IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

The Hon. Attorney General
Attorney General's Department
Colombo 12.

Complainant

Vs.

CA 93/2015

H.C. Chillaw – HC:39/2010

Deekiri Mudiyanselage Duminda Maduran Alwis

Accused

AND NOW BETWEEN

Deekiri Mudiyanselage Duminda Maduran Alwis

Accused – Appellant

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo 12.

Complainant – Respondent

BEFORE: S. DEVIKA DE LIVERA TENNEKOON J

S. THURAIRAJA, PC, J

COUNSEL:	**Accused – Appellant – Amila Palliyage with Nihara Randeniya and Sandeepani Weerasooriya**
	Complainant – Respondent – SSC Asad Navavi
ARGUED ON -	**09.08.2017**
WRITTEN SUBMISSIONS –	**Defendant – Appellant – 11.09.2017**
	Complainant– Respondent - 14.09.2017
DECIDED ON:	**10.10.2017**

S. DEVIKA DE LIVERA TENNEKOON J.

The Accused Appellant (hereinafter sometimes referred to as the Appellant) was indicted in the High Court of Chillaw for the offence of the murder of a 2 ½ year old boy named Dissanayake Pathiranage Pansilu Prabashwara Weeraman under Section 296 of the Penal Code.

The Appellant pleaded not guilty to the said charge and the prosecution led the evidence of one K.A. Nirosha Madhumali, the virtual complainant and the mother of the deceased (PW1), M. K. Mahindadasa (PW2), Ranjith Anthony (PW3), S. A. Pushpa (PW4), D.M.P.B. Dissanayake (PW7), PS 19664 Amarasena (PW10), IP Manohara (PW11), IP Subasinghe (PW12), PS 23311

Dissanayake PW14 and Dr. Wijewardena JMO (PW18) and the evidence of the Court interpreter and concluded the case for the prosecution.

In brief the case for the prosecution was that PW1, the mother of the deceased was living separately from her spouse in a rented house in the Wennapuwa area with the deceased child who was 2 ½ years of age at that time and her father. The Appellant was her paramour, who she was expecting to get married after, obtaining a divorce from her husband. Her husband had the habit of visiting her to see the deceased child, which the Appellant didn't like.

The deceased child was admitted to a Day Care Centre run by PW4, where the child was kept from 8.00 am / 8.30 am – 2.30 pm until she returns from work, after which she would take the child home. As stated in evidence the child was in the habit of referring to the Appellant as 'father'.

The night prior to the date of the alleged offence, the Appellant had quarrelled with PW1 regarding her husband's constant visits to her house, to see the child. The next day when she went to pick her child from the Day Care Centre PW4 had informed her that the now deceased child was picked up by the Appellant. Sensing some form of foul play PW1, PW4 and PW3 commenced a search for the child. The Appellant when contacted over the phone denied having picked up the child and acted in a suspicious manner. Even after meeting the search party, the Appellant had denied taking the child with him. However, after been confronted by both PW3 and PW4 the Appellant had left the scene in an irritated manner. The fact that the Appellant took the child from the day care centre was corroborated by witnesses.

Consequent to a complaint to Seeduwa Police the Appellant was arrested and handed over to PW 11 of the Wennapuwa Police.

The body of the deceased child was thereafter found on a recovery under Section 27 (1) of the Evidence Ordinance under the Ging Oya Bridge situated along the Colombo - Chillaw road. The JMO (PW18) giving evidence opined that the cause of death was gagging by applying external force on and around the nose and mouth area of the child.

The Appellant opted to make a dock statement denying culpability and the learned High Court Judge delivered a verdict of guilty and sentenced the Appellant to death.

As correctly contended by the learned Counsel for the Appellant the case for the prosecution rested on circumstantial evidence which were;

a) The Appellant was last seen in the company of the deceased on the date of the incident,

b) The dead body was found consequent to a statement made by the Appellant and further it is the Appellant who led the police to where the body of the deceased lay.

c) The Cause of death was asphyxia due to stuffing a piece of cloth into the oral cavity and applying pressure around the mouth and nose.

It was further stated in evidence that the Appellant, who was a driver in a Company, had left the Company premises on the day in question in the van

assigned to him and there was an unexplainable absence from work during 11.25am – 1.15pm. This could explain how the Appellant could have reached the day care centre by 12.05pm and picked up the child. PW11 IP Manohara in is evidence has stated that the exact place where the body was recovered from, was not visible even after arriving at the said location and it had been the Appellant, who had pointed to the exact place where the deceased body lay, around four feet into the water. The items of clothing the deceased child was dressed in (P4, P1, P2 and P3) at the time of discovery was identified by PW3 and PW4 as what the child was dressed in at the time he left with the Appellant.

Therefore, evidence elucidated by the prosecution can be seen as strong circumstantial evidence. This coupled with the subsequent conduct of the Appellant i.e. been aggressive towards PW 1 when she inquired about the child, not helping to search for the child and not assisting in preferring a complaint to the Police regarding the child infers strong evidence pointing at the guilt of the Appellant.

With this insurmountable evidence against the Appellant, the Appellant opted to simply deny any culpability by making an unsworn statement from the dock. As the learned SSC has fittingly noted, it was simply a three line bare denial of the allegation to which the learned Trial Judge has correctly applied the dictum of Lord Elenborough in Rex v. Cochrane, Garney's Reports, page 479. which states;

> " No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such

> exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest".

This dictum was applied in several cases including The King Vs. L. Seeder de Silva 41 NLR page 337, The King Vs. Geekiyanage John Silva 46 NLR 73, Queen Vs. Seetin 68 NLR 316, Republic Vs. Illangathilaka 1984 2 SLR page 38, ChadradasaVs. Queen 72 NLR page 160.

In James Silva v. the Republic of Sri Lanka (1980) 2 Sri.l R p167 at176 following the Privy Council case of Jayasena v. The Queen 72 NLR 313 (PC) stated;

> 'A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty.'

In the case of AG Vs. Potta Naufer & others 2007(2) SLR 144 Thilakawardena J held that;

> 'When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.'

In the case of Kusumadasa Vs. State 2011(1) SLR 240 Sisira de Abrew J has held that;

> 'The prosecution must prove that no one else other than the accused had the opportunity of committing the offence. The accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.'

Also in the case of Sarath Fernando Vs. Attorney General 2014 (1) SLR 16 it was held that;

> 'In order to justify the inference of guilt from purely 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.'

In Premawansha V. Attorney General 2009 (2) SLR 205 relied by the learned SSC for the Respondent Sisira de Abrew J has held that;

> 'In a case of circumstantial evidence if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapable conclusion that the accused committed the offence'

He further held that;

> "Although there was no judicial evaluation of evidence learned trial Judge on the evidence led at the trial could not have arrived at any other conclusion other than the conclusion reached by him.

Although the circumstantial evidence has not been specifically analysed by the learned Trial Judge in the instant case this Court finds that the strong corroborated circumstantial evidence against the Appellant aforementioned, when taken together points, to the only inference that no one other than the Appellant could have committed the offence. Therefore in this case the learned High Court Judge could not have arrived at any other conclusion other than to find the Appellant guilty.

In light of the above this Court finds no reason to disturb the findings of the learned High Court Judge and therefore affirms the conviction and sentence of the learned High Court Judge and dismisses the instant appeal.

Appeal Dismissed.

Judge of the Court of Appeal

S. THURAIRAJA, PC, J

I Agree.

Judge of the Court of Appeal