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

In the matter of an appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No.15 of 1979, read with Article138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA/HCC-231/2020

High Court of Tangalle
Case No: HC 51/2006

Vs.

1) Kaluhennadige Rohitha Sarath Jayantha

Accused

And Now Between

1) Kaluhennadige Rohitha Sarath Jayantha

Accused-Appellant

Vs.

The Honourable Attorney General,

Attorney General's Department,

Colombo 12

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Darshana Kuruppu with
Dineru Bandara
for the Accused-Appellant

Maheshika de Silva, SSC,
for the Respondent.

ARGUED ON : 21/02/2022

DECIDED ON : 22/03/2022

R. Gurusinghe, J.

The Accused Appellant ("the Appellant") was indicted in the High Court of Tangalle for committing the murder of one Loku Yaddehige Rajika on or about the 15th of October 2012 at Kudawella, an offence punishable in terms of section 296 of the Penal Code.

The appellant pleaded not guilty to the charge and preferred to have the Trial before the Learned High Court Judge without a jury.

The prosecution led the evidence of PW1, PW2, PW3, PW6, PW8, PW4, PW5 and the Court Translator.

The appellant made the dock statement.
At the conclusion of the trial the appellant was convicted as charged and

was sentenced to death. The appellant preferred this appeal against the said conviction and sentence.

Briefly, the facts of the case are as follows;

On the day of the incident when the deceased and his son PW1 was at home, the appellant had come to the deceased's house around 10.00 in the morning and demanded for some amount of money from her. The deceased, however was not ready to give him money and she went to the kitchen to prepare lunch. While she was washing rice, the appellant had come to the kitchen and poured kerosene oil on the deceased and lit a match stick and the deceased was engulfed in flames. Thereafter, the appellant had fled the house where the incident took place. PW1 who witnessed the incident had shouted and PW3 had come to the scene and discovered that the deceased had been engulfed in fire. Then, he had extinguished the fire by pouring water and took the deceased to the Matara General Hospital. Later on, she had been transferred from there to Colombo. As per the evidence of PW3 and her husband PW2, the deceased had told both of them that the appellant had set her on fire after pouring kerosene oil. The police witness, with the permission of the doctor and the nurse on duty, had recorded a statement from the deceased when she was in the Matara General Hospital. In her statement to the police, the deceased had stated that the appellant poured kerosene oil over her body and set fire.

The grounds of appeal set forth on behalf of the appellant are as follows;

I. The Learned High Court Judge has failed to consider Evidence of Solitary Eye Witness who is a child, cannot be accepted due to following reasons:

A. Testimony of Solitary Eye Witness (11 years of age) was not corroborated by medical evidence.

B. Testimony of Solitary Eye Witness was contradicted by the so-called Dying Declaration made by the deceased.

C. When there are ample opportunities for the prosecution to record a statement from the child on the day of the incident, they have failed to do so. Therefore, the possibility of tutoring the child witness cannot be totally ruled out.

D. Behaviour of the child witness is not natural.

II. The Learned High Court Judge has failed to consider the inherent weaknesses of the purported Dying Declaration of the deceased.

III. The Learned High Court Judge has seriously erred in appreciating the evidence of other prosecution witnesses, including Doctor Dona Indra Malini Ratnayake (JMO), who had performed the post-mortem on the person of the deceased.

IV. The Learned Trial Judge has not taken into his consideration that the First Information does not contain the name of the accused-appellant.

V. The Learned High Court Judge has failed to consider the fact that the prosecution did not call medical reports of the accused-appellant and therefore, the accused-appellant has been denied the right to a fair trial.

VI. The Learned Trial Judge has failed to consider that the probability of suicide cannot be totally ruled out.

VII. Prosecution's failure to prove its case beyond reasonable doubt has not been considered in a Judicial perspective by the Learned Trial Judge.

PW1 was an 11-year-old boy at the time of the incident. He had stayed at home with the deceased on the day of the incident as he was not well enough to go to school. In giving evidence, PW1 had narrated the incident to the court. He described the way the appellant poured kerosene oil over his mother and the way how he had set her on fire and how the appellant fled the place. PW1 further stated that he rushed to PW3 exclaiming as to what had happened. PW3 had then run to the scene and extinguished the fire and had taken the deceased to the hospital.

It was submitted for the appellant that the testimony of a solitary eye witness was not corroborated in material particulars by the evidence of independent sources. Further, it was argued that the evidence of PW1 was contradicted by the medical evidence and the police evidence. However, this argument was not factually correct. The doctor was of the opinion that the kerosene oil was poured on the deceased person's body. Whereas, PW1's evidence reveals that the appellant had poured kerosene oil from the back of his mother and the oil spilled all over her body. I do not see any significant difference here. The point argued by the appellant is whether the kerosene oil was poured on the head of the deceased or the body of the deceased. It was proved by the evidence that eighty-one percent of the body of the deceased was burnt. It was quite clear that the evidence of PW1 is that "ඇඟෙස්රම ගලා ගියා", was correct. All these actions had been taken place in a pretty unexpected manner and in a rapid succession. There is no considerable contradiction concerning the evidence of PW1 and the evidence of PW1 is corroborated by the evidence of the doctor.

Section 118 of the Evidence Ordinance is as follows:

> 118. All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions. By tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

The children are not excluded as incompetent to give evidence. The argument is that the evidence of a child must be corroborated on material particulars which can be considered as a matter of prudence and not as a requirement of law. In this particular case, PW1 was 11 years old at the time of the incident. He was capable of understanding the questions posed to him and of giving rational answers to the same. This shows undoubtedly that PW1 is a competent witness.

The next argument is that PW1's statement was not recorded on the day of the incident. PW1 could not have gone to the police station on his own as there was no other senior person in the house to accompany him to the police station, as his father had gone to the Matara General Hospital on the day of the incident. However, the statement of PW1 was recorded at the Tangalle police station on the following day at 8.00a.m. Thus, it cannot be considered as a delayed statement, as it was made within a 24 hour period of the incident. Therefore, the above mentioned argument has no merit.

The next argument is that the behavior of the child (PW1) is not natural and his testimony is improbable. The basis for the aforementioned argument is that there is no evidence to show whether or not PW1 shouted in between the two events, that is namely, pouring kerosene oil and igniting the match stick. Therefore it is inferred that he had not seen the incident. However, all those actions took place in rapid

succession, where PW1 had no time to shout and alert his mother. Further, The appellant himself stated in his dock statement that PW1 was also present. Therefore, it can be concluded that the argument raised by the Counsel to the appellant was untenable and unreasonable.

It was further argued that PW1 had not made any effort to extinguish the fire by pouring water. As mentioned earlier, PW1 was 11 years old at that time, and he had also stayed at home as he was not well and therefore, he must have lacked physical strength to act quickly. However, PW1 had run to the next door and got the help of his uncle PW3 (sometimes referred to as PW11). It can be regarded as the most natural and reasonable course for a child of that age to follow in a fearsome incident. Thus, I see no merit in this argument.

The next ground of appeal is that the Learned High Court Judge has failed to consider the inherent weaknesses of a dying declaration.

The medical evidence established the fact that the deceased had the ability to speak, and she had been conscious. PW3 in his evidence testified that the deceased made a dying declaration to him while taking her to the hospital. It was further revealed from the evidence that she had also made a dying declaration to her husband while she was taking treatment in the hospital. The police officer had also recorded a statement containing the dying declaration from the deceased while she was in the Matara General Hospital.

The dying declaration is as follows:

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යන අය මෙසේග කියා සිටී. මා කුස්සිය ඇතුලේ මැස්ස උඩ තියාගෙන හාල් ගරමින් සිටියා. ඊට පස් ජයන්ත කීවා උඹලගේ මහත්තයා දැන් ටැංගි ගිහින් ඇවිත් උඹලට

සලකයි නේද මම කරපු උදව් උඹලට මතක නැහැ නේද. ජයන්ත කීවා උඹගේ ලමයි පස්දෙනා දාලා මාත් එක්ක යන්න වරෙන් කීවා. ඔහුද විවාහක පුද්ගලයෙකි. ඔහුටද ළමයින් **04** දෙනෙක් සිටී. මම ඒ නිසා කීවා උඹගේ ළමයි ගැනිත් එක්ක උඹ හිටපන්. මට ශාන්තගෙන් කිසිම කරදරයක් නැහැ. ඒ නිසා මම යන්න බෑ කියා කීවා. ඊට පසු ඔහු එසේ කථා කරලා මගේ උරයට අත තිබ්බා. ඊට පසු උඹ මගේ උරයට අත තියන්න එපා කියා ඔහුගේ පපුව විකුවා. ඊට පස්සේ මා සිටි ස්ථානයේ සිගරට් එකක් පත්තු කරන්න කියා කුස්සියට ආවා. ඔහු කුස්සියට ආවාම මා ඔහුට පිටුපසින් සිටියේ. ඔහු කුස්සියට ආවාට පසුව මාගේ පිටිපස්සට වතුර පාරක් වදිනවා වගේ දැනුනා. එවිට මා සිතුවේ මට වතුර ගැසුවා කියායි. වතුර වැටුනු පසුව පුතා කෑගැසුවා අම්මේ අම්මගේ ගවුම ගිනිගන්න කියා කීවා. ඒ සමගම ජයන්ත මා කුස්සියේ සිට මා ඇද සිටි ටීෂර්ට් එකෙන් කොලරයෙන් අල්ලා මා එළියට ඇදලා දාලා ඔහු අපේ ලැට් එකට පස්සෙන් දිව්වා. ඔහු මා එළියට ඇදලා දැමීමට පසුව මා මුනින් අතට බිම වැටුනු අතර ඒ සමගම මා ඇද සිටී නයිටිය හා ටීෂර්ට් එක ගලවා විසි කලා. පුතා කෑගහන විට මගේ මල්ලි වන රංෂිත් පැමිණ වතුර ගැසුවා. ඒ සමගම අසල්වාසි අයද පැමිනියා. ඒ පමණ මාගේ ඇගේ තිබුනු ගින්න නිවා දමා වෑන් රථයක නවත්වාගෙන කුඩාවැල්ල හන්දියේ රෝහලට රැගෙනවිත් ඊට පසු මාතර රෝහලට රැගෙන ආවෙමි.

The deceased had also stated to her husband that ජයන්ත ලාමිපුතෙල් ඇගට දාලා ගිනි තිබ්බා.

Hence it is understandable from the evidence that all three dying declarations are the same, and there is no inconsistency. Furthermore, PW1 in his evidence testified that he had seen the appellant pouring kerosene oil over his mother and setting her on fire. Thus it shows that the dying declarations are not the only evidence regarding the incident, but it is corroborated by the evidence of PW1.

It was argued for the appellant that PW6 the police officer, had not recorded statements from the doctor or nurse who was on duty, at the time when he recorded the statement from the deceased. PW6 had recorded a statement from the deceased after consulting the doctor and nurse who were on duty. As per his evidence, the statement was recorded on the sixteenth. The deceased died on the twentieth. Had the deceased survived, this statement would have been only a statement. The Learned Trial Judge has cited from the ***Bench Book Law of Evidence, the Law of Evidence E.R.S.R. Coomaraswamy, Ranjit vs. The State 2000 3 SLR 346*** and two other cases in considering the applicable law regarding dying declarations.

The Learned Trial Judge has considered the dying declaration with caution.

The counsel for the appellant argues that "if the deceased had made a dying declaration, the husband PW2, should have made a complaint to the police on the same day. Instead, he had sent someone else to complain to the police." This argument is not only untenable, but also unreasonable. When his wife is severely burnt, he naturally has to give attention to his wife rather than going to the police. The evidence of PW1, an eyewitness, is sufficient to support the conviction.

The fourth ground of appeal is that the first information does not contain the name of the appellant. This argument is factually incorrect. The police message from the police post of the Matara General Hospital was received by the Tangalle Police Station at 2.00 pm on the fifteenth of October 2002, which contained the name of the appellant. Therefore, I hold that this argument has no merit at all.

The fifth ground of appeal is that the prosecution failed to call a medical report of the appellant and thereby denied a fair trial. This argument has

not been elaborated in the written submission or oral arguments. I do not see any prejudice caused to the appellant when considering the defense. The appellant could have made an application to call for a medical report if he had wished to.

The sixth ground of appeal is that the Learned Trial Judge has failed to consider the possibility of a suicide, which cannot be ruled out. The defense never suggested to any of the witnesses that the death of the deceased was a suicide. This position came out from the dock statement of the appellant for the first time. The appellant admitted that he was at the deceased house at the time of the incident. The presence of PW1 was also admitted.

In the case of ***Galagamage Indrawansa Kumarasiri and others vs Honorable Attorney General SC TBA*** **appeal No. 02/2012**, decided on 2/4/2014, a Divisional Bench of the Supreme Court stated the following:

> '**Dadimuni Indrasena & Dadimuni Wimalasena v AG (2008)** where it was stated that — Whenever the evidence given by a witness on a material point is not challenged in cross-examination it has to be concluded that such evidence is not disputed and is accepted by the opponent. This principle is echoed in **Pilippu Mandige Nalaka Krishantha Kumara Tissera v. AG (2007)** and is line with the approach adopted by Indian Courts as well as evidenced by the decisions in **Sarwan Singh v State of Punjab (2002) (AIR SC 111)** where it was held that 'It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted', and in **Motilal v. State of Madhya Pradesh (1990) (CLJ NOC 125 MP)** which held that. ' the Absence of cross examination of Prosecution

Witnesses of certain facts leads to inference of admission of that fact'.

If the deceased tried to commit suicide, there is no reason for the appellant to flee that place where the incident took place. Counsel for the appellant argued that the 11-year old PW1 could have poured water on the deceased and extinguished the fire. However, it can be commented on the fact that the appellant being an adult, he could have done the same instead of fleeing the place. There was nothing to suggest that the incident was a suicide. The appellant's position in the dock statement was not put to PW1 or any other witnesses. Therefore, this argument cannot be accepted.

The final and alternative argument is that "The Learned Trial Judge has failed to consider the availability of the defense of sudden provocation which can be seen from the permitted dying declaration."

Counsel for the appellant quoted the following statement of the deceased:

"ඊට පසු ඔහු එසේ කතා කරලා මගෙ උරයට අත තිබ්බා. ඊට පසු මගෙ ඇඟට අත තියන්න එපා කියලා මම එයාගෙ පපුව විකුවා. The argument is that if this portion is believed, there should have been a struggle or altercation between the appellant and the deceased. However, to establish the ingredients to come within the general exception of a grave and sudden provocation was not visible from the evidence. The defence never suggested or posed any question to any of the witnesses on this basis. The Learned Trial Judge could not have considered such a defense without sufficient evidence. Therefore this argument is not sustainable.

In the above circumstances, it is evident that there is sufficient evidence to support the conviction of the appellant. There is no reason to interfere

with the findings of the Learned Trial Judge of the High Court of Tangalle.

We affirm the conviction and the sentence dated 05.12.2020.

The appeal is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal