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/0101/15

Complainant

High Court of Chilaw
Case No. HC/26/2001

Vs.

1. Warnakulasuriya Lionel Fernando.
2. Madanasinghalage Nimal Perera.
3. Suriya Mudiyanselage Danapala.

Accused

AND NOW BETWEEN

Madanasinghalage Nimal Perera.

2nd Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Anil Silva, PC for the Accused-Appellant.
Rohantha Abeysooriya, ASG for the Respondent.

ARGUED ON : 06.05.2024

DECIDED ON : 04.06.2024

WICKUM A. KALUARACHCHI, J.

The 2nd accused-appellant was indicted in the High Court of Chilaw along with another two accused in terms of Section 296 of the Penal Code for committing the murder of Perimasamy Sadasivam Subramanium, on or about 24.03.1996 at Kiriyankalliya. The 3rd accused had died prior to the trial. The 1st accused absconded during the trial and the trial proceeded in his absence. After trial, the 1st and 2nd accused have been convicted for the charge of Murder by the Judgment dated 15.06.2015 and death sentence was imposed upon them. This appeal has been preferred by the 2nd accused- appellant against the said conviction.

Prior to the hearing of the appeal, the learned President's Counsel for the 2nd accused-appellant (herein after referred to as the "appellant") and the learned Additional Solicitor General (ASG) for the respondent

filed written submissions. At the hearing, the learned President's Counsel and the learned Additional Solicitor General made oral submissions.

Briefly, the prosecution case is as follows:

PW-1 and PW-2 are the eyewitnesses to the incident. According to PW- 2, on the day of the incident, she had gone to the brick kiln owned by her husband, PW-1. On her way, she had seen the 2nd accused-appellant and the 3rd accused assaulting the deceased with clubs, in the house of the 2nd accused-appellant. When she inquired about the reason why the accused were assaulting the deceased, they told PW-2 that they want to know something from the deceased. Thereafter, PW-2 had gone to work to the brick kiln. While PW-2 was working in the brick kiln, she had seen the 1st accused coming to the place of incident and the three accused who were armed with clubs taking the deceased to the palmyra woods behind the house of the 2nd accused-appellant.

Around 3.00- 3.30 pm, PW-1, the husband of PW-2 had also arrived at the brick kiln to work. After hearing the cries of a person asking not to beat him from the direction of the 2nd accused-appellant's house, PW-1 had inquired his wife about the noise. Thereafter, both PW-1 and PW-2 had gone to the place of the incident and witnessed the 2nd accused appellant and the 3rd accused continuously assaulting the deceased. However, PW-1 and PW-2 have interfered and taken the deceased to the Chilaw hospital. He died on 31.03.1996 at the hospital after seven days from the incident as a result of the injuries.

At the trial, the prosecution led the evidence of six witnesses. Dying declaration made to the police by the deceased while undergoing treatment in the hospital has been admitted as evidence in terms of Section 32 of the Evidence Ordinance. After the prosecution case was

closed, the 2nd accused-appellant gave evidence on oaths and his mother was called as a defence witness.

The learned President's Counsel for the appellant advanced his arguments mainly on the ground that the learned High Court Judge has misdirected himself on facts and law in coming to a conclusion. In addition, the learned President's Counsel contended that the learned Trial Judge had wrongly relied upon the dying declaration. He also contended that even if the prosecution story is believed to be true and correct, the accused-appellant could be convicted only for culpable homicide not amounting to murder but not for murder.

The learned Additional Solicitor General submitted that the deceased and the 2nd accused-appellant were residing in close proximity, and PW-1 and PW-2 had no enmity with the 2nd accused-appellant to give false evidence against him. The learned ASG contended that the learned Trial Judge correctly considered the dying declaration and the evidence of PW-1 and PW-2 regarding the incident and has come to the correct conclusion.

In this case, a dying declaration recorded by a police officer has been marked as P-2. The learned High Court Judge has relied upon the dying declaration in determining the action. In his Judgment, the learned Judge has extensively dealt with the legal position in accepting a dying declaration as evidence of a case. The learned Judge has observed that a dying declaration is also hearsay evidence. The legal position regarding a dying declaration stated in the Judgment is correct. However, the legal position stated by the learned Judge regarding the admissibility of hearsay evidence is incorrect. His observation regarding the admissibility of hearsay evidence is as follows:

"සාක්ෂි නීතියේ සාමාන්‍ය රීතියක් වන්නේ ප්‍රවාදක සාක්ෂි පිළි නොගැනීමය. එහෙත් එයට ව්‍යතිරේක ඇත. ප්‍රවාදක සාක්ෂි පිළිනොගතහොත් යුක්තිය ඉටු නොවන විටද ඒවා

පිළිගැනීමෙන් වන හානිය අල්ප වන විටද එවැනි අවස්ථාවලදී ප්‍රවාදක සාක්ෂි පිළිගැනීමට සාක්ෂි නීතියේ ප්‍රතිපාදන සලසා ඇත.”.
(page 16 of the High Court Judgement).

According to the learned High Court Judge, in cases where justice would not be served if the hearsay evidence is not admitted and the harm caused by its admission is minimal, provisions are made in Law of Evidence to admit such hearsay evidence. With due respect to the learned High Court Judge, I must say that there is no such provision in the Evidence Ordinance. The rule applicable in accepting or rejecting hearsay is that when the object of the evidence is to establish the truth of what is contained in the statement, it is inadmissible and when it is proposed to establish by the evidence not the truth of the statement but the fact that the statement was made, it is admissible. The above legal position has been explained in the Privy Council decision of ***Subramaniam V. Public Prosecutor*** – (1956) 1 W.L.R. 965.

The Evidence Ordinance does not state anywhere that hearsay evidence is inadmissible. However, Section 60 (2) of the Evidence Ordinance states that oral evidence must, in all cases whatever, be direct; that is to say, if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact. The Evidence Ordinance provides for from Sections 17 to 39 to admit hearsay evidence. Accordingly, in terms of Section 32, a statement, written or verbal, made by a person who is dead could be led in evidence when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question. A dying declaration can be led in evidence in terms of the aforesaid section of the Evidence Ordinance. Therefore, in the instant action, the dying declaration can be accepted as evidence of the case. However, as decided in ***Ranasinghe V. Attorney General*** – (2007) 1 Sri. L.R. 218, the Trial Judge must be satisfied beyond reasonable doubt whether the

statement made by the deceased was true and accurate and whether the statement made by the deceased could be accepted beyond reasonable doubt because the statement of the deceased had not been made under oath and the statement had not been tested by cross-examination.

PW-1 is the brother of the deceased. PW-2 is the wife of PW-1. The learned President's Counsel for the appellant pointed out a vital contradiction between the dying declaration and the evidence of PW-1 and PW-2 in respect of the place where the deceased was assaulted. According to the dying declaration, when the deceased was sleeping in his house, the 2nd and 3rd accused came armed with clubs and the 3rd accused dealt a blow to his head with a club. Thereafter, the deceased was taken outside the house, and then the 1st accused came and assaulted him. However, according to PW-1 and PW-2, the learned President's Counsel pointed out that the deceased was assaulted by the 2nd and 3rd accused when the deceased was in the verandah of the house of the 2nd accused-appellant.

The learned Additional Solicitor General contended in reply that there was no contradiction between the dying declaration and the evidence of PW-1 and PW-2 regarding the aforesaid point because in the dying declaration, it is stated about the commencement of the assault and PW-1 and PW-2 have described not about the commencement but the events that took place subsequently.

I regret that I am unable to agree with the contention of the learned ASG because in the dying declaration, not only the commencement of the assault but also the entire incident of assault has been described by the deceased. He stated that after dealing a blow to his head, he was taken outside from his house and again he was hit on his legs and spine. However, the deceased has never stated that he was assaulted when he was in the verandah or anywhere at the 2nd accused-

appellant's house. It is clear from the evidence of PW-1 appearing on page 104 of the appeal brief and the evidence of PW-2 appearing on page 124 of the appeal brief that both of them have clearly stated that the deceased was assaulted by the 2nd and 3rd accused when he was in the verandah of the 2nd appellant's house. Therefore, there is a vital contradiction that goes to the root of the case in respect of the place of assault. If the evidence of PW-1 and PW-2 is accepted, the deceased's dying declaration that he was assaulted when he was sleeping at his house would be improbable. If the dying declaration is accepted as true, the evidence of PW-1 and PW-2 would be improbable. Because of the said contradictory positions, a reasonable doubt arises on the prosecution case.

Be that as it may, it is apparent from the medical evidence that the dying declaration is improbable and cannot be relied upon because the doctor who conducted the postmortem examination has clearly stated in his evidence that there is no injury to the head of the deceased. The doctor has described two bruise marks and ten abrasions as external injuries and seven contusions as internal injuries. However, there is no any kind of injury on the head of the deceased. If an accused had inflicted a blow to the head of the deceased with a club, there must be some kind of injury on his head. Therefore, his dying declaration that a blow was inflicted on his head when he was sleeping at his home cannot be believed.

The important matter that arises from the evidence of PW-1 and PW-2 is that the 2nd accused-appellant also stated in his evidence that the deceased was assaulted when he was at his home. Accordingly, what the learned High Court Judge should have ascertained is whether the deceased was assaulted by 2nd and 3rd accused and then by the 1st accused as stated by PW-1 and PW-2 or whether the deceased was assaulted only by the 1st accused as stated by the 2nd accused-appellant when the deceased was at the 2nd accused-appellant's house. However,

the learned High Court Judge has not considered these matters. He accepted the dying declaration, which contradicts the evidence of PW-1 and PW-2 as well as the evidence of PW-1 and PW-2 and concluded that the charge has been proved beyond a reasonable doubt. As explained previously, according to the medical evidence, this assault could not have happened in the way described by the deceased in his dying declaration. In addition, if the dying declaration is accepted, PW-1 and PW-2's evidence that assault took place in the 2nd appellant's house cannot be believed. Without considering this vital contradiction which affects the entire prosecution case, the learned Trial Judge has come to the conclusion that the prosecution has proved its case beyond a reasonable doubt.

On the other hand, when the prosecution witnesses, PW-1 and PW-2 also state that the deceased was assaulted when he was at the 2nd appellant's house, the learned Trial Judge should have considered whether the incident could have taken place as described by the 2nd appellant in his evidence because according to him also, the deceased was assaulted when he was at his house. The Supreme Court of India, held in the case of ***Dudh Nath pandey V. The State of U.P.***, decided on 11th February 1981, reported in 1981 AIR 911, 1981 SCR (2) 771 that "defence witnesses are entitled to equal treatment with those of the prosecution."

Instead, the learned High Court Judge has erroneously rejected the evidence of the 2nd accused as well as the evidence of the defence witness using a confessionary statement that could not be admitted as evidence and in fact was not presented during the trial. The reason for rejecting the evidence of the 2nd accused according to the Judgement of the learned High Court Judge is that the 2nd appellant had stated in his statement to the police that he assaulted the deceased with a broomstick. The learned Judge stated that as a contradiction, the said portion of the police statement has been marked "X-1". [page 27 of the

High Court Judgment] It is apparent from the proceedings of the trial that the 2nd accused's statutory statement has been marked as "X-1" (page 257 of the appeal brief). In the non-summary proceedings, when making the statutory statement, the accused had stated that he does not say anything to the charge and that a written submission would be tendered on behalf of him. Apart from that, the learned Additional Solicitor General pointed out that another "X-1" has been marked at page 285 of the appeal brief. This "X-1" has been marked as a contradiction. The contradictory portion reads as follows: "මේ අවස්ථාවේදී පසුව සවස 4 පමණ ලයනල් මහත්තයා පැමිණියා යන කොටස එක්ස්:01 වශයෙන් ලකුණු කිරීමට අවසර ඉල්ලා සිටි.".

Therefore, it is apparent that a portion of 2nd accused's statement to the police saying that he assaulted the deceased with a broomstick has not been marked as "X-1" in this case. Therefore, the learned High Court Judge misdirected himself, used a certain portion of the police statement that was not led as evidence of the case and rejected the evidence of the 2nd accused-appellant erroneously. It is vital to note that it is not an unsworn statement from the dock, but the 2nd accused-appellant had given evidence on oaths, and he had been cross-examined. The learned Trial Judge not only rejected the evidence of the 2nd accused-appellant on the aforesaid completely wrong basis but also rejected the evidence of the defence witness stating in his Judgment that the defence witness's evidence that led to corroborate the evidence of the 2nd accused need not be considered as the evidence of the 2nd accused has been rejected. Therefore, it is apparent that the evidence of the 2nd accused-appellant as well as the evidence of the defence witness has been rejected by the learned Trial Judge on a completely wrong basis. Therefore, this is a case where the Judgment was entered without considering the defence case which should have been considered by the learned Trial Judge. Obviously, whatever evidence has been presented on behalf of the prosecution, the Judgment entered without considering the defence evidence cannot be allowed to stand.

In this case, as explained previously, the prosecution case consists of lot of infirmities. The prosecution evidence is contradictory. Dying declaration cannot be believed when considering the medical evidence. Hence, even without considering the defence case, it can be concluded that the prosecution has not proved the charge beyond a reasonable doubt. However, the learned Trial Judge rejected the defence evidence and concluded that the prosecution has proved the charge of murder beyond a reasonable doubt, which I hold is a wrong conclusion.

Another important matter pointed out by the learned President's Counsel was that the aforesaid "X-1", that was erroneously used by the learned High Court Judge to reject the appellant's evidence cannot be admitted as evidence under any circumstances because it is a confessionary statement. I agree with the said contention of the learned President's Counsel. The learned High Court Judge made two major errors in referring to "X-1", a portion of the appellant's police statement in which he claimed to have assaulted the deceased with a broomstick. One of the errors made by the learned Trial Judge is that the said portion of the police statement of the appellant, which was not the evidence of the case, has been used to reject the defence evidence. The other error made by the learned Trial Judge is that the 2nd accused-appellant's confessionary statement, which cannot be admitted in evidence in terms of Section 25(1) of the Evidence Ordinance has been used in determining the action. Section 25(1) of the Evidence Ordinance states that "no confession made to a police officer shall be proved as against a person accused of any offence". In ***Seyadu v. The King*** - 53 NLR 251, the Court of Criminal Appeal held that "Under section 25 of the Evidence Ordinance, a confession made to a police officer is inadmissible as proof against the person making it whether as substantive evidence or in order to show that he has contradicted himself. The circumstance that no objection was taken to the reception of such evidence at the time is immaterial." It has been held in this

Judgment that a confessionary statement is inadmissible even if such statement had come to the case record without an objection.

In ***King v. Emanis*** - 42 NLR 166, De Krester J held that "A statement made by an accused person to a Police Officer in the course of an investigation under section 122(3) of the Criminal Procedure Code may be used to contradict him provided the statement is not a confession within the meaning of section 25 of the Evidence Ordinance". Hence, it is apparent that confessionary statement cannot be used even to contradict the accused.

In the case at hand, the learned Trial Judge has used a confessionary statement of the 2nd accused-appellant which is not a part of the evidence led before him to reject his evidence. Therefore, the evidence of the 2nd accused-appellant and the evidence of the defence witness has been rejected by the learned High Court Judge erroneously and illegally. Hence, this is a Judgment given without considering the defence evidence as well as the vital infirmities of the prosecution case. It must be noted that in the case of ***Anthony Michael Morril V. Attorney General*** – Court of Appeal Case No. CA 26/06, decided on 25.05.2010, it was decided that the presumption of innocence should be operative until the learned Trial Judge peruse and analyze the entirety of the evidence led in the case, that of the prosecution as well as that of the defence. In the case at hand, as explained previously, the appellant's evidence as well as the defence witness's evidence that should have been analyzed by the learned Trial Judge, have not been analyzed in entering the Judgment.

To summarize, the learned High Court Judge has not taken into account that the vital contradiction of the evidence of PW-1 and PW-2 with the dying declaration would cast reasonable doubt on the prosecution case. The defence evidence that should have been analyzed has not been analyzed and rejected on a completely erroneous basis.

Thus, the learned High Court Judge misdirected himself on law as well as facts and has come to a wrong conclusion.

For the foregoing reasons, the Judgment dated 15.06.2015, the conviction and the death sentence imposed on the 2nd accused-appellant are set aside. The 2nd accused-appellant is acquitted of the charge of murder.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL