

SISIRA DE ABREW, J.

Heard both counsel in support of their respective cases. The accused-appellant in this case, was convicted of the murder of a man named Handuwalge Piyasena and was sentenced to death.

According to the prosecution case the accused has stabbed the deceased. This incident was witnessed by two eye witnesses. The accused appellant in his dock statement denied the incident and said that a few days prior to his arrest, he had made a complaint to the Police Station about the disappearance of his wife. According to him on 26.06.1999 (day after the incident of murder) he was on his way to the Police station to face an inquiry on his complaint. Whilst on his way to the Police Station he had gone to a boutique to have a cup of tea and when he was coming out of the boutique he was arrested by the Police.

Learned trial Judge in his judgment has made a specific statement that the dock statement could not be considered as evidence. Learned High Court Judge after making the said statement rejected the dock statement and observed that the dock statement did not create a reasonable doubt in the prosecution case. In our view he had reached the above conclusion after coming to the conclusion that the dock statement could not be considered as evidence. We are therefore of the view that the defence of the accused-appellant had not been properly considered by the learned trial Judge. We are unable to agree with this view expressed by the learned trial Judge. Dock statement should be considered as evidence subject to the following two infirmities.

- 1) Dock statement is not tested by cross examination.
- 2) Dock statement is not made under oath.

This view is supported by the judicial decision in **Queen Vs. Buddarakkitha Thera 63 N.L.R. page 433** His Lordship

Basnayake CJ at page 442 dealing with the legality of the dock statement observed thus “ The right of an accused person to make an unsworn statement from the dock is recognized in our law (King Vs. Vellayan 20 N.L.R. page 257 and 266). 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”.

In Queen Vs. Kularatne 71 N.L.R. page 529 and at page 551 Court of Criminal Appeal observed thus; “In Buddarakkitha case it was held that the ‘right of an accused person to make an unsworn Statement from the dock is recognized in our law. That right would be of no value unless such 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’. We are in respectful agreement and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had

deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that;

- a) If they believe the unsworn statement it must be acted upon
- b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed , and
- c) That should not be used against another accused. ”

In W.G. Punchirala Vs. The Queen 75 N.L.R. 174 His Lordship Justice G.P.A. de Silva S.P.J. held thus: “Where at a trial before the Supreme Court, the accused makes a statement from the dock, the Judge would be misdirecting the jury, if he tells them that they should consider the statement of the accused but that it is not of much value having regard to the fact that it is not on oath and not subject to cross examination”. In Queen Vs. Arasa 70 N.L.R. page 403 Court

of Criminal Appeal observed the following facts. "The 1st accused, who was charged with murder, made a dock statement in which he said that before he stabbed the deceased man, the latter had struck him with a club. The cross examination of the prosecution witnesses and the accused's statement from the dock set up defences either of self defence or of provocation or both. Held, that it was the duty of the Judge to have directed the jury that the dock statement was a matter before the Court which could be taken into consideration".

For the benefit of the legal practioners and the trial Judges in this country, we set down the following guide lines regarding evaluation of a dock statement. Court must consider dock statement as evidence subject to the following two infirmities

- 1) The dock statement is not made under oath.
- 2) The dock Statement is not tested by cross examination.

Trial Judges must bear in mind the following guide lines when dock statement is evaluated.

- 1) If the Court believes the dock statement it must be acted upon.
- 2) If the dock statement raises a reasonable doubt in the mind of the Court about the prosecution case, defence must succeed.
- 3) Dock statement should not be used against another accused.

As I pointed out earlier since the learned trial Judge had not considered the dock statement as evidence, we are unable to permit this conviction to stand.

We are mindful of the fact that the prosecution has led evidence which should be considered by the trial Court. For the above reasons, we set-aside the conviction and the death

sentence and send the case back to the High Court of Ratnapura with a direction that the accused should be re-tried on the same indictment. We direct the Registrar of this Court to send a copy of this judgment to the High Court Judge who delivered the judgment .

Re-trial ordered.

JUDGE OF THE COURT OF APPEAL

D.S.C. LECAMWASAM, J.

I agree.

JUDGE OF THE COURT OF APPEAL

Jmr/-