# ‘AN ACCUSED’S TALE OF WOEBENEATH THE GLASS CEILING’: A LEGAL DISSECTION

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Born as a human being well equipped with human rights, it could be heinous to distort the rights of another by committing a socially unacceptable act against humanity. Yet, the sanctum of justice reserves a place for this being, a glass box in which he stands, exposed to the world, offered with an opportunity to unveil his unsworn tale of woe, whose authenticity is only known to the conscience of this very being. The under lying notion of this is that how distasteful the individual is, the justice system will never denigrate the rights he has as an accused.

The right to a fair trial is considered to be the essence of democracy and rule of law. This right encompasses prime safeguards to an accused in a criminal trial more often than not which are the right to be presumed innocent until proven guilty and the right to remain silent. It also includes the right to make a statement from the dock and/or the right to legal representation in order to setup a defence. The whole notion of the justice systems around the world is intrinsically connected with honouring human dignity. These principles are enshrined in the Constitution, International Conventions but are deeply rooted in the common law jurisprudence.

A criminal trial being yet another instance where the life, liberty and freedom of parties (an accused) are jeopardized till proven guilty, recognizes the principle of fair hearing, akin to **DUE PROCESS of Law**. The pragmatic approach to ensure fairness is by scrutinizing the competency of an accused in a criminal trial to make a statement from the dock. The Law of Evidence which deals with this aspect in Sri Lanka have been enshrined in the Evidence Ordinance in Toto. As per Section 120(6);

**“In criminal trials the accused shall be a competent witness in his own behalf, and may give evidence in the same manner and with the like effect and consequences as any other witness, provided that, so far as the cross-examination relates to the credit of the accused, the court may limit the cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness.”**

According to the aforementioned section, an accused in a criminal case is a qualified witness and can testify in the same manner and with the same results as any other witness. Hence, the accused has been made a “competent” witness. Therefore, our law allows for an accused to testify on his own behalf and call upon witnesses to testify on his behalf. Further, in terms of section 120 (6) above, it is clearly seen that when an accused gives evidence, he is provided with protection that no other witness given.

**Should an accused be entitled to a right to make a statement from the dock while such provisions are made in our law? Why, then, does our law recognize such a right? In what law is that right mentioned? What is the effect**

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**of such a statement? What is the evidentiary value of a dock statement? Under what circumstances would such a statement be useful?**

The answers to these queries lie beneath the analysis of how the accused got the right to make a statement from the dock.

## Where It All Started – The Origin Story Of The Dock Statement

The Sri Lankan Evidence Ordinance is a complete statute of law. It was first adopted in 1895, but the number of amendments made to the principal enactment is minimal.

The fundamental question revolves around the origin of the right of an accused to make an unsworn statement from the dock as it is neither embedded in the Evidence Ordinance nor in any other written law.

"In the early days English Law did not permit a defendant in criminal proceedings the right to give evidence in his own defence. The law of England at that time was exposed to the criticism that exclusion of sworn testimony by the Accused gravely hampered a blameless Accused in vindicating his innocence. Thus, the position in England was changed by Section 1 of the Criminal Evidence Act of 1898 which rendered an Accused a competent witness for the defence in all criminal cases. Furthermore, Section 1 (h) of the said Act embodied the express proviso that, "Nothing in this Act shall affect ... any right of the person charged, to make a statement without being sworn ". Thus, it appears that proviso to Section 1 of the Criminal Evidence Act No. 1898 is what allowed an Accused, when called up for defence, to make an unsworn statement from the dock."[1]

Even before the Criminal Act of England in 1898 provided for the right to an Accused to give sworn evidence, Evidence Ordinance in Sri Lanka embraced it in 1895.

**The Code of Criminal Procedure Act. No. 15 of 1979, in Section 7** provides that,

"As regards matters of criminal procedure for which special provisions may not have been made by this Code or by any other law for the time being in force, such procedure as the justice of the case may require and as is not inconsistent with this Code may be followed."

As the aforementioned fundamental question arose, in addition to the provisions of Criminal Procedure Act, Section 100 of the Evidence Ordinance provided that recourse was to be had to English Law in the case of a Casus Omissus. Accordingly, making use of Section 100, Sri Lankan Courts recognized the right of an Accused to make an unsworn statement from the dock in the case of ***King V. VallayanSittambaram***[2], where His Lordship Bertram C.J. stated;

" ... There is no provision on this subject one way or the other in the Code, and this is, therefore, another point on which we may have recourse to English procedure. The rules of English procedure are plain. The prisoner may still if he prefers it, make an unsworn statement from the dock, instead of giving evidence from the witness box, and on this analogy he has the same right in Ceylon...."

[1] Professor Peiris, G.L. 1981, 'UNSWORN STATEMENTS BY ACCUSED PERSONS: TRENDS IN THE COMMONWEALTH'

[2] [1918] 20 N.L.R. 257


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Thus it is seen that, the right of an accused person to make an unsworn statement from the dock, as was recognised under the English Law, had been consistently followed by our Courts for a long time, and it is in conformity with the legal provisions found in our law, even at present.

Justice Shaw delivering a separate judgment on the same case emphasized on the fact that, "our code is silent as to whether or not it is open to an accused to make an unsworn statement at the trial." But has gone on to refer to **Section 6 of the Criminal Procedure Code of 1898**, and has stated as follows at page 274.

"Section 6 of the Code, however, provides that, as regards matters of criminal procedure for which no special provision is made, the law relating to criminal procedure for the time being in force in England shall be applied, so far as the same shall not conflict or be inconsistent with the Code and can be made auxiliary thereto. In England it has always been open for an accused to make an unsworn statement at the trial, should he desire to do so, and this right still exists, notwithstanding the right of an accused to give evidence on oath under the provisions of the Criminal Evidence Act, 1898."

It was subsequently held that a prisoner may, if he prefers it, make an unsworn statement from the dock, instead of giving evidence from the witness box and gradually Dock statement crept into our criminal procedure and became a rule of practice.

Sri Lankan Courts on this basis have continued to place evidentiary value in dock statements, as seen in cases such as ***Queen V. Buddharakkita Thera***[3]and ***Queen V. Kularatne***[4]where it was held that while jurors must be informed that such a statement must be looked upon as evidence, subject however to the infirmities that the Accused statement is not made under oath and not subjected to cross examination.

In ***"Kularatne"*** Court further held that;"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 abo lit the case for the prosecution, the defence must succeed, and
c) That it should not be used against another Accused."[5]

However, the two infirmities to which the dock statement is subject to, i.e. the statement made been not under oath and it is precluded from either cross examining or questioning, has welcomed plethora of criticisms in all forms. Thus it is in fact a weak form of evidence which in practicality needs corroboration from other material witnesses in order to stand on its own footings.

The dubious nature with regard to the evidentiary value of dock statements has led to the abolition of the right of the Accused to make an unsworn statement in the United Kingdom by Section 72 of the Criminal Justice Act 1982. Other commonwealth countries that followed the English approach in bringing the right of an Accused to make an unsworn statement, such as South Africa (Criminal Procedure Act 1977)and South Australia (Section 18 of the Evidence Act 1929) abolished the same even before the United Kingdom.

[3][1962] 63 N.L.R. 433
[4][1968] 71 N.L.R. 529
[5] Ibid


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However, until and unless this is explicitly taken out of our law by the legislature, or is revisited by the Superior Courts, the Sri Lankan Courts are bound to follow the same legal principle which gives such right to an Accused as stated in cases ***'Vallayan ', 'BuddharakkithaThera' and 'Kularatne'***.

In case of ***PunchiRala V. The Queen***[6], it was held that, where at a trial before the Supreme Court, the Accused makes a statement from the dock, the Judge would be misdirecting the jury, if he tells them that they should consider the statement of the Accused but that it is not much value having regard to the fact that it is not on oath and not subject to cross examination.

In case of ***Don Shamantha Jude Anthony Jayamaha V. Hon. Attorney General*** held;

"Whether the evidence of the defence or the dock statement is sufficient to create a doubt cannot be decided in a vacuum or in isolation because it needs to be considered in the totality of the evidence that is in the light of the evidence for the prosecution as well as the defence ".[7]

## Reception of unsworn statements by the judiciary

An accused, who is a layman in terms of the way prosecution functions and the nature of the court proceeding, should be made well aware of the three options given to him by the court of law. It is the defense counsel who should act in the best interest of the accused by taking multiple factors into consideration including the accused's psychology and his ability to face a rigorous course of cross-examination.[8] The dock statement would be the safest way to relate the accused's version of the series of event and prove his innocence, if and only if the defense counsel has a firm defense in his favour to back up the dock statement which in turn would create a reasonable doubt in the prosecution case.

Often times the reluctance to accept dock statements with the entire anomaly surrounding it, is quite obvious by the acts of trial judges. Such an instance was elicited in the case of ***Ganganandav.The state***.[9] It was stated by their Lordships of the Court of Appeal that;

"…In addition, it is pertinent to note here that, the right given to a prosecuting Counsel under **Section 201(2) of the Criminal Procedure Code** is, "to cross-examine all the witnesses called by the defence to testify on oath or affirmation", (emphasis is mine).As the right to cross-examination, under that provision, is given only in respect of witnesses who have given evidence on, "oath or affirmation", that provision will have no application to statements from the dock, which always are made, not on oath or affirmation. Furthermore, the admission of dock statements, as evidence, will not offend the provisions of that Section, because it does not exclude the defence from adducing evidence, other than on "oath or affirmation".

The right of an accused to make an unsworn statement as stated earlierhas now become a deep-rooted principle within the Sri Lankan legal framework. This is yet another rule of practice that has infiltrated our law as a result of misinterpretation of the relevant provisions.

The evidentiary value of the dock statement is the centre of a major anomaly which has been

[6]75 N.L.R. 174
[7]CA 303/2006 (11.07.2012)
[8]Walaliyadda, T. (2013). The Craft of Cross-examination, pp 166-168
[9] (1995) 2 SLR 373


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controversial and confusing. The infirmities inherent to the unsworn statement necessarily diminish its significance as evidence. It is as if one hand has taken back a thing that the other hand had offered.

The degree of significance attached to dock statements varies from case to case based on the circumstances. Hence it is rather a subjective matter to ponder upon. "An unsworn statement by the accused can consist of one or more of four distinct types of assertions or contentions:

a) Admissions of fact against the accused
b) Allegations of fact in his favour
c) Argument pertaining to (a)
d) Argument relevant to (b)"[10]

Thus based on the facts of the case the, the veracity of the statements made by the accused and his ability to narrate the series of events in a similar fashion as the prosecution and then eventually deviate at a certain point would make the situation strikingly chaotic for the presiding trial judge to make a clear decision. The accused could escape liability without being traumatized by strenuous cross examination using the weakest possible mode of adducing evidence which is making an unsworn statement in such a way that the judge nor the jury (if the trial was led by a jury) would no longer latch on to the Prosecution's version of the sequence of events by creating an imbalance in the well discharged burden of proof by the prosecution.

This was well explained by Prof. G.L Pieris in his work.

**"…One of the fundamental objections to an unsworn statement by the accused is that it enables him to have the best of both worlds by using the opportunity of making averments of fact consisting with his innocence – which are adverted to by the jury in reaching their verdict – without submitting himself to cross-examination by Opposing counsel."[11]**

In a Criminal trial the, trial judge is duty bound to consider the evidence placed before the court in its totality in order to pronounce the judgment. Even though an unsworn statement carries lesser weight it is still evidence subjected to infirmities which should also be taken into account. In a recent case the trial judge had failed to consider the dock statement, let alone an analysis of the defence evidence. The appellate court emphasized the on the principles of natural justice and the requisites of a fair trial and cited Section 283(1) of the Code of Criminal Procedure Act, which reads as follows:

**"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."**

"It would thus be seen that, the Code of Criminal Procedure Act requires the judgment to contain the following among other features:

- Points for determination
- Decisions of the Court with regard to such points

[10] Ibid 1

[11] Peiris, G.L. (1980) "LAW ENFORCEMENT AND PROTECTION OF THE RIGHTS OF THE ACCUSED: A COMPARATIVE ANALYSIS OF MODERN LEGAL SYSTEMS." Malaya Law Review, vol. 22, no. 2, pp. 238–274. Retrieved from JSTOR, www.jstor.org/stable/24863544 .Accessed 7 May 2020.


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- Reasons for such decisions

Therefore, where an Accused makes **an exculpatory dock statement** (as it is often the case), the learned trial judge is required to decide whether or not to accept the position of the Accused, and give reasons for his decision. In the instant case, the learned High Court should have

a) Referred to the nature of the dock statement made by the Accused,
b) Pronounced his decision to reject the contents of the dock statement, and
c) Given reasons for the rejection of the dock statement.

The absence of these features in the impugned judgment renders such judgment voidable. In the circumstances of this Appeal, this Court must hold that the impugned judgment is not in compliance with the rules of natural justice, incompatible with Section 283(1) of the Code of Criminal Procedure Act, and is therefore, unlawful."[12]

This authority has clearly laid a solid foundation for the unsworn statements made by the accused where now there is no space for it to go unnoticed by the trial judge as the their Lordships' court has clearly embarked on creating precedence to state reasons for rejecting the dock statement and more over to refer such unsworn statement made, especially if it is exculpatory in nature, in the judgment.

The evidentiary value and the significance of an unsworn statement are intrinsically interconnected to two factors. The first is that an accused has the right to remain silent in a criminal case, based on the presumption of innocence of the accused. The second is the burden of proof on a criminal case. The burden of proof can be considered in two folds. The first is the **legal burden of proof**. The second is the **evidentiary burden of proof**.

Legal burden is the standard of proof required by law. For example, the prosecution of a criminal case must prove beyond reasonable doubt. Lord Sankey famously described the dutyupon the prosecution to prove guilt as the 'golden thread' running through criminal law in the case ***Wolmington V. DPP* [1935] 1 AC 462, 481-82 (HL)**.[13]The burden of proving special and general exceptions rests on the accused. The relevant standard is to prove on a balance of probability. The evidentiary burden is the burden of presenting sufficient evidence to prove what is required to be proved according to stipulated standards. It is not a *sine qua non* for an accused in a criminal case to adduce evidence by calling for witnesses, in order to discharge the evidentiary burden of proof. Often times, the cross-examination of prosecution witnesses will enable the counsel appearing on behalf of the accused to draw the essence of the facts to their advantage. When deciding when to make an unsworn statement, the theory of the burden of proof mentioned above, the established evidence of the case, and the formula set out in the ***Kularatne case*** must be taken into due consideration.

[12]NimalPinsiriGodakandeniyage alias NimalPinsiri V. Hon. Atttorney General, CA 77/2014 (decided on 18.11.2019)
[13]A report by JUSTICE. (2015) In the Dock / Reassessing the use of the dock in criminal trials. Retrieved from https://justice.org.uk/wp-content/uploads/2015/07/JUSTICE-In-the-Dock.pdf . Accessed 31st April 2020


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## A Pragmatic Approach

An unsworn statement could be of utmost use, albeit the infirmities and anomalies. A number of simple and general principles can be set out as a guideline to determine the most suitable time at which an unsworn statement can be made from the dock, by meticulously examining authorities and the embedded facts in it. But none of such principles are final or conclusive, and more often than not, the making of a dock statement solely depends on the evidence presented in each case. It is important to note that the basis of the defence is well placed and properly before Court in the course of the cross-examination. The accused can always add his embellishments in his dock statement or in the course of giving evidence, but the basic defence structure should be firmly placed in cross-examination.[14]

Be that as it may, the dock statement in fact is a double edged sword. The accused has to walk on a tight rope, as his statement though not made under oath, is required to be true in nature like any other evidence adduced by the defence or the prosecution. An accused in dire need to be relieved from liability cannot blindly make an unsworn statement which may be incompatible with the other established evidence in the case or falsify a well-established fact. The reason for this been that the falsehood of evidence given, **Dock Statement** or a statement made outside the Court by the accused may be used to *corroborate* the prosecution case. This corroborative nature of the defence case has been provided by the celebrated case of **Rex V. Lucas,** whose dictum is now well settled as the **"Lucas theory".**

It is to be noted that a lie told out of court, or in court to be capable of amounting to corroboration must satisfy the following requirements:-

1) It must be deliberate.

2) It must relate to a material issue.

3) The motive for the lie must be a realization of guilt and fear of the truth.

4) The statement must be clearly shown to be lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.[15]

The application of the ***Lucas Test*** to an unsworn statement made by an accused was extensively discussed in the case of ***AjithSamarakoon V. The Republic (Kobaigane Murder Case)***[16]

"……This manifest lie utteredby the accused in his dock statement too satisfies the three tests formulated by Lord Lane in ***Rex V Lucas (Supra).***"

This is the very reason why the defense counsel should explain the options an accused has and inform him that he must take the consequences of his actions based on the choice he makes. If the accused makes a false statement from the dock, the defense counsel will be burdened with an additional task to defend the making of the false statement. The counsel is duty bound to observe the demeanour and deportment of an accused upon consultation, so that he could

[14] Ibid, 8

[15] De Silva, U.R, (2010), Criminal Defense (Bilingual Version-Sinhala and English)

[16][2004] 2 Sri. L.R 209


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suggest the best option as far as he can see, but the final conclusion must be with the accused.

In the meantime, it is of paramount importance to scrutinize the instances where an unsworn statement could be used to reap benefits by the defense.

- When the evidence presented by the prosecution corroborates the contents of the unsworn statement, fair and square. Here ironically the dock statement will be reinforced by the prosecution case itself. The space to create such an opportunity may arise at the time of cross examining the prosecution witnesses. At this juncture, the trial judge is left with no other option but to believe the evidence brought by the prosecution and also the unsworn statement in a similar fashion. This is sufficient to create a reasonable doubt in the mind of the judge on the prosecution case. The accused should definitely have the benefit of such doubt.

- When the dock statement is corroborated by the evidence adduced and established by the accused. A plea of alibi could be propounded by the defence by sliding it through the dock statement if and only if the presence of independent evidence can prove that the accused was hospitalized or elsewhere at the time of the crime.
- At times the prosecution case tends to be weak. In such instances the shortcomings cannot be highlighted or brought to the attention of the learned trial judge if the accused opts to exercise his right of silence. Hence, an unsworn statement made from the dock at this point will bolster up the loopholes which will provide an opportunity to create a reasonable doubt in the prosecution case.

- The burden is cast upon the accused to tender an explanation only where a **strong prima facie case** is established against the accused, in which case, the silence of the accused may engender an adverse inference may be justifiably drawn by the Court. **Ellenborough Dictum,** a benchmark created by the case of ***Rex V. Cockraine*** requiring an explanation from the accused is abundantly applied in Sri Lankan Courts.[17] In such an instance, the accused could render an explanation from the dock which is once again required to be compatible and corroborated by the established evidence in the case.

- If the defence relentlessly persist on a complete 'denial', an unsworn statement blatantly contradicting the well-established evidence of the case would be of no purpose. A more effective dock statement could be woven if it is substantiated by indisputably independent evidence. In such a case, the defence should be able not only to corroborate the dock statement but alongside prove to the court to a certain extent that the evidence presented by the prosecution lacks evidentiary value.

[17] De Silva, U.R. (2017) The Burden of Proof in a Criminal Case, MEEZAN Annual Law Journal, pp.80-106


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## Conclusion

Under the present law the unsworn statement of an accused person has four main incidents: it is not on oat hand therefore not subject to any of the sanctions for perjury or false swearing, it is not subject to cross-examination: it has a probative capacity in the case of the accused who makes it in the sense that the jury should take it into account ill their deliberations it' they accept its truthfulness or are not satisfied of its untruthfulness, and, though theoretically subject to the rules of evidence, nevertheless can be delivered in a manner that may make it difficult to control so far as compliance with those rules are concerned.[18]

The jury considers the making of an unsworn statement by the accused as an act of deliberately abstaining from giving evidence under oath and being subjected to cross-examination. Therefore, the dock statement should be of such nature that, it could win the trust of the jury regardless of its infirmities and the deficiencies. If so, it must be corroborated by some piece of evidence. The best way is to seek corroboration from the prosecution evidence itself.

The dock statement should at least be strong enough to emphasize that the prosecution was not even in a position of drawing an irresistible inference of guilt with regard to the culpability of the accused. At this point, the accused shall not contradict him with the prosecution case. This strategy could be diverted to create a doubt in the prosecution case. It is not possible to formulate a complete framework of laws and authorities relating to the use and benefit of the dock statement. Often it depends on the prowess, expertise and proficiency of the lawyer.

***"An unsworn statement made with no purpose and without any corroboration does a good deal of harm rather than any benefaction to the accused"***[19]

[18]NSW Law Reform Commission,(1985) REPORT 45– CRIMINAL PROCEDURE: UNSWORN STATEMENTS OF ACCUSED PERSONS, Retrieved from https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-45.pdf Accessed on 09th May 2020.

[19]Kathubdeen v. Republic o f Sri Lanka [1998] 3 SLR 107


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