RANASINGHE
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJIT SILVA, J.
SISIRA DE ABREW, J.
C.A. 15/2004
H.C. AVISSAWELLA 44/2003
MARCH 28, 29, 2007

Penal Code – Section 296 – Murder – Dying declaration – inherent weakness not considered – Principles relating to dying declarations – Evidence Ordinance – Section 27 – Discovery in consequence of a section 27 Statement – Important of giving reasons?

The accused-appellant was convicted of murder of his mother-in-law and was sentenced to death.

In appeal, it was contended that the trial Judge had not considered the inherent weaknesses of a dying declaration and that there was an erroneous approach with regard to section 27 Statement of the appellant.

Held:

(i) When a dying declaration is considered as an item of evidence against an accused person in a criminal trial the trial Judge/Jury must bear in mind the following weaknesses.

  (a) The statement of the deceased person was not made under oath;

  (b) The statement of the deceased person has not been tested by cross examination,

(ii) The trial Judge/Jury must be satisfied beyond reasonable doubt on the following matters:

  (a) whether the deceased in fact made such a statement;

  (b) whether the statement made by the deceased was true and accurate;

(c) whether the statement made by the deceased could be accepted beyond reasonable doubt?

(d) whether the evidence of the witness who testifies about the dying declaration could be accepted beyond reasonable doubt?

(c) whether the witness is telling the truth;

(f) whether the deceased was able to speak at the time the alleged declaration was made;

(iii) The trial Judge had totally failed to consider the principles relating to the dying declaration and the risk of acting upon a dying declaration;

(iv) The conclusions reached by the trial Judge about the recovery of the iron club removed from a well is erroneous since discovery is consequence of a section 27 statement only leads to the conclusion that the accused had the knowledge as to the weapon being kept at the place from which it was detected;

(v) The trial Court must declare its reasons for the acceptance of the prosecution evidence and the rejection of the defence evidence.

APPEAL from the Judgment of the High Court of Avissawella.

Cases referred to:

(1) *King* v *Asirivadam Nadar* – 51 NLR 322

(2) *Justinpala* v *Queen* – 66 NLR 409

(3) *Queen* v *Anthonypillai* – 68 CLW 57

(4) *Moses* v *State* – 1993 – 3 Sri LR 401

(5) *Heen Banda* v *Queen* – 75 NLR 54

Dr. Ranjith Fernando for appellant.

Dappula de Livera, D.S.G. for the Attorney-General.

Cur.adv.vult.

May 09, 2007

SISIRA DE ABREW, J.

The appellant was convicted of the murder of his mother-in-law 01
and was sentenced to death. This appeal is against the said conviction and the sentence. The prosecution mainly relied upon the following items of evidence to prove the fact that the appellant inflicted injuries on the deceased.

(1) The utterances made by the appellant. Around 12.30 p.m. on the day of the incident the appellant addressed the witness Manel Perera, one of the daughters of the deceased in the following language. "I will kill all of you. I have written in the Police Station and come."

(2) At the time the appellant made the above utterances he was armed with an iron club which was identified by the witness at the trial.

(3) This iron club was recovered by the investigating officer from a well in consequence of a section 27 statement made by the appellant.

(4) Dying declaration made by the deceased to witness Manel Perera to the effect that the appellant attacked her with an iron club.

(5) The enmity that the appellant was having with the deceased with regard to a land dispute.

Learned Counsel for the appellant complained that the learned trial Judge had not considered the inherent weaknesses of a dying declaration before accepting the dying declaration as evidence in this case. In order to appreciate the contention of the learned Counsel it is necessary to consider dying declaration made by the deceased and the relevant answers given by the witness Manel Perera who went to see her mother on hearing that her mother had been attacked.

Witness Manel Perera saw the deceased almost crawling in her direction away from the house of the deceased when she went to the house of the mother. On being asked as to who assaulted her the deceased who was bleeding at the time first replied in the following words: "Elder son-in-law attacked me with an iron club." Learned Prosecuting State Counsel who was apparently not satisfied with this answer given by the witness Manel Perera told the witness to use the exact words used by the deceased. The answer to this question by the witness is as follows: "Mother said son-in-law attacked me." When questioned by Court she said the deceased used the following words: "Wijelal attacked me." When the witness questioned the deceased for the second time the deceased used the following words: "Elder son-in-law Wijelal attacked me." It is therefore seen that witness Manel

Perera had given four different answers with regard to the words used by the deceased. They are as follows:

(1) Elder son-in-law attacked me with an iron club.

(2) Son-in- law attacked me.

(3) Wijelal attacked me

(4) Elder son-in-law Wijelal attacked me.

Are these the words used by the deceased? Are these the words used by the witness or is this a mixture of words used by both the witness and the deceased? Learned trial Judge should have been mindful of these questions.

When a dying declaration is considered as an item of evidence against an accused person in a criminal trial the trial Judge or the jury as the case may be must bear in mind following weaknesses. (a) The statement of the deceased person was not made under oath. (b) The statement of the deceased person has not been tested by cross examination; vide *King* v *Asirivadam Nadar*[1] and *Justinpala* v *Queen*[2]. (c) That the person who made the dying declaration is not a witness at the trial.

In the case of *Queen* v *Anthonypillai*[3] H.N.G. Fernando, J., held that "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 as 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."

As there are inherent weaknesses in a dying declaration which I have stated above, the trial Judge or the jury as the case may be must be satisfied beyond reasonable doubt on the following matters. (a) Whether the deceased, in fact, made such a statement. (b) Whether the statement made by the deceased was true and accurate. (c) Whether the statement made by the deceased person could be accepted beyond reasonable doubt. (d) Whether the evidence of the witness who testifies about the dying declaration could be accepted beyond reasonable doubt. (e) Whether witness is telling the truth. (f) Whether the deceased was able to speak at the time the alleged declaration was made.

I have gone through the judgment of the learned trial Judge and I find that the learned trial Judge had failed to consider the above weaknesses of a dying declaration. Further the learned trial Judge had not directed his mind to the above matters referred to in (a) to (g) above. However there is some reference to criterion (f) above in the judgment but even here he had not been mindful that this was a matter that should be proved beyond reasonable doubt. In my view the learned trial Judge should have been mindful of the inherent weaknesses in a dying declaration before he decided to act upon the dying declaration. The learned trial Judge should also have been satisfied beyond reasonable doubt about the other matters set out in (a) to (g) above. The learned trial Judge should have been cautious and careful before he decided to accept the dying declaration especially in view of the different answers, which I have already mentioned, given by the witness Manel Perera. It is true that the trial Judge who has a trained legal mind need not state all these principles in his judgment but it must be apparent from the judgment that he had directed his mind to the principles of law governing the dying declaration. The learned trial Judge failed to give reasons for the acceptance of the dying declaration. In this regard I would like to consider a passage from the judgment of Justice Hector Yapa in the case of *Moses* v *State*(6)."Furnishing of reasons not only assist the Court of Appeal in scrutinizing the legality and the correctness of the order made by the lower Court, but also the existence of reasons will tend to support the idea of justice and would enhance the public confidence in the judicial process. Failure to give reasons may even lead to the inference that the trial Judge had no good reasons for his decision." I endorse this view and add further that in a case of murder it must be borne in mind that the Court which hears the trial is dealing with the liberty of the accused because in the event of the charge being proved the accused would be sentenced to death. Thus the trial Court must declare its reasons for the acceptance of the prosecution evidence and the rejection of the defence evidence. In the instant case 1 it is dangerous to permit the conviction to stand as the learned trial Judge had totally failed to consider the principles relating to the dying declaration which I have stated above and the risk of acting upon a dying declaration.

The next complaint made by the learned Counsel for the appellant was that the erroneous approach of the learned trial Judge with regard to section 27 (Evidence Ordinance) statement of the appellant (hereinafter referred to as section 27 statement). Learned trial Judge, referring to recovery of iron club recovered from a well, observed as follows: *"This iron club was recovered from a well in consequence of the accused's statement. This shows that the accused tried to hide the weapon which was used to commit the crime."* In my view the above conclusion of the learned trial Judge is erroneous since discovery in consequence of a section 27 statement only leads to the conclusion that the accused had the knowledge as to the weapon being kept at the place from which it was detected. This view is supported by the judgment of His Lordship Justice Sirimane (with whom Samarawickrama, J. and Weeramantry, J. agreed) in the case of *Heenbanda* v *Queen*[7] which states as follows: "Where part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance, it is the duty of the trial Judge to explain to the Jury that such a statement is only evidence of the fact that the accused knew where the article discovered could be found, and nothing more."

Learned Counsel for the appellant also complained about the basis of the rejection of the dock statement by the learned trial Judge. He submitted that the learned trial Judge had rejected the dock statement on the basis that it had not been corroborated. But I am unable to agree with this submission. Learned trial Judge observed that the dock statement was an uncorroborated one. Although there is no requirement in law that a dock statement should be corroborated in order to accept it, the observation made by the learned trial Judge revealed the factual position. The learned trial Judge came to the conclusion that the dock statement was not capable of creating a reasonable doubt in the prosecution case. It is not necessary for me to comment on the findings of the learned High Court Judge with regard to the rejection of the dock statement in view of the conclusion reached earlier by me with regard to conviction of the appellant.

If the evidence of witness Manel Perera is properly considered having due regard to the law relating to dying declarations and keeping in mind the demeanor and

deportment of the witness, trial might even end up in a conviction.

For the reasons set out in my judgment I set aside the conviction of the appellant and the death sentence imposed on him and order a retrial.

SILVA, J. – I agree.

Appeal allowed.

Retrial ordered.