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 (1) of the Code of Criminal Procedure Act No. 15 of 1979.

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

Court of Appeal Case No. HCC/385/19

Complainant

High Court of Tangalle Case No. THC/62/16

Vs.

Thotamune Patabadige Chathura Madusanka

Accused

AND NOW BETWEEN

Thotamune Patabadige Chathura Madusanka

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**
WICKUM A. KALUARACHCHI, J

COUNSEL : Shavindra Fernando, PC with Umayangi Indatissa and Natasha Wijesekara for the Accused-Appellant

Anoopa De Silva, DSG for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 28.04.2021 (On behalf of the Accused-Appellant)
28.10.2021 (On behalf of the Respondent)

ARGUED ON : 04.05.2022 and 05.05.2022

DECIDED ON : 31.05.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Tangalle on the charge that he committed the offence of murder on or about the 16th of January 2014, by causing the death of the infant Thinithi Sadithya Sasathmi which is an offence punishable under Section 296 of the Penal Code. After the trial, the learned High Court Judge convicted the appellant and imposed the death sentence. This appeal is preferred against the said conviction and sentence.

Written submissions on behalf of both parties have been filed prior to the hearing. At the hearing, the learned President's Counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions.

The facts of this case may be briefly summarized as follows:

The accused-appellant and the PW1 had lived together since 2011 and subsequently got married in the year 2012. PW1 had a baby girl namely Thinithi Sadithya Sasathmi. She was born on 26th April 2013. At the time of her birth, PW1 and the appellant had been living in PW1's house. The charge against the accused-appellant is the killing of this baby girl. During the time of this incident, PW1's 'loku Thaththa' (PW2) and her elder brother (Nuwan Sanjeewa) occupied the house with PW1. However, at the time of the incident, the appellant did not live in PW1's house with her because the police asked him to stay out of the house due to the constant fights between the PW1 and the appellant. So, the appellant stayed in his house and PW1 remained in her house with her baby. The appellant's house had been located within a distance of 20-25 minutes, if one proceeds on foot.

During the time of living separately, the appellant used to visit the baby at PW1's house daily. On the 15th of January 2014, the appellant had come up to the road in front of PW1's house around 8.15 p.m. in a motorbike when PW1 was just about to put her baby to sleep after returning from the temple. On seeing the appellant, according to PW1, she had requested PW2, her 'Bappa' to hand over the baby to the appellant thinking that he would return the baby as usual. PW1 says further in her evidence that she saw the appellant proceed with the baby in the direction where Anula (PW3) lived and she had thought that the appellant was taking the baby to Anula's house. Thereafter, PW1 received an SMS from the daughter of PW6 to the effect that the appellant had run upward with the baby. Then, PW1 had searched for the baby all over, not found and lodged a complaint to the Middeniya Police.

Around 12.15 – 12.20 in the night, the appellant had called PW1 and informed her to come to Thekkawatte to collect the baby. As it had been very late in the night, PW1 did not go but PW2 had gone

in search of the baby and returned crying, saying that the baby girl had been killed. On the following morning, PW1 had seen the dead body of the baby with her neck had almost been severed.

The JMO who performed the post-mortem examination on the body of the deceased baby was of the opinion that death was due to a fatal cut injury caused to the neck. The main artery that supplies blood to the brain has been cut and the head was almost severed from the neck. At the time of the death, the baby girl was only nine months old.

There are no eyewitnesses to the incident. The prosecution case relied on circumstantial evidence. Hence, the prosecution must prove that no one else other than the accused had the opportunity of committing the offence.

At the hearing of the appeal, the learned President's Counsel informed this court, after a very fair analysis, that he does not intend to point out defects or shortcomings in the judgment because the learned High Court Judge had considered all relevant aspects of the case. However, he invited this court to draw the attention to the fact, the impossibility of committing such a brutal murder by the accused-appellant who loved the baby girl so much. He submitted that the appellant constantly visited the baby even after he left the PW1's house on the instructions of the police. The learned President's Counsel also submitted that it was impossible to think that the appellant killed the baby, if he was in a proper state of mind. The learned President's Counsel further contended that it can be inferred in these circumstances that he was intoxicated or was not in a normal state of mind. Therefore, he urged to give the benefit of the doubt to the appellant.

