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

In the matter of an Application for Revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka to be read with section 364 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal Revision

Application No:

CA (PHC) APN 111/2017

The Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-PETITIONER

High Court Avissawella

Case No. HC 48/02

Vs.

Hettiarachchige Chandrawathi,

Seetha Peella,

Avissawella.

ACCUSED-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Dileepa Peiris, SDSG for the Petitioner

: R. D. D. Harshana Ananda for the Accused-Respondent

Argued on : 12-09-2023

Decided on : 18-01-2024

Sampath B. Abayakoon, J.

This is an application filed by the Hon. Attorney General (hereinafter referred to as the petitioner) invoking the revisionary jurisdiction of this Court granted in terms of Article 138 of The Constitution.

After having considered the application, this Court issued notices to the accused-respondent (hereinafter referred to as the respondent) and she was allowed to file her objections in relation to the application.

At the hearing of this application, this Court heard the submissions of the Senior Deputy Solicitor General (SDSG) who represented the petitioner, as well as the views expressed by the learned Counsel for the respondent.

This revision application is based on the indictment preferred against the respondent before the High Court of Avissawella, where the respondent was acquitted after trial.

The petitioner who was the complainant in the High Court case has failed to follow the due procedure if the petitioner was aggrieved by the said acquittal by preferring an appeal as required by law.

The relevant section 15 of the Judicature Act No. 2 of 1978 reads as follows.

> **15. The Attorney General may appeal to the Court of Appeal in the following cases: -**
>
> **a. from an order of acquittal by a High Court-**
>
> **1. on a question of law alone in a trial with or without a jury;**
>
> **2. on a question of fact alone or on a question of mixed law and fact with leave of the Court of Appeal first had and obtained in a trial without a jury.**
>
> **b. in all cases on the ground of inadequacy or illegality of the sentence imposed or illegality of any other order of the High Court.**

It appears that this revision application has been filed based on questions of mixed law and fact. Under the circumstances, it was imperative on the petitioner to explain the reasons as to why the provisions of section 15 of the Judicature Act were not followed. In paragraph 19 of the petition, the petitioner has stated that the non-availability of the certified copy of the judgement was the reason as to why a leave to appeal application was not filed within the stipulated time.

The judgement in this case has been pronounced on 24-05-2017. The revision application has been filed on 28-07-2017 some two months after the pronouncement of the judgement.

Along with the petition, only two documents had been filed namely, the Post-Mortem Report marked P-1 and a statement made to a police officer which appears to be a dying declaration as P-2. In the petition, the petitioner has stated that the entire case record of the High Court case will be filed as P-3 when a certified copy is obtained.

The mentioned certified copy has been subsequently filed as a part of the case record. The certified copy has been issued on 15-11-2017. The journal entry made on 27-07-2017 of the High Court case, which was a day before the date mentioned in the petition, indicates that the learned Counsel has filed a motion requesting a certified copy of the case record.

This clearly demonstrates that the petitioner has not taken necessary steps to obtain a certified copy of the judgement as soon as the judgment was pronounced in Court. This shows that what is stated in the petition to justify the failure of the petitioner to follow the due process, if the petitioner was aggrieved by the acquittal, was not correct and it was only an excuse, which cannot be accepted.

Be that as it may, since the matter was considered by this Court having listened to both the parties, I will now proceed to consider whether the application made in revision has any merit.

The petition has been filed on the basis that the learned High Court Judge was misdirected as to the relevant facts and the law when it was decided to acquit the respondent of the charge preferred against her.

The respondent was indicted before the High Court of Avissawella for having committed the following offence.

1. Causing the death of Arachchilage Sarath Rupasinghe on 21-09-1999, in a place called Seetha Peella within the jurisdiction of the High Court of Avissawella, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

The evidence led by the prosecution before the High Court to prove the charge against the respondent had been entirely based on several alleged dying declarations made by the deceased to several persons including the police officer who recorded his statement while he was receiving treatment at the hospital.

It is apparent from the judgement that the learned High Court Judge has determined that although there are several dying declarations, because of the

stand taken up by the respondent as to her defence, the prosecution has failed to establish the charge against the respondent beyond reasonable doubt.

This is a case where the deceased person has suffered burn injuries over 90% of the body. During the time relevant to the incident, he had been living with the respondent as husband and wife. The respondent was a person who has worked as a housemaid in a gulf country over several years and returned. She has had 9 children out of her legally married husband and at the time relevant to this incident, three of the younger children of her marriage were also living in the house where this incident occurred.

The house was a one built using wooden planks in a crowded housing area where several small houses were adjacent to each other. It is common ground that the deceased was a habitual drinker of alcohol and a person used to frequently assault and quarrel with the respondent.

According to the evidence of their immediate neighbour, on the day of the incident as well, both of them had been quarrelling with each other until 2.00 – 2.30 in the morning. Taking it no more, the neighbour, namely, PW-04 has shouted at them from her home to keep quiet, saying that they need a rest. Around 3.30 in the morning, while working in her kitchen, she has seen the house of the respondent on fire.

The neighbours had gathered, and although they had made an attempt to douse the fire it has failed, and the entire house was in a blaze. She has seen the respondent on the road and has seen the deceased coming out of the house screaming. He has stated that 'චන්ද්‍රාවතී මට ගිනි තිබ්බා,' while running away from the place.

The evidence of several other witnesses who were present at that time was more or less the same. The deceased has informed the police officer who recorded his statement, the same thing.

However, the evidence of PW-05, who was another neighbour present at that time, was of significance as observed by the learned High Court Judge in his judgement. He has stated in his evidence that when he came near the house that was on fire, the respondent as well as her children were outside of the house and the respondent was shouting 'මේ මනුස්සයා කරගත් වැඩේ.'

When the evidence was led in this trial, PW-01 and 03 were dead. Their depositions made during the non-summary inquiry has been adopted in terms of the Evidence Ordinance.

The evidence of PW-03 who was the mother of the deceased establishes the fact that the deceased had made a previous attempt to commit suicide while he and the respondent were living as husband and wife. The evidence of the JMO establishes the fact that the deceased has died because of the burn injuries he received as a result of this incident.

At the hearing of this revision application, it was the contention of the learned SDSG that the learned High Court Judge was totally misdirected as to the way evidence should be considered in a criminal trial. He pointed out that the learned High Court Judge has considered the defence evidence before he turned his attention to the prosecution's evidence.

He pointed out that the learned High Court Judge has looked at the prosecution evidence only to justify that the respondent is not guilty. The learned SDSG was of the view that the learned High Court Judge has failed to consider the law applicable to dying declarations in his judgement, and it was contended that the learned High Court Judge's reasoning based on the respondent's evidence to acquit her was a total misdirection.

It was his submission that this is a fit case to order a retrial.

The learned Counsel for the respondent submitted that the only evidence available against the respondent was the dying declarations alleged to have been made by the deceased, and that alone would not suffice to sustain a conviction

in view of the unreliable nature of the said dying declarations. He pointed out to the evidence in relation to the respondent's behaviour at that time, and pointed out whether she would risk losing everything she earned throughout the years knowing very well that if she set fire to the deceased inside the house, the possibility of the entire house being burned down, and she will become destitute.

It was his position that since the learned High Court Judge has considered these aspects in his judgement, the judgement should not be disturbed and the acquittal of the respondent should stand.

As pointed out correctly by the learned SDSG, I am in total agreement with his submission that the learned High Court Judge was misdirected as to the way evidence in a criminal case should be considered. It is quite apparent that the learned High Court Judge has considered the defence version of events and after deciding that it was credible, has considered the prosecution evidence to discredit the prosecution evidence. In other words, it clearly appears that the learned High Court Judge has compared the defence evidence with that of the prosecution to find the respondent not guilty.

In the case of **James Silva Vs. The Republic of Sri Lanka (1980) 2 SLR 167**, the trial Judge stated, "I had considered the defence of the accused and I hold that it is untenable and false in the light of the evidence led by the prosecution."

Held:

> *"There is a serious misdirection in law. It is a grave error for a Trial Judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the accused, in the light of the prosecution witnesses is to reverse the presumption of innocence. It is also worth mentioning that the learned High Court Judge has considered the weaknesses of the defence case extensively in determining that there is no doubt as to the prosecution case. It is trite law that the prosecution must stand on its own legs*

and it cannot derive any strength from the weaknesses in the defence."

However, since this is an offence said to have been committed in the year 1999, and a case where the judgement has been pronounced in 2017, having considered the age of the respondent and the possibility of gathering the relevant witnesses to give evidence again, it becomes necessary for this Court to consider whether sending the case back for a retrial would serve justice.

I am of the view that although the learned High Court Judge was misdirected as to the evaluation of evidence in his judgement, it also appears that the necessary portions of evidence that need to be considered has also drawn his attention in pronouncing the judgement.

There is no doubt that the deceased has uttered the words implicating the respondent stating that it is she who set fire on him. However, it is settled law that such a statement needs to be considered with reference to other attendant circumstances relating to a case in order to find whether such a statement can be accepted beyond reasonable doubt.

In proceedings in which the cause of death comes into question, **E. R. S. R. Coomaraswamy** in his authoritative book on **'The Law of Evidence' Volume 1 at page 431** refers to several cases decided by the Indian Supreme Court as to the rules that should be laid down in that regard.

"The rules laid down by the Indian Supreme Court may be summarized as follows:

1. *Ordinarily it is not safe to base a conviction for murder only upon the dying declaration of the deceased when there is no corroboration of it from any independent source. Such corroboration may be by circumstantial evidence, or an oral statement made to a relative shortly after the incident may corroborate a subsequent duly recorded dying declaration .*

2. *Though ordinarily corroboration must be looked for, there is no absolute rule of law or prudence that corroboration is always necessary before a conviction which rests on a dying declaration can be sustained. Corroboration is necessary when the declaration is an incomplete statement which is not categoric in the accusation as to a crime against a named person or when the declaration suffers from some infirmity.*
3. *Where the Court is satisfied that the dying declaration is true and reliable and does not suffer from any infirmity, a conviction can be based upon it even in the absence of corroboration. Each case must be Judged on its own facts. If it is proved that the dying declaration were made without any prompting or influenced by anyone and there is no cogent reason given or suggested by the accused for throwing doubt in their truth or correctness, the conviction can be based solely on them.*

In the case of **Ranasinghe Vs. The Attorney General (2007) 1 SLR 2018**, it was held;

1. *"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;*
2. *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."*

Although PW-04 has stated that when she saw the house was on fire, the respondent was outside and did nothing, the evidence of PW-05 who was also present at the scene of the fire was different. He has stated that the respondent was shouting 'මේ මනුස්සයා කරගත් වැඩේ', which obviously refers to something the deceased himself has done.

This piece of evidence needs to be considered with the evidence of the mother of the deceased, where, although she has not directly admitted, it is clear that the deceased has previously attempted to commit suicide. In her evidence, the respondent has given details of the previous incident where the deceased has consumed poison and was admitted to the hospital.

There was no dispute as to the fact that the deceased was a habitual liquor consumer and was in the habit of assaulting and harassing the respondent under the influence of liquor. On the day of the incident as well, the same thing has occurred and according to the evidence of the immediate neighbour, the quarrelling has gone on until 2.00 – 2.30 in the morning. The respondent has informed her that she is being assaulted by the deceased.

Under the circumstances, another important factor that needs to be taken into consideration is the fact that the place of the incident was the house of the respondent, where the deceased was cohabiting with her. Everything she earned through her employment overseas had been inside the house. As a result of this fire, she has lost everything. A question invariably arises under the circumstances, whether a person who tends to lose everything she earned through hard labour, would risk setting fire on to the deceased while them being inside of the house, knowing very well about the disastrous consequences of

such an action. It may very well even be that it was the deceased who set fire to himself and attempted to pass the blame on to the respondent.

It is trite law that if a given fact can be interpreted against an accused person or in favour of an accused person, what favours an accused person has to be considered.

In the case of **Alim Vs. Wijesinghe, S.I. Police Batticaloa, 38 CLW 95,** it was held that; where the same facts are capable of an inference in favour of the accused and also of an inference against him, the inference consistent with his innocence should be preferred.

For the reasons considered as above, I am of the view that even if sent for a retrial, given the facts and the circumstances, it cannot be said that the prosecution stands a greater possibility of securing a conviction against the respondent.

Accordingly, I find no basis to order a retrial or to allow this revision application.

The application is dismissed for the reasons as considered above.

The Registrar of the Court is directed to communicate this order to the High Court of Avissawella for information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal