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

In the matter of an Appeal against the order made by High Court of Colombo on 03.10.2019 under and in terms of the Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

Democratic Socialist Republic of Sri Lanka

Complainant

CA Case No: CA/285/19

Vs.

HC Colombo Case No. 6036/12

1. Mohammed Hussain Mohamed Firnas
2. Abdul Kareem Kurrathul Ain

Accused

AND NOW BETWEEN

1. Mohammed Hussain Mohamed Firnas
2. Abdul Kareem Kurrathul Ain

Accused – Appellant

Vs.

Hon. Attorney General,

Attorney General Department,

Colombo 12.

Complainant- Respondent

Before : Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel : N. M Shaheid with Zaid Ali and

Wazeem Amhar for the Accused-Appellant.

Maheshika Silva, DSG for the State.

Argued on : 09.07.2024

Decided on : 25.07.2024

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the judgment dated 03.10.2019 of the High Court of Colombo.

The accused appellant (hereinafter referred to as the appellant) had been indicted for committing the murder of his wife along with his mother. At the conclusion of the trial both accused had been convicted for murder and the mother of the appellant who had been the 1st accused at the trial had died in prison.

The main ground of appeal raised by the Counsel for the appellant was that, the trial judge had not considered the dying declaration properly and the case for the prosecution had not been proved beyond a reasonable doubt.

The prosecution evidence is mainly based on three dying declarations the deceased is supposed to have made.

The main witness for the prosecution had been the father of the victim, who had said in evidence that the deceased at the time of the incident had been 19 years of age and she had been married to the appellant and had been living in the house of the appellant and the 1st accused.

The deceased also has had a child and the father of the victim had said on the fateful day that he received a telephone call from the appellant stating that if he did not take the daughter home, he would only see the body of hers.

As such the witness had taken a three wheeler and had fled to the house of the appellant but on his way, he had passed the vehicle of the appellant and he had heard the deceased calling out to him and he had got down from his three wheeler and had gone towards the appellant's vehicle and he had seen the deceased all burnt and crying, seated next to the appellant. At this point the father got very emotional in Court.

Thereafter, he had taken the deceased to the hospital and had admitted her on the 30th of December 2007. The deceased had lived till the 3rd of January 2008 and had succumbed to the burn injuries.

The deceased had made a statement to the father while in hospital in which she had said that she has had an argument with the 1st accused and the appellant had come and had slapped her and taken her by the hair and had banged her head on the wall and she had fallen down. The 1st accused had then poured kerosine oil on to her and had set fire. She had pleaded with the appellant to help her but he had not.

The same story was told to a relative, who had visited her in hospital but the relative had made a statement to the police after the death of the deceased.

The police had received the 1st complaint on 30.12.2007 from the father and the police had commenced investigations. On 01.01.2008, the police had recorded a statement from the deceased, with permission from the nurse in charge of the ward (page 273) and the deceased had told the police something similar to what had been told to the father and the relative.

The doctor, who did the post mortem, had said that the deceased had died of burn injuries and the totality of the burn injuries had been 65% and it is supposed to be necessarily fatal if it is over 50%, hence it is undoubtedly fatal.

The doctor had said that the deceased had been in a position to talk and had been very conscious but would have been in severe pain due to the seriousness of the injuries.

The doctor had been lengthily cross examined and he had ruled out an accident or suicide.

At the conclusion of the trial, the appellant had given evidence on oath and he had said that the deceased had been of quarrelsome nature and on the day of the incident she had fought with him for not having ginger at home to serve ginger tea when her parents came that day. He further says that then he had

hit her and had gone to the toilet and when he came back, she had set fire to herself.

The trial judge in his judgement had referred to the evidence of both sides and had said that three dying declarations of the deceased and the medical evidence had clearly demonstrated that the appellant and the 1st accused acted in furtherance of a common murderous intention and the type of injuries inflicted clearly demonstrates the murderous intentions of the appellant and the 1st accused.

The deceased is supposed to have pleaded with the appellant to douse the fire but he had not helped her and his telephone call to the father, prior to the incident, further displays the intentions he had been harboring.

The counsel for the appellant strenuously argued that the dying declarations of the deceased are deficient and contradicts each other, but we do not see such a thing, and in fact we find the dying declarations to be very consistent, as it clearly demonstrates the cause of death and the way the two accused persons had acted to commit the gruesome act.

The Counsel for the appellant also said that the dying declaration made to the police is questionable because he had not obtained permission from the medical authorities. But we find at page 274 of the brief that the police had asked permission from the nurse who had been in charge of the ward and had even recorded the bed head ticket number, before recording the statement from the victim. Therefore, we are unable to agree with the submission that the police recorded the statement from the deceased without proper permission from the authorities.

The Counsel for the appellant also had submitted that the relative to whom the deceased had made a dying declaration, while in hospital, had not made a statement until the victim had died and therefore it is coached, but we find it hard to believe because these witnesses are not people who are conversant with the criminal justice system, hence they are unable to understand the validity of making a police statement promptly. As such, we are unable to agree with that contention.

The main item of evidence against the appellant is the dying declarations made by the deceased to the police, the father of the deceased and to her relative.

The law pertaining to dying declarations have been defined under section 32(1) of Evidence Ordinance and the prosecution must prove that the deceased made the said statement anticipating the death.

In the case of **CA-41-2009,** Kumidini Wickramasinghe J had quoted the case of **Gamini Attanayake vs the Attorney General CA-3-2011**, decided on

04.08.2014, Anil Gunaratne J has held, that a trial judge in considering a dying declaration must be mindful of the following guidelines,

1) Whether deceased statement was true and accurate,
2) Whether it could be accepted beyond a reasonable doubt,
3) Whether the witness who is quoting the dying declaration can be accepted as a truthful witness,
4) Whether the deceased was able to speak at the time,
5) Whether the deceased could identify the assailant.

The same principle of dying declaration has been discussed in the cases of **Somasundera vs The Queen 76 NLR 10, Perera vs Jayasinghe 48 NLR 17.**

In the case of **Sigera v Attorney General (2011) 1 Sri.L.R. 201**, it was held, "An accused can be convicted of murder based mainly and solely on a dying declaration made by a deceased".

In the instant case, the deceased had been in a position to speak according to the doctor who conducted the post mortem and she identified the assailants. Furthermore the dying declarations had been made to the police, the father and the relative of the victim whose evidence, as discussed above, has stood the test of cross-examination satisfactorily.

As such, from the evidence placed above, we are of the opinion that the prosecution has proved beyond a reasonable doubt that the appellant has acted with a common murderous intention with the first accused and committed the murder of the deceased.

Hence as said in the case of **Ambika Prasad vs State of New Delhi 2000 SCC Crl 522** that " a criminal trial is meant for doing justice to the accused ,victim and society, so that law and order is maintained .A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties."

As such, upon consideration of the submissions of both parties, we are of the view that there is no merit in the submissions of the Counsel for the appellant and as such we are compelled to dismiss the instant appeal and affirm the conviction and the sentence imposed by the trial judge.

JUDGE OF THE COURT OF APPEAL

Hon. Justice B. Sasi Mahendran

I agree.

JUDGE OF THE COURT OF APPEAL