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/0044/20

High Court of Kuliyapitiya

Case No: HCC/109/10

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Mapa Mudiyanselage Ananda Kumara

ACCUSED

AND NOW BETWEEN

Mapa Mudiyanselage Ananda Kumara

ACCUSED-APPELLANT

Vs.

The Hon Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Palitha Fernando, P.C. with Harshana Ananda for the Accused Appellant
	: Shanil Kularatne, SDSG for the Respondent
Argued on	: 31-08-2022
Written Submissions	: 31-03-2021 (By the Accused-Appellant)
	: 16-06-2021 (By the Respondent)
Decided on	: 28-09-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Kuliyapitiya for causing the death of one Uswatta Liyanage Kalum Sameera on 07th June 2008, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

After trial without a jury, the learned High Court Judge of Kuliyapitiya by his judgement dated 26-06-2020, found the appellant guilty as charged, and the appellant was sentenced to death.

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

Facts in Brief

The deceased Kalum Sameera was the younger brother of PW-01 Asanka Milroy. He was 23 years old at the time this incident has happened. While sleeping in his home on 07-06-2008 around 12 midnight, PW-01 has received a call to his mobile phone. It was his brother Kalum Sameera. He has informed the PW-01 that, "අයියේ මට ආනන්ද කුමාර පෙට්ල් දාල ගිනි තිබ්බා. මාව ඉස්පිරිතාලේ ගෙනියන්න." The

witness has been informed that he is near the house of Suresh, who was a friend of his brother.

Immediately after receiving this message, the witness along with his younger brother Manjula, has travelled to the place where the deceased informed that he is waiting. He has found his brother in front of the house, crying and with burn injuries. When questioned as to what happened, the injured has uttered the same words as before. Thereafter, the witness has taken steps to admit his brother to the Kuliyapitiya hospital. After being warded there for 3 days, he has been transferred to Colombo General Hospital where he has succumbed to his injuries six days after the admission.

The witness has met his brother for the last time around 4.30 p.m. on the day of the incident, where he has informed the witness that he is going to Kurusa Palliya in Marawila along with the appellant Ananda Kumara. He has met his brother again around 5.30 in the evening, travelling on a motorbike with the appellant, while he was waiting near the bus stand in the Naaththandiya Colombo road,

PW-02 Manjula was the other brother who went and saw the deceased after being informed by PW-01 about what has happened to him. He too had been informed by the deceased that Ananda set him on fire after pouring petrol on him. He has been informed further that both the appellant and the deceased consumed liquor and the appellant set fire to the deceased using a cigarette lighter.

PW-14 Indika Jayasekara was the police officer who has recorded the statement of the deceased Kalum Sameera while he was receiving treatment in the Kuliyapitiya Base Hospital. After being satisfied that he was in a position to communicate and conscious, he has recorded the deceased's statement. The said statement has been marked as P-01 at the trial, However, I find that the prosecution has failed to draw the attention of the Court to the relevant portion of the statement relied on by the prosecution as a dying declaration and the witness has failed to give evidence as to what was told to him by the deceased.

According to the evidence of Judicial Medical Officer (JMO) who conducted the postmortem on the deceased (postmortem report marked P-2), the death has been due to Septicemia following extensive burn injuries.

In his evidence, the JMO has explained his findings in the following manner:

> "මිනිසෙකුට මෙය විශාල ප්‍රමාණයක්, එනම් 58% සාමාන්‍යයෙන් ස්වභාවික තත්වය යටතේ මරණය ගෙන දෙන පිළිස්සුනු තුවාලයක්. ලංකාවේ තිබෙන වෛද්‍ය පහසුකම් මත 50% 40% පිළිස්සුම් තුවාල ඇති වුයේ නම්, එවැනි කෙනෙකුගේ ජීවත් වීමේ හැකියාව ඉතා අඩුයි. කෙනෙක් පිළිස්සුම් තුවාල ලැබූ පසු ජීවත් වෙන කාලයක් නිශ්චිතව ප්‍රකාශ කිරීමට බැහැ . ස්වාමිනි සාදක කීපයක් ඒ සඳහා එනම්, පෝෂණ තත්වය, වයස, සෞකර්‍යමය තත්වයන්, පිළිස්සී ඇති ආකාරය සහ ප්‍රතිකාර ලබාගැනීමට ඉදිරිපත් වන කාලය අනුව තමයි. සාමාන්‍යයෙන් ගිනි තැබීමක් සිදු වූ විට ශනික මරණයක් සිදු වීම ඉතාමත් අඩුයි. සාමාන්‍යයෙන් දින කීපයක් ප්‍රතිකාර ගැනීමෙන් පසු මරණය සිදු වීම තමයි දක්නට ලැබෙන්නේ."

In this matter, the police officers who conducted investigations as to the crime have given evidence explaining their investigations as to the crime.

It needs to be noted that during the prosecution case, the appellant has not taken any stand or a defence, other than questioning the witnesses on the evidence given by them.

At the conclusion of the prosecution case and when the appellant was called for a defence, he has chosen to give evidence under oath. In his evidence, he has admitted that he and the deceased went to Kurusa Palliya on the day of the incident in his motorcycle and later consumed arrack in a rocky area in Udubeddawa. He has stated that since his bike did not have sufficient petrol, he purchased a bottle of petrol from a nearby shop and kept it near them while consuming liquor. It was his position that, while consuming liquor, the deceased requested for his motorbike to go to Kuliyapitiya in order to see his girlfriend and because he did not agree, the deceased got angry and uttered an obscene word and took the petrol bottle which was nearby, and poured the petrol over the rock on which they were seated. It was his position that, after doing that, the deceased attempted to light a cigarette using the lighter and because of the petrol poured

on to the rock, it was set on fire suddenly. As a result, the lower part of the deceased's body started burning.

He has contended further, that although he attempted to rescue the deceased, it failed, as the deceased ran away from the scene. He has stated that without knowing what to do, he phoned his elder brother asking him to come and also phoned one of the brothers of the deceased to inform what happened. Although he looked for the deceased, he could not find him and later he was informed that he was hospitalized by others, was his stand taken in his evidence.

It was his position that he never set fire on the deceased and he was not guilty to the charge.

The Grounds of Appeal

The learned President's Counsel in his submissions before the Court formulated the following grounds of appeal for consideration.

1. That the learned High Court Judge failed to take into consideration that there was no motive for the appellant to commit this offence.
2. According to the postmortem report, the deceased has died due to an infection as a result of the injuries sustained. The learned High Court Judge has failed to adequately consider that fact and the JMO has failed to prove adequately as to the reason for the death.
3. In view of the position taken up by the accused, the learned High Court Judge should have considered the fact whether the incident was an accident.
4. In view of the circumstances of the case, the learned High Court Judge should have considered whether this was a case of culpable homicide not amounting to murder.

It was the submission of the learned President's Counsel that this is a case where the matter has been decided solely on a dying declaration by the deceased. Such

a dying deposition should be treated with utmost care in the evaluation was his position.

It was the view of the learned President's Counsel that, given the fact that there was no motive for the appellant to commit the murder of the deceased and given the other facts and the circumstances, the learned High Court Judge should have considered the possibility of an accident. It was also his view that the learned High Court Judge has failed to consider the matters in favour of the appellant in this regard. Commenting on the evidence of the Judicial Medical Officer, it was the position of the learned President's Counsel that since the deceased has died, as a result of Septicemia, it was the duty of the JMO to explain the reasons for his conclusions, which the JMO has failed to do in his evidence. It was also the position of the learned President's Counsel, if evaluated properly, the evidence placed before the Court leads only towards the conclusion that this was an accident or at least an offence in terms of section 298 of the Penal Code, and not a case of murder as concluded by the learned High Court Judge in his judgement.

Replying the learned President's Counsel, it was the position of the learned Senior Deputy Solicitor General (SDSG) that it is settled law, that the motive is not a matter that needs to be established for a crime of this nature to be proved, although it would be a plus factor if it can be so established. It was his view that there was no evidence placed before the learned High Court Judge to consider the incident as a result of an accident or a matter that could be considered in terms of section 298 of the Penal Code. It was his position that the dying depositions made by the deceased on several occasions are cogent and trustworthy that the Court can rely solely on the dying depositions to find the appellant guilty. He also points to the fact that the appellant has never confronted the relevant witnesses when they gave evidence before the High Court as to the stand taken by him in his evidence when called for a defence.

Making submissions as to the evidence of the JMO, it was his position that the JMO has given clear evidence that when a person suffered this kind of burn injuries, the death is inevitable and it is only a matter of time, depending on the injured person's ability to withhold the injuries. It was his position that when a person suffers burn injuries of this magnitude, as shown by evidence, the death will invariably be due to infections of the injuries as established in this action.

It was also his view that the doctor's evidence clearly suggestive that the burn injuries found on the head and the face, as well as the legs of the deceased are injuries caused as a result of pouring petrol on the deceased as stated by him in his dying deposition.

The learned SDSG moved for the dismissal of the appeal as it was devoid of any merit.

The Considerations of The Grounds of Appeal

As the grounds of appeal raised by the learned President's Counsel are interrelated, all the grounds will be considered together.

Since this is an action that has been determined based on the dying depositions of the deceased, I think it is nothing but proper to consider the law relating to dying depositions before considering the grounds of appeal in detail.

Section 32 (1) of the Evidence Ordinance, which refers to the relevancy of a statement of a person who is dead and 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 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 are 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 being before the court as a witness, and not having made the statement 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."

"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."

When it comes to the facts relevant to this case, the declarant has passed away before the proceeding commenced, and his statement directly relates to his cause of death and the circumstance which resulted in his death. According to the evidence of PW-01 and PW-02, the two brothers of the deceased, when they reached the deceased, although he was in pain from the burn injuries suffered, he was well conscious and has stated what happened to him and who did what. When the police officer recorded the statement marked P-01 as well, the deceased was in a position to speak and narrate the incident. The deceased has made the

dying declaration in a form of a complete verbal statement with a definite meaning, without any ambiguity.

The probative value of the dying declaration is a matter that has to be considered before such a declaration can be accepted as evidence in a case of this nature. There was clear evidence before the trial Court to establish that the deceased and the appellant were together at the time of the incident. The appellant in his evidence has admitted that fact and that they were consuming liquor and were alone. The appellant has admitted that the deceased received burn injuries while being with him, but has claimed in his evidence that it was an accident and not a deliberate act committed by him.

Under the circumstance, it is my considered view that, even considered with its inherent deficiencies a dying declaration may carry as stated above, this is a declaration that can be considered as a statement made as to what really happened to him and the witnesses are telling the truth as to what they heard.

It is settled law that corroboration is not always a must in proving a case based on a dying declaration.

The rules laid down by the Indian Supreme Court in this regard may be summarized as follows:

1. Ordinarily it is not safe to abuse a conviction for murder only upon the dying declaration of the deceased when there is no corroboration of it from any independent source. Such corroboration may be by circumstantial evidence, or an oral statement made to a relative shortly after the incident may corroborate a subsequent duly recorded dying declaration.
2. Though ordinarily corroboration must be looked for, there is no absolute rule of law or prudence that corroboration is always necessary before a conviction which rests on a dying declaration can be sustained. Corroboration is necessary when the declaration is an incomplete

statement which is not categoric in accusation as to a crime against a named person, or when the declaration suffers from some infirmity.

3. Where the Court is satisfied that the dying declaration is true and reliable and does not suffer from any infirmity, a conviction can be based on it even in the absence of corroboration. Each case must be judged on its own facts. If it is proved that the dying declarations were made without any prompting or influence by anyone and there is no cogent reason given or suggested by the accused for throwing doubt on their truth or correctness, the conviction can be based solely on them.

[See the Law of Evidence Volume-1 page 471, by E.R.S.R. Coomaraswamy]

The first ground of appeal urged by the learned President's Counsel was that there was no reason or motive for the appellant to commit the crime against the deceased as they were good friends.

As pointed out correctly by the Senior Deputy solicitor General (SDSG) for the respondent and agreed by the learned President's Counsel, the motive is not a necessary ingredient that needs to be proved in a criminal case, although it may be beneficial if established.

E.R.S.R. Coomaraswamy, in The Law of Evidence - Volume I at page 224 discusses the relevancy of motive in a criminal case in the following manner;

> "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 do 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 is not clear."

I find no relevancy of the motive in this matter as considered above, and no basis for the first ground of appeal.

I am in no position to agree with the learned President's Counsel as to the second ground of appeal either.

It is correct that the cause of death of the deceased was septicemia, but as a result of the burn injuries he suffered according to the post mortem report. The nexus between the injuries and the cause of death has been well explained by the JMO in his evidence as I have highlighted earlier, and further, in his evidence. It is abundantly clear that the septicemia has set in as a result of the extensive burn injuries suffered by the deceased. According to the evidence of the JMO, death is inevitable for a person who has suffered this magnitude of burn injuries.

In the case of **Sumansiri Vs. Attorney General (1999) 1 SLR, 309,** it was Held:

(1) Death was traceable to direct cardio-cerebral injury inflicted by the first accused-appellant on the head of the deceased with a heavy sledgehammer using considerable force. The prosecution case thus comes within the purview of close 3 to section 294 of the Penal Code. An accused person is liable not only for the direct consequences of his act but he is equally liable for the consequences of any supervening condition which is directly traceable to his act.

(2) If the original wound was still the operation cause and is a substantial cause and the death can properly be said to be the result of the wound, although some other cause of death was also operating, the offence is murder, only if it can be said that the original wound was merely the setting in which another cause operates, can it be said that the death did not result from the wound. Putting it another way, only if the second

cause was so overwhelming as to make the original wound merely part of its history can it be said that the death does not flow from the original wound.

(3) *Any controverted issue relating to causation ought to be decided according to rational and common-sense principles. Where there was no breach in the line of causation despite the fact that the surgical operation was performed at a time posterior to the infliction of the injury and at a point of time anterior to the death, the offence is murder if the act is done with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death. (if the injury is left to nature without resorting to proper medical remedies and skillful treatment would cause death)*

The argument that the learned High Court Judge has failed to consider the evidence that was in favor of the appellant that this could have been an accident, was the contention of the learned President's Counsel, which was the third ground of appeal urged.

The appellant has failed to put any questions to the relevant witness when they gave evidence as to the possibility of an accident.

It was only when the appellant was called for his defence, the appellant has come out with a story of an accident.

In the case of **Sarwan Singh Vs. State of Punjab 2002 AIR Supreme Court iii 3652 at 3655, 3656** it was stated thus;

> *"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."*

His Lordship **Sisra de Abrew, J.** in the case of **Pilippu Mandige Nalaka Krishantha Thisera Vs. The Attorney General, CA 87/2005 decided on 17-05-2007** held:

"….I hold whenever evidence is 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 subject of course to the qualification that the witness is a reliable witness."

If he called the brother of the deceased and informed that such a thing happened, that position should have been put to PW-01 and PW-02 when they gave evidence, which has not been done. The evidence of the elder brother of the deceased was that it was his deceased brother who gave a call around midnight from a house of a friend called Suresh. If it was he who wanted to give medical aid to the deceased as soon as possible, confronting the brother of the accused when he gave evidence should have been the first step towards adding value to the story of the appellant in his evidence towards creating a doubt as to the evidence of the prosecution witnesses. It is clear that the story of an accident due to the actions of the deceased himself was an afterthought, but without merit.

If it was an accident as claimed by the appellant, there was no reason for him to be out of the vicinity when the brothers of the deceased arrived at the place where the deceased was found, as it was his duty to offer help to his friend who was consuming liquor with him and got himself burned due to his own actions as claimed.

The argument advanced that the deceased had burn injuries to his lower part of the body, and that was in line with the position of the appellant that when the deceased attempted to light a cigarette while seated, the petrol fumes on the ground caused the fire.

When considering the uncontradicted evidence of the JMO, it is clear that the deceased had burn injuries on the head and the face, in addition to injuries to the thighs and the legs. If it was the poured petrol which was on the rock that triggered the fire, there is no possibility of the deceased having burn injuries to his head and the face.

I find that the learned High Court Judge has well considered the position taken up by the appellant in his evidence with the view of considering that whether it has created any doubt as to the prosecution evidence and come to a firm finding in that regard, for which I have no reason to disagree.

The appellant has not taken any defence on the basis that the incident was culpable homicide not amount to murder in terms of section 297 of the Penal Code at the trial. It is trite law that it is the duty of a trial judge to consider whether there is a possibility of culpable homicide not amounting to murder even if an accused had not taken such a position before the trial judge, only if there is evidence before the trial judge in that regard. I do not find any evidence before the trial judge to come to such a conclusion, hence, no basis for the fourth ground of appeal.

I find that the appellant has been rightly convicted by the learned High Court Judge based on the dying declarations made by the deceased and the attending facts and circumstances.

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