DHARMAWANSA SILVA AND ANOTHER

v.

THE REPUBLIC OF SRI LANKA

COURT OF APPEAL
RANASINGHE, J. RODRIGO, J AND TAMBIAH, J.
C. A.10 11/80
H. C. COLOMBO 325/76.
OCTOBER 19, 20, 21, 27, 28 & 29, 1981

Criminal law – indictment for murder – dying deposition – admission of evidence of motive in dying deposition – s.32(1) of the Evidence Ordinance.

The two accused appellants were indicted along with thirteen others for murder on the basis of membership of an unlawful assembly and of having acted on the basis of a common intention. The indictment against the 4th to the 13th accused was withdrawn and the 3rd accused was acquitted. The appellants were convicted of murder and sentenced to death.

The evidence of the only two alleged eye witnesses being contradictory and unreliable, the prosecution case really rested on a dying declaration of the deceased recorded by a Police Sergeant in which the two appellants were named as the assailants and as motive was mentioned a previous clash at the temple.

Held

When a dying statement is produced, three questions arise for the Court. Firstly, whether it is authentic. Secondly if it is authentic whether it is admissible in whole or in part. Thirdly the value of the whole or part that is admitted.

In regard to authenticity the Sergeant's record was not fully borne out by the two eye witnesses. Further the statement was made in Sinhala and recorded in English by the Sergeant who was a Muslim. The burden was on the prosecution to establish the competency of the Sergeant in Sinhalese. The Sinhala translation of the statement recorded by the Sergeant which went before the jury had certain deficiencies.

A dying deposition is not inferior evidence but it is wrong to give it added sanctity.

Evidence of motive found in a dying declaration is not admissible under s. 32(1) of the Evidence Ordinance. To be admissible the evidence must be directly related to the attack and in addition proximate, that is, closely causally related.

Independent corroboration is not essential but cases may arise when the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be safe to sustain a conviction. In such an event the Judge may call in aid the deposition and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the deposition he would not be prepared to accept.

The first thing is to marshal the oral evidence and see how it stands but here the oral evidence and the dying statement itself were suspect. The genuineness of the dying statement was open to grave doubt. Assuming it is genuine, the limited opportunity for identification, the possibility of the deceased acting on suggestion, and the possibility also of malicious implication by the deceased militate against acceptance of it as the truth.

Quaere: Is it necessary to caution the jury that a dying declaration is evidence untested by cross-examination?

Cases referred to

(1) *Perera v The Queen (1970) 76 N.L.R. 217, 219*
(2) *The Queen v. Stanley Dias S. C. (C.C.A. Minutes of 24.11.70)*
(3) *The Queen v. Sathasivam (1953) 55 N.L.R. 255, 256.*
(4) *Narayana Swamy v. Emperor A.I.R. 193 P.C.47, 50.*
(5) *Rex v Woodcock (1789) 1 Leach 500.*
(6) *Wright v. Littler (1761) 3 Burr 1244.*
(7) *Alisandri v. The King (1937) A.C.220.*
(8) *R v. Vincent Perera (1963) 65 N.L.R. 265.*
(9) *R v. Asirwadan Nadar (1950) 51 N.L.R.322.*
(10) *R v. Justinapala (1964) 66 N.L.R. 409.*
(11) *Weerappan v. The State (1971) 76 N.L.R.109*
(12) *Somasunderam v. Queen (1971) 76 N.L.R. 10*
(13) *Palaniandy v. The State (1972) 76 N.L.R. 145*
(14) *Tapinder Singh v State of Punjab A.I.R.1970 S.C.1566.*
(15) *Bakshish Singh v. State of Punjab A.I.R. 1957 S.C.901*
(16) *Pompiah v. State of Mysore A.I.R. 1965 S.C. 939*
(17) *Kashmeri Singh v. State of Madiya Pradesh A.I R. 1952 S.C.59.*

Appeal from conviction by Jury in the High Court of Colombo

Dr. Colvin R. de Silva with N. V. de Silva and Ranjan Mendis for accused-appellants

Asoka de Z. Gunawardene, Senior State Cousel for the State.

Cur. adv vult

November 18, 1981
RODRIGO, J.

The two appellants are the 1st and the 2nd accused who were indicted together with thirteen others in the High Court of Colombo with (a) being, with others unknown, on 1st October 1972 members of an unlawful assembly having the common object of committing the murder of Sunil Perera and, (b) being, with others unknown, members of the same assembly while one or more members of that assembly committed the murder in prosecution of the aforesaid common object or such as members of the same assembly knew to be likely to be committed in prosecution of that object and, (c) having committed the murder of the said Sunil Perera in furtherance of their common intention to murder the said Sunil Perera.

After trial the Jury returned a unanimous verdict of guilty on all counts against the two appellants and a unanimous verdict of not guilty in respect of the 3rd accused also on all counts. The other twelve accused, the indictments against whom were

withdrawn by the prosecution at an early stage of the case, had been discharged at that stage. Following upon the verdict the appellants were convicted on all counts and each sentenced to death on the second and the third counts and to six (6) months rigorous imprisonment on the first count. They have appealed from their convictions and sentences.

The prosecution case principally unfolded through two witnesses who alleged themselves to be eye witnesses. They were Pawarapala and Tudor, Pawarapala says that on the evening of October 1st, 1972 he went with the deceased (Sunil) and Tudor and two others to the "Impala" Cinema at Welikada intending to see the evening show therein. They were not lucky enough to purchase tickets for the show. So, they took the bus back to Battaramulla. From there they intended walking the rest of the way to Pelawatta which was their ultimate destination. They walked about half a mile. It was a motorable road. They then reached the junction with Dharmodaya Mawatha. At this point, a van just passed them. It slowed down as it passed them but continued. From immediately behind the van, however, "the 1st accused and other accused" emerged shouting "Where is Sunil ?" Thereafter Sunil took to his heels. He ran in the direction of Pelawatta along the motorable road. All the accused gave chase. Pawarapala and Tudor also ran but behind the accused. At a point about 60 yards away from where they took off Sunil fell in the middle of the road. It was close to a culvert. The accused were armed. The first accused carried a sword. It was 3 feet long. So did the third. The sword he carried was equally long. The second accused carried a local battle axe called "keteriya" – a small axe with a short handle. The rest carried clubs. The accused set to work on the fallen Sunil. Sunil shouted "Please do not cut me." Then Pawarapala and Tudor stopped in their tracks. They saw the accused (all the accused) cutting Sunil. Shortly thereafter five of the accused turned their attention to Pawarapala and Tudor. Then it was their turn to take to their heels. So they ran along a narrow branch road. Having run some distance they halted to look back. The accused were not to be seen. So they came back to where Sunil first fell in the middle of the road. They then heard Sunil groaning about 15 – 20 yards away in the paddy field situated alongside the road. They also heard sounds of swords striking water. At this stage they decided that they should inform the Police. They walked to Pelawatta to make a telephone call. Not being successful, they took a bus to come to Battaramulla. They had to come back the way they went to reach Battaramulla. On their way back they noticed a Police jeep halted by the culvert near which Sunil fell down and was attacked by the accused earlier. They got out of the bus and went to the Police jeep.

Sgt. Saleem was standing by the jeep. Pawarapala told the sergeant that "Sunil had been cut and injured and lying fallen in the paddy field." He did not tell him (sergeant) who cut Sunil. Then the three of them went to the paddy field and lifted Sunil and carried him into the jeep.

The sergeant gave Sunil first aid. Sunil was conscious and was able to speak. The sergeant asked him (Sunil) what happened. Sunil said "Dharmawansa alias Suda and his brothers and others cut me." Sergeant asked him why they did it. Sunil said "On account of a row at Mayurapala Pirivena". This is all that Sunil said.

The deceased was then taken in the jeep to hospital where he died about 8.30 in the same evening.

Statements were received from Pawarapala and Tudor at the Police Station– Pawarapala's at 2.30 a.m. and Tudor's at 1.05 a.m. that same night.

This substantially is the narrative of events given by Pawarapala. The prosecution then discovered after Pawarapala concluded his evidence or rather re-discovered that Pawarapala had not in his statement to the Police mentioned the names of any one of the accused from the 4th to the 15th (both inclusive) though he knew the name of the 7th accused among them. He had not given a description of any one of them either, though, at the trial he was positive that it was the fifteen accused in the dock who composed the group that attacked and killed Sunil and there was nobody else. He did not mention to the Sergeant when he met him by the jeep who attacked Sunil though he pointed out where Sunil lay fallen at the time. There were persistent suggestions from the defence to Pawarapala that he had not seen a thing and that his whole story was a tutored one, it having been fabricated at the Police Station. It was also suggested that they were attacked by an unknown crowd whom they had antagonised at the Impala Theatre and who had followed them by the van that slowed down at Battaramulla and finally that he implicated the first accused on account of enmity against him arising from an incident at Mayurapala Pirivena some two weeks earlier. The second and the third accused, it was suggested, were implicated as being brothers of the first accused.

In this state of the evidence and suggestions at the conclusion of Pawarapala's evidence, the prosecution led the formal evidence of the medical officer in regard to the injuries sustained by the deceased and moved for permission to withdraw the indictment

against the 4 – 15th accused. The Judge and Jury were apprised that the other alleged eye witness Tudor cannot take the prosecution case any further than this witness had taken it. On the specific ground that this witness and the other witnesses had not mentioned the names or given a description of any of the accused from the 4th to the 15th accused in their statements, and, that their identification for the first time by these two witnesses was some four months later from the dock at the Magisterial inquiry, the prosecution moved to withdraw the indictment against the 4th to the 15th accused. The motion was allowed. These accused were then discharged at this early stage. The prosecution was at pains, however, to assure the Jury that the two witnesses were regarded by the prosecution as truthful witnesses and that the withdrawal of the indictment was really on a technical ground.

The other eye witness Tudor then gave evidence. In purporting to support Pawarapala he actually weakened the case presented through Pawarapala. He did not say what the first accused did after the fifteen accused gave chase to Sunil and Sunil fell. After he emerged with Pawarapala from hiding and came to where Sunil first lay fallen, he noticed a car with lights on pulling up just beyond the culvert. The fifteen accused then came up to the car from the paddy field where the witness had noticed them a while earlier. He did not wait to see what was happening or happened. He hurried away from the place with Pawarapala. Now, this car episode Pawarapala had not spoken to at any time. Thereafter, as Pawarapala testified, both of them returned by bus to the scene of the attack.

There was still the evidence of Siripala. To his evidence I shall turn in its proper setting as he was not an eye witness. The evidence of the two witnesses mentioned, if not wholly incredible is totally inadequate for a reasonable Jury to find any accused guilty of such a serious charge as that with which they have been indicted. Besides, the withdrawal of the indictment I have already mentioned was not without its ripples. It was bound to affect the evidence of the two witnesses as regards the remaining accused. They had not mentioned who the attackers were to Sgt. Saleem at the first opportunity they got when they knew the names of at least the first three accused and the 7th accused. Their conduct after witnessing the attack on Sunil was queer and strange. Still more strange, if not incredible, was the act of their running behind the pursuers risking an attack on themselves as well. There is no explanation as to why Pawarapala did not mention the arrival of a car and its halting by the culvert. In his evidence Sgt. Saleem has testified to the windscreen of the car being damaged when he came there shortly after the incident. Sgt. Saleem or Inspector

Terrence Perera did not find any traces of blood or signs of any struggle on the spot where the alleged eye witnesses said the assault took place. All the evidence pointed to the assault having taken place in the paddy field. The deceased's clothes had been removed from the paddy field. Besides, the medical evidence did not establish any injury that could have been caused by a violent attack by clubs though there were three minor abrasions on the body of the deceased. No convincing motive has been established through these two witnesses against any of the accused. It was therefore not surprising that the Jury unanimously returned a verdict of not guilty in respect of the 3rd accused. What then turned the scale against the first two accused, the appellants ?

The answer to the last question posed lies in the alleged dying statement of the deceased. A battle royal raged in the argument before us for its admissibility, truthfulness and relevance by the prosecution on the one side and to the contrary by the defence on the other side. I shall put down its contents as testified to by Sgt. Saleem.

> "This evening at about 7.30 Dharmawansa alias Suda and his elder brother Premawansa with some others jumped towards me. Suda and his brother Premawansa cut me with swords. Suda and others are angry with me. They got angry with me because of a clash at the temple. That took place about two weeks prior to this incident. Read over and explained. He is unable to sign.
>
> Admitted as correct."

Sgt. Saleem said that the deceased made his statement in answer to a question by him as to what happened. He replied in Sinhalese. Presumably, the question was also in Sinhalese. He wrote it down in English. What went before the Jury is the Sinhala translation of this. We were shown the certified copy of the English record by Sgt. Saleem of the statement. In that record the word "Pelawatta" appears before the word "temple" (not Dharmodaya Pirivena). It is lacking in the Sinhala version. Again after the work "swords" is the statement "That is all." This too is not in the version that went before the Jury.

When an alleged dying statement is produced, three questions arise for the Court. Firstly, whether it is authentic. Secondly, if it is authentic whether it is admissible in whole or in part. Thirdly, the value of the whole or part that is admitted.

I shall firstly address myself to the first. The statement was challenged. It was suggested that this was fabricated by Sgt.

Saleem together with witness Tudor at the Police Station. The deceased was bleeding profusely when he was brought to the jeep. He was alleged to have made the statement in the jeep. He had been put down on the floor of the jeep with face downwards. He has been given first-aid by the Sergeant when brought to the jeep. He was naked when brought to the jeep. Some clothes had been borrowed and wrapped round him to mitigate the bleeding. He was in very poor physical condition. He was conscious and able to speak. The Sergeant would have the Jury believe that the deceased could remember what happened well and clearly, that he could remember the names of his assailants, their relationship to each other and that he could speak intelligibly and convey his thoughts intelligently. The Jury had only the Sergeant's word for it and the evidence of Pawarapala and Tudor. The medical evidence gave some tenuous support. The two witnesses, however, and the Sergeant differ with regard to what the deceased is alleged to have said. According to Pawarapala, the deceased said "Dharmawansa alias Suda and his brothers cut me." Tudor has said that the deceased said "Dharmawansa, Premawansa and their crowd cut me".

It has been urged before the Jury in his address by the prosecuting Counsel that the witnesses had testified after five years and they should disregard discrepancies as there was broad agreement between them as to the contents of the dying statement. The Sergeant's record is reliable to ascertain what exactly the deceased said. So it was submitted. The Sergeant evidently could not write Sinhalese. His competence to understand and interpret the statement made in Sinhalese was not established. It was submitted that the burden was on the prosecution to establish this. Not a single question had been put to Sergeant Saleem towards satisfying the Jury that the Sergeant was equal to the task. There is no presumption in favour of the prosecution on this point. There is no presumption that the Police Officer understands the language of the person whose statement is recorded. It is the medical evidence that the skull of the deceased had a 6" long injury which had extended downwards cutting the brain tissue. It had not damaged the brain matter though. The medical witness also says that the deceased could have been unconscious *(sic)* at least for an hour. He had died within an hour of the incident. The Jury then must have had considerable disquiet and misgiving as to the authenticity of this dying statement and must have eagerly awaited some circumstance to dispel this disquiet and misgiving or to confirm it. Since the Jury had brought in a verdict of guilty against the accused-appellants we must assume that this circumstance was forthcoming and was established. The question is what was it ? I shall return to this matter later.

On the assumption that it was authentic the next consideration is one of its admissibility. The dying statement, it must be remembered, refers to the physical or external cause of death and to the motive for the assault. The part dealing with the actual attack and the identification of the assailants is undoubtedly admissible. There was no dispute on that. But it is argued that the part that mentions the motive is not. Counsel for the prosecution argued for its admissibility submitting that what is stated in that part by the deceased is a circumstance meaning an incident in the transaction directly related to the occasion of death.

On this point, our attention was drawn to *Perera v. Queen*.[1] The learned Chief Justice has said,

> "Learned Senior Crown Counsel who appeared for the Crown in appeal conceded that the statement of the deceased men concerning this previous incident had been wrongly admitted in evidence at the trial. We had occasion recently in *The Queen v. Stanley Dias*[2] to refer to a similar improper admission of a deceased's statement, not permitted by s.32 of the Evidence Ordinance because it was not a statement as to the circumstances of the transaction which led to the death of the deceased."

It must be mentioned that the statement concerning the previous incident has been excluded because in that case it was not a statement as to the circumstances of the transaction which led to the death of the deceased. See the last sentence of that paragraph.

A more helpful case on the point is *The Queen v. Sathasivam.*[3] In that case a letter written by the deceased three weeks before her death addressed to the Supdt. of Police was sought to be produced in evidence before the Jury as being relevant. It is mentioned "The learned Solicitor-General had first claimed that these statements are relevant and admissible under s. 32(1) of the Evidence Ordinance. In addition he argued that they were relevant to establish a suggested motive for the crime under s. 8(1) and/or (2) to prove conduct on the part of the deceased lady under s.8(2) read with s.11."

The letter is in these terms:–

"Jayamangalam"
7, St. Alban's Place,
Bambalapitiya,
17th September, 1951.

C. C. Dissanayake, Esqr.
Supdt. of Police, Colombo.

Dear Sir,

I am writing to you, as requested over the telephone to inform you that I have filed an action in the Colombo District Court asking for a divorce from my husband Mr. M. Sathasivam on the ground of desertion. He has been away in England and the summons though issued has not yet been served. He will be arriving in Colombo per s.s. Himalaya on the 21st instant, and I understand from his attorney that he intends to come to this house (which is mine) with his mother and reside here. In view of the pending divorce action this cannot be allowed, and I have been advised to refuse him admittance.

But, from my knowledge and experience of my husband, I have reason to fear that he may attempt to force his way into the house and use violence and cause a breach of the peace.

In this situation I need protection and I therefore request that you will instruct the Bambalapitiya Police to afford me the same if I telephone to them. I have a telephone in the house and the Police Station is close by.

I may mention that I have my four young children in the house with me and I am also apprehensive on their account.

Yours faithfully,
Ananda Sathasivam.

Justice Gratiaen dealing with the claim of the Solicitor-General said this:—

> "Can it be said that, in the facts of this particular case, P24 contains any statements 'as to the circumstances of the transaction which resulted in' the deceased's death on 9th October, 1951 ? Even if one gives those statements a meaning which is most favourable to the Crown, they amount at best to mere 'general expressions indicating fear or suspicion of (the prisoner) and not directly related to the occasion of (her) death'. Evidence of that kind has expressly been ruled to be inadmissible by Lord Atkin in the course of his judgment in *Narayana Swamy v. Emperor*[4] where the Judicial Committee of the Privy Council had occasion to make an authoritative pronouncement as to the limits within which the application of s. 32(1) of the Evidence Ordinance must be confined. The circumstances to which the deceased's statements relate must,

said Lord Atkin, 'have some proximate relation to the actual occurrence.' Following this principle, I am satisfied that the reception of the proposal evidence under s.32(1) would not be justified."

Judged by this criteria laid down in the preceding passage, is the statement in question in this case admissible under s.32(1)? The incident had happened two weeks earlier. The deceased does not say that he was assaulted because of this incident. All that he says is that they (the persons mentioned) are angry over the incident. A man that assaults may be angry with the victim, but it is not every man angry with a person that assaults him. It has been said by Lord Atkin that "the circumstances of the transaction" is less wide than any "circumstantial evidence" and more narrow than res gestae. Res gestae is defined in s. 6 of our Evidence Ordinance. –see the Commentary on Evidence Ordinance by Ratnalal & Takore. In this Section the illustration (a) does not take in anything uttered by the victim or the assailant except in the immediate context of the beating and murder. Assuming the incident to be a circumstance having some bearing on the attack, it must be directly related to the attack and in addition proximate. Proximate means closely causally related - See Black's Law Dictionary. Counsel for the defence however did not press his objections to the admissibility of this part of the dying statement since as he submitted he could make use of it to his advantage. He argued that this disclosed enmity on the part of the deceased towards the first accused in particular and the second accused as well. Such enmity would therefore provide a malicious motive to implicate the first and second accused. A reasonable Jury would therefore not accept its truthfulness even though independent corroboration is not a requirement for its acceptance. We cannot find fault with this submission and in the circumstances it is not necessary for us to express a view as to whether this part of the dying statement should have been excluded. Viewed thus there remains for consideration then the value of the dying statement.

"The tongues of dying men enforce attention like deep harmony; where words are scarce, they are seldom spent in vain; for they breathe the truth that breathe their words in pain."

The earlier theory of the common law has been stated by Eyre C. B. –*Rex v. Woodcock*[5] to be that,

"The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced and

the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

The origin of the rule, which forms an exception to the rule against heresay evidence is traceable to the judgment of Lord Mansfield in *Wright v. Littler.*[6]

This principle had been applied in *Alisandri v. King*[7] where the dying statement consisted of a nod of assent interpreted to mean an answer in the affirmative to a question whether the suspect was the murderer. A verdict of guilty was returned based on the nod and without corroboration.

In *R. v. Vincent Perera*[8] dying declarations were held not to be inferior evidence. The view was taken, however, that it was equally wrong to give it an added sanctity.

In the meantime in *R. v. Asirwadan Nadar*[9] failure of the trial Judge to caution the Jury that dying depositions are not tested by cross-examination and that therefore it is a minimising factor was held to vitiate the verdict and a re-trial was ordered. This was by Gratiaen, J.

In *R. v. Justinapala*[10] T. S. Fernando, J. agreed with the view taken by Gratiaen, J in *R. v. Asirwadan Nadar* (supra).

This trend continued through *Weerappan v. The State*[11] (H. N. G. Fernando, C. J.); *Somasunderam v. Queen*[12] (Samarawickrema, J).

But there was a shift of emphasis in *Palaniandy v. The State*[13] where Alles, J distinguished the line of cases which require the Jury being cautioned on the ground that in those cases the dying depositions contained lengthy statements. In the case before him the statement of the dying boy consisted of a simple answer to a simple question immediately after the injury. Even so, he did not rule out the need for corroboration.

Alles, J's flexible attitude finds support in a judgment in the Indian Supreme Court in *Tapinder Singh v. State of Punjab*[14] which observed that inasmuch as a dying declaration is admitted on the principle of necessity an obligation lay on the Court to be on its guard to scrutinize all the relevant surrounding circumstances. Dua, J said that :–

"If the declaration is acceptable as truthful then even in the absence of other corroborative evidence it would be open to the court to act upon the dying declaration and convict the appellant stated therein to be the offender. An accusation of a dying declaration comes from the victim himself and if it is worthy of acceptance then in view of its source the court can safely act upon it."

For similar views see *Bakshish Singh v. State of Punjab* (15) and *Pompiah v. State of Mysore*. (16)

Inclined as we are to prefer the flexible attitude to dying declarations, on obligation is cast on the Court to scrutinise all the relevant circumstances – "First, to marshall the evidence against the accused excluding the dying deposition altogether and to see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the deposition, then of course, it is not necessary to call the deposition in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be safe to sustain a conviction. In such an event the Judge may call in aid the deposition and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the deposition, he would not be prepared to accept." See *Kashmeri Singh v. State of Madiya Pradesh* (17) (I have substituted 'deposition' for 'confession' in this passage).

So the first thing, is to marshall the oral evidence and see how it stands but in the circumstances of this case, as I have described earlier, an examination of the oral evidence makes such evidence and the dying statement itself suspect. Its genuineness is open to grave doubt. Assuming it to be genuine, when regard is had to the time of the evening when the attack took place, the fact that the deceased started running away the moment he heard his name being shouted, to the surprise of the attack and the number of the assailants involved and to the possibility of the names being mentioned by the deceased not on his own initiative but on being suggested by Tudor and Pawarapala and also to the possibility of malicious implication by the deceased, its truthfulness is not worthy of ready acceptance. Even to assume the genuineness, one is constrained to accept as true the narrative given by Tudor and Pawarapala. But the account of the events given by these two witnesses leave many pertinent questions unanswered. So that in the net result we find the oral evidence and the dying deposition very unsafe to base a conviction on.

I remarked that there must have been some circumstance

which made the Jury turn the scale against the accused in view of the grave doubts in which the deposition and the oral evidence are shrouded. I must now turn to it. Now, the evidence was led of witness Siripala who spoke of a row at Mayurapada temple between himself and the 1st accused. The deceased on that occasion had noticed the row while he was elsewhere and had come to the scene and separated the two. Thereafter the deceased had taken Siripala away but the 1st accused had not forgiven Siripala and had followed the deceased and Siripala and had addressed a threat to the two of them. It was reasonable to infer that the threat was directed only to Siripala but the State Counsel argues that it was directed to both and submits that is how the Jury must have understood it. This was two weeks earlier. On the evening of the day in question there had been a violent clash between Siripala and the 1st accused in the company of unidentified friends of the 1st accused. This had been a short time before the attack on the deceased. The 1st accused in his dock statement admitted that there was an incident at the temple premises on the occasion of a festival in that place. He said on this day the deceased was also involved in this incident but merely as a peacemaker and according to the dock statement the affair was settled.

The Jury undoubtedly must have been greatly influenced by this piece of evidence and must have thought that this afforded the corroboration for the allegation of enmity in the dying statement and of the names of the assailants mentioned therein.

The reception of this piece of evidence before the Jury can thus be seen to have made the difference between an acquittal and a conviction. The incident itself belies the allegation of the first accused being angry with the deceased, notwithstanding the State Counsel's statement to the contrary. In any event, the incident is of a dubious nature in regard to it having provided a motive to the first accused to have committed this offence. But the Jury would not have weighed this piece of evidence nicely enough to have been able to appreciate its very tenuous relevance, if any. Instead, they had evidently seized on it to convict the appellants.

We are, therefore, of the view that a reasonable Jury should have brought in a verdict of acquittal in all the circumstances of this case. We, accordingly set aside the verdicts, convictions and the sentences and substitute therefore a verdict of acquittal of both accused appellants.

The appeal is accordingly allowed and the appellants are acquitted.

RANASINGHE, J.

I agree.

TAMBIAH, J.

I agree.

Convictions set aside and accused acquitted.