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

In the matter of an Appeal against an Order of the High Court under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979

C.A. Case No: 24/2015
H.C. Chilaw Case No: 28/2007

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

Complainant

-Vs-

Kumarasinghe Hettiarachchilage Gamini Sarath
No. 94/11, Malpura,
Gothatuwa.

Accused

-And-

Kumarasinghe Hettiarachchilage Gamini Sarath
No. 94/11, Malpura,
Gothatuwa.

Accused-Appellant

-Vs-

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

Complainant-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

K. Priyantha Fernando J.

Counsel : Indica Mallawarachchi with K. Kugaraja for the Accused-Appellant.

Chethiya Goonesekera, DSG for the Respondent.

Written Submissions of the Accused-Appellant filed on: 27/02/2018

Written Submissions of the Complainant-Respondent filed on:24/04/2018

Argued on : 20/02/2019

Judgment on : **22/03/2019**

A.L. Shiran Gooneratne J.

The Accused-Appellant, (hereinafter referred to as the Appellant) was indicted in the High Court of Chilaw, under Section 296 of the Penal Code for causing the death of Ashan Sumith Perera, (hereinafter referred to as the deceased) and upon conviction the Appellant was sentenced to death.

The conviction is solely based on 3 dying declarations.

When this case was taken up for argument, of the 6 grounds of Appeal raised in the written submissions, the 1st, 2nd,3rd and 4th grounds of Appeal were couched as the 1st ground of Appeal and the 5th and 6th grounds of Appeal were argued by the Counsel for the Appellant. They are set out as follows;

(1) Conviction based on vague and ambiguous dying declarations is wholly unsafe

(5) Rejection of the defence evidence is factually untenable

(6) Section 114 (F) of the Evidence Ordinance operates against the prosecution by its failure to admit the deposition of PW2, who was an eye witness to the incident.

Ranjani Fernando (PW1), the mother of the deceased, stated in evidence that she received a message that the deceased was shot at and was lying injured at the Maiyawa Junction. She further states that, at the time the deceased was receiving treatment at the Ragama Hospital, the deceased had told her many times that Gamini had shot him. (හැම වෙලාවෙම කිව්වේ ගාමිණී මට වෙඩි තිබ්බා කියලා.)

In cross examination, she admitted that there are several Gaminis in the village and the person who shot the deceased is Caroline's Gamini.

ප්‍ර: කොයි ගාමිණීද කියලා කිව්වද තමන්ගේ පුතා?

උ: මේ ගාමිණී කියලා තමයි කිව්වේ.

ප්‍ර: මේ ගාමිණී කියලා කිව්වේ කොහොමද?

උ: එයාගේ අම්මා කරලයින්. කරලයින්ගේ ගාමිණී මට වෙඩි තිබ්බා කියලා කිව්වා.

It is observed that the reference to Caroline's Gamini was made for the first time by this witness who has referred to the Appellant as Gamini throughout her evidence in chief and in the statement given to the police. According to the medical officer Dr. Anton Tissera (PW9), the deceased had stated that Gamini had shot at him. The doctor who conducted the post mortem examination of the deceased states that, a firearm injury to the abdomen and spine has caused the death of the deceased, which corroborates the evidence given in the dying depositions. In the statement recorded by the investigating officer (PW8), the deceased had repeated his stand that Gamini had shot at him.

In this background, the counsel for the Appellant submits that since there were several Gaminis in the village, there is a reasonable possibility that it could have been a Gamini other than the Appellant who committed this crime which the prosecution has failed to exclude.

As noted above, PW1 at many times in her evidence in chief has referred to the Appellant as Gamini who was involved in the shooting of her son.

PW1 has referred for the first time to the Appellant as Caroline's Gamini and admits that in her statement to the police she referred to the Appellant as Gamini. However, in cross examination, when questioned about other Gamini's in the village she clarified her position by stating that the Appellant is Caroline's

Gamini. She has identified the Appellant in Court as Caroline's Gamini. However, the defence failed to question her further on this issue or dispute her on this point. Therefore, the evidence is that amongst the several Gaminis in the village, the one she identified in Court is Caroline's Gamini.

In case ***C.A. 03/2011 decided on 04/08/2014, submitted by the Counsel for the Appellant, Anil Gooneratne J.*** held that;

"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."

The 3 dying declarations are challenged only on the basis that there were several Gaminis and the prosecution failed to exclude other Gaminis in the village.

The facts contained in evidence of witnesses who testified regarding the dying declarations, are not challenged. According to the medical evidence, the Appellant was in a fit state to make a dying declaration. The dying declaration recorded by PC 31686 Sunil Weerasinghe (PW8), clearly indicates that the Appellant had a clear opportunity to observe and identify the Appellant at the time of the incident. A dying declaration as evidence can be acted upon without corroboration if it is found to be true and reliable.

The learned trial judge decided that the dying declarations are true and accurate and could be accepted. Regarding the identity of the Appellant, the learned trial judge held that PW1 had precisely identified the Appellant out of the several Gaminis in the village.

"*It is essential to ascertain correct identity specially when there are others with the same name*" ***(C.A. 03/2012 Supra)***. Admitting that, there were other Gaminis in the village, PW1 has identified the Appellant and clearly distinguished other Gaminis in the village from the Appellant. The said clarification by PW1 regarding the identity of the deceased remain unchallenged.

On this point, it was contended by the counsel for the Appellant that the prosecution failed to question PW1 to exclude the possibility of the involvement of the Appellant by ruling out other Gaminis in the village. It is noted that, when the witness clearly clarifies as to which Gamini she refers to, it needs no further clarification, since it is self explanatory. In the circumstances, the Court is

satisfied that the said dying declarations can be admitted in evidence to base a conviction without further corroboration.

The Counsel for the Appellant has also pointed out that the rejection of the Appellants evidence given on Oath is factually untenable. The accused in his defence took up the position that, he was not at the crime scene and that he was at home at the time of incident. We observe that the learned trial judge has evaluated the evidence given by the Appellant in the context of the prosecution evidence and to that extent we do not find any infirmity which questions the validity in rejecting the evidence of the Appellant.

The last ground of Appeal is framed on the basis that the prosecution has failed to admit under Section 33 of the Evidence Ordinance, the evidence of an eye witness to this incident. The Counsel for the Appellant submits that Janaka Chaminda Kumara PW2, an eye witness to this incident who is reported dead at the time of the trial in his evidence on oath at the non-summary inquiry had exculpated the Appellant of this murder and contends that the failure on the part of the prosecution to admit the deposition of this witness under Section 33 of the Evidence Ordinance entitles the Court to draw an adverse inference in terms of Section 114 (f) of the Evidence Ordinance.

In ***C.A. Appeal 57-58/2003, this Court cited with approval the case of Walimunige John Vs. The State 76 NLR 488,*** where the court held that;

"whenever the prosecutor is in doubt or errs in the exercise of this discretion (to place such; evidence as he considers necessary), the depositions and statements made by the witnesses to the Police being available to the trial Judge, he can, and indeed should, intervene and either order the prosecutor to call such witness as the Court considers necessary in the interests of justice or call the witness mero motu in the exercise of its own powers under the Criminal Procedure Code and the Evidence Ordinance."

In the interest of justice, I take the liberty to peruse the deposition of PW2 at the non-summary inquiry, where I find that the said witness in his testimony on oath has denied that he was an eye witness to this incident. Therefore, the said testimony if produced in evidence, would neither strengthen nor weaken the case for the prosecution. Accordingly, I find that not producing the testimony of PW2 in evidence could not have supported the prosecution, nor could draw an adverse inference or not producing create a doubt in the prosecution case.

As held in ***Walimunige John V. The State (Supra),*** *"the question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is with held by the prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would if called not have supported the prosecution".*

It further held that;

> *"the prosecution is not bound to call witnesses whose names appear on the back of the indictment or tender them for cross examination".*

It is trite law that when a dying declaration is found to be true voluntary and accurate, it can base a conviction without corroboration. For all the reasons stated, we find that the 3 dying declarations relied upon by the prosecution suffers no infirmity and therefore could be safely acted upon.

Accordingly, we refuse relief on all grounds of appeal and affirm the conviction and the sentence.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL