**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.

K. Nimal Ariyaratne

**Accused-Appellant**

**Court of Appeal Case No:**
**HCC-411/2018**
*HC of Kandy Case No:*
*130/03*

***v.***

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

**Respondent**

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

**Counsel:** Indica Mallawaratchy for the Accused-Appellant
Azard Navavi, SDSG for the respondent

**Written Submissions: On** 27.02.2020 (by the Accused- Appellant)

**Argued On:** 01.11.2023

**Decided On:** 14.12.2023

**Sasi Mahendran, J.**

The 1st Accused appellant (hereinafter referred to as 'the Accused') along with two others, stood indicted before the High Court of Kandy for causing the death of Korawakkawe Nimal Thilakarathne(hereinafter sometimes referred to as 1st Deceased), his wife Medagedara Tekla Kumari(hereinafter sometimes referred to as 2ndDeceased) and his children Korawakkawe Salitha Mahesh Thilakarathne and Korawakkawe Madushani Kumari at Katugasthota on or about 1999.03.02.

The prosecution presented the evidence of seven witnesses and marked documents as P1 to P12. The Accused testified from the witness box. After the trial, the Learned High Court Judge acquitted and discharged the 2nd and 3rd Accused. However, the 1st Accused was convicted of murder, and the death sentence was imposed.

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

When this case was taken up for argument, on 01.11.2023, the Learned Counsel for the Accused did indicate to the Court that she was not challenging the conviction and sentence. Be that as it may, the Court must satisfy that the prosecution has proved the case beyond a reasonable doubt as the Accused is facing the death sentence.

I shall now proceed with the facts and circumstances of this case.

According to PW02 Kattadi Gedara Chandrawathie (neighbor of the deceased), on the fateful day of 1999.03.02, at approximately 12.10 am, she heard the deceased crying out loud mentioning that his eldest-younger brother (ලොකු මල්ලි) had set fire to his house.

Page 666 of the Appeal Brief,

'ලොකු මල්ලි ගෙදරට ගිනි තිබ්බා'

She identified that the 1st deceased was referring to his brother Nimal Ariyarathna, who is the 1st Accused.

Further, she states that when she went to the deceased house, she saw Tekla Kumari (2nd deceased ) lying on the ground with burn injuries. Upon approaching her she asked the PW02 to take care of her children and told her that the younger brother of the deceased did this act.

Nikathanneh Korawakkegegedara Nilmini Chamila Kumari (PW04), an eyewitness recalling the murder of her father, mother, brother, and sister stated that on the said date when she was sleeping, she heard a noise of breaking down the door and identified the 1st Accused and his two friends (2nd and the 3rd Accused ) entering their house. And saw the 1st Accused stabbing her parents, pouring petrol on them, and setting them on fire. Upon being frightened by the said event she fled away and by the time she returned her house was on fire. In the cross-examination, they marked that she hadn't mentioned the 2nd Accused in her statement to the Police. Later on, in the cross-examination she admitted that she couldn't identify the other two people who came with the 1st Accused.

Upon calling to give evidence, witness Megadara Susantha (PW01) (2nd deceased's brother) stated that while transporting her sister to the hospital she told him that it was the 1st deceased eldest-younger brother who did this act.

On page 350 on the Appeal brief;

ප්‍ර : තමන් කිව්වද "තමන් දැක්ක කිව්වා ඒ වෙලාවේ අක්කට පණ තිබුණා. මම ඇසුවා අක්කා මෙය කලේ කවුද කියල ඇසුවාද ? ලොකු මල්ලි තමයි මෙය කලේ කිව්වද " ලොකු මල්ලි කියන්නේ 1 වන විත්තිකරු ?

උ : එහෙමයි

Apart from the evidence established by the above-mentioned witnesses, according to IP Jeewakantha PW11, he visited the scene on 03.03.1999 and then decided to visit the alleged victim (1st deceased).

This witness testified that at that time the deceased was receiving treatment in Kandy Hospital, he visited the said hospital and recorded the statement from the 1st deceased he further testified that the statement was made by the deceased voluntarily and he was mentally fit to give that statement.

According to the dying deposition made to him, the 1st deceased stated that, after going to sleep around 8.00 pm on 1999.03.02, upon forcefully entering the premises, his brother ලොකු මල්ලි the 1st Accused stabbed and poured a lubricant like petrol or kerosene and set the house on fire. He further stated that he and his brother were not on good terms, he further stated that he suspects the other two persons who came with the 1st accused were Baby (Pabli's son) and Mahinda. After entering the statement in the main criminal information book since the deceased skin was heavily burnt, he couldn't sign the

statement, but the inspector was able to get the fingerprint of the deceased. The said dying declaration is marked as P01.

JMO, Dr. Asokha Bandara Seneviratne in the Medio Legal Report mentioned that the 1st deceased had died due to trauma caused by burnt injuries where 80% of his body had been burnt (document marked as P04). Further, he observed several stab injuries on his body. He further mentioned that he conducted the post-mortem of the 2nd deceased, (Tekla Kumari) and stated even her cause of death was due to trauma caused by burn injuries and internal damage caused due to burning (document marked as P05). Furthermore, the JMO stated both these deceased may have had the capacity to communicate at times despite being heavily burnt.

Further, the JMO stated that two children also died due to the trauma caused by heavy burning and it would have been caused because a lubricant like petrol might have been used to ignite the fire. ( Post Mortem Report marked as 06 and 07)

In the dock statement, the Accused categorically denied the murder charges and stated that he was Highly intoxicated on the first day to do any act. Then he continued to consume liquor the following day and thought to himself either he should live or his brother should live. He admits he had brought petrol in two shopping bags and proceeded towards the deceased house.

He further states that after entering his brother's premises he was saddened and had decided only to attack him and not to murder. Amidst the attack, the deceased had woken up and grappled the sword. While they were quarreling, the wife of the deceased Tekla had woken up and bolted outside along with the children, and according to the Accused it was she who tossed the bags of petrol at them, and he assumes that it got ignited because of the lamp that was lighted inside the house.

However, the Accused denied the fact he deliberately caused the fire, he testified that his action was caused due to the quarrel they had over for 7 years. And he was severely provoked by the act of the deceased and he had committed these crimes because he was voluntarily intoxicated.

The Learned High Court Judge had rejected the evidence of the Accused on the basis that both the 2nd deceased and the two children were found inside the house with burned injuries.

In the instant case, it is imperative to note that the prosecution has heavily relied on the dying declaration made to the Police officer (PW11) by the 1st deceased and deceased wife (Tekla Kumari) to PW1 and PW2 concerning the 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 judgments 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:

"Are these the words used by the deceased? Are these the words used by the witness or is this a mixture of words used by both the witness and the deceased? Learned trial Judge should have been mindful of these questions.

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 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; vide King v Asirivadam Nadat and Justinpala v Queen. That the person who made the dying declaration is not a witness at the trial."

Further held that:

"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."

**Justice H.N.J. Perera, (as he was then ) in Ananda v. Attorney General, 2015 (1) SLR 158, held that:**

"It is well settled that dying declarations can form the sole basis of conviction provided that it is free from infirmities and satisfies various tests.

In *Khushal Rao V. State of Bombay* It was held that it is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subjected to cross-examination, there is neither a rule of law that a dying declaration cannot be acted upon unless it is corroborated.

It is also settled in all these cases that the statement should be consistent throughout if the deceased had several opportunities of making such dying declarations, that is to say, that 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 any corroboration."

In the instance case, the Judicial Medical Officer has testified that both the deceased were able to speak at the initial stage. The Police officer's evidence was that the 1st deceased made the dying declaration at the Hospital. According to this witness, the deceased was in a very fit mental condition when making that statement. He also testified that he had recorded the statement without asking any questions. In Addition to this dying declaration, the 2nd deceased also made a dying declaration to the PW02. We are mindful that PW02 is a neighbor who has witnessed the 1st disease coming out from the house with burn injuries.

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 about the dying declaration made by both Deceased:

1. The dying declaration was made by both the Deceased.
2. The Statements were true and accurate.
3. The Statements made by the Deceased could be accepted beyond reasonable doubt.
4. Prosecution witnesses PW1, PW2, and PW11 are telling the truth.
5. The 1st and 2nd Deceased were able to speak at that time.

To strengthen to admit these dying declarations, there's a piece of corroboration evidence available. According to PW04, the daughter has seen the 1st Accused stabbing the father and the mother.

The Learned High Court Judge considered the entire evidence and came to the finding that there is no sufficient evidence to establish the guilt of the 2nd and 3rd Accused for the murder, and he has correctly concluded that the prosecution has established beyond reasonable doubt that 1st accused is guilty of the murder of all of the deceased.

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**