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/0054/22

High Court of Hambamtota

Case No: HC/17/2006

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Thuwan Anush Yunush

ACCUSED

AND NOW BETWEEN

Thuwan Anush Yunush

ACCUSED-APPELLANT

Vs.

1.Democratic Socialist Republic of Sri Lanka

COMPLAINANT-RESPONDENT

2.The Attorney General

Attorney General's Department

Colombo 12

2ND RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Nalin Ladduwahetty, P.C. with Kavithri Ubesekara and Rajith Samarasekara for the Accused Appellant
	: Rajindra Jayaratne, S.C. for the Respondent
Argued on	: 24-07-2023
Written Submissions	: 20-09-2022 (By the Accused-Appellant)
Decided on	: 01-11-2023

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Hambantota for causing the death of one Siththinisa Nishadeen on 08-04-2004, and thereby committing an offence punishable in terms of section 296 of the Penal Code.

The allegation against the appellant was that he deliberately set fire to the deceased who was his legally married wife.

After trial without a jury, the learned High Court Judge of Hambantota, by his judgement dated 17-12-2021, found the appellant guilty as charged, and the appellant was sentenced to death accordingly.

It is apparent from the judgement that the conviction has been reached based on an alleged dying declaration of the deceased and the other circumstantial evidence.

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

Facts in brief

The deceased was the elder brother's daughter of PW-01. The deceased was married to the appellant and had one child out of the marriage. At the time of her death, she had been 17 years of age. On the day of the incident, namely 08-04-2004, the deceased had come to the house of PW-01 around 7.15 am and after chatting with her for some time, has left the house and gone to her house. After some time, she had heard a female voice and some smoke emanating from the direction of the deceased's house and has later come to know that the deceased has received burn injuries. When she visited the house, she has seen the deceased on a chair with burn injuries all over her body. Even though she has questioned the deceased as to what happened, she was not in a position to talk. The other villagers have taken the deceased to the hospital where she has succumbed to her injuries on the 11th April 2004 at the Kalubowila hospital.

According to the evidence of PW-01, the deceased and her husband lived a normal life other than the routine issues faced by a married couple. The appellant was working in a saltern at that time, and although they had quarrels, they were limited for that moment. It has been the evidence of PW-01 that there were quarrels between the two when the appellant received his salary on the basis that he did not give enough money to the deceased.

She has given evidence in Court stating that when she saw the deceased with burn injuries, the appellant did nothing to take her to the hospital. However, the defence has pointed out several contradictions in that regard in relation to her evidence before the non-summary inquiry, where the witness has stated when she went to the house, the appellant was near his wife and in distress while crying and holding their child, and only the appellant was near her at that time.

The prosecution has called PW-04, the doctor who entered some notes in the bedhead ticket marked P-01(අ). She has entered these notes while the deceased was warded in ward number 05 of the Kalubowila hospital after she was transferred from Matara hospital. On the bedhead ticket, the doctor has noted

that the incident happened on 08th April 2004 around 9.00 am and it was done by the husband of the patient. It is clear from the evidence of the doctor that she was unable to say whether it was the deceased who said that to her or somebody else.

PW-07, the Judicial Medical Officer (JMO) who conducted the post-mortem marked P-02 has testified that the death of the deceased was due to extensive burn injuries suffered by her over 75 percent of her body. In his evidence, he has categorically stated that although she had 75 percent of her body covered with burn injuries, she had no injuries to her face and the neck and she could have spoken until her death.

PW-03 is the witness of importance when it comes to the dying declaration relied on by the learned High Court Judge to determine that the prosecution has proved the case against the appellant.

The deceased had been her elder sister's daughter. PW-03 who lived in the Kegalle area is the person who was near the bedside of the deceased when she succumbed to her injuries. She has been with her from the 10th morning until her death on the 11th of April 2004. According to her, the deceased was able to talk and the witness has questioned her as to what happened. The deceased has answered saying that her husband was not looking after her and not even providing and feeding her. Every time she questioned the deceased, the answer given by her was the same, which goes on to establish that the deceased has not made any allegations against the appellant to the PW-03 who was her mother's younger sister.

A police officer has visited the bedside of the deceased around 8.00-8.30 in the morning on the 11th. The witness has stated to the deceased "a police uncle has come, and if possible, talk to him." It has been her evidence that at that instant, she told the police officer aloud that "my husband set me on fire." A few minutes after making that statement to the police officer, the deceased has passed away.

The police officer who supposed to have taken down the statement of the deceased, which the prosecution relied on as a dying declaration, was not a listed witness in the indictment. After PW-03 gave evidence and said the said dying declaration was made to a police officer, the prosecution has gotten activated and has listed the said police officer as PW-12.

According to the evidence of the police officer, at the time relevant to this incident, he had been working attached to the hospital police post of Kalubowila hospital. After receiving the information that a person has been admitted to the hospital with burn injuries, he has gone to the relevant ward on 11-04-2004 and questioned her. According to him, she was in a very serious condition at that time, and had stated that her husband Thuwan Anush poured kerosene on her at 9.30 pm on 08th April 2004.

He has marked and produced the relevant extract which carries the alleged statement recorded by him as X-01 before the trial Court. According to him, the statement has been given around 9.15 am on the 11th and it had taken about 7 minutes to record the statement. He had come to know around 10.00 am that the burn victim has passed away.

However, it is abundantly clear from PW-12's evidence that he has not recorded what the deceased told him in its exact words, but recorded it in his own words as he thought fit.

The other police officers who conducted investigations into the incident also has given evidence describing their investigations in relation to the incident.

After the closure of the prosecution case, the learned High Court Judge has decided to call for a defence from the appellant. The appellant has made a dock statement and had denied that he set fire to his wife. It had been his position that when he came home on that day, his wife was crying and she was saddened that her mother is coming to separate them. She did not cook for the night because of this and when he was inside the room with the child, he heard a noise in the living area, and when he went out, he saw his wife on fire. He has

attempted to douse the fire, and pour water on her. According to him, he was involved in taking the wife to the hospital. He has denied that he is responsible for the death of his wife.

On behalf of the appellant, a three-wheeler driver who claims that he took the deceased along with the appellant to the hospital in his three-wheeler has given evidence. Apart from that fact, nothing has come out from the evidence of the said witness called on behalf of the appellant.

The learned High Court Judge in his judgement has correctly determined that the note made by PW-04, the doctor who was attached to the Kalubowila hospital at that time in the bedhead ticket, cannot be considered as a statement made by the deceased in relation to her cause of death.

The learned High Court Judge after having considered the relevant statutory provisions as well as the judicial decisions in relation to the manner how a dying declaration should be considered as relevant, has considered several infirmities in the alleged dying declaration, the deceased has made to PW-12.

The learned High Court Judge has also considered the evidence of PW-03, the relative who was near the deceased when the alleged dying declaration to the police officer was made and had come to a conclusion that the alleged dying declaration can be accepted as credible evidence against the appellant.

The learned High Court Judge has considered the evidence of PW-02 in relation to the behaviour of the appellant when she went to his house also as a relevant fact that substantiates the alleged dying declaration of the deceased.

The learned High Court Judge has determined that the prosecution has proved the case beyond reasonable doubt based on the evidence of PW-03 and PW-12 in relation to the alleged dying declaration made by the deceased, and the evidence relating to the behaviour of the appellant at the time of the incident.

The Grounds of Appeal

At the hearing of the appeal, the learned President's Counsel raised the following grounds of appeal for the consideration of the Court.

1. Can the alleged dying declaration be admitted in evidence in the way it was admitted.
2. Can the alleged dying declaration be admitted as evidence in view of the infirmities and contradictions as for the police and medical evidence.
3. The learned High Court Judge has failed to give adequate considerations to the defence put forward by the appellant.

The learned President's Counsel submitted that the evidence led in this case was wholly inadequate to determine that the charge was proven beyond reasonable doubt.

He pointed out to the deficiencies in the evidence in relation to the alleged dying declaration made by the deceased to PW-12 and the manner it has been recorded by him. It was his position that due to the deficiencies in the alleged dying declaration, the evidence of PW-03 who is said to have overheard the dying declaration has also become doubtful as the prosecution has failed to lead the dying declaration made, in terms of section 32(1) of the Evidence Ordinance.

He pointed out several infirmities in the evidence of other witnesses and was of the view that their evidence in no way corroborate the evidence in relation to the alleged dying declaration which has been based upon to convict the appellant.

According to the document marked X-01, which was the statement that has been recorded by PW-12, it has been recorded at 9.15 am. However, the learned President's Counsel pointed to the time of death recorded in the Post-Mortem Report marked P-02 which was also 9.15 am.

He was of the view that the learned High Court Judge was misdirected when it was determined that the subsequent conduct of the appellant after his wife received burn injuries are corroborative of the dying declaration. He pointed out

that the learned High Court Judge has failed to consider the obvious contradictions in that regard in the evidence of PW-01 which has been pointed out to the Court during the trial.

The learned State Counsel who represented the Hon. Attorney General, having considered the relevant facts, circumstances, and the law, informed the Court that he is in no position to justify the reasons given by the learned High Court Judge in determining that the prosecution has proved the case beyond reasonable doubt against the appellant.

This Court would like to express our appreciation towards the learned State Counsel for assisting the Court as a responsible officer of the Court in dispensing justice.

Consideration of The Grounds of Appeal

The alleged dying declaration relied on by the learned High Court Judge to find the appellant guilty has been made to PW-12. As considered correctly by the learned High Court Judge in his judgement, the relevant statutory position can be found in section 32(1) of the Evidence Ordinance which reads as follows,

> **32. (1) When the statement is made by a person as to the course of his death or to any of the circumstances of the transaction which resulted in his death, in cases in which the course 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 whatever may be the nature of the proceedings in which the cause of his death comes into question.**

It appears from the judgement that the learned High Court Judge has well considered the factors that need to be considered by a trial Judge when determining whether to accept a dying declaration as relevant in a criminal trial.

In the case of **Ranasinghe Vs. The Attorney General (2007) 1 SLR 218,** the accused-appellant was convicted for the murder of his mother-in-law and was sentenced to death. On appeal, it was contended that the trial Judge has not considered the inherent weaknesses of a dying declaration.

Held:

1. 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 must bear in mind the following weaknesses.

a. *The statement of the deceased person was not made under oath.*
b. *The statement of the deceased has not been tested by cross-examination.*

2. The trial Judge or jury 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 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 the witness is telling the truth.*
f. *Whether the deceased was able to speak at the time the alleged declaration was made.*

The evidence of PW-12 clearly indicates that he has not recorded what the deceased told him in its exact words, but has recorded it in his own words. I am of the view that such a recording would not qualify as a dying declaration made

by the deceased in relation to her cause of death, because of the infirmities that are inherent to a dying declaration as I have considered earlier.

In the case of **The King Vs. Asirvadan Nadar 51 NLR 322**, it was held that,

> *"Whenever Magistrates are called upon to record dying declaration in accordance with the procedure laid down in chapter 23 of the criminal procedure code, they should record the deponent's statements in the words which he actually employs or when this is not practicable, in an accurate translation of those actual words. Whenever questions are put to a deponent for the purpose of elucidation, the form of the question as well as of the answer should be precisely recorded."*

In the case of **Rex Vs. Mitchell (1892) 17 Cox C.C. 503 at 507 Cave, J.** said,

> *"A declaration should be taken down in the exact words which the person who makes it uses, in order that it may be possible, from the words, to arrive precisely at what the person making the declaration meant. When a statement is not the ipsissima verba of the person making it, but is composed of a mixture of questions and answers, there are several objections opened to its reception in evidence which it is desirable should not be opened in cases in which the person has no opportunity of cross-examination. In the first place, the questions may be leading questions, and in the condition of a person making a dying declaration there is always very great danger of leading questions being answered without their force and effect being fully comprehended. In such circumstances, the form of the declaration should be such that it would be possible to see what the question and what was the answer, so as to discover how much was suggested by the examining Magistrate and how much was the production of the person making the statement."*

In the matter under appeal, the PW-12 has admitted that he did not record the dying declaration in the words uttered by the deceased. Although the learned High Court Judge has drawn his attention to that fact, it has been decided to

accept what the PW-12 has written in his own words to take that as the words uttered by the deceased to him.

