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/0296/14

High Court of Kandy

Case No: HC/167/2004

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Balendran Prasad Sadeeskaran

2. Sivapalasundaram Thibaharan

ACCUSED

AND NOW BETWEEN

Balendran Prasad Sadeeskaran

1st ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Shanaka Ranasinghe, P.C. with Anushika Ranasinghe, Tharakee Manchanayake and Niroshan Mihindukulasuriya for the Accused Appellant

: Anoopa de Silva, DSG for the Respondent

Argued on : 27-09-2022

Written Submissions : 25-05-2022, 06-02-2018 (By the Accused-Appellant)

: 22-09-2022, 10-05-2018 (By the Respondent)

Decided on : 28-10-2022

Sampath B Abayakoon, J.

The first accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Kandy along with the second accused named in the indictment on the following counts.

1. At or about 6th October 1997, the appellant, along with several others, with the purpose of causing injury to Selvavinayagapragas Warapragash, became members of an unlawful assembly, and thereby committed an offence punishable in terms of Section 140 of the Penal Code.
2. At the same time and at the same transaction, being a member of the said unlawful assembly, knowingly abducted the above mentioned Warapragash, and thereby committed an offence punishable in terms of Section 358 read with Section 146 of the Penal Code.
3. At the same time and at the same transaction, being members of the said unlawful assembly, and in order to fulfill its common object, caused the death of the above mentioned Warapragash, and thereby

committed the offence of murder, punishable in terms of Section 296 read with Section 146 of the Penal Code.

4. At the same time and at the same transaction, the appellant and the other accused knowing that the earlier mentioned Warapragash would be subjected to grievous injuries or may be subjected to such injuries, abducted the said person and thereby committed an offence punishable in terms of Section 358 read with Section 32 of the Penal Code.
5. At the same time and at the same transaction, the appellant and the other accused caused the death of the earlier mentioned Warapragash and thereby committed the offence of murder, an offence punishable in terms of Section 296 read with Section 32 of the Penal Code.

This is an incident that happened on the 6th October 1997. At that time, the deceased as well as the appellant and the others involved in this case have been students of the Faculty of Engineering at the University of Peradeniya.

The main charge against the appellant was that he subjected the deceased Warapragash who was a 1st year student at that time, to inhumane ragging which resulted in his death. After the incident on the 6th and after receiving treatment for some time, he has passed away on 26-10-1997.

The appellant who was the 1st suspect in the case has failed to appear before the Magistrate Court of Kandy from the very inception of the case. There had been eight students accused of committing this crime. The Magistrate Court non-summary proceedings against the appellant had taken place in his absence as he had absconded, whereas, the other accused had participated in the non-summary inquiry.

After the conclusion of the non-summary inquiry, the learned Magistrate of Kandy has committed three of the accused to stand trial before the High Court. However, on the instructions of the Honorable Attorney General, one of them had been discharged from the proceedings due to lack of evidence, and the appellant and the 2nd accused was indicted before the High Court of Kandy.

The said indictment had been filed on the 21st July 2004. The appellant was never served with summons as his whereabouts were unknown.

Accordingly, the learned High Court Judge of Kandy has taken the due procedural steps in terms of Section 241 of the Code of Criminal Procedure Act. After being satisfied that the appellant is a person who is absconding from the Court, has decided to issue a warrant against him and to proceed with the trial. The learned High Court Judge of Kandy has made this order on 01-12-2005. At the inquiry held in that regard, the prosecution has called two police witnesses who had attempted to execute the warrant issued earlier against the appellant, and have given evidence to state that it cannot be executed since the appellant has left the address where he was living in Peradeniya area and his whereabouts are unknown.

It appears from the High Court case record that the 2nd accused has pleaded guilty to a lesser offence and accordingly, he has been dealt with by the learned High Court Judge.

After trial, by his judgement dated 04-07-2014, the learned High Court Judge of Kandy found the appellant guilty for the 4th and the 5th charges preferred against him, that means the charge of abduction, punishable in terms of Section 358 read with Section 32 of the Penal Code and the charge of murder, punishable in terms of Section 296 read with Section 32 of the Penal Code.

Accordingly, the appellant was sentenced in his absence for a term of 10 years rigorous imprisonment on count one, and for the punishment of death on count two. An international arrest warrant was also issued against the appellant.

The High Court case record bears testimony that a motion has been filed on 15-07-2014 by an Attorney-at-Law indicting that the appellant has instructed a President's Counsel to lodge an appeal on behalf of him. Along with the motion, a copy of a letter dated 14-07-2014 purported to have been written and signed by the appellant has also been filed, and on 18-07-2014, the appeal now under consideration before this Court has been lodged on his behalf. Along with these

letters and the petition of appeal, he has filed a copy of his National Identity Card as well, which shows that his first name is not Balendran as mentioned in the indictment, but Balachandran. In other words, his full name is Balachandran Prasad Sadeeskaran. However, his identity was never a matter in dispute.

The Grounds of Appeal

At the hearing of this appeal, the learned President's Counsel, on behalf of the appellant urged the following grounds of appeal for the consideration of the Court.

1. Did the trial Court misdirected itself by failing to consider that the prosecution did not place evidence as required by law before moving to proceed against the appellant in terms of Section 241 of the Code of Criminal Procedure Act.
2. Did the learned trial Judge misdirected himself by failing to consider that the prosecution has failed to produce a report with relevant material regarding the appellant as ordered by the learned High Court Judge on 30-11-2009.
3. Did the learned High Court Judge was misdirected by failing to consider that the prosecution did not place evidence to the effect that the statement made by the deceased was accurately translated.
4. Did the learned High Court Judge err in law by considering the evidence placed by the prosecution regarding the contents of the statement made by the deceased contrary to Section 59 of the Evidence Ordinance.
5. Did the learned High Court Judge err in law by considering the contents of the statement made by the deceased in terms of Section 33 of the Evidence Ordinance.
6. Did the learned High Court Judge err in law by failing to follow the guidelines set out in considering a dying deposition.

7. Was there evidence placed before the Court to satisfy that the appellant entertained a murderous intention.

The Evidence in Brief

As I have stated before, the deceased Warapragash has entered the Engineering Faculty of the University of Peradeniya and was studying as a first-year student when he died under tragic circumstances. The appellant was also a 2nd year student at the same Faculty.

According to the evidence of PW-05 who was also a first-year student, the deceased Warapragash was living somewhere in Kandy while he and the other first-year students were residents of the Akbar Hall of the university. On the day in question, that was, on the 6th October 1997, after attending his lectures, PW-05 has gone with another friend called Surendra to a house in Panideniya which was about half a kilometer away and used by students as a hostel, in order to bring back a bag belonging to one Revan. When he entered the house, he has seen the deceased Warapragash and eight other senior students in the house including the appellant Sadeeshkaran. It was about 6.30-7.00 in the night. Among the first-year students, it was only the deceased Warapragash who was being there, and he had seen the appellant Sadeeshkaran yelling and giving out some orders while ragging the deceased at the verandah of the house. The rest of the senior students were inside the house chatting in a room. He has seen the appellant forcing the deceased with a threatening voice to do sit-ups with stretched hands. When he saw the deceased, he had no clothes on him other than his underwear. He has observed that the deceased was looking exhausted and was able to realize that he has been subjected to ragging for some time before he saw him.

After seeing the deceased in that state, PW-05 and his other friend has gone inside the house, taken the bag they were looking for and had come out of the house. When they came out, the PW-05 has seen Warapragash being dressed up

and the appellant had told the deceased to go with them. It was the evidence of PW-05 that the appellant informed him that Warapragash was looking exhausted.

While walking back, Warapragash has informed PW-05 and his friend that he was exhausted and he finds it difficult to walk but has left saying that he was going to his residence. Thereafter, PW-05 has only seen his dead body at the mortuary.

The PW-03 called by the prosecution was Professor Sumana Bandara Weerakoon attached to the Faculty of Engineering at the University of Peradeniya. During the period relevant to this incident, he had been functioning as the Deputy Proctor of the faculty. On 13-10-1997, he has received information through the Dean of the faculty that the deceased Warapragash is undergoing treatment at the Nawaloka Hospital for injuries he suffered as a result of being subjected to ragging at the University.

Accordingly, he had initiated an inquiry and had gone to the hospital and talked to the deceased whilst he was receiving treatment. Although he has observed the deceased in a critical stage, he had managed to speak with him. When he showed about 150 photographs available in the personal files of the students , the university authorities had in their possession, the deceased had identified the appellant's photograph and two other photographs as the persons involved in ragging him. As part of his inquiry, he has recorded a statement from the appellant who was a second-year student at that time and also from the other two students identified by the deceased. Subsequently, he had come to know that Warapragash has succumbed to his injuries on 26-10-1997.

K.B. Nimal Ratnayake who was another senior lecturer at the engineering faculty during that time has also given evidence in this trial about the inquiry regarding this ragging incident and the statement made by the appellant at the inquiry.

PW-01 who has given evidence at the trial was Sivaguru Selvavinayagan Prakashan, the father of the deceased, who was a doctor by profession. The deceased was his only son and his daughter was elder to the deceased.

His son, has studied at St. Joseph's College in Jaffna and had entered the Faculty of Engineering at the University of Peradeniya, and has been studying as a first-year student at the time of his death.

He and his family were living in Colombo at that time. When the deceased Warapragash came home for the weekend on 3rd October 1997, he has informed him that he is being subjected to ragging at the university. The witness states that he did not take much notice of it stating to his son that "that is a thing that always happen."

During that time, he was working as a doctor in Kotmale area, and on the 7th of October 1997, that was a day after the incident, his daughter had informed him that the brother informed her that he has fallen ill as a result of the ragging and he is passing blood with his urine and is also unable to walk. He has immediately rushed to the boarding house where his son was living in Kandy and had observed that he was in pain, and has taken immediate steps to take him to Colombo for treatment. Since he did not recover, after taking treatment from a private doctor, the father had admitted the child to the General Hospital Colombo and from there to the Nawaloka hospital. He has been vomiting blood at that time.

It was his evidence that while receiving treatment at the hospital, Professor Weerakoon of the faculty of engineering visited his son and recorded his statement.

The condition of the deceased had got worsened by the day, and seven days after the admission he has fallen into a coma. Despite the best efforts by the doctors, his son had passed away on the 26th of October 1997.

While in hospital, the PW-01 has spoken to his son and had asked him what happened. It was his evidence that his son informed him that while returning in the afternoon after attending lectures on the 6th, Sadeeshkaran and some others took him to their room and subjected him to ragging. When asked for details, he has mentioned that he was asked to do dips and sit-ups. It was also his evidence that it appeared to him that his son was not voicing the exact details of what he had to undergo due to shame.

PW-15 Dr. L.B.L.Alwis was the Judicial Medical Officer (JMO) who had performed the postmortem on the deceased. He is a doctor who has retired as the Chief Judicial Medical Officer of Colombo. The JMO has conducted his postmortem on 28th October 1997, and has observed the following external injuries on the body.

1. *Deep muscle contusion – 2.5 cm in diameter on the right side of the buttock.*
2. *Deep muscular contusion – 3 cm in diameter on the left side of the buttock.*
3. *Depigmented scar with a few punctate scabs – 5 cm by 3 cm in front of the right knee.*
4. *Depigmented scar with a few punctate scabs – 5 cm by 3 cm in the front of left knee.*
5. *Two surgical scars – 1 cm long placed one below the other, 1 cm apart in the midline of the anterior abdominal wall, 1 cm below the umbilicus.*
6. *Multiple punctate injuries in the right neck, right elbow, left elbow, dorsum right wrist, dorsum left wrist, dorsum left hand and right groin.*

He has opined that the muscle injuries he observed can occur as a result of being hit by some object or being assaulted. The 3rd and 4th injuries he observed may be injuries due to being fallen in a frontal position. The injuries mentioned under the 5th were surgical wounds. Injuries mentioned under the 6th were also medical wounds.

He has informed the Court that the deceased had undergone dialysis during treatment and has well explained to the Court regarding the injuries found in the brain, the heart, the liver and the kidneys of the deceased. He has opined that the internal injuries to the deceased have occurred due to him being subjected to excessive physical exercise and has given detailed reasoning as to his opinion.

The JMO has specified the cause of death as follows;

> *"Acute renal failure due to muscle injury (Rhabdomyosis) following physical exertion."*

PW-11 who has given evidence in this action was the police officer who has recorded the statement of the deceased whilst he was receiving treatment at the Nawaloka hospital. The witness has recorded a statement from the deceased on 17th October 1997 at 10.00 hours. Since the deceased could not speak the Sinhala language, his statement has been translated by one of his relatives, namely, L. Pakyaman who was by the bedside to look after the deceased.

The deceased had supposed to have stated to the police officer in his statement that after being taken by the appellant and the four others, the appellant subjected him to do sit-ups while holding his hands in front, and was asked to do 500 sit-ups but he fell after doing 200. Afterwards, water was poured on his face and his clothes were removed, and again he was asked to do sit-ups. While he was doing sit-ups, toothpaste was inserted into his anus, and later was allowed to go home.

The prosecution has led evidence in this action to establish that the mentioned L. Pakyaman who has translated the statement made by the deceased to PW-11 has left the country, and therefore, cannot be located and called to give evidence in this action although he was the witness named as PW-16 in the indictment. Accordingly, the learned High Court Judge has allowed his deposition at the non-summary inquiry with regard to this death before the learned Magistrate of Kandy to be led as evidence in terms of section 33 of the Evidence Ordinance.

His evidence in this regard has been led in Magistrate Court Kandy Case No. NS 63496 on 4th September 2000. It appears that although the application of the prosecution has been allowed, his deposition at the non-summary had not been produced and marked as part of the evidence at the trial before the High Court.

The rest of the witnesses who have testified in this trial are the official witnesses and the investigation officers.

By his judgement dated 4th July 2014, it becomes clear that the learned High Court Judge has convicted the appellant and the 2nd accused indicted, based on the eyewitness account as well as the dying depositions of the deceased.

With the above factual positions in mind, I will now proceed to consider the grounds of appeal urged and the submissions made by the learned President's Counsel as well as the learned Deputy Solicitor General in that regard.

Consideration of the Grounds of Appeal

The 1st and the 2nd Grounds of Appeal: -

The aforementioned grounds of appeal will be considered together as they are interrelated.

It was the strenuous contention of the learned President's Counsel that the 241-inquiry held in terms of the provisions of the Code of Criminal Procedure Act was flawed and it has created a situation where the appellant has been denied of a fair trial.

It was his position that the two witnesses called by the prosecution had stated that they looked for the appellant at number 118, Angunawala, Peradeniya, which was the address the appellant used to live while attending the university. It was his position that the authorities right throughout had the correct residential address of the appellant which was No-47/1, K.K.S. Road, Jaffna with them, and the document marked P-7 which was a statement obtained during the

disciplinary inquiry by the university authorities indicates that. He also points out that even at the non-summary inquiry, where evidence was led to establish that the appellant cannot be found, it has been revealed that he is living in his Jaffna address.

Citing several judgements pronounced in the Court of Appeal, it was the contention of the learned President's Counsel that the trial held in absentia against the appellant without sufficiently establishing that the appellant cannot be found was null and void and the case should be sent for a retrial.

The relevant section 241 (1) (b) under which the learned High Court Judge has decided to proceed with the trial in the absence of the appellant reads as follows;

> **241 (1). Anything to the contrary in this Code notwithstanding the trial of any person on indictment with or without a jury may commence and proceed or continue in his absence if the Court is satisfied-**
>
> > **(a) .....**
> >
> > **(b) that such person is absconding or has left the island and it has not been possible to serve indictment on him.**

It is clear from the proceedings that the learned High Court Judge after hearing the witnesses called at the inquiry by the prosecution and by his order dated 01-12-2005, has satisfied himself that the appellant is a person who is absconding the Court. Accordingly, it has been decided to commence and proceed with the trial in his absence.

It is the view of this Court that for the learned President's Counsel's view that the 241 inquiry was flawed and irregular, and has the effect of vitiating the proceedings taken thereafter to have merit, there must be a basis for this Court to conclude that it has caused a material prejudice to the appellant and thereby occasioned a failure of justice.

The relevant section 436 of the Code of Criminal Procedure Act reads as follows;

> **436. Subject to the provisions hereinbefore contained, any judgement passed by a Court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-**
>
> **a. of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgement, summing up, or other proceedings before or during trial or any other inquiry or other proceedings under this Code; or**
> **b. of the want of any sanction required by section 135,**
>
> **unless such error, omission, irregularity, or want has occasioned a failure of justice.**

It is therefore necessary to determine whether the decision by the learned High Court Judge to hear evidence in the absence of the appellant was something that cannot be justified.

It is true that the prosecution has led the evidence of two police officers to testify that the appellant was not living at the Peradeniya address when they were taking steps to execute the warrant that has already been issued against him. The original case record of the Magistrate Court of Kandy case No- NS 63496 establishes the fact that the appellant was never arrested and produced or appeared himself before the Court, although he was the first accused in the case. All other accused have been present right throughout the non-summary proceedings before the Magistrate Court. The non-summary inquiry has been proceeded before the Magistrate of Kandy in the absence of the appellant in terms of section 148 (4) of the Code of Criminal Procedure Act.

It is my view that the appellant cannot claim that he was unaware that a case was proceeding against him because of the fact that after the incident and while the deceased student was receiving treatment at the hospital, an inquiry regarding the incident has been conducted by the university, where he has given

a statement. He cannot claim ignorance of the fact that the student who was subjected to ragging died two weeks after the incident.

Although the appellant has never appeared before any Court thereafter, it is clear from the High Court case record that he has been diligently following the proceedings against him. After the judgement was pronounced on 04-07-2014, he has instructed his Attorney-at-Law to file a motion on 15-07-2014 with an attached letter dated 14-07-2014, seeking a copy of the judgement indicting that he is going to file an appeal.

It appears that he has been careful in the letters written by him to his lawyers not to divulge his present living address or even to indicate that he is not in the country.

However, this Court finds that in the appeal brief, the Attorney-at-Law for the accused appellant has filed a motion dated 30th May 2018 with the letter of authorization dated 14th May 2018 signed by the accused appellant giving authorization for his lawyers to pursue this appeal on behalf of him.

In the said letter, he has mentioned his address as;

2, Allp, Srancoes Vinnons
Argenteuil
95100
France,

which indicates that he is no longer living in this country. Along with the letter of authorization, several other documents also have been filed where it indicates that the appellant has made a complaint to the United Nations Human Rights Council at the United Nations office in Geneva complaining that he does not have confidence in the domestic remedy.

In the attached petition, he has made a statement which appears to be a statement that he was unaware of the murder charges preferred against him before the Magistrate Court of Kandy. In the same complaint, he has stated that

he was living in his home district of Vanni until the Sri Lankan government gained control of the area and subsequently left Sri Lanka to pursue higher studies in the year 2001. He has stated further that he only came to know that he was convicted for murder by reading the online edition of the Daily Mirror newspaper on 4th July 2014, which was the date of the judgement.

The Magistrate Court of Kandy non-summary case No- 63496 indicates that the appellant was named as a suspect in the case from the initial B report number B44950/97 filed by the officer-in-charge of the Peradeniya police. However, police were never able to arrest the appellant after the death of Warapragash as he had fled the area after the incident.

The indictment in this matter has been filed before the High Court of Kandy on 21st July 2004. As for the reasons considered before, it is abundantly clear that even if the police were aware of the address the learned President's Counsel submits as his home address, no summons would have been served on him as he has already left the country by then.

It appears from the High Court case record that after the case against the appellant commenced, the succeeding High Court Judge on 30th November 2009 has ordered the police to conduct further investigations about the whereabouts of the appellant and report to the Court. This appears to be a genuine attempt by the learned High Court Judge to get the appellant before the Court, which cannot be termed as proof that the appellant has not been properly served with summons.

It is my considered view that the decision of the learned High Court Judge who considered the evidence made available and ordered that the trial shall proceed in the absence of the appellant was a decision made after satisfying about that fact. Therefore, I find no basis for the considered grounds of appeal.

Besides that, if the appellant is claiming that he was not served with summons not due to any fault of his, the course of action he can adhere to has been provided in section 241 of the Code of Criminal Procedure Act in itself.

Section 241 (3) reads as follows;

> **241(3). Where in the course of or after the conclusion of the trial of an accused person under sub paragraph (i) of paragraph (a) of sub section 1 or under paragraph (b) of that sub section he appears before Court and satisfies the Court that his absence from the whole or part of the trial was *bona fide*, then –**
>
> **(a) where the trial has not been concluded, the evidence led against the accused up to the time of his appearance before Court shall be read to him and an opportunity afforded to him to cross-examine the witness who gave such evidence; and**
>
> **(b) where the trial has been concluded, the Court shall set aside the conviction and sentence, if any, an order that the accused be tried *de novo*.**

Out of the three judgements pronounced by the Court of Appeal and cited by the learned President's Counsel in support of his contention, two of them namely, **CA/PHC/APN/137/2011 decided on 21-05-2012** and **CA No. 52/2012 decided on 28-07-2015** are matters decided upon the rejection by the learned High Court Judge to act under 241 (3) of the Code of Criminal Procedure Act after an inquiry held in that regard before the High Court.

Although I am unable to conclude from the judgement in **CA No. 96/2013 decided on 10-07-2015** whether this was a matter of a refusal by the learned High Court Judge to act under section 241 (3) of the Code of Criminal Procedure Act or a final appeal preferred by the appellant, I find that the respondent, Honorable Attorney General too has agreed that there was insufficient evidence placed before the learned High Court Judge to proceed in the absence of the accused appellant, which is a matter that has been determined on the facts and the circumstances relevant to the said matter.

I am of the view that any person against whom a High Court trial has proceeded in his absence after taking due procedural steps in terms of section 241 (1) of the Code of Criminal Procedure Act needs to first make an application in terms of section 241 (3) before the same Court and satisfy Court that his absence from the whole or part of the trial was *bona fide.*

I am of the view that it is only thereafter an accused can seek to challenge the order of refusal to act in terms of section 241(3) before the Court of Appeal.

In the appeal under consideration, although it seems that the appellant has had legal representations at least from the date of the judgement, the appellant has never chosen to take that necessary procedural step.

The appellant has chosen to file an appeal challenging the judgement, which is a step he has chosen rather than appearing before the trial Court. Hence, I am of the view that, it is not open for the appellant to now argue that he was not served with summons and was denied a fair trial.

The 3rd, 4th and the 5th Grounds of Appeal: -

The above three grounds of appeal will be considered together as they are interrelated.

The mentioned three grounds of appeal are grounds urged on the basis that there was no evidence to establish that the statement made by the deceased to police was accurately translated and that the learned High Court Judge considered the evidence contrary to the relevant provision of the Evidence Ordinance and also that the learned High Court Judge was wrong in the way he considered evidence in terms of section 33 of the Evidence Ordinance.

The evidence led in this action clearly establishes the fact that PW-11 (PS 903) Dissanayake Mudiyanselage Piyasena who was attached to the Slave Island police has recorded a statement from the deceased Warapragash while he was receiving treatment at Nawaloka hospital on 17th October 1997 where the deceased has revealed as to what happened to him and who was responsible.

There can be no doubt that the statement amounts to a dying declaration as the deceased has succumbed to his injuries on the 26th of October 1997.

However, the argument of the learned President's Counsel revolved around the fact whether the statement of the deceased was accurately translated and whether that fact has been rightly proved before the Court.

In his evidence, PW-11 has stated that when he questioned the deceased, he answered in Tamil language and it was one of his relatives, namely, L. Pakyaman who was there to look after the deceased translated what the deceased said in the Tamil language to Sinhala.

Evidence has been led in this action to show that the said Pakyaman who was witness number 16 named in the indictment has left the country by the time his evidence was called for at the High Court trial. It has also been established that the said witness has given evidence at the non-summary inquiry held before the Magistrate of Kandy. Accordingly, the learned High Court Judge who heard the evidence then had allowed to admit his deposition before the Magistrate of Kandy in that regard, in terms of section 33 of the Evidence Ordinance. It also appears for that very purpose, the prosecution has included the Registrar of the Magistrate Court of Kandy as prosecution witness number 20 in order to get the relevant evidence produced before the High Court.

However, the case record also bears testimony that no such evidence has been led. It is correct to say that the learned High Court Judge in his judgement has considered that the evidence of PW-16 who translated the deceased's statement to PW-11 has been admitted at the trial in terms of section 33 of the Evidence Ordinance, whereas the prosecution has failed to produce the relevant deposition in evidence. I find that it was not correct for the learned High Court Judge to consider the dying deposition of the deceased without such proof.

Even though it may be so, the dying deposition of the deceased to PW-11 was not the only evidence led by the prosecution against the appellant in this matter.

This is not a matter that has been determined only by the dying deposition of the deceased to PW-11. This is a matter where an eye witness has given evidence and the deceased has made several dying depositions to others as well.

The evidence of PW-05 who was the eyewitness to the incident reveals that it was the appellant who was subjecting the deceased to ragging at a house in the Panideniya area in the way he has stated in his evidence. PW-05 has observed the deceased exhausted and it was the appellant who has asked PW-05 to take the deceased away.

The evidence clearly establishes that the deceased could not recover from the external and internal injuries he suffered due to the direct result of him being subjected to inhumane ragging.

The evidence of the then chief JMO of Colombo, who has conducted the postmortem was very much consistent with the evidence of PW-05, if one looks at the external and internal injuries and the JMO's opinion as to the cause of death.

Apart from the eyewitness account, Professor Weerakoon, the deputy proctor of the Faculty of Engineering at the University of Peradeniya who has conducted an inquiry into this incident has gone to the bedside of the deceased at Nawaloka hospital where the deceased has implicated the appellant as one of the persons who subjected him to the ragging.

The deceased had also informed his father that he was ragged by the appellant which resulted him receiving the injuries that led to his untimely death. Although it can be argued that the learned High Court Judge failed to consider the fact that the deposition made by PW-16 at the non-summary inquiry has not been produced in evidence, and thereby considering the dying deposition of the deceased Warapragash has been correctly translated and considering it as a dying deposition was irregular, I am of the view that even if one decides to disregard the evidence of PW-11 as to the dying deposition made to him by the

deceased, there would not have been any other conclusion that can be reached than the final conclusion of the learned High Court Judge.

As I have stated before, the available eyewitness account and the dying declarations made to two others have also been well considered by the learned High Court Judge to find the appellant guilty and not only the evidence of PW-11 in its isolation. Therefore, I am of the view that even if it is considered as an irregularity in the way the evidence has been considered, that has not occasioned any failure of justice towards the appellant.

At this juncture, apart from the earlier mentioned provision contained in section 436 of the Code of Criminal Procedure Act, I would also like to bring to my consideration, the proviso to Article 138 of the Constitution which reads thus;

> **"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."**

In the case of **Lafeer Vs. Queen 74 NLR 246,** H.N.G.Fernando, C.J. stated;

> *"There was thus both misdirection and non-direction on matters concerning the standard of proof. Nevertheless, we are of opinion having regard to the cogent and uncontradicted evidence that a jury properly directed could not have reasonably returned a more favourable verdict. We therefore affirm the conviction and sentence and dismiss the appeal."*

For the reasons set out above, I find no basis for the considered grounds of appeal as well.

The 6th Ground of Appeal: -

The 6th ground of appeal urged by the learned President's Counsel is that the learned High Court Judge failed to follow the guidelines set out in considering a dying deposition in its correct perspective.

At this stage it needs to be reiterated that this was not a case where the prosecution had solely relied on dying depositions to prove the charges against the appellant. The main evidence relied on by the prosecution was that of the eyewitness PW-05 whose testimony has not been discredited in any manner as to what he actually saw on the day of the incident.

Although it appears from the judgement that the learned High Court Judge has not discussed the principles governing the evidence of a dying deposition, that does not mean that the learned Trial Judge has not considered the evidence placed before him with regard to dying depositions made by the deceased and has come to wrong conclusions in that regard.

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 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 been before the court as a witness, and not having made the statement under oath, this is an infirmity 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 51NLR 322,** it was held:

> *"That it was imperative that the jury should have been adequately cautioned that, when considering the weight to be attached to the statements contained in the dying declaration, they should appreciate that the statements of the deponent had not been tested by cross-examination.*
> *Held further; 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."*

As I have stated before, since the learned High Court judge has considered the eye witness evidence and the dying depositions of the deceased to several other witnesses in its totality and has come to his findings, I do not find a basis to the considered ground of appeal.

The 7th Ground of Appeal: -

The 7th ground of appeal urged by the learned President's Counsel was that the learned High Court Judge was wrong when he determined that the appellant had a murderous intention when he subjected the deceased to ragging. The learned High Court Judge has determined that because of the way the deceased was subjected to ragging, where he had even fainted, and because of the external and internal injuries suffered by the deceased, the appellant and others who were instrumental in causing these injuries to the deceased had the murderous intention. Apparently, in terms of the 3rd limb of section 294, which is committing the offence of murder with intention.

For matters of clarity, I will now reproduce the relevant section 294 of the Penal Code which defines murder.

> **294. Except in the cases hereinafter excepted, culpable homicide is murder-**
>
> > ***Firstly*- if the act by which the death is caused is done with the intention of causing death; or**
> >
> > ***Secondly*- if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause- the death of the person to whom the harm is caused; or**
> >
> > ***Thirdly*- if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or**
> >
> > ***Fourthly*- if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.**

It is clear from the evidence made available to the trial Court that the appellant as well as the other students who were involved in the ragging of the deceased were second year students of the Faculty of Engineering. It is also clear that the fact the deceased was a first-year student or in other words, being a fresher to the faculty had been the reason for him being subjected to this kind of ragging of inhumane nature. It is in evidence that the deceased was taken forcibly from the faculty to a house where the appellant and other students lived and was subjected to ragging. When PW-01 saw the deceased, he was almost naked and doing sit-ups as ordered by the appellant. It is the appellant who has instructed PW-05 to take the deceased away as he looked exhausted.

Although the appellant may not have intended to kill the deceased through his actions, it is abundantly clear that he knew what he was subjecting the deceased was so imminently dangerous and it is likely to cause death. The evidence of the JMO has established the extent to which the body tissues and the vital internal organs of the deceased's body had been damaged

No one can believe such serious injuries can occur if the person who forced the deceased to do such extreme exercise in the name of ragging unless he does that knowing very well that his actions are imminently dangerous and likely to cause death.

In my view, that may be the very reason why the appellant evaded arrest and never appeared before the Court after he came to know that the deceased passed away after having lost his battle for life as a result of his heinous actions.

One has to be mindful that the charges for which the appellant was found guilty were charges formulated on the basis that he committed these crimes with a common intention in mind with the others who were involved in the crimes.

For matters of clarity, I will now reproduce the relevant section 32 of the Penal Code.

> **32. When a criminal act is done by several persons in furtherance of the common intention of all, each such persons is liable for that actin the same manner as if it were done by him alone.**

For the reasons stated above, although I find merit in the argument of the learned President's Counsel that the appellant may not have entertained the murderous intention, I find that it is a matter which would not have the effect of vitiating the conviction of the appellant.

I am of the view if considered in the correct perspective, there was ample evidence before the learned High Court Judge to prove beyond reasonable doubt that the appellant had the required knowledge of his action in terms of the 4th limb of section 294 of the Penal Code.

Therefore, I am of the view that no failure of justice has occasioned to the appellant due to the considered misdirection and hence, no reason to interfere with the finding of guilt by the learned High Court Judge.

As for the reasons considered above, I find no basis to interfere with the finding that the appellant was guilty of the offences of abduction and murder of the deceased, and therefore, the conviction and the sentence of him by the learned High Court Judge.

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

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal