GANGANANDA
v.
THE STATE

COURT OF APPEAL.
DR. A. DE Z. GUNAWARDANA, J.
L. H. G. WEERASEKERA, J.
C.A. 60/92
HIGH COURT BADULLA 22/91
JULY 21, 1993

Dock Statement – Accused indicted for Murder – Accused did not give Evidence or call any witnesses on his behalf – Right to make a unsworn statement from the Dock.

The Accused was indicted with having committed Murder. After trial, without a jury he was convicted of the charge. He did not give evidence or call any witness on his behalf. The learned Trial Judge did not inform the accused that he can make a statement from the Dock.

It was contended that the learned Trial Judge had erred in law in depriving the accused of his Right to make an unsworn statement from the Dock.

Held:

(1) The right of an accused to make an unsworn statement from the Dock as was recognised under the English Law, had been consistently followed by our Courts for a long time and it is in conformity with the legal provisions found in our law even at present.

(2) The Right of an accused to make a 'Dock Statement' does not vary in content or quality whether it is a trial before jury or not.

(3) The 'Dock Statement' should be treated as evidence subject to two infirmities that it had not been made under oath and has not been subject to cross examination.

(4) The admission of 'Dock Statements' as evidence will not offend the provisions of that section because it does not exclude the defence from adducing, evidence, other than on 'oath or affirmation'.

(5) S 201(2) of the Criminal Procedure Code is not applicable as the right to cross examination under that provision is given only in respect of witnesses who have given evidence on oath or affirmation, that provision will have no application to Statements from the Dock which are always made not on oath or affirmation.

APPEAL from the order of the High Court of Badulla.

Cases referred to:

1. *King v Vallayan Sittambaram* – 20 NLR 257.
2. *Queen v Buddharakkita Thero* – 63 NLR 442.

Dr. *Ranjith Fernando* for accused-Appellant
Palitha Fernando SC for *AG*

Cur. adv. vult.

July 21, 1993.
DR. A. DE Z. GUNAWARDANA, J.

The accused in this case was indicted in the High Court of Badulla with having committed the murder of one R. M. Gunapala on 6.1.1985, an offence punishable under Section 296 of the Penal Code. After trial, before the learned High Court Judge of Badulla, without a jury, the accused was convicted of the said charge, and was sentenced to death. This appeal is from the said conviction and sentence.

The case for the prosecution was that one Jamis Perera had come to see the deceased with a bottle of kasippu (illicit liquor) at about 7 p.m. They were talking inside one of the rooms in the house of the deceased. The deceased's mother was in the adjoining room which was used for cooking. What was happening inside the room where the deceased was visible from where the mother was. The deceased and Jamis Perera were served with a meal by the mother. Soon after the deceased finished eating, the accused had come into the room where the deceased was, with one Sudubanda. They were talking together for sometime. When the mother was in the other room she had heard the deceased shouting 'I am stabbed', and the deceased ran out of the room and fell in the compound. According to the mother, she clearly saw the accused stab the deceased and run away. There was a bottle lamp burning inside the room. The mother's evidence was corroborated by the brother of the deceased. The doctor has testified that, the deceased had seven cut injuries.

The accused did not give evidence or call any witnesses on his behalf.

The learned Counsel for the accused submitted that the learned trial Judge had erred in law, in depriving the accused of his right to make an unsworn statement from the dock. In support of his contention that the accused had a right to make a dock statement, the learned Counsel cited the case of the *King v. Vallayan Sittambaram* [1]. This is a full bench decision of the Supreme Court, where Bertram, C.J. has stated at page 266 that,

"There is nothing, however, in the fact that the law now allows the prisoner to give evidence, to take from him the right which he previously enjoyed of making an unsworn statement. There is no provision on this subject one way or the other in the Code, and this is, and this is, therefore, another point on which we may have recourse to English procedure. The rules of English procedure are plain. The prisoner may still if he prefers it, make an unsworn statement from the dock, instead of giving evidence from the witness box and on this analogy he has the same right in Ceylon. The action of the District Judge would, therefore, appear to be an irregularity, and an irregularity of such a nature as necessarily to cause a failure of justice, in that it necessarily prejudiced the defence of the accused."

In the same case, Shaw, J., in a separate judgment has also pointed out that, "our code is silent as to whether or not it is open to an accused to make an unsworn statement at the trial." But has gone on to refer to Section 6 of the Criminal Procedure Code of 1898, and has stated as follows at page 274.

"Section 6 of the Code, however, provides that, as regards matters of criminal procedure for which no special provision is made, the law relating to criminal procedure for the time being in force in England shall be applied, so far as the same shall not conflict or be inconsistent with the Code and can be made auxiliary thereto.

In England it has always been open for an accused to make an unsworn statement at the trial, should he desire to do so, and this

right still exists, notwithstanding the right of an accused to give evidence on oath under the provisions of the Criminal Evidence Act, 1898."

In the case of the *Queen v. M. Buddharakkita Thero* [(2)], Basnayake, C.J., has stated that, "The right of an accused person to make an unsworn statement from the dock is recognised in our law. (*King v. Vallayan*)." (*Supra*)

It is pertinent to point out here that the Code of Criminal Procedure Act. No. 15 of 1979, in Section 7 provides that,

"As regards matters of criminal procedure for which special provisions may not have been made by this Code or by any other law for the time being in force, such procedure as the justice of the case may require and as is not inconsistent with this Code may be followed."

In addition Section 100 of the Evidence Ordinance provides that,

"Whenever in a judicial proceeding a question of evidence arises not provided for by this ordinance or by any other law in force in Sri Lanka, such question shall be determined in accordance with the English Law of Evidence for the time being."

Thus it is seen that, the right of an accused person to make an unsworn statement from the dock, as was recognised under the English Law, had been consistently followed by our Courts for a long time, and it is in conformity with the legal provisions found in our law, even at present.

However, the learned Trial Judge has misdirected himself on several questions of law in regard to that right. Firstly, he has stated that although it was explained to the accused that the accused had an opportunity to call evidence or to give evidence, the accused did not do so. According to the learned trial Judge, the accused did not do so, because the learned trial Judge did not mention to the accused, any thing about making a statement from the dock. The learned trial Judge has stated that he did not inform the accused that

he can make a statement from the dock, because in his view, although the accused may have a conventional right to make a statement from the dock in a Jury trial, there is no provision under the Evidence Ordinance giving such a right to an accused person, in a trial before a Judge only. It must be pointed out here that, the right of an accused to make an unsworn statement from the dock, does not vary in content or quality, whether it is a trial before a Jury or not. In fact, the case of *King v. Vallayan Sittambaram,* (*Supra*) which we have referred to earlier, was a case before a District Judge, where the said right was specifically upheld, by a full bench of the Supreme Court.

Secondly the learned trial Judge has stated that although in some instances a statement made by an accused person from the dock has been described as evidence, there is no provision in the Evidence Ordinance or in the Criminal Procedure Code, which enables the Court to consider such a statement as evidence.

As pointed out earlier the right of an accused person to make an unsworn statement from the dock is now well established under our law. Basnayake, C.J. dealing with this right in the case of the *Queen v. M. Buddharakkita Thero* (*Supra*), which we have referred to earlier, has stated as follows, at page 442.

> "That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination."

Thirdly the learned trial Judge has stated that, whilst under Section 138 of the Evidence Ordinance, the evidence of a witness consist of three parts, namely, evidence-in-chief, cross-examination and re-examination, the provisions of Section 201(2) of the Criminal Procedure Code, enables the prosecuting Counsel to cross-examine all the witnesses called by the defence. The learned trial Judge has concluded that, since a statement from the dock is not made under oath and not subject to cross-examination, it is not possible to consider such a statement as evidence. For these reasons he has justified the course of action he had taken. He has further pointed out

that there was no application on behalf of the accused to make a statement from the dock. As evident from the passage quoted above such a statement should be treated as evidence subject to the two infirmities, that it had not been made under oath, and has not been subject of cross-examination. In addition, it is pertinent to note here that, the right given to a prosecuting Counsel under Section 201(2) of the Criminal Procedure Code is, "to cross-examine all the witnesses called by the defence to testify on oath or affirmation". (emphasis is mine). As the right to cross-examination, under that provision, is given only in respect of witnesses who have given evidence on, "oath or affirmation", that provision will have no application to statements from the dock, which always are made, not on oath or affirmation. Furthermore, the admission of dock statements, as evidence, will not offend the provisions of that Section, because it does not exclude the defence from adducing evidence, other than on "oath or affirmation".

In view of the above wrong decisions on the question of law, grave prejudice had been caused to the defence and we are of the view that the verdict and the sentence of the learned trial Judge should be set aside. Accordingly, we quash the conviction and sentence of the accused, and order that a re-trial be held in this case as early as possible.

L. H. G. WEERASEKERA, J. – I agree.

Appeal allowed.

Retrial ordered.