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

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

Court of Appeal Case No.
CA/HCC/ 0166/2016
High Court of Embilipitiya
Case No. HC/73/2014

Jagath Premalal Senanayake

ACCUSED-APPELLANT

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**

P. Kumararatnam, J.

COUNSEL : **Darshana Kuruppu with Sahan Weerasinghe for the Appellant.**
Janaka Bandara, DSG for the Respondent.

ARGUED ON : **11/06/2024**

DECIDED ON : **13/09/2024**

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JUDGMENT

P. Kumararatnam J

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General for committing two counts of murder of Madarasinhage Chandrawathi and Madarasinhage Padmawathi on or about 22/08/2008 an offence punishable under Section 296 of Penal Code.

Following a jury trial, the learned Trial Judge convicted the Appellant on both counts of murder and sentenced him to death on 12/08/2016.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court seeking to set aside the conviction and sentence imposed on him. Deceased is the wife of the Appellant.

The learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence. During the argument he was connected via zoom from prison.

The following Grounds of Appeal are raised on behalf of the Appellant.

1. The Appellant was denied a fair trial guaranteed by Article 13(3) of the Constitution due to the following reasons:
    I. The Registrar of the High Court announced the verdict of the Jury before the Foreman of the Jury announced their verdict.
    II. The learned High Court Judge had refused the application of the Appellant to call the Magistrate who conducted the inquest in this case.
2. The learned High Court Judge erred in law by misdirecting the Jury as to the standard of proof.
3. The learned High Court Judge erred in law by misdirecting the Jury as to the evidential value of the dock statement of the Appellant.
4. The learned High Court Judge erred in law by misdirecting the Jury that the weakness of the defence case would establish the prosecution case.
5. The learned High Court Judge erred in law by misdirecting the Jury about the dying declaration.
6. The learned High Court Judge erred in law by misdirecting the Jury about the Section 27(1) recovery of the Evidence Ordinance.
7. The learned High Court Judge misdirected the Jury regarding culpable homicide not amounting to murder.
8. The verdict of the Jury is against the evidence led at the trial.

Background of the case

On the day of the incident around 9.30am when PW1 Appuhamy and PW2 Sumanasena were working outside the deceased's house, PW1 heard someone shouting '**menna maranawa'**. When PW1 and PW2 had rushed near the deceased's house after hearing the cries, they had seen the deceased

Padmawathi lying fallen on the paving around the house and the Appellant standing a little further away carrying a crowbar. When he went near Padmawathie, she had uttered **'Aru Jagath, Jagath'**. Thereafter, PW1 had gone to the police station to inform the incident.

The Appellant made a dock statement and denied the charges. According to him when he came home, he had had a bath and afterwards he had seen both the deceased persons and he had raised cries. Hearing his cries PW1 and PW2 had arrived at the scene. In this case, although he was named as a prosecution witness, PW2 was not called on behalf of the prosecution. But he was called as a defence witness by the Appellant.

Article 10 of the Universal Declaration of Human Rights, the Fourth, Fifth, Sixth, Seventh, and Fourteenth Amendments to the United States Constitution, and Article 6 of the European Convention of Human Rights, in addition to numerous other constitutions and declarations throughout the world set out the various rights associated with a fair trial. It is a trial which is conducted "fairly, justly and with procedural regularity by an impartial judge".

Similarly, according to Article 13(3) of the Constitution of Sri Lanka every Accused person has a right to a fair trial. Additionally, Section 14(1) of the International Covenant on Civil and Political Rights (ICCPR) also guarantees the right to a fair trial. Hence, the right to a fair trial is an international concept guaranteed to the all across the world.

Under the first ground of appeal, the Appellant contends that the Registrar of the High Court announced the verdict of the jury, before the Foreman announced the verdict.

The procedure of announcing the verdict of the Jury is laid down under Section 234 of the Code of Criminal Procedure Act No. 15 of 1979.

Sub-Section (4) of Section 234 states:

"On this the foreman shall state what is the verdict of the Jury."

But in this case, the Registrar of the High Court read out the charges which have been levelled against the Appellant, and informed the learned High Court Judge, that the Jury has unanimously found the Appellant guilty of the stated charges. The relevant portion of the proceeding is re-produced below:

Pages 826-827 of the brief.

රෙජිස්ට්‍රාර්තුමිය,

ස්වාමීනි, විත්නි කූඩුවේ සිටින විත්තිකරු වැරදිකරු බව ජූරි සභාව ඒකමතිකව ..... (තම ප්‍රකාශය නවතයි)

ප්‍ර : විත්තිකරුට නඟා ඇති පලමුවන චෝදනාවට වරදකරු ද නිවැරදිකරු ද ?

උ : වරදකරු.

ප්‍ර : දෙවන චෝදනාවට වරදකරු ද නිවැරදිකරු ද ?

උ : නිවැරදිකරු.

ජූරි සභාවේ නායක : දෙවන චෝදනාව ආපසු කියවා දෙන්න ?

: දෙවන චෝදනාව කියවා සිටි.

ප්‍ර : දෙවන චෝදනාවට වරදකරු ද නිවැරදිකරු ද ?

උ : වරදකරු.

අධිකරණයෙන් :-

ප්‍ර : පලමුවන චෝදනාවට ඔබ කියන උත්තර කුමක්ද ?

උ : වැරදිකරු.

ප්‍ර : දෙවන චෝදනාවට ඔබ කියන උත්තර කුමක්ද ?

උ : වැරදිකරු.

ප්‍ර : ඔබට වැරදීමක් සිදු වුනාද ?

උ : නැහැ. ඇහුනේ නැති නිසා.

ප්‍ර : ඔබ සියලු දෙනා ඒකමතික තීරණය කරනු ලබන්නේ චූදිත පලමුවන චෝදනාවට සහ දෙවන චෝදනාවට වරදකරු බවද ?

උ : ඒසේය.

.....

ස්වාමීනි, විත්ති කූඩුවේ සිටින විත්තිකරු වැරදිකරු බව ජූරි සභාව ඒකමතිකව තීරණය කර තිබෙනවා.

Highlighting the above portions of the proceeding, the Counsel for the Appellant strenuously argue that this not a mere procedural error, but this is an illegality which cannot be cured by applying Section 334(1) of the Code of Criminal Procedure Act.

In this case, the Registrar had become involved only at the point where the foreman should have announced the verdict. She had not involved herself in any manner in deciding the outcome of the case.

In **King v Martin** 31 NLR 124 Lyall Grant J. held that:

> *"Under section 249 (3) a verdict can be amended only before or immediately after the verdict is recorded, i.e., before the jurors have left the Court and while they are still under the observance of the presiding Judge."*

"The law provides that the verdict may be amended by the jury either before it is signed or immediately thereafter……. The section only allows the verdict to be altered if the mistake is immediately brought to the notice of the jury. I find in the comments to section 304 of the Indian Act given in Sohoni's Code of Criminal Procedure that the law is set forth as follows: -'' The section for an amendment of a- wrong verdict delivered by accident or mistake clearly contemplates that such a verdict is amended only before or immediately after it is recorded; in other words, before the jurors have left the Court and while they are still under the observance of the presiding Judge."

This case was decided under the old Criminal Procedure Code of Sri Lanka.

In this case as per the case record, although the Appellant was pronounced not guilty to the second charge, it was immediately corrected by the foreman of the jury. Further, the learned High Court Judge had proceeded only after clearing the confusion by directing pertinent questions to the foreman and taking due steps to receive the verdict clearly, which is that the Appellant is guilty of both charges. Importantly, this had been done before the jury rose and was officially dispersed. Therefore, this is my considered view that the corrected verdict did not cause any prejudice to the Appellant nor has he been deprived of a fair trial.

Further the Code of Criminal Procedure Act No. 15 of 1979 and the Constitution of our country provide provisions to rectify any error, omission, or irregularity in a judgment where such error, omission or irregularity which has not prejudiced the substantial right of the parties or occasioned a failure of justice.

Section 436 of the Code of Criminal Procedure Act No: 15 of 1979 states as follows:

> "Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-
>
> (a) of any error, omission or irregularity in the complaint, summons, warrants, charge, judgment, summing up or other proceedings before or during trial or in any inquiry or other proceedings under this code; or
>
> (b) of the want of any sanction required by section 135,
>
> **Unless such error, omission, irregularity, or want has occasioned a failure of justice."** [Emphasis added]

Article 138 of The Constitution of Democratic Republic of Sri Lanka states:

> "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be 111 [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things 112 [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance:
>
> **Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect or irregularity, which has not prejudiced**

the substantial right of the parties or occasioned a failure of justice". [Emphasis added]

Under the same ground the Appellant contended that his request to call the learned Magistrate who had conducted inquest proceedings had been turned down unreasonably and therefore the Appellant was deprived of a fair trial.

The procedure of conducting a trial either with or without a jury had been laid down in the Code of Criminal Procedure Act No.15 of 1979. The procedure laid down in the CPC should apply equally to both parties. Hence, following the correct procedure is vital to avoid confusion in a trial.

In this case, the learned Counsel for the Appellant made his application without filing a list of the defence witnesses. Further, he had made this application before the closure of the prosecution and before calling for defence by the Court. The Application was to call the learned Magistrate who conducted the inquest via a telephone call at 15:20 hours on 09.08.2016. Considering the premature nature of the application and the inducement to adopt an irregular procedure by the defence, the learned High Court Judge by her order dated 09.08.2016 had accurately refused the said application. The relevant order of the learned High Court Judge is re-produced below:

Pages 644-645 of the brief.

නියෝගය

චූදිතගේ නීතිඥවරයා මෙතෙක් සාක්ෂි ලැයිස්තුවක් ඉදිරිපත් කර නැත. අද දින විවෘත අධිකරණයේදී මෙම අවස්ථාවේදී ප්‍රකාශ කරනු ලබන්නේ, මෙම සිද්ධියට අදාල මහේස්ත්‍රාත් පරීක්ෂණය පවත්වන මහේස්ත්‍රාත්වරයා රෙජිස්ට්‍රාර් මඟින් දුරකථනය මඟින් දැනුම් දී හෙට දින සාක්ෂි කැඳවීමට හැකි දැයි සොයා බලන ලෙසටයි. තවද නීතිඥවරයා විසින් එකී මහේස්ත්‍රාත්වරයා මීගමුව මහේස්ත්‍රාත් අධිකරණයේ සේවයේ නියුතු බව ප්‍රකාශ කරයි.

එතුමා කරනු ලබන ඉල්ලීම අනුව අපරාධ නඩුවක සාක්ෂිකරුවෙක්ට සාක්ෂි නිකුත් කරන ක්‍රමවේදය සම්පූර්ණයෙන් පටහැනි එනම් සිතාසියක් නිකුත් කිරීමකින් තොරව රෙජිස්ට්‍රාර්වරිය මගින් දැනුම්දීමෙන් මහේස්ත්‍රාත්වරයා කැඳවීමට ඉල්ලීමක් ඉදිරිපත් කරනු ලබයි. දැන් වේලාව ප.ව. 3.20 වන අතර සිතාසියක් නිකුත් කලද මහේස්ත්‍රාත්වරයාට සිතාසිය භාර දීමට කාලවේලා නැත.

දෙවනුව මහේස්ත්‍රාත්වරයෙකු අධිකරණයක සාක්ෂි දීම සඳහා රාජකාරීමය වශයෙන් පිටවන්නේ නම්, අධිකරණ සේවා කොමිෂන් සභාවේ නීත්‍යානුකූල නියමයන් පරිදි රාජකාරී නිවාඩු මත පිටවිය යුතුය. මීගමුවේ සිට හෙට දිනට මෙම අධිකරණයට පැමිණීමට එතුමාට ප්‍රමාණවත් කාලයක් නැත.

තෙවනුව සාක්ෂිකරුවෙක්ට සිතාසි භාර දීමේදී, මීට වසර 08 කට පෙර තමන් කරනු ලැබූ රාජකාරිය සොයා බලා සූදානම්ව පැමිණීමට ප්‍රමාණවත් කාලයක් ලබා දිය යුතුය.

මෙම නඩුව ආරම්භයේදී එතුමන් විසින් එම සාක්ෂිකරු කැඳවීමට අදාලව පමණක් හෝ සාක්ෂි ලැයිස්තුවක් ගොනු කලේ නම්, ප්‍රමාණවත් කාලයක් තුල මහේස්ත්‍රාත්වරයාට පෙනී සිට සාක්ෂි දීමට සාක්ෂි සිතාසි නිකුත් කිරීමේ අවකාශයක් තිබිනි. ඒ අනුව මහේස්ත්‍රාත්වරයෙකු වැනි භාර්යඋර්ය රාජකාරියක් කරනු ලබන සාක්ෂිකරුවෙකු හෙට දින මෙම අධිකරණයට කැඳවීමට හැකියාවක් නැත.

අද දින පැමිණිලිකරු සාක්ෂි අවසන් කිරීමටත් හෙට දින විත්තිකරුගේ සාක්ෂි කැඳවීමට දෙපාර්ශවයේ නීතිඥවරු මා ඉදිරියේ එකඟ වී සිටින ලදී. මෙම අවස්ථාව වන විටත් චූදිතගේ සාක්ෂි ලැයිස්තුවක් ගොනු කර නැත. එබැවින් ඉහත කී මහේස්ත්‍රාත් පරීක්ෂණය පැවැත්වූ මහේස්ත්‍රාත්වරයාට කාලය ප්‍රමාණවත් නැති බැවින් හා නීත්‍යානුකූල නොවන ආකාරයෙන් නඩුව පිළිබඳව දැනුම් දීම ප්‍රතික්ෂේප කරමි.

මහාධිකරණ විනිසුරු - ඇඹිලිපිටිය.

Therefore, I see no irregularity or prejudice caused to the Appellant. He has not been deprived of a fair trial.

Under the second ground of appeal the learned Counsel argued that the learned High Court Judge erred in law by misdirecting the Jury as to the standard of proof.

In a criminal trial, it is incumbent on the prosecution to prove the case beyond a reasonable doubt. There is no burden on the Appellant to prove his innocence. This is the "Golden Thread" as discussed in **Woolmington v. DPP** [1935] A.C.462. In this case Viscount Sankey J held that:

> *"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt…… If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner…..the prosecution has not made out the case and the prisoner is entitled to an acquittal.*

In Hakkini Asela De Silva and two others v The Attorney General SC Appeal No. 14/2011 decided on Saleem Marsoof, J. held that:

> *"It is trite law that, in criminal proceedings, the burden of proof is always on the prosecution to establish the guilt of the accused person beyond reasonable doubt, and the burden never shifts to the defence. The prosecution has the duty to prove all, and not merely some, of the ingredients of the offence charged beyond reasonable doubt"*

The learned Counsel for the Appellant highlighting a portion of the opening address (Pages 85-86 of the brief) and a portion of summing-up (Page 768) of the learned High Court Judge in his written submission, complains that the learned High Court Judge had confused the meaning of 'Beyond a reasonable doubt' in the portion of the proceedings extracted above.

But on perusal of the portions of the proceedings highlighted in the written submission of the Appellant, I could not see any confusion created by the learned High Court Judge. She had used very simple language and simple examples to explain what is meant by 'Beyond a reasonable doubt' in her opening and closing summations. As accurately submitted by the learned Deputy Solicitor General, basic legal principles and concepts such as

'presumption of innocence, burden of proof, beyond a reasonable doubt, admissible evidence, facts in issue and relevant facts are properly described with examples by the learned High Court Judge in her opening address and in summing-up.

Under the third ground of appeal the learned Counsel contended that the learned High Court Judge erred in law by misdirecting the Jury as to the evidential value of the Appellant's dock statement.

The Counsel for the Appellant extended his argument that the learned High Court Judge has not properly explained the evidentiary value of a dock statement in her summing-up. Further she had failed to direct the jury that, if the dock statement creates a reasonable doubt on the prosecution case, the defence must succeed.

The following judgements are very important as it laid down guidelines to show how it can be treated as evidence in a criminal trial

In **Queen v. Buddharakkitha Thero** 63 NLR 433 the court held that:

> *"The right of an accused person to make an unsworn statement from the dock is recognised in our law (King v. Vellayan[10 (1918) 20 N. L. R. 251-at 266.].) That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination'.*

In **Queen v. Kularatne** 71 NLR 529 the court held that:

> *"We are in respectful agreement and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving*

sworn testimony, and the jury must be so informed. But the jury must also be directed that;

a) *If they believe the unsworn statement, it must be acted upon.*
b) *If it raised a reasonable doubt in their minds about the case for the prosecution, the defense must succeed,*
c) *That it should not be used against another accused".*

Although the learned Counsel for the Appellant contended that the learned High Court Judge had not given proper directions with regard to the dying declaration, but had given proper direction in her summing-up. The relevant portions are re-produced below:

Page 810 of the brief.

එහිදී මෙම විත්ති කූඩුවේ සිට කරන ප්‍රකාශයට දිවුරුමක් නොමැති වීම හරස් ප්‍රශ්න වලට ලක් නොවීම යන දුර්වලතා තිබුනත් සාක්ෂියක් වශයෙන් ඔබතුමන්ලාට සලකා බැලිය හැකිය.

Page 814 of the brief.

විත්තිකරු විත්ති කූඩුවේ සිට ප්‍රකාශයක් කරනු ලබනවා. මා ඔබතුමන්ලාට කිව්වා විත්තිකරු විත්ති කූඩුවේ සිට ප්‍රකාශයක් කරනු ලබන විට දිවුරුම් දීම සහ හරස් ප්‍රශ්න ඇසීමට අයිතියක් නොලැබීම යන දුර්වලතා ඇතත්, එය සාක්ෂියක් වශයෙන් සැළකිය යුතු බව.

Considering above portions of evidence highlighted, it is incorrect to say that the learned High Court Judge had misdirected the jury as to the evidentiary value of the Appellant's dock statement.

Under the fourth ground of appeal the learned Counsel for the Appellant contended that the learned High Court Judge erred in law by misdirecting

the Jury that the weakness of the defence case would establish the prosecution case.

In **Kalinga Padmatilake alias Sergent Elpitiya v The Director General, Commission to Investigate Allegations** SC Appeal No. 99/2007 the Court held that:

> *"The prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness in the defence, and when the guilt of the accused is not established beyond reasonable doubt, he is liable to be acquitted as a matter of right and not as matter of grace or favour"*

The learned Counsel for the Appellant only citing a portion of summing-up pertaining to the explanation regarding the defence case at page 796 of the brief, complains to this Court that the learned High Court Judge has provided a serious misdirection with regard to the weakness of the defence case.

I am of the view that it is very important to consider the entire paragraph at page 796 as against the portion highlighted by the Appellants on the same page of the brief to come to a conclusion whether the learned High Court Judge has misdirected the jury with regard to the weakness of the defence case. The relevant paragraph at page 796 is re-produced below:

Page 796 of the brief.

අවසාන වශයෙන් පැමිණිල්ල විසින් කැඳවන ලද සියලුම සාක්ෂි ඌනතාවයන්, පරස්පරතාවයන් ඉදිරිපත් උනා. ඒ සියල්ල සලකා බලා සමස්ථයක් වශයෙන් ගෙන පැමිණිල්ල විසින් ඔප්පු කර තිබෙනවා යන්න බැලිය හැකිය. මෙම නඩුවේදී විත්තිකරු සාක්ෂි ගෙනාවා. විත්තිකරු ගෙන එන ලද සාක්ෂිකරුවන් සියල්ල විත්තිකරුගේ ප්‍රකාශයද, විත්තිකරුගේ සාක්ෂිකරුවන් තිදෙනාගේම සාක්ෂි සමස්ථයක් වශයෙන්ම ගෙන සලකා බැලීමේදී ඔබතුමන්ලාට එම සාක්ෂි පිලිගත හැකි නම්

විත්තිකරු ඔබතුමන්ලා නිවැරදිකරු බවට තීරණය කල හැකිය. එසේ විත්තිකරුගේ සාක්ෂි පිලිගත නොහැකි නම් එම කරුණු විත්තිකරු වරදකරු කිරීම සඳහා සලකා බැලීමේදී ඔබතුමන්ලාට භාවිතා කිරීමේ හැකියාවක් තිබෙනවා. නමුත් පැහැදිලිවම ඔබතුමන්ලා මතක තබා ගත යුතුයි විත්තිකරු වරදකරු බවට ඔප්පු කිරීමේ වගකීම තිබෙන්නේ පැමිණිල්ල මත. පැමිණිල්ල විසින් ඔවුන්ගේ සාක්ෂි එනම් පැමිණිල්ලෙන් කැඳවන ලද සාක්ෂිකරුවන්ගේ සහ විත්තියේ සාක්ෂිකරුවන්ට ඉදිරිපත් කරන ලද හරස් ප්‍රශ්න තුලින් පැමිණිල්ලේ නඩුව සහේතුක සැකයෙන් ඔබ්බට ඔප්පු කර තිබෙනවා නම් විත්තිකරු වරදකරු කල හැකිය.

Considering the entire paragraph mentioned above in the summing-up, the learned High Court Judge had not misdirected the jury with regard to the weakness of the defence case at all.

Under the fifth ground of appeal the contention of the Appellant is that the learned High Court Judge erred in law by misdirecting the Jury about the dying declaration.

As in this case the prosecution relies on the dying declaration made by the deceased, it is very important to discuss the relevant laws pertaining to the acceptance of dying declarations as evidence in criminal trials under our law.

<u>According to Section 32(1) of Evidence Ordinance;</u>

> Statements, written, or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the court unreasonable, are themselves relevant facts in the following cases: -
>
> (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 expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question.

The following requirements must necessarily be established before any evidence is led under section 32(1) of the Evidence Ordinance.

1. That the maker of the statement is dead.
2. That the statement made by the deceased refers to his/her cause of death or to the circumstances of the transaction which resulted in his/her death.

Hence such evidence would become admissible only where the cause of death of the person making the statement is in question in the particular judicial proceedings. Admissibility of such evidence would ultimately be decided by the trial judge as per Section 136 of the Evidence Ordinance.

In **Dharmawansa Silva and Another v. The Republic of Sri Lanka** [1981] 2 Sri.L.R.439 it was held:

"When a dying statement is produced, three questions arise for the Court. Firstly, whether it is authentic. Secondly if it is authentic whether it is admissible in whole or part. Thirdly, the value of the whole or part that is admitted. A dying deposition is not inferior evidence but it is wrong to give it added sanctity"

In **Sigera v Attorney General** [2011] 1 Sri.L.R. 201 it was held that:

> *"An accused can be convicted of murder based mainly and solely on a dying declaration made by a deceased".*

The main contention of the Appellant is that the learned High Court Judge had misdirected the jury about the admissibility of dying declarations made by the deceased Padmawathi to PW1. Upon the perusal of the Summing-Up at page 782 the learned High Court Judge had provided proper directions with regard to the admissibility of the dying declaration of the deceased Padmawathi. The relevant paragraph is re-produced below:

Page 782 of the brief.

අප නීතියේ තිබෙන ප්‍රවාදක සාක්ෂියක ලක්ෂණ ඇති යම් කරුණක් නීතියෙන් සාක්ෂියක් හැටියට භාරගන්නවා. ඔබ අසා තිබෙනවා ඇති මරණාසන්න ප්‍රකාශය කියලා එකක්, මරණාසන්න ප්‍රකාශය කියන්නේ, යම් පුද්ගලයෙක් තමන් මිය යාමට ආසන්න වේලාවේ දී තවත් පුද්ගලයෙකුට කියනවා තමන් මිය යාමට හේතු වූ කාරණය. උදාහරණයක් හැටියට මෙම නඩුවේත් එවැන්නක් පැ.සැ. 01 කියනවා. එය ඔබතුමන්ලාට පිළිගත හැකිද යන්න සළකා බැලිය හැකි ආකාරය මා පසුව විස්තර කරන්නම්. මෙම නඩුවේ පැ.සා. 01 ට පද්මාවතී කියනවා අරූ, අරූ, ජගත් ගැහුවා. එහෙම නැත්නම් ජගත්, ජගත්, අරූ ගැහුවා කියලා කියනවා. එවිට මෙම මරණාසන්න ප්‍රකාශය කළ පද්මාවතී සාක්ෂියට කැඳවන්න හැකියවක් නැහැ. මද්දුම අප්පුහාමි ඇවිල්ලා කියන්නේ පද්මාවතී කළ ප්‍රකාශය. එම නිසා මෙම මරණාසන්න ප්‍රකාශය සාක්ෂියක් වශයෙන් ආවේශ්‍ය කරගත හැකියි. හැබැයි ඊට පෙර ඔබ පරීක්ෂාවන් කිහිපයකට ලක් කළ යුතුයි. එනම්, මෙම මරණාසන්න ප්‍රකාශය කලා යැයි ප්‍රකාශ කරන පුද්ගලයාගේ සාක්ෂිය ඔබට විශ්වාස කළ හැකිද, මෙම නඩුව ගතහොත් මද්දුම අප්පුහාමිගේ සාක්ෂිය ඔබට විශ්වාස කළ හැකිද. මද්දුම අප්පුහාමිගේ සාක්ෂියේ ඌණතා සහ පරස්පරතාවයන් සැළකිල්ලට ගෙන ඒවා බරපතල ඌණතාවයන් නම් එය සැළකිය හැකිය. එය බරපතල ඌණතාවයන් නොවේ නම් ඒ කියන්නේ ඔහුගේ සාක්ෂියේ හරයට බලපාන බරපතල ඌණතාවයන් නොවේ නම් මද්දුම අප්පුහාමිගේ සාක්ෂිය පිළිගත හැකිය. ඒ වුනත් මරණාසන්න ප්‍රකාශයක් පිළිගැනීමේ දී අවස්ථාවේ හැටියට එම ප්‍රකාශය කළ හැකිද, නොහැකිද යන්නත් ඔබ කල්පනා කර බැලිය යුතුයි. මෙය පරීවේෂණයක්

වශයෙන් ඔබතුමන්ලා සළකලා ඔබතුමන්ලා ඉතා සුපරීක්ෂාකාරීව තීරණය කළ යුතුයි මේ මරණාසන්න ප්‍රකාශය පිළිගැනීම පිළිබඳව. නැවතත් මතක් කර දෙනවා මරණාසන්න ප්‍රකාශයක් පිළිගත හැක්කේ එම මරණාසන්න ප්‍රකාශය ඉදිරිපත් කරන පුද්ගලයාගේ සාක්ෂිය සම්බන්ධයෙන් විශ්වාසනීයත්වයක් ඔබ සතුව ඇත්නම් පමණයි. මොකද මද්දුම අප්පුහාමිගේ සාක්ෂිය ගතහොත් ඔහුට එරෙහිව විත්තිය විසින් චෝදනා නගනු ලබන්නේ, ඔහුට මරණකාරියන්ගේ ඥාතීත්වයක් සහ පරස්පරතා සහ ඌණතා නිසා ඔහුගේ සාක්ෂි බිඳවැටීම. ඒ නිසා මරණාසන්න ප්‍රකාශය ඉදිරිපත් කරන තැනැත්තාගේ සාක්ෂිය විශ්වාස කිරීම යන කරුණ මත සහ පද්මාවතී එම ප්‍රකාශය කලාද, නැද්ද යන කරුණ මත ඔබතුමන්ලාට සිද්ධිය සම්බන්ධයෙන් පරම විනිශ්චයකාරවරුන් හැටියට තීරණයක් ගත හැකියි. එනම්, මද්දුම අප්පුහාමි බොරුවක් කියනවාද, නැද්ද යන කරුණ ඔබතුමන්ලාට කල්පනා කළ හැකියි.

Considering the Summing-Up pertaining to the Dying Declaration, the learned High Court Judge had given reasonable directions regarding the admissibility of the Dying Declaration of the deceased Padmawathi. Therefore, it is incorrect to say that the leaned High Court Judge had misdirected the jury with regard to the Dying Declaration.

Under the sixth ground of appeal, the Appellant contends that the learned High Court Judge erred in law by misdirecting the Jury about the recovery made under Section 27(1) of the Evidence Ordinance.

The prosecution had produced a crow bar (අලවංගුව) as a production which had been recovered under Section 27(1) of the Evidence Ordinance. However, the Counsel for the Appellant submits that the recovery evidence consists of a lot of infirmities and doubtful circumstances which the learned Trial Judge failed to put to the jury in her Summing-Up.

<u>According to Section 27(1) of the Evidence Ordinance-</u>

> "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

The Supreme Court in the case of **Somaratne Rajapakse Others v. Hon. Attorney General** (2010) 2 Sri L.R. 113 at 115 stated that:

> *"A vital limitation on the scope of Section 27 of the Evidence Ordinance is that only the facts which are distinctly related to what has been discovered would be permitted in evidence. 'There should be a clear nexus between the information given by the accused and the subsequent discovery of a relevant fact. A discovery made in terms of Section 27 of the Evidence Ordinance discloses that the information given was true and that the Accused had knowledge of the existence and the whereabouts of the actual discovery."*

The learned High Court Judge had given a very clear guideline as to the utilization of recovery evidence under Section 27(1) of the Evidence Ordinance. The relevant portion of the Summing-Up is re-produced below:

Page 793 of the brief.

එම විත්තිකරුගේ ප්‍රකාශයෙන් භාණ්ඩ සොයා ගත්තා කියලා විත්තිකරු එම වරද සිදු කලා යැයි කිසිසේත්ම අනුමිතියක් ලබාගත නොහැකිය. එයින් ලැබෙන එකම අනුමිතිය වන්නේ අපරාධයට භාවිතා කලා යැයි සැක කරන භාණ්ඩය. ඉන්පසුව තිබූ ස්ථානය සම්බන්ධයෙන් විත්තිකරුට දැනීමක් තිබුණා යන කරුණ පමණයි. විත්තිකරුවෙකු විසින් පොලිස් නිලධාරියෙකුට කරන ලද ප්‍රකාශයේ ඔහු වරද පිලිගැනීම සිදුකර ඇතත් එය ඔහුට එරෙහිව සාක්ෂියක් වශයෙන් ඔහුව එම වරදට අදාල නඩු විභාගයේ දී භාවිතා කල නොහැකිය. නමුත් පොලිස් නිලධාරියාට කරන එම වරද කියාපෑම ඇතුලත් ප්‍රකාශයේ අඩංගු කරුණු වලින් අපරාධයට භාවිතා කල භාණ්ඩය සොයා ගතහොත් ඉන් ලැබෙන එකම අනුමිතිය වන්නේ අපරාධයට භාවිතා කල භාණ්ඩය අපරාධයෙන් පසුව තිබෙන ස්ථානය සම්බන්ධයෙන් චූදිතට දැනීමක් තිබූ බව පමණයි. කුමන හේතුවක් නිසාවත් එම භාණ්ඩය තිබූ තැන අනාවරණය කර ගැනීම හේතු කොට ගෙන චූදිත මෙම අපරාධය කලා යැයි අනුමිතියකට නොඑළඹිය යුතුයි. නමුත් එම භාණ්ඩය සොයා ගැනීම ඇතුලු ඉදිරිපත් කල

අනෙකුත් සියලු කාරණා සැලකිල්ලට ගෙන සමස්ථයක් වශයෙන් සාක්ෂි සියල්ල සලකා බලා තීරණයකට එළඹීමටත්, භාණ්ඩය සොයා ගැනීමටත් භාවිතා කල හැකිය.

Immediately after providing the above said guidelines, the learned High Court Judge had very correctly analysed the evidence of PW5 and PW6 the JMOs who held the post mortem examinations on the deceased persons and expressed opinion about the injuries on the body of the deceased persons and its possible connection to the murder weapon, the crow bar. The learned High Court Judge in her Summing-up accurately explained the evidence given by both JMOs and their opinion regarding the murder weapon. Further, she had correctly dealt with the recovery evidence through the investigating officer and directed the jury to consider those evidence to come to their verdict. Hence, it is incorrect to say that the learned High Court Judge had not put any doubtful circumstances to the jury.

Under the seventh ground of appeal the appellant contends that the learned High Court Judge misdirected the Jury regarding culpable homicide not amounting to murder.

The learned High Court Judge, had accurately and extensively explained to the jury the difference between murder and culpable homicide not amounting to murder, in her Summing-Up at 800-803 of the brief. There is no any misdirection as contended by the Counsel for the Appellant.

Under the final ground of appeal, the Appellant complains that the verdict of the Jury is against the evidence led at the trial.

Considering the instructions and the directions given to the jury by the learned High Court Judge in her summing-Up, the jury has come to a correct verdict. Upon consideration of the evidence presented and the Summing-Up, I conclude that no other possible verdict other than the verdict of guilty.

Hence, all appeal grounds raised by the Appellant are devoid any merit.

When the evidence presented against the Appellant is considered I conclude that the prosecution had succeeded in adducing highly incriminating evidence against the Appellant and thereby established the charge beyond reasonable doubt. As such I conclude that this is not an appropriate case in which to interfere with the findings of the jury and the sentence imposed by the learned High Court Judge of Embilipitiya dated 12/08/2016. Hence, the appeal is dismissed.

The Registrar is directed to send this judgement to the High Court of Embilipitiya along with the original case record.

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree

JUDGE OF THE COURT OF APPEAL