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

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

CA 156/2016
HC/ MATARA/ 174/2007

Indiketiya Hewage Ananda

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Devika Abeyratne J**

P. Kumararatnam J

COUNSEL : **Mr.Razik Zarook PC with Mr.Chanakya Liyanage AAL for the Appellant.**

Mrs.Harippriya Jayasundara SDSG for the Respondent.

ARGUED ON : **31/03/2021**

DECIDED ON : **09/07/2021**

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JUDGMENT

P. Kumararatnam J

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General for committing murder of Nupe Hewage Priyanka on or about 13/06/1998 an offence punishable under Section 296 of Penal Code.

After a non-jury trial, the Learned Trial Judge convicted the Appellant on the count of murder and sentenced him to death on 01/08/2006.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court seeking to set aside the conviction and sentence imposed on him. Deceased is the wife of the Appellant.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via zoom from prison.

On behalf of the Appellant following Grounds of Appeal are raised.

1. The conviction is bad in law as the Learned trial Judge has solely relied on the dying declaration of the deceased which is not corroborated by any other evidence.

2. The Learned Trial Judge has failed to consider that the prosecution has not proved that the alleged offence was committed by the accused- Appellant.

Back ground of the case

On the day of the incident witness PW2 Upali Samantha who is a neighbour of the Appellant had heard several cries of a female from the house of the Appellant. He could hear the voice very clearly as the two houses are situated very close to each other. When he ran towards the direction of the cries, a neighbour who was already there told him to bring a three-wheeler to transport the deceased to hospital as she got burnt. He could not see anything happening inside the compound of the Appellant's house. He immediately went in search of a three-wheeler and sent it to the Appellant's house. When he returned to the place of incident the deceased had already been removed to the hospital.

The deceased had been transported to the hospital in the three-wheeler belonging to PW03 who is the nephew of the Appellant. While transporting the deceased had uttered several times to go quickly to the hospital. The Appellant was the person who took the deceased in the three-wheeler and admitted to the hospital.

PW05 a boutique owner confirmed that the Appellant had bought ½ bottle of kerosine oil in the evening at about 6.45pm on the day of the incident.

PW06 police Sgt/1548 Seneviratne had recorded the dying declaration of the deceased at the hospital on 16/06/1998 three days after burn injuries. The deceased had passed away on 19/06/1998 after receiving in house treatment from the hospital.

PW10 JMO Padmatilake had conducted the post-mortem examination and confirmed that the deceased had suffered 90% burn injuries on her body except the head, face, neck and below the ankle. Considering the pattern of

injuries, the JMO had opined that the burns had been caused due to throwing flammable substance on the deceased's body.

As there was a case to answer, the Learned High Court Judge had called for the defence and the Appellant made a dock statement and took up the position that the deceased had committed suicide by setting fire to herself.

Further the Appellant had called Dr.Priyantha Perera to give evidence on behalf of him.

In the first ground of Appeal the Learned President's Counsel contended that the conviction is bad in law as the Learned Trial Judge has solely relied on the dying declaration of the deceased which is not corroborated by any other evidence.

As this case solely relies on the dying declaration made by the deceased it is very important to discuss the relevant laws pertaining to the acceptance of dying declaration as evidence in criminal trials under our law.

According to Section 32(1) of Evidence Ordinance,

Statements, written, or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases: -

(1) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

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, and

whatever may be the nature of the proceedings in which the cause of his death comes into question.

The following requirements must necessarily be established before any evidence is led under section 32(1) of the Evidence Ordinance.

1. That the maker of the statement is dead.
2. That the statement made by the deceased refers to his/her cause of death or to the circumstances of the transaction which resulted in his/her death.

Hence such evidence would become admissible only where the cause of death of the person making the statement is in question in the particular judicial proceedings. Admissibility of such evidence would ultimately be decided by the trial judge as per Section 136 of Evidence Ordinance.

In **Dharmawansa Silva and Another v. The Republic of Sri Lanka** [1981] 2 Sri.L.R.439 it was held:

> *"When a dying statement is produced, three questions arise for the Court. Firstly, whether it is authentic. Secondly if it is authentic whether it is admissible in whole or part. Thirdly, the value of the whole or part that is admitted. A dying deposition is not inferior evidence but it is wrong to give it added sanctity"*

In **Sigera v Attorney General** [2011] 1 Sri.L.R. 201 it was held that:

> *"An accused can be convicted of murder based mainly and solely on a dying declaration made by a deceased".*

Before the prosecution could lead the dying declaration of the deceased as evidence, the defence had raised two objections. In their first one, the defence contended that as the deceased had not signed the said dying declaration it a violation under section 110(1) of the Code of Criminal Procedure Act No.15 of 1979. In this case the deceased had sustained 90% burn injuries on her body. As a result, her fingers were also burnt. When

PW06 recorded her statement, he had noted that her fingers were also burnt and oozing pus. As such he could not obtain her signature to the dying declaration. This point has been considered by the Learned High Court Judge when he delivered the order on 17/10/2012. Further the Learned High Court judge correctly concluded that the deceased's statement had been recorded under Section 32(1) of the Evidence Ordinance and allowed it to mark as P2 in the trial.

Even though the defence counsel objected, the Learned High Court Judge rightly allowed an application under Section 167(1) of Code of Criminal Procedure Act No 15 of 1979 by the prosecution to amend the indictment to include the dying declaration as production number 09. Application to amend an indictment under Section 167(1) of the Code of Criminal Procedure Act No.15 of 1979 is a statutory right which cannot be denied by the court.

Next the Learned President's Counsel has contended that the Learned Trial Judge has disregarded the contradiction with regards to the words merely attributing it to a typing error by the stenographer who recorded it and considered the dying declaration admissible.

In **Mendis v. Paramaswami** 62 NLR 302 held that:

> *"Now section 32 is the only section of the Evidence Ordinance which permits the proof of relevant facts contained in statements made by 'deceased persons. The type of evidence permitted by the section is known as hearsay evidence. A statement of relevant facts cannot be admitted under the section unless the statement consists of the very words of the deceased person"*

In the dying declaration which had been marked as P2 in the trial the deceased had said that the Appellant had first demanded her to drink kerosine oil and after that he poured it over her body and set fire to her. PW06 in his evidence given to court also mentioned the same. But the

stenographer had wrongly recorded as the Appellant poured kerosine oil over her head and set fire to her. In the cross examination although the defence tried to mark this as a contradiction, the witness very correctly after examining P2 brought to the notice of the court that the word “body” has been wrongly recorded as “head” in the proceedings by the stenographer. The Court after examining P2 had correctly held that the dying declaration contains the *ipsissima verba* of the deceased.

In the second ground of appeal the Learned President’s Counsel has contended that the prosecution has not proved that the alleged offence was committed by the accused-Appellant.

In this case no eye witnesses were available and the case solely rests on a dying declaration made by the deceased. Further the deceased is the wife of the Appellant and the Appellant was at home when the incident had taken place.

It is correct that PW 02 Upali Samantha had not witnessed the incident but heard cries of a woman around 7.30pm on the date of incident. Thereafter he had only gone to bring a three-wheeler to transport the deceased to the hospital. He had not met or seen the deceased at that time.

PW03 Jothipala is the person who took the deceased to the hospital along with the Appellant. This witness is the uncle of the Appellant. He had said that the deceased had pleaded several times to take her to the hospital soon. His evidence clearly shows that the deceased was in a condition in which she was able to talk at the time. Further when she uttered these words the Appellant was in the three-wheeler. Hence deceased was not in a comfortable position to reveal the name of the perpetrator to this witness. Further considering her painful condition it is not possible for her to remember or recall everything said and done after receiving burn injuries.

PW06 Sgt.Senaviratna is a total outsider in this case. He had gone to hospital after receiving information from the Police Post of the hospital. He

was not aware of the incident until he recorded the dying declaration of the deceased. As there was no room for him to manipulate his evidence in this case the acceptance of the dying declaration as evidence has not caused any prejudice to the Appellant.

Further, although the JMO who had conducted the post-mortem examination admitted that his report consists minor deficiencies but he expressed his opinion with regard to the cause of death very clearly.

To highlight this deficiencies in the post mortem-examination report the defence had called Dr.Priyantha Perera as a defence witness. He has ultimately admitted that the observation made by the JMO may be correct and a JMO can express an opinion whether it was a case of murder or a suicide.

In the dying declaration the deceased had said that the Appellant had come home after consuming liquor as usual around 8.00pm on that day. But PW02 had said that he heard the cries of a woman around 7.30pm and PW03 had testified that he took the deceased to hospital around 7.30pm. Although the defence had tried to point out this time discrepancy as a contradiction, I fully appreciate the submission made by the Learned Senior Deputy Solicitor General that no one can state the time with precision, at a time like this. Hence this time discrepancy is not material to this case. Further she stressed that unless and otherwise the Appellant has not caused injuries to her, no other reason transpired at the trial, as to why she would falsely implicate the Appellant.

According to the boutique owner PW05 Bandupala had testified that the Appellant was not drunk when he came to his boutique at 6.45pm on that day and bought ½ bottle of kerosine oil, beetle, tea and vegetables. But the stance taken by the deceased in her dying declaration would not contradict this position as the incident had happened around 7.30pm. Further, PW05

was not aware whether the Appellant had consumed liquor after leaving the boutique.

Further the Appellant in his dock statement had taken up the position after he bought kerosine oil, again he went to the boutique to buy beetle. But this position was contradicted by PW05 in his evidence.

When the evidence presented against the Appellant is considered I conclude that the prosecution had succeeded in adducing highly incriminating evidence against the Appellant and thereby established a strong prima-facie case against him. As such we conclude that this is not an appropriate case in which to interfere with the findings of the Learned High Court Judge of Matara dated 01/08/2016. Hence, we dismiss the Appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J

I agree

JUDGE OF THE COURT OF APPEAL