It is to be noted that the defence of intoxication and the doubt creates on the improbability of committing the offence are two different situations. The learned President's Counsel admitted that if the defence

of intoxication is accepted, the appellant has to be convicted for culpable homicide not amounting to murder. However, if the argument of the improbability of committing this offence by the appellant is accepted, the appellant has to be acquitted.

When the accused-appellant gave evidence, he said that he consumed liquor heavily on that day. The said defence of intoxication would not succeed because of the contradiction marked X2, when cross-examining the appellant. Although he said in his evidence that he consumed liquor heavily on that day, contradiction marked X2 shows that he had told the police, when making a statement that he did not consume alcohol, since it was a Poya day. Due to this significant discrepancy between his testimony and his statement to the police, his evidence on intoxication is not credible and cannot be accepted. Furthermore, there is no other evidence to imply or establish that the appellant was so intoxicated that he couldn't understand what he was doing. Therefore, the defence of intoxication fails.

In reply to the argument that the appellant would not commit this offence, as he very much loved the baby, the learned Deputy Solicitor General contended that the appellant had never been a loving father because when the PW1 requested the appellant to return the baby as she wanted to nurse the baby and she found it difficult to wait without nursing the baby, the appellant had replied by asking PW1 to cut off her nipples. The said item of evidence given by the PW1 has never been challenged in cross-examination. Not only that, the unchallenged item of evidence of the PW1 reveals that when the baby was killed in the Thekkawatte, the appellant told PW1 to come to Thekkawatte and pick up the baby. Therefore, I agree with the contention of the learned DSG that the appellant does not appear to be a loving father to the baby. Hence, I hold that no reasonable doubt would be created on the basis that the appellant being a loving father would not commit this offence.

The learned President's Counsel also pointed out that the evidence of PW6 and PW1 is contradictory in respect of the SMS message sent by the daughter of the PW6. It is correct that PW6 has stated in her evidence that she saw a person running upward towards the Thekkawatte with a baby in his hands. She has also said that she could not identify the person. However, the PW1 says that she received an SMS message from the daughter of the PW6 that 'Chandika aiya (the appellant) ran upward with the baby'. I do not see any major discrepancy in these two versions because what PW6 told her daughter was that "මම දුවට කිව්වා පුතේ ළමයෙක් අරගෙන උඩහට දිව්වා කවුදෝ. චන්දික අයියාද දන්නේ නෑ. මාලිට කෝල් එකක් දීලා කියන්න කියලා." (Page 140 of the appeal brief) She has also said that "දිනේෂාට මාලි කියලත් කියනවා." Hence, it is apparent that although PW6 said in her evidence that she did not see the person, when she asked her daughter to send an SMS message to PW1, PW6 had mentioned about appellant's name. Consequently, the daughter of the PW6 conveyed the SMS to PW1 stating "චන්දික අයියා දරුවා අරගෙන උඩහා පැත්තට දිව්වා."

Anyhow, this contradiction is immaterial because the accused-appellant himself had told via mobile phone to PW1 to come to the water tank in the Thekkawatte to collect the baby and the said item of evidence has not been challenged. Thereafter, when PW2 went in search of the baby on request of the PW1, it was found that the nine-month baby has been killed. At least, there was no suggestion to the PW1 on behalf of the appellant that the appellant did not say so. Therefore, it clearly transpires that the appellant very well knew where the dead body of the baby was. But he did not say that the baby was dead, instead, he informed the PW1 to come to Thekkawatte to collect the baby. Although the learned President's Counsel for the appellant contended that the daughter of the PW6 was not called in evidence and mobile phone details were not produced in evidence, under these circumstances, there was no necessity to call the daughter of the PW6 in evidence or

submit the mobile phone details as evidence to establish the charge against the appellant.

The learned President's Counsel also contended that the learned High Court Judge has allowed to lead evidence regarding the bad character of the appellant by allowing to disclose about a rape case filed against the appellant in the Walasmulla Courts. (Pages 85 and 86 of the appeal brief) In dealing with this issue, it has to be considered the reason why PW1 had to disclose about this rape case. The question put to the PW1 in cross-examination is as follows:

මාල දීලා, මෝටර් සයිකල් දීලා, සල්ලි දීලා ඒත් තමුන් එක්ක රණ්ඩු කරනවා ඇයි ඒ එයා අඩදබර වෙන්නේ?

The answer given by the PW1 was "මෙයාට රේප් කේස් එකකුත් තිබුනා වලස්මුල්ල උසාවියේ. ඒවාට තමයි, සෑහෙන ගෑනු ප්‍රශ්ණත් තිබුනා.

It clearly appears that the reason for disclosing this rape case was to explain the reason for having quarrels with the appellant. Section 54 of the Evidence Ordinance prohibits leading evidence regarding the bad character of the accused in Criminal Proceedings. However, Section 9 of the Evidence Ordinance states that "facts necessary to explain or introduce a fact in issue or relevant facts are relevant ……. in so far as they are necessary for that purpose." This is the fact necessary to explain a relevant fact to the case. Without disclosing about this rape case, PW1 has no way to explain why there were quarrels between her and the appellant.

Anyhow, the instant action is a murder case and the disclosure of the said rape case filed against the appellant did not cause any prejudice to the appellant in deciding this case because the learned High Court Judge has never considered the said evidence of bad character of the appellant in determining this action. Especially, as this is a case based on circumstantial evidence, considering his bad character or good character was not relevant at all in deciding the case. In addition, it is

to be noted that it was held in the case of Arumugam alias Podithambi V. Range Forest Officer – (1986) 2 Sri L.R. 398 that "where evidence of bad characters is given in a trial, it is not fatal to a conviction by a judge (without a jury) if there is evidence to convict the accused and the judge is not influenced by the evidence of bad character." In the instant action, the learned trial judge has never been influenced by the evidence of the bad character of the accused-appellant in any manner. Therefore, I hold that the said evidence regarding the rape case was necessary to answer the said question posed to the PW1 and no prejudice has been caused to the appellant by allowing the said item of evidence to be led.

The learned President's Counsel for the appellant advanced another argument that the learned High Court Judge has pre-judged the case and remanded the appellant in the middle of the trial. (Pages 127 and 128 of the appeal brief) Apparently, the learned trial judge remanded the appellant acting on section 263 of the Code of Criminal Procedure Act and decided to take up the trial continuously and conclude. I am of the view that the said order made on 26.02.2019 is lawful and in accordance with section 263 because the explanation to the section 263 of the Code of Criminal Procedure Act states that "*if sufficient evidence has been obtained to raise a reasonable suspicion that the accused may have committed an offence and it is likely that further evidence will be obtained by a remand, this is a reasonable cause for a remand.*" Also, I am of the view that this is not a pre-determination of the case because the said explanation states that if there is a reasonable suspicion that the accused may have committed an offence, the accused could be remanded. So, this is not a determination that the accused-appellant has committed the offence but making an order in terms of a legal provision on a reasonable suspicion raised by the evidence that led up to that point that the accused may have committed the offence. Hence, I regret to state that the said argument of pre-judging the case by the order dated 26.02.2019 has no merit.

In the circumstances, I find no sustainable argument in respect of this appeal to be considered by this court. Undisputedly, this is a case based on circumstantial evidence. As decided in the cases of Junaiden Mohamed Haaris Vs. Hon. Attorney General – SC Appeal 118/17, decided 09.11.2017, King Vs. Abyewickrama – 44 NLR 254, King Vs. Appuhamy – 46 NLR 128, and Don Sunny Vs. Attorney General (Amarapala murder case) – (1998) 2 Sri L.R. 1, it was held that "it was incumbent on the prosecution to establish that the circumstances the prosecution relied on, are consistent only with the guilt of the accused-appellant and not with any other hypothesis".

