IN THE COURT OF APPEAL OF THE DEMOCRETIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0268/2019

High Court of Panadura Case No:

HC/3035/2013

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

W M Aruna Shantha Mendis

ACCUSED

AND NOW BETWEEN

W M Aruna Shantha Mendis

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: K Priyantha Fernando, J. (P./C.A.)
	: Sampath B Abayakoon, J.
Counsel	: A S M Perera, PC, with Angela Joseph for the Accused- Appellant
	: Anoopa de Silva SSC for the Respondent
Argued on	: 16-12-2021
Written Submissions	: 28-08 -2020 (By the Accused-Appellant)
	: 04-10-2021 (By the Respondent)
Decided on	: 24-01-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and sentence of him by the learned High Court judge of Panadura.

The appellant was indicted before the High Court of Panadura for committing the murder of his wife Chandi Priyanthika Peiris, on 18th May 2009, an offence punishable in terms of section 296 of the Penal Code and also attempted murder of his daughter Chathushi Mendis, by pushing her to the fire that killed his wife, an offence punishable in terms of section 300 of the Penal Code.

After trial without a jury, the appellant was found guilty as charged by the judgment dated 11-10-2019 and sentenced accordingly.

At the hearing of the appeal, the learned President's Counsel for the appellant formulated the following two grounds of appeal for the consideration of the Court.

(1) The learned High Court judge has failed to properly consider the evidence led at the trial.

(2) On the basis of the evidence placed before the Court, the learned High Court judge could not have come to a finding that the charges were proved beyond reasonable doubt.

The facts as revealed in evidence are briefly as follows.

According to the mother of the deceased (PW-06), the marriage between the appellant and her daughter was a turbulent one from the very beginning. There had been a previous divorce action between the parties, which had been subsequently settled. At the time of the incident, they were living in a rented house and still they had frequent marital problems. On the day of the incident the daughter who came to the house of PW-06 informed of her fears to her life. However, later in the day, she left with the husband and the child to the house where they live. Because of what she was told, PW-06 also followed them and had waited with the house owner, who was living adjacent to the rented house till about 9pm and left as there were no issues. Subsequently, at about 11 pm. she received the news that her daughter has received burn injuries and had been taken to the Panadura hospital.

As the injured was asked to be taken to Kalubowila hospital, the mother of the deceased accompanied by the earlier mentioned landlady of the rented house (PW-05 named in the indictment) had taken her in a three-wheeler to the hospital. While being so taken, the injured is said to have made her first dying declaration to the mother that it was the appellant who poured petrol on her and set her on fire.

During the cross examination, the mother of the deceased had admitted that there was an earlier attempt by the deceased to commit suicide due to the problems she had with the appellant. She has also failed to mention about the dying deceleration when she made her statement to the Police.

The injured had succumbed to her injuries on the 29th of May 2009. However, she has made her second dying declaration in writing, while being treated in the hospital (the document marked P-01) to the woman Police officer (PW-08)

who came to record her statement on the 21st May 2009, stating that it was her husband who caused the burn injuries to her.

The daughter of the appellant and the deceased (PW-02), who received burn injuries in the same incident was three years and eight months old at the time. When she gave evidence in Court, she had been 12 years old. In her evidence she has given a vivid description as to what happened between her father and the mother and has also explained how she received her injuries due to her being thrown into the fire.

PW-08 was the female Police officer who was instrumental in getting the deceased to make a written dying declaration as she was unable to talk at the time it was given, and has described how it was recorded. She was the Police officer who has recorded the statement of the child as well.

The above mentioned are the main witness called by the prosecution in order to prove the charges against the appellant.

The position of the appellant throughout the trial had been that it was the deceased who set fire to herself in order to commit suicide, and he was innocent of murder and the daughter received her injuries during the scuffle he had in order to defuse the fire.

In making a dock statement when he was called for his defence, it was his position that due to the constant disputes he and his wife had in their marital life, she committed suicide and it was not an act of him as alleged. Explaining the reason for having petrol in his possession, he has explained that since his motorcycles petrol meter was not working, he kept some extra petrol in the house so that he would not have any issues in the morning when leaving home for work.

Grounds of Appeal: -

As pointed out correctly by the learned President's Counsel for the appellant, this action has been determined mainly by giving consideration to three main items of evidence, namely;

(a) Dying declaration made by the deceased to her mother while being transported to the hospital.

(b) Dying declaration made in writing to the Police who came to the hospital to record the statement of the deceased.

(c) The evidence of the only eye witness, the child of the deceased and the appellant, who was three years and eight months old at the time.

It was the contention of the learned President's Counsel that the evidence of the child was not reliable as it was highly improbable for a child of that age to remember the events that unfolded on that fateful day so vividly as stated by her in giving evidence some eight years after the incident.

It was his position that the only inference that can be drawn from the way the child has given evidence describing minute details of the incident is that the child had been either coached or had stated so due to the influence of the relatives who are trying to fix the blame on the appellant. He submitted that the only way to dispel such an inference would have been to call a child psychologist to establish that the child had the capacity to remember what happened in such detail, which has not happened in this action and it was highly unsafe to rely on the child's evidence as reliable under the circumstances.

The learned Counsel also pointed out to the evidence where the child appears to have been given the opportunity of reading her statement to the Police before giving evidence and the close contacts the child had maintained with the female Police officer who recorded the statement of the child who was also instrumental in getting a written dying declaration from the deceased, to further his argument that the evidence of the child cannot be relied on as trustworthy.

He brought to the notice of the Court the failure of the prosecution to call the landlady of the house who saw the deceased on fire first, and who was also present when the deceased was alleged to have made her first dying declaration to her mother whilst being transported to the hospital, and also of several

important omissions of PW-06 in her evidence in relation to the evidence she gave before the Magistrate Court and in the Police statement.

It was the submission of the learned Senior State Counsel (SSC) for the Attorney General that there cannot be any doubt that the deceased had in fact made the dying declaration in writing while receiving treatment at the hospital. However, giving consideration to the submissions made with regard to the reliability of the evidence of PW-02, and the prosecutions failure to call the relevant material witnesses, she invited the Court to consider the appeal accordingly.

Consideration of the Grounds of Appeal: -

As there is evidence of an eye witness apart from the alleged dying declarations of the deceased, I now proceed to consider whether the evidence of PW-02 was reliable enough for the learned trial judge to accept her evidence as an accurate description of what happened between her father and the mother at the time of the incident.

Before drawing my attention to the reasons given in that regard, I find it relevant to consider the fact that the learned High Court judge has decided that it was highly dangerous to act on the evidence of the mother of the deceased namely, Swarnalatha, (PW-06) on the basis that her evidence was not trustworthy. It has been determined that the witness's failure to mention in the Police statement or at the non-summary inquiry that her daughter told her in the evening of the incident that the appellant threatened her with death and wanted her to follow them to the rented house as materially relevant. Furthermore, the failure of the witness to mention to the Police that her daughter informed her that it was her husband who set fire to her while being transported to the hospital also has been considered among other infirmities in her evidence to disregard her evidence.

The learned High Court judge in his judgment at page 21 (page 390 of the brief) has correctly concluded that the child's evidence cannot be assessed as that of an adult, and also the fact that since the child is living with her grandmother

after the incident, her mind may have been contaminated with what is often discussed about the incident to believe that she actually saw the incident in that way. He has also drawn his attention to the fact that the child was even unable to understand the questions asked in Court in some instances at page 22 of the judgment (page 391 of the brief), but has concluded that it has not caused any effect on the trustworthiness of her evidence.

It has been considered that the child was unable to describe what happened when she was examined by the doctor one year after the incident. The learned High Court judge has considered that, if she was unable to describe what happened one year after the incident, how it was possible for her to give a Police statement in the manner it has been recorded, since it was the contention of the defence that it was a concocted story recorded at the instigation of the Police and the relatives of the deceased. The fact that the female Police officer who gave evidence at the trial has had a relationship beyond her official commitments with the deceased's family and the child has also attracted the attention of the learned trial judge.

The attention has also been drawn to the observations of the learned Magistrate before whom the non-summary inquiry was conducted. When the statement made by the child to Police was read over to her, she has not been in a position to confirm the statement and the learned Magistrate has decided not to proceed with the recording of her evidence any further. It has been observed that there was no use in recording her evidence as she was confused and unable to relate the facts properly.

However, after considering all the above-mentioned negatives of the evidence of the child, the learned High Court judge has decided that it was the Magistrate who has been confused in making the observations, apparently based on the observations of the learned Magistrate before he commenced the recording of the evidence proper, that the child appears to be a competent witness because of the answers given by her to his questioning.

On the basis that the child's failure to describe what happened to her to the doctor was not a material factor since a child may show reluctance to make a statement given the environment and since the child has repeatedly stated that it was the father who set fire to her mother in her evidence to Court, the learned trial judge has decided that the child was a reliable witness.

Commenting on the child's evidence where it appears that the child has had the opportunity of reading her Police statement before giving evidence, it has been the determination of the learned High Court judge that even if it was to assume that the child had in fact read the statement, it is not possible to assume that she has the ability to read and understand the contents of the statement.

The material omissions of the child's evidence where she has failed to mention to Police that her mother while after been set on fire in the living room, pushed her under the bedroom bed and her failure to mention that the appellant poured petrol brought in a Coca Cola bottle on the body of her mother has been considered as insignificant, given the young age of the witness.

Determining that the child has given her evidence confidently with self-assurance that it was her father who pushed her into the fire and that she has rejected the allegation that she is giving evidence on the instigation of the grandmother in the similar manner, it was the finding of the learned High Court judge that the defence had failed to create a doubt as to the evidence of the PW-02, and he has no reason to disbelieve the evidence.

I find that the learned High Court judge was misdirected as to the relevant facts and the law when he decided that the evidence of PW-02 can be acted upon and the defence had failed to create any doubt as to the reliability of her evidence. I am of the view that even if one looks at the analysis of the evidence of PW-02 by the learned High Court judge in itself, it is abundantly clear that there was no basis to consider her evidence as reliable.

This becomes more so given the reasons mentioned by the learned trial judge to disbelieve the evidence of the mother of the deceased. Given the fact that the

child was living with the grandmother and the relatives from the mother's side, the learned High Court judge should have considered the evidence of the child who has given a vivid description of what happened more attentively as to whether it was the truth or a story narrated believing that it was what she saw in that fateful day.

This may be the very reason why the learned SSC invited this Court to have a second look at the evidence placed before the trial Court given the circumstances.

It is my considered view that acting on the evidence of the child as to what happened was also similarly dangerous, as viewed correctly by the learned High Court judge when it comes to the evidence of the mother of the deceased.

This leaves only the dying declaration the deceased supposed to have made in writing, to consider whether it was safe to act on that alone in a matter of this nature.

E.R.S.R.Coomaraswamy on The **Law of Evidence - Vol.01, at page 469** states about the probative value of such evidence in the following manner;

> *"The probative value of dying declarations relevant under section32(1) would depend on the facts and circumstances of each case. But there is no doubt that such evidence suffers from certain intrinsic infirmities. Two of these defects are the fact that the statement was not made under oath and the absence of cross-examination of the deponent of the statement.*
>
> *It has, therefore, been held by our courts that the jury should be told. In assessing the value of the dying declaration, they should consider these infirmities and certain other matters peculiar to this type of evidence."*

In the case of **The King Vs. Asirvadan Nadar 51NLR 322,** It was held:

> *"That it was imperative that the jury should have been adequately cautioned that, when considering the weight to be attached to the statements contained in the dying declaration, they should appreciate that the statements of the deponent had not been tested by cross-examination.*

Held further; that the attention of the jury should have been specifically drawn to the question how far the other facts and surrounding circumstances proved in evidence might be said to support the truth or otherwise of the deposition."

The case under appeal is a unique situation where the person to whom the alleged second dying declaration was made had obtained it in writing on the basis that the person who made it was unable to speak, but could write despite the burn injuries she had suffered.

The learned trial judge who had considered several infirmities of the evidence of PW-08 the woman Police officer who was instrumental in getting the written statement has decided them to be insignificant. It has been established that the victim was not in a position to open her eyes due to the burns and her hand was partially burned and could not talk. Under the circumstances, it was important for the Police officer to at least get a statement recorded from a person in authority in the hospital ward as proof that the victim was in fact was in a position to write with all her injuries, which has not happened. The PW-08 had admitted in her evidence that she failed to enter the required notes in her notebook as to the condition of the victim when she wrote the dying declaration.

Although the learned High Court judge had decided that these are matters that would not affect the case of the prosecution, I am not in a position to agree, given the considered differences in the evidence of the mother of the deceased who was supposed to have been present at the time of the declaration in this regard.

I am of the view that PW-08 was not a cogent witness to act on her evidence alone as to the dying declaration of the deceased.

It has been an admitted fact that the deceased had, on a previous occasion too, attempted to commit suicide due to the family disputes the deceased and the appellant had in their married life. Therefore, given the stand taken by the appellant that it was his wife who set fire on herself using the petrol he had in

his house for the use of his motorcycle, it was up to the prosecution to eliminate all the doubts that were in favour of the appellant.

It is true that all the suspicions can naturally direct towards the appellant in this matter, given the tormented relationship he had with his wife. However, it is settled law that suspicions do not establish guilt.

It was stated by Basnayake,C.J. in the case of **The Queen Vs. Sumanasena 66 NLR 350** that;

> *"In our opinion the learned judge's direction was wrong. Suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence. We are unable to reconcile what the learned judge said earlier in his summing-up with what he said in the passage to which exception is taken. The burden of establishing circumstances which not only establish the accused's guilt, but are also inconsistent with his innocence remains on the prosecution throughout the trial."*

In analyzing the defence evidence and the stand taken by the appellant that it was a suicide, I find that the learned High Court judge has commented that his wife's previous attempt of suicide should have been proved by the appellant by calling evidence. This was an admitted fact by the mother of the deceased when she faced the test of cross-examination, which need no further proof.

I find that the appellant has been found fault with for not calling Kanthi, the landlady of the house they lived on rent to substantiate his version of events. I observe this as a shifting the burden of proof to the appellant, which is a misdirection of law given the circumstances of this action. She has been the listed witness number 05 in the indictment. Had she been called, she would have been a key witness for the prosecution, as she was the first person who

was supposed to have reached the scene of the incident and travelled with the deceased to the hospital.

The only inference that should have been drawn by the prosecution's failure to call her as a witness was the presumption that can be drawn under the provisions of section 114(f) of the Evidence Ordinance, which should have been held in favour of the appellant and not against him.

The relevant section 114(f) reads as follows;

> **114(f) that evidence which could be and is not produced would if produced, be unfavourable to the person who withholds it.**

At this juncture, I would like to comment that it was the duty of the prosecution to assist the Court by placing before it all the relevant evidence in order to meet out justice, may it be for a victim of a crime or the accused of the crime for that matter. Had the prosecution called PW-05 Kanthi, who was the landlady of the rented house where the deceased and the appellant lived, and the one who reached the deceased first after the incident and also took her to the Kalubowila hospital in the three-wheeler with the mother of the deceased, the truth of the evidence could have been determined more accurately. I find that this failure on the part of the prosecution is a matter that has gone into the root of this action, which has escaped the attention of the learned trial judge.

It is trite law that in a criminal trial the accused has to prove nothing, and it is sufficient for him to give a reasonable explanation as to the evidence against him and or to create a reasonable doubt of the evidence. An accused person is entitled to be acquitted of the charges against him in such a situation.

It was held in the case of **Pantis Vs. The Attorney General (1998) 2 SLR 148** that;

> *"As the burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it's*

sufficient for the accused to give an explanation which satisfies the Court or at least is sufficient to create a reasonable doubt as to his guilt."

For the reasons adduced as before, I am of the view that the appellant has created a reasonable doubt as to his guilt of the charges preferred against him and it is unsafe to allow the conviction and the sentence to stand.

Therefore, allowing the appeal, I set aside the conviction and the sentence and acquit the appellant of the charges.

Appeal allowed.

Judge of the Court of Appeal

K Priyantha Fernando, J. (P./C.A.)

I agree.

President of the Court of Appeal