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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist
Republic of Sri Lanka

Court of Appeal Case No.
HCC/115/2022
High Court of Colombo
Case No. HC 598/18

Complainant

Vs.

Mahawanni Arachchige Sampath Chaminda.

Accused

AND NOW

Mahawanni Arachchige Sampath Chaminda.

Accused –Appellant

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Palitha Fernando, P.C. for the Accused-Appellant.

Maheshika Silva, D.S.G. for the Respondent.

ARGUED ON : 27.02.2024

DECIDED ON : 26.03.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Colombo for committing the murder of one Ranathunga Arachchige Dinesh Prasanna and in the same transaction, committing the murder of Mayadunnage Chandralatha on 13th October 2008, offences punishable under Section 296 of the Penal Code. After trial, the learned High Court Judge convicted the accused-appellant on the two counts of murder and imposed the death sentence on him. This appeal is preferred by the accused-appellant against the said convictions and sentence.

Prior to the hearing, written submissions were filed on behalf of both parties. At the hearing of the appeal, the learned President's Counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions.

In brief, the prosecution case is as follows:

The two deceased persons who were shot dead, Chandralatha and Dinesh Prasanna were mother and son. On the day of the incident, around 7 a.m. in the morning, PW-4, the daughter of Chandralatha and the sister of Dinesh was asleep in the room of their house. PW-4 was suddenly awakened by a sound similar to a fire cracker followed by the smell of gun powder. When PW-4 came out to the front portion of their house, she saw the accused-appellant leaving their house with another

person whom she could not identify. She has then seen her brother fallen down shivering after receiving gunshot injuries. She has also seen her mother who was seated on a bed in the front portion of the house, fallen to a side. Thereafter, PW-4 had quickly arranged a three-wheeler and sent her brother to hospital assuming that her mother had fainted due to shock, after seeing his son being shot. When PW-4 returned to the house after sending her brother to the hospital, she had witnessed that her mother whom she assumed to have merely fainted had also been shot at and sustained injuries. She had thereafter taken steps to hospitalize her mother.

Even at the time of admission to the hospital, the brother of PW-4, Dinesh Prasanna was dead. Her mother, Chandralatha, died from her injuries nearly a month after the incident. One day after the incident, while receiving treatment at the National Hospital, Chandralatha made a statement to PW-8, Police Constable Saman Kumara. In the said statement, the deceased Chandralatha stated that she identified "Sampath" who was in Bandaranayakepura as the person who shot at her and her son. She had signed the said statement. The dying declaration was marked as P4 by the prosecution.

The learned President's Counsel for the appellant formulated his arguments on the following grounds of appeal:

i. The learned Trial Judge has failed to adequately consider the facts in favour of the accused-appellant as required by law.
ii. The obvious infirmities in the case for the prosecution have not been considered adequately and reasons for acting upon the evidence notwithstanding such infirmities have not been given.
iii. The dying deposition of the deceased has not been considered utilizing the tests laid down by our courts.
iv. The defence of alibi taken up by the accused throughout the trial has not been adequately considered.

v. In view of the above circumstances, there has not been adequate consideration of the defence case as required by law.

vi. Due to one or more of the above reasons, the accused has been denied a fair trial, which is a constitutionally guaranteed fundamental right of a person accused of an offence.

Apart from the aforesaid grounds of appeal, the learned President's Counsel for the appellant contended that the chain of causation with regard to the death of Chandralatha was not considered by the learned High Court Judge. The learned DSG pointed out that the cause of death of Chandralatha has not been challenged and therefore, there was no necessity for the learned Trial Judge to specifically consider the chain of causation.

The cause of death of Chandralatha mentioned in the cause of death form (P3) has been recorded as an admission as the defence did not challenge the cause of death (Page 121 of the appeal brief). As the admitted facts need not be proved, I agree with the contention of the learned DSG that it is not essential for the learned Trial Judge to consider the chain of causation with regard to the death of Chandralatha. It is established that the death of Chandralatha was due to the Septicemia occurred as a result of firearm injuries. From the Post-Mortem Report and the evidence of the Assistant Judicial Medical Officer, it is established that the cause of death of Dinesh Prasanna is cranio-cerebral injuries following discharge from a firearm or firearms. Therefore, the deaths of both Chandralatha and Dinesh Prasanna had occurred due to the injuries caused by a firearm.

The main contention of the learned President's Counsel was that the sole eye witness PW-4 was not credible and convicting the appellant on her evidence is wrong. The learned President's Counsel contended that according to the testimony of PW-4, she had not clearly identified the appellant as the person who shot at her mother and the brother,

obviously, her attention was drawn to the injured brother. The learned DSG appearing for the respondent contended that PW-4 is a credible witness and her evidence could be acted upon. The learned DSG submitted that PW-4 had made a prompt statement to the Police on 14.10.2008 after attending to the Post-Mortem Examination to identify the body of her brother, Dinesh Prasanna. The learned DSG contended further that the incident occurred between 7 and 7.15 in the morning, the lighting condition was good at that time and the distance between the appellant and the witness was about six feet.

In cross-examination, there was no suggestion to PW-4 at least that she did not see two persons fleeing from the place of the incident soon after the shooting. What was suggested on behalf of the accused in cross-examining PW-4 is that the accused-appellant did not come to the place of the incident, but his brother came there, and PW-4 saw the brother of the accused, "Upul" and since both the brother and the accused look alike, PW-4 mistakenly claims that the person that she identified at the scene is the accused-appellant (Pages 53, 54 of the appeal brief). PW-4 stated in her testimony that she identified the person as 'Sampath'. However, it is apparent from the above suggestion made on behalf of the appellant that the appellant had not disputed the fact that PW-4 saw two persons running away from their house. Defence suggestion was that she misidentified one of the persons as the appellant instead of appellant's brother. Therefore, the only issue to be determined is whether PW-4 correctly identified the appellant when she saw two persons running away from the house. PW-4 stated in her evidence that she could not identify one person, but the other person was identified as "Sampath", the appellant.

Chandralatha clearly stated in her dying declaration that Sampath, the accused-appellant shot her and her son, Dinesh Prasanna. If the learned Trial Judge's decision is correct to accept the said dying declaration as evidence, it can be concluded without any ambiguity that

the accused-appellant committed the two murders because Chandralatha had clearly identified the shooter as the appellant and PW-4 also identified the appellant as one of the persons ran away soon after the shooting.

In order to decide whether Chandralatha's dying declaration can be acted upon, it is pertinent to consider the legal position regarding the acceptance of a dying declaration as evidence of a case.

A dying declaration can be admitted in evidence in terms of Section 32 of the Evidence Ordinance. In ***Ranasinghe V. Attorney General*** – (2007) 1 Sri L.R. 218 the tests that should be applied in accepting a dying declaration as evidence are specified as follows:

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,

The Trial Judge/Jury must be satisfied beyond a 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;

The learned President's Counsel for the appellant contended that none of the aforesaid tests have been applied by the learned High Court Judge in acting upon the dying declaration.

A dying declaration may be written or oral. If it is an oral statement made by the deceased, the Court must consider whether the witness who testifies about the dying declaration is truthful and whether the deceased in fact made such a statement. In addition, the Court must consider whether the statement made by the deceased was true and accurate. In the case at hand, the dying declaration is not oral. The Police Officer Saman Kumara recorded the statement of the deceased Chandralatha and she had signed the statement. It is apparent that the Police Officer did not want to implicate the appellant for this double murder and write a false statement and obtain Chandralatha's signature for the statement. There is no evidence that the Police Officer at least knew the appellant prior to the incident. Therefore, there was no reason for the Police Officer to implicate the appellant.

As stated previously, the position taken up by the appellant was that not the appellant but his brother came to the place of the incident and PW-4 saw his brother running away. If the appellant's brother shot at Chandralatha and her son, there was no reason for Chandralatha to mention that the appellant shot at both of them. She could have mentioned the name of the appellant's brother, as Chandralatha's family knew the appellant's family for a long time. Therefore, it is apparent that Chandralatha stated in her dying declaration that she clearly identified the appellant because in fact she identified him clearly. Hence, there was no reason for a false implication and it is evident from Chandralatha's dying declaration that PW-4 had not misidentified the appellant.

It is correct as contended by the learned President's Counsel that the learned Trial Judge has not specifically stated in his Judgment about the aforementioned tests to be applied in considering a dying declaration. However, before accepting the dying declaration as evidence, the learned Judge has considered some of the matters which are said to be considered in these tests. One of the important matters that the learned Judge has considered is that Chandralatha did not have an opportunity to be taught by anyone before making the dying declaration. The learned Judge observed that it is not revealed from the evidence that even her daughter PW-4 had an opportunity to see Chandralatha at the hospital before making the dying declaration (Page 17 of the High Court Judgement). After considering those relevant matters, the learned Judge decided that the dying declaration had been made independently without any tutoring or influence.

It is apparent from the evidence that when they were sleeping on the floor of the room, the shooter came and fired at them. Therefore, in very close proximity, Chandralatha could see the shooter. The appellant was well-known person to Chandralatha as well as to PW-4. That is why Chandralatha had stated in her dying declaration that I identified the shooter very well as 'Sampath' ('ඒ, පුතාට හා මට වෙඩි තිබ්බ අය අපේ බණ්ඩාරනායකපුර හිටිය සම්පත් බව මම හොඳින් හඳුනාගත්තා' – Page 96 of the appeal brief). In addition, the learned Trial Judge observed that there was no suggestion from the defence about any other 'Sampath' in that area. In considering all these facts and circumstances, it is clear that Chandralatha had the opportunity to identify the appellant very well. Hence, I hold that it is correct in accepting the dying declaration of Chandralatha as a true statement made by the deceased. The dying declaration is also accurate because she explicitly stated that the appellant shot both her and her son.

It was held in ***Sigera V. Attorney General*** – (2011) 1 Sri L.R. 201 that an accused can be convicted for murder based mainly and solely on a

dying declaration made by a deceased without corroborating under certain circumstances. It was held further that it would not be repugnant or obnoxious to the law to convict an accused based solely on a dying declaration. In ***Kumarasinghe Hettiarachchilage Gamini Sarath V. The Hon. Attorney General*** – C.A. Case No. 24/2015, decided on 22.03.2019, it was held that "A dying declaration as evidence can be acted upon without corroboration, if it is found to be true and reliable". In view of the aforesaid judicial authorities, Chandralatha's dying declaration can be acted upon even without corroboration as it can clearly be accepted as true and reliable. Hence, it is evident from the said dying declaration that the appellant had shot and murdered Chandralatha and her son Dinesh Prasanna.

In the instant case, Chandralatha's dying declaration has been corroborated by the evidence of PW-4. On the other hand, no reasonable doubt arises in respect of PW-4's evidence regarding the identity of the accused-appellant because her identification is corroborated by the dying declaration of Chandralatha. Therefore, it is established from the prosecution evidence that the appellant murdered Chandralatha and her son Dinesh Prasanna.

The next matter to be considered is whether the defence of alibi taken up by the appellant has been properly considered by the learned Trial Judge and whether the alibi creates a reasonable doubt on the prosecution case. The position taken up in the alibi had been suggested to the prosecution witnesses when they were cross-examined. The defence of alibi taken up by the accused in making a statement from the dock was that he was on official duty at Kotte Municipal Council at that time. Furthermore, the appellant stated that the following day he was arrested near Welikada Shed by a police officer called "Saman". There was no any other evidence documentary or oral, to show that he was working in the Kotte Municipal Council on that day apart from the statement made by the accused-appellant from the dock. However,

according to our law, a defence of alibi could be taken up by a dock statement and the accused has no burden to prove an alibi to any degree of probability. If the plea of alibi raises a reasonable doubt on the prosecution case, the accused must be acquitted.

In the case of ***Jayatissa v. Hon. Attorney General*** - **(2010)1 Sri LR 279,** the Supreme Court held as follows with regard to the plea of alibi:

Plea of alibi is not an exception to penal liability. Hence, there is no burden of proof on the accused to prove a plea of alibi. Section 105 of the Evidence Ordinance has no application to a plea of alibi. Evidence of alibi has merely to be weighted in the balance with the prosecution evidence.

When the defence sets up an alibi, the prosecution is entitled to lead evidence in rebuttal.

It was also held that when an accused takes up an alibi as a defence, three positions could arise;

(a) If the evidence is not believed the alibi fails,

(b) If the evidence is believed, it succeeds,

(c) If the alibi evidence is neither believed nor disbelieved, but would create a reasonable doubt as to the prosecution case on identity, the accused is entitled to get the benefit of the doubt.

Some of the fundamentals to be observed when an alibi is set up as a defence have been specified in the said Supreme Court Judgment as follows:

- If an alibi is established by unsuspected testimony, that will be satisfactory and conclusive.
- An alibi should cover the time of the alleged offence so as to exclude the accused's presence at the crime scene at the relevant time.

- A false alibi will weaken the defence case and strengthen the prosecution case.

Apart from the statement that "මම ඒ වෙලාවේ රාජකාරි කරමින් සිටියේ කෝට්ටේ නගර සභාවේ", the accused-appellant had not even stated a time that he reported to work. No attendance register has been produced to show the time that he reported to work or at least to demonstrate that he had reported to work on 13.10.2008. According to the aforesaid Supreme Court decision, an alibi should cover the time of the alleged offence so as to exclude the accused's presence at the crime scene at the relevant time. Undisputedly, the incidents relating to this case have occurred around 7.10, 7.15 in the morning. The appellant has not even stated that around 7.10, 7.15 in the morning, he was on duty at the Kotte Municipal Council. Therefore, the said fundamental requirement that an alibi should cover the time of the alleged offence has not been fulfilled.

In addition, the appellant stated in his dock statement that he was arrested by a police officer the next day after the incident. PW-8, Police Sergeant "Sunil Kumara" testified that he arrested the appellant on 25.10.2008 at 14.15 hours. The appellant's position was that a police officer called "Saman" had arrested him. In cross examining PW-9, it was suggested that the appellant was arrested at 8.30 in the morning and PW-9 was not the police officer who arrested the appellant. However, it was never suggested to PW-9 or any other prosecution witness that the appellant was not arrested on 25.10.2008 and he was arrested the very next day after the day that the incident occurred. So, the date of arrest has never been challenged by the defence. Apart from that, PW-9 stated that the appellant was absconding and, based on an information received, he was arrested. The PW-9's evidence that the appellant was absconding was also not challenged in cross-examination. However, in the dock statement, the appellant stated that he was arrested vey next day of the incident.

As the unchallenged evidence of PW-9 could be considered as evidence accepted by the appellant, appellant's statement from the dock regarding the date of the arrest cannot be believed. Also, it is apparent from the aforesaid unchallenged evidence that the appellant was absconding after the incident. Since the accused-appellant has not stated in his dock statement that he was on official duty on 13th October 2008 around 7.00, 7.15 in the morning at the Kotte Municipal Council, his alibi does not create any doubt on the prosecution case because the dock statement cannot be believed.

It was held in the Indian Judgment of ***Sarvan Singh V. State of Punjab*** (2002 AIR SC (iii) 3652) which was cited in the case of ***Ratnayake Mudiyanselage Premachandra V. The Hon. Attorney General*** C.A. Case No. 79/2011, decided on 04.04.2017 that "*It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted.*" In the case of ***Himachal Pradesh V. Thakur Dass*** (1983) 2 Cri. L.J. 1694 at 1701 V.D Misra CJ held that "*whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed.* Similarly, in ***Motilal V. State of Madhya Pradesh*** (1990) Criminal Law Journal NOC 125 MP it was held that "*Absence of cross-examination of prosecution witness of certain facts, leads to inference of admission of that fact.*"

In view of the aforesaid judicial authorities, the defence of alibi fails as stated previously. The learned High Court Judge has adequately considered the alibi, the defence case and correctly rejected the dock statement after recording reasons. Therefore, no reasonable doubt cast on the prosecution case as a result of the accused's dock statement.

For the foregoing reasons, I regret that I am unable to agree with the grounds of appeal raised by the learned President's Counsel for the

appellant. The accused-appellant has not been denied a fair trial. As the unbelievable alibi and the dock statement do not cast a reasonable doubt on the prosecution case as explained previously, I hold that the evidence presented by the prosecution proves the two charges against the accused-appellant beyond a reasonable doubt.

Accordingly, the Judgment dated 03.06.2022, the convictions and the death sentence imposed on the accused-appellant is affirmed.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J
I agree.

JUDGE OF THE COURT OF APPEAL