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/0224/2018

High Court of Colombo

Case No: HC/9568/1998

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Muttusami Saraswathi

ACCUSED

AND NOW BETWEEN

Muttusami Saraswathi

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Nayantha Wijesundara for the Accused Appellant.

: Anoopa de Silva, DSG for the Respondent.

Argued on : 10-08-2022

Written Submissions : 08-07-2019 (By the Accused-Appellant)

: 01-08-2019 (By the Respondent)

Decided on : 29-09-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo for causing the death of one Sumana Kusumsiri Amarasinghe on 16th May 1995 and thereby committing murder, an offence punishable in terms of section 296 of the Penal Code.

Upon the appellant pleading not guilty to the indictment, the trial has commenced on 04th July 2003. After the conclusion of the evidence of PW-01 who was the daughter of the deceased, and the PW-02, the son-in-law on 17-09-2003, the case has gotten dragged on because of the prosecution's inability to secure the presence of PW-03 and PW-04 to give evidence. In the meanwhile, the appellant has absconded and after taking necessary steps under section 241 of the Code of Criminal Procedure Act, the trial has recommenced only on 28-06-2006, where PW-04 has given evidence. PW-03 has never given her evidence in this action. It has been revealed during the 241 inquiry, that the appellant has left the country for employment.

After trial, by the judgment dated 24-07-2013 the appellant was convicted as charged and an open warrant has been issued for her arrest.

The appellant had been arrested and produced in Court after she arrived in the country, on 12-02 2014. Thereafter an inquiry has taken place in terms of section 241(3) of the Code of Criminal Procedure Act and her application for a rehearing of the evidence has been rejected on 05-06-2018 and accordingly, she was sentenced to death on the same day.

Being aggrieved by the conviction and the sentence, the appellant filed this appeal on 18-06-2018.

At the hearing of this appeal the learned Deputy Solicitor General (DSG) on behalf of the respondent raised a preliminary objection on the basis that the appeal cannot be maintained as it has been filed in Court out of time.

However, having considered the relevant facts and the exceptional circumstances of this action, although the appeal has been filed out of time, this Court decided to consider the appeal as an application in revision as the justice demands.

Facts in Brief

The PW-01 the daughter of the deceased and a specialist doctor by profession had been informed that her mother has suddenly fallen ill and had been admitted to Nawaloka hospital. The deceased had been living in her own house with two female domestics and a watcher. PW-01 has found her mother at the hospital, and being a doctor, she has suspected that her mother may have suffered a stroke. When she spoke to her, she has uttered the words "නිදිකුම්මා, නිදිකුම්මා තිත්තයි" which she could not properly understand initially. Later, she has come to know that her mother has consumed a potion of boiled Nidikumba plants (Mimosa pudica L.), which had been recommended to her as a cure for blood pressure (hypertension) by a friend.

Upon further inquiry from PW-03, Chandra Hegoda, who was one of the domestic servants of the deceased and who has not given evidence in this action, she has come to know that it was she who prepared the potion, and she

has claimed that she too consumed it and kept it in the pantry of the house and later gave to the deceased. The only other occupant inside of the house had been the appellant who was a servant employed about two months before the incident. After being in hospital for about six weeks, the mother of the PW-01 had passed away.

According to the evidence of PW-01 her mother has regained her consciousness after about three weeks and had made the following statements in English when speaking about what may have happened to her,

> *"The Nidikumba drink was very bitter and I am sure they have added something into the drink."*
>
> *"There was a dispute at home between me and Saraswathi."*
>
> *"A man gave a call on Saturday or Sunday. Saraswathi told that man is one of her boyfriends, and he works for the police and there was a small argument with me over the telephone call."*
>
> *"There was a friend, named Vasanthi who gave a jewellery box on Saturday and Saraswathi had been looking from upstairs."*
>
> *"Poison would have been added to the Nidikumba to take the jewellery box."*

It was the evidence of the PW-01 that the answers given to her husband when he questioned the servant Saraswathi was contradictory to the answers given to her by the servant when she was questioned by her.

After the death of the deceased, it had been revealed at the postmortem that her death was due to brain damage following organophosphate poisoning.

It had been her evidence that several types of weedicides were used in the garden of the house of her mother and the bottle produced as P-01 was one of them and it was PW-04 who used to come and work in the garden. It was he who used to handle them when necessary.

PW-02's evidence has not revealed anything material towards pinpointing any culpability of the appellant to the crime. It had been his evidence that his mother-in-law intended to discontinue the services of the appellant and they suspected both servants for what happened to the deceased. Although he has spoken about a confession made to him by one of the two servants, he has failed to give specific evidence in that regard.

PW-04 Ajith Kumara was the person who used to attend to the maintenance of the garden of the deceased's house. It had been his evidence that he used weedicides, pesticides as well as fertilizer in the garden as and when required by the deceased. It was his evidence that he visited the house two to three weeks before his statement was recorded. There is no indication in the case record that the evidence of the PW-04 was concluded or he was subjected to any cross-examination.

In this action, the Government Analyst has confirmed that, of the productions handed over for the analysis, only the production marked P-01 contained weedicide that falls within an organophosphorus compound.

The Judicial Medical Officer who conducted the postmortem of the deceased has confirmed that the death was due to organophosphate poisoning.

Of the police officers who had conducted the investigations in this action, it was the PW-06 Inspector of Police, Niroshan Suriyakumara who has recovered the bottle marked as P-01 allegedly on the statement made by the appellant to him. Although it was his evidence that the bottle was recovered from the front corner of the right side of the room of the appellant, the relevant extract of the statement marked in terms of section 27 of the Evidence Ordinance reads as follows;

> "බෝතලය ඉස්ටෝරු කාමරයේ පහල තට්ටුවේ දොරෙන් ඇතුලුවනවාත් සමගම ඉදිරිපස මුල්ලේ ඇත. පොලිසියට එය පෙන්වා දියහැක."

After the conclusion of the prosecution case the judgment had been pronounced by the learned High Court judge on 24-07-2013. It appears from the judgment the conviction has been based mainly on the section 27 recovery and the alleged dying declarations of the deceased.

The Grounds of Appeal

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

(1) The learned High Court Judge has misdirected herself in law by considering the alleged statements made by the deceased to PW-01 and PW-02 as dying declarations.

(2) The learned High Court Judge has been misdirected in the evaluation of the evidence led in the case with regard to the incident.

It was the contention of the learned Counsel that the alleged dying declarations considered by the learned High Court Judge are mere speculative statements based on suspicion which cannot be considered as dying declarations.

It was his submission that the evidence led in this action does not connect the appellant to any of the events that happened on the day the deceased had consumed a Nidikumba drink prepared by PW-03. It was pointed out that the failure of the prosecution to call the PW-03 who was a suspect at one time and was the person who could have stated what happened on the fateful day, was a major drawback for the prosecution case.

Referring to the section 27 statement, it was the contention of the learned Counsel that the statement does not reveal that the place where the bottle marked P-01 was within the exclusive knowledge of the appellant.

It was the contention of the learned DSG that the admission of the dying declaration was within the law. It was her position that the Nidikumba plants that had been used to prepare the potion had been obtained within the

compound of the house and no outsider can enter the house which points the finger directly at the appellant.

It was also the submission of the learned DSG that there are no exceptional circumstances that can be considered this matter as an application in revision and the appeal should stand dismissed.

The consideration of the Grounds of Appeal

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 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 may be 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 the 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 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."*
>
> ***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 is clear from the alleged statements the deceased has made to her daughter after her hospitalization are statements made on suspicion and speculations based on some previous events and not based on what she really knew.

The statement she has made to her son-in-law before the incident that she intends to discontinue the services of the servant is a statement that cannot be considered a dying declaration under any circumstances.

The matters stated by the deceased to her daughter are matters that had not been known to her previously to the incident. Although the statements may lead to a suspicion being pointed at the appellant, it is settled law that in a criminal case, suspicion does not establish guilt.

In the case of **The Queen Vs. M.G. Sumanasena, (1963) 66 NLR 350,** it was stated by **Basnayake, C.J.** that

> *"Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence. We are unable to reconcile what the learned Judge said earlier in his summing up with what he said in the*

passage to which exception is taken. The burden of establishing circumstances which do not only establish the accused guilt, but are also inconsistent with his innocence remain on the prosecution throughout the trial and is the same in a case of circumstantial evidence as in a case of direct evidence."

In the case of **The Queen Vs. Sathasiwam (1953) 55 NLR 255, Gratian, J.** considering the facts and the circumstances relevant to the appeal before the Court held as follows:

"*Can it be said that, in the facts of this particular case, P24 contains any statements as to the circumstances of the transaction which resulted in the deceased's death on 9th October 1951. Even if one gives those statements a meaning, which is most favorable to the Crown, they amount at best to mere general expressions indicating fear or suspicion of (the prisoner) and not directly related to the occasion of her death. Evidence of that kind has expressly been ruled to be inadmissible by Lord Atkin. In the course of his judgment in* ***Narayana Swami Vs. Emperor, A.I.R. 1939 P.C. 47 at 50,*** *where the Judicial Committee of the Privy Council had occasioned to make an authoritative pronouncement as to the limits within which the application of section 32 (1) of the Evidence Ordinance must be confined. The circumstances of which the deceased's statement must relate, said Lord Atkin, 'have some proximate relation to the actual occurrence.' Following this principle, I am satisfied that the reception of the proposed evidence under section 32 (1) would not be justified."*

In the appeal under consideration, the facts and the circumstances revealed by way of evidence are as such, that without the evidence of PW-03 being called, falls within the category of unsubstantiated evidence. According to the evidence, PW-03, the senior servant who was in the house with the appellant was the one who has prepared the Nidikumba potion on the day the deceased fell ill. The evidence shows that she may have obtained Nidikumba plants

within the garden for the preparation of the potion. According to the evidence of PW-04, he has visited the house and attended to the garden some 2-3 weeks before his statement was recorded by the police. The deceased had also regained her consciousness and made the alleged statements to her daughter some three weeks after she initially fell ill. Therefore, it may also be possible that PW-04 had sprayed the weedicide in the garden during the time relevant to this incident and PW-03 may have removed the Nidikumba plants sprayed with weedicide without realizing the gravity of it. In my view, PW-03 would have been the perfect witness to eliminate all these possibilities. If PW-03 had also consumed this potion before it was given to the deceased, it was she who should state that in evidence before the Court. Otherwise, PW-01 saying that would amount to hearsay evidence.

Although motive for a crime is not a thing that needs to be proved in a criminal case, in this matter, it has been stated that the deceased told something as to why she suspects the appellant has poisoned her. She has stated that the appellant saw one of her friends named Vasanthi giving a box of jewellery to her for safe keeping. If that was so, the mentioned Vasanthi would have been a good witness for the prosecution as the facts demand. She too has not been called as a witness.

For the reasons as stated above, I am in no position to agree with the learned High Court Judge's findings on page 32 and 33 of the judgement (page 384 and 385 of the brief) which reads as follows:

> "පැ.සා. 1 සහ පැ.සා 2 යන සාක්ෂිකරුවන් එකී ප්‍රකාශය ඉදිරිපත් කරඇති කරුණු සම්බන්ධයෙන් සළකා බැලීමේදී එම සාක්ෂිකරුවන් සත්‍ය ප්‍රකාශ කර ඇති බවට විශ්වාසනීයත්වයෙන් යුක්තව පැහැදිලිව ඉදිරිපත් කර ඇති බව අධිකරණයට පෙනී යයි. එබැවින් එකී සියලු කරුණු අධිකරණයට පිළිගත හැකි කරුණු වේ. එසේ වුවද අධිකරණය ඉදිරියේ ඉදිරිපත් වී ඇති සාක්ෂි අනුව පෙනී යන්නේ, විත්තිකාරියට මෙම මරණකාරිය හා ද්වේශයක් ඇති වීමෙන් හා රත්‍රං බඩු භාර දෙනවාද දුටු හෙයින් යම්විටක එම භාණ්ඩ ලබා ගැනීමට විත්තිකාරියගේ යම් ආසාවක් තිබුනාද යන්නය. එම භාණ්ඩ මරනකාරිය විසින් පසුදින ඇයගේ

යෙහෙළියකට දුන් බවත් ඒ බව විත්තිකාරියට දැන ගැනීමට හේතුවක් නොමැති බවත් මරනකාරිය විසින් සිය දියණියට පවසා ඇත. කෙසේ වෙතත් විත්තිකාරිය මිය ගිය තැනැත්තිය හා සමග ද්වේශයක් ඇති වුවා යැයි යන පදනම මත (motive) මිය ගිය තැනැත්තියගේ මරණය සිදු කිරීම සඳහා එම කරුණු හේතු වී ඇත. ඉදිරිපත් වී ඇති කරුණු එකිනෙකට සම්බන්ධ කර බැලීමේදී පෙනී යන්නේ, විත්තිකාරිය විසින් මෙම මරණකාරියගේ මරණය සිදු කිරීම සඳහා මොනකොටපස් යන විෂ වර්ගය යොදා ගත බවත්, එය නිදිකුම්බා ද්‍රවණයට එකතු කර පානයට දීමට සැලැස්වූ බවත්ය. මරණකාරිය පැ.සා 1 ට පවසා ඇති මරණාසන්න ප්‍රකාශය අනුව පෙනී යන්නේ විත්තිකාරිය නිදිකුම්බා ද්‍රවණය මරණකාරියට බීමට දුන් බව ඔප්පු වී ඇති බවය. එය ඇය විසින් හිතාමතාම මරණය ගෙන දීම සඳහා මරණකාරියට බීමට දී ඇති බව සාධාරණ සැකයෙන් තොරව ඔප්පු වී ඇති ඇත.”

It is my considered view that there was no evidence before the learned High Court Judge to come to a finding beyond reasonable doubt as concluded by the learned High Court Judge. As stated by me before, suspicious circumstance does not establish guilt and no nexus between the consuming of the Nidikumba potion by the deceased and the appellant had been proved in this action.

I am in no position to agree with the learned High Court Judge’s expression with regard to the recovery of a bottle as a result of the statement made in terms of section 27 of the Evidence Ordinance by the appellant. The relevant observation by the learned High Court Judge reads as follows:

“එසේම සරස්වතී යන මෙම විත්තිකාරිය විසින් මොනකොටපස් අඩංගු බෝතලය පෙන්වීමෙන් සහ ඇය විසින් එය ඉදිරිපත් කිරීමෙන් මෙම ද්‍රව්‍ය අඩංගු බෝතලය තබා තිබූ ස්ථානය ඇය විසින් දැන සිටි බවත් වෙනත් කිසිවෙකුට එය සම්බන්දයෙන් දැනීමක් නොතිබූ බවත් අධිකරණය ඉදිරියේ ඔප්පු වී ඇත.”

The relevant section 27 (1) of the Evidence Ordinance reads thus;

27 (1). Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such

information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

It was held in the case of **Justin Fernando Vs. I.P. Slave Island (1945) 46 NLR 158** that, a clear nexus must be established between the information given by the accused and the subsequent discovery of a relevant fact.

The Court of Criminal Appeal setting aside the verdict in the case of **Etin Singho Vs. The Queen (1965) 69 NLR 353** held that

> *"If the jury believed that the accused made the statement P-17, all that was proved was that he had knowledge of the whereabouts of club P-01, the fact discovered as a consequence of P-17 was confined to that knowledge on the part of the accused. There was no proof before the Court that P-01 was in fact used in the assault on the deceased. The jury should have been told that the accused's knowledge of the whereabouts of the club should not be treated by them as an admission that he used that club to attack the deceased."*

In this matter, although the learned High Court Judge has decided that the whereabouts of the bottle P-01 was within the exclusive knowledge of the appellant, the evidence led in this action does not suggest so. The evidence of PW-04 also suggests that he too was privy to the fact where the pesticides and weedicides are being kept in the house. Although the police officer who has given evidence saying that he discovered this bottle in the room of the appellant, the alleged statement of the appellant marked as X-02 at the trial was that the bottle is in the store room. Although by giving evidence the police officer has tried to portray a picture that the whereabouts of the bottle was within the exclusive knowledge of the appellant, I find that it was not so. Therefore, without establishing a clear nexus between the finding and the culpability of the appellant to the alleged poisoning of the deceased, I find that

the section 27 statement marked X-02 was of much lesser value than considered by the learned High Court Judge.

Although it can be concluded that the appellant had the knowledge of the whereabouts of the bottle marked P-01, her statement to the police and the other attendant circumstances does not point towards the exclusive knowledge of that fact towards the appellant.

I am of the view that the above reasons are reasons that can be considered as exceptional circumstances that warrant the intervention of this Court in the interest of justice, although the appeal has been preferred out of time.

I am of the view that the learned High Court Judge was misdirected as to the evaluation of the evidence in relation to the dying declaration as well as the section 27 statement as considered above and therefore, it is not safe under any circumstances to let the conviction to stand.

Accordingly, the appeal is allowed. The conviction and the sentence are set aside. The appellant is acquitted of the charge preferred against her.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal