

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

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

Complainant

V.

Arumugam Kanagaratnam alias Kalu

Accused

Court of Appeal Case No.
HCC 73/2013

High Court of Nuwara Eliya
Case No. HC/NE 41/2009

AND

Arumugam Kanagaratnam alias Kalu

Accused Appellant

V.

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

Complainant Respondent

BEFORE

: **K.K. WICKREMASINGHE, J**
 K. PRIYANTHA FERNANDO, J

COUNSEL

: Sharon Seresinhe for the Accused Appellant.
 Chethiya Goonesekera DSG for the Respondent.

ARGUED ON : 28.01.2020

WRITTEN SUBMISSIONS

FILED ON : 24.01.2017, 15.03.2017 & 26.06.2018 by the Accused Appellant.

27.08.2018 & 05.02.2020 by the Respondent.

JUDGMENT ON : 27.02.2020

K. PRIYANTHA FERNANDO, J.

01. The Accused Appellant (Appellant) was indicted in the High Court of Kandy for one count of murder. After trial, the learned High Court Judge upon convicting the Appellant for the charge sentenced him to death. Being aggrieved by the said conviction, the instant appeal was preferred by the Appellant. Although the learned counsel for the Appellant in her written submissions has urged 3 grounds of appeal, at the argument of this appeal she pursued only the following two grounds.

1. Is the deceased telling the truth in the dying declaration?
2. When there were doubts in the prosecution case, the learned Trial Judge had convicted the Accused for murder without considering those doubts.

Facts in brief

02. The deceased was a widow with 3 children. Appellant was a married man whose wife was abroad. Both Appellant and the deceased had been living in the same line house in separate line rooms. Both of them had been living together for about a month until the day the deceased got burned. The Appellant was alleged to have poured kerosene oil on the deceased and set fire to her. The deceased had made three separate dying declarations to separate witnesses that the Appellant set fire to her. Deceased was admitted to the hospital and later succumbed to her burn injuries.

03. Learned counsel for the Appellant submitted that it is doubtful whether the deceased was telling the truth in her dying deposition. Counsel further submitted that the learned High Court Judge erred when he concluded in his judgment at page 17, that the deceased had been a pest or a nuisance to the Appellant according to the dock statement of the Accused. Evidence of PW1 should not be relied upon as he is an interested witness as the brother of the deceased.
04. As the hair of the deceased was not burned, the dying deposition made by the deceased that the Appellant poured kerosene oil on the head and threw the lamp, could not be accepted as the truth, counsel contended.
05. Learned Deputy Solicitor General for the Respondent submitted that the deceased has made dying declarations on 3 occasions to three different persons, out of them the Police Officer to whom the deceased made the deposition is an independent witness. According to the Judicial Medical Officer who conducted the autopsy, the deceased had burn injuries on 70 percent of her body. Therefore, the dying depositions made by the deceased can be accepted as the truth, learned DSG submitted.
06. Deceased had made dying depositions to three persons including her own brother PW1. According to PW1, when he saw the deceased with burn injuries he had asked her as to what happened. Deceased had told him that the Appellant after coming drunk, poured kerosene oil on her and burned her. According to PW1, then he had gone and asked the Appellant who was in the 3rd house, as to why he did it. The Appellant had said, ‘මම කාටවත් ගිනි තිබ්බේ නැහැ.’ (page 56 of the brief).
07. It is the case for the Appellant that the evidence of PW1 should not be acted upon as he is an interested witness as he is the brother of the deceased.
08. In case of *Jayabalan V. U.T. of Pondicherry, Supreme Court of India Criminal Appeal 1246 of 2002, (6th November 2009)* court observed;

"...We are of the considered view that in cases where the Court is called upon to deal with the evidence of interested witnesses, the approach of the Court, while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavor of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

09. Merely because the PW1 is the brother of the deceased, his evidence should not be rejected if the court finds that he is a credible witness. His evidence has to be considered with caution. Genuinely he said that the Appellant denied the allegation when he inquired from him. I am of the considered view, that the learned High Court Judge rightly accepted the evidence of PW1 and that he was truthful.
10. It is also pertinent to note the post conduct of the Appellant. The Appellant had been in the 3rd house when the PW1 inquired about the incident. Appellant being the man who was living with the deceased had not even taken any steps to take the deceased to the hospital. In the circumstances and considering his own statement from the dock the Appellant made, the learned High Court Judge was entitled to conclude that the deceased had been a nuisance to the Appellant by pestering him to marry her.
11. Section 32 (1) of the Evidence Ordinance provides for admitting dying declarations made by the deceased persons 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.
12. Trial Judge has to be mindful and direct himself on the inherent weaknesses of a dying declaration of a deceased. The statement of the deceased is not made under oath. It cannot be tested by cross examination as he cannot be called as a witness.

13. In case of **Gamini Attanayake V. Hon. Attorney General (CA 03/2011, decided on 4.8.2014)**, Anil Goonaratne J. observed the following, that a Trial Judge must give serious consideration in view of the inherent weaknesses in a dying declaration.

“Whether the deceased in fact made such a statement,

- a. Whether the statement made by the deceased was true and accurate.*
- b. Whether the statement made by the deceased person could be accepted beyond reasonable doubt.*
- c. Whether the evidence of the witness who testifies about the dying declaration can be accepted beyond reasonable doubt.*
- d. Whether the witness is telling the truth.*
- e. Whether the deceased was able to speak at the time the alleged declaration was made.*
- f. Whether the deceased was able to identify the assailant.”*

14. In case of **Jayabalan V. U.T. of Pondicherry, Supreme Court of India Criminal Appeal 1246 of 2002, (6th November 2009)** on acting upon a dying declaration of a deceased, court further observed;

“...The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated....”

15. In the instant case it is evident that the deceased was in a fit state of mind when she made the declarations. Deceased in fact had walked to get into the lorry to go to the hospital. The second declaration was made at the hospital to the PW3 Jayaram who testified in court. PW3 had accompanied the deceased to the hospital. Not even a suggestion was made to PW3 by the defence at the trial, that PW3 had any enmity with the Appellant or he had any reason to implicate the Appellant. PW3 cannot be considered as an interested witness.

16. PW12 was a Police Officer who was attached to the Kandy hospital police post. He has testified in court about the dying declaration the deceased made to him in hospital. He was an independent witness who had no connection to the deceased or to the Appellant. Although, PW12 was cross examined by the defence at the trial, his evidence on the dying declaration that was made to him by the deceased was never challenged by the defence.
17. Although the hair of the deceased was not burnt, from her face up to the legs were severely burnt according to the medical evidence adduced in the court.
18. In the above premise, the learned High Court Judge was entitled to act upon the three dying declarations made by the deceased to three different persons on three different occasions that the Appellant poured kerosene oil on the deceased and set fire to her. I see no reason to interfere with the judgment of the learned High Court Judge and the grounds of appeal urged by the Appellant should necessarily fail.

Conviction and the sentence imposed on the Appellant by the learned High Court Judge is affirmed.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL