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

In the matter of an appeal in terms of section 331 (3) of the Code of Criminal Procedure Act No. 15 of 1979.

CA-HCC/156-159/2020

HC of Kalutara Case No:

HC 170/009

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

1. Akurugoda Gamage Upendra
2. Akurugoda Gamage Upul Indrajith
3. Kolamba Arachchige Indika Pushpakumara alia Doora
4. Jayasuriya Kankanamge Jayashantha alias Rathaa

Accused

AND NOW BETWEEN

1. Akurugoda Gamage Upendra
2. Akurugoda Gamage Upul Indrajith
3. Kolamba Arachchige Indika Pushpakumara alia Doora
4. Jayasuriya Kankanamge Jayashantha alias Rathaa

Accused-Appellant

Vs.

The Attorney General

Attorney General's Department,

Colombo 12.

Complainant-Respondent

Before : **B. Sasi Mahendran, J.**
Amal Ranaraja, J

Counsel: Charith Calhena for the 1st- 4th Accused-Appellants
Maheshika Silva, DSG For the Complainant-Respondents.

Argued On: 01.04.2025

Written Submissions: 27.06.2022 and 09.01.2023 (by the 1st to 4th Accused-Appellant)
On 09.06.2023 (by the Complainant-Respondent)

Judgment On: 04.06.2025

JUDGMENT

B. Sasi Mahendran, J.

The Accused- Appellants (hereinafter referred to as the Accused) were indicted before the High Court of Kalutara for committing the offence of murder of one Hettige Premajiwa alias Ranji on 23.06.2007 punishable under Section 296 read together with Section 32 of the Penal Code as amended.

The Prosecution led the evidence through eleven witnesses and marking productions from P1 to P6 and thereafter closed its case. The Accused gave evidence from the dock and called one witness in defence. At the conclusion of the trial, the Learned High Court Judge by judgment dated 07.09.2020, found the Accused guilty of murder and imposed the death sentence.

Being aggrieved by the afore-mentioned conviction and the sentence, the Accused has preferred this appeal to this Court.

The grounds of appeal as urged by the Accused are as follows;

1. The High Court has not considered the contradictions in the prosecution case
2. The Court did not properly consider the defence case.
3. The Learned High Court Judge has not properly considered the weaknesses and the non-credibility of the Prosecution witnesses.
4. The order was given in contradiction to the evidence placed before the Court.

According to the evidence placed before the Learned High Court Judge, the prosecution has relied on three dying declarations made by the deceased to PW1, PW3, and PW4.

Before we analysing the legal issues, it is pertinent to delve into the facts as revealed at the trial Court.

According to PW1, Kannan Thudawage Kanthi who is the wife of the deceased, before the incident happened on 23.06.2007, she had lodged a complaint to the Bulathsinhala Police on 27.05.2007 about an incident of cutting the tire of the deceased's bike by the 1st and 2nd Accused which was settled.

Later, she had lodged another complaint to the Bulathsinhala Police on 13.06.2007 about a threat made by the 4th Accused to PW1 that, "උඹේ මිනිහව මරනවා මරනවාමයි කියලා." However, such complaint was not investigated.

According to her, the deceased had told her that the 4 Accused in this case have an enmity with the deceased.

On page 87-88 of the brief;

"ප්‍ර: ඔබගේ පුරුෂයා කියලා තිබුණාද කවුරු හරි අමනාපයි කියලා?

උ: නෑ. මේ 4 දෙනා විතරයි.

ප්‍ර: මේ 4 දෙනා කියන්නේ කවුද?

උ: උපුලුයි, උපේන්ද්‍ර යි, ජයශාන්ත යි ඉන්දිකයි.

ප්‍ර: විත්තිකරුවන් 4 දෙනා අමනාපයි කියලා තමුන්ගේ පුරුෂයා කියලා තිබෙනවද?

උ: කිව්වා.

ප්‍ර: ඒ පුරුෂයා මිය යාමට කොච්චර විතර කාලයකට කලින්ද?

උ: මේ රණ්ඩු වුණු දවසේ ඉඳන් තමී තරහා වෙලා කියලා කිව්වේ.

ප්‍ර: පුරුෂයා කිව්වේ මොන වගේ අමනාපයක් තිබෙනවා කියලාද?

උ: එයාලගේ කසිප්පුවලට ඔත්තුවක් ප්‍රේමජීව දුන්නා කියලා තමයි තරහ කියලා."

