SHEELA SINHARAGE

v.

THE ATTORNEY-GENERAL

SUPREME COURT.
WIMALARATNE, J., RANASINGHE, J. AND ROGRIGO, J.
S.C. 2/84 – H.C. COLOMBO 692/79.
OCTOBER 3, 1984.

Abortion – Death caused by septic abortion – S. 305 of the Penal Code – Dying deposition – Perusal and use of it by Judge when not produced before him in evidence – S. 110(4) of the Code of Criminal Procedure Act – Witness refreshing memory from notes – Conflicting accounts of statement of deceased – Sections 32 and 33 of the Evidence Ordinance – Need for corroboration – Corroboration coming circuitously from deceased herself and not from independent quarter – Use of false denial by accused as corroboration – Miscarriage of justice – Code of Criminal Procedure Act, sections 334 and 335 and Article 138(1) of the Constitution.

The accused-appellant, a lady Ayurvedic physician was indicted before the High Court with having caused the death of one Merlin Ranasinghe a woman with child by inserting two pieces of stick (කුරු දෙකක්) into her vagina on 22.4.1973 with intent to cause a miscarriage and thereby with committing an offence punishable under s. 305 of the Penal Code. She was tried by the Judge without a jury, found guilty and sentenced to two years' imprisonment.

The prosecution version was that on 22.4.1973 the deceased had attended the appellant's dispensary and wanted treatment to abort the child she was carrying. The appellant had inserted two pieces of stick into her vagina and also put in some medicine. She had later taken ill and she went to the appellant's dispensary again on 23.4.1973 and wanted the sticks removed. But the appellant's treatment not availing the deceased had entered the Castle Street Hospital where she died on 26.4.1973.

The main contention of the appellant was that the prosecution had failed to discharge its burden of proving beyond reasonable doubt that the appellant was the person who inserted the two pieces of stick into the deceased's vagina. On this point the prosecution relied mainly on the evidence of Dr. (Mrs.) Waas. A copy of the statement of the deceased as recorded by Dr. Waas had been produced as P 1 in the Magistrate's Court but not in the High Court. This statement P 1 though not produced in evidence before him, was perused by the High Court Judge during the trial before him. The appellant while admitting the visit of the deceased to her dispensary on 23.4.1973 denied any such visit on 22.4.1973.

Held –

(1) Section 110 (4) of the Code of Criminal Procedure Act No. 15 of 1979 empowers the High Court Judge to use a statement made at a non-summary proceeding to aid him at the trial but it cannot be used as evidence in the case. Under section 33 of the

Evidence Ordinance evidence given by a witness in a judicial proceeding can be proved at the later stage of the trial in accordance with the provisions of the laws of evidence and criminal procedure. But here the High Court Judge perused the evidence given at the non-summary inquiry of the deceased's statement to Dr. Waas and used material contained in it for the purpose of his judgment without having taken any steps to have such material placed before him in evidence. This procedure is illegal and cannot be justified.

(2) The deceased had made conflicting statements about how she fell ill. There were conflicting versions of the deceased's statement. It would not have been therefore safe to act on the evidence of Dr. Waas without corroboration. Such corroboration must come from an independent source and not circuitously, as here, from the deceased herself.

A false denial can amount to corroboration in certain circumstances. For a false denial to amount to corroboration of a witness' evidence such false denial must relate to a vital issue which is in dispute in the case. The denial of the appellant that the deceased visited her in her dispensary on 22.4.1973 cannot be regarded as corroboration.

The statement of the deceased to Dr. (Mrs.) Waas stands, in law, alone and uncorroborated in regard to the identity of the offender. It must not be acted on because of the conflicting versions

(3) The question of no "substantial miscarriage of justice" under section 334(1) of the Code of Criminal Procedure Act and Article 138(1) of the Constitution does not aris for consideration. Section 334 of the Code of Criminal Procedure Act applies only to trials before a judge and jury. Appeals from a verdict of the High Court at a trial without a jury must be determined according to section 335 of the Code of Criminal Procedure Act.

Cases referred to :

(1) *The King v. Asirvadan Nadar (1950) 51 NLR 322, 325.*
(2) *Mendis v. Paramaswami (1958) 62 NLR 302, 305.*
(3) *B. F. Lewis Fernando v. The Queen (1952) 54 NLR 274, 277, 278.*
(4) *The Queen v. Anthonypillai (1965) 69 NLR 34, 38.*
(5) *The King v. Atukorale (1948) 50 NLR 256.*
(6) *The Queen v. Julis (1963) 65 NLR 505, 526.*
(7) *Karunaratne v. The Queen (1966) 68 NLR 257, 259.*
(8) *Dole v. Romanis Appu (1939) 40 NLR 449.*
(9) *Tennekoon v. Tennekoon 78 NLR 13.*
(10) *Warawita v. Jane Nona (1954) 58 NLR 111.*
(11) *Dharmadasa v. Gunawathy (1957) 59 NLR 501.*
(12) *Somasena v. Kusumawathie (1958) 60 NLR 355.*
(13) *Indrawathie Kumarihamy v. Purijjala (1970) 74 NLR 430.*
(14) *J. F. Throne and Others (1978) 66 Cr.Ap.Rep.6.*
(15) *The King v. Fernando (1930) 32 NLR 250, 253.*
(16) *Martin Fernando v. The Inspector of Police, Minuwangoda (1945) 46 NLR 210.*
(17) *The King v. Guneratne 14 C.L.Rec. 144.*
(18) *Sangarakkita Thero et al v. Buddharakkita Thero (1949) 39 CLW 86.*
(19) *Perera v. Naganathan (1964) 66 NLR 438.*
(20) *Hamid v. Karthan (1917) 4 CWR 363.*

(21) *The King v. Soysa (1924) 26 NLR 324.*
(22) *R. v. Cooray (1926) 28 NLR 74.*
(23) *Inspector of Police, Gampaha v. Perera (1931) 33 NLR 69.*
(24) *Paulis Appu v. Don Davith (1930) 32 NLR 335.*
(25) *Bartholomeusz v. Velu (1931) 33 NLR 161.*
(26) *S.I.P. v. Thalagahagoda 13 CLRec 211.*
(27) *Kitnapulle v. Christoffelz (1948) 49 NLR 401.*
(28) *Reg v. Arthur Perera (1956) 57 NLR 313, 326.*

APPEAL from judgment of the Court of Appeal.

Dr. Colvin R. de Silva with *Miss. Saumya de Silva* for accused-appellant.

D. P. Kumarasinghe, S.S.C. for respondent.

Cur. adv. vult.

October 31, 1984.

RANASINGHE, J.

On 23.4.73 at 4.05 p.m. Merlin Ranasinghe, the deceased, was admitted to the N.O.H. Ward of the Castle Street Hospital, Colombo. Upon admission Dr. (Miss) Panchchalingam who was in charge of the said ward, had, with the assistance of Dr. Neela Ranjithraja and Dr. (Mrs.) Waas, examined the deceased, at about 4.30 p.m., and had found the deceased to be pregnant and suffering from septic abortion. Parts of a foetus had also been removed from the deceased by Dr. (Miss) Panchchalingam. Dr. Ranjithraja had then questioned the deceased. The deceased had, in answer to Dr. Ranjithraja, told Dr. Ranjithraja that she had started to bleed as a result of a fall near the well. No reference had been made in that reply to an abortion.

Thereafter on the following day, 24.4.73, as the deceased's condition had taken a turn to the worse, Dr. Ranjithraja had, about 10 p.m., directed Dr. (Mrs.) Waas to record the deceased's statement. Dr. (Mrs.) Waas had then proceeded to question the deceased in the presence of Dr. Ranjithraja, and the deceased had made an oral statement to this doctor. The statement so made is, briefly : that, on 22.4.73, she had gone to the accused "in order to get an abortion done" : that the accused had "introduced 2 sticks (කූරු දෙකක්) into her vagina", and had also given her some medicine to be taken orally : that she was also advised to see the accused on the following day : that the same evening she started to bleed and also developed a temperature : that, on the morning of the following day the 23rd, as she was feeling faintish and also found her vision blurred, she went

back to the accused and requested her to pull out the "two sticks" which had been inserted the previous day : that she is not sure whether they were pulled out : that although the accused asked her not to go to the Castle Street Hospital, she decided to seek treatment from the Hospital.

After Dr. (Mrs.) Waas had recorded the said statement from the deceased, the hospital authorities had contacted the Borella Police Station. P.C. 5256 Abeyratne, who was then attached to the said Police Station, had then proceeded to the said Castle Street Hospital, and he too had, later that same night, recorded a statement (a copy of which was marked P2 at the trial) from the deceased. Briefly, the deceased had, in the said statement, stated : that she went to see the accused on 22.4.73 with her five year old son : that, when she told the accused of her intention, the accused had "inserted some medicine" into her vagina : that, after she went home, she began to bleed from her vagina : that on the following day 23.4.73, she went again to see the accused : that she went on that occasion with her husband : that, although the accused assured her that she would be cured, she nevertheless proceeded to the Castle Street Hospital and had herself admitted to the said hospital the same evening.

The deceased's condition had thereafter deteriorated and she passed away in the early hours of the 26th April 1973. A post-mortem examination on the body of the deceased had been held by Dr. Sarveswaran. A copy of the post-mortem report was produced at the trial marked P1. The cause of death has been set out as "septicaemia following septic abortion".

The accused appellant – a registered ayurvedic-practitioner of eleven years standing and practising at Etul-Kotte, along with her husband, himself a registered Ayurvedic-Practitioner – was thereupon indicted before the High Court, Colombo with having caused the death of the deceased : that she did on 22.4.73, with intent to cause a miscarriage, insert "කූරු දෙකක්" into the vagina of Merlin Ranasinghe, a woman with child, and thereby caused her death, an offence punishable under sec. 305 of the Penal Code.

The learned judge of the High Court, after trial without a jury, convicted the accused-appellant of the said charge, and imposed a sentence of 2 years' imprisonment – which said imprisonment, the Court of Appeal has construed to be simple in character.

The accused-appellant's appeal to the Court of Appeal having failed, the accused-appellant has now come before this Court.

The principal submission made to this Court by learned Counsel appearing for the accused-appellant is : that the prosecution has failed to discharge the burden resting on it to prove that it was the accused-appellant who committed the said offence on the deceased : that the prosecution has failed to prove beyond reasonable doubt that it was the accused-appellant who inserted the "two sticks" (whether they be කුරු දෙකක් or කෝටුකැලි දෙකක් as what is alleged to have been used by the accused-appellant has been variously described in the indictment and in the proceedings) into the deceased's vagina and caused the septic abortion which brought about the death of the deceased.

The principal item of evidence relied on by the prosecution to prove the identity of the offender who committed the said offence is the aforesaid oral statement said to have been made by the deceased to Dr. (Mrs.) Waas at the Castle Street Hospital shortly after 10 p.m. on the night of the 24th April 1973. The said statement was relied on as a dying deposition which is admissible under sec. 32 (1) of the Evidence Ordinance.

The statement of the deceased, which is said to have been so made to Dr. (Mrs.) Waas, would appear, according to the evidence, to have been contemporaneously recorded by Dr. Waas. The judgment of the Court of Appeal also refers to such statement having been "recorded" by Dr. Waas. The record said to have been so made by Dr. (Mrs.) Waas of the oral statement which she says, was made to her by the deceased, has itself not been produced in evidence at the trial before the High Court. The evidence, which is available in the record of the proceedings before the High Court, is only the oral evidence of Dr. (Mrs.) Waas of what, according to her, the deceased told her that night in the hospital. The judgment of the Court of Appeal discloses that, before the Court of Appeal, learned Counsel for the accused-appellant had "severely criticised" the manner in which the said statement had been proved at the trial. The Court of Appeal had taken the view that Dr. (Mrs.) Waas had, at the time she gave evidence, been making use of some notes which were in her possession, and that, in view of the provisions of sec. 159 (1) and (3) of the Evidence Ordinance, this witness could have refreshed her memory from a copy of the statement so recorded by her, and that the

fact that this witness was so permitted by the trial judge to use a copy of the statement recorded by her leads the court to assume that such permission had been granted because the trial court had been satisfied that there was sufficient reason for the non-production of the original record. This, as already stated was only an assumption by the Court of Appeal. There is no express order made by the learned trial judge in regard to this matter ; and there is nothing in the proceedings themselves of the trial Court to indicate that the learned trial judge had expressly addressed his mind in regard to the requirements of the provisions of Sec. 159 of the Evidence Ordinance before Dr. (Mrs.) Waas was permitted to refresh her memory from the document, which she had, in order to give oral evidence of what she says the deceased told her on the night in question. It however, seems to me, in view of the submissions made to us at the hearing before us of the procedure adopted by the learned trial judge – and which said procedure has been found acceptable by the Court of Appeal as well (to which reference will be made later on in this judgment) – of perusing on his own, the evidence given by this witness in the course of the non-summary inquiry held before the Magistrate's Court, that the learned trial judge, who so perused her evidence given before the learned Magistrate, would have become aware of the existence of the document which had, at that inquiry, been produced as P 1. P 1 has been described as a "certified copy of the patient's statement". In her evidence at the trial Dr. (Mrs.) Waas has stated that : "at the Magistrate's Court, before I gave evidence I examined the Bed-head Ticket" : that she "got this report after examining the Bed-head Ticket". The "report" , so referred to could be the document from which she was refreshing her memory when she gave evidence at the trial. The document produced by Dr. (Mrs.) Waas as P 1 in her evidence – which as stated earlier has been perused by the learned trial judge – in the Magistrate's Court has not been marked in evidence by the prosecution at the trial, even though its contents have been sought to be led in evidence through Dr. (Mrs.) Waas as part of the prosecution case. No explanation seems to have been given at the trial by the prosecution for the non-production of either the said document, or of the Bed-head Ticket referred to by Dr. (Mrs.) Waas. Whatever be the document which Dr. (Mrs.) Waas had in her possession and from which she refreshed her memory when she was in the witness-box at the trial, there seems to be considerable room for doubt, as submitted by learned Counsel for the accused-appellant, whether that document was the record itself or even a copy of the

record, she says, she made on the night in question itself contemporaneously with what the deceased is said to have told her, in view of a very significant difference in regard to a matter which the prosecution itself has thought to be of such importance as to require a reference to it in the indictment itself, namely the means adopted by the accused-appellant to cause the alleged abortion. Dr. (Mrs.) Waas, in her evidence – given after referring to the document she had – refers to what the deceased told her was used as "කෝටු කැලි දෙකක්" This reference was made by the witness four times in the course of her evidence. In the document P 1 produced by this witness in her evidence – perused by the learned trial judge – in the Magistrate's Court, what is said to have been inserted has been referred to as "කුරු" Be that as it may the resulting position is that the document which came into existence contemporaneously with the oral statement made by the deceased, has not been produced at the trial. The said document would be the best evidence of the words used by the deceased herself. There were no good grounds urged for the non-production of the said original document. On the contrary, all the facts and circumstances, which emerged at the trial, point unmistakably to the said document having been available for production in evidence at the trial. The necessity for the ipsissima verba used by a deceased in a dying declaration has been emphasised by the then Supreme Court of this island in several decisions : *The King v. Asirvadan Nadar* (1), *Mendis v. Paramaswami* (2).

Apart from the aforementioned statement made to Dr. (Mrs.) Waas the deceased, as set our earlier, had also made two other statements – one before and the other after the said statement – in which too she had purported to describe the circumstances which resulted in her death. The earlier one, also made to a doctor – though a male – who attended on her after admission to the same hospital, is embodied in the document D 1 produced by the defence. The later one is in the document, which, according to the proceedings of the trial, was marked P 2 by learned State Counsel in his cross-examination of the police-constable who had recorded it and who was called to testify at the trial not by the prosecution but by the defence.

Both D 1 on the one hand and P 2 on the other hand come into conflict not only inter se, but also separately with the statement that the deceased is stated to have made to Dr. (Mrs.) Waas in regard to how exactly the abortion in question was caused. The conflict between P 1 and D 2 with the statement to Dr. (Mrs.) Waas, which alone has been relied on by the prosecution, is in regard to the manner in which the offence has, according to the prosecution as set out in the indictment, been committed. The Court of Appeal was of opinion : that the manner of the commission of the offence as put forward by the prosecution is of considerable importance : that it was the duty of the trial judge to find whether the offence has been committed by the accused in the manner set out in the indictment : that the trial judge has seriously misdirected himself on this particular matter. Although the Court of Appeal took the view that the evidentiary value of Dr. Ranjithraja's deposition, embodied in D1, is weakened due to certain circumstances specified by the Court of Appeal, – namely because it stands alone and is not supported by Dr. (Mrs.) Waas, and because the defence has failed to put to Professor Fernando, the chief medical witness for the prosecution at the trial, a view expressed by Dr. Ranjithraja, the Court of Appeal, however, was also of the view that the contradiction, as between D 2 and the deceased's statement to Dr. (Mrs.) Waas "remains". Although Dr. Ranjithraja was not called by the prosecution at the trial, he was nevertheless put forward at the non-summary inquiry by the prosecution as a witness for the prosecution and tendered to the defence for cross-examination and thereafter re-examined on behalf of the prosecution. At no stage had his evidence been challenged in the Magistrate's Court by the prosecution as being unreliable or unacceptable. He was then put forward as a witness of truth ; and the defence is entitled to have his deposition, contained in D1, which is legally admissible and has been properly proved, considered as truthful evidence. The matter, on which there was a conflict between the deceased's statement to Dr. (Mrs.) Waas and each of the other statements D1 and P2, was thus a matter of importance. However "human and understandable" be the explanations preferred by learned Counsel for the prosecution in respect of the aforesaid variations in the respective statements made by the deceased, yet, as the Court of Appeal stated "the contradiction remains". It must also be noted that even the trial judge seems to have acted upon Dr. (Mrs.) Waas's evidence given at the trial, in regard to the contents of the deceased's statement to her, only after –

whatever be the validity of such a procedure – a perusal of the evidence given by her at the earlier stage of these proceedings in the Magistrate's Court.

It must also be noted that, in answer to a question from the prosecution witness Pearle Perera, who had accompanied the deceased to the accused-appellant's dispensary on 23.4.73 at the request of the deceased herself, as to what her ailment was the deceased had told Pearle Perera only that she, the deceased, "had shivered and developed a temperature". No reference had been made to the accused-appellant having being in any way responsible for her condition.

In the result the statement said to have been made by the deceased to Dr. (Mrs.) Waas and relied on by the prosecution was such that special care was needed in considering whether the said statement should be accepted as true and accurate. The said statement was such that it was not safe to act upon it unless it was corroborated – vide : *The King v. Asirvadan Nadar* (supra) ; *B. F. Lewis Fernando v. The Queen* (3); *The Queen v. Anthonypillai* (4).

A consideration of the judgments of the Court of Appeal and the High Court reveals that both courts did also think it necessary to consider the question of how far there was corroboration of the said statement of the deceased.

The Court of Appeal has proceeded on the basis that, whilst the said statement made to Dr. (Mrs.) Waas supplies the only direct evidence to connect the accused-appellant with the commission of the said offence, corroboration of the deceased's allegation against the accused-appellant herself is provided by the evidence of the prosecution witness Pearle Perera, and by a false denial made by the accused-appellant herself of the deceased's allegation that she met the accused-appellant for the first time in this connection on 22.4.73 at the accused-appellant's dispensary in Etul-Kotte.

The item of evidence in the testimony of the witness Pearle Perera, which is relied on as corroborating the deceased's evidence incriminating the accused-appellant, is Pearle Perera's statement of a discussion between the deceased and her husband after they had set out from the deceased's home, on the afternoon of the 23rd of April 1973, to go to hospital. Pearle Perera did in her evidence, say that, on

their way to hospital, a discussion took place between the deceased and her husband as to where the deceased should go, and that, in the course of such discussion, the deceased told her husband "ඉස්සර වෙලා බෙහෙත් ගත්ත තැනට යමු." and that thereupon they first proceeded to the accused-appellant's dispensary, and that it was only thereafter that the deceased entered the Castle Street hospital on 23.4.73. The Court of Appeal has taken the view that this particular item of evidence is admissible under the second limb of sec. 32 (1) of the Evidence Ordinance as it relates to the circumstances of the transaction which resulted in her (the deceased's) death, and that it also corroborates not only the deceased's evidence of her first visit to the accused-appellant's dispensary on the previous day, 22.4.73, but also of what the accused-appellant did on that occasion. In my opinion, however, this item of evidence in the testimony of Pearle Perera does not, in law, amount to such corroboration ; for, although this item of evidence is placed before court through the witness Pearle Perera it is in truth and in fact only a statement made by the deceased who is herself the witness who requires to be corroborated. It is not an item of evidence extraneous to the deceased herself. It does not relate to an independent circumstance which a person other than the deceased herself is in a position directly to testify to. It is not independent testimony ; and "it lacks the essential quality of coming from an independent quarter". It is evidence which has "proceeded circuitously" from the deceased herself. Although the said item of evidence may be taken to show the consistency of the deceased's evidence given at the trial, yet, it "cannot be regarded as corroboration in the proper sense in which that word is understood in cases of this kind and it is a misdirection to refer to it as such"– vide : *The King v. Atukorale* (5) ; *The Queen v. Julis* (6) ; *Karunaratne v. The Queen* (7) ; *Dole v. Romanis Appu* (8). In this connection reference has to be made to the decision of the then Supreme Court in the case of *Tennekoon v. Tennekoon* (9) where (Malcolm) Perera, J. has taken the view that, in an application for maintenance a statement made by the applicant-mother herself, in regard to the paternity of the child, would be admissible to corroborate the applicant-mother's evidence, if such statement satisfied the requirements of sec. 157 Evidence Ordinance. It has, however, to be observed that, although Perera, J. did take the view that a previous statement made by the applicant herself, whose evidence had to be corroborated, could be regarded as corroborative evidence (and so also a false statement of the defendant), yet Perera, J. proceeded to conclude at page 24, that "quite apart from the

statement of the applicant to her mother . . . . . , I think the unimpeachable evidence of Dingiri Banda to which I have already referred, more than amply corroborates the applicant's evidence on material particulars". What was decisive seems to have been the *"unimpeachable" evidence from an independent quarter.* Furthermore, the earlier decisions of the earlier Supreme Court – *The King v. Atukorale* (5). *Queen v. Julis* (6) and *Karunaratne v. The Queen* (7) – referred to by me above, do not seem to have been cited to the Bench of two judges which heard the *Tennekoon's case* (supra). It seem to me that the said view taken by Perera, J.–in regard to a previous statement by the very witness, who needs to be corroborated, being accepted as corroboration –must give way to the other authoritative decisions referred to by me.

The evidence of Pearle Perera that the deceased did in fact go to the accused-appellant's dispensary on 23.4.73 does not amount to corroboration of the deceased's evidence of her (deceased's) visit to the accused-appellant on the previous day, 22.4.73, and of what happened inside that dispensary on that first visit. Pearle Perera had not gone into the dispensary and cannot, and does not, testify to what took place inside the room in which there were only the deceased, her husband and the accused-appellant. Furthermore, the accused-appellant admits, that the deceased came to her dispensary on the 23rd April, and that she treated the deceased on that occasion. If, however, the accused-appellant had denied the deceased's visit on the 23rd April as well, then an acceptance of Pearle Perera's evidence on that point, and a finding that the accused-appellant's denial is deliberately false, would have produced certain consequences. Such a situation does not, as stated earlier, however arise in this case.

The evidence of the deceased and of the two prosecution witnesses, Pearle Perera, referred to above, and Japin Nona do, however, disclose the existence of a person who was in a position to testify to what happened inside the accused-appellant's consulting room when she examined the deceased on the afternoon of the 23rd April '73 and thereby furnish evidence of the deceased's evidence in regard to what the deceased says took place on the previous day, 22.4.73, as between her and the accused-appellant. The person so disclosed is none other than the deceased's husband who was on the list of witnesses for the prosecution set out in the indictment. He, however, has not testified for the prosecution at the trial. Our attention has not been drawn to any ground or explanation submitted

to the trial court, or even to the Court of Appeal, in regard to the failure to call the deceased's husband at the trial for the prosecution. Although, when this was referred to by learned Counsel for the accused-appellant in the course of his submissions to this court, learned Senior State Counsel appearing for the Respondent stated from the Bar that learned State Counsel, who had appeared at the trial for the State, has informed him that this witness was dead at the time the trial commenced, no evidence, in a form such as is usually tendered to satisfy the Court in regard to such a matter and thereby silence any possible comment by the defence, has been tendered on behalf of the prosecution to the trial Court or to the Court of Appeal, or, even now, to this Court. Although there is this defect in the case for the prosecution, it is not necessary to discuss it further in view of the opinion. I take upon the principal submission, referred to earlier, made to this Court on behalf of the accused-appellant.

That a false denial deliberately made in Court by a person, against whom an allegation is made in proceedings instituted against him, of a matter of vital importance could, under certain circumstances, be taken as corroborating the allegation so made by the complainant whose evidence is, in law, required to be corroborated, is a principle which has been laid down by the Supreme Court of this Island –vide : *Warawita v. Jane Nona* (10) ; *Dharmadasa v. Gunawathy* (11) ; *Somasena v. Kusumawathie* (12) ; *Indrawathie Kumarihamy v. Purijjala* (13) ; *Tennekoon v. Tennekoon* (supra).

The aforesaid decisions all dealt with cases in which claims for maintenance or seduction were made. Our attention has not been drawn to any decision made in this Island in proceedings instituted under the criminal laws of the Island. The Court of Appeal has, in its judgment, referred to the decision of the Court of Appeal in England in the case of *J. F. Throne and Others* (14), where the Court of Appeal considered this principle in relation to the evidence of an accomplice in which criminal charges of conspiracy and robbery were levelled against the accused. In considering the question whether the conduct of the accused in putting forward alibis which the prosecution alleged were fabricated to deceive the jury was evidence capable of corroborating the evidence of an accomplice, who testified for the prosecution against the accused, the Court stated at p. 18 :

"The prosecution alleged that all these alibis had been fabricated to deceive the jury and that if this was so the very act of fabrication was evidence capable of being corroboration of O'Mahoney's

evidence against them. Counsel did not suggest that alibis fabricated with such intent could not be corroboration. In our judgment they can be, provided that the jury is satisfied that the falsity has not arisen from mistake and that the fabrication has not come about through panic or stupidity";

and in regard to the defence submission that there was not enough evidence to justify the jury finding that there has been the relevant kind of fabrication, the Court held that there was evidence from which the relevant kind of fabrication could be inferred.

A consideration of this principle, as elucidated in the judgments referred to above, makes it quite clear that the statement so sought to be relied on must relate to a vital issue which is in dispute in the case : that it must not only be false, but must also be deliberately false : that its falsity must be established by evidence aliunde, that is by evidence which is independent of and extraneous to the witness who stands in need of corroboration. Before this principle could be invoked, it is absolutely important that the falsity of the statement made by the defendant, or the accused as the case may be, must be clearly established. The statement so sought to be relied upon must first be proved to be deliberately false. Such falsity must be proved by other independent facts and circumstances. The mere fact that such statement comes into conflict with the assertion made by the witness sought to be corroborated is not sufficient. Otherwise, it would amount to using statement 'A' to condemn statement 'B' and then proceeding to use statement 'B' to support statement 'A'. In other words it would amount to the statement, which requires to be strengthened, itself being used to provide the material to be used to so strengthen it. Thus in this case the falsity of the accused-appellant's statement, that the deceased did not consult her at her dispensary on 22.4.73, must first be established by other independent evidence which does not issue forth from the deceased herself. That the said denial of the accused-appellant was deliberately false must be evidenced by facts and circumstances which are testified to by a witness or witnesses other than the witness who needs to be corroborated. That such denial is in conflict with an assertion made by the deceased herself is by itself insufficient to establish the falsity which it is contended corroborates the deceased's allegation against the accused-appellant. A consideration of the judgment of the Court of Appeal, in my opinion, makes it clear that this is precisely the approach adopted by the Court of Appeal. There was

no evidence – direct or circumstantial – before the trial court, other than the assertion made by the deceased in her dying declaration to Dr. (Mrs.) Waas, to justify a finding that the accused-appellant was unmistakably speaking an untruth when she stated under oath that the deceased did not see her at her dispensary on the 22nd April 1973. There was on this point – whether the deceased consulted the accused-appellant at the accused-appellant's dispensary in Etul Kotte on 22.4.73 – only the statement made by the deceased in the said dying deposition made to Dr. (Mrs.) Wass on 24.4.73 on the one hand, and, on the other, a statement made in court under oath by the accused-appellant repudiating the deceased's said assertion. The conclusion that the accused-appellant's such denial was false is based only on the fact that the trial court was of the opinion that the deceased's assertion in the dying declaration is true. The assertion so made by the deceased stands alone unsupported by any other independent fact or circumstance (as what emerges from Pearle Perera's evidence of the discussion between the deceased and her husband is also only material furnished by the deceased herself) to support what she says. Similarly there is no independent fact or circumstance to show that the accused-appellant's assertion is not true. That being so, such falsity of the accused-appellant's denial, as is required as a condition precedent to the application of the said principle, has not in this case been proved.

The duty of an appellate court in a criminal case has been considered in several cases : *The King v. Fernando* (15); *Martin Fernando v. The Inspector of Police, Minuwangoda* (16); *The King v.* Guneratne et al. (17); *Sangarakkita Thero et al. v. Buddharakkita Thero* (18); *Perera v. Naganathan* (19). It must also be observed that the findings of the trial court in this case in regard to the culpability of the accused-appellant herself, is not based upon the perception of the evidence placed before the trial judge but rather upon an evaluation of such evidence. The existence of concurrent findings by the High Court and by the Court of Appeal in regard to the guilt of the accused-appellant does not, therefore, stand in the way of this Court too testing the evidence led at the trial "extrinsically as well as intrinsically"

For the foregoing reasons I am of opinion that the aforesaid statement of the deceased made to Dr. (Mrs.) Waas stands, in law, alone and uncorroborated, in regard to the identity of the offender.

The Court of Appeal was of opinion that, although the learned trial Judge has "seriously misdirected" himself in a conclusion he had arrived at yet, there was ample evidence to prove, inter alia, that it was the accused-appellant who did the offending act, and that, as the deceased's statement to Dr.(Mrs.) Waas has been "rightly believed" by the learned trial Judge, no "substantial miscarriage of justice has actually occurred", and that this is an instance wherein the provisions of the proviso to sec. 334(1) of the Code of Criminal Procedure Act No. 15 of 1979 and the proviso to Article 138 (1) of the Constitution should prevail.

The only item of evidence available to the prosecution to affix responsibility to the accused-appellant in this case is the said statement of the deceased to Dr. (Mrs.) Waas. I have, however, set out earlier why the said statement cannot and must not be acted upon as being true and accurate. That being so, the provisos referred to by the Court of Appeal – the proviso to sec. 334(1) of the Code of Criminal Procedure Act No. 15 of 1979, and the proviso to Article 138(1) of the Constitution – do not arise for consideration. In any event the provisions of sec. 334 of the said Act No. 15 of 1979 have no application to this case, as the provisions of that section apply only to appeals in cases where the trial is held before a judge and jury. Appeals to the Court of Appeal from a verdict of the High Court at a trial without a jury are determined according to the provisions of sec. 335 of the said Code of Criminal Procedure Act No. 15 of 1979.

There is just one other matter I have to refer to before concluding this judgment. Although it is not a matter upon which the decision of this case by this Court has been made to rest yet, it is a matter upon which, in my opinion, the observations of this Court should be recorded lest what has been done in the trial court – and has received the sanction of the Court of Appeal – be drawn as a precedent for the future.

The trial judge has, as indicated earlier, in considering the evidence given before him by the principal witness for the prosecution looked into – evidently after the conclusion of the trial – the record of the non-summary inquiry held in this case before the Magistrate and perused the evidence given by the said witness at such non-summary inquiry in the course of which the witness had also produced a document, which though it had then been marked P1, has not been produced in evidence by the witness when the witness gave evidence

at the trial. The learned trial judge, faced with the situation that, whilst the indictment set out a particular description of the way in which the accused-appellant is alleged to have carried out the abortion, the principal prosecution witness's evidence of the deceased's description to her of how the accused-appellant had effected the abortion differed from it, had then proceeded to look into the record of the non-summary inquiry and peruse the witness's evidence, given before the Magistrate, which contained the document, referred to earlier as having been marked as P1 before the Magistrate. Having so perused the said evidence, the learned trial judge sets out, in his judgment, the description contained in the said evidence, and then concluded that "there cannot be even an iota of a doubt" that the deceased made "a statement like this" to the said witness. The learned trial judge's ultimate finding, against the accused-appellant in regard to the manner of the commission of the offence, however, is not that it was committed in the manner set out in the indictment ; nor in the manner set out in the said witness's evidence at the trial ; but that, as set out by the Court of Appeal, "some action or means was adopted to effect an abortion." Although the learned trial judge did so peruse the evidence given at the non-summary inquiry and did also proceed to make use of, for the purposes of his judgment, material contained in such evidence, yet, he took no steps to have such material placed before him in the way that the other material, placed at the trial for his consideration both by the prosecution and by the defence, had been placed. Neither the prosecution nor the defence seem to have been made aware of what has been done. The defence, which had taken the trouble to place before the learned trial judge according to law a deposition made in the non-summary inquiry by a witness who could not be called to testify at the trial, was completely ignorant that another deposition, though not properly placed before him, was being considered by the learned trial judge. There is no benefit of a record by the learned trial judge as to why he did what he did. In the absence of any such express record made by the learned trial judge it is reasonable to infer that he did so because the evidence given at the trial by the said witness did give rise to doubts in his mind and he desired ro resolve such doubts. It is undoubtedly the right and indeed the duty of a trial judge and an inquiring Magistrate to take certain steps, as set out by the Court of Appeal "in the interests of

justice and to serve the purpose of justice, ... to acquit the innocent and convict the guilty". Such steps, however, must be taken strictly in accordance with the relevant provisions of law relating to procedure and evidence, and not solely "in the spirit" of such provisions. The Court of Appeal, in sanctioning the procedure adopted by the learned trial judge, has referred to the provisions set out in sec. 110 (4) of the Code of Criminal Procedure Act No. 15 of 1979 (which correspond to the provisions of sec. 122 (3) of the Criminal Procedure Code – Chap 20 – which was repealed by the said Act No. 15 of 1979) and has expressed itself as follows :

> "If the law permits statements made to the police which are often urged to be (sometimes very justifiably) doctored or forced statements to be perused to aid Court in a inquiry or trial an accused-appellant cannot be heard to say that for the same purpose, and in the spirit of that section, the Court should not make use of evidence of higher value and sanctity to aid Court at a trial".

The said section 110 (4) undoubtedly empowers any criminal court "to send for the statements recorded in a case under inquiry or trial in such court" and to use such "statements or information" for the purpose set out therein, namely, "to aid it in such inquiry or trial"; but it also expressly provides that such "statements and information" are not to be used "as evidence in the case". The nature and the extent of the powers vested in a criminal court by the provisions of sec. 122 (3) of the now repealed Criminal Procedure Code (the relevant provisions of which and those in the corresponding sec. 110 (4) of Act No. 15 of 1979 are identical) and manner in which such powers should be exercised have been clearly laid down by the then Supreme Court in a long line of cases : *Hamid v. Karthan* (20); *The King v. Soysa* (21); *R. v. Cooray* (22); *Inspector of Police, Gampaha v. Perera* (23); *Paulis Appu v. Don Davith* (24); *Bartholomeusz v. Velu* (25); *S.I.P. v Thalagahagoda* (26); *Kitnapulle v. Christoffelz* (27), and the unreported cases : *S.C. 128-129 M. C. Kalmunai 7003, S.C.M. 15. 10.63 ; S.C. 475/58 M.C., Kegalle 22209 S.C.M. 20. 10.59.* Thus if what was perused and made use of by the learned trial judge in this case in the way he did had been a "statement or information" as contemplated by sub-sec. 4 of sec 110 of the Code of Criminal Procedure Act No. 15 of 79, then the procedure so adopted by the learned trial judge could not have been justified.

What now remains to be examined is whether the fact that what was so perused and used was evidence given at the non-summary inquiry held in this case before the Magistrate would clothe such procedure with legality. There is no express provision in the Code of Criminal Procedure Act No. 15 of 79 (nor was there in the earlier Code) authorising the use of evidence given at a non-summary inquiry at a later stage of the same proceedings in the way "statements and information", referred to in the said section 110 (4), could be used as set out in the said section. There is, however, express provision in the Evidence Ordinance (Chap. 14), in sec 33, making evidence given by a witness in a judicial proceeding relevant in a later stage of the same judicial proceeding. Once such evidence becomes relevant at the stage of the trial, then such evidence would have also to be proved before the trial judge in the same way the other items of relevant and admissible evidence are placed before the trial judge in accordance with the express provisions of the laws of evidence or of criminal procedure. Facts which are relevant can be considered by the trial judge only if and when they are led in evidence before him at the trial in accordance with the relevant express provisions of law. A deposition made at a non-summary inquiry must, if relevant at the subsequent trial, be adduced in evidence in open court at the trial in the presence of both parties, just as much as the other relevant facts have to be led in evidence and proved at the trial in open court in the presence of the parties. This is what the law requires, and it has also been the inveterate practice. That that is so is also borne out by the case of *Reg. v. Arthur Perera* (28). The procedure adopted in regard to this particular matter by the learned trial judge cannot, in my opinion, be justified upon any basis – whether of precedent or of any express provision of law.

For these reasons, I make order allowing the appeal of the accused-appellant. The conviction of, and the sentence imposed on the accused-appellant are set aside ; and the accused-appellant is acquitted.

WIMALARATNE, J. – I agree.

RODRIGO, J. –I agree.

Appeal allowed and accused acquitted.