

**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.

B.G. Wasantha Kumara  
**ACCUSED – APPELLANT**

**Case No. CA 67/2017**

**HC (Negombo) Case No. HC 10/08**

**VS**

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

**RESPONDENT**

**BEFORE**

: Deepali Wijesundera J.

: Achala Wengappuli J.

**COUNSEL**

: Indika Mallawarachchi for the  
Accused – Appellant

H.A. Navavi S.S.C. for the

Respondent

**ARGUED ON**

: 20<sup>th</sup> March, 2018

**DECIDED ON**

: 04<sup>th</sup> April, 2018

**Deepali Wijesundera J.**

The appellant was indicted in the High Court of Negombo under section 296 and section 300 of the Penal Code for the murder of Chandralatha Kumari and attempted murder of Hasanthi Madushika. After trial he was found guilty and convicted on both counts and sentenced to death. He was not given a sentence for the second charge.

The deceased was the wife of the appellant and Madushika is the daughter of the appellant. The prosecution case was based on a dying declaration made by the deceased to a police officer. The injured Madushika was only five months old at the time of the incident.

The grounds of appeal taken up by the appellant's counsel was that the conviction which is based on an uncorroborated dying declaration made to a police officer is unsafe due to infirmities. The other ground of appeal was that the learned High Court Judge erred on the burden of proof when he evaluated evidence given by the appellant.

Prosecution witness number one Anura Bandara has recorded the dying declaration of the deceased on the 29<sup>th</sup> January 2005 at 1.25 p.m.

in the National hospital, five days after the incident. He has observed that her entire body was bandaged but he has stated that she was conscious and was able to speak and after making the statement since she could not sign, her thumb impression was taken. Six hours after making the statement she has passed away. This statement was marked and produced as P1.

The learned counsel for the appellant argued that there are several infirmities in this evidence. The statement was given five days after the incident and six hours before she passed away. She has not said anything about this incident earlier to anyone, even to a doctor or hospital staff. The statement made has meticulous details of the incident and also it contains inconsistent evidence with the evidence of other prosecution witnesses. The statement was made only, in the presence of prosecution witness number one, no hospital officer was present when it was made. The correct procedure is to have a hospital staff member with the patient.

The second ground of appeal the learned counsel argued is that the learned High Court Judge has compared the dying declaration and the accused's evidence and said he had to consider which one is more acceptable out of the two. There by shifting an unnecessary burden to

the accused appellant's counsel cited the judgment in **Queen vs Ariyadasa 68 NLR 66.**

The learned Senior State Counsel argued that the dying declaration can be relied upon when considering with the other evidence. He also stated that the learned High Court Judge did not act only on the dying declaration but has considered other evidence as well. He said that the dying declaration is reliable and other evidence supported the dying declaration.

When considering the dying declaration we find that the deceased has stated “මගේ මහත්තයා පැත්තටින් ආවේ නෑ” but the prosecution witnesses have stated that it was the appellant who threw water at the deceased to douse the fire.

The appellant giving evidence had stated that when he was with the child in the verandha the deceased doused herself in kerosene oil and lit a match and set herself on fire. He has also said that when they argued the deceased threatened that she will set herself on fire.

When considering the doctors evidence we find that the deceased's feet were not burned and also her right hand did not have burn injuries. Here we can apply the test of probability on the appellant's evidence which is consistent with the evidence of Suresh who saw the appellant splashing water at the deceased to douse the fire. Witness Catherine also has testified that she saw the appellant bringing water to throw at the deceased.

On perusal of the evidence placed before the High Court and the judgment given by the learned High Court Judge we find that the burden of proof has been shifted from the prosecution to the accused appellant. It has flawed the principles relating to burden of proof thereby denying the appellant a fair trial.

For the afore stated reason we decide to set aside the judgment dated 09/03/2017 and allow the appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

**Achala Wengappuli J.**

I agree.

JUDGE OF THE COURT OF APPEAL