

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

R. A. Gaminie Attanayake

ACCUSED-APPELLANT

C.A. 03/2011

(H.C. Puttlam 146/2004)

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Indika Mallawarachchi for the Accused-Appellant
H.I. Peiris S.S.C. for the Complainant-Respondent

ARGUED ON: 27.06.2014

DECIDED ON: 04.08.2014

GOONERATNE J.

The Accused-Appellant was indicted in the High Court of Chillaw for the murder of one Manathunge Arachchige Saman Chandrasiri Bandara on 05.03.2004. He was convicted on or about 18.01.2011. The prosecution case is more or less based on circumstantial evidence i.e dying declaration and Section 27 recovery in terms of the Evidence Ordinance. According to the version of two main prosecution witnesses, we have noted the following.

Prosecution witness No. 1 was at his residence between 7.00/8.00 p.m. on the day of the incident, when he heard a distress call or somebody shouting “මරණවා බේරා ගන්න” , (save me from getting murdered) from a distance. The witness went in the direction of the voice shouting as above and came from a distance of about 300 meters and noticed a push cycle toppled on the road side. When the witness still heard cries which was from the jungle area he went into the jungle and saw the deceased lying on the ground on a pool of blood. He had spoken to the deceased uttered the words “Kumara mata ketuwa”, The witness carried the deceased to take him to the hospital and at that point the deceased brother arrived at the scene and they took the

deceased to the hospital. Witness No. 2 also confirm he above inclusive of the utterance of deceased which is a dying declaration, but witness No. 2 brother of the deceased testified that the deceased had come to his house and given some biscuits to the witnesses' children at about 7.00 – 8.00 p.m. It is in evidence which transpired from the prosecution witnesses that there were others in the village who also had the name 'Kumara'. In fact this is an important aspect relied upon by the defence, to create a doubt in the prosecution case.

The learned counsel for the Accused-Appellant has urged the following important matters on behalf of the defence.

1. Conviction is wholly unsafe in view of the uncertainty and ambiguity attached to the dying declaration.
2. Learned trial Judge failed to address her mind to the contradictions-inter-se between the police evidence which throws a serious doubt in the prosecution case.
3. Learned trial Judge has misdirected herself on critical issues of facts causing serious prejudice to the appellant.
4. Items of evidence are wholly inadequate to support the conviction
5. Learned trial Judge has shifted the burden of proof to the Appellant and misapplied the Ellen Borough principle to the instant case.

The defence emphasis that there were several 'Kumaras' in the village. Witness Chrisantha stated that he cannot say which 'Kumara' was being mentioned by the deceased. Prosecution has failed to rule out all others? In this way cannot point the finger of guilt towards the Accused, and would be highly unsafe to act on the available dying declaration. Defence counsel also submitted that considering the police version would make it more improbable. S.I. Aluthgamage stated that the deceased said "Miyellawe Padinchi Kumara kaduwen ketuwa". (pg. 125). At pg. 131 same police witness testified that Accused-appellant was arrested at his house in Karuwalagaswewa Road Bogahawewa, Nawagaththegama. The other Police Constable Wasantha Edirisinghe testified that Miyellawe and Bogahawewa are two different villages situated in close proximity. Learned defence counsel argues that the learned High Court Judge in evaluating the evidence relating to the dying declaration has been totally oblivious to the fact that both prosecution lay witnesses have testified that there are several 'Kumaras' in the neighborhood and the dying declaration made to the police it was stated that the Accused living in Miyellawe had attacked the deceased.

The other point stressed by learned defence counsel is on the contradictions-inter-se of the police witness, S.I. Aluthgamage , testified to the dying declaration, whereas police officer Wasantha Srilal Edirisinghe who accompanied S.I. Aluthgamage testified that the environment was not conducive to speak to the victim as was being treated by the medical team (pg. 154/155). This is a contradiction-inter-se along with the place of arrest which suggest a difference which Miyellawe being connected to the Accused-Appellant by the prosecution. Defence also point out to the fact of previous enmity as observed by the trial Judge(pg. 220) and same being contrary to the evidence of witness Dharmasiri, who testified about a cordial relationship pgs. 198, 100 & 106. Another misdirection is highlighted of the learned trial Judge who states that the Appellant accosted the deceased where he was returning home having visited one to his sister's house prior to the murder which is totally unsupported by evidence.

The learned Senior State Counsel submitted that the prosecution relies on the dying declaration of lay witness and the item of evidence as regards the recovery of the weapon. He also referred to the admissions made as regards the Government Analyst report.

Having considered the case of either party, it is evident that, it is the dying declaration that matters in this case. Both the prosecution and the defence attempt to explain each, others position as regards the utterances made by the deceased ie. 'Kumara attacked' In fact the very first question which happens to be the normal reaction of witness No. 1 was to say that he does not know 'Kumara' and thereafter say there was no enmity between the Accused and the deceased and also state the deceased was able to speak. Witness also testified that there are several persons by the name of 'Kumara' and that witness cannot say which 'Kumara' caused the injuries. Even in re-examination of the witness fortified the defence case and stated there are others called 'Kumara'. In fact witness No. 2 very specifically state that the deceased had many dealings with the Accused and had been engaged in cultivation. At the hospital the 2nd witness state the deceased could not talk. The two lay witnesses refer to 'Kumara' no doubt, but does not rule out all others who had the name 'Kumara'. Court need to be very careful and with lot of care and caution, to act on this evidence. Learned State Counsel who conducted the prosecution no doubt did question and probed to target the Accused-Appellant but has not been successful to rule out all others with the name of 'Kumara'. To secure a conviction in this manner would be highly

unsafe. Especially not much reliance could be placed on the police evidence as pointed out by the learned defence counsel. There are material contradictions-inter-se between the police witnesses. In fact it is very much unsafe to rely on the police witnesses, and I have no hesitation to accept the position put forward by the learned defence counsel. It appears to this court that the trial Judge has not properly examined the correct identity of the Accused person. It is essential to ascertain correct identity especially when there are others with the same name. Such a lapse cannot be cured by adding the section 27 statement to fortify the version of the two lay witnesses. In a long line of cases the following matters had been considered before acting upon such utterances of the deceased person. In CA 106/2002 decided on 22.8.2007, I note the following weaknesses highlighted.

- (1) Statement of deceased person not made on oath.
- (2) Statement of deceased not tested on cross-examination. King Vs. Asirivadan Nadar 52 NLR 32; Justice Pala Vs. Queen 66 NLR 409
- (3) Person who made the declaration is not a witness at the trial.

Having perused the above Judgment I also note the following in same in view of the inherent weakness in a dying declaration and the trial Judge must give very serious consideration to the following.

- (a) Whether the deceased in fact made such a statement
- (b) Whether the statement made by the deceased was true and accurate.
- (c) Whether the statement made by the deceased person could be accepted beyond reasonable doubt.
- (d) Whether the evidence of the witness who testifies about the dying declaration can be accepted beyond reasonable doubt.
- (e) Whether the witness is telling the truth
- (f) Whether the deceased was able to speak at the time the alleged declaration was made
- (g) Whether the deceased was able to identify the assailant

It is also important to bear in mind the medical evidence led in this case. At pgs. 177, 178 the Medical Officer testify that according to the flow of blood from the body the speech of a patient has to be decided. If there is a release of substantial amount of blood the patient would be able to speak only during a period of 15 minutes to half an hour. In this case medical report shows several injuries. It is apparent that by the time the police arrived at the hospital the condition of the deceased had been deteriorating and one of the police officers testified that it was not possible to talk to the deceased because the medical team was so involved with the patient due to loss of blood.

In all the above circumstances, when we consider the entirety of the material placed before us, it has to be stated that it would be highly unsafe to act on the available dying declaration, for the reasons stated above. Therefore we set aside the conviction and sentence.

Appeal allowed.

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL

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