken up by an accused at the time his statement is made during the course of investigations. During training programmes, we always informed police officers that it was their duty to investigate the veracity of a statement made by a suspect claiming alibi.

In a case of murder, the basis of the indictment is that the accused committed the offence intentionally or with the required knowledge. The basis of an indictment is that all the legal conditions required by law to constitute the offence charged has been fulfilled.[10] What it means that the offence had been committed with the required mental element and none of the circumstances that reduced the offence to a lesser one was available in the case. Therefore, it is for the prosecution to negate all the mitigatory circumstances and also to prove all the ingredients of the offence beyond reasonable doubt. If the accused takes up the position that it was an accidental act, there is no burden on the defence to prove that it was an accident.[11] It is for the prosecution to establish beyond a reasonable doubt that it was an intentional act of the accused and not an accident.

In both the above instances that is where the accused claims an alibi or takes up the position of an accident, it must be noted that the accused should at least lead some evidence to show the necessary circumstances. If the accused was somewhere else and was not the person who committed the act, the accused should at least place material before court to show where he was. If the gun discharged accidently, the accused should explain how it happened. No proof on a balance of probability is necessary, but the accused should place some material so that at least a doubt would arise on the case for the prosecution. Court will not convict in a case where an alibi is taken up unless court is convinced that the prosecution has proved beyond reasonable doubt that it was the accused who committed the act. That would be the duty of court even if no alibi was taken up. However, it may not be sufficient for the derence to take up accident as a defence or an alibi as a defence and remain silent in court. Counsel for the defence should be well aware of this position.

The defence can also take up the position that the prosecution has failed to establish an ingredient of the offence. The failure to establish an ingredient of an offence is fatal to the prosecution. It is the duty of the prosecution to place evidence covering all the ingredients of the offence with which the accused is charged. After the case for the prosecution is closed, the accused may take up the position that the prosecution has not established an ingredient of the offence. In such a situation court would have no alternative but to acquit the accused without calling for a defence, if court sees merit in that submission. Defence counsel may make an application to court in this regard.[12] In the case of a Non-jury trial, counsel for the defence could make the submission that the accused is entitled to an acquittal without calling for a defence

9 Section 126 of the Code of Criminal Procedure act as amended by the Cod of Criminal Procedure (Amendment Act No. 14 of 2005

10 Section 164 (5) of the Code of Criminal Procedure Act

11 Kandakutty v. The Queen 75 NLR 457

12 See section 200 in respect of a non-jury trial before the High Court and section 220 in respect of a Jury trial.

since there is no credible evidence before court. In the case of a Jury trial that submission could be made only if there is no evidence before court. In fact the submission should be that the prosecution has not led evidence in respect of an ingredient of the offence. On the other hand if there is evidence covering all ingredients, however untrustworthy that evidence would be, such a submission cannot be made in the case of a jury trial since credibility of witnesses and the testimonial trustworthiness, is a matter for the jury and not for the judge. However, whether a defence should be called or not is a matter for the Judge and not for the jury. In a trial by judge, the judge is entitled to consider the credibility of the evidence before deciding to call for a defence.

If an exculpatory defence such as the right of private defence is available to the accused, it is important to have in mind the limits of that right and the burden the accused has to discharge. It is always advisable for the accused to give evidence on oath if he has adverted to that right or circumstances that permits him to exercise that right in his police statement. Counsel should be extremely careful when that defence is taken up, as in such a case most of the case for the prosecution is accepted and it is only left for the accused to prove on a balance of probability that he was within his legitimate limits.

In the case of a mitigatory defence, the accused is entitled to plead to a lesser offence with the consent of the prosecuting counsel and permission of court at the commencement of the trial. In a jury trial if the accused wishes to plead to a lesser offence, it has to be done before the empaneling of the jury. After the empaneling of the jury the accused is entitled to plead to a lesser offence only if the jury is agreeable to that course of action.[13] Generally defence counsel is entitled to discuss the issue of a plea with the prosecuting officer and meet the judge in chambers and express the willingness of the accused to plead to a lesser offence. In some jurisdictions this is referred to as plea bargaining and even the sentence is discussed by the parties before the judge in chambers. However, this practice is not encouraged in Sri Lanka. Sentence is considered to be essentially a matter for the judge and neither the prosecution nor the accused is entitled to demand a sentence.

If counsel for the accused is of the view that a mitigatory plea is legitimately available to an accused, it is his duty to inform the accused of that position at the very commencement. In such a case it would not be advisable for the accused to proceed to trial in order to secure an acquittal. If the accused is willing to settle for a conviction for a lesser offence counsel should proceed to trial having in mind his objective, if the prosecuting counsel is not willing to accept a plea for the lesser offence. My short experience at the unofficial bar has shown me that an accused who stabbed another since he was provoked is not unwilling to accept a jail term instead of a sentence of death. Some of them have told me that they would have settled for a conviction for a lesser offence if they were informed of the fact that a total acquittal was not a possibility in the circumstances. Where they proceed to trial without pleading to the lesser offence, instead of setting out the grounds upon which a conviction for a lesser offence is possible, they suppress the true facts and make it impossible to secure a conviction for a lesser offence difficult even in appeal.

It is true that even where a defence based on a mitigatory plea is not taken up, if it arises upon the evidence of the prosecution, the trial judge should consider it. In a jury trial those fact should be placed before the jury. However, it is important that those facts be placed before court by way of evidence for the defence in order to ensure that a firm foundation for the plea is made out.

What I have attempted to do above is to focus on the important issue of formulating a defence in a criminal case. I hope it would be of some

13 Karuratne and others v. The Attorney General 1983 2 SLR 22

assistance to young counsel handling criminal cases , especially before the High Courts.

I was delighted when a request was made of me by my dear friend Mr. Felician Fernandopulle to contribute towards the Journal due to be published in connection with the Centenary Celebrations of the Negombo Bar. Felician was first introduced to me by my dear friend the Late Mr. Jeyaraj Fernandopulle who was my contemporary at the Sri Lanka Law College, and a who was a very successful criminal lawyer both in the High Courts and the Magistrate's Courts when I was prosecuting before the High Court of Negombo. His addresses to the jury were a pleasure to listen to.

I have nostalgic memories at the High Court of Negombo. The first case I appeared as assigned counsel was at the High Court of Negombo, before High Court Judge Siva Sellaiah. That appearance, perhaps paved the way for me to join the Attorney General's Department. I prosecuted several sessions before the High Court of Negombo before High Court Judge Stanley Gunawardane. I have a large number of personal friends at the Negombo Bar.

I wish all members of the Negombo Bar good luck and wish their celebrations success.