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 087/2018

High Court of Kegalle
Case No: HC 3355/2014

Vs.

1) Karavitage Dayananda

Accused

And Now Between

1) Karavitage Dayananda

Accused-Appellant

Vs.

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Kanishka Gunawardena

for the Accused-Appellant

Dileepa Pieris SDSG

for the Respondent

ARGUED ON : 20/06/2022

DECIDED ON : 28/07/2022

R. Gurusinghe, J.

The accused-appellant was indicted in the High Court of Kegalle for having committed the murder of one Chulasinghe, an offence punishable under section 296 of the Penal Code.

After trial, without a jury, the appellant was found guilty and sentenced to death. Being aggrieved by the conviction and sentence the appellant preferred this appeal.

The appellant urged the following two grounds of appeal:

1. The prosecution has failed to prove the case against the appellant beyond reasonable doubt.

2. The dock statement of the appellant has been disregarded by the Learned High Court Judge without evaluating its evidential value.

The facts of the case are briefly as follows:

The appellant was married to the elder sister of the deceased. There was animosity between the appellant and the deceased as a result of a land dispute. The case for the prosecution is that the appellant had put petrol on the deceased and set him on fire. The incident took place on the 13th of April 2012, on the eve of the new year.

PW1 the son of the deceased stated that he heard his father screaming and when he rushed to the place, he saw that the appellant was near his father, with a plastic bottle and a torch prepared with coconut husk (හුළු අත්ත). When he came toward his father, he saw that his father was black in colour due to the burn. He immediately rushed to bring his three-wheeler in order to take his father to the hospital. While the deceased was being taken to the hospital, the deceased said to PW1 that the appellant put petrol and set him on fire.

PW1 answered as follows, on Page 37

ප්‍ර: තමාගේ පියා රෝහලට ගෙනයන අතරතුර හෝ ඊට ඉස්සර තමාට කතා කරලා මොනවා හරි කීවද?

උ: මට අමාරුයි මට ඉන්න බැහැ දැවිල්ලයි කීවා.

ප්‍ර: මොනවද වුණේ? කොහොමද වුණේ කියන සිද්ධිය කීවද?

උ: ඉස්සරලාම මුහුණට මොනවද ගැහුවා කීවා. දන්න පටන් ගත්තලු. මොනවද වක් කරලා තියෙනවා. තාත්තා වතුර වගයක් කියලා හිතලා. එකපාරට තාත්තට හිතා ගන්න බැරුව එකපාරටම මොකක්ද වුණාලු.

ප්‍ර: තමාගේ පියා ඉතා අසාධ්‍ය තත්ත්වයෙන් නේ ඒ වෙලාවේ හිටියේ නේද?

උ: ඔව් අමාරුවෙන් හිටියේ.

ප්‍ර: මම අහන්නේ පියා එකපාරටම තමාට කවුරු මොනවා කළා කියලද කිවුවේ කියලා.

උ: මට කීවා දයානන්ද පෙට්රල් දාලා ගිනි තිබ්බා කියලා කීවා.

PW2 the wife of the deceased also rushed to the scene when she heard the deceased screaming. She saw her husband the deceased, lying on the ground with burnt injuries. She also saw the appellant near his water tank which was about 28 meters away from the place where the deceased was lying.

PW2 wife of the deceased stated in her evidence that, after two days of the incident the deceased had told her that;

On Page 65

උ: දයානන්ද අයියා පෙට්රල් බෝතලයක් ගැහුවා කියලා, එයා කිව්වා.

ප්‍ර: කවුරු ගැහුවා කියලා කීවේ?

උ: දයානන්ද.

PW4 a woman of 66 years of age, who is neither related to the appellant nor to the deceased stated that on the day of the incident in the evening the appellant had come to her house. He was sweating and looked scared at that time. When PW4 asked him why he came, he stated “I put chillie powder and petrol on Dayananda and set him on fire. The appellant further stated that the deceased was burnt a lot including the skin and the people had taken him to the hospital. He asked her if the police would come to take him.

On Page 83 and 84 she answered as follows:

ප්‍ර: නිවසේ කොහෙ ඉඳන්ද කිව්වෙ?

උ: මිදු ලෙ ඔහු වාඩි වෙලා කිව්වේ.

ප්‍ර: ඔහු නිකම්ම කීව්වාද තමන් ඇහුවද?

උ: නෑ එයා ඇවිල්ලා බය වෙලා වගේ හිටියා. මුහුණෙන් ලේ පෙරාගෙන. මම ඇහුවා දයානන්ද වැටුනද කියලා. ඊට පස්සෙ කිව්වා ඔව් කිව්වා . මම ඊට පස්සෙ කිව්වා ඔයාට වැටෙන්න හොඳ නෑ නේ ඔයාට කොන්දෙ අමාරුව තිබෙනවා නේ ඇයි වැටුනෙ කියලා ඇහුවා. ඊට පස්සෙ බයෙන් වගේ නිකම් දාඩිය දාගෙන හිටියෙ. ඇයි ආවේ පණිවිඩයක් කියන්න ආවේ කියලා ඇහුවා. මම චූලසිංහට මිරිස් කුඩු දාලා, පෙට්රල් දාලා ගිනි තිබ්බා. දැන් හොඳට පිච්චුනා. ඇඟ ඔක්කෝම හම ගියා, දැන් කට්ටිය ඉස්පිරිතාලෙ අරන් ගියා. දැන් මාව පොලීසියෙන් ඇවිල්ලා අරන් යයි ද කියලා ඇහුවා. අහලා කිව්වා මට දැන් ගිනි දැල් මැවී මැවී පේනවා කියලා කිව්වා. ආයෙත් කිව්වා මට මැරෙන මොහොතෙත් මතක් වෙන්නෙ ඒ ටිකමයි. නැවතත් මගෙන් ඇහුවා මාව පොලීසියෙන් ඇවිල්ලා අරන් යයිද කියලා.

The deceased was initially taken to the Wathupitiwela hospital and then transferred to the National Hospital in Colombo. The police officer at the police post in the Wathupitiwela hospital asked the deceased as to what happened. The deceased said that Dayananda had thrown a petrol bomb/bottle at him**.** (දයානන්ද පෙට්රල් බෝම්බයක් ගැහැව්වා.) The police officer did not question him any further, as the deceased was in severe pain. The police officer informed the same to the Ruwanwella police station.

The deceased died a week later on the 20th of April 2012, in the hospital. The Ruwanwella police made investigations and the appellant was arrested on the 13th of April 2012, when the deceased was in the hospital.

The post-mortem examination on the body of the deceased was carried out by the Judicial Medical Officer PW9. He gave evidence in court.

PW17 a police sergeant was on duty at the police post of the Wathupitiwela hospital, at the time the deceased was admitted to the hospital. As per his

evidence, the deceased was admitted to the hospital at 16.30 by PW1. PW17 stated that he was informed by the emergency treatment unit of the hospital that a person was admitted to that unit. When PW17 came towards the deceased, he saw that the doctors and nurses were treating the deceased and the deceased was in severe pain. PW17 with the permission of the doctors questioned the deceased as to who set him on fire. The deceased answered **මස්සිනා දයානන්ද, පෙට්රල් බෝම්බයකින් ගැසුවා කියා.** PW17 did not try to question the deceased any further, as it was not appropriate as the deceased was in severe pain. PW17 reported this short statement in his book maintained at the police post (Page 132).

Dying declarations are admissible as evidence under section 32 (1) of the evidence ordinance.

In the case of *Umakant & Anr vs State Of Chhatisgarh* (decided on 1st July 2014 AIR 2014 SC 2943). The Supreme Court of India stated as follows, at paragraphs 18 and 19.

"18. The philosophy of law which signifies the importance of a dying declaration is based on the maxim "nemo moritu suspra sumitus mennre", which means, "no one at the time of death is presumed to lie and he will not meet his maker with a lie in his mouth". Though a dying declaration is not recorded in the Court in the presence of accused nor it is put to strict proof of cross-examination by the accused, still it is admitted in evidence against the general rule that hearsay evidence is not admissible in evidence. The dying declaration does not even require any corroboration as long as it inspires confidence in the mind of the Court and that it is free from any form of tutoring. At the same time, dying declaration has to be judged and appreciated in the light of surrounding circumstances. The whole point in giving lot of credence and importance to the piece of dying declaration, deviating from the rule of evidence is that such declaration is made by the victim when he/she is on the verge of death.

19. In spite of all the importance attached and the sanctity given to the piece of dying declaration, Courts have to be very careful while analyzing the truthfulness, and genuineness of the dying declaration and should come to a proper conclusion that the dying declaration is not a product of prompting or tutoring."

In the same judgment considering several previous judgments, the court has given the following guidelines while considering a dying declaration.

"1. Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.

2. The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

3. Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

4. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborative. The rule requiring corroboration is merely a rule of prudence.

5. Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

6. A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

7. Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

8. Even if it is a brief statement, it is not to be discarded.

9. When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

10. If after careful scrutiny the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration."

In the case of *Ranasinghe vs Attorney General 2007 1 SRI LR 2018 Sisira de Abrew, J.* stated that;

"When a dying declaration is considered 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 the following weaknesses,

(a) The statement of the deceased person was not made under oath,

(b) The statement of the deceased person has not been tested by cross-examination; (vide King v Asirivadam Nadar and Justin pala v Queen.)

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

The learned Trial Judge has referred to the following in his judgment.

(On page 251)

The Jury as the case may be must bear in mind on the following weakness.

(1) 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 NLR 222 and Justin Pala vs Queen 66 NLR 409*

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

As there are inherent weaknesses in a dying declaration which I have stated above, then 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 a 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.

As per the evidence of PW9 the Judicial Medical Officer, approximately 85 percent of the deceased skin was burnt. The injury was necessarily fatal. The deceased died 7days after the incident. The doctor has been questioned as to whether the deceased was able to speak considering the injuries. The doctor explained it as follows, on pages 147 and 148.

ප්‍ර: ඔහුට කතා කිරීමේ එහෙම නැති නම් යම්කිසි දෙයක් අවබෝධ කර ගැනීමේ හැකියාව රදා පවතිනවද?

උ: හැකියාවක් තිබෙනවා ස්වාමීනි. මොලයේ කතා කිරීමේ මධ්‍යස්ථානයක් තිබෙනවා. එම ස්ථානය නිරූපද්දිතව තිබියයුතුයි. එම ස්ථානය සිට මුහුණේ මාංශපේෂී ශ්වරාලයේ මාංශපේෂී සහ උරස් කුහරයේ මාංශපේෂී වල ස්නායු වල සම්බන්ධතාවය තිබියයුතුයි. ඒ එක්කම සිහිය සහ කල්පනාව යන කාරණාවද තිබියයුතුයි. මේ පිලිස්සුම් තුවාල පිහිටා තිබෙන්නේ සිරුරේ සමේ. මා කලින් සඳහන් කල කිසිම ස්ථානයකට සමේ සම්බන්ධතාවයක් නොමැති නිසා මේ පුද්ගලයාට කතා කිරීමේ හැකියාව තිබියයුතු යැයි මතයක් ලෙස ප්‍රකාශ කලහැකියි.

ප්‍ර: කොපමණ කාල වේලාවක්ද, දවස් ගානක් පුලුවන්ද, නැති නම් පැය ගානක්ද කතා කිරීමේ සහ යම් දෙයක් හිතන්න ඒ අවකාශය තියෙනවාද?

උ: සාමාන්‍යයෙන් පුද්ගලයෙක් මුල් දින දෙක තුන ඇතුලත කතා කිරීමේ හැකියාව තිබෙනවා. 4 වන දිනය පමණ වන විට ඔහුගේ සිහිය මදක් අඩු වනවා. මේ පුද්ගලයාට කතා කිරීමට හැකියාවක් නැත යැයි කීමට තරම් දත්තයක් මෙම පශ්චාත් මරණ පරීක්ෂණ වාර්තාවේ නැත ස්වාමීනි.

The doctor also explained that the deceased was conscious and rational up to 4 days after the incident. Even the witness called by the defence, the daughter of the appellant stated that the deceased had spoken to her immediately after the incident.

The learned High Court Judge after considering the evidence came to the conclusion that the deceased had made a dying declaration and he was conscious when making the said dying declarations. The evidence of PW2 was basically not challenged by the defence.

PW1, PW2, and PW17 confirmed that the deceased was able to speak at the hospital and made a dying declaration regarding the assailant. The medical opinion also verifies the fact that the deceased was conscious and rational and could speak up for 4 days after the incident.

The learned High Court Judge has been mindful of the principles mentioned above while considering the dying declaration.

On the other hand, The dying declaration is not the only evidence against the appellant in the instant case. The appellant had gone to the house of PW4 after the incident and confessed that he put petrol on the appellant and set him on fire. The confession was not challenged by the defence at all. The only issue is, why she was not able to make a statement to the police immediately. She stated that she was not aware that it was necessary to inform anyone else about the confession made by the appellant. It is to be noted that the police had recorded PW4's statement on the 20th, the same day the deceased died. Until the 20th the police had not investigated the incident as a murder case. Until the 20th the police carried out its investigations, but not on the assumption that it was a murder case. The incident turned into a murder case, only when the deceased died.

In the case of *Nazir Khan and others vs State of Delhi [2003], 8 SCC 461* the Supreme Court of India held that *"a free and voluntary confession is deserving of highest credit because it is presumed to flow from highest sense of guilt".*

In the case of *State of Rajasthan v. Raja Ram[2003] 8 SCC 180* it was held;

"*19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of*

attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

PW4 was not a person in authority. PW4 was not aware of the incident until the appellant made his confession to her. The confession was not sought by PW4. There was no question of any coercion or inducement on the part of PW4. The confession of the appellant was spontaneous in the form of natural response to his own horrific deed. PW4 can be regarded as an independent witness. On the other hand, there is no evidence to show that she had any reasons to concoct a story against the appellant and she had any sort of animosity towards the appellant. Besides, The evidence of PW4 was not challenged by the defence in cross-examination. She did not volunteer to the police, but when the police questioned her about the incident, she narrated what was told by the appellant. In the circumstances, no adverse inference can be drawn for not making a statement to the police immediately. It is therefore clear that the confession of the appellant was made voluntarily. In the case of *Rahulan vs Attorney General [2006] 3 Sri LR 253* it was held that a voluntary confession can be the basis for a conviction.

The law does not require that the evidence of extra-judicial confession should in all cases be corroborated. However, coming to the facts of this case, the confession of the appellant is amply corroborated by the other evidence. The confession is reliable and trustworthy and the conviction can be based on it.

In addition to the above-mentioned evidence, the police have recovered the plastic petrol bottle and the torch (හුළු අත්ත) in consequence of the statement of the appellant.

The evidence against the appellant can be summarized as follows:

The incident happened in broad daylight. The appellant and the deceased PW1, and PW2 are closely related people. PW4 is a neighbor of the appellant. The identity of the appellant is therefore not an issue at all. When PW1 came to the place of the incident, the appellant was a few meters away from the place where the deceased was lying with the injuries. The appellant had the plastic bottle and the torch. PW2 had also seen the appellant near his water tank about 18 ft away from where the deceased was lying. The appellant made a confession to PW4 on the same day evening. The appellant had an animosity towards the deceased because of the land dispute. The police had found a plastic bottle and a torch (හුළු අත්ත) consequent to the statement of the appellant. The dying declaration and the confession collaborate each piece of evidence, other than the evidence of PW1 and PW2. In view of the evidence of the case, I am of the view that the case against the appellant is proved beyond reasonable doubt and that the first ground of appeal has no merit.

The second ground of appeal is that the learned Trial Judge has not evaluated the dock statement properly. A considerable part of the judgment is devoted to considering the defence evidence including the dock statement of the appellant.

The position of the appellant in his dock statement is that he was not at the place where the deceased was burnt. He had gone to tether his cattle and he got to know of the incident only when he came back home. He also said that PW4 gave false evidence, but he did not attribute any reason as to why PW4 was doing so. As pointed out earlier the evidence regarding the confession was not contested in the cross-examination. The appellant also said that the police only came to his kitchen and did not go into the room to find the petrol bottle or the torch. The evidence of PW1 and PW2, regarding the fact that the appellant was there within a few meters away from the place where the deceased was lying with burnt injuries, was not challenged in cross-

examination. The daughter of the appellant was called as a defence witness. She said that her father, the appellant came only half an hour after the incident. However, in her statement to the police, she had stated that her father had come running to the place of the incident. She denied making such a statement. That portion of that statement was marked by the prosecution as a contradiction and showed that her position was different earlier.

The argument that the learned High Court Judge has not considered the dock statement properly, has no merit.

For the reasons set out in this judgment, I see no reasonable ground to interfere with the judgment of the learned High Court Judge dated 2018.05.10. The appeal of the appellant is dismissed. The conviction and the sentence imposed on the appellant is affirmed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal