SOMASIRI
v.
ATTORNEY-GENERAL

COURT OF APPEAL
SENEVIRATNE, J. ABEYWARDENE, J. AND G. P. S. DE SILVA, J.
C. A. NO. 127/82; M.C. COLOMBO CASE NO. 764/84.
MAY 5, 1983.

Criminal Law — Motive — Dock Statements — Non-directions — Proviso to section 334/(1) of Code of Criminal Procedure Act No. 15 of 1979.

Evidence — Admissibility of statements under Section 32 of the Evidence Ordinance.

Held —

Two statements by the deceased that the accused attempted a homosexual attack on him and he (the deceased) struck him some blows on the night on which the deceased met with his death as a result of cuts with an axe are admissible under Section 32(1) of the Evidence Ordinance which makes admissible evidence of any of the circumstances of the transaction which resulted in the death (where the cause of death is in question). No direction was given on this to the jury.

The two statements of the deceased were not led in evidence to prove a motive alone for proof of a statement of a deceased to prove motive would be inadmissible under Section 32(1) of the Evidence Ordinance.

The trial Judge had also not adequately directed the jury on the law pertaining to consideration as evidence of an unsworn statement made by an accused from the dock. He had instructed the jury that such evidence is subject to the infirmity that it is not tested by cross-examination but failed to mention to the jury that if they believe the unsworn statement it must be acted upon or if it raised a reasonable doubt in their minds about the prosecution case they must acquit the accused.

These two non-directions however caused no prejudice to the accused. This was an instance when the court should act on the proviso to section 334(1) of the Code of Criminal Procedure and hold that notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the accused, the appeal should be dismissed as no substantial miscarriage of justice has occurred and the verdict has not occasioned a failure of justice.

Cases referred to :

1. *King v. Marshal Appuhamy* 51 NLR 272
2. *H. S. Perera v. Queen* 76 NLR 217, 219.
3. *Queen v. Stanley Dias* — CCA Minutes of 24.11.1970
4. *Somasunderam v. Queen* 76 NLR 10, 12
5. *King v. Asirwadan Nadar* 51 NLR 322, 324
6. *Justinpala v. The Queen* 66 NLR 409
7. *Queen v. Anthonypillai* 69 NLR 409
8. *King v. Kularatne* 71 NLR 551
9. *The Attorney-General v. Nallanthambi Thevanayagam Pillai* S.C. 83/81 S.C. Minutes of 12.6.1982.

APPEAL from order of the High Court of Colombo.

W. Dayaratne for accused-appellant.

G. L. M. de Silva, S.S.C. for Attorney-General.

Cur. adv. vult

17 June, 1983
SENEVIRATNE, J.

The accused-appellant was indicted in the High Court, Colombo on the following charge — that you did on 7.4.1978 at Nugegoda cause the death of Kulatunge Arachchige Aladin Singho **alias** Hemapala, and thereby committed the offence of murder — section 296, Penal Code. The Jury by a 6-1 verdict has found the accused-appellant guilty of the offence of murder. The case against the accused-appellant was based solely on circumstantial evidence. I will set out the items of circumstantial evidence which the prosecution led to prove the charge of murder against this accused-appellant.

(1) Witness Siripala stated that his father was the owner of the boutique in premises No. 472, High Level Road, Gangodawila. There was a Carpenter's Bench behind the boutique by the wall. He knew well, both the accused-appellant Somasiri and the deceased, Hemapala. Hemapala and Somasiri used to sleep together usually on this Carpenter's Bench. Stephen, the watcher of the Co-operative Stores also gave evidence to the effect that there was a Carpenter's Bench behind the said boutique, and that he had seen the accused-appellant and the deceased Hemapala sleeping on this Carpenter's Bench. Witness Lukshman Ranatunga gave evidence to the effect that the accused-appellant and the deceased were close friends, and he had seen them sleeping together on the Carpenter's Bench. This evidence and another item of vital evidence which I will refer to later, disclosed a homosexual association between the accused-appellant and the deceased, and has on the evidence in this case provided the motive for this murder of Hemapala.

(2) Siripala's evidence was to the effect that on 6.4.1978 he went to sleep in a room in his father's boutique, which is referred to in evidence as the "Walan kade". At that time he saw the accused-appellant Somasiri and the deceased Hemapala seated on the said Carpenter's Bench. Late at night he heard a loud sound as if something was being struck, and later he heard someone groaning and vomitting. He switched the light and came out of the room. He saw the deceased Hemapala on the Carpenter's Bench with cut injuries. The accused-appellant Somasiri was not there nor was he seen even later. He called his father, Stephen the watcher of the Co-operative Stores and others and took the deceased Hemapala to hospital.

(3) Stephen the watcher of the Co-operative Stores close by stated that on 6.4.1978 at about 9 p.m., he saw Hemapala the deceased and the accused-appellant seated on

the said Carpenter's Bench. At that time he did not know the name of the accused-appellant. At about midnight Hemapala the deceased came up to him and told him as follows :—

"අරු මගේ ඇඟට නැග්ගා, මම උඹට පහරවල් (4) හතරක් ගැහැව්වා" : "That fellow got on to my body, I gave him four blows."

The deceased did not mention the name of the person referred to by him as "අරු" "That fellow". Then Hemapala went to the tea kiosk to have tea. He came back and told Stephen as follows :— "අරු ඉන්නවාද කියලා බලන්න. "See if that fellow is there". Stephen stated that he understood that the deceased was referring to the accused-appellant, whose name he came to know on that night as Somasiri. He went up to the Carpenter's Bench and looked, the accused-appellant was not there. Hemapala the deceased said that he was going to sleep and left. Later in the night he saw the deceased Hemapala on the Carpenter's Bench with cut injuries, and he along with witnesses Lukshman, Siripala and others took the deceased to hospital. A crowd gathered there, but the accused-appellant was not seen in the crowd.

(4) Witness Lukshman Ranatunga ran a tea boutique some distance away from the said boutique. He stated that late midnight Hemapala the deceased came to his tea boutique, had tea and told him as follows : "සෝමේ ලඟට ඇවිත් ඇඟ උඩ නැග්ගා, එතකොට මම පාරවල් දෙකක් ගැහැව්වා" Somé came near and when he tried to get on my body I gave two blows." Later he saw Hemapala the deceased with cut injuries and along with Siripala and others took him to hospital. At the hospital Hemapala was pronounced to be dead.

(5) Witness Padmasiri Singanetti worked in the timber shed which was close to the said boutique. He stated that there were three axes used by him to chop the wood, and he usually kept the three axes under the table in the room inside the timber shed. He stated that the accused-appellant used to sometimes sleep in his timber shed, and he also used to sleep in the "Walan kade". On 6.4.1978 night he went to sleep. Later in the night the accused-appellant came

into the timber shed and asked him to light the lamp. He lighted the lamp and both the accused-appellant and he went to sleep. The accused-appellant slept on a mat inside the timber shed. In the early hours of the morning on 7.4.1978, one Sunil came and put him up and asked him where Somasiri was — i.e. the accused-appellant. He lighted the lamp and found Somasiri was not there. But the mat on which he slept was laid in the same place on the ground. He went out to the road and heard that the deceased Hemapala was found with cut injuries. He stated that he padlocked the timber shed and left to the hospital to see Hemapala the deceased. When the timber shed was padlocked no one could enter the shed. Next morning the Inspector of Police came to his timber shed and took one of the axes, which was under the table. That axe had stains like blood on the blade. That was an axe (marked P2) which was used by him to chop the wood. The learned Senior State Counsel submitted that the plausible explanation for the accused's conduct in getting the lamp lit was his ulterior motive to look for a weapon, in this case the axe.

(6) Sugunendran, Inspector of Police, Mirihana stated that he received information regarding this murder and went to the scene at 4.15 a.m. on 7.4.1978. There, he saw the Carpenter's Bench on which a mat was laid and there were blood stains on the mat. He recovered the axe (P2) from the timber shed, in which witness Padmasiri worked. He noticed that the blade of the axe (P2) had stains of blood. The axe (P2) was forwarded to the Government Analyst for examination and the Government Analyst has reported that stains of human blood were identified in the blade of the axe, in his report P3. The Inspector of Police, Sugunendran stated that having found that the accused-appellant had gone to the harbour where he worked, to draw the monthly advance, he sent two police officers and got the accused-appellant arrested.

(7) The postmortem on the body of the deceased has been held by Dr. T. P. Weerasinghe, Acting J.M.O., Colombo. As

Dr. Weerasinghe was not available to be called as a witness, Dr. Neville Fernando, A.J.M.O., produced the postmortem Report (P1), and has given evidence explaining the postmortem Report. The postmortem Report stated that the deceased had three long cut injuries, all on the right side of the face. According to the postmortem Report (P1), death was due to the "multiple injuries caused by a sharp cutting heavy weighted weapon with force". Dr. Neville Fernando stated that those, injuries could have been caused by the blade of an axe like (P2), and were injuries that could cause death in the ordinary course of nature.

The above were the items of circumstantial evidence led by the prosecution, and the evidence on which the charge against the murder of this accused-appellant has been proved. The accused-appellant has not given evidence, but had made a statement from the dock. His statement was a bare denial as follows :— "The deceased Hemapala was my friend. I did not have that kind of enmity with him to cause his death. We two were friends. I cannot say for what reason I have been implicated in this case. I came to know that Hemapala was dead when I was in my work place. When I was in my work place, two Police Constables came and took me into custody in connection with this charge. I cannot say anything because I do not know about this murder."

In the petition of appeal filed the main grounds urged are :—

(a) That the weaknesses of the prosecution case and the facts favourable to the accused have not been put to the Jury,

(b) The circumstantial evidence led was not sufficient to prove a case of murder against the accused-appellant;

(c) The evidence led is consistent with the innocence of the accused-appellant:

These grounds of appeal are not warranted in the light of the charge made by the learned Trial Judge to the Jury. The learned

trial Judge has adequately directed the Jury on all matters favourable to the accused-appellant, which matters were really some contradictions of the statements made by witnesses to Inspector Sugunendran. The learned trial Judge had asked the Jury to consider those contradictions and evaluate the evidence The learned trial Judge had adequately charged the Jury on the basis that this was a case based on circumstantial evidence, and directed the Jury in what manner the Jury should consider the circumstantial evidence. There are no grounds for any complaint by the accused-appellant as regards the matters urged in the petition of appeal.

Learned Assigned Counsel for the accused-appellant urged two new grounds of appeal, which are substantial and worthy of consideration by this Court. Even though those two grounds of appeal which I will refer are not contained in the petition of appeal, I will consider the new grounds, as those grounds are substantial and worthy of consideration, as the accused-appellant has been defended by an Assigned Counsel, the petition of appeal has been filed by him, and as the accused-appellant has been found guilty of murder. The learned counsel for the accused-appellant submitted —

(1a) That the statements of the deceased Hemapala made to Stephen and Lukshman Ranatunga, which were led in evidence were inadmissible under Section 32 of the Evidence Ordinance;

(1b) Even if the statements came within the purview of section 32 of the Evidence Ordinance, those were statements pertaining to the motive of the accused-appellant and as such inadmissible ;

(2) The learned trial Judge has not adequately directed the Jury on the law pertaining to the manner in which the Jury should consider the unsworn statement made by the accused-appellant from the dock.

As regards the grounds of appeal pertaining to (1a) & (1b), the learned Senior State Counsel admitted that the learned trial

Judge's charge does not contain any direction as to the law pertaining to admissibility and credibility of a statement made by the deceased. The charge to the Jury, does not contain any directions pertaining to the admissibility of a statement made by a deceased in terms of section 32 of the Evidence Ordinance. Section 32(1) of the Evidence Ordinance is as follows :—

> "Statements ..... of relevant facts made by a person who is dead ..... are themselves relevant facts in the following cases :—
>
> (1) 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 his death comes into question".

"Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceedings in which the cause of his death comes into question". Learned counsel based his submissions, only on the first limb of section 32(1) — "Statement made by a person as to the cause of his death". His argument appeared to be that the statements made by the deceased elicited from Stephen and Ranatunga, did not pertain to the cause of Hemapala's death, but that those statements were pure and simple statements pertaining to the motive of any person, who would have murdered Hemapala and thus inadmissible. In making this submission, the learned counsel had lost sight of the other limb of this section, which is the relevant limb in the instant of the present case ".....or as to any of the circumstances of the transaction which resulted in his death". These statements led in evidence are admissible in terms of this limb, as it relates to the transaction, which resulted in Hemapala's death to wit :—

(a) That the accused-appellant had attempted an homosexual act; and

(b) That the deceased had retaliated by giving him blows.

In the case of *King v. Marshal Appuhamy* (1) the appellant was charged for murder of one Elizabeth on September 19, 1949. "The principal witness for the prosecution Ana Maria, the mother of the deceased said that about 2 or 3 days prior to the murder the deceased complained to her that the appellant made an improper suggestion to her, that she did not agree to it, and that she did not want him to come to the house". After this complaint by the deceased, she told the appellant not to come to her house. It was after she told so that Elizabeth was murdered by the appellant. The main point argued in this appeal was that the statement made by the deceased to Ana Maria was not admissible in evidence under section 32(1) of the Evidence Ordinance. In this appeal, Jayetilleke, S.P.J., held as follows :—

> "The transaction in this case is one in which the deceased was murdered on September 19, 1949. The transaction cannot be restricted to the physical cause of death. If events prior to the death can be taken into account, the transaction would include the connected events which culminated in death. Whether there is a proximate relation between the commencement of the transaction and the ending thereof is a matter to be determined on the facts of each case. Here, there is a clear connection between the complaint made by the deceased, the warning given by Ana Maria to the appellant and the actual stabbing."

In the instant case before us, there is a close proximity between the transaction spoken to by the deceased Hemapala to Stephen and Ranatunga, and the time Hemapala the deceased was found injured. As such, the evidence pertaining to the statements made by Stephen and Ranatunga are admissible in evidence "as the circumstances of the transaction which resulted in the death" of Hemapala. The two statements of the deceased led in evidence have not been led to prove a motive alone. Proof of a statement of a deceased to prove motive would be inadmissible evidence under section 32(1) of the Evidence Ordinance — (C. C. A.) — *H. S. Perera v. Queen* (2) followed the unreported case — *Queen v. Stanley Dias* (3).

The learned trial Judge has also not directed the Jury fully as to the manner in which statements of the deceased should be considered, to determine the credibility. He has not directed the Jury that such statements are hearsay evidence, and statements which cannot be subjected to and tested by cross-examination. As such statements made by the deceased must be considered subject to those infirmities. Learned trial Judge has also not directed the Jury to consider whether there is other independent evidence to corroborate the statements of the deceased person.

In the case of *Somasundaram v. Queen,* (4) Samarawickreme, J. — sets out some of the directions that should be given to the Jury by a trial Judge in respect of the admission of a statement made by a deceased under section 32(1) of the Evidence Ordinance. He states as follows :—

> "That the Jury are always to be cautioned as to the inherent weakness of this form of hearsay evidence — vide *The King v. Asirvadan Nadar* (5) — (51 N.L.R. 322 at 324) and *Justinpala v. The Queen* (6) (66 N.L.R. 409). Further, a presiding Judge should caution the Jury 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 — vide *Queen v. Anthonypillai* (7) (69 N.L.R 34)."

I have anxiously considered whether these non-directions have caused any prejudice to the accused-appellant. In the present case, I am of the view that the non-direction as to the manner in which evidence relevant to section 32(1) of the Evidence Ordinance has to be considered, has not caused any prejudice to the accused-appellant's case. Stephen and Ranatunga are independent witnesses. There is no indication whatsoever, nor has it been even suggested by the accused-appellant that they bore any enmity or prejudice to the accused-appellant. Further, the deceased's statements are corroborated by the evidence of Siripala, Stephen and Ranatunga, that the accused-appellant and

the deceased Hemapala used to sleep at night on the Carpenter's Bench, and that they were close friends and companions, thus suggesting a homosexual relationship between the two.

The next submission made by the learned counsel for the accused-appellant is that the learned trial Judge has not adequately directed on the law pertaining to the consideration as evidence an unsworn statement made by the accused-appellant from the dock. The learned trial Judge has directed the Jury as follows : regarding the accused's statement from the dock —"The accused's statement is evidence in this case. But he did not get into the witness box and subject himself to cross-examination. As such this statement is not as strong evidence as evidence given from the witness box. But still it is evidence. You should consider the statements made by the accused". This only direction on this matter though not a fully complete direction has adequately in the circumstances of this case directed the Jury, how the Jury should consider the statement made from the dock by the accused-appellant. The accused-appellant's statement was a bare denial, as such this direction alone would cause no prejudice to the accused-appellant. His statement has not thrown any light on his own conduct that night, as for example — he was found missing from where he slept on the night at the time the deceased was found with cut injuries, nor does it in any way affect the facts narrated by the prosecution witnesses. In any case, it has to be stated that this direction is not as complete as it should have been. In the case of *Queen v. Kularatne* (8) a judgment of the full Court — (C.C.A.) — has laid down the law as follows : "We are in respectful agreement, and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the Jury must be so informed. But the Jury must also be directed that —

(a) If they believe the unsworn statement it must be acted upon ;

(b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed ; and

(c) That it should not be used against another accused.

(a) & (b) above are the two matters relevant to this case on which the learned Judge should have directed the Jury in this instant. Though, the learned trial Judge has directed the Jury to consider the statement as evidence, he has not directly told the Jury that if they believe the unsworn statement of the accused-appellant, that it must be acted upon, and that if his statement raised a reasonable doubt in the minds of the Jury, the accused is entitled to be acquitted. But on the facts of this case, I hold that the above non-direction has not caused any prejudice to the accused-appellant.

The learned Senior State Counsel strenuously submitted that there was another compelling fact against the accused-appellant, which the learned trial Judge has not touched upon, on which, he invited this Court to act as an additional item of evidence to establish the guilt of the accused-appellant. Learned Senior State Counsel stated that the prosecution has built up a case, facts and circumstances against the accused-appellant, a case which called for an explanation from him, as regards facts and circumstances within his own knowledge and which he can only explain. The accused-appellant has chosen not to offer such explanation, and that conduct of the accused-appellant must be used as one of the facts against the accused-appellant in considering his guilt. The learned Senior State Counsel based this submission on the most recent decision of the Supreme Court in the case of — *The Attorney General, v. Nallanthambi Thevanayagam Pillai,* (9) (Unreported). Though there is much force in the argument of the learned Senior State Counsel, that the trial Judge has not directed the Jury, on the aspect submitted by the learned Senior State Counsel, I am of the view that at this stage of the case, it would not be fair and just to hold that principle of law against the accused-appellant and to take accused-appellant unawares.

I hold that on the totality of the evidence led against the accused-appellant, the Jury could not have come to any other conclusion, than the one and only irresistible conclusion that on this circumstantial evidence the accused was guilty of the

offence of murder of Hemapala. I have pointed out the non-directions in the charge to the Jury. This is an instance in which this Court should act on the proviso to section 334(1) Code of Criminal Procedure Act No. 15 of 1979, and hold that "notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred". The trial Judge has directed the Jury to consider a verdict of both murder and culpable homicide not amounting to murder on the basis of knowledge. The Jury having considered the directions brought a verdict of murder. It is, quite clear that the Jury brought this verdict having come to the conclusion on the circumstantial evidence that the accused-appellant has used the weapon axe (P2) and intentionally caused the death of Hemapala. There is no reason to interfere with the verdict of murder. Though, there have been non-directions in the charge, I am of the view that "no miscarriage of justice" has occurred, nor has the verdict "occasioned a failure of justice". For the reasons set out above, I affirm the verdict of the Jury and the sentence passed on the accused-appellant. The appeal is dismissed.

ABEYWARDENE, J.—I agree.

G. P. S. DE SILVA, J.—I agree.

Appeal dismissed