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

In the matter of an appeal in terms of Section 331 (1) 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.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA - HCC 215/2017

High Court of Moneragala
Case No: HC 23/2016

Vs.

1) Hikkaduwa Vithanage Asanka Sanjeewa

Accused

And Now Between

1) Hikkaduwa Vithanage Asanka Sanjeewa

Accused-Appellant

Vs.

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Nihara Randeniya

for the Accused-Appellant

Riyaz Bary, SSC

for the Respondent

ARGUED ON : 24/01/2022

DECIDED ON : 05/05/2022

R. Gurusinghe, J.

The Accused Appellant (the appellant) was indicted in the High Court of Moneragala for committing the murder of a child named Adeep Sanjeewa, an offence punishable under section 296 of the Penal Code.

Having pleaded not guilty to the charge, the appellant preferred to have the trial before the judge without a jury.

The Prosecution called seven witnesses, including a consultant judicial medical officer (JMO). The appellant testified for himself and called PW6 as a defence witness.

After trial, the learned High Court Judge found the appellant guilty as charged and sentenced him to death. The appellant preferred this appeal against the said conviction and sentence.

The grounds of appeal relied upon by the appellant are as follows:

1) The learned trial judge failed to consider the vital contradictions and omissions of PW1.

2) The learned trial judge erred in law when concluding that PW1 is a credible witness in light of the contradictions and omissions.

3) The learned trial judge failed to consider favourable evidence to the defence.

4) The learned trial judge erred in both facts and law by concluding that the medical evidence has been corroborated by the evidence of PW1.

The facts of this case are briefly as follows:

PW1, mother of the deceased, married the appellant when she was about 13 years of age. The deceased child was born in 2007, as a result of the said marriage between PW1 and the appellant. However, the appellant refused to admit the paternity of the deceased. The appellant worked as a mason. According to PW1, the appellant was an abusive husband who used to harass both PW1 and the deceased. At the time of the incident, the appellant, PW1 and the deceased were living close to the house which belonged to the mother of PW1.

PW1 giving evidence, stated that when the deceased was between the age of three to six months on a particular day, she had observed that the child was not able to move his hand. When questioned, the appellant had denied any knowledge as to what had happened to the child's hand. After that, the deceased had been given ayurvedic medical care.

On the 21st of October 2007, they returned from the house that belonged to the mother of PW1. When PW1 was preparing rice (බෙරිබතක්) for the child, at around 5.00 pm, she suddenly heard the deceased crying. The appellant demanded a plate of rice from PW1 and started to assault the child. When PW1 tried to save the deceased, the appellant assaulted PW1 on the head. Then the appellant held the child from both his thighs and dashed him on the wall. The deceased was semi-conscious and was unable to lift his head, and his eyes were half-closed. PW1 tried to breast feed the child but he was not able to grip onto the breast properly. Even though PW1 wanted to take the child to a doctor, the appellant did not allow her to do so, thinking that PW1 would reveal the incident. The appellant threatened PW1 that he would kill both PW1 and the deceased, if she divulged the incident to anyone. The next morning, as the condition of the deceased was aggravating, PW1 insisted on taking the deceased to a doctor. The appellant had then agreed on the promise that PW1 would tell the doctor that the child had a fall. They went to an Ayurvedic doctor who then directed them to go to the hospital. The deceased was admitted to the Moneragala hospital. On the same day, he was transferred to the Kandy Teaching Hospital, where the deceased was admitted to the Intensive Care Unit. As the appellant was also at the hospital with PW1, she was not able to reveal the actual incident to the doctors. The condition of the child started to deteriorate and he succumbed to the injuries three days after the incident. However, when the appellant left the hospital in order to find some money, PW1 revealed the incident to the doctor's prior to the death of the child. The hospital authorities then in turn informed the incident to the police. The consultant judicial officer who conducted the post mortem had noticed several injuries on the deceased child's body. The cause of death was craniocerebral injuries due to blunt force trauma. The doctor also observed a deformity (bending of the left arm bone) which was due to a greenstick fracture. This is

compatible with the history given by PW1, about a prior incident that had happened some time back.

The appellant's position is that the child had a fall when they were engaging in a fight, with the paramour of the mother-in-law, whom he had resisted. He further stated that he and the said paramour had fallen on the child.

I consider the first, second and third grounds of appeal together.

The first ground is that the learned trial judge has failed to consider the contradictions and omission of PW1. The defence had marked two contradictions. One is whether PW1 had revealed the incident that the accused had dashed the child's head on the wall before or after the death of the child. The trial judge considered these contradictions. It was to be noted that all the evidence was led before the same judge who delivered the judgment. The judge had the advantage of observing the demeanour and the deportment of each and every witness of the case. There is no doubt that PW1 had revealed the incident prior to the death of the child. She divulged the same to her mother at the Kandy hospital.

The second contradiction is whether the appellant had come to the hospital after the death of the child. PW1 stated in her evidence that she could not exactly remember whether the appellant had come after the death of the child. According to her recollection, she said that the appellant had not come after the death of the child. On the other hand, the appellant himself stated in his evidence that he did not go to the Kandy hospital after the death of the child, as he was arrested by the police.

The learned High Court Judge has considered two contradictions in her judgment and came to the conclusion that those two contradictions were not on the matters that go to the root of the case. These two contradictions have no bearing on the incident which eventually led to the death of the child. When

considering the evidence as a whole, the second contradiction is not a contradiction at all. The two contradictions were not affected to the basic version of the prosecution case. The defence had drawn attention to one omission which was not related to the incident that led to the death of the child.

In the case of *Barwada Bhoginbhai Hirjibhai V. State of Gujarat* AIR 1983 SC 753 wherein Indian Supreme Court held as follows:

"By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

By and large, people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation, and one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on"

In the case of *Wickramasinghe vs Dedoleena and others* *1996 2 Sri LR 95* *F.N.D.Jayasooriya J.* stated as follows:

"In the case of *Attorney-General v. Viswulingam*, Justice Cannon stressed that the trial judge should direct his mind specifically to the issue what contradictions are material and what contradictions are not material before he proceeds to discredit the testimony of a witness. Likewise, in State of Uttar Pradesh v. Anthony-" the important principle and rule of caution was laid down that a witness should not be disbelieved on account of trifling discrepancies and omissions. In a similar context, Justice Collin Thome in Jagathsena v. Bandaranaike, in considering the issue of contradictions inter se of the testimony of two witnesses, emphasized that the trial judge should probe the issue whether the discrepancy is due to dishonesty or defective memory or whether the witness's powers of observation were limited, This is particularly true where, after an abortive inquiry, the fresh inquiry is held after a protracted delay and lapse of time. Justice Collin Thome was pleased to remark on that occasion that in weighing the evidence, the trial judge should specifically take into consideration the demeanour of the witness in the box. The Inquiring Officer has had the benefit of such demeanour but certainly, the Appeal Court is not provided with that opportunity and, therefore, the Inquiring Officer's findings in regard to testimonial trustworthiness and credibility is entitled to much weight and consideration. Vide also the observations made by Justice Priyantha Perera in *Samaraweera v. The Republic*, where he has adopted and followed the observations and principles laid down in leading Indian decisions on contradictions and discrepancies in the evidence."

In the case of *Moonesinghe vs Vidanage 69 NLR 97* the Privy Council held as follows:

" If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." — per Viscount *Simon in Watt or Thomas v. Thomas* (1947 A. C. 484 at pp. 485-0).

In the case of *Alwis vs Piyasena Fernando 1993 1 Sri LR119,* His Lordship Justice *G. P. S.de Silva CJ* made the following observation:

"it is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal".

In this case, PW1 was only 15 years old at the time of the incident. Having considered the above-mentioned legal literature and the contradiction that had been brought to the notice of the court, I hold that those two contradictions and the omission do not go to the root of the case. Therefore, I find no reason to disagree with the findings of the trial judge, in this regard. For the

aforesaid reasons, the first, second and third grounds of appeal cannot be sustained.

The next argument is that the learned Trial Judge erred in both facts and law, by concluding that, the medical evidence has corroborated the evidence of PW1.

PW1 had narrated how the appellant had held the child by his thighs and dashed him on the wall, which resulted in a fatal head injury.

PW2 was a consultant Judicial Medical Officer with more than 30 years of experience. His qualifications, experience and expertise were admitted by the parties and recorded under section 421 of the Criminal Procedure Code as an admission. The doctor described the injuries that were on the body of the deceased. He described using a doll as to how the head injury could have been caused. He also noted the contusions on both thighs. The opinion of the doctor was exactly compatible with the evidence of PW1. The doctor noted that there was a healed greenstick fracture that corroborated the evidence of PW1 regarding a previous incident.

The position of the appellant was, that the child had fallen when they engaged in a fight with the paramour of the mother-in-law. When this version was confronted with the Judicial Medical Officer, the JMO categorically ruled out any possibility of causing the injuries in such a fall. The doctor's evidence, therefore, corroborates the evidence of PW1. The evidence of the JMO, also proved that the evidence of the appellant is not true.

The evidence of PW1 is credible and completely corroborated by the evidence of the JMO. Therefore, we find no reason to reject her evidence.

For the aforesaid reasons, we affirm the judgment dated 17th October 2017 and the sentence imposed upon the appellant.

The appeal of the appellant is dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal