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 Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/390/2019

High Court of Gampaha

Case No: HC/138/2008

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Withana Weerasinghe Arachchige

Wijeweera *alias* Baby

ACCUSED

AND NOW BETWEEN

Withana Weerasinghe Arachchige

Wijeweera *alias* Baby

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Hemal Senarathne for the Accused Appellant

: Azard Navavi, DSG for the Respondent

Argued on : 01-08-2022

Written Submissions : 14-12-2020 (By the Accused-Appellant)

: 09-02-2022 (By the Respondent)

Decided on : 12-09-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Gampaha for causing the death of one Rajapaksha Pathirannahalage Munasighe alias Gamini on 30th November 2006, an offence punishable in terms of section 296 of the Penal Code.

After trial without a jury, he was found guilty by the learned High Court Judge of Gampaha by the judgment dated 23-09-2019 and was sentenced to death accordingly.

Being aggrieved by the said conviction and the sentence, the appellant preferred this appeal.

The facts in brief are as follows.

The appellant and the deceased are known to each other. According to the evidence of PW-01, while he was travelling home from Veediyawatta junction the deceased had got into his foot bicycle in order to get down near his house. He was travelling on the front bar of the bicycle. After they had travelled about 200 meters the witness has seen the appellant whom he referred to as Baby Aiya crossing the road from his right side and approaching them. As soon as

they saw him the deceased has alighted from the bicycle and the witness has seen appellant stabbing the deceased. He has seen the deceased holding on to his stomach and later he has seen both of them scuffling. The PW-01 has paddled to the house of the deceased, which was about hundred meters away, and informed his sister Manel what was happening. Although it was around 7.30 in the night of 30th November 2006 when the incident happened, the witness has had no difficulty in identifying the appellant as he was a person well known to him and with the use of nearby lights. It was his evidence that could not properly see the knife that was used, and cannot identify it.

PW-02 is the sister of the deceased with whom he and his wife had lived. After being informed by Thanuka (PW-01) that Gamini was stabbed by Baby, she and the wife of the deceased has hurried towards the place where they were informed the incident happened. While on their way, their neighbour Sumanawathi (PW-04) too had come and informed that the deceased was found fallen in the backyard of her house. It was her evidence that he was able to speak to her and informed that baby stabbed her. After two days in the hospital, the deceased has succumbed to his injury. PW-03, the wife of the deceased and the neighbour Sumanawathi has given evidence as to the respective events unfolded before them.

Police inspector Bandula Wijesiri was the officer who has arrested the appellant on the same day around 11 p.m. and had recovered the manna knife marked P-02 based on the statement of the appellant.

PS Ashoka Jayaweera (PW-08) was an officer attached to the hospital police post of Gampaha hospital and was the first police officer who had spoken to the deceased. When questioned as to what happened, the deceased has informed him that “Baby stabbed me”, which information he has passed on to Weeragula police at 21.25 hours on the 30th of November 2006.

As the Judicial Medical Officer Priyanjith Perera, who has conducted the post mortem was not available to give evidence, it was Dr. Wijewardena who had the possession of the reports of the postmortems conducted by the said JMO who has produced the postmortem report of the deceased marked P-03 and confirmed that the death was due to the stab injury suffered by the deceased.

When called for a defence at the conclusion of the prosecution case, the appellant has chosen to remain silent.

The Grounds of Appeal

At the hearing of the appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

(1) The learned High Court Judge failed to evaluate the dying deposition relied upon by the prosecution in accordance with the principles laid down for the evaluation of dying depositions.
(2) Since there was only one injury to the deceased, the learned High Court Judge failed to consider the possibility of knowledge as against the intention to cause death of the deceased.
(3) Whether the cause of death establishes the nexus between the injuries and the death.
(4) The learned High Court Judge failed to consider all the infirmities in the evidence.

In his submissions before this Court, it was the contention of the learned Counsel for the appellant that PW-02 Chandrawathi who claimed that the deceased made a dying declaration to her was not a reliable witness. It was his position that the postmortem report does not establish that the death was due to a stab injury and no proper cause of death has been given. There was no nexus between the death and the injuries mentioned in the postmortem report was another argument advanced by the learned Counsel.

Citing the judgment in the case of **Ranjith Vs. The State (2000) 3 SLR 46** where it was stated that ordinarily it is not safe to base a conviction for murder solely upon a dying declaration, it was his contention the learned High Court Judge should have drawn his attention to whether this was a case that falls under the ambit of section 297, that is culpable homicide not amounting to murder.

The view of the learned Deputy Solicitor General (DSG) was that there can be no basis to any of the arguments adduced on behalf of the appellant.

He points out that this was not a conviction that relied solely on a dying declaration, but by an eyewitness account as well as dying declarations made to several persons at different times before his death which occurred two days after the stabbing. He was of the view that the cause of death has been well established in this matter and ambiguity as to the evidence of the doctor who produced the postmortem report whether the knife marked P-02 may be the weapon used has not created any doubt as to the cause of death and to the fact that the deceased had a stab wound which resulted in his death.

It was his position that there was no evidence before the trial Court to come to a finding that the act of the appellant amounts to culpable homicide not amounting to murder and the evidence was that this was a preplanned attack on the deceased and nothing else. He points out that the motive to a crime of this nature is not a matter that necessarily needs to be proved.

Consideration of the Grounds of Appeal

As the grounds of appeal are interrelated, all the grounds urged will be considered together.

As contended correctly by the learned DSG, this was not a matter where the prosecution relied solely on a dying deposition to prove the case against the appellant. PW-01 was an eyewitness to the incident. Although he has given his evidence later in the case due to the fact that he was overseas when the case

commenced, that has not caused any prejudice to the appellant. His evidence has been cogent and trustworthy. There are no material omissions or contradictions in his evidence. The contradiction marked P-06 was not a material contradiction as to his evidence on the incident where the appellant stabbed the deceased. His evidence clearly establishes that this was not a chance meeting between the appellant and the deceased, but the appellant had been waiting for the deceased about hundred meters away from the house of the deceased. The evidence establishes the fact that the scuffle between the two was after the deceased was stabbed by the appellant, which goes on to establish that there was no sudden fight.

Apart from the eyewitness account, the prosecution has led the evidence of the sister of the deceased PW-02 and that of the police officer who spoke to him (PW-08) when he was first admitted to the hospital, to establish that the deceased had made two dying declarations as to who caused the fatal injury on him.

The law in relation to the applicability of statements made by persons who cannot be called as witnesses as relevant under certain conditions are clear in our judicial system. Section 32 (1) of the Evidence Ordinance, which refers to the relevancy of a statement of a person who is dead as to the transaction which resulted in his death reads as follows;

> **32 (1) When the statement is made by a person as to the cause of his death, or to any of the circumstances of the transaction which resulted in his death, in cases in which cause of death 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 whether may be in the nature of the proceedings in which the cause of his death comes into question.**

E.R.S.R. Coomaraswamy in his book **The Law of Evidence, Volume I, at page 466** gives the summary of conditions of admissibility under section 32(1) in the following manner;

> In Sri Lanka, the conditions of admissibility may said to be:
>
> (1) Death of the declarant before the proceedings.
>
> (2) The statement must relate to the cause of his death or any of the circumstances of the transaction which resulted in his death.
>
> (3) The case must be such that the cause of the declarant's death must come into question.
>
> (4) The competency of the declarant to testify may have to be established, depending upon circumstances of each case, but strict rules of competency do not apply.
>
> (5) The statement must be a complete verbal statement, though it may take the form of question and answer or appropriate gestures. It must be complete in itself and capable of definite meaning.

At page 469, citing several decided cases, **Coomaraswamy** discusses the probative value of evidence, infirmities of such evidence, the necessary directions, in the following manner;

> 'The probative value of dying declarations relevant under section 32(1) would depend on the facts and circumstances of each case. But there is no doubt that such evidence suffers from certain intrinsic infirmities. Two of these defects are the fact that the statement was not made under oath and the absence of cross-examination of the deponent of the statement.'
>
> The following matters require consideration in regard to the proper directions:

(1) The deceased not been before the court as a witness, and not having made the stamen under oath, this is an infirmity in the evidence in the evidence of the statement.

(2) The statement has not been tested by cross-examination.

(3) The weight that should be attributed to the statement admitted in the circumstances of a given case.

(4) If in a dying declaration, there is material favorable to the accused, the judge should refer to it.

(5) Corroboration is not always necessary to support a dying declaration.

In the case of **The King Vs. Asirvadan Nadar, 51 NLR 322;**

> *"Where in a trial for murder, the dying deposition of the deceased was led in evidence against the accused under section 32(1) of the Evidence Ordinance."*
>
> ***Held:*** *"That the attention of the jury should have been specifically drawn to the question how far the other facts and surrounding circumstances proved in evidence might be said to support the truth or otherwise of the deposition."*

It needs to be noted that the appeal under consideration is not a matter that had been decided only on the dying depositions of the deceased. In this matter, the main evidence was an eyewitness account as to what happened. As I have discussed before, the evidence of the sole eyewitness to the incident was cogent and trustworthy. Therefore, the dying deposition, which was not the main piece of evidence relied upon by the prosecution to prove the charge against the appellant only has a corroborative value in my opinion.

When it comes to the question whether it would have been possible for the deceased to relate what happened to him to his sister and the police officer,

and the question whether the evidence in relation to that can be accepted as accurate and probable are matters that attract consideration.

When considering the evidence of PW-01 who was the eyewitness to the incident, it has been established that as soon as he informed the sister of the deceased (PW-02) about the incident she had hurried to the place where the deceased was found fallen. The evidence clearly establishes that although he had stab wounds in his stomach area, he was able to speak. Naturally, anyone would question an injured person as to what happened when sees with stab wounds or even if no such question was asked the natural tendency is to relate what happened to him when an injured sees someone close to him.

The alleged contradictions marked when the PW-02 gave her evidence are markings that cannot be considered as contradictions in any manner, although the trial Court has allowed them to be marked. The argument by the learned Counsel for the appellant that the evidence as to the dying declaration was an afterthought, has no basis as considered above.

The deceased has succumbed to his injuries two days after his admission to the hospital. According to the evidence of PW-08, the police officer who questioned the deceased at the time of his admission to the hospital, the deceased was conscious and spoke to him stating that it was the baby who stabbed him. I find this quite probable as it is the duty of a police officer who was assigned to a police post of a hospital to ascertain what happened from an injured if it was possible.

This shows that the deceased had made these dying declarations to the two witnesses independently to each other, and on two different occasions.

The evidence led in this matter has proved beyond reasonable doubt that the deceased had in fact made such statements to the two witnesses, and his statement was true and accurate as to what happened to him. There is no doubt that the deceased was in a position to identify the appellant at the time

of the attack. It has been proved that the evidence of the witnesses is truthful and trustworthy in that regard. I am unable to find any basis to the argument that the learned High Court Judge has failed to consider the evidence as to the dying depositions in its correct perspective. I am of the view that the learned High Court Judge had well considered the evidence with a clear understanding of the relevant legal principles.

I find no basis at all in the ground of appeal that the nexus between the injury and the cause of death has not been established. The postmortem report marked P-03 clearly establishes that the death had been a result of the stab wound received by the deceased. The evidence clearly establishes that the injury was inflicted on the deceased by the appellant using a knife. The doctor who produced the postmortem report not expressing a clear opinion that the knife marked P-02 may be the weapon used is not a reason to doubt the cause of death.

I do not find any merit in the argument that the appellant had no knowledge and the intention to kill when the attack took place either. The evidence shows that the appellant has been waiting for the deceased knowing very well that the deceased has to go pass the place to reach his house. He had come prepared to attack the deceased. Although it was one wound, according to the post mortem report, it has cut through several vital organs of the body, which has caused his death. I find that the appellant had the knowledge and the intention when he inflicted the fatal stab wound on the deceased.

The law is clear that the motive for a crime is not a matter that needs to be proved in a criminal trial.

E.R.S.R. Coomaraswamy, in his book **The Law of Evidence Volume I at page 224** states thus;

> "But even in criminal cases, it is not necessary for the prosecution to prove a motive or the adequacy of the motive, if any, in order to establish

the charge. The motive which induces a man to do a particular act is known to him and him alone. Therefore, the prosecution is not bound to prove a motive for the offence, though it can suggest a motive, and when it does so, the judge or jury can examine it. Where there is clear evidence that a person has committed an offence, it is immaterial that no motive has been proved, or that the evidence of motive in not clear." ***(See- Emperor Vs. Balaram Das 49 Cal. 358).***

Therefore, it is not necessary to prove the motive at all. A conviction is possible without any motive being disclosed.

(See- Naresh Singh Vs. Emperor A.I.R. (1935) Oudh 265, 154 I.C. 691 and Rabari Ghila Fadav Vs. state of Bombay, A.I.R. (1960) S.C. 748)

It is trite law that even if an accused did not take up an exception in terms of section 294 to contend that his action amounts to culpable homicide not amounting to murder, it is the duty of a trial judge to consider whether there was evidence before the Court to come to such a conclusion.

In the case of **King Vs. Belana Withanage Eddin 41 NLR 345** Court of Criminal Appeal held;

"In a charge of murder, it is the duty of the judge to put to the jury, the alternative of finding the accused guilty of culpable homicide not amounting to murder when there is any basis for such a finding in the evidence of record, although such defence was not raised nor relied upon by the accused."

In **King Vs. Vidanalage Lanty 42 NLR 317** the Court of Criminal Appeal observed the following;

"There was evidence in this case upon which it was open to the jury to say that it came within exception 04 of section 296 of the Penal Code and that

the appellant was guilty of culpable homicide not amounting to murder. No such plea, however, was put forward on his behalf. In the course of his address the presiding judge referred to this evidence as part of the defence story, but not as evidence upon which a lessor verdict might possibly be based."

Held: *"It was the duty of the presiding judge to have so directed the jury and that in the circumstances, the appellant was entitled to have the benefit of a lesser offence."*

In the instant action, the appellant has not taken any stand at the trial. He has remained silent when he was called for a defence. There was no evidence before the trial court to suggest that the action of the appellant amounts to culpable homicide not amounting to murder, to enable the learned High Court Judge to consider such a proposition, and a basis for the contention of the learned Counsel for the appellant.

I find that the learned High Court Judge has well considered the relevant facts and the legal principles that need his attention to come to a firm finding as to the guilt of the accused for the offence of murder, which needs no interference from this Court for the reasons aforementioned.

Therefore, the appeal is dismissed, as it is devoid of any merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal