[IN THE COURT OF CRIMINAL APPEAL]

1964 *Present:* **T. S. Fernando, J. (President), Sri Skanda Rajah, J., and G. P. A. Silva, J.**

P. L. JUSTINPALA, Appellant, *and* THE QUEEN, Respondent

APPEAL NO. 75 OF 1964, WITH APPLICATION NO. 79

*S. C. 50—M. C. Chilaw, 48018*

*Evidence Ordinance—Section 32 (1)—Statement of deceased person as to the cause of his death—Weight to be attached to it—Duty of judge to direct jury in regard to the absence of cross-examination.*

Where, in a trial for murder, the dying deposition made by the deceased has been admitted in evidence under section 32 (1) of the Evidence Ordinance, it is the duty of the judge to warn the jury adequately that, when considering the weight to be attached to this evidence, they should appreciate that the statement of the deponent had not been tested by cross-examination. Dicta to the contrary in *The Queen v. Vincent Fernando* (65 N.L.R. 271) disagreed with.

APPEAL against a conviction in a trial before the Supreme Court.

*L. V. P. Wettasinghe*, for the Accused-Appellant.

*P. Colin Thome*, Crown Counsel, for the Crown.

*Cur. adv. vult.*

August 31, 1964. T. S. FERNANDO, J.—

The appellant stood indicted on a charge of murder of a man named Karunaratne and, after trial, was found guilty upon an unanimous verdict of the jury of the offence of culpable homicide not amounting to murder.

The only matter that merited attention on this appeal was the complaint made on behalf of the appellant that the learned Commissioner who presided at the trial did not direct the jury adequately on the manner in which it should treat a dying deposition made by the deceased Karunaratne in the course of which he had stated he was stabbed by the appellant.

Reliance was placed by Counsel for the appellant on the decision in *The King v. Asirvadan Nadar*[1] where this Court stated :—

" As the evidence was presented to the jury at the trial, the statements contained in the dying deposition P 9 formed to a large extent the foundation of the case against the accused, and it was in our opinion imperative that they should have been adequately cautioned

[1] *(1950) 51 N. L. R. at p. 324.*



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that, when considering the weight to be attached to this evidence, they should appreciate that the statement of the deponent had not been tested by cross-examination. . . . . There is no rule of law under which evidence which is admissible under section 32 (1) may not be acted upon unless it is corroborated by independent testimony, but the jury should always be cautioned as to the inherent weakness of this form of hearsay evidence."

*Asirvadan Nadar's case* (supra) was referred to in the later case of *Lewis Fernando v. The Queen* [1] where the point taken on behalf of the appellant was that the trial judge had failed to caution the jury adequately upon the danger of acting on the uncorroborated deposition of the deceased. The trial judge in that case had drawn the attention of the jury to the absence of cross-examination of the deponent and indicated that they should be reasonably cautious before accepting it as true. No question, therefore, arose there in respect of any absence of cross-examination. In regard to the absence of a direction that a jury ought not to act on a dying deposition unless there was some reliable corroboration, this Court appears to have preferred the view that such a direction was not imperative in every case. It went on to point out that in any event there was such corroboration furnished by facts that were not in dispute in the case there considered. It must be emphasized that the trial judge in that case had discussed at length in his summing-up to the jury the evidence of what he referred to as " corroborative factors ".

Learned Crown Counsel has drawn our attention to certain dicta in a judgment delivered by this Court last year in the case of *The Queen v. Vincent Fernando* [2] which appear to be in conflict with the statements in the law contained in *Asirvadan Nadar's case* (supra) and, in certain respects, with the views implicit in the judgment of this Court in *Lewis Fernando's case* (supra). In dealing with a certain statement made by the deceased and admitted in evidence, the trial judge in *Vincent Fernando's case* had directed the jury entirely in accordance with the observations of this Court in *Asirvadan Nadar's case*. It is difficult to appreciate how the appellant in *Vincent Fernando's case* could reasonably have complained of prejudice to him by the direction there questioned. It was a direction favourable to him and, in the light of the decision in *Lewis Fernando's case*, indeed too favourable. This Court appears to have concluded, *inter alia*, that the absence of cross-examination of the deceased did not diminish the weight to be attached to his statement. After drawing attention to the actual direction to the jury, Basnayake C.J., in delivering the judgment of the Court, stated :—

" The directions given above find no support in the provisions of the Evidence Ordinance. The statement of a deceased person is not an inferior kind of evidence which must not be acted on unless corroborated. Like any other relevant fact it must be considered by the jury having due regard to the circumstances in which the

[1] *(1952) 54 N. L. R. at p. 217.* [2] *(1963) 65 N. L. R. at p. 271.*

statement was made, the character and standing of the person making it. It is wrong to give the statement of a deceased person an inferior status, as it is also equally wrong to give it an added sanctity. The prosecution was seeking to prove that the 1st, 2nd and 3rd accused committed criminal acts in furtherance of their intention to kill the deceased. In support of that fact the Crown placed before the jury evidence of the statements of the deceased and of Mary Margaret. It was open to the jury to return a verdict against the accused if they believed the statement of the deceased or the evidence of Mary Margaret or both. That being the case the question of the corroboration of the deceased's statement did not arise. In the circumstances there was no need to over emphasize the absence of cross-examination. The weight to be attached to such a statement would vary with the circumstances of each case and is a matter for the jury, and the absence of cross-examination does not diminish it even as the mere fact that a witness is cross-examined does not increase it."

It appears to us necessary to say here that we are unable to agree with the statement above that implies that the absence of cross-examination does not affect adversely the weight to be attached to a dying deposition or declaration. Nor can we agree that the question of corroboration of the deceased's statement did not arise in the case there discussed. While the necessity of a direction in regard to corroboration of a dying declaration or deposition must depend on the particular circumstances of each case, we think the jury's attention should ordinarily be drawn to the fact that the declaration or deposition, as the case may be, has not been tested in the usual mode available to a party affected by it, viz. by cross-examination. There may, of course, be other ways of testing the truth of such a statement, as for example, by the presence or absence of other evidence corroborating the statement. In this apparent conflict of decisions of this Court, we prefer to follow the earlier decision in *Asirvadan Nadar's case* (supra) in so far as it requires a trial judge to direct the jury in regard to the absence of cross-examination In making this preference, we are fortified by a contemplation of the unsatisfactory situation that must arise, for example, in a case where the only evidence relied on by the prosecution is a dying deposition and where the direction to the jury follows the views expressed in *Vincent Fernando's case* (supra).

We think we are right in presuming that the learned Commissioner, being aware of the conflict of views appearing in the judgments of this Court noted above, considered it was his duty to follow the law as indicated in the latest of these judgments. It is correct that he did not draw the jury's attention specifically to the absence of cross-examination of the deceased. There were, however, before the jury other evidence of a direct nature to establish the identity of the assailant. There were two eye-witnesses, Juwan and Abeysinghe, called by the prosecution to testify to the stabbing by the appellant. The question before the jury throughout was whether these two witnesses were to be believed.

There was a discrepancy between the evidence of these two witnesses who testified that the stabbing took place in the compound of the house of the appellant and the dying deposition in which the deceased Karunaratne stated that he was stabbed by the appellant when he was seated on a chair in the house of the appellant. The dying deposition was made use of by the trial judge in his summing-up mainly to direct the jury to consider whether the discrepancy between the evidence of the two eye-witnesses and the deposition renders the evidence of the two witnesses unreliable. There is little doubt that the defence must itself have relied on the dying deposition for the same purpose. In these circumstances we saw no reason for disturbing the conviction and dismissed the appeal.

*Appeal dismissed.*