

**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 together with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA 202/2013

Vs.

HC Batticaloa Case No. 2628/2009

Ussainar Naleem

ACCUSED

AND NOW BETWEEN

Ussainar Naleem

ACCUSED – APPELLANT

Vs.

The Hon. Attorney General
Attorney Generals Department
Colombo 12.

COMPLAINANT- RESPONDENT

BEFORE: L.T.B DEHIDENIYA J (PCA)

S. DEVIKA DE LIVERA TENNEKOON J

COUNSEL: Indica Mallawaratchy for the Accused – Appellant
Dileepa Peeris DSG for the Complainant – Respondent

ARGUED ON: 14.06.2017

WRITTEN SUBMISSIONS: Accused – Appellant – 30.06.2017
Complainant – Respondent – 30.06.2017

DECIDED ON: 14.09.2017

S. DEVIKA DE LIVERA TENNEKOON J

The Accused – Appellant (hereinafter sometimes referred to as the Appellant) was indicted in the High Court of Batticaloa case bearing No. 2628/2009 on 20.08.2009 on the following chargers;

1. That on or about the 20th of November 2005 at Oddamavadi within the jurisdiction of this Court, he had committed murder by causing the death of Meerasahib Ahamed Lebbe; and thereby committing an offence punishable under Section 296 of the Penal Code,
2. At the same time, and that same place and in the course of the same transaction as mentioned in the 1st charge above, causing death to Mohamed Lebbe Fowziya and thereby committing an offence punishable under Section 296 of the Penal Code.

At the conclusion of the trial, by judgment dated 10.12.2013 the Appellant was convicted as charged and sentenced to death.

In summary, as per the prosecution, on 20.11.2005 A. Achchu Mohamed of Meeravodai (PW2) complained to the Police that his wife's sister Mohamed Lebbe Fowziya, Fowziya's husband Meerasahib Ahamed Lebbe, his wife's mother Asia Ummah and his children were sleeping at home and that he woke up as Fowziya and her husband switched on the light at midnight opened the gate and went to the courtyard saying "thief", and Fowziya had screamed "he is standing there". At this time. Achchu Mohamed had heard gun shots and he had rushed inside as he was afraid to go outside. When the gun shots had seized he had gone out and looked to see Fowziya and her Husband screaming with injuries and blood. Mohamed Lebbe Fowziya and Meerasahib Ahamed Lebbe were taken to Valaichchenai Hospital where Meerasahib Ahamed Lebbe died and thereafter Fowziya was transferred to the Batticaloa Hosital where she also died.

As correctly submitted by the learned Counsel for the Appellant, the case for the prosecution hinges on a dying declaration emanating from PW 1, Mohamed Lebbe Umadhu Hajarah.

The grounds of Appeal submitted by the learned Counsel for the Appellant are as follows;

1. The Conviction which is solely based on an infirm dying declaration is legally and factually untenable,
2. The learned Trial Judge has failed to address his judicial mind to the inherent weakness in the purported dying declaration,

3. The learned Trial Judge has been totally oblivious to the fact that the evidence of Hajarrah is wholly contradicted by the evidence of Jauffer which renders the conviction factually unsustainable,
4. The findings of the learned Trial Judge that the witness Hajarrah is reliable and credible is totally fallacious and wholly contrary to the evidence led at the trial.

The learned DSG for the State concedes that 'there is inevitably a doubt in the version of the prosecution witness Hajarrah's evidence.'

In the case of *Ranasinghe V. Attorney General* 2007 (1) SLR 218 it was held as follows;

(i) 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,

(ii) The trial Judge/Jury 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 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;

(iii) The trial Judge had totally failed to consider the principles relating to the dying declaration and the risk of acting upon a dying declaration;

In the case of *Lukshman vs. Republic of Sri Lanka* 2010 (2) SLR 152 it was held *inter alia* that where 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 in part. Thirdly the value of the whole or part that is admitted.

In the case of *Sigera vs. Attorney General* 2011 (1) SLR 201 it was held *inter alia* that;

(4) First and foremost a judge must apply his mind and decide whether the dying declaration is a true and accepted statement - in doing so he must be mindful of the fact that the statement was not made under oath, that the statement of the deceased person has not been tested in cross examination and that the person who , made the dying declaration is not a witness at the trial.

(5) 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 would not be repugnant or obnoxious to the law to convict an accused based solely on a dying declaration.

In the said case Ranjith Silva. J states;

"In order to justify an inference of guilt from the circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt".

In the instant case as per the Hajarah's (PW1) testimony the victim Fawziya had allegedly made a dying declaration implying that the Appellant had shot her. However as pointed out by the learned Counsel for the Appellant, in evidence in chief PW1 admits that he did not mention the said dying declaration in his 1st statement to the Police. Further, in cross examination PW1 admits that he had failed to mention the name of the Appellant in the 1st Police Statement as well as the inquest. PW 1 further admits that the victim had not mentioned anything to him.

As correctly contended by the learned Counsel for the Appellant, both PW2 and PW4 have stated in evidence that the victim Fawziya had not spoken on the way to hospital. This evidence contradicts the evidence of PW1 whose position is that the said dying declaration was made on the way to hospital.

Further, PW4 who was the son of the victim, who took the victim to the hospital testified that the victim had mentioned that she could identify the perpetrator but that "she could identify them if she saw them."

The learned Counsel for the Appellant relies on the Indian case of Smt. Kamala Vs. State of Panjab (1993) 1 SCC 1 which held that;

“A dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declarations they should be consistent particularly in material points”.

She further cites the Indian case of Lella Srinivasa Rao Vs. State of Andhra Pradesh (2004) 9 SCC 713 which held that it would not be safe to act on such conflicting dying declarations to the accused.

In the instant appeal it is clear that the evidence of Hajarah who stated that the victim Fowziya made a dying declaration to the effect that the Appellant had shot at her is contradictory and un-collaborated when considering the evidence *in toto*.

Upholding the best traditions of the Attorney General's Department the learned DSG has acknowledged this weakness in the case for the prosecution.

In this context and for the reasons as more fully described above this court is of the view that the learned High Court Judge had erred in law and fact by arriving at a conclusion of guilt on the strength of a contradictory and un-collaborated testimony about a dying declaration.

For the aforesaid reasons this appeal is allowed. The judgment of the learned High Court Judge dated 10.12.2013 is hereby set aside and the Appellant is acquitted.

Appeal Allowed.

Judge of the Court of Appeal

L.T.B DEHIDENIYA J (PCA)

I Agree.

Judge of the Court of Appeal