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

In the matter of an Appeal under section 331 of the Code of Criminal Procedure Act No- 15 of 1979.

Court of Appeal No:

CA/HCC/0045/22

High Court of Gampaha

Case No: HC/283/2006

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Baddegama Ganithage Ranjith Jayantha

ACCUSED

AND NOW BETWEEN

Baddegama Ganithage Ranjith Jayantha

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

COMPLAINANT-RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Naushalya Rajapaksha with Dilan Maduwage for the Accused Appellant
	: Madhawa Tennakoon, DSG for the Respondent
Argued on	: 31-08-2023
Written Submissions	: 13-09-2022 (By the Accused-Appellant)
Decided on	: 01-12-2023

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Gampaha for having caused the death of Dharmakeerthi Abeywickrama *alias* Chaminda on 23-07-2003 at Kadawatha, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

After trial without a jury, the appellant was found guilty as charged by the learned High Court Judge of Gampaha of the Judgement dated 07-10-2021, and accordingly, he has been sentenced to death.

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

At the very outset, it needs to be stated that this is a matter where the conviction has been entirely dependent on the dying declarations, the deceased supposed to have made to several witnesses, and other incidental evidence.

The Facts in Brief

The 1st witness called by the defence had been the PW-03 listed in the indictment. He was the elder brother of the deceased. According to his evidence, the deceased had been working in a bakery belonging to one Saman Mudalali. He has come to know that his brother suffered burn injuries as a result of an incident happened at the bakery. His brother has been receiving treatment for about two and a half months in the Colombo General Hospital and PW-03 was the person who looked after him throughout his stay in the hospital.

While hospitalized, the deceased has informed the witness that he had disputes with a person called Ranjith. He has told him that while he was sleeping in the bakery, he was awakened when something was poured on him where he saw Ranjith with a matchstick, and he set fire to him. He has informed further that the incident occurred while he was sleeping in front of the bakery furnace on a wooden box.

The mentioned Ranjith was a person unknown to the witness. The deceased has passed away on 08-10-2003 while receiving treatment and the witness has identified his body at the post-mortem.

PW-01 Samoan Prasad was the owner of the bakery, where this incident occurred. He has confirmed that the deceased as well as the appellant were working under him at the time relevant to this incident and both of them were working as labourers at the bakery. While at home on 22-07-2003, around 1.30 – 2.00 a.m., he has been informed by another servant that the deceased servant had been set on fire by the appellant and had run away. After hearing the news he has gone to the bakery, the has been informed that the deceased was taken to the Ragama hospital. When he reached the hospital, he has seen the deceased screaming due to pain, but was in a position to talk. When asked what happened, the deceased has informed him that while he was seated on a wooden bench (බංකුවක), Ranjith poured petrol on the back of his body (පිටට) and set him on fire. The witness has identified the mentioned Ranjith as the appellant.

Explaining further, the witness has stated that when these words were uttered, the deceased was not admitted to the hospital ward, but was on a stretcher outside of it. The witness has been very specific that when he met him before he was admitted to the hospital ward that night, he spoke to him and informed him that it was the appellant who set him on fire, but has stated further, that after admission to the hospital, he could not speak for about a week. However, after he was transferred to Colombo hospital, he regained his ability to talk after 4 or 5 days of treatment at the Colombo hospital.

Speaking about the reason for this incident, the witness has stated that when he went to the bakery in that evening, both the appellant as well as the deceased came and informed him about a quarrel that happened between them, and he has opined that it may be the reason for this incident.

PW-05 Wasantha Kumara had been called by the prosecution as another person to whom the deceased has narrated what happened to him. He has been a witness to the earlier incident where the deceased and the appellant had a quarrel. According to his evidence, both of them had exchanged blows as a result of the quarrel, and around 1.15 a.m. in the night while he was sleeping, he has felt a heat and had seen the deceased on fire. He has observed that the appellant was nowhere to be seen in the bakery. The evidence of PW-05 had been that the deceased was screaming in pain and did not inform what happened to him other than screaming pleading to rescue him. The witness has stated that he spoke about what happened at the hospital, but not to him. He has stated that because of the earlier incident and since the appellant was nowhere to be seen after the incident, he suspects the appellant for causing the injuries.

The other person who heard the dying declaration of the deceased was PW-07 PC 16512 Upul Kumara Ubhayaratna. He had been a Police Constable attached to Kadawatha police station and was the person who has recorded the statement of the deceased Dharmakeerthi Abeywickrama on 29-07-2003 at 12.30 p.m.

while he was receiving treatment at ward number 20 in the Colombo National Hospital.

When giving the statement, the deceased has been covered with bandages from the hip upwards up to his neck. He has been in a position to speak. The witness has narrated the entire statement made to him by the deceased, which has been marked as X during the trial.

In the statement, the deceased has stated that;

> "ඊට පස්සේ මමයි කුමාරයි වැඩ කලා පාන් පුච්චන පාන් ටික පෝරණුවට දාලා මම පෝරණුව ඉස්සරහ බිත්තර ගෙනඑන පෙට්ටි දෙකක උඩ ඉඳගෙන පාන් පිච්චෙන තුරු ඔලුව කකුල් දෙක ලඟ තියාගෙන හාන්සි වෙලා හිටියා. එතකොට රාත්‍රී 1ට පමණ එක පාරටම මගේ ඇඟට සීතල වතුරක් වගේ දෙයක් වැටෙනවා දැනුනා. මම ඒත් එක්කම ඔලුව උස්සල බලනකොට බේකරියේ දමල තිබුණු ලයිට් එළියෙන් දැක්කා රන්ජිත් එනන ඉන්නවා. මගේ ඇඟට එක පාරටම සීතල වගේ දැනෙනකොට මට ඇහුනා අපේ බේකරියේ තෙල් දමන තාච්චිය වැටෙන ශබ්දයක්. මම ඔලුව උස්සල බලනවාත් එක්කම මම දැක්කා රන්ජිත් ගිනි කුරක් ගහලා මගේ ඇඟට විසි කලා. මම ඒ වෙලාවේ මගේ ඇඟට පෙට්‍රල් දමලා රන්ජිත් ගිනි තිබ්බා කියල හයියෙන් කෑගැහුවා. එත් මම කෑගහනවා කාටවත් ඇහිලා නැහැ . මගේ ඇඟට ගිනි කුර ගසනවාත් එක්කම රන්ජිත් බේකරියේ පෝරණුව ඉස්සරහ තිබෙන පිටවෙන දොරකඩින් දුවනවා දැක්කා."

The Judicial Medical Officer (JMO) who conducted the post-mortem of the deceased has observed over 60% of his body with burn injuries. He has expressed the view that the probability of dying because of the injuries would be very much higher even if the injured person was treated in a hospital due to the level of injuries sustained by him. The JMO has expressed the opinion that the death was due to septicemia condition due to the burn injuries sustained by the deceased.

At the conclusion of the prosecution evidence and when called for a defence, the appellant has made a dock statement. In his dock statement, he has admitted that there was a quarrel between him and the deceased in the evening of the day of the incident. It had been his position that after hearing about this incident,

the owner of the bakery came to the bakery in the afternoon, scolded both of them and said that they should leave if they cannot work in the bakery.

The position of the appellant had been that he left the bakery as a result and after staying for few days at his previous wife's house, found employment in another bakery and after about 7 days, the owner of the bakery and some others came and took him to the police station. He has denied that he has anything to do with the burn injuries suffered by the deceased and had claimed innocence in that regard.

It is clear from the Judgement pronounced by the learned High Court Judge of Gampaha that the learned High Court Judge has been very much considerate of the basic principles of evidence that need to be adhered to when evidence of a case of this nature is evaluated. The learned High Court Judge has determined that this is a matter where a dying declaration should be considered and has drawn his attention to the matters that needs to be considered in such a situation.

The learned High Court Judge has evaluated the evidence in that context and had found that the evidence as to the dying declarations that the deceased had allegedly made to several witnesses and to the police officer who recorded his statement are cogent and reliable. The learned High Court Judge has considered the defence taken up by the appellant and had determined that it did not create any doubt as to the evidence of the prosecution witness. The evidence of the JMO has been well considered since the cause of death has been determined as a condition called septicemia, and has determined that the occurring of such a condition was due to the deliberate actions of the appellant where his actions fall within the ambit of section 294 3rd limb. The appellant has been convicted on that basis.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

1. The learned trial Judge has erred in law by not affording the option of a jury to the accused prior to the commencement of the trial.
2. The learned trial Judge has failed to consider the discrepancies with regard to the dying declaration of the deceased.
3. The learned trial Judge has failed to consider the discrepancies with regard to the procedure that needs to be adhered to when handling the productions against the accused-appellant.

I will now proceed to consider each ground of appeal separately having regard to the submissions made by the learned Counsel for the appellant as well as the learned Deputy Solicitor General (DSG) who represented the respondent.

Consideration of The Grounds of Appeal

The 1st Ground of Appeal :-

The argument of the learned Counsel for the appellant was that the learned High Court Judge has failed to correctly follow the requirements of section 195ee of the Code of Criminal Procedure Act.

Citing several decided cases, it was his position that, said procedural defect has the effect of vitiating the conviction of the appellant.

He relied on the case of **The Attorney General Vs. Segulebbe Latheef And Another (2008) 1 SLR 225** and **Wijesena Silva Vs. Attorney General (1998) 3 SLR 309.**

Both the above Judgements were Judgements where it was determined that following section 195ee of the Code of Criminal Procedure Act (CPA) is mandatory, because it gives the option for an accused person to be tried by a

jury or tried by a Judge. It has been determined that failure to follow the said provision would vitiate a Judgement on that basis alone.

Therefore, it is the view of this Court that the relevant law in that regard is well settled as considered above.

The relevant section 195ee which came into effect as a result of the Code of Criminal Procedure (Amendment) Act No. 11 of 1988 reads as follows.

> **195ee. If the indictment relates to an offence triable by a jury, inquire from the accused whether or not he elects to be tried by a jury.**

Section 195 of the CPA is the provision where certain procedural steps that have to be taken once the indictment is received by the relevant High Court has been described. It is clear from the said provisions that these steps are steps that had to be taken before the matter is fixed for the trial, and not after the case has been fixed for trial.

When it comes to the facts relevant to the case under appeal, the High Court case record clearly establishes the fact that when the indictment was served on the appellant on 06-12-2007, other than fixing the matter for trial and releasing the appellant on bail, no other procedural step as required by section 195 of the CPA has been followed.

The trial of this matter has commenced on 10-12-2013, where the indictment has been read over to the appellant and he has pleaded not guilty. On that day, PW-03 who was the elder brother of the deceased has given evidence and concluded.

When the case was taken up again on 11-11-2014 before the same Judge who heard the evidence of PW-03, the learned High Court Judge, apparently realizing the failure to follow due procedure, has decided to read over the charge again to the appellant and has asked the appellant whether he wants the case to be heard by a jury or without a jury. The appellant has informed the Court that he wants the matter to be heard without a jury.

After recording that fact, the learned trial Judge who heard the matter then, has decided to proceed with the trial by calling the other witnesses relevant to the matter. It needs to be noted that on 22-04-2015, the prosecution has moved to amend the indictment indicating an alias of the deceased Dharmakeerthi Abeywickrama as Dharmakeerthi Abeywickrama alias Chaminda.

After allowing the said amendment, the learned High Court Judge has again taken steps to read over the amended charge to the appellant and had inquired whether he elects to be tried by a jury or not. The appellant has informed the Court that he is prepared to be tried without a jury and has agreed to proceed with the case without the previously led evidence being recalled.

The above facts clearly suggest that this is not a matter where the jury option as required in terms of section 195ee had not been given to the appellant, but a situation where the said option has been given after the conclusion of the 1st witness for the prosecution.

I am of the view that this is a case where it cannot be said that the jury option had not been given to the appellant, which is a situation different to the matters considered in the above-mentioned cases where the jury option has not been given at all.

Under the circumstances, I would like to get inspiration from the ratio decidendi of the case of **Hiniduma Dahanayake Siripala *alias* Kiri Mahaththaya And Another Vs. Attorney General SC Appeal No. 115/2014 decided on 22-01-2020.**

This is a case where it was contended that the trial Court failed to follow the provisions of section 196 of the CPA where it is necessary for the Court to read and explain the indictment to the accused person when the Court is ready to commence the trial, and ask whether he is guilty or not guilty of the offence charged. There was nothing in the High Court case record to indicate that the charge was read over to the accused and whether he pleaded not guilty to the charge. However, it was clear from the High Court proceedings that the trial has

proceeded on the basis that the accused pleaded not guilty to the charge and the Judgement has been pronounced accordingly.

Per Aluvihare, P.C., J.;

> "*The learned Counsel for the 1st and 2nd accused-appellants strenuously argued the importance of trial Judges adhering to the procedure laid down under the law. I fully agree with this view. But as Alexander Pope once said, 'to err is human.' Judges erring in their human capacities is but an inevitable fact of the justice system. What we must be conscious of, is the need to rectify such mistakes and lapses in every such instance where they have casued prejudice to the rights of the parties or have subverted the course of justice. At the same time, we must caution against attaching too great a meaning to a mistake, lest we provide a person with a free ticket out of a conviction which the evidence fully warrants. In this present appeal, no justification was made in regard to any prejudice to the substantial rights of the accused-appellants or that the irregularity has occasioned a failure of justice, which are constitutional requirements if the accused-appellants are to be granted relief in this case.*"

When it comes to the matters relevant in relation to the appeal under consideration, as I have stated above, this is not a case where jury option has not been given, but given subsequently to the commencement of the trial. After concluding the evidence of PW-03 and before the commencement of the evidence of the other witnesses, the learned High Court Judge has taken steps to correct the procedural defect of not giving the jury option to the appellant.

It is clear from the proceedings that when it was given, the appellant had elected not to be tried by a jury. The appellant had been legally represented by a Counsel throughout the case. Had he elected to be tried by a jury when that opportunity was afforded to him, the trial Judge would have had to stop the trial being proceeded and take necessary steps to appoint a jury and proceed therefrom.

Under the circumstances, if it was so, there cannot be any argument that the previously led evidence of PW-03 will have to be taken again as the said evidence was not taken before the jury. The proceedings before the Court amply demonstrates that since the appellant has elected not to be tried by a jury, the case has proceeded to further trial.

Even after the indictment was amended to include an alias of the deceased in the charge, it appears from the case record that the learned High Court Judge has taken the correct procedural step of reading the amended charge to the appellant and had taken an additional burden by inquiring again whether he elects to be tried by a jury.

The above-mentioned facts clearly show that the intention of the appellant had been to be tried without a jury. He has clearly demonstrated his wish when the learned trial Judge inquired him on two separate occasions whether he elects to be tried by a jury or not.

Under the circumstances, I am of the view that since this is not a matter where jury option has not been given to the appellant at all, there had been no prejudice caused to the substantial rights of the appellant or occasioned a failure of justice.

The proviso to Article 138 of The Constitution which is the article which gives the jurisdiction to the Court of Appeal to exercise appellate jurisdiction reads thus;

> **"Provided that no Judgement, 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."**

For the reasons as set out above, I find no basis for the 1st ground of appeal urged by the learned Counsel for the appellant.

The 2nd Ground of Appeal:-

The 2nd ground of appeal urged by the learned Counsel for the appellant is based on the premise that there are several discrepancies with regard to the alleged dying declaration of the deceased.

Before considering the contention of the learned Counsel about the alleged discrepancies, I would now proceed to consider the manner in which a dying declaration or declarations of a person can be considered as evidence in a criminal trial.

In terms of section 32 of the Evidence Ordinance, statements by persons who cannot be called as witnesses are relevant under certain circumstances. The relevant section 32 (1) reads as follows.

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

E. R. S. R. Coomaraswamy in his authoritative book on **'The Law of Evidence' Volume 1 at page 431** refers to several cases decided by the Indian Supreme Court as to the rules that should be laid down in that regard.

> *"The rules laid down by the Indian Supreme Court may be summarized as follows:*
>
> 1. *Ordinarily it is not safe to base a conviction for murder only upon the dying declaration of the deceased when there is no*

corroboration of it from any independent source. Such corroboration may be by circumstantial evidence , or an oral statement made to a relative shortly after the incident may corroborate a subsequent duly recorded dying declaration .

2. *Though ordinarily corroboration must be looked for, there is no absolute rule of law or prudence that corroboration is always necessary before a conviction which rests on a dying declaration can be sustained. Corroboration is necessary when the declaration is an incomplete statement which is not categoric in the accusation as to a crime against a named person or when the declaration suffers from some infirmity.*
3. *Where the Court is satisfied that the dying declaration is true and reliable and does not suffer from any infirmity, a conviction can be based upon it even in the absence of corroboration. Each case must be Judged on its own facts. If it is proved that the dying declaration were made without any prompting or influenced by anyone and there is no cogent reason given or suggested by the accused for throwing doubt in their truth or correctness, the conviction can be based solely on them.*

In the case of **Ranasinghe Vs. The Attorney General (2007) 1 SLR 2018**, it was held;

1. *"When a dying declaration is considered as an item of evidence against an accused person in a criminal trial, the trial Judge/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 person has not been tested by cross-examination;*
2. *The trial Judge/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."*

It was the contention of the learned Counsel for the appellant that the evidence of PW-01 who was the owner of the bakery, that he was told by the deceased that it was the appellant who poured petrol on him and set him on fire, cannot be believed due to his own evidence and that of PW-03.

This is a case where the evidence of the prosecution had been to the effect that the deceased made several dying declarations to several persons other than the police officer who recorded the statement of the deceased.

PW-03 is the brother of the deceased who looked after him during his two and a half months long stay at the hospital before he passed away. It had been his evidence that while receiving treatment, he divulged to him that it was the appellant who set fire on him.

The evidence of PW-01 who was the employer of the deceased as well as the appellant, had been that when he was taken to the hospital, although he had serious burn injuries and was screaming in pain, the appellant was able to talk to him before he was admitted to the hospital ward. It had been his evidence that the deceased informed him that it was the appellant who set him on fire after pouring petrol on him.

The learned Counsel for the appellant has relied on the evidence of PW-01, the owner of the bakery, where he states that after admitting him to the hospital, the deceased could not talk and it was only after 4-5 days of his admission to the

Colombo General Hospital, the deceased was able to talk, suggesting that the evidence of PW-01, which says that the deceased talked to him before he was admitted to the hospital cannot be believed.

However, I am in no position to agree with that contention. When reading the evidence of PW-01 as well as that of PW-03, it becomes amply clear that what the PW-01 had stated before the trial Court was the truth as to what happened on that day. It may well be that the deceased had spoken to his employer just before he was admitted to the hospital for medical care. He may not have spoken thereafter for some time until he was in a position to speak after receiving treatment for his injuries. That does not mean that the evidence of PW-01 was not cogent enough to accept as the truth. I am not in a position to believe that the evidence in that regard as contradictory.

Although the learned Counsel for the appellant contended that the evidence of the witnesses was contradictory, I find no basis to consider as such. It is clear from the evidence that the witnesses have spoken about what they saw and what they heard from the deceased. The fact that there had been a previous quarrel in the evening of the day of the incident had been an admitted fact which has provided a corroboration as to the sequence of events that had happened on that day. The evidence of PW-01 clearly indicates that the appellant was present when he left his establishment after advising both the deceased and the appellant over the dispute they had. It has been clearly established that after the incident, the appellant was nowhere to be seen until he was arrested by the police some days after the incident.

I find no basis to accept the appellant's explanation that he left his job after his employer told him to leave if he cannot work. The evidence of other witnesses clearly establishes it was not the case, but the appellant was present until they found that the deceased was set on fire. Even the evidence of PW-05 who was another employer of the bakery who saw the deceased on fire speaks about the appellant not being present when he looked for him at the time of the incident.

It is clear from the Judgement of the learned High Court Judge that the evidence has been considered with the relevant legal requirements in mind and the relevant conclusions have been reached after duly analyzing the evidence, for which I find no reason to disagree.

The evidence of PW-07, the police officer who recorded the statement of the deceased clearly establishes the fact that he was able to speak and narrate what happened to him. The deceased has made a dying declaration to him, which clearly demonstrates that the statement has been made without any prompting or influence.

For the reasons considered above, I am of the view that the relying on the dying declarations that have been made by the deceased to determine the charge against the appellant had been done after considering the evidence in accordance with the law.

Hence, I find no merit in the considered ground of appeal.

The 3rd Ground of Appeal :-

In the 3rd ground of appeal, the learned Counsel for the appellant contends about the productions taken over by the police during their investigations.

I am of the view that the productions were not an essential requirement in proving the charge against the appellant and the prosecution has not relied on productions to prove the charge.

The learned High Court Judge has correctly considered the issues that had arisen during the trial in relation to the productions in its correct perspective. It is the view of this Court, that even if there were no productions at all, given the facts and circumstances and the evidence led in the trial provides a sufficient basis to conclude that the charge has been proved beyond reasonable doubt against the appellant.

For the reasons considered above, I find no basis for the grounds of appeal urged on behalf of the appellant.

Accordingly, the appeal preferred by the appellant is dismissed. The conviction and the sentence dated 07-10-2021 affirmed.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal