

**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:

Democratic Socialist Republic of Sri Lanka

CA/HCC/0070/21

COMPLAINANT

Vs.

High Court of Kegalle

Koralalage Chaminda Korala

Case No: HC/2277/2006

ACCUSED

AND NOW BETWEEN

Koralalage Chaminda Korala

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Nalaka Samarakoon with Rajinda Kandegedara for
the Accused Appellant
: Anoop De Silva, DSG for the Respondent

Argued on : 07-03-2023

Written Submissions : 12-01-2023 (By the Accused-Appellant)
: 27-02-2023 (By the Respondent)

Decided on : 06-04-2023

Sampath B Abayakoon, J.

This is an appeal preferred by the accused appellant (hereinafter referred to as the appellant) being aggrieved of the conviction and the sentence of him by the learned High Court Judge of Kegalle.

The accused was indicted before the High Court of Kegalle for causing the death of one Dangampola Mudiyanseelage Gunapala Munasinghe on 3rd June 2001, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

The appellant has taken part in the trial until the very end of the prosecution case, and thereafter, had absconded the Court. Accordingly, the learned High Court Judge who presided over the trial had taken steps in terms of section 241 of the Code of Criminal Procedure Act, and had proceeded with the trial in his absence as provided for in the Code.

He was found guilty as charged of the judgement dated 19-03-2012, and an open warrant has been issued for the arrest of the appellant.

Subsequently, he has been arrested and produced before the High Court of Kegalle on 8th October 2020, wherein the learned High Court Judge of Kegalle has pronounced the death sentence on the appellant on the 30th March 2021.

It needs to be noted that although when the appellant was arrested and produced, he has given an opportunity to explain his absence from the Court in terms of section 241 (3) of the Code of Criminal Procedure Act, it has been informed to the Court that he is not making an application in terms of the said section.

The appellant has preferred an appeal challenging both the conviction and the sentence on 13th April 2021, almost 10 years after the conviction but within 14 days after the sentence.

At the hearing of this appeal, the learned Deputy Solicitor General (DSG) raised an objection as to the maintainability of this appeal on the basis that the appeal has been preferred out of time.

However, it is the view of this Court that since the sentence has been pronounced only on the 30th March 2021, there exists no basis to conclude the appeal has been filed out of time as contended by the learned DSG, although the appeal is against both the conviction and the sentence.

Facts in Brief

Manel Jayasinghe (PW-01) was the wife of the deceased. While at home around 1.00 pm on 3rd June 2001, a neighbour has come and informed her that her husband has been attacked by Raffiel's grandson and get ready to go to the hospital. After getting this information, she has run towards the place where it was informed that the attack took place, which was about one mile away from her home near a place called Weddagala Temple. When she reached there, she has observed her husband being taken in a van and she too has got into it. There had been several other villagers in the van who were helping her husband to be

taken to the hospital. She has observed her husband in a pool of blood and with great pain.

While traveling towards the hospital, she has inquired from her husband as to what happened. He has replied stating “කෝරල මට පිහියෙන් ඇන්නා. මම පාරේ ඒ අයිනෙන් ආවා, එයා පාරේ ඒ පැත්තෙන් ආවා. එයා ඒ පැත්තෙන් ඇවිත් එක පාරටම පැන්න ගමන් පිහියෙන් ඇන්නා. තව පාරක් අනින්න හදනවිට ගල් දෙකක් ගෙන පැන්නුවා. නැත්තම් මට ආයේ අනිනවා.”

The witness has identified the mentioned Korala as the appellant who was well known to her being a fellow villager. The deceased has succumbed to his injuries on the following day at the Intensive Care Unit of the Colombo National Hospital.

Under cross-examination, she has explained that she went to the police on the day of the incident itself and gave a statement, and gave another statement after the death of her husband. According to what has transpired in the cross-examination, it is clear that her statement has been taken down by the police on 5th June 2001, which was after the passing away of the deceased. Although she has stated that she made a statement to police soon after the incident on 3rd June, it appears that it has not been recorded, and it was only after the death, her statement has been recorded.

PW-03, Gunawathi is a relative of the appellant who lived in the village of Poththekanda. On 3rd May 2001, she was at home preparing meal. She has heard a motor bicycle coming on the road which runs in front of her house and had come out to inquire. It was the appellant who was riding the motorbike. He has come and stopped the bike in front of the house. She has observed him holding a knife in his mouth. The appellant had taken the knife to his hand and had told the witness “මම දෙන්නෙකුට වැඩක් දුන්නා” and had left. This was around 12.30 pm on that day. Later, she has come to know about the stabbing incident where the deceased Munasinghe has received injuries.

PW-04, Leelawathi was a fellow villager of the deceased as well as the appellant. Her house had been at a lower elevation to the road that runs through the village.

While working outside of her home, the deceased Munasinghe had come along the road and had informed her that Korala stabbed him. She has observed him covered in blood. She and the other fellow villagers have taken steps to take the injured to the hospital.

PW-08 Nimal Weerasinghe was another fellow villager who has been with one Weeraratne and Premasiri when the deceased who had come with bleeding injuries and informed them that Korala stabbed him. He has observed a bleeding injury on the right side of his chest. PW-09 was the Premasiri mentioned by PW-08 who has corroborated the evidence of PW-08, where he too had been told by the deceased that Korala stabbed him. PW-07 is the Weeraratne mentioned by PW-08 in his evidence. He too had corroborated the evidence of PW-08 and 09 as to what the deceased stated to them. All of them have identified the appellant as the person mentioned by the deceased as Korala. PW-08 Weerasinghe has stated under cross-examination, that there is another person called Korala in Weddawala area but he was an old person.

Apart from the other official witnesses, the Judicial Medical Officer (JMO) who has conducted the postmortem of the deceased has given evidence in this trial, and had marked the Postmortem Report as P-01. The JMO has observed five injuries and had observed injury number 01, which has been to the right side of the chest as the fatal stab injury, which has resulted in the death of the deceased.

There had been no opportunity for the trial Court to consider whether a defence should be called or not based on the evidence adduced before the Court, as the appellant had absconded the Court by then.

After considering the evidence placed before the Court, the learned High Court Judge found the appellant guilty as charged and after he was arrested and produced, the learned High Court Judge who presided over the Court, then, has pronounced the mandatory death sentence upon the appellant.

The Grounds of Appeal

The learned Counsel for the appellant urged the following grounds of appeal for the consideration of the Court.

1. The appellant was denied a fair trial.
2. The prosecution has failed to prove the identity of the appellant.
3. The prosecution failed to prove the dying declaration of the deceased.
4. The charge was not proved beyond reasonable doubt against the appellant.

Consideration of the Grounds of Appeal

As the grounds of appeal are interrelated, I will now proceed to consider all the grounds together.

The argument that the appellant was denied of a fair trial was on the basis that the evidence establishes that witness number 01 has made two statements to the police, but only one statement had been provided to the appellant at the trial. Referring to the provisions of section 147 of the Code of Criminal Procedure Act, it was the position of the learned Counsel that the police have failed to provide the first statement allegedly made by PW-01 to the police at any stage of the non-summary inquiry or along with the indictment. It was his view that this has denied a fair trial for the appellant, as he had no opportunity of studying the alleged first statement made by PW-01 to the police.

However, I find no basis to conclude that PW-01, who was the wife of the appellant had made two written statements to the police. It is abundantly clear that the two statements referred to by the witness in her evidence refer to the oral statement she may have given to the police soon after the incident and the statement recorded by the police after the death of her husband. It appears that the police have not taken steps to record a formal statement from her initially,

but had done so only after the death of the deceased, which was the statement handed over to the appellant.

It appears that the learned Counsel for the appellant in formulating a claim that a fair trial has been denied to his client, in an attempt to give a different interpretation to the evidence of PW-01, for which I find no merit. I find that at the trial, the position taken up on behalf of the appellant had been that witness number 01 made only one statement to police and that was after the death of her husband, and not that she made two statements as stated by her in evidence. The position taken up by the appellant had been that she had made a belated statement to police, and not that she made a statement immediately after the incident.

When it comes to the argument that the prosecution has failed to prove the identity of the appellant as the perpetrator of the crime is concerned, there cannot be any doubt that the deceased has informed his wife and several other fellow villagers soon after the incident that it was Korala who stabbed him.

It is very much clear that the person known as Korala in the village was the appellant. Although PW-08 mentions about another person called Korala, he was a person of old age and cannot be regarded as the person mentioned by the deceased as the person responsible for his injuries. The appellant has never taken up the position at the trial Court that he is not the person referred to by the witnesses as Korala. Being a fellow villager and a person known to the deceased as well as the other witnesses, there was no question as to whether the deceased has failed to identify the person who stabbed him as the incident has happened in broad daylight.

Soon after the incident, PW-03 who was also a relative of the appellant has seen him coming in a motorbike while holding a knife in his mouth. He has stopped his bike and had talked to PW-03, where he had stated that “මම දෙන්නෙකුට වැඩක් දුන්නා” which is very much consistent with the evidence of other witnesses.

I do not find any merit in the argument that the prosecution has failed to prove the identity of the appellant as the identity was never been in doubt throughout the trial.

I find no merit in the argument that the prosecution has failed to prove the dying declaration either.

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 the 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 been 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:

“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 evidence of all the relevant witnesses that the deceased has received only one stab injury to his chest and although he was bleeding heavily, he was conscious while taken to the hospital in a van. As any person would naturally do, when his wife asked what happened, he has revealed that it was the appellant who caused injuries to him. The several of the other witnesses who were in the vehicle has overheard what the deceased told his wife.

Soon after the incident, the deceased has gone near the house of PW-04, where PW-07, 08 and 09 also has been. The deceased has informed them that it was Korala, who stabbed him. This shows that the deceased had been consistent as to what happened to him. It is after informing PW-04, 07, 08 and 09, he has informed his wife in more detail the incident faced by him, while being taken to the hospital.

The evidence of the JMO is very much consistent with the fact that the deceased had the ability to talk soon after the incident and the death was not instantaneous.

For the reasons as stated above, I find no basis for the contention that the prosecution has failed to prove the charge against the appellant beyond reasonable doubt.

I am of the view that this is a case where the prosecution has proved that it was the appellant who committed the murder, based on the dying declaration of the deceased as well as other evidence consistent with the version of events that had taken place in relation to the crime.

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