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

In the matter of an Appeal under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979.

C.A.No. 288/2013
H.C. Colombo No. 4585/2009

Korinvige Anura Lakshman Silva
alias Pechchei alias Chooti

Accused-Appelant

Vs.

Hon. Attorney General
Republic of Sri Lanka

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**
ACHALA WENGAPPULI J.

COUNSEL : Shanaka Ranasinghe P.C. with Niroshan Mihindukulasooriya and Yasas Wijesinghe for the Accused-Appellant
Dileepa Peiris D.S.G for the Respondent

ARGUED ON : 15.03.2018 & 04.04.2018

DECIDED ON : 04th May, 2018

ACHALA WENGAPPULI J.

The Accused-Appellant is present in Court produced by the Prison Authorities.

The accused-appellant was sentenced to death upon his conviction for the murder of his wife. The prosecution primarily relied on the dying deposition made by the deceased, which was recorded by the Police in the presence of the medical officer, to prove its charge of murder.

In seeking to set aside his conviction and sentence imposed by the High Court of Colombo, the accused-appellant sought to challenge his conviction on the basis that the trial Court was in error when it acted upon the unreliable dying deposition of the deceased, which in effect contradicted with the evidence of other witnesses presented by the prosecution. It is alleged by the accused-appellant that the trial Court also failed to consider the case presented by him in the light of the established legal principles. Learned Presidents Counsel for the accused-appellant thereby contended that the accused-appellant was denied of his right to a fair trial.

Learned President's Counsel further contended that the prosecution has failed to call a vital witness and the trial Court erroneously failed to draw the inference under Section 114(f) of the Evidence Ordinance. In addition, he further submitted in replying to the submissions of the State,

that the trial Court has failed to consider the diminishing culpability of the accused-appellant.

In support of his position that the trial Court acted on the unreliable dying deposition of the deceased, it was submitted by the learned President's Counsel that the sister of the deceased, in her evidence has stated that she was told by her deceased sister how her husband has set her on fire after pouring petrol on her and what she did thereafter when she was engulfed by the flames. The written statement of the deceased was also marked by the prosecution as P2. Then in the bed head ticket, marked as P3, it is recorded by the admitting medical officer that she was admitted with a history of "burning" but he/she has put two questions marks after writing the word "Assault". The admitting medical officer was not called as a witness. The accused-appellant submits that there are inconsistencies, in relation to the claim of the deceased that the accused-appellant has undressed her, tied her hands and performed an unnatural sexual act with the deceased prior to setting her on fire, when compared with what she told her sister who attended to her during the period in which she received medical treatment and the statement recorded by the Police.

The accused-appellant placed reliance on the judgment of ***Gamini Mahaarachchi v The Attorney General*** CA 106/2002 - Court of Appeal minutes of 22.08.2007, where it was held that;

> *"As there are inherent weaknesses in a dying declaration which I have stated above, the trial judge or jury as the case may be, must be satisfied beyond reasonable doubt on the following matters;*

(a) Whether the deceased in fact made 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 a 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 the contention of the accused-appellant that the dying deposition on which he was convicted fails to satisfy these stringent tests, in view of the inconsistencies referred to above and therefore the prosecution has failed to prove its case against him.

Learned Deputy Solicitor General for the Attorney General sought to counter the submissions of the accused-appellant on the basis that the sequence of events as narrated by the deceased in her written statement is corroborated by medical evidence and therefore the truthfulness and accuracy of its contents were proved beyond reasonable doubt. In replying to the claim of the accused-appellant that the trial Court had failed to consider and analyze his evidence given under oath, learned Deputy Solicitor General submitted that the trial Court has properly evaluated the credibility of the accused and in addition it has also considered his subsequent conduct in coming to the conclusion it eventually did.

In replying to the submission that a vital witness has not been called by the prosecution, learned Deputy Solicitor General stated to Court that the neighbour who has rushed to rescue the deceased, when she raised cries, could not be located and it is for that reason his evidence was not led.

In view of these submissions and for its proper appreciation, it is necessary to set out the evidence presented before the trial Court at least briefly.

According to Nilanthi, the deceased is her sister and after her marriage to the accused-appellant, she was residing in Angoda. They had a male child who was preparing for his grade five scholarship exam at the time of the incident. In June 2004, the deceased returned to her parental house at Bomiriya with her belongings, after a scuffle with the accused-appellant. She also brought her child. On the day of the incident, the accused-appellant came to Bomiriya in the evening and invited the deceased to go with him to "settle a problem". The accused-appellant prevented their son coming with his mother. They went away in a three-wheeler.

As the deceased did not return for two days, upon enquiry, Nilanthi learnt that the deceased has suffered burn injuries and had been admitted to hospital. When the witness visited her sister at the hospital, it was observed that the deceased has "lost parts of her body". Probably the witness was referring to the phenomenon of peeling off skin after burn injuries. Her condition was critical and was being given oxygen. Then, having removed her oxygen mask, she spoke a little to convey that the accused-appellant had set her on fire by pouring petrol on her after

assaulting her with a bottle and tying her hands with a thick rope. She was fallen on the ground as she lost consciousness upon the assault, and when she regained consciousness the accused-appellant was pouring petrol over her.

Witness Kumara, who claimed to have accompanied the deceased to the hospital after she suffered burn injuries stated that she merely complained of the pain due to burning during the journey. He also said that her body was covered with a cloth which appeared like a sarong. The other male person who accompanied the deceased, lived in a neighbouring house and was an employee of the Water Board. The witness claimed that it is who he called out for his help.

It is through Dr.Ariyaratne, the prosecution has tendered the written statement of the deceased as her dying deposition, marked P2. The medical witness also said that the deceased was in good mental state at the time of making the statement to the Police in his presence. He has then placed his signature on it. PS 12425 Wipulasena has recorded it.

Dr. Rani, in her evidence stated that she has performed the post mortem examination on the body of the deceased. She observed one laceration on the head, in addition to burn injuries which has spread over both sides of her body above her knees. She further stated that the deceased had burn injuries over 82% of her body surface. She was of the opinion that the burn injuries may have resulted in a fire due to some combustible substance being thrown at her. The deceased has died due to septicaemia.

In cross examination she further opined that it is not a case of suicide, judging by the injury pattern. She further stated that it is unlikely a suicide or an accident.

IP Samarasinhe visited the crime scene only after the death of the deceased. He has observed a guava tree located in a shrub area of the back garden of one Ranjith, as the place of the incident. The land belonged to the Water Board and he also noted a boutique. There was also a water tank, located about 75 meters from Ranjith's house.

When the defence was called by the trial Court, the accused-appellant elected to give evidence under oath.

It was his evidence that he got married to the deceased in 1988. At the time of their son's birth the deceased has purchased a house in Bomiriya. He has allowed the deceased to operate a tailor shop from the boutique situated in Angoda and three of them lived in its adjacent room. He was involved in rehabilitating youth addicted to drugs in an establishment located in Galle.

In describing the incident, the accused -appellant claimed that they had a dispute over the tailor shop and she left for Bomiriya. Then he started an eatery in the vacant premises. One day, a person, described as the husband of deceased's sister, came to see him and told that he needed to talk to the accused -appellant but he was too embarrassed to reveal the reason. Then he told the accused-appellant "certain things". After this incident, he went to Bomiriya, brought back the deceased to Angoda and assaulted her. When she was assaulted she admitted "certain things" which took place. She fell on the ground with the assault. Then he went

back to the boutique, took some cash and left for Galle. He disclosed what happened to one of his superiors and later surrendered to Court. He denied any knowledge of setting fire to his wife.

The most important evidence in relation to the charge levelled against the accused-appellant came through the statement of the deceased, marked as P2.

In that statement, the deceased claims that on 7th July 2004, at about 7.30 p.m., her husband took her to the back garden, and assaulted her on the head with a glass bottle which resulted in a bleeding injury. He then tied her to a branch of a tree, having undressed her, he performed a *"JaraVedak"* and repeated it once more. She felt faintish over this and then she laid herself on the ground and asked for water. The accused-appellant then ran to their house, brought a bottle back and poured some liquid over her body. She heard a match being lit and then she felt heat. Her body was enveloped by flames. She has then run towards the water tank and splashed water on her body. There too she was assaulted by her husband.

Learned High Court Judge, in her judgment has devoted significant space to evaluate the truthfulness and reliability of the dying deposition of the deceased in order to determine the charge against the accused-appellant. In her evaluation, the position of consistency has also been considered. Deceased's sister clearly stated in her evidence that it was the accused-appellant who set fire to her. Then she repeated the same allegation in the presence of the Doctor to the Police officer. The deceased had burn injuries over 80%of her body. In such a state, with the pain from her extensive burn injuries, it is not reasonable to expect the deceased to

narrate how she received her injuries to the two relative strangers who took her to hospital, immediately after the incident. Even at the time of admission, it is not clear as to who provided the history of her injuries. There is evidence that patients are admitted initially to the OPD and then they are transferred to Emergency Treatment Unit, before commencing treatment at Ward 73. Then only they are transferred to the specialized ward.

In these circumstances, no weightage can be attached to the brief references made in the BHT of "Assault" with two question marks, in order to conclude that it is a doubtful claim. The medical officer, who performed the post mortem clearly observed a laceration on her head with skin damage. This confirmation dispels any challenge on the claim of assault.

The three grounds to which the learned President's Counsel referred to in his submissions as inconsistencies when the dying deposition is compared with what her sister said in evidence, this Court finds that they were consistent except on the claim of "*Jara Wade*". Both Nilanthi and the deceased claim that her clothing was removed. The use of rope is also mentioned in the two versions. The absence of the reference to the repulsive act of the accused-appellant could easily be attributed to the condition she was in at the time of its making. The sister clearly said in her evidence that the deceased spoke briefly after removing her oxygen mask, whereas when making P2, her condition may have been stabilized as the expert witness said that she was rational and was in a position to make a statement.

As correctly pointed out by the learned Deputy Solicitor General, that the contents of the dying deposition are corroborated by independent sources. The medical evidence confirms that there was in fact an assault on the deceased. The removal of her clothing is confirmed by witness Kumara who says that the deceased was only covered by a sarong when she was taken to hospital. The presence of the guava tree and the water tank are relevant in this context.

There is no challenge by the accused-appellant for the admission of the dying deposition of the deceased as relevant evidence under Section 32(1) of the Evidence Ordinance.

In the circumstances, we find no merit in the submissions of the learned President's Counsel that the dying deposition could not be relied upon and a conviction based on its contents as to the "cause of his death, or as to any of the circumstances of the transaction which resulted in his death" could not be sustained. Once the statement is admitted, the trial Court would confine itself to the contents of it which relates to the cause of death, or as to any of the circumstances of the transaction which resulted in death. Any motive as revealed from the contents of such a statement had to be excluded from its consideration as per the judgment of ***Silva and Another v Republic of Sri Lanka*** (1981) 2 Sri L.R.439.

The trial Court was obviously mindful of the legal principles laid down in the judgment relied upon by the accused-appellant and ***Ranasinhe v Attorney General*** (2007) 1 Sri L.R. 218, as it has considered the reliability of truthfulness of the dying deposition at length. Therefore, it is our

considered view that the reliance placed on the dying deposition by the trial Court in convicting the accused-appellant is legally acceptable.

The complaint that the evidence presented by the accused-appellant has not been properly considered by the trial Court must be considered now.

Upon perusal of the judgment of the trial Court, it is clear that the trial Court has analyzed his evidence in detail and arrived at a definitive finding that he has presented an improbable defence. In coming to this conclusion, the trial Court has considered that the accused-appellant, having admitted the sequence of events as stated by the deceased up to the point of her falling on the ground, had then presented a fanciful claim. Learned Deputy Solicitor General termed this claim as an act of character assassination of the deceased.

When the proceedings are examined in relation to the accused-appellant's evidence, it is clearly seen that through a series of leading questions, learned Counsel who defended him at the trial, introduced the claim of deceased having an extramarital affair with his brother-in-law. It did not originate from the accused-appellant himself. The accused only referred to what he learnt from his brother-in-law as "certain things". It is his Counsel who suggested what he referred to a "certain things" is in fact a confession on infidelity. He has mostly agreed with what his Counsel suggested through his examination in chief. In addition, this claim was made by the accused-appellant for the first time only in his evidence. He did not suggest it to the sister of the deceased, who would have been the best person to answer it affirmatively as it involves her husband. He did

not suggest this claim even to the witness who has worked under him for some time, who was evasive in giving answers. Therefore, it is clearly an inconsistent claim and it was only raised at a very late stage of the proceedings before the High Court. Therefore, it could reasonably inferred as an afterthought.

On the question of probability of his version, in our view that it is highly improbable for a person to confess to the accused-appellant that he had a relationship with his wife, without any compulsion and absolutely on a voluntary basis. The trial Court has observed the accused-appellant's demeanour when he gave evidence before it and concluded that he uttered falsehood in his evidence. Of course, there is no specific sentence by which the trial Court states that it rejects the evidence of the accused-appellant. When it already concluded that the accused-appellant is lying, and thereby giving a clear indication that it had rejected his evidence in total, we do not think that the trial Court should add another statement in its judgment that it has also considered the position whether it could be accepted nor rejected.

The complaint regarding the witness not called by the prosecution is based primarily in support of the issue of consistency of the claim of the prosecution as to how the deceased suffered burn injuries. It is clear from the other witness who rushed to the scene, that the missing witness only involved with calling out his help and taking the deceased to hospital and there was no time gap allowing him to talk to the deceased to verify with her as to how she got burnt. He does not qualify to be termed as a person who "unfolds a narration" that is different to the one given by the witness

already called by the prosecution as per the judgment of ***Walimunige John v The State*** (1973) 76 NLR 488.

Lastly, the consideration of diminished responsibility did not arise before the trial Court since the accused-appellant emphatically claimed that he did not consume alcohol when he confronted and assaulted the deceased over the allegation of infidelity and the evidence before the trial Court did not reveal that he lost his power of self-control over the suspicion of extramarital affair attributed to the deceased.

Considering the totality of the evidence, this Court is of the view that the trial Court has arrived at the correct finding and the several grounds of appeal, as raised by the learned President's Counsel for the accused-appellant does not suffice to challenge the validity of the conviction.

We affirm the judgment delivered by the learned High Court Judge dated 15.08.2008. The appeal of the accused-appellant is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL