

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

**In the matter of an appeal under and
in terms of Section 331 of the
Criminal Procedure Code Act No. 15
of 1979.**

The Attorney General of the Democratic
Socialist Republic of Sri Lanka.

Complainant

**Court of Appeal
Case No. CA 95/2015**

Vs,

1. Ilandari Pendilage Dedunu Hansamali
2. Botalage Sajith Dinesh Kumara

Accused

And Now Between

1. Botalage Sajith Dinesh Kumara
(2nd Accused)

Accused-Appellant

**High Court Chilaw
Case No. 64/2010**

Vs,

The Attorney General of the Democratic
Socialist Republic of Sri Lanka

Complainant-Respondent

**Before : S. Devika de L. Tennekoon, J &
S. Thurairaja PC, J**

**Counsel : Sharon Seresinhe for the Accused-Appellant
Harippriya Jayasundara DSG for the Complainant-Respondent**

Judgment on : 13th October 2017

Judgment

S.Thurairaja PC J

The Accused appellant together with his female partner, Ilandari Pedilage Dedunu Hansamali, was indicted by the Attorney General for causing the death of their infant child Bothalage Sajith Dinesh Kumara, on the 24th July 2009, at the High Court of Chilaw.

After the trial the 1st Accused A. I. P. D. Hansamali was acquitted for want of evidence, and the 2nd Accused Appellant was convicted for the offence of Murder and sentenced to death. Being aggrieved with the said decision the Appellant preferred an appeal to this court.

The Counsel for the accused appellant framed the following ground of appeal;

"The learned trial judge has not evaluated the evidence of the witnesses properly and when there were doubts caused in the prosecution case, he has convicted the accused appellant for murder." (SIC)

On perusing the proceedings of the High Court, we find that the Prosecution had led the evidence of 10 witnesses, of which 6 are lay witnesses, 2 Police officers, the JMO and the officiating interpreter of the Court as official witnesses. When the defence called, the 1st accused remained silent and the 2nd accused made a Dock Statement.

According to the evidence of the Prosecution witnesses it was revealed that the 1st and 2nd accused were not married but lived together, as a result they had a child, who is the deceased in this case.

Wijayalath Pedige Nilanthi mother of the 1st accused gave evidence and stated that after the child birth for about 6 months they lived together. She states that the child was a deformed child therefore the 1st accused had to go to the hospital very often. She also noticed disputes between the 1st and 2nd accused regarding 'talking to another woman on the phone'. About a week prior to the incident the 2nd accused had left their house, after two days the 1st accused also left with the child telling her that she is going in search of the 2nd accused. On the 24/07/2009 Nimal Rajakaruna had dropped the 1st accused at this witness's place. The 1st accused had told her that the 2nd accused had assaulted and chased her away. She left the child with the 2nd accused and came to her mother. At around 11am a person called Nimal called her and told that the child was found drowned in a public well at Etiyawala, its about a kilometre away from their house. The 1st accused immediately left the house and went to the well.

This clearly shows that the deceased child was in the custody of the 2nd accused. At the time of the incident the 1st accused was with this witness.

Prosecution witness Ekanayake Mudiyanalage Nimal Rajakaruna was a family friend of the 1st accused. After the 1st accused leaving her mother she went and stayed at this witness's house with the child and searched her partner, the 2nd accused. One day the 2nd accused had come to this witness's house and stayed with them. Thereafter the 2nd accused left leaving his partner the 1st accused and the deceased child. On the following day the 1st accused had left the house of this witness saying that she is going to see the 2nd accused and returned home without the child. When asked she had said that she left the child with the 2nd accused. On the day in question this witness had asked the 1st accused to go to her place for him to go to his work, she refused to go to her mother's house but the witness took her around 6.30-7 am and left her with mother. Around mid-day when he was returning from work he got to know that the child was drowned.

This witness confirms that the 1st and 2nd accused were living together as a result they had the deceased child. He also confirms there was some quarrel between both accused persons.

Weliweriya Kankanamge Jayathilake gave evidence for the prosecution and stated when he was going to the boutique he had seen the 2nd accused carrying a child on his shoulder with a bag. Further he had noticed that the child was wearing a yellow colour dress. In a village a male carrying a child all alone received this attention. Further he had seen that the 2nd accused about 200 metres away from the public well. When he was returning from the boutique he heard a child was drowned in the public well. When he went to the well he identified that the child was carried by the 2nd accused a while ago.

Wijesuriya Arachchilage Karunaratne a villager gave evidence for the prosecution more or less stating the above fact. He clearly identifies that it was the 2nd accused alone carrying the child.

Batepola Arachchige Sriyani Mallika is the one who saw the child floating in the well. She claims when she went to have a bath in the public well she had found the child. She raised cries Iyavan a fish monger came there and took the deceased baby out. she had not scene any of the suspects.

These witnesses who are not related or connected to these accused persons they are independent and gave a clear evidence that it was the second accused who was carrying the deceased child immediately before the body was found.

The Judicial Medical Officer (JMO) Dr. Diphthakumara Wijewardane was of the view that the death was due to the drowning and it had happened just around the time the 2nd accused was seen with the child. JMO had stated that the medical condition will not allow the child to make any move, which rules out the infant child falling into the well while crawling. This will conclude that the only way the child was found in the well was due to a voluntary act of another person. There is more than sufficient evidence against the 2nd Accused appellant that he was seen with the deceased child immediately before his death. A male carrying a child alone with a bag in a village, had received special attention of many people, is fact to be mindful of the court.

Analysing the above evidence for the prosecution it can be easily concluded that the deceased is a child with deformities was last seen with the 2nd accused.

Considering the evidence of all witnesses, the accused appellant owes an explanation to the courts. Unfortunately, the accused did not provide any explanation not even a denial of the participation, which made the trial judge to solely act on prosecution evidence. It should be noted that the accused had made a dock statement and said he can't remember about the day.

In the case of **The King Vs Seedar de Silva 41 NLR 337** Howard C.J discussed the principle laid down in the following dictum of Lord Ellenborough in the case of **Rex Vs Lord Cochrane and others [Gurney's Rep. 479.]** which is quoted as follows:

"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."

The learned High Court Judge had evaluated the evidence and found that there is no evidence against the 1st accused and acquitted her. Similarly, evidence was sufficient to convict the 2nd accused and he had found him guilty.

After carefully analysing the evidence led before the High Court, I am convinced that there is sufficient evidence against the accused appellant to prove the case beyond reasonable doubt. One cannot expect the trial judge to write a thesis on a case before him, the judicially trained judge will spell out what he recognises as important in a case which does not mean that he had not considered all relevant facts and law.

In the case of murder if he is going to explain the law, exemptions and exclusions it will run into hundreds of pages but in reality, they only discuss the most relevant provisions which are in issue, it does not mean that they have overlooked the other relevant provisions in the Penal Code and important judicial decisions.

In my opinion the trial judge is expected to consider the entire legal provisions, decided authority, social background of the parties and present developments in the law but it is not expected to reduce everything in writing. It will be appreciated that if he could reduce to writing as much as possible for clarity in his decision and not for the purpose of academic writing.

It is our considered view that the evidence led before the learned trial judge of the High Court warrants nothing but a conviction for murder against the accused appellant (2nd Accused). Therefore, we affirm the conviction and sentence and dismiss the appeal.

Appeal dismissed

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J
I agree,

JUDGE OF THE COURT OF APPEAL