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

In the matter of an Appeal in terms of section 331 (1) of the Criminal Procedure Code No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0102/2019

High Court of Puttalam Case No:

HC/45/2018

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Rathnasekaralage Nimal Anthony

ACCUSED

AND NOW BETWEEN

Rathnasekaralage Nimal Anthony

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: K Priyantha Fernando, J.
	: Sampath B Abayakoon, J.
Counsel	: I.B. Sachitra Harshana for Accused-Appellant
	: Sanjeeva Dissanayaka D.S.G. for the Respondent
Argued on	: 26-03-2021
Written Submissions	: 12-05-2020 (By the Accused-Appellant)
	: 22-03-2021 (By the Respondent)
Decided on	: 27-04-2021

Sampath B Abayakoon, J.

This is an appeal by the accused-appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Puttalam.

The appellant was indicted before the High Court of Puttalam for causing the death of one Manikkuge Gunathilaka, thereby committing the offence of murder punishable in terms of section 296 of the Penal Code.

After trial without a jury, the appellant was found guilty as charged, and was sentenced to death by the learned High Court Judge from his judgment dated 27-06-2019 and the sentence of even date.

This is a conviction solely based on the dying declaration of the deceased person, and the attendant circumstantial evidence, and hence, the only ground of appeal urged by the learned counsel at the hearing of this appeal was that the learned High Court Judge has failed to consider the infirmities of the dying declaration of the deceased in its correct perspective and the conviction therefore is bad in law.

The only eyewitness to the incident has not been called as a witness against the appellant because of the statutory bar imposed by the provisions of section 120 of the Evidence Ordinance as she was the legal wife of the appellant at the time of the incident.

According to the evidence led before the High Court, the incident where the deceased received cut injuries has happened on the night of 13th April 2016 and the statement of the deceased had been recorded by PW-05, namely, PC 41239 Susantha Kumara on the 17th of April 2016 at the Puttalam hospital. The deceased succumbed to his injuries on the 27th of April 2016 while receiving treatment at the same hospital.

It is under the provisions of section 32 (1) of the Evidence Ordinance a statement made by a person who cannot be called as a witness when it relates to the cause of death or as to any other circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question becomes relevant.

Such statements are relevant whether the person who made them was or was not at the time when they were made under expectation of death.

According to the evidence of PW-05, on receiving orders from the Head Quarters Inspector of Puttalam Police, he had visited the Puttalam Base Hospital on 17-04-2016 in order to record the statement of the deceased. He had found him in the intensive care ward of the Hospital under bed head No-14713. After inquiring from the nurse in charge of the ward, and with his permission, the witness has spoken to the deceased and the deceased had told the witness that he was well enough and, in a position to speak. PW-05 has commenced the recording of the statement at 1015 hours and has recorded the same for about half an hour. He had recorded the statement in the way the deceased had narrated the incident. After the recording of the statement, it has been read over and explained to the deceased and the deceased has placed his signature. After returning to the station, the statement has been pasted in the

Crime Information Book on the same day at 1400 hours, a certified copy of which has been marked as P-01 at the trial.

Before considering the contents of the deceased's statement and its relevancy, I would like to address my mind to the relevant legal principles that governs the acceptance of a dying declaration as evidence in a trial.

It was held in the case of **Somasundaram and Others Vs. The Queen 76 NLR 10** that;

> *"When evidence is given under section 32(1) of the Evidence Ordinance of statements made by a person as to the cause of his death or as to the any of the circumstances of the transaction which resulted in his death, it is the duty of the trial judge to give the jury the necessary caution with regard to how they should approach the consideration of the statements made by a deceased person."*

After being guided by the judgment of H.N.G.Fernando, J. in the case of **Queen Vs. Anthony Pillai 68 CLW 57,** where it was stated that;

> *"The failure on the part of the learned trial judge to caution the jury as to the risk of acting upon a dying declaration, being a statement of a person who is not a witness at the trial, and as to the need to consider with special care the question whether the statement could be accepted as true and accurate had resulted in a miscarriage of justice."*

Sisira de Abrew, J. held in CA-106/2002 decided on 22-08-2007, that when a dying declaration is sought to be produced as an item of evidence against an accused person in a criminal trial, the trial judge or the jury as the case may be must bear in mind of the following weakness;

(1) The Statement of the deceased person was not made under oath.

(2) Statement of the deceased person has not been tested by cross examination. Vide- **King Vs. Asirivadan Nadar 51 NLR 322 and Justin Pala Vs. The Queen 66 NLR 409**

(3) That the person who made the dying declaration is not a witness at the trial.

Per Sisira de Abrew, J.

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

(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 accepter 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 very much apparent from the judgment of the learned High Court Judge that he was well possessed of the relevant legal principles that should be considered in deciding a matter upon a dying declaration. Apart from considering the relevant principles as to the dying declaration, the learned Judge has also well considered the relevancy of any circumstantial evidence in such a scenario.

When it comes to the facts of the instant action, it is very much clear that the deceased has in fact made a statement to PW-05 and there was no reason for PW-05 to not to speak the truth about the circumstances under which he recorded the statement of the deceased. Although the deceased was in the ICU of the Hospital at the time of the recoding of the statement, he has been in a position to make a statement on his own free will and was not in the expectation of death and has even signed the statement. The Judicial Medical Officer (JMO) who conducted the post mortem examination of the deceased has clearly expressed the opinion that the deceased had the ability to speak as his injuries were not injuries that cause any impediment to the ability of the deceased to speak. He has also expressed his opinion that the death of the deceased was a result of the injuries he suffered. The evidence of the JMO was never subjected to any challenge by the defence.

PW-05 was an officer who was not involved in the investigations as to the incident and apparently, he has had no prior knowledge as to the facts of the incident. I am unable to find any reason to doubt that he has not recorded or wrongly recorded what was said to him by the deceased.

It is very much apparent from the dying declaration marked P-01, that the deceased has never attempted to exaggerate the incident, but has described as to what really happened on the day of the attack. There cannot be any doubt as to the identity of the person who attacked the deceased either. According to the statement of the deceased and other witnesses, the deceased and the appellant are well known to each other. It is well established that the legally married wife of the appellant was the paramour of the deceased and that they were living together at the place where the stabbing incident took place. The deceased has clearly stated that due to this animosity, the appellant came at night towards his house and scolded him in filth threatening to kill him. Although it was night time, there would have been no difficulty for the deceased to identify the appellant when he threatened him as they were well known to each other. I find

that in the statement, the deceased has only described how he saw the knife carried by the appellant saying that due to the available moonlight, he managed to see that the appellant was carrying a white-coloured pointed knife.

In explaining his injuries, the deceased person has given an accurate description, which was in line with the evidence of the JMO and has stated that he fell unconscious after receiving the injuries. This explains very well the reason why the person who came to the scene of the incident subsequently, and who took the deceased to the hospital, namely, PW-01 Ranjith Lowe's, failure to ask the deceased about the incident as the deceased would not have been in his proper senses.

PW-01 in his evidence has identified the paramour of the deceased who was with him when he reached the scene of the incident as one 'Baby', but has identified her as the wife of the appellant Nimal Anthony. The deceased in his statement has named his paramour as Hettige Dushanthi De Silva and has stated that she is the legal wife of Nimal. It is therefore clear that the female referred by PW-01 as Baby and by the deceased as Dushanthi refers to one and the same person, namely, the paramour of the deceased.

I find that the learned High Court Judge has well considered the relevant legal principles before coming to his finding that PW-05 was telling the truth as to the recording of the statement of the deceased and he has recorded the same accurately. After deciding so, the learned trial judge has proceeded to consider the statement and the other circumstantial evidence to test the accuracy and the truthfulness of the statement and has come to a firm finding that it relates to the cause of the death of the deceased and the circumstances that led to the death, in deciding to accept the same as relevant under section 32(1) of the Evidence Ordinance, for which I find no reasons to disagree.

I am unable to agree with the contention of the learned counsel for the appellant that not calling the male nurse who was in charge of the ICU at the time the statement was recorded by PW-05 as a witness relevant, as the

prosecution has led sufficient evidence to establish that the deceased had the ability to talk and to make a statement on the day the statement was recorded. I find no relevancy of the provisions of section 114(f) of the Evidence Ordinance for the instant situation as contended by the learned counsel.

I am also unable to agree with the learned counsel's argument that the deceased telling the PW-05 that the incident happened around 8.30pm and PW-01 saying that he came to the place of the incident around 7.30pm create a reasonable doubt as to the correctness of the statement. It is very much obvious that neither the deceased nor the PW-01 has referred to actual times, but to what they thought the time was, when the incident happened at night time, which does not create any doubt as to the evidence of the PW-01 and the dying declaration of the deceased.

At this juncture, I would also like to mention that it was the same judge who has heard the case in its entirety. It is well settled law that an appellate forum would not lightly disturb the findings of facts by a trial judge.

In the case of **Fradd Vs. Brown and Co. Ltd. 20 NLR, 282** it was held:

> *"Immense importance attaches, not only to the demeanour of the witnesses, but also in the course of the trial and the general impression left on the mind of the judge present, who saw and noted everything that took place in regard to what was said by one or other witness. It is rear that a decision of a judge so express, so explicit, upon a point of fact purely, is over-ruled by a Court of Appeal, because Courts of Appeal recognize the priceless advantage which a judge of first instance has in matters of that kind, as contrasted with any judge of a Court of Appeal, who can only learn from paper or from narrative from those who were present."*

I find that the learned trial judge who had the benefit of listening to all the witnesses of this action had reached his verdict after well considering the facts and the relevant law, which needs no disturbance.

The appeal therefore is dismissed, as I find no merit in the same. The conviction and the sentence is affirmed.

Judge of the Court of Appeal

K. Priyantha Ferando, J.

I agree.

Judge of the Court of Appeal