THE

Sri Lanka Law Reports

**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**

**PAGES 197 - 224**

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**PUBLISHED BY THE MINISTRY OF JUSTICE**

**Printed at M. D. Gunasena & Co. Printers (Private) Ltd.**

**Price: Rs. 25.00**

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*Section 35 of the Excise Ordinance provides that “Any*

*offcer of the Excise, Police, Customs or Revenue Depart-*

*ments, not below such rank and subject to such restrictions*

*as the Minister may prescribe, and any other person duly*

*empowered, may arrest without warrant any person found*

*committing in any place other than a dwelling house, an*

*offence punishable under section 46 or 47; and may seize*

*and detain any excisable or other article which he has*

*reason to believe to be liable to confscation 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 confscation

under the Excise Ordinance or other law in force relating to

excise revenue. While the frst 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 Notifcation No. 509, the

Minister has appointed all offcers 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 fled for the petitioners, the learned counsel

quoting the words of section 35 that “Any offcer 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 specifed the rank of the police offcers

who could perform the acts and duties mentioned in sec-

tion 35, the police offcers cannot act under section 35 of the

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Excise Ordinance. This submission does not appeal to me at

all. When the Minister by the said clause 1(ii) of the Excise

Notifcation has appointed all offcers of the Police Force to

perform the acts and the duties mentioned in section 35 of

the Excise Ordinance, that is an appointment of offcers 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 offcers of all ranks of the Police Force have

powers to perform the acts and duties mentioned in section

35. As such all police offcers 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 contraven-

tion 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, em-

powered by Excise Notifcation 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 sell-

ing 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

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any condition of the licence can be dealt with only under

section 48(c) of the Excise Ordinance and as the Excise

Notifcation No. 509 does not empower a police offcer to act

in terms of section 48 (C) the police offcers 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)

specifcally 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 off-

cers 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

Notifcation 509 read with sections 35 and 46(g) of the Excise

Ordinance, police offcers 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 offcer. 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),

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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

offcer 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 offcers 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 Notifcation No. 509 read with

section 35 and 46(g) of the Excise Ordinance police offcers

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 fnding 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*

CA 201

**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?- Identifcation 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 identifcation 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 fndings 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 deport-

ment of the witnesses as and when they gave evidence in Court.

(2) The identifcation was not in a diffcult circumstance or in a

multitude of persons in a crowd or in a feeting moment. To

apply the Turnbul principles the identifcation 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

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multitude of persons in a crowd but only the accused-appellant

and the deceased. In order to infict 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 corroborat-

ing 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 circumstan-

tial 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 circum-

stantial 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

*Sigera Vs. Attorney General*

CA *(Ranjith Silva, J.)* 203

*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

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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 pros-

ecution 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

diffculty told Priyanka that I quote, “Athula Sigera shot me”.

It appears that the deceased had mentioned the name of the

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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 po-

lice offcer 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 fred 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

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diseased one from front of chest moving downwards, one

from behind near the hip, one from front moving down-

wards, on the abdomen and another injury on the arm. The

conclusions drawn by the Medical offcer were that the

deceased had died due to gunshot injuries sustained by him,

fred 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 un-

proven 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 miscar-

riage of justice.

(4) The learned High Court judge has not given due consid-

eration to the contradictory narrative of circumstances

surrounding the alleged Section 32 statement.

(5) The learned High Court judge has drawn an unwarrant-

ed inference regarding the circumstances surrounding

the alleged identifcation of the assailant by the deceased.

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(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

identifcation 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 fndings 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 fndings 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 fndings of facts of a judge of a court

of frst instance based upon oral testimony given before that

judge, it is not absolved by the existence of these fndings

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

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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 fndings

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 fndings of primary facts

by a trial judge who hears and sees witnesses are not to

be lightly disturbed on appeal. The fndings 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 fndings of the trial

judge.” (vide. *Wickramasooriya Vs Dedoleena*(5).)

**For convenience I shall frst 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 identifcation of**

**the assailant by the deceased.**

**Whether the Appellant was suffciently identifed 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 suffcient to identify the Appellant beyond

reasonable doubt as the entire transaction took place during

the night.

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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 consid-

erable lengh of time and that the distance between the resi-

dence of the deceased and the accused has been described as

‘walking distance’. This witness has also stated in evidence

that when he frst 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 signif-

icant 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, infer-

entially 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

Offcer 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 signifcance 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

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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 Identifcation was not in diffcult circumstances or

in a multitude of persons in a crowd or in a feeting 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 identifed

the accused at the trial, manifest that at the point of identi-

fcation 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 identifcation had to be

made under diffcult 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

infict 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-

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bourhood, in the same vicinity for a long time. These uncon-

toverted 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

suffcient 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 fol-

low 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**

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**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 state-

ments are relevant whether the person who made them was

or was not at the time when they were made, under expecta-

tion 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.

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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 occur-

rence 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

identifed 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

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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 justifed 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 frst 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 mind-

ful 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 declara-

tion, enumerated above, the trial judge or the jury as the case

may be must be satisfed 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

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able to identify the assailant, whether the statement made

by the deceased was true and accurate, whether the state-

ment made by the deceased person could be accepted beyond

reasonable doubt, whether the evidence of the witness who

testifes about the dying declaration can be accepted as

credible.

The frst 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 prosecu-

tion 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 corrobora-

tion 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 corrobo-

ration 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.

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In the appeal it was argued that the dying deposition of

Herathamy could not be used by the prosecution to support

the frst charge that is, the murder of Punchi Nilame. Follow-

ing 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 corrobo-

rated. 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 prosecu-

tion witness number 1 wherein he had stated that he had

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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 offcers 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 frearm

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

offcers 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 frearm recovered conse-

quent 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

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all ammunition found at the scene had been fred from one

weapon. On a scientifc analysis (ballistics) the Government

Analysts has also concluded that these Bullets had been

fred from the frearm 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 hypoth-

eses 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 circumstan-

tial 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 con-

sistent with the innocence of the accused the accused cannot

be convicted.

In the instant case taken cumulatively the proved circum-

stantial evidence irresistibly point towards the only inference

that the accused committed the offence, and is not capable of

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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 justifable

reason for me to interfere with the judgment of the learned

Trial judge. Accordingly I affrm the conviction and the

sentence and dismiss this appeal.

Appeal dismissed

**leCaMwasaM, J. -** I agree

*Appeal dismissed*

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**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 fling 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 notifed. 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

notifed. It is in order to follow the said procedure that it is impera-

tive for a Petitioner to comply with Rule 8 of the Supreme Court

Rules.

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(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

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*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.

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*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 K*ushan 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

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that judgment, the Court of Appeal had refused to issue

notice and interim relief, on the application fled 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 con-

tained 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*.

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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 fle fresh docu-

ments and the matter was fxed for support for 27.05.2011.

On 23.05.2011, the petitioner had issued notice on the 4th

respondent through the Registry. Although the applica-

tion was fxed for support on 27.05.2011, the said date was

later declared as a public holiday in the Western Province and

this matter was fxed 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

fled 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.