WARAPITIYA RAHULA THERO
v.
COMMISSIONER GENERAL OF EXAMINATIONS AND OTHERS

SUPREME COURT
AMERASINGHE, J.
WIJETUNGA, J.,
BANDARANAYAKE, J.
SC (FR) 683/99
MARCH 31ST, 2000

Fundamental Rights - Constitution Article 12(1) - Member of the Clergy - Application to sit S.L.A.S refused - Violation of rights guaranteed under Article 12(1).

Held :

(1) There is nothing in the gazette notification or in the Law disqualifying the members of the clergy from serving in the Public Service.

APPLICATION under Article 126 of the Constitution.

Ms. Mallika Prematilaka with *Manori Pathirana* and *Leslie Suraweera* for Petitioner.

Harsha Fernando, S.C. for Respondents.

Cur. adv. vult.

March 31, 2000.
AMERASINGHE, J.

The Petitioner obtained his diploma in Social work in 1983 and was confirmed in the post of Social Service Officer with effect from 01.11.89. He had served in the Department of Social Service as Social Service Officer Grade II since that time. On the 24th of March 99, in response to an advertisement in the Government Gazette dated 2nd March, 99 the petitioner applied to sit the limited competitive examination for entry in to the Sri Lanka Administrative Service.

By letter dated 09. 07. 99 marked P2 in these proceedings the Department of Examinations informed the petitioner that

other incriminating factors emanating from the evidence in the case on which the jury could have arrived at a verdict of guilt against the accused-appellant. He referred to the evidence relating to the conduct of the accused-appellant subsequent to the attack on the deceased, evidence relating to the recovery of some blood stained clothes from the house of the accused-appellant and the alleged motive for the crime.

In support of his contention the learned Senior State Counsel cited the case of *Dharmawansa Silva & another v. The Republic of Sri Lanka*[7]. In that case Rodrigo, J sought to follow the flexible approach to dying depositions adhered to by the Indian decisions in *Bakshish Singh v. State of Punjab(Supra)* and *Pompiah v. State of Mysore*[8] and *Kashmeri Singh v. State of Madhya Pradesh*[9]. In the latter case obligations on the Court is laid down in the following terms:

> "First, to marshall the evidence against the accused excluding the dying deposition altogether and to see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the deposition, then of course, it is not necessary to call the deposition in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be safe to sustain a conviction. In such an event the Judge may call in aid the deposition and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the deposition, he would not be prepared to accept."

In the instant case we have already considered the the evidential value of the alleged dying depositions and rejected them. Hence there is no way, to call in aid the dying depositions to bolster up and strengthen the rest of the evidence in the case inorder to uphold the verdict of the jury.

We now proceed to examine the submission made by the learned Senior State Counsel that even if the dying depositions

are excluded altogether, there still remains items of evidence which are of such an incriminating nature that would justify the verdict of guilt arrived at by the jury.

Inspector Rodrigo testified that on 23. 09. 93 after inspecting the scene of the crime he went to the house of the accused-appellant around 4.30 p.m. and that he did not find him there. He has stated to Court that the accused-appellant had surrendered to Court through a lawyer on 29. 09. 93. There is no evidence whatsoever elicited from the police witnesses to the effect that the accused-appellant was absconding. As regards the evidence relating to the recovery of blood stained clothes it appears that these clothes had not been sent to the Government Analyst for examination and report. Hence there is no evidential value to consider that item of evidence as an item of incriminating evidence against the accused-appellant. As regards the motive it can also be taken as a factor which could have prompted the aggrieved parties to implicate the accused-appellant with the murder of the deceased. Hence we are unable to accept the submissions of the learned Senior State Counsel. For these reasons we set aside the verdict, conviction and the sentence and proceed to acquit the accused-appellant.

HECTOR YAPA, J. - I agree.

Appeal Allowed.

Cases referred to :

1. *Rex v. Woodcock* (1789) 1 Leach 500
2. *Somasunderam v. Queen* 76 NLR 10
3. *King v. Asirvadan Nadar* 51 NLR 322 at 324
4. *Ram Nath v. State of Madya Pradesh* (1953) AIR SC 420
5. *Bakhshish Singh v. State of Punjab* (1970) AIR SC 1566
6. *Tapinder Singh v. State of Punjab* (1970) AIR SC 1566
7. *Dharmawansa Silva* and *another v. Republic of Sri Lanka* (1981) 2 SLR 439
8. *Pompiah v. State of Mysore* (1965) SC 939
9. *Kashmeri Singh v. State of Madya Pradesh* (1952) AIR SC 59

T. Walaliyadde for Accused Appellant.

Yasantha Kodagoda - State Counsel for Attorney General.

Cur. adv. vult.

May 31, 2000.

KULATILAKA, J.

In this prosecution the accused-appellant who was indicted for the murder of one Okanda Gamage Andiris was found guilty of culpable homicide not amounting to murder by an unanimous verdict of the jury and thereafter was sentenced to a term of 7 years rigorous imprisonment and a fine of Rs. 2000/- with a default term of 6 months simple imprisonment. The accused-appellant appeals against the conviction and sentence.

The prosecution story as deposed to by Okanda Gamage Upasena a son of the deceased and Udupitiya Liyanagamage Jagath Weerasekera a close relative of the deceased is summarised as follows:

The deceased was an old man of 88 years. He was living in his own house along with his wife and son Upasena. The accused-appellant was a man from the same village where he was known as Navaratne. The accused-appellant's father was a treacle seller and he was the only person selling treacle in

that village. On the day of the incident the deceased had left his house around 3 p.m. to visit his daughter-in-law Dayawathie. Witness Upasena also had followed him to Dayawathie's place around 5.30 p.m. on his bicycle. While he was there the deceased had left Dayawathie's place around 6 p.m. Soon after the witness too had proceeded towards their house on his bicycle. On his way home he met Jagath Weerasekera. He said "Muttha is lying fallen in a pool of blood." After the receipt of this information the witness had proceeded to the place where his father was lying. The deceased was conscious at the time. When Upasena questioned the deceased as to who his assailant was, the deceased had made the following utterance:

"නවරත්න ගහලා පිහියෙන් ඇන්නා."

(Navaratne hit me and stabbed me with the knife). Thereupon the deceased was taken to the hospital in a van. Inside the van he had repeated the same utterance. The witness had told Court that by the name "Navaratne" the deceased was referring to the accused-appellant as his assailant. Around 10 p.m. on the same day the deceased had succumbed to his injuries. Witness also testified to the enmity the accused-appellant had with the deceased. During the insurgency a brother of the accused-appellant had been killed by the army. The story in the village was that it was the deceased who gave information to the army about the accused-appellant's brother. This factor was highlighted by the prosecution as the motive for the crime.

Jagath Weerasekera testified that on 22. 09. 93 around 6.45 p.m. he was on his way to see his uncle Upasena when he saw the deceased lying fallen on the road. He had gone up to the deceased and the latter had asked him as to who he was and when Weerasekera disclosed his identity the deceased made the following utterance:

"පැණිකාරයාගේ පුතා මට ගැහුවා"

(panikaraya's son hit me). The witness did not know who "panikaraya" was at that point of time. Thereafter he had proceeded to the house of the deceased and was told by the deceased's wife that Upasena was not in. Whereupon he had borrowed a motor cycle and went in search of a vehicle to take the injured to the hospital and on his way he met Upasena and told him that muttha was lying fallen on the road.

According to the medical expert Wijegunawardene who had performed the post mortem, the death was due to shock and internal haemorrhage arising from the injuries to the abdomen and other multiple fractures. Dr. Wijegunawardane, J.M.O. Matara was an experienced medical officer with 22 years of service at the time of giving evidence.' He had observed 15 injuries on the body of the deceased. Those injuries consisted of fractures, lacerations and contusions. Not a single of the injuries was a stab injury. The medical expert boldly and consistently had expressed the view that those injuries had been inflicted by a blunt weapon.

According to the investigating officer Inspector Rupasinghe Rodrigo having inspected the scene of the crime he had proceeded to the accused-appellant's house around 4.30 p.m. on 23. 09. 93. It was located on a hill. The accused-appellant was not present but on 29. 09. 93 the accused-appellant had surrendered to Court.

The most significant feature in this prosecution is that apart from the dying declarations alleged to have been made first to Jayantha Weerasekera and then to Upasena, the rest of the evidence in the case was not sufficient to secure a conviction. The learned trial Judge had correctly grasped this point when he directed the jury that the case for the prosecution rests solely on the three dying declarations and that in the event of the jury rejecting them the jury may proceed to acquit the accused.

The learned counsel for the accused-appellant urged the following grounds in his endeavour to assail the verdict reached by the jury, namely -

(1) that the direction given by the learned High Court Judge to the jury emphasizing the sanctity attached to a dying deposition is not the correct exposition of the law relating to the admissibility of dying depositions in our law and thereby the learned Judge has misdirected the jury on a vital question of law.

(2) that the learned trial Judge failed to direct the jury to look for factors that would tend to corroborate a dying deposition.

(3) that the learned Judge has failed to adequately direct the jury with regard to the inherent weakness in the evidence led in the case.

Urging the first point raised by him the learned counsel for the accused-appellant referred us to the following passage in the Judge's summing up to the jury where the Judge explained to the jury the law relating to the admissibility of a dying deposition in the following terms:

> "Dying declarations are admitted on the basis that had been accepted from ancient times that a person at death's door will not utter a lie. He knows that he is about to die. A wicked person may falsely implicate someone who is not the actual doer of the act. *Such instances are not even one in a million.*" (emphasis is mine.)

In fact in making this direction to the jury the learned trial Judge was placing before the jury the classical exposition of the English Common Law as stated by Eyre *C.B - Rex v. Woodcock*[1] in the following terms:

> "The principle on which this species of evidence is admitted is that they are declarations made in extremity,

> when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemnly and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice."

In this regard Professor G.L. Peiris in his book The Law of Evidence in Sri Lanka, first edition at page 202 makes the following observation:

> "The proposition that, before this principle of inclusion can come into play, the deponent or declarant must necessarily be in extremity at the time when the statement is made, is not valid for the law of Ceylon."

In *Somasundaram v. The Queen*[2] the learned trial Judge in the course of his summing up to the jury had explained the law relating to dying depositions in the following terms:

> "This is a very vital matter for the reason that under our law a statement made by a man who is very seriously injured is considered with great sanctity, because the law assumes that a person in that position will not unnecessarily implicate an innocent man."

Justice Samerawickrame in his judgment at page 12 referring to the above direction given to the jury on the sanctity attached to dying depositions made the following observation:

> "This direction does not correctly set out the position under our law."

In the instant case the classical view of sanctity attached to a dying deposition had been placed before the jury by the learned trial Judge in a more emphatic language, thus causing much prejudice to the accused-appellant's case.

"The learned Senior State Counsel quite correctly brought to the notice of Court that the learned trial Judge himself had labelled the utterances alleged to have been made by the deceased as "dying declarations". Having introduced the utterances as "dying declarations" the learned trial Judge has resorted to the classical principle of the English Law as the basis for accepting dying declarations as gospel truth. The learned counsel for the accused-appellant submitted to Court that even though at a latter stage of his summing up the learned trial Judge had cautioned the jury as to the inherent weakness in a dying declaration yet it cannot erase the impression that had already crept into the minds of the jurors. The learned counsel contended that much prejudice was caused by the learned Judge's emphatic phrase "such cases are not even one in a million." The learned counsel fortified his submission with a series of case law. The learned counsel laid emphasis on the judgment of Justice Gratiaen in *The King v. Asirvadan Nadar*[3] at 324 where His Lordship observed:

> "Under our Evidence Ordinance the sense of impending death which is believed to provide "a situation so solemn as to create a special guarantee of veracity" is not insisted upon".

We see merit and substance in his submission that the learned trial Judge had misdirected the jury by giving an undue sanctity to a dying declaration and placing it on a higher pedestal than rest of the evidence in the case.

At this juncture it is appropriate and pertinent to examine the dying declarations alleged to have been made to the two prosecution witnesses. The first utterance was made to Jagath Weerasekera and reads as follows:

"පැණිකාරයාගේ පුතා මට ගැහුවා."

(panikaraya's son hit me). The second one was made to Upasena and reads as follows:

"නවරත්න ගහලා පිහියෙන් ඇන්නා."

(Navaratne hit me and stabbed me with the knife). The third one was made to Upasena inside the van and was to the following effect:

"නවරත්න ගහලා පිහියෙන් ඇන්නා."

The time gap between the first and the second utterances was roughly about 15 minutes. The significant feature in the second utterance is that it sought to clarify and describe the first utterance. Another interesting feature is that the third utterance made inside the van to Upasena was exactly a word repetition of the earlier utterance made to him. If we are to apply the Test of Probability and Improbability a reasonable doubt would arise in our minds as to the veracity and truthfulness of both witnesses with regard to the utterances alleged to have been made to them by the deceased. On a perusal of the summing up of the learned trial Judge to the jury we find that the direction given to the jury is thoroughly insufficient on these matters pertaining to the alleged dying depositions.

Ordinarily it is not safe to base a conviction for murder solely upon a dying declaration, unless there is corroboration from an independant source. Vide the decision in *Ram Nath v. State of Madhya Pradesh*[4] or else by circumstantial evidence. Vide *Bakhshish Singh v. State of Punjab*[5]. An examination of the evidence of the medical expert Dr. Wijegunawardane vis a vis the dying depositions made to Upasena serious doubt arises as to the truthfulness of the utterance itself which speaks of stabbing with a knife. Of the 15 injuries noted in the post mortem report and described by the Doctor there wasn't a single stab injury. Furthermore the Doctor was quite emphatic when he expressed his view that the injuries were the result of an attack with a blunt weapon. Thus the medical evidence not only contradicts the dying declaration made to

Upasena but in fact demolishes it in toto. Unfortunately the jury did not receive adequate guidance on this vital point as well.

The learned counsel for the accused-appellant sought to impugn the first utterance made to Weerasekera by raising a query as to why Jagath Weerasekera who was possessed of the fact that it was the "panikaraya's son" who had attacked the deceased at that point of time when he met the deceased's son Upasena did not disclose that fact to Upasena. Learned Senior State Counsel attempted to answer this query by submitting that Jagath Weerasekera being a layman his prime concern was to fetch a vehicle to take the injured person to the hospital. We find it difficult to accept this submission because according to the prosecution it was to Weerasekera, the deceased had made the first utterance disclosing the identity of the person who attacked him and a reasonable man's conduct would be to disclose that fact to Upasena who is the son of the deceased, at the earliest opportunity. We have already entertained a serious doubt as to the truthfulness of the utterances made to Upasena and the testimonial trustworthiness of that witness. Taking this factor in conjunction with Weerasekera's conduct in not informing Upasena of the identity of the assailant cast a serious doubt in our minds as to the veracity of Weerasekera's evidence to the effect that the deceased made a dying declaration to him.

In fact inasmuch as a dying declaration is admitted on the basis of necessity an obligation lies on the learned trial Judge to direct the jury to be on its guard to scrutinize all the relevant surrounding circumstances. Vide Dua, J in *Tapinder Singh v. State of Punjab*[6]. Hence we take the view that the second and third grounds urged by the learned counsel for the accused-appellant stand in good stead and carry sufficient weight to vitiate the conviction.

The learned Senior State Counsel submitted to Court that even if the dying depositions are disregarded yet there were

his application was rejected, since he was a member of the clergy.

There is nothing in the gazette notification or in the law disqualifying the members of the clergy from serving in the Public Service. They are in the circumstances, entitled to the protection relating to equal treatment guaranteed by Article 12(1) of the Constitution. Indeed Learned Counsel for the respondents properly concedes that there has been a violation of petitioner's fundamental rights guaranteed by Article, 12(1) of the Constitution, although he did express concern about the appropriateness of a member of the clergy functioning as an ordinary public officer.

In the circumstances, we declare that the petitioner's rights under Article 12(1) of the Constitution have been violated. We made order that the State shall pay a sum of Rs. 25,000/- as costs to the petitioner.

WIJETUNGA, J. - I agree.

BANDARANAYAKE, J. - I agree.

Relief Granted.