As stated by PW1, on the day in question, the deceased had left home with the equipment and had asked PW1 not to bring lunch as usual but he would come home for lunch. Then she had received a call around 1.15 PM saying the deceased had fallen on the estate. Then she had managed to send her brother, Shantha Kumara, PW3, and an aunt to the scene as she was not in a position to go because of the child.

Later, the deceased was taken in a three-wheeler by the said brother, and the aunt and PW1 had joined her brother to take the deceased to the hospital. When she saw the deceased, he was bleeding. Right after she got into the said three-wheeler, the deceased had told her that Upul, Upendra, Indika, and Dora, who are the Accused in this case had hit him.

On page 93 of the brief;

"ප්‍ර: ඊටපස්සේ පුරුෂයා සම්බන්ධයෙන් මොනවද කලේ?

උ: ඊටපස්සේ මම නැග්ග ගමන්ම එයා කිව්වා මට උපුලුයි, උපේන්ද්‍ර යි, ඉන්දිකයි, ඩෝරයි හතර දෙනාත් එක්ක එකතු වෙලා ගැහුවා. බෙරගන්න ගොඩක් සෙනඟ හිටියා. ඒ අයට බෙරගන්න බැරි වුනා කියලා."

According to her, the deceased was in a state where he could speak when he said that to her.

Later, when the deceased was taken to the Bulathsinhala Hospital, they were asked to take him to Horana Hospital as his condition was serious. Accordingly, he was admitted to the Horana Hospital. Later, on the same day around 7.30 to 8 PM, the Police has informed PW1 that her husband passed away.

According to PW3, Kannan Thudawage Shantha Kumara, when PW1 informed him about the incident, he went to the scene, and the deceased fell lying on the middle of the road. Then the deceased had said to PW3 that, "අනේ ශාන්ත පුතේ මට උණ ගන්න දුන්නා කියලා."

On page 176 of the brief;

"ප්‍ර: ඊටපස්සේ?

උ: අනේ ශාන්ත පුතේ මට උණ ගන්න දුන්නා කියලා කිව්වා.

ප්‍ර: ඊටපස්සේ?

උ: මම ඇහුවා කවුද රංජී අයියේ කියලා, උපේන්ද්‍ර යි, උපුලුයි, ජයශාන්ත යි, ඉන්දික යි කිව්වා ආයෙත් කෑ ගැහුවා බෝරයි, රනායි කියලා එන්න එහෙම කෑ ගැහුවා, එක අතක සම්පුර්ණයෙන් ඇටය ඉරි තලලා තිබුණා, අනෙක් අතත් කැඩිලා තිබුණා,ඔළුවේ තුවාල දෙකක් තිබුණා, කකුලේ මැහුම් 10ක් 12ක් දාන්න කකුල තලලා තිබුණා, හැම තැනම ලේ ගෑවිලා තිබුණා.

ප්‍ර: ඔබට ඒ වෙලාවේ ප්‍රේම ජීව නොහොත් රංජී නම් කීයක් ඔබට ප්‍රකාශ කලාද?

උ: ඒ නම් හතර විතරයි කිව්වේ.

ප්‍ර: ඒ නම් හතර මොකද්ද?

උ: උපේන්ද්‍ර, උපුල්, ජයශාන්ත, ඉන්දික. රනා කියලත් කිව්වා, බෝරා කියලත් කිව්වා."

Then, the deceased was taken to the hospital by a three-wheeler, and on the way, his sister, PW1 also got into the vehicle. Then he was transferred to another hospital from the Horana Hospital where the deceased passed away.

According to PW4, Hewage Don Nilantha Kumara, when PW1 had called one Sujith Priyankara saying that Ranji was hit and there was no one to take him to Colombo Hospital. Then the said Sujith Priyankara called PW4 and then he went to Horana Hospital. When he went there, the deceased was lying on the hospital bed, then PW4 asked the deceased who did this.

On page 143 of the brief;

"ප්‍ර: ඔහුට වෙලා තිබුණේ මොකද්ද?

උ: ඔහුට ගහල තිබුණා. මම ළඟට ගියාම මම ඇහුවා කවුද ගැහුවේ කියලා ඔහු කිව්වා උපුල්, උපේන්ද්‍ර, ඉන්දික, ජයශාන්ත ගැහුවා කියලා.

ප්‍ර: මරණකරු කිව්වේ කවුරුන් ගැහුව බවද?

උ: උපුල්, උපේන්ද්‍ර, ඉන්දික, ජයශාන්ත"

Later, the deceased was taken to the hospital and passed away there.

According to the PW11, Dr. Tharaka Priyajeewa Elwitigala, the Judicial Medical Officer, he performed the post-mortem of the deceased. There were 9 external injuries. Injury No. 1 and 2 were lacerations that had caused skull fractures. Further, injury No. 2 had caused internal bleeding in the brain of the deceased. Injury No. 3 was a cut injury. According to PW11, the injuries done to the head and the effect those had on the brain were the cause of death.

When we consider these three dying declarations made by the deceased, it is apparent that the deceased had consistently mentioned the names of the 4 Accused to all three witnesses. There is no doubt created about such names.

We are mindful of the opinion expressed by His Lordship H.N.G. Fernando S.P.J regarding dying declarations in Queen vs. Anthonypillai 69 NLR 34 on 38 (also reported in 68 CLW 57)

> "Apart from the medical evidence, the second important factor was the statement made to the Police by the deceased woman. With regard to this statement the learned Judge gave the following directions:-
>
> > *" This statement is evidence. The law permits you to take into consideration this piece of evidence. Usually a witness's evidence is tested by cross-examination and in this case the deponent is dead. In spite of the fact that there is no cross-examination because she is dead, still the law permits you to examine that evidence. It is in the nature of a dying declaration. Examine that evidence and if you are satisfied beyond reasonable doubt, accept what has been stated there. Do not forget that there was no other witness to the incident and the deponent herself is not before you, the law regards her statement as evidence in regard to the cause of death, and the circumstances which led to her death. "*
>
> In our opinion this direction only instructed the Jury that they could act upon the deceased's statement. But there was no caution as to the risk of acting upon the statement of a person who is not a witness at the trial, and as to the need to consider with special care the question whether the statement could be accepted as true and accurate."

This dictum was considered by His Lordship Sisira de Abrew J in Gamini Mahaarachchi vs. The Attorney General, CA 106/2002, Decided On 22.08.2007, held that:

"When a dying declaration is sought to be produced as an item of evidence against an accused person in a criminal trial. the Trial Judge or the jury as a case may be, must bear in mind on the following weakness;

1. Statement of the deceased person was not made under oath.
2. Statement of the deceased person has not been tested by cross-examination vide King vs. Asirivadan Nadar 51 NLR 322 and Justin Pala vs. Queen 66 NLR 409/
3. That the person who made the dying declaration is not a witness at the trial.

As there are inherent weaknesses in a dying declaration which I have stated above, the trial Judge or the jury as a case may be, 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 person could be accepted beyond reasonable doubt.
d. Whether the evidence of the witness who testifies about the dying declaration can 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.
g. Whether the deceased was able to identify the assailant."

(Similar legal principles related to dying declarations were considered by His Lordship Sisira De Abrew in Ranasinghe v Attorney-General [2007], 1 S.L.R 218)

His Lordship Ranjith Silva, J in Sigera Vs. Attorney General, 2011 (1) SLR 201 at 214 held that,

> "First of all this court has to decide whether the dying declaration in question was a true and accurate one. It is only then the learned High Court Judge could be justified in treating the dying declaration as substantive evidence against the Appellant, which is an exception to the hearsay Rule."

Further held that;

> "Therefore it is seen that first and foremost a judge must apply his mind and decide whether the dying declaration is a true and accurate statement."

Further held that,

> "In view of the inherent weaknesses in the dying declaration, enumerated above, the trial judge or the jury as the case may be must be satisfied beyond reasonable doubt on the following matters; whether the deceased in fact made such a statement, whether the deceased was able to speak at the time the alleged statement was made, whether the deceased was able to identify the assailant, whether the statement made by the deceased was true and accurate, whether the statement made by the deceased person could be accepted beyond reasonable doubt, whether the evidence of the witness who testifies about the dying declaration can be accepted as credible."

Applying the principles in the above judicial decisions, the Court has to consider whether the dying declaration was true and accurate.

The main argument put forward by the Defence Counsel was that these dying declarations were not corroborated by any other independent witnesses. The question is whether it is a requisite to have corroborations when the Court considers dying declarations as evidence.

We are mindful that the defence had not disputed that the deceased had made three dying declarations and that the witnesses were telling the truth. Further, they are not disputing the fact that the deceased was able to identify the Accused persons.

According to *Sarkar on Evidence* on pages 678,

> "**Corroboration of Dying Declaration**. – It is well settled that there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated."

Further on page 679,

> "Relying on the dying declaration alone the conviction can be maintained. No corroboration is necessary if the dying declaration is believed to be truthful one and not vitiated in any other manner. Court must not look out for corroboration unless it comes to a conclusion that dying declaration suffered from any infirmity by reason of which it is necessary to look out for corroboration. The Court as a matter of prudence has to gauge whether the statement of the deceased was the result of either tutoring, prompting or product of his imagination. A dying declaration is admitted in evidence on the principle of necessity. The fact that it is not tested by cross-examination on behalf of the accused necessitates the obligation on the Court to scrutinize these aspects. A dying declaration is an independent piece of evidence like any other piece of evidence – neither extra strong nor weak – and can be acted upon without corroboration if it found to be otherwise true and reliable, conviction based on the evidence of doctor that the deceased was capable of deposing and was in a fit condition and senses at the time of recording statement would not be lightly interfered with. Doctor is an independent witness and there is no reason for him to depose falsely."

In Sigera Vs. Attorney General (Supra, on page 215) His Lordship Ranjith Silva, J held that;

> "This cannot in my opinion prejudice the defence in any event as corroboration is not the *sine qua non* in proving a dying declaration. As I have enumerated in a different chapter of his judgment an accused can be convicted for murder based mainly and solely on a dying declaration made by a deceased without corroboration under certain circumstances."

The same dictum was considered by His Lordship K. Priyantha Fernando J in Athukorala Kankanamge Susantha alias Chuti and Another vs. The Attorney General, CA/HCC/305-306/2018 decided on 07.06.2022.

His Lordship had referred to the following Indian judgments to come to the conclusion.

Smt. Paniben Vs. State of Gujarat (1992) 2 S.C.R. 197 at page 205 – 207,

> "Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. This Court

has laid down in several judgments the principles governing sole basis of conviction, which could be summed up as under:

(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. *Mannu Raja v. State of M.P.,* (1976) 2 SCR 764

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. *State of M.P. v. Ram Sagar Yadav*, AIR 1985 CS 416; *Ramavati Devi v. State of Bihar*, AIR 1983 CS 164.

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the assailants and was in a fit state to make the declaration. *Ram Chandra Reddy v. Public Prosecutor*, AIR 1976 S.C. 1994.

(iv) Where dying declaration is suspicious it should not be acted upon without corroborative evidence. *Rasheed Beg v. State of Madhya Pradesh*, [1974] 4 S.C.C. 264.

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (*Kake Singh v. State of M.P.,* AIR 1982 S.C. 1021)

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (*Ram Manorath v. State of U.P.*, 1981 SCC (Crl.) 531)

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (*State of Maharashtra v. Krishnamurthi Laxmipati Naidu*, AIR 1981 SC 617)

(viii) Equally, merely because it is a brief statement, it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. *Surajdeo Oza v. State of Bihar,* AIR 1979 SC 1505)

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail. (Nanahau Ram and another vs. State, AIR 1988 SC 912)

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (*State of U.P. v. Madan Mohan*, AIR 1989 S.C. 1519)"

Jayabalan Vs. U.T. of Pondicherry (2009) 15 (ADDL) S.C.R. 736

"19. With regard to the issue of dying declaration raised by the appellant, it is well established legal position that a dying declaration can be made the sole basis of conviction of an accused provided the dying declaration is found to be true and voluntary and is not a result of tutoring or prompting or a product of imagination. This Court in the case of *Paniben vs. State of Gujarat* (1992) 2 SCC 474 has succinctly summarized the law on the on the point as follows in para 18."

In the instant application, according to the medical evidence, the deceased may have had the ability to speak. Further, we note that the defence never challenged the evidence of PW1, PW3, and PW4 on the fact that the deceased made the dying declarations. They challenged such depositions on corroboration. As I mentioned earlier, if the Court believes that the said dying declarations were made by the deceased and he was able to speak, identify the assailants, in fact it was true and accurate, there is no reason for us to

overturn the decision of the High Court Judge who had accepted the dying declaration as evidence against the Accused.

Another ground urged by the Accused was that the injuries caused to the deceased were in result of a fall from a moving vehicle. We are mindful that the medical evidence establishes that the deceased had two defence injuries namely injury no. 6 which was a stab injury.

Considering the totality of the evidence, we are of the view that the Learned High Court Judge had arrived at the correct finding.

Therefore, we affirm the judgment delivered by the Learned High Court Judge on 23.06.2007.

The appeal of the Accused-Appellant is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE

JUDGE OF THE COURT OF APPEAL