

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

Tennakoon Mudiyanseelage Palitha
Tennakoon.

Accused-Appellant

C.A. Appeal No.173/11

H.C.Kandy No. 84/2003

Vs.

The Hon.Attorney-General.

Respondent

Before : **Sisira J. de Abrew, J.**
 P.W.D.C. Jayathilaka, J

Counsel : Ranil Samarasooriya with M.R.Ranasinghe for the Accused-
 Appellant.

A.Jinasena DSG for the Attorney-General.

Argued &

Decided on 05.09.2013.

Sisira J.de Abrew, J.

Heard both Counsel in support of their respective cases.

The accused-appellant in this case was convicted of the murder of a man named Palugedera Thilakaratne Banda and was sentenced to death. Being aggrieved by the said conviction and the sentence he has appealed to this Court.

The case of the prosecution completely depended on two dying declarations made by the deceased person and recovery of a knife under Section 27 of the Evidence Ordinance. According to the facts of this case when the deceased person was lying fallen on the road side after receiving injuries the villagers took him to the village hospital. On the way to the hospital he was taken to the police station. I.P.Jayasinghe(the investigating police officer) says that when he questioned the deceased person as to who stabbed him he (the deceased person) answered in the following language. "පාලිත මස්සිනා. පාලිත තෙනෙනකෝන් " (brother-in-law Palitha. Palitha Tennekoon) Thus it is very clear from the evidence of I.P.Jayasinghe that the deceased person made a dying declaration to him to the effect that the accused person in this case stabbed him(the deceased person). When the above dying declaration was being made Anura Weerakoon who was a three wheeler driver too was present near the

police officer. He too heard the same dying declaration being made to the police officer.

Jayasinghe is one of the neighbours who ran to the place of the incident. According to him, he questioned the deceased person while he was taken to the hospital. When he questioned as to what happened to him (the deceased person), he replied that Bandara stabbed him. The accused-appellant is also called Bandara. Learned Counsel for the accused-appellant submitted that the dying declaration made to Jayasinghe was not heard by Anura Weerakoon who too was present when the dying declaration was being made. He therefore submitted that the dying declaration made to Jayasinghe should be rejected. He contended that the dying declaration made to Jayasinghe should have been ✓ heard by Anura Weerakoon too. There is no rule in Criminal Law ^{that} what was heard by a witness should necessarily be heard by other witness who was present at this place. When considering the argument of learned Counsel for the accused-appellant, I am reminded of the judgment of the Indian Supreme Court in *Bhoginbhai Hirijibhai vs State of Gujarat* AIR 1983 SC 753. Indian Supreme Court in the said case held thus: " the powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder."

For the above reasons I am unable to agree with the contention of learned Counsel for the accused-appellant.

Learned Counsel for the accused-appellant contended that Karunaratne was also present near the police officer when the deceased person made the dying declaration. He contended that the reasonable doubt was created in the prosecution case by not calling Karunaratne as a witness. Should the prosecutor call all the witnesses who are on the back of the indictment? Karunaratne was a witness on the back of the indictment. There is no rule in Criminal Law that the prosecutor should call all the witnesses on the back of the indictment. This view is supported by the judgment of the Privy Council in the case of *King vs Seneviratne* 38 NLR 208 where their Lordships held thus: "the prosecution is not bound to call witnesses irrespective of consideration of number and reliability. In *King vs Chalo Singho* 42 NLR 269, Soertsz,J held thus: "prosecuting Counsel is not bound to call all the witnesses named on the back of the indictment or tender them for cross examination." In *Walimunige John vs State* 76 NLR page 488 His Lordship Justice G.P.A. Silva held thus: "the prosecution is not bound to call all the witnesses whose names appears on the back of the indictment or to tender them for cross examination." For the above reasons I am unable to agree with the contention of learned Counsel for the accused-appellant. The dying declaration in this case was made to an independent witness police officer. It was heard by Anura Weerakoon.

Jayasinghe who is also a lay witness speaks about the dying declaration made by the deceased person. Doctor who conducted the post mortem, says that the deceased could speak after receiving injuries. The accused in his dock statement denied the incident. The police officer who recorded the statement of the accused-appellant recovered a knife in consequence of a statement made by the accused-appellant. The doctor says that the injuries found on the body of the deceased person could be caused by the said knife.

I have considered the evidence led at the trial. I see no reason to interfere with the judgment of the learned trial Judge. I therefore affirm the conviction and the death sentence and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilaka, J

I agree.

JUDGE OF THE COURT OF APPEAL

KLP/-