IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal against an order of the High Court under Section 331 of the Code of Criminal Procedure Act No: 15 of 1979.

Alagan Sasitharan

Accused-Appellant

Court of Appeal Case No:
HCC 107/15
HC Vavuniya Case No:
2084/10

v.

The Attorney General

Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Dr.Ranjith Fernando for the Accused-Appellant
Dileepa Peiris, SDSG for the Respondent

Written Submissions: On 26.08.2019 (by the Accused-Appellant)
01.06.2018(by the Respondent)

Argued On: 24.07.2023

Decided On: 25.09.2023

Sasi Mahendran, J.

The 1st Accused (hereinafter referred to as 'the Accused') along with two others, Thiyagarajah Kumar and Thillaiyambalam Arunthawarjah, were indicted before the High Court of Vavuniya for the alleged murder of one Thiyagarajah Thiripuradasan (the Deceased). This offense is punishable under Section 296 read with Section 32 of the Penal Code.

The prosecution presented the evidence of seven witnesses and marked documents as P1 to P7. The Accused testified from the witness box. At the conclusion of the trial, the Learned High Court Judge acquitted and discharged the 2nd and 3rd Accused. However, the Accused was convicted of murder, and a death sentence was imposed.

Dissatisfied with this conviction, the Accused has appealed to this court.

In the instant case, it is imperative to note that the prosecution has heavily relied on the dying declaration made to the Police officer (PW5) and two statements by the Deceased to PW1 and PW2 concerning his cause of death. These statements were deemed admissible and relevant under Section 32(1) of the Evidence Ordinance. Before we analyze the evidence presented to us, we must consider how the courts have historically interpreted and accepted the concept of a dying declaration. We are mindful of the judgements relied by Justice Sisira De Abrew on considering the admissibility of the dying declaration as an item of evidence against the accused in the case of **Ranasinghe v Attorney-General [2007], 1 S.L.R 218, His Lordship Sisira De Abrew** held that:

"When a dying declaration is considered as an item of evidence against an accused person in a criminal trial the trial Judge or the jury as the case may be must bear in mind following weaknesses,

(a) The statement of the deceased person was not made under oath,

(b) The statement of the deceased person has not been tested by cross examination

(c) That the person who made the dying declaration is not a witness at the trial"

He has relied on the following cases to strengthen his proposition.

In **The King v Asirvadan Nadar [1950], 51 NLR, 322, His Lordship Gratiaen J** held that:

"As the evidence was presented to the Jury at the trial, the statements contained in the dying deposition P9 formed to a very large extent the foundation of the case against the accused, and it was in our opinion imperative that they should have been adequately cautioned that, when considering the weight to be attached to this evidence, they should appreciate that the statements of the deponent had not been tested by cross-examination.

The reliance was also placed on the decision in **Justinpala v. Queen [1964], 66 NLR, 409, His Lordship T.S Fernando J** held that:

"While the necessity of a direction in regard to corroboration of a dying declaration or deposition must depend on the particular circumstances of each case, we think the jury's attention should ordinarily be drawn to the fact that the declaration or deposition, as the case may be, has not been tested in the usual mode available to a party affected by it, viz. by cross examination. There may, of course, be other ways of testing the truth of such a statement, as for example, by the presence or absence of other evidence corroborating the statement. In this apparent conflict of decisions of this Court, we prefer to follow the earlier decision in Asirvadan Nadar's case (supra) in so far as it requires a trial judge to direct the jury in regard to the absence of cross-examination."

Further **Justice Sisira De Abrew** held that in the case **Ranasinghe v Attorney-General [2007] (Supra):**

"As there are inherent weaknesses in a dying declaration which I have stated above, the trial Judge or the jury as the case may be must be satisfied beyond reasonable doubt on the following matters,

(a) Whether the deceased, in fact, made such a statement,

(b) Whether the statement made by the deceased was true and accurate,

(c) Whether the statement made by the deceased person could be accepted beyond reasonable doubt,

(d) Whether the evidence of the witness who testifies about the dying declaration could be accepted beyond reasonable doubt,

(e) Whether witness is telling the truth,

(f) Whether the deceased was able to speak at the time the alleged declaration was made."

When we evaluate the truthfulness and reliability of the said dying declaration made by the deceased, we will take into account the above observations

I shall now proceed with the facts and circumstances of this case.: According to PW1, Thiyagarasa Manjula (sister to the deceased), on the fateful day of 24th of November 2011, PW1, their mother (PW2), and the Deceased slept in the hall of their house. At approximately 4:30 a.m., PW1 heard a gunshot. She woke up after the Deceased cried out, "They have shot me." The Deceased told her, "Sasidaran shot me. Look for him using the torch." Upon flashing the light, she identified three people from a 2ft distance: Sasidaran (the Accused), who was armed with an object resembling a gun, Kumara, and Aruthawarasa, who held a lit flashlight. This flashlight helped PW1 further identify the individuals. She had known the Accused prior to these events as a member of the village. After PW1 shouted, they fled the area. The Deceased further disclosed that the Accused had shot him. Subsequently, PW1, along with PW2, took the Deceased to the Chettikulam Hospital. She indicated that there was a bullet injury on his left arm and chest. According to PW1, the Deceased was able to speak for 6 days, even after being transferred from the Vavuniya Hospital to the Anuradhapura Hospital. She also stated that the police took a statement from the Deceased before his demise. In her cross-examination, she mentioned that she did not see the Deceased being shot. She had only woken up due to the noise. When the Counsel for the 3rd Accused questioned her, PW1 confirmed that the shooting occurred at the rear of the house. She saw the Accused face-to-face as they ran towards the rear. However, she did not witness the shooting but relied on the Deceased's words. Considering PW1's evidence, the following facts are evident:

1. The Deceased could identify the Accused because one of them held a flashlight, ensuring enough light for identification.

2. The Deceased made a dying declaration to the police, strengthened by PW2's evidence that he told her Sasidaran had shot him. Shortly after the Deceased's statement, she saw the 1st Accused fleeing with a gun, accompanied by two others.

No contradictions or omissions were proven or marked by the Defense. The logical conclusion is that her evidence at trial is consistent with her police statement. Considering the evidence

from PW2, *Thiyagarasa Punithawathy* (mother to the Deceased), she claims that the accused, known to her only as Sasi from the same area, shot her son at 4:00 a.m. The Deceased told PW2, "Mother, Sasi has shot me," and asked PW1 to use the torch. She observed the injury on his chest. They then took him to the *Chettikulam* Hospital with PW1 and a neighbor who wasn't called for testimony. She confirmed that the Deceased spoke and that she heard one gunshot. Upon examining PW2's evidence, it corroborates PW1's testimony. Reviewing the evidence, both PW1 and PW2 stated that the Deceased said Sasi (the 1st Accused) shot him. Both prosecution witnesses recounted the Deceased's words post-incident. PW1 first mentioned the Deceased's cry, "They have shot me," implying multiple perpetrators. He then said, "*Sasidaran* shot me, look for him using the torch." PW2 stated that the Deceased said, "Mother, Sasi has shot me." In our view, the credibility of both witnesses remains intact regarding the Deceased's claims. We believe there's no doubt about the Deceased's words concerning "Sasi shot me." Another witness also heard the Deceased's dying declaration. According to the prosecution, PW5, P.S 56313 Weerasinghe, went to the Vavuniya Hospital on the day in question. There, he questioned the Deceased, receiving treatment at the Emergency Unit. The Deceased responded, and PW5 took notes. The Deceased mentioned that at 4:30 a.m., he heard someone call, "Rasa! Rasa!" Upon waking, he saw three individuals, including the Accused with a trap gun. The Accused shot him, injuring his right chest area. PW1 and PW2 then took him to the hospital. PW5 couldn't get the Deceased's signature due to his critical state. In his cross-examination, PW5 stated he saw none of the Deceased's relatives at the hospital. He only focused on obtaining the Deceased's statement, given his critical condition. The conversation lasted about 10 minutes, with the Deceased conscious throughout. After recording the statement, the Deceased was moved to the Anuradhapura Hospital. PW5 explained that he couldn't get the Deceased's signature because both his hands had cannulas, he was on artificial respiration, and was receiving a blood transfusion. PW5 never asked the Deceased how he identified the Accused. PW5's testimony corroborated the evidence given by PW1 and PW2. No contradictions or omissions were noted. Thus, we believe PW5 is a credible witness whose evidence can be accepted.
A similar situation had arisen in the case of **Lukshman v Republic of Sri Lanka [2010] 2, S.L.R. 152, His Lordship Upaly Abeyrathne J** held that:

"The prosecution is mainly based on the dying declaration of the deceased. Sergeant Sirisena in his evidence testified that he went to the three wheeler and questioned the deceased. She

said “මාපිටිගම සල්ලි පොලියට දෙන ලකී පිහියෙන් ඇන්නා” He took down what the deceased said in a piece of paper and entered them in the crime book (CNB). The CNB was produced before court and has been subjected to cross examination. Paragraph 113 contained the said dying declaration. It was further revealed from the evidence that while the three-wheeler was halted in the police station, sergeant Sirisena upon the instruction of the OIC went to the three-wheeler and questioned the deceased as to what happened. Then the deceased made the said dying declaration and he proceeded to take it down. Thereafter sergeant Sirisene advised the persons who accompanied the deceased to admit the deceased to hospital.”

“Hence it is understandable from the said evidence that sergeant Sirisena’s said visit was not made in order to record the dying declaration of the deceased. At the cross examination sergeant Sirisena said that since the deceased was in a critical condition with heavy bleeding he promptly proceeded to take down the dying declaration in a piece of paper and thereafter he entered the dying declaration in the CNB. In the aforesaid circumstances I do not find any irregularity caused in the course of the recording of the dying declaration which would be prejudicial to the substantial rights of the Appellant. When the authenticity of the dying declaration is not blameworthy it is admissible evidence against the Appellant.”

We note that all three witnesses indicated that the Deceased had told them that Sasi shot him. These dying depositions were made at different times. The question arises: should the statement made remain consistent throughout?

In the Indian case of **Smt. Kamala Vs. State of Panjab (1993) 1 SCC 1, His Lordship K. Jayachandra Reddy, J** held that:

“It is also settled in all those cases that the statement should be consistent throughout if the deceased had several opportunities of making such dying declarations, that is to say, if there are more than one dying declaration they should be consistent. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without even any corroboration. In a case where there are more than one dying declaration if some inconsistencies are noticed between one and the other, the court has to examine the nature of the inconsistencies namely whether they are material or not. In scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.”

We hold that the dying depositions were consistent throughout.

In the evidence of PW4, the Judicial Medical Officer, he reported two gunshot injuries adjacent to each other on the right side of the Deceased's chest, and the cause of death was due to the injuries sustained. He further stated that, given the injuries sustained, the deceased was able to talk. When we analyze the evidence presented to the Learned High Court Judge, we are convinced that the following matters have been satisfied beyond reasonable doubt with regard to the dying declaration made by the Deceased:

1. The dying declaration was in fact made by the Deceased.

2. The Statement was true and accurate.

3. The Statement made by the Deceased could be accepted beyond reasonable doubt.

4. Prosecution witnesses PW1, PW2, and PW5 are telling the truth.

5. The Deceased was able to speak at that time.

One of the objections raised by the Counsel for the Defense was that there was no proper identification of the dead body. It is imperative to note that PW4 stated that PW1 and PW2 had identified the body of the Deceased. However, this was not mentioned in the testimonies of PW1 and PW2 regarding the identification of the body. Albeit the names of those who identified the body are mentioned in the postmortem report as PW1 and PW2. Furthermore, according to PW1, she had taken the injured to the hospital. A similar issue was raised in the case of **Namaratne and Another v. The State, [2001] 2 S.L.R, 273 at page 278, His Lordship Kulatilaka, J** held that:

"It is manifest that the learned counsel for the accused-appellants raised the issue that the dead body was not identified for the reason that in the post mortem report prepared by Dr. S.M. Panagoda he had not entered the names of persons who had identified the dead body in the relevant column. But the post mortem report clearly indicates that the Doctor had performed the post mortem examination at the request of Mr. S. Wattegama, Acting Magistrate of Avissawella and on the date he conducted the post mortem i.e. 20.3.1989 he was aware of the date and the time of death. In that column he has put the date as 15.3.1989 and on the post mortem report he has put the name of the deceased person as Mathota

Gamaralalage Podi Appuhamy. Hence the post mortem report speak for itself for the reason the Doctor was well aware of the fact that he was performing the post mortem on the body of Matota Gamaralalage Podi Appuhamy. Further Matota Gamaralalage Enohamy who made the first complaint to the effect that her brother Matota Gamaralalage Podi Appuhamy was missing, in her evidence has categorically stated that when the body was exhumed she identified the body as that of her brother. (Vide pages 56 and 57 of the original record). Hence we do not see any merit in the submission made by the learned counsel regarding the identity of the body of the deceased"

Recently in the case of **Athudage Premadasa v AG, CA Appeal No. 17/2017, decided on 4.04.2018, His Lordship Achala Wengappuli J** had referred the above judgement.

Therefore, we are of the view that there is no merit in the submission made by the Learned Counsel for the Accused regarding the identification of the Deceased's body. Upon perusal of the evidence put forward, it emerges that all three witnesses have indicated that the Deceased told them, "Sasi (the Accused) had shot him" after he had received gunshot injuries. It should be noted that there was no time to tutor a dying man to tell a lie. At all material times, he was in a sound state of mind despite the injuries sustained. Therefore, we have no reason to doubt the truth of the dying declarations and their reliability. In this context, and for the reasons more fully described above, we are of the view that there is no necessity to interfere with the conviction of the Accused. We, therefore, affirm the conviction and the sentence imposed upon the Accused. We dismiss this appeal.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL