

LUKSHMAN VS. REPUBLIC OF SRI LANKA

COURT OF APPEAL

SISIRA DE ABREW. J

UPALY ABEYRATNE. J

CA 17/2005

27, 28, 29, 30 MARCH 2009

***Penal Code—Murder—Dying declaration—When Could it be admitted?
Presumption of Innocence - Ellenborough principle***

The accused—appellant was convicted and sentenced to death – for the murder of one F. In appeal it was contended that, the dying declaration should not have been accepted since the Police witness has failed to produce the piece of paper in which he noted the dying declaration and that the accused did not offer an explanation.

Held

- (1) Where a dying statement is produced three questions arise for the Court. Firstly whether it is authentic. Secondly if it is authentic whether it is admissible in whole or in part. Thirdly the value of the whole or part that is admitted.
- (2) Sgt-Sirisena's evidence was corroborated by the evidence of others. There were no contradictions or omissions marked from the evidence of Sirisena – He is a truthful witness where evidence can be accepted.

Per Upaly Abeyratne, J.

“After the conclusion of the case for the prosecution the appellant exercising his legal rights remained silent in the dock, therefore the High Court Judge may have considered the applicability laid down in R vs. Lord Cochrane and others”.

APPEAL from the judgment of the High Court of Gampaha.

Cases referred to:-

1. *Dharmawansa Silva and another vs. Republic of Sri Lanka* – 1981 – 2 Sri LR 439
2. *R vs. Cochrane and others* -1814 Gurneys Report – 479
3. *Rajapaksha Devage Somaratne Rajapaksa and others vs. A.G.* – 2010 - 2 Sri LR 113

Tirantha Walalliadda PC with *Indica Mallawaratchi* for accused-appellants.

S. Thurairajah DSG for respondent.

June 23rd 2009

UPALY ABEYRATHNE, J.

This is an appeal preferred against the conviction and sentence imposed upon the Accused Appellant (hereinafter referred to as the Appellant) by the learned High Court Judge of Gampaha date 24.02.2005. The Appellant in this case was indicted in the High Court of Gampaha for having committed murder of a woman named Abdul Hannan Nabisha alias Farthima. After trial the Appellant was found guilty for the said offence and sentenced to death. Being aggrieved by the said conviction and sentence the Appellant preferred the instant appeal to this court.

At the hearing of this appeal, the learned President's Counsel for the Appellant submitted that the dying declaration of the deceased cannot be accepted since the witness sergeant Sirisena has failed to produce the piece of paper in which he noted the dying declaration.

I now deal with the said submission. According to the evidence of Mohomad Safi Mohomed Jifry, who was an eye witness to the incident, the deceased who was his mother's sister (aunt) had a vegetable stall near his house. On

21.01.2000, at about 9.30 a.m. while the witness was in his shop he heard a family voice. He recognised that voice as his aunt's voice. On his way to inquire about the voice he again heard the same voice. He saw the appellant was pulling out some object from his aunt's abdominal area. At that time the witness was about 3 feet away from the place of the incident. He identified the person who attacked his aunt as Sarath Luxman (the appellant). Therefore the appellant got on to a motor cycle, raised his hand with the object he attacked the deceased and said "එකකුට ඇත්තා තව එකක් ඉන්නවා." Thereafter he left the place of the incident. The witness noticed the object which was in the appellant's hand as of a knife. The witness instantly attended to his aunt, put her in to a three-wheeler and rushed to the police station. On their way to the police station the deceased said to the witness that "Locki stabbed me with a knife."

When they reached the police station sergeant Sirisena came to the three-wheeler. Then the deceased said to sergeant Sirisena that "මාපිටිගම සල්ලි පොලියට දෙන ලකී පිහියෙන් ඇත්තා" Thereafter the deceased was admitted to the hospital. She succumbed to the injuries inflicted to her chest and abdomen.

The prosecution is mainly based on the dying declaration of the deceased. Sergeant Sirisena in his evidence testified that he went to the three wheeler and questioned the deceased. She said "මාපිටිගම සල්ලි පොලියට දෙන ලකී පිහියෙන් ඇත්තා" He took down what the deceased said in a piece of paper and entered them in the crime book (CNB). The CNB was produced before court and has been subjected to cross examination. Paragraph 113 contained the said dying declaration. It was further revealed from the evidence that while the three-wheeler was halted in the police station, sergeant Sirisena upon the instruction of the OIC went to

the three-wheeler and questioned the deceased as to what happened. Then the deceased made the said dying declaration and he proceeded to take it down. Thereafter sergeant Sirisena advised the persons who accompanied the deceased to admit the deceased to hospital.

Hence it is understandable from the said evidence that sergeant Sirisena's said visit was not made in order to record the dying declaration of the deceased. At the cross examination sergeant Sirisena said that since the deceased was in a critical condition with heavy bleeding he promptly proceeded to take down the dying declaration in a piece of paper and thereafter he entered the dying declaration in the CNB. In the aforesaid circumstances I do not find any irregularity caused in the course of the recording of the dying declaration which would be prejudicial to the substantial rights of the Appellant. When the authenticity of the dying declaration is not blameworthy it is admissible evidence against the Appellant.

In the case of *Dharmawansa Silva and Another vs. The Republic of Sri Lanka*⁽¹⁾ The evidence of the only two alleged eye witnesses being contradictory and unreliable, the prosecution case really rested on a dying declaration of the deceased recorded by a police sergeant in which the two appellants were named as the assailants and as motive was mentioned a previous clash at the temple. It was held that "When a dying statement is produced, three questions arise for the court. Firstly, whether it is authentic. Secondly if it is authentic whether it is admissible in whole or in part. Thirdly the value of the whole or part that is admitted."

Sergeant Sirisena's evidence was corroborated by the evidence of Mohamad Jifry. There were no contradictions or omissions marked from the evidence of sergeant Sirisena.

Hence it can be concluded that sergeant Sirisena is a truthful witness whose evidence can be accepted.

The Learned President's counsel submitted that the following passage in the judgment is in violation of the presumption of innocence of the accused appellant. Namely;

“සාක්ෂි කැඳවීම, සාක්ෂි දීම හෝ ප්‍රකාශයක් නොකර සිටීමට විත්තිකරුට අයිතියක් ඇත. එසේ වුවද, විත්තිකරු නියත වශයෙන්ම නිර්දෝෂී වුවානම්, සාක්ෂි කැඳවීම, සාක්ෂි දීම හා විත්ති කුඩුවේ සිට ප්‍රකාශයක් කිරීම සලකා බැලිය හැකිව තිබුණි. එහෙත් විත්තිකරු එසේ ක්‍රියා කර නැත.”

I regret to note that I cannot agree with the said submission. The said passage in my view does not indicate any inference which would be prejudicial to the substantial rights of the Appellant. First sentence of the passage clearly denotes that the learned High Court Judge was possessed of the presumption of innocence. It is to be noted that after the conclusion of the case for the prosecution the Appellant exercising his legal rights remained silent in the dock. Therefore the learned High Court Judge may have considered the applicability of the dictum laid down in the case of *R vs. Lord Cochrase and other*⁽²⁾. There Lord Ellenborough held that “No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.”

In the case of *Rajapaksha Devage Somarathna Rajapaksha And Others vs. Attorney General*⁽³⁾ Justice Bandaranayake observed that “With all this damning evidence against the Appellants with the charges including murder and rape the Appellants did not offer any explanation with regard to any of the matters referred to above. Although there cannot be a direction that the accused person must explain each and every circumstances relied on by the prosecution and the fundamental principle being that no person accused of a crime is bound to offer any explanation of his conduct there are permissible limitations in which it would be necessary for suspect to explain the circumstances of suspicion which are attach to him.”

Hence in the light to the judicial decisions I hold that the said passage in the judgment has not caused any prejudice to the substantial right of the Appellant.

The learned High Court Judge in coming to his conclusion has properly evaluated the evidence having considered, the contradictions marked and the omissions highlighted at the trial. I am of the view that there is no necessity to interfere with the conviction of the Appellant. I therefore affirm the conviction and the sentence imposed upon the Appellants.

The appeal of the Appellant is dismissed.

SISIRA DE ABREW, J. – I agree.

Appeal dismissed.