The PW-12 has recorded that the deceased told him the incident happened at 9.30 in the night. However, the evidence led in this case clearly suggestive that the incident had happened in the morning hours of the day.

Under the circumstances, I am of the view that the evidence of PW-03 where she says that she overheard what the deceased said to the police officer becomes doubtful in relation to what she heard the deceased telling the police officer. PW-03 is a close relative of the deceased and had been with her at her bedside from the 10th morning until her death on the 11th. She has questioned the deceased several times as to what happened, but the deceased has failed to implicate her husband to her receiving of burn injuries. What she has stated had been that the husband does not treat her well and nothing else.

PW-03 has stated in her evidence what the deceased told PW-12 was her husband set her on fire. The PW-12 has recorded the statement to indicate that the deceased told him that her husband poured kerosene on her and set her on fire. It is also in evidence that soon after the said alleged statement, the deceased has passed away.

The learned High Court Judge has considered the behaviour of the appellant soon after the incident on the basis that he had no intention to take the deceased to a hospital, apparently based on the evidence of PW-01. Although the PW-01 has claimed that the appellant did nothing and not to be seen when she came to the house of the deceased while giving evidence before the trial Court, her evidence during the non-summary proceedings before the Magistrate's Court had been very much different. She had testified that when she came to the house, the appellant was near the deceased and crying while holding their child in his hand. She had testified that it was the appellant who poured water on the deceased, which goes on to show that the PW-01 was not forthcoming with what

actually happened and what she saw on that fateful day when she gave evidence before the High Court.

The witness who gave evidence on behalf of the appellant has given clear evidence to establish that it was with the appellant he took the deceased to the hospital in his three-wheeler, which also shows that the evidence of PW-01 where she says that the appellant did nothing was doubtful.

I am unable to agree with the learned High Court Judge's determination that the post-conduct of the appellant corroborates the dying declaration of the deceased due to the above infirmities.

There was no evidence before the Court to show that the deceased and her husband was constantly quarrelling in their married life. The evidence of PW-01 who was a neighbour and a relative was that although they had issues in their married life, those issues lasted for the moment and they had a married life which cannot be considered as a situation where the appellant has harassed his wife continuously.

Although there may be reasons in evidence given before a Court to believe that there are suspicious circumstances against the appellant, suspicious circumstances in itself do not establish guilt.

In the case of **Queen Vs. M. G. Sumanasena 66 NLR 350**, it was held,

> *"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 evidence 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 not only establishes the accused's guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial."*

I am of the view that the learned High Court Judge has over relied on the evidence of PW-12 despite the obvious drawbacks of his recording of the alleged dying declaration to justify the infirmities in that relation.

I am in no position to agree that there was evidence corroborating the alleged dying declaration when in fact there was no evidence which proves beyond reasonable doubt that the post-conduct of the appellant amounts to any corroboration of the dying declaration.

I find that if the evidence of PW-01, PW-03 and that of PW-12 was considered in its correct perspective, there was no basis for the learned High Court Judge to determine that the prosecution has proved the charge beyond reasonable doubt against the appellant.

For the reasons as set out above, I find strong merit in the grounds of appeal urged by the learned President's Counsel, and is of the view that the prosecution has failed to prove the case beyond reasonable doubt.

Accordingly, I allow the appeal of the appellant and set aside the conviction and the sentence dated 17-12-2021 by the learned High Court Judge of Hambantota.

The appellant is acquitted of the charge preferred against him.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal