THE

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Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2011] 1 SRI L.R. - PART 8

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Section 35 of the Excise Ordinance provides that "Any officer of the Excise, Police, Customs or Revenue Departments, not below such rank and subject to such restrictions as the Minister may prescribe, and any other person duly empowered, <u>may arrest</u> without warrant any person found committing in any place other than a dwelling house, an offence punishable under section 46 or 47; and <u>may seize</u> and detain any excisable or other article which he has reason to believe to be liable to confiscation under this Ordinance or other law for the time being in force relating to excise revenue; ..... " (emphasis added).

This section gives powers of arrest of any person found committing an offence under section 46 or 47 and the power to seize any excisable or other article liable to confiscation under the Excise Ordinance or other law in force relating to excise revenue. While the first part of this section gives powers of arrest of offenders committing offences under section 46 or 47, the second part gives powers of seizure of contraband liable to forfeiture under laws relating to excise revenue.

By clause 1 (ii) of the Excise Notification No. 509, the Minister has appointed all officers of the Police Force to perform the acts and duties mentioned in section 35 of the Excise Ordinance throughout the Island. In the written submissions filed for the petitioners, the learned counsel quoting the words of section 35 that "Any officer of the Excise, Police, Customs or Revenue Departments, not below such ranks and subject to such restrictions as the Minister may prescribe" has submitted that since in clause 1(ii) the Minister has not specified the rank of the police officers who could perform the acts and duties mentioned in section 35, the police officers cannot act under section 35 of the

Excise Ordinance. This submission does not appeal to me at all. When the Minister by the said clause 1(ii) of the Excise Notification has appointed all officers of the Police Force to perform the acts and the duties mentioned in section 35 of the Excise Ordinance, that is an appointment of officers of all ranks of the Police Force to perform the acts and duties under section 35. I therefore reject the aforementioned submission and hold that officers of all ranks of the Police Force have powers to perform the acts and duties mentioned in section 35. As such all police officers have powers to arrest without a warrant any person found committing in any place other than a dwelling house an offence punishable under section 46 or 47 of the Excise Ordinance.

Section 46 of the Excise Ordinance in Paragraphs (a) to (h) of that section sets out offences committed in contravention of the Excise Ordinance, or of any rule or order made thereunder or of any licence, permit or pass obtained under it. In terms of paragraph 46(g) whoever in contravention of any licence granted under the Ordinance "sells or keeps or exposes for sale any excisable article shall be guilty of an offence." In view of this provision sale of arrack at a wine stores in contravention of a condition of the licence issued to such wine stores is an offence under section 46 of the Excise Ordinance and as such a member of the Police Force, empowered by Excise Notification No. 509 to perform the acts and duties mentioned in section 35 of the Excise Ordinance has power to arrest without a warrant any person found selling any excisable article in contravention of a licence issued under the Excise Ordinance.

The learned counsel for the petitioners, in his written submissions has submitted that any violation or breach of

any condition of the licence can be dealt with only under section 48(c) of the Excise Ordinance and as the Excise Notification No. 509 does not empower a police officer to act in terms of section 48 (C) the police officers do not have the power to detect sales of excisable articles in contravention of the conditions of a licence. However section 48(c) deals with acts or omissions in breach of any condition of a licence not otherwise provided by the Excise Ordinance. Section 46(g) specifically states that the sale of any excisable article in contravention of a condition of the license is an offence. Therefore sales of excisable articles in contravention of a condition of a licence falls within section 46(g) and not under Section 48(c). For the reason set out above I am unable to accept the submission referred to above.

For the reasons set out above I am unable to accept the proposition put forward by the petitioners that police officers do not have power to detect sales of excisable article in contravention of the conditions of a license issued under the Excise Ordinance. As I have already stated in this judgment, as a result of the combined effect of clause 1(1) of the Excise Notification 509 read with sections 35 and 46(g) of the Excise Ordinance, police officers have the power to detect the offence of selling an excisable article in contravention of a condition of the licence issued to a wine stores.

However in terms of section 52(1)(a) of the Excise Ordinance, no Magistrate shall take cognizance of an offence punishable under section 46, 47 or 50 except on his own knowledge or suspicion or on the complaint or report of an excise officer. Although the police have the power to detect and apprehend a person who has committed an offence under section 46(g), in view of the provisions of section 52(1)(a),

the police have no authority to initiate proceedings before a Magistrate against the offender. Such offences, commonly called technical offences, have to be referred to an excise officer for appropriate action.

The 1st and 2nd petitioners' assertion that the detection made by the 3rd and 4th respondents at the petitioners wine shop on 10.10.2005 was illegal is based on their contention that police officers do not have power and authority under the Excise Ordinance to detect violations of the conditions of their licence. In this judgment I have already held that in terms of Clause 1 (ii) of the Excise Notification No. 509 read with section 35 and 46(g) of the Excise Ordinance police officers have the power to detect the offence of selling an excisable article in contravention of a condition of a licence granted under the Excise Ordinance and to arrest the offender without a warrant. In view of that finding the 1st and the 2nd petitioners' assertion that the respondents have violated their fundamental rights guaranteed by Articles 12(1) and 14(1) (g) fails.

For the same reason the 3rd petitioner's claim that the respondents have violated his fundamental rights guaranteed by Articles 12(1), 13(1), 13(2) and 14(1) (g) also fails. This application is therefore dismissed without costs.

TILAKAWARDENA J. – I agree.

MARSOOF J. – I agree.

Application dismissed.

SIGERA VS. ATTORNEY GENERAL

COURT OF APPEAL
RANJITH SILVA.J
LECAMWASAM.J
CA 184/2004
DC COLOMBO 849/2002
JANUARY 27, 2011
MARCH 9, 2011

Penal Code - Section 296 - Murder - Conviction - Approach of the Appellate Court?- Identification of accused by deceased?- Turnbul principles - Evidence Ordinance Section 27, Section 32 - Statement - Contradictory - Consideration – Dying declaration - circumstantial evidence

The accused-appellant was indicted with another (since dead) for causing the death of one F. After trial he was convicted and sentenced to death. In appeal, it was contended that, the High Court Judge misdirected himself on the facts, not given due consideration to the contradictory narration of circumstances surrounding the alleged Section 32 statement, drew unwarranted inferences regarding the circumstances surrounding the alleged identification of the assailant by the deceased and that the burden of proof was placed on the accused.

Held:

(1) Appellate Court will not lightly interfere with the findings of facts of a trial Judge as it is the trial Judge who has the privilege and the advantage of hearing and observing the demeanour and deportment of the witnesses as and when they gave evidence in Court.

(2) The identification was not in a difficult circumstance or in a multitude of persons in a crowd or in a fleeting moment. To apply the Turnbul principles the identification had to be made under different circumstances - in this case although the incident took place - during night, there was ample light shed by the bulb of the lamp post that was burning. There was no congregation of

multitude of persons in a crowd but only the accused-appellant and the deceased. In order to inflict the injuries on the deceased, the assailant had to come very close to the deceased.

(3) Under our law a dying declaration can be admitted in evidence under Section 32 of the Evidence Ordinance. One of the salient features discernible in this section is that the declaration may be written or oral. Even a sign made by a person who is unable to speak is caught up in this phrase.

(4) First and foremost a judge must apply his mind and decide whether the dying declaration is a true and accepted statement - in doing so he must be mindful of the fact that the statement was not made under oath, that the statement of the deceased person has not been tested in cross examination and that the person who made the dying declaration is not a witness at the trial.

(5) An accused can be convicted for murder based mainly and solely on a dying declaration made by a deceased without corroborating under certain circumstances. It would not be repugnant or obnoxious to the law to convict an accused based solely on a dying declaration.

Per Ranjit Silva. J

> "In order to justify an inference of guilt from the circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt".

Per Ranjit Silva. J

> "In the instant case taken cumulatively the proved circumstantial evidence irresistibly point towards the only inference that the accused committed the offence, and is not capable of any inference other than the guilt of the accused. The proved items of circumstantial evidence taken together with the dying declaration are inconsistent with the innocence of the accused".

APPEAL from the judgment of the High Court of Colombo.

Cases referred to:-

1. *Samaraweera vs. AG* - 1990 1 Sri LR 256

2. *Perera vs. Sigera* - Sri Kantha Law Reports - Vol 1 page 7
3. *Karunaratne vs. Anulawathie* - Sri Kantha Law Reports Vol 7 - page 74
4. *Alwis vs. Piyasena Fernando* - 1993 - 1 Sri LR 119 at 122
5. *Wickramasinghe vs. Dedoleena* - 1996 - 2 Sri LR 95
6. *Nissanka vs. The State* - 2001-1 Sri LR at 78
7. *Bhola Singh vs. State of Punjab* - 1994 SC 137 at 161
8. *Uthtar Pradesh vs. Nahar Singh* - AIR 1998 - SC 1328 at 1333
9. *CA 51/2003- HC 6416* - CAM 1.11.2007 at 11 and 12
10. *Alisandri vs. The King* - 38 NLR 257
11. *K vs. Mudalihamy* - 47 NLR 139
12. *Q vs. Anthony Pillai* - 68 CLW 57
13. *Weerappan vs. Q* – 76 NLR 169
14. *K vs. Asirivadan Nadar* - 51 NLR 322
15. *Justinapala vs. Q* 66 NLR 409
16. *Ratnayake vs. Q* - 73 NLR at 481
17. *K vs. Samarakoon Banda* - 44 NLR 169
18. *The Emperor vs. Naga Hal Din and another AIR Rampon at 187*
19. *Q vs. Vincent Fernando* 65 NLR 265
20. *Lewis Fernando vs. Q* - 54 NLR 274
21. *K vs. Abeywickrama* - 44 NLR 254
22. *K vs. Appuhamy* 46 NLR 128
23. *Podi Singho vs. K* - 53 NLR 49
24. *Don Sunny vs. A.G.* – 1998 - 2 Sri LR at 1

Tirantha Walaliyadda PC for accused-appellant

Rohantha Abeysuriya SSC for respondent.

March 31st 2011

RANJITH SILVA, J.

In this case the Accused Appellant, P. Mervin Athula Sigera, hereinafter some times referred to as the Appellant was indicted in the High Court of Colombo, along with

another accused who died before the trial commenced, for causing the death of one Abdul Cader Arshad Fahim on 23rd March 1996 at a place called 'Sigera Watte' and thereby committing the offence of murder which is an offence punishable under section 296 of the Penal Code. After trial on 14th of October 2004, the Appellant was convicted and was sentenced to death. It is against the said conviction and the sentence that the Appellant has preferred this appeal to this Court.

The facts

According to evidence led at the trial it is apparent that there are no eyewitness to the incident and the case for the prosecution rested almost entirely on items of circumstantial evidence. On the date of the incident namely on 23rd March 1996, shortly prior to the incident the deceased had been at his residence in the company of one Joseph Priyanka Perera (prosecution witness number one) who happened to be a friend of the deceased, and his brother Naushad prosecution witness number four. Priyanka was residing at the premises number 86/48,. The deceased had left his residence to proceed to the residence of another friend of his around 9 p.m. and within a few minutes Priyanka Perera too had left the house of the deceased. It is shortly thereafter prosecution witness number one had witnessed the deceased walking towards him grievously injured with bleeding injuries. Priyanka had seen the deceased by the light that was shed by the streetlamp that was burning in the close vicinity, around 9 p.m. witness Priyanka had helped the deceased to sit and at or about that time the deceased had upon enquiry, with difficulty told Priyanka that I quote, "Athula Sigera shot me". It appears that the deceased had mentioned the name of the

Appellant in no uncertain terms and thereafter the deceased had not made any further utterances. Thereafter Naushad P.W. 4 had arrived at the place where the deceased and Priyanka were and Priyanka had told Naushad that Athula Sigera shot the deceased. According to the evidence of Priyanka there had been some trivial disputes between the accused and the deceased sometime back.

Having received a complaint Inspector Jayasundara had arrived at the scene on the same day at 22.05 hours. According to him the incident had taken place on a land called “86 Watte”. He had noted blood stains at the threshold to the said land (86/watte) and large patches of blood were found in front of the house bearing number 86/65, where Priyanka encountered the deceased that night. This particular police officer during his investigation had found four empty .22 cartidges at the entrance to the ’86 Watte’. According to his evidence when one proceeds from the entrance to the said land along a by road one comes to the spot where the deceased was lying fallen on the ground this land is called ‘Sigera Watte’. Thereafter Inspector Jayasundara had searched for the suspects and during his search he had sent phone messages to the surrounding police stations. Finally the Accused Appellant was arrested by Sub Inspector Asoka Kumara on 26 of March 1996 in a hut at ‘Katukurunda Watte’ and upon a statement made in terms of section 27 of the Evidence Ordinance a gun was recovered from inside a chest containing clothes in the house where the Appellant was found. According to the evidence of the Government Analyst the empty catridges that were found at the scene could have been fired from the gun that was recovered from the chest of clothes. The medical practitioner who gave evidence that there were four gun shot injuries on the

diseased one from front of chest moving downwards, one from behind near the hip, one from front moving downwards, on the abdomen and another injury on the arm. The conclusions drawn by the Medical officer were that the deceased had died due to gunshot injuries sustained by him, fired from a range just over 3 feet. The Post-mortem report was produced marked as P1. The prosecution closed its case leading in evidence the statutory statement made by the appellant. The Appellant opted to remain silent and did not call any witness to give evidence on his behalf.

Counsel for the Appellant in his written submissions as well as in his oral submissions raised several grounds of appeal which are as follows;

(1) The learned High Court Judge misdirected himself on what amounts to corroboration in law.

(2) The learned High Court Judge has misdirected himself on section 33 and section 157 of the Evidence Ordinance and acted on unwarranted assumptions regarding unproven testimonies in previous judicial proceedings.

(3) The learned High Court judge misdirected himself on the facts and read into the evidence of witness what was not in their respective testimonies, thereby causing a miscarriage of justice.

(4) The Learned High Court Judge has not given due consideration to the contradictory narrative of circumstances surrounding the alleged Section 32 statement.

(5) The Learned High Court Judge has drawn an unwarranted inference regarding the circumstances surrounding the alleged identification of the assailant by the deceased.

(6) The Learned High Court Judge misdirected himself on the facts narrated by the Government Analyst on crucial matters thereby causing a miscarriage of justice.

(7) The learned High Court Judge has not given due consideration to the contradictory evidence regarding the identification of the productions.

(8) The Learned High Court Judge has abdicated his functions to the Government Analyst.

(9) The Learned High Court Judge misdirected himself on the burden of proof by placing an imperative burden on the Accused Appellant.

Most of the grounds of appeal urged by the Counsel for the Appellant are based on credibility of the Witness. I must emphasize that an Appellate Court will not lightly interfere with the findings of facts of a Trial Judge. In *Samaraweera Vs A.G*[1]. it was held that an Appellate Court will not lightly interfere with the findings of facts of a Trial Judge as it is the Trial Judge who has the privilege and the advantage of hearing and observing the demeanour and deportment of the witness as and when they give evidence in court.

"While a Court of Appeal will always attach the greatest possible weight to any findings of facts of a Judge of a court of first instance based upon oral testimony given before that Judge, it is not absolved by the existence of these findings from the duty of forming its own view of the facts, more particularly in a case where the facts are of such complication that their right interpretation depends not only on any personal impression which a Judge may have formed by listening to the witnesses but also upon documentary

evidence, and upon inferences to be drawn from the behavior of these witnesses (demeanour and deportment) both before and after the matters on which they give evidence. A Court of Appeal in such situations is free to overrule such findings of facts if it appears that the Trial Judge has misdirected himself on the facts or that wrong inferences have been drawn from the facts. (*Vide.Perera Vs Sigera*[3] and *Karunaratne Vs Anulawathie*[3].

In *Alwis Vs Piyasena Fernando*[4] at 122 it was observed by the Learned Judges who heard that case as follows: "it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal. The findings of this case are based largely on credibility of witnesses. I am therefore of the view that there was no reasonable basis upon which the Court of Appeal could have reversed the findings of the trial Judge." (vide. *Wickramasooriya Vs Dedoleena*[5].)

For convenience I shall first deal with the 5th ground of appeal which reads thus; the learned High Court Judge has drawn an unwarranted inference regarding the circumstances surrounding the alleged identification of the assailant by the deceased.

Whether the Appellant was sufficiently identified to support a conviction against him?

One of the grounds of appeal urged by the Accused Appellant is the issue of identify i.e. as to whether the deceased was able to clearly identify the assailant. The Learned Counsel for the Appellant contended that the evidence was not sufficient to identify the Appellant beyond reasonable doubt as the entire transaction took place during the night.

Prosecution witness (PW1) Priyanka has clearly stated in his evidence that the deceased, the Accused Appellant and he were neighbours who had known each other for a considerable lengh of time and that the distance between the residence of the deceased and the accused has been described as 'walking distance'. This witness has also stated in evidence that when he first encountered the deceased on the road on that fateful day, He was near a street lamp post with the light switched on and by that light he was able to clearly identify the deceased. It is obvious according to the medical evidence that the deceased could not have walked more than a few feet let alone a far distance, in that condition, fatally injured, with four gun shot injuries and therefore it is safe to assume that the shooting took place in the close vicinity of the street lamp post that illuminated the area. In this regard it is significant to note that the Counsel for the Appellant himself was taking in contradictions when he argued that it would not have been possible for the deceased to make any coherent utterances after he sustained the gun shot injuries due to the serious nature of the said injuries. If that was the case, inferentially the deceased could not have walked a far distance after he received the fatal injuries. According to the expert witness Dr. Lalani Indrani Ratnayake the Additional Judicial Medical Officer who performed the autopsy on the deceased, the deceased would have retained the ability to speak for a while prior to his death after sustaining the injuries. Furthermore the doctor did not exclude the ability of the deceased to walk a few steps after sustaining the injuries. The significance of this statement is that the deceased could have walked only a few steps after he sustained injuries. Furthermore, on a consideration of the nature of the gun shot injuries sustained by the diseased, the doctor who performed the autopsy has

expressed his opinion in no uncertain terms in stating that the shooting would have taken place at close range. Thus it could be seen undoubtedly that even the assailant would have been in the close vicinity of the street lamp. According to the evidence of prosecution witness No. 4, the brother of the deceased, he knew only of one person in that area who was known by the name Athula Sigera.

The Identification was not in difficult circumstances or in a multitude of persons in a crowd or in a fleeting moment. I am of the view that Turnbul principles do not apply under the circumstances.

In *Nissanka Vs The State*[(6)] at 78 Their Lordships held that the facts elicited from the testimony of C –who identified the accused at the trial, manifest that at the point of identification there was no congregation of a multitude of persons in a crowd but only the two accused, the deceased and the witness had been present and this happened in broad daylight hence there cannot be any doubt.

To apply Turnbul principles the identification had to be made under difficult circumstances. In this case, although the incident took place during night, there was ample light shed by the bulb of the lamp post that was burning. There was no congregation of a multitude of persons in a crowd but only the Accused Appellant and the deceased. In order to inflict the injuries on the deceased, the assailant had to come very close to the deceased. The injuries could not have been caused from a distance. According to the Government Analyst the shooting had taken place from a short distance. In fact it had to be done at close quarters and the distance couldn’t have been more than an arm’s-length. A bulb was lit and the Appellant was a well known person who lived in the neigh-

bourhood, in the same vicinity for a long time. These uncontoverted facts prove that there was ample light and ample time for the deceased to identify the Appellant.

In *Bhola Singh Vs State of Punjab*[7] at 161 the Indian Supreme Court held, if I may quote; "if the light was sufficient for the accused to identify their target there is no reason to hold that the injured eyewitness and the other witnesses could not identify the assailant."

In State of *Uthtar Pradesh Vs Nahar Singh* [8] at 1333 once again the Indian Supreme Court held that, "If the light was enough to enable the assailant to identify the victims and kill them it can hardly be contended, much less accepted that the light was not enough to identify the assailants.

The two judgments above referred to cannot be applied as a general rule without exception. I am prepared to follow the decisions in the above mentioned cases only to the extent that in the circumstances of the instant case the two judgments above referred to could be safely applied. There could be a case where the assailants plan and then surprise the victim in such a way that the victim would not have any chance of identifying the assailant. If the appellant is in hiding lying in ambush, waylays the victim and the witnesses, if any, taking them by surprise, in such a situation the Appellant may have the opportunity of observing the victim prior to the attack but the victim or the witness may not see the Appellant till the last moment and thus may not be able to identify the assailant. **(Vide. The Judgment of Ranjith Silva,J.**

Dying declarations

4th ground of appeal: The Learned High Court Judge has not given due consideration to the contradictory

narrative of circumstances surrounding the alleged Section 32 statement.

The principle on which this kind of evidence is admitted in certain cases is that they are declarations made in the extremity when the party is at the point of death; when every hope of this world has gone; when every motive to falsehood is silenced; and the mind is induced by the most powerful considerations to speak the truth.

Under our law a dying declaration can be admitted in evidence under section 32 of the Evidence Ordinance. The said section states: statements written or verbal of relevant facts made by a person who is dead... are themselves relevant facts in the following cases-

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.

The section above referred to states that, 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 proceeding in which the cause of his death comes into question.

Section 32 (1) is illustrated in the following manner:

The question is whether A was murdered by B; or whether A died of injuries received in a transaction in the course of which she was ravished. Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape .... under consideration, are relevant facts.

One of the salient features discernible in this section is that the declaration may be written or oral, even a sign made by a person who is unable to speak is caught up in this phrase. (*Alisandri Vs the King*[10])

The circumstances must be circumstances of the transaction. General expression indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death will not be admissible but statements made by the diseased that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding or that he was going to meet a particular person or that he had been invited by such person to meet him would even then be circumstances of the transaction and would be so whether the person was unknown or was not the person accused. Circumstances must have some proximate relation to the actual occurrence though for instance in the case of prolonged poisoning they may be related to dates at a considerable distance from the date of the total dose. In *King Vs Mudalihamy* [11] when the witness Mary Nona questioned from Wiliamsingho (the deceased) as to where he going he said "Mudalihamy (the accused) wanted me to go and collect honey and I am going to meet him."

Thereafter nobody heard about William Singho. Twelve days later the decomposed body of a man was found wedged in between two rocks in the middle of a stream. Mary Nona identified the body as that of William Singho and several stab injuries were on his body.

It was held that the said statement made by the deceased that he was going to the place where the accused lived could

be admitted in evidence as it was clearly a statement as to some of the circumstances of the transaction which resulted in his death.

First of all this court has to decide whether the dying declaration in question was a true and accurate one. It is only then the learned High Court Judge could be justified in treating the dying declaration as substantive evidence against the Appellant, which is an exception to the hear say Rule. H.N.G. Fernando, J in *Queen Vs Anthony Pillai* (12) held I quote; "the failure on the part of the Learned Trial Judge to caution the jury as to the risk of acting upon a dying declaration, being 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 had resulted in a miscarriage of justice."

Therefore it is seen that first and foremost a judge must apply his mind and decide whether the dying declaration is a true and accurate statement. In doing so he must be mindful of the fact that the statement of the deceased was not one made under oath (*Weerappan Vs the Queen*(13)), that the statement of the deceased person has not been tested in cross examination (Vide *King Vs Asirivadan Nadar*(14) and *Justinapala Vs The Queen* (15)) and that the person who made the dying declaration is not a witness at the trial.

In view of the inherent weaknesses in the dying declaration, enumerated above, the trial judge or the jury as the case may be must be satisfied beyond reasonable doubt on the following matters; whether the deceased in fact made such a statement, whether the deceased was able to speak at the time the alleged statement was made, whether the deceased was

able to identify the assailant, whether the statement made by the deceased was true and accurate, whether the statement made by the deceased person could be accepted beyond reasonable doubt, whether the evidence of the witness who testifies about the dying declaration can be accepted as credible.

The first ground of appeal relied on by the counsel for the Appellant is that the learned High Court Judge misdirected himself on what amounts to corroboration in law.

Of course the learned High Court judge has misdirected himself with regard to 'corroboration' of the evidence of the prosecution witness No. 1 in that he had concluded that prosecution witness No. 4 corroborated the evidence of prosecution witness No.1 whereas the evidence of prosecution witness number 4 is only admissible under Section157 of the Evidence Ordinance to ensure consistency of the evidence of prosecution witness number one. This cannot in my opinion prejudice the defence in any event as corroboration is not the *sine qua non* in proving a dying declaration. As I have enumerated in a different chapter of his judgment an accused can be convicted for murder based mainly and solely on a dying declaration made by a deceased without corroboration under certain circumstances.

In *Rathnayake Vs The Queen*[16] at 481 the accused was charged with the murder of a person called Punchi Nilame as well as one Herath Hamy. The case against the accused depended almost entirely on statements made by Herath Hamy to the police and to the magistrate. Herath Hamy said that the accused Ratnayake stabbed Punchi Nilame and when he (Herath Hamy) tried to intervene the accused stabbed him as well.

In the appeal it was argued that the dying deposition of Herathamy could not be used by the prosecution to support the first charge that is, the murder of Punchi Nilame. Following the decisions in *King Vs Samarakoon Banda*[17] at 169 and *The Emperor Vs Naga Hal Din and another*[18] at 187 it was held in that case that the circumstances relating to the two killings were so closely interwoven that Herath Hamys death would come into question in any charge relating to the death of Punchi Nilame.

A dying deposition 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 judge having due regard to the circumstances in which the statement was made. It is wrong to give the statement of a deceased person an inferior status as it is also equally wrong to give an added sanctity. It would be a misdirection to hold that the statement of a deceased person as to the cause of his death which is admissible under section 32 of the Evidence Ordinance as a relevant fact is diminished in weight by the absence of cross examination or that it is an inferior kind of evidence which must not be acted upon unless corroborated. (Vide. *The Queen Vs Vincent Fernando*[19], *Lewis Fernando Vs the Q*[20])

It would not be repugnant or obnoxious to the law to convict an accused based solely on a dying deposition, if the trial judge is convinced that the evidence of the witness testifying as to the dying deposition is credible, is a true and accurate version of the statement of the deceased and that it could be safely acted upon. In this regard I would like to refer to the evidence given by witness Priyanka prosecution witness number 1 wherein he had stated that he had

absolutely no reason to falsely implicate the Appellant since there was no enmity between the witness and the Appellant and that evidence was never contradicted. In the circumstances there aren't any reasonable grounds to doubt the credibility of prosecution witness number 1 with regard to the dying declaration made by the deceased. The medical evidence and the evidence of the police evidence too strongly support his evidence.

Another item of circumstantial evidence which may be considered in favour of the prosecution version is the subsequent conduct of the Accused Appellant. According to the evidence of the police witness it seems that although the accused is a very close neighbour of the deceased, he had been absconding for some time after the incident. It was about three days later that the officers attached to the Meeggahawatte police station succeeded in apprehending the Appellant who was hiding in a house in the area. Thus it appears that the Accused Appellant opted to be away from his permanent place of abode immediately after the murder. Another important item of circumstantial evidence is the recovery of a firearm from the hideout of the Accused Appellant consequent to a statement made by the accused which is admissible under section 27 of the Evidence Ordinance. Under the guidance of the accused a pistol was recovered by the investigation officers concealed in a box of clothes where the Appellant was found. The police recovered four spent cartridges from the scene of the crime shortly after the commission of the offence. The said cartridges with the firearm recovered consequent to the statement of the Accused Appellant were sent for examination and report by the Government Analyst. As per the report of the Government Analyst which is marked as P9, the opinion of the Government Analyst was to the effect that

all ammunition found at the scene had been fired from one weapon. On a scientific analysis (ballistics) the Government Analysts has also concluded that these Bullets had been fired from the firearm recovered consequent to the section 27 statement of the Accused Appellant. Furthermore on the day the prosecution led the evidence of the Government Analyst the defence had admitted the entire chain of productions right up to the handing over of the same to the Government Analyst.

In order to base a conviction on circumstantial evidence, the evidence must be consistent with the guilt of the accused and inconsistent with any other reasonable hypotheses of his innocence. In order to justify an inference of guilt from the circumstantial evidence the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt. (Vide. *King Vs Abeywickrama*(21) *King Vs Appuhamy*(22)) it was held in *Podisingho Vs King* (23) that in the case of circumstantial evidence it is the duty of the trial judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilt. In *Don Sunny Vs Attorney General* (24) at 1 it was held that proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence and that if an inference can be drawn which is consistent with the innocence of the accused the accused cannot be convicted.

In the instant case taken cumulatively the proved circumstantial evidence irresistibly point towards the only inference that the accused committed the offence, and is not capable of

any other inference other than the guilt of the accused. The proved items of circumstantial evidence taken together with the dying declaration are inconsistent with the innocence of the accused.

For the foregoing reasons adumbrated by me on the facts and the law, I am of the view that there is no justifiable reason for me to interfere with the judgment of the Learned Trial Judge. Accordingly I affirm the conviction and the sentence and dismiss this appeal.

Appeal dismissed

LECAMWASAM, J. - I agree

Appeal dismissed

ATTANAYAKE V. COMMISSIONER GENERAL OF ELECTIONS

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, C.J.,
RATNAYAKE, P.C., J. AND
PRIYASATH DEP, P.C.,J.
S.C.(SPL)L.A. NO. 55/2011
C.A. WRIT APPLICATION NO. 155/2011
JULY 4TH, 2011

Supreme Court Rules, 1990 – Compliance of Rule 8 is imperative – Rule 40 – Application for extension of time for the purpose of Rule 8(3) - Procedure

The petitioner preferred this application before the Supreme Court for special leave to appeal. The Respondents took up a preliminary objection that the application for special leave to appeal before the Supreme Court should be dismissed as the Petitioner has not complied with Rule 8(3) and Rule 40 of the Supreme Court Rules, 1990. At the time of filing of the application, the Petitioner had not issued notices on the Respondents through the Registrar. It is also admitted that the Petitioner had not made any application in terms of Rule 40 for an extension of time. Admittedly, this matter had come up for support on two occasions without notices to the other Respondents.

Held:

(1) the provisions laid down in Rule 8 clearly deal with the need to issue notices on the Respondents through the Registry and sets out clear guidelines to ensure that steps are taken at several stages to ensure that the Respondents are so notified. The guidelines are given not only for the Petitioner, but also for the Registrar of the Supreme Court and even for the Respondents to see that the application for special leave to appeal is properly instituted, notices are correctly tendered and relevant parties are properly notified. It is in order to follow the said procedure that it is imperative for a Petitioner to comply with Rule 8 of the Supreme Court Rules.

(2) Supreme Court Rules 8(3) and 40 indicate that the Petitioner should tender notices to the Registry of the Supreme Court along with his application for special leave to appeal and in the event if there is need for an extension of time to tender such notice that it should be done following the procedure laid down in terms of Rule 40 of the said Rules.

(3) In terms of Rule 40, where there is an application for extension of time for the purpose of Rule 8(3), the Registrar cannot entertain such an application, but he should submit it to a single Judge, nominated by the Chief Justice, in chambers to decide on such grant of extension of time.

(4) The Supreme Court procedure laid down by way of Supreme Court Rules made under and in terms of the provisions of the Constitution cannot be easily disregarded as they have been made for the purpose of ensuring the smooth functioning of the legal machinery of the Supreme Court. When there are mandatory Rules that should be followed and when there are preliminary objections raised on non compliance of such Rules, those objections cannot be taken as mere technical objections.

APPLICATION for Special Leave to Appeal from the judgment of the Court of Appeal dated 04.03.2011

Cases referred to:

1. *C. Comasaru V. M/s. Leechman and Co.Ltd. and Others* – S.C. Application No. 217/72 and 307/72, S.C. minutes of 26.05.1976
2. *Nicholas V. O. L. M. Macan Marker Ltd. and Others* – (1981) 2 Sri L.R. 1
3. *K. Reaindren V.K. Velusomasundera* – S.C. (Spl.) L.A. Application No.298/99, S.C. minutes of 07.02.2000
4. *Union Apparels (Pvt.) Ltd. V. Director-General of Customs and Others* – (2000) 1 Sri L.R. 27
5. *Piyadasa and Others V. Land Reform Commission* – S.C. Application No.30/97, S.C. Minutes of 08.07.1998
6. *Kiriwanthe and Another v. Navaratne and Another* – (1990) 2 Sri L.R. 393

7. *Priyani Soysa V. Rienzie Arsecularatne and Another – (1999) 2 Sri. L.R. 179*
8. *Bank of Ceylon V. Bank Employees' Union (0n behalf of Karunatilake)* - (2003) 1 Sri L.R. 47
9. *Samantha Niroshana V. Senarath Abeyruwan* – S.C. (Spl.) l.A. No.145/2006, S.C.Minutes of 02.08.2007
10. *Fowzie and Others V. Vehicles Lanka (Pvt.) Ltd.* – 2008 1 Sri L.R. 23
11. *L.A. Sudath Rohana V. Mohamed Cassim Mohamed Zeena* – S.C. (H.C.C.A.) L.A. 111/2010, S.C. Minutes of 17.03.2011
12. *N.A. Premadasa V. The People's Bank* – S.C.(Spl.) L.A. Application No.212/99, S.C. Minutes of 24.02.2000
13. *Hameed Majibdeen and Others* – S.C. (Spl.) L.A. Application No.38/2001, S.C.Minutes of 23.07.2001
14. *K.M. Samarasinghe V. R.M.D. Ratnayake and Others* – S.C. (Spl.) L.A. Application No.51/2001, S.C. Minutes of 27.07.2001
15. *Soong Che Foo V. Harosha K. De Silva and Others* – S.C. (Spl.) L.A. Application No.184/2003, S.C. Minutes of 25.11.2003
16. *C.A. Haroon V. S.K. Muzoor and Others* – S.C. (Spl.) L.A. Application No.158/2006, S.C. Minutes of 24.11.2006
17. *Woodman Exports (Pvt.) Ltd. V. Commissioner-General of Labour* – S.C. (Spl.) L.A. Application No.335/2008, S.C. Minutes of 13.12.2010
18. *Fernando V. Sybil Fernando and Others* – (1997) 3 Sri L.R. 1

Upul Jayasooriya with *M. Ariyadasa* for Petitioner-Petitioner

Nihal Jayamanne, P.C., with *Kushan D'Alwis, K. Ratwatte, Dilshan de Silva* and *Chamath Fernando* for 4th Respondent-Respondent

Nerin Pulle, P.C., SSC for 1, 2, 3, 28th Respondent.

Cur.adv.vult.

July 07th 2011

DR. SHIRANI A. BANDARANAYAKE, CJ.

This is an application for special leave to appeal from the judgment of the Court of Appeal dated 04.03.2011. By

that judgment, the Court of Appeal had refused to issue notice and interim relief, on the application filed by the petitioner-petitioner (hereinafter referred to as the petitioner) for a writ of certiorari quashing the decision of the 2nd and 3rd respondents-respondents (hereinafter referred to as 2nd and 3rd respondents) in accepting the nomination paper of the United People's Freedom Alliance for Chilaw Pradeshiya Sabha 2011, a writ of mandamus directing the 1st to 3rd respondents-respondents (hereinafter referred to as 1st and 3rd respondents) to conduct the election for Chilaw Pradeshiya Sabha consequent to the rejection of the nomination paper submitted by the United People's Freedom Alliance and a writ of Prohibition prohibiting the 5th respondent-respondent (hereinafter referred to as 5th respondent) and others contained in the same list, from contesting as candidates of the United People's Freedom Alliance for the Chilaw Pradeshiya Sabha Election 2011 and /or sitting and voting as Members of the Chilaw Pradeshiya Sabha on the basis of preliminary objections raised on behalf of the 4th respondent-respondent (hereinafter referred to as 4th respondent).

The petitioner preferred an application before this Court for special leave to appeal and when this matter came up for support, learned Senior State Counsel for 1st, 2nd, 3rd and 28th respondents took up a preliminary objection that the application for special leave to appeal before this Court should be dismissed as the petitioner had not complied with Rule 8(3) and Rule 40 of the Supreme Court Rules 1990.

Learned President's Counsel for the 4th respondent also raised the same preliminary objection stated above and submitted that the petitioner's application for special leave to appeal should be dismissed *in limine*.

Since preliminary objection was raised at the stage when the application was listed for support, all parties were heard on the said preliminary objection and the order on the said preliminary objection was reserved.

The facts relevant to the preliminary objection raised by the learned Senior State Counsel and the learned President's Counsel as presented by them, *albeit brief,* are as follows:

On 03.05.2011, the petitioner's application for special leave to appeal came up for support before this Court with an undated petition and incomplete documents. This Court at that stage had directed the petitioner to file fresh documents and the matter was fixed for support for 27.05.2011. On 23.05.2011, the petitioner had issued notice on the 4th respondent through the Registry. Although the application was fixed for support on 27.05.2011, the said date was later declared as a public holiday in the Western Province and this matter was fixed for support on 07.06.2011 and later for 21.06.2011.

When it came up for support on 21.06.2011, objections were raised by the learned Senior State Counsel and the learned President's Counsel for the 4th respondent that notices were not tendered to the Registry and therefore the petitioner had not complied with the Supreme Court Rules, 1990.

Thereafter the petitioner made an application to tender notices to the 5th to 27th respondents on 21.06.2011, after having been informed by Court that notices had not been issued on the respondents in terms of Supreme Court Rules, 1990. Learned Senior State Counsel referred to the motion filed by the Instructing Attorney-at-Law for the petitioner dated 27.06.2011 that there had been failure on the part of the petitioner to tender notices in compliance with the Supreme Court Rules, 1990.