

[COURT OF CRIMINAL APPEAL]

1952 Present : Gunasekara J. (President), Pulle J. and Swan J.

B. F. LEWIS FERNANDO, Appellant, and THE QUEEN, Respondent

APPEAL No. 46 WITH APPLICATION No. 69 OF 1952

S. C. 2—M. C. Colombo, 20,980

Evidence Ordinance—Declaration relevant under section 32 (1)—Requirement of corroborative evidence.

When, in a trial for murder, the statement of the deceased person as to the cause of his death has been admitted in evidence under section 32 (1) of the Evidence Ordinance, it is not imperative that the jury should be advised that they ought not to act on the deceased's statement unless there is some reliable corroboration.

APPPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

V. S. A. Pullenayagam, for the accused appellant.

R. A. Kannangara, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

September 8, 1952. GUNASEKARA J.—

The appellant Lewis Fernando was convicted of the murder of Malwenna Hewage Edwin, a young man of 20, who died of stab wounds inflicted on him on the 11th October, 1951. The appeal was pressed upon two grounds of misdirection that were not included among the original grounds of appeal but were formulated by Counsel after the appealable time had expired. They relate respectively to a comment on the fact that the appellant did not give evidence and to a direction regarding the evidentiary value of a statement made by the deceased man as to the circumstances of the transaction which resulted in his death.

The following facts were proved by the prosecution by evidence that was not challenged in cross-examination or contradicted by other evidence. The deceased was an assistant in a tailor's shop in Pettah, where he had been employed for about a month and a half. He was living in Maradana during that time at the house of his employer Kassivel, but his home was in Hunupitiya, a few miles outside Colombo. The appellant himself lived in Hunupitiya and was a friend of the deceased. On the 11th October the appellant turned up at Kassivel's house at about 6.30 a.m., and obtained his permission for the deceased to go with him to Hunupitiya to give him a letter that was in a box in the deceased's house. The two of them then left for Hunupitiya, the deceased going "quite happily" with the appellant so far as Kassivel observed. At about 7.30 a.m. they were seen at Hunupitiya walking along a footpath in the direction of the deceased's house, which was about a quarter of a mile away, and they were chatting together as they went. This was in the neighbourhood of the house of a man named Peter Perera which stood some 40 yards away from the path. At about 8 a.m. they arrived together at the deceased's house. There the deceased got from his sister a photograph of himself, which he said the appellant wished to see, and also a letter that he had left with her, and the two men went away together a short while later. At about 9 a.m. Peter Perera, who was in his house, heard a cry of pain from the direction of the footpath and presently the deceased ran into his compound in blood-stained clothes and fell there. Peter asked him what had happened to him and in reply to Peter's questions he said that he had been stabbed with a knife by his friend and that it was Lewis who stabbed him. He also stated to a neighbour of Peter's named Anthony, who too came up and asked him "who had done this to him", that it was Lewis who had stabbed him. Anthony went to the village headman's house and informed him of the stabbing. A police constable, who happened to come there when Anthony's statement was being recorded by the headman, noted that the time was 9.45 a.m. by his watch. Having recorded Anthony's statement the headman went to Peter's house with the constable. They found the deceased still lying on Peter's compound, at the end of a trail of blood that started from the foot-path, and they had him taken to the General Hospital in Colombo. He was admitted to the hospital at 11.11 a.m., and he made a statement on affirmation to an unofficial magistrate at 1.15 p.m. Meanwhile the police had

arrested the appellant at 1 p.m. at a bakery at Hunupitiya. The deceased died at 4 a.m. on the next day. He had received seven stab wounds, of which three were on the front and one on the back of the chest, and the rest were on the front of the left shoulder, on the palm of the left hand penetrating it from front to back, and the back of the right elbow. The four stabs on the chest had injured the pericardium and the right auricle, the left lung in two places, and the right lung.

Though this evidence was not contested, the defence did dispute the truth of some further evidence given by Anthony, the effect of which was that he had seen the appellant stab the deceased, and also the truth of the statements made by the deceased himself. No evidence was called for the defence, but the appellant stated from the dock that he "knew nothing about the stabbing".

The learned Judge directed the jury to the effect that if they could not accept Anthony's evidence in full they had to consider whether they could act upon the statements made by the deceased. It was contended for the appellant that the learned Judge "failed to caution the jury adequately upon the danger of acting on the uncorroborated deposition of the deceased," and that the failure to do so amounted to a misdirection. This ground of appeal was originally formulated as a ground of law, but learned Counsel for the appellant agreed at the hearing that the alleged misdirection did not involve "a wrong decision of any question of law". It follows that the appeal can succeed on this ground only if it has been shown that there has been a miscarriage of justice.

The deposition in question was in the following terms :

"Lewis Fernando stabbed me with a kris knife. I was stabbed several times. I think about 9 times. He demanded money from me. I refused to give him. He wanted money as 'kappan'. I did not owe him any money. The stabbing took place near a jungle. Lewis wanted a letter delivered to him. I went home to fetch it. Whilst returning he attacked me with a kris knife. No one saw the stabbing. For my cries people from the neighbouring houses came up. They saw the man running away."

It is apparent from the facts that are not in dispute that the deceased was in a position to observe whether it was the appellant or someone else who stabbed him : he was stabbed in broad daylight when he was out in the open, and five of the seven wounds were inflicted on the front of the body. According to the prosecution the deceased and the appellant were on friendly terms with each other up to that day, and the cross-examination of the prosecution witnesses suggests that that fact is common ground. It is therefore improbable that the deceased would have made an accusation against the appellant which he knew to be false. According to the evidence of Peter Perera, who was cross-examined only as to whether he knew "how the quarrel started between the accused and the deceased", it was immediately after he was stabbed that the deceased declared that it was his friend Lewis who stabbed him. To the Magistrate the deceased stated further that Lewis stabbed him when he was returning from his house where he had gone to fetch a letter

that Lewis had wanted to be delivered to him. The facts that the appellant had made such a request, that the deceased went home that morning as stated by him, that he had set out from home on his return journey a short time before he was stabbed, and that the appellant was in his company then have been proved by other evidence. It seems to us that there was ample corroboration of the deceased's deposition.

In his summing up the learned Judge, having discussed the evidence of Anthony and the conclusion that would flow from an acceptance of it, directed the jury as follows :

“ If on the other hand you feel that you cannot accept Anthony's evidence in full and if you feel some reasonable doubt as to whether Anthony saw all that he says he saw, you then come to what you call the dying declaration and to certain other circumstances which I should wish to mention to you.

Now, Gentlemen, with regard to dying declarations they are admissible evidence, but of course naturally when you are dealing with statements by a person who is not before you, you will bear in mind that they cannot be tested in the way that other evidence is tested by cross-examination, and it is for that reason that juries in practice are warned to be cautious in dealing with dying declarations, but that by no means implies that you should reject it. It merely means that you should consider in your mind very carefully any alternative possibilities if there are any alternative possibilities, that may present themselves to you, but it by no means implies that you must decline to act on it, provided you approach it with caution bearing in mind, as I say, the fact that it is unable to be tested in the way that other evidence can be tested ”.

He then read to them the deposition and discussed at length the evidence of what he referred to as “ corroborative factors ”. Finally, on the question of the identity of the deceased's assailant, he said :—

“ It is purely a question as to what value you are prepared to attach to Anthony's evidence, which if you accept in full makes your task easy. If you do not accept that evidence in full but think that he merely arrived at the scene after the stabbing, then you are thrown back upon the dying declaration, and the fact of course that when Anthony asked this man who stabbed him he said that it was Lewis who stabbed, and the fact for what it is worth that Lewis and this man were together a short time before this episode, and that they left the house of the sister Emmie Nona a short time before. We do not know exactly what time it was but it was half an hour or so before this episode.”

The question as to the direction that should be given to a jury about the evidentiary value of a statement admitted under section 32 (1) of the Evidence Ordinance was considered by this Court in the case of *R. v. Asirvadan Nadar*¹. It was held that where in a trial for murder statements contained in a deposition made by the deceased formed to a very large extent the foundation of the case against the accused it was imperative

¹(1950) 51 N. L. R. 322.

that the jury should have been adequately cautioned that they should appreciate that the statements of the deponent had not been tested by cross-examination ; and that while there is no rule of law requiring corroboration of such evidence, the jury should always be cautioned as to the inherent weakness of this form of hearsay and their attention ought specifically to be drawn to the question of the extent to which the deposition is corroborated or contradicted by other facts and surrounding circumstances proved in evidence. Mr. Pullenayagam relied on this decision and also invited us to adopt the following dictum of Beaumont C.J. in the case of *Emperor v. Akbarali Karimbhai*¹ decided by the Bombay High Court :

“ Generally speaking, and as a rule of prudence, I am of opinion that a declaration relevant under section 32 (sc. of the Evidence Act), but not made by one in immediate expectation of death, and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration.”

At the same time, however, he very properly brought to our notice a judgment of Leach C.J. in a Madras case, *In re Guruswami Tevar*², dissenting from this view. We respectfully agree with the view taken in the Madras case ; but even if the other were the better opinion we do not think it was necessary in the circumstances of the present case that the jury should have been advised that they ought not to act on the deceased's statement unless there was some reliable corroboration, for there was such corroboration furnished by facts that were not in dispute. The jury were adequately cautioned as regards the inherent weakness of evidence of this kind and we are unable to agree that there was a misdirection on this point.

[The Court then considered the other ground of appeal that was argued and was of opinion that it could not be upheld.]

Appeal dismissed.

