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

In the matter of an Appeal under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Complainant

V.

Court of Appeal Case No. CA HCC 253/2019

High Court of Kandy Case No. HC/ 316/2013

Hettiyakande Gedara Sumathipala

Accused

AND NOW BETWEEN

Hettiyakande Gedara Sumathipala

Accused - Appellant

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

Complainant - Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J**

SAMPATH B. ABAYAKOON, J

COUNSEL: Isansi Dantanarayana for the Accused – Appellant.

S. Balapatabendi ASG, PC for the Respondent.

ARGUED ON : 24.02.2021

WRITTEN SUBMISSIONS

FILED ON : 26.06.2020 by the Accused - Appellant.

04.08.2020 by the Respondent.

JUDGMENT ON : 17.03.2021

K. PRIYANTHA FERNANDO, J.

1. The accused appellant (hereinafter referred to as the appellant) was indicted in the High Court of Kandy with one count of murder punishable in terms of section 296 of the Penal Code. Upon conviction after the trial, the appellant was sentenced to death. Being aggrieved by the said conviction and sentence, the appellant preferred the instant appeal on the following grounds.

   i. The learned Trial Judge has convicted the appellant relying on uncorroborated and inconsistent evidence of untrustworthy witnesses.
   ii. The learned Trial Judge has not properly analyzed the expert evidence and has failed to consider the law and legal principles relating to expert evidence.
   iii. The learned High Court Judge has misdirected himself about the laws and legal principles relating to circumstantial evidence.
   iv. The learned Trial Judge has failed to offer appropriate prominence and due consideration to the dock statement in accordance with the established legal principles.

Facts in brief

2. The deceased was 45 days old at the time of the incident. PW1 is the mother of the deceased and PW2 is the father. They were living in an estate line room. The house contained one bedroom and the front room which was used as a boutique. The deceased had three elder siblings.

3. According to the main witness PW1, at about 8 pm one *Bodhidasa* had come in front of the house with the appellant who is his brother and another person by the name of Anthony. *Bodhidasa* had threatened them, asking them to switch off the lights. *Bodhidasa* had told her to send her husband out. *Bodhidasa* had been drunk. She had told her husband not to go out. All three persons who came had scolded her. *Bodhidasa* had tried to hit PW2 with a bat. After pulling her out of the house the appellant had gone inside. Anthony had told the appellant "... පාල දරුවා උස්සපන් එතකොට ඒකා එළියට එයි කිව්වා"

4. When she ran inside the house, the child who was on the bed had been on the floor and the appellant had been near the bed. She had realized that the appellant had dashed the child on the floor. She had shouted and carried the child. Then, PW3 who is the nephew of PW2, had rushed the child to the hospital.

5. The version of the defence as per the unsworn statement made by the appellant was that on the day in question, when the appellant went to see his mother, the mother had told him that PW2 scolded her. He then went to PW2's house and had asked PW2 why he scolded his mother. PW2 had been seated on the bed with the deceased child. At once, PW2 had got up scolding him. Then, PW1 had come shouting. A crowd had gathered and taken the child to the hospital. He denied dashing the child on the floor.

Ground of Appeal No. 1

6. It is the contention of the learned Counsel for the appellant that the learned trial Judge had relied upon the inconsistent and uncorroborated evidence of the witnesses for the prosecution. PW1 at one point had said that she saw the appellant dashing the child on the floor and another point she had said that when she went inside the room, the appellant had already dashed the child on the floor. Learned counsel further submitted that the learned Trial Judge had failed to apply the maxim *falsus in uno, falsus in omnibus.*

7. Learned Additional Solicitor General appearing for the respondent submitted that the learned Trial Judge had carefully analyzed the evidence of PW1 and rejected the portion of her evidence that she saw the appellant dashing the child on the floor.

8. PW1 in her evidence said that as she went inside the room, she saw the appellant dashing the child on the floor. In cross examination she said that when she went inside the room, the child who was on the bed was on the floor and the appellant was standing near the bed. After carefully analyzing her evidence, the learned High Court Judge rejected her evidence that she saw the appellant dashing the child on the floor. The learned Trial Judge concluded on the basis that what she saw was that the child who was on the bed was on the floor, and that the appellant was standing beside the bed. The learned High Court Judge relied upon the evidence of PW1, other than the portion that she saw the appellant dashing the child on the floor.

9. On carefully scrutinizing her evidence, it is clear, that upon seeing the child who was on the bed on the floor, and the appellant being near the bed, taken together with what Anthony told the appellant 'පාල දරුවා උස්සපන්', it is natural for PW1 as the mother of the child to feel that the appellant dashed the child on the floor. The learned High Court Judge has rightly taken what she really saw, as one of the proved circumstances to come to the conclusion based on circumstantial evidence that the appellant dashed the child on the floor.

10. In the case of ***Samaraweera V. The Attorney General [1990] 1 Sri LR 256,*** P.R.P.Perera J. discussed the maxim *falsus in uno, falsus in omnibus* at length. His Lordship said;

"*Where however the maxim set out above is applicable it must be borne in mind that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood. Nor does it apply to cases of testimony on the same point between different witnesses. (vide The Queen V. Julis 65 NLR 585).*"

11. It was held further, that the Judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole testimony or whether the false part can safely be separated from the truth. Therefore, the credibility of witnesses can be treated as divisible and the Judge

is entitled to accept part of the evidence of a witness and reject another, depending on the circumstances and the evidence in each case.

12. As rightly submitted by the learned ASG for the respondent, a witness cannot be expected to possess a photographic memory and to recall the exact details of an incident. ***(Mohommed Nayaz Naufer and Others V. Attorney General SC Appeal 1/2006).*** Thus, a great significance cannot be attached to minor discrepancies or contradictions in the testimony of a witness. Other than the above portion of evidence of PW1 that was rejected by the learned Trial Judge, PW1, PW2 and PW3 were consistent in their evidence.

13. Hence ground of appeal No. 1 is devoid of merit.

Ground of Appeal No.2

14. Learned Counsel for the appellant submitted that the deceased did not receive any injuries in his shoulders or ribs. According to the opinion expressed by the consultant JMO who testified on behalf of the defence, if a child was dashed on the floor from 8 feet above, there have to be injuries to the child's shoulder as well. Therefore, there is a reasonable doubt whether this was a crime or an accident, counsel submitted.

15. It is pertinent to note that the consultant JMO called by the defence never said that there had to be injuries on the shoulder if the child was dashed on the floor from 8 feet above, as submitted by the learned counsel for the appellant. What the JMO said was that it is more probable that injuries will be caused on the shoulder (page 191 of the brief).

16. It is not clear as to how the defence suggested the height of 8 feet. However, the version of the appellant in his dock statement was that the child and PW2 were seated on the bed. When PW2 got up suddenly, he heard a noise. 'මමයා එකවරම මට බැනගෙන නැගිට්ටා. ඩොග් ගාලා ශබ්දයක් ඇහුනා.' The appellant did not even say that he saw the child fall down. It may be assumed so when he said that he heard a noise when PW2 got up. However, the appellant in his statement from the dock did not say that the child fell on to the edge of the bed or even on to a pointed surface.

17. The medical officer who conducted the autopsy said in evidence that it is not probable to sustain such injuries if the child fell from the bed. The height of the

bed according to the police officer who recorded his observations was about 30 centimeters. Consultant JMO did not say that the injuries sustained could occur by the child falling on to the floor from a height of about 30 centimeters. His evidence was that it is probable if the child fell on to an edge of the bed or an uneven floor. The consultant JMO had not expressed a direct opinion that the injuries sustained by the child were by an accidental fall from the bed or a fall from a similar height.

18. Hence, this ground of appeal should necessarily fail.

Ground of Appeal No.3

19. Learned counsel for the appellant submitted that the circumstances the learned High Court Judge considered to come to the conclusion that the accused is guilty are not sufficient to come to an inference that the appellant and no one else committed the crime. Counsel further submitted that there can be other inferences that can be drawn other than the guilt of the appellant.

20. It is the contention of the learned ASG that the learned High Court Judge has correctly applied the laws and legal principles relating to circumstantial evidence. Learned ASG also submitted that the words uttered by Anthony who came with the appellant "පාල දරුවා උස්සපන් එතකොට ඒකා එළියට එයි කිව්වා" will also have to be taken into account when deciding on the matter.

21. In the case of ***Junaideen Mohommed Haaris V. Hon. Attorney General SC Appeal 118/17 decided on 09.11.2018***, His Lordship Justice Aluwihare stated;

The Court is not only required to decide whether the facts are consistent with the hypothesis of his innocence (R V. Hodges supra). The circumstances must be such as to produce moral certainty to the exclusion of every reasonable doubt. ..."

22. In the case of ***Shankarlal Gyarasilal Dixit V. State of Maharashtra AIR 1981 Supreme Court of India [1981] Cri. L. J. 325,*** Chandrajud C.J.held;

"In case of circumstantial evidence, the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. It is not to be expected that in every case depending on circumstantial

evidence, the whole of the law governing cases of circumstantial evidence should be set out in the judgment. Legal principles are not magic incantations and their importance lies more in their applications to a given set of facts than in their recital in the judgment. The simple expectation is that the judgment must show that the finding of guilt, if any, has been reached after a proper and careful evaluation of circumstances in order to determine whether they are compatible with any other reasonable hypothesis."

23. In the instant case, the learned High Court Judge has stated the proved circumstances led in evidence at page 17 of his judgment (page 287 of the brief). He has carefully analyzed the above circumstances and come to the conclusion that the proved circumstances are consistent with the sole hypothesis of the guilt of the accused and that no one else could have committed the crime. I do not find any reason to interfere with the above conclusion.

24. Hence, ground of appeal No.3 has no merit.

Ground of Appeal No. 4

25. Learned counsel for the appellant contended that the learned High Court Judge has rejected the dock statement made by the appellant as it was made from the dock and was unsworn. Further it was submitted that, to examine the evidence of the accused in light of the evidence of the witness for the prosecution, is to reverse the presumption of innocence.

26. It is the contention of the learned ASG for the respondent that the dock statement of the appellant was clearly without credibility and that the appellant had failed to give any explanation to the strong evidence led against him by the prosecution.

27. Upon reading the judgment of the learned High Court Judge, it is clear that the learned High Court Judge has not considered the dock statement to be inferior. He had mentioned that the prosecution witnesses have given strong evidence under oath which is factually correct. The appellant in his statement from the dock has admitted his presence at the scene. His statement was that, when PW2 got up from the bed where he was seated, he heard a noise. "මෙයා එකවරම මට බැනගෙන නැඟිට්ටා. ඩොග් ගාලා ශබ්දයක් ඇහුනා." He did not even say that he

saw the child falling from the lap of PW2. On the improbable version made by the appellant in his statement from the dock, the learned High Court Judge was entitled to reject the version the appellant had taken as a defence, through his statement from the dock.

28. This ground of appeal too has no merit.

29. On the evidence placed at the trial before the High Court, I find that the prosecution has proved the charge against the appellant beyond reasonable doubt. The learned High Court Judge has carefully considered the evidence for the prosecution as well as the defence and has rightly concluded that the appellant is guilty as charged.

30. Appeal is dismissed. Conviction and the sentence imposed on the appellant by the High Court is affirmed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

I agree.

JUDGE OF THE COURT OF APPEAL