The appellant admits the fact that he had taken the baby from the custody of the PW1 on the day in question. After the baby had been taken by the appellant, she was killed. Since she was a nine-month-old baby, no one can say that she ran over or escaped from his custody. So, if he had not handed over the baby to PW1, PW2, or any other person, he would be responsible for the death of the baby because the baby was in his custody. If he says that he is not responsible, at least he should know what happened to the baby because it was entirely within his knowledge.

In Jagath Premawardena V. Attorney General – C.A. Appeal 173/2005, decided on 19.03.2009, it was held that "*when considering the evidence, there was no evidence either direct or circumstantial or no clue about an indication of a third party. The only irresistible inference that one can be drawn is that only the appellant and the appellant alone was involved in commission of the crime.*" In the instant action also, there was no iota of evidence about the involvement of a third party. Even the learned President's Counsel for the appellant did not raise an argument regarding a third party involvement. Undisputedly, the appellant took the baby from the custody of the PW1 on the day in question. If he had not handed over the baby back, the only inference that could be drawn is that the appellant committed the murder.

The appellant's explanation and the defence taken by the appellant was that he handed over the baby back to the PW2 when an unknown person had rushed out of PW1's house with a manna knife.

PW2 has given evidence in this case. It is vital to be stated that no single question has been asked from the PW2 to the effect that the appellant had handed over the baby to him. It must also be noted that even a single suggestion has not been made to the PW2 to that effect on behalf of the appellant.

An observation of the Indian judgment of Sarvan Singh V. State of Punjab – (2002 AIR SC (iii) 3652 at 3655 and 3656) has been cited in the case of Ratnayake Mudiyanselage Premachandra V. The Hon. Attorney General – C.A. Case No. 79/2011, decided on 04.04.2017 as follows: "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination, it must follow that the evidence tendered on that issue ought to be accepted. In Himachal Pradesh V. Thakur Dass – (1983) 2 Cri. L. J. 1694 at 1701, Chief Justice V.D. Misra held that "whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed. In addition, in the case of Motilal V. State of Madhya Pradesh reported in (1990) Criminal Law Journal NOC 125 MP, it was held that "Absence of cross-examination of prosecution witness of certain facts leads to an inference of admission of that fact. In view of the aforesaid judicial authorities, the appellant who has never put his defence of handing over the baby to the PW2 during the prosecution case, especially when the PW2 was cross-examined, cannot formulate that defence later at the stage of defence case.

Not only that, the following question was put to the PW2 on behalf of the appellant in cross-examination.

ප්‍ර: මෙදා රාත්‍රී තමයි මේ දරුවා ගෙනැල්ලා දුන්නේ නැත්තේ?

It is apparent from this question that the fact of not handing over the baby on that particular night by the appellant has not been disputed by the appellant. Therefore, under any circumstances, the appellant cannot take up the position at the end of the case that the baby was handed over to the PW2. Therefore, necessarily the said position taken up at the end of the case, when the accused-appellant was giving evidence could not be believed and had to be rejected. Then the circumstantial evidence led in this case invites to come to the only conclusion that no one else but the appellant has committed the murder of the baby girl.

Apart from that, the unchallenged evidence that the appellant called PW1 and told her to come to the water tank in the Thekkawatte to collect the baby is also a significant item of circumstantial evidence. This is the place where the dead body of the baby was found. When the PW2 went to take back the baby on the said request made by the appellant, he found that the baby had been killed. The said items of evidence have never been challenged on behalf of the appellant. So, knowingly that the baby was killed, the appellant asked the mother, PW1 to come to Thekkawatte and collect the baby. The learned High Court Judge has carefully evaluated and extensively dealt with all these relevant circumstances in his well-considered judgment and correctly concluded that the accused-appellant has killed the baby girl.

For the foregoing reasons and the reasons stated by the learned High Court Judge in his judgment, I hold that the proved items of circumstantial evidence are consistent with the guilt of the appellant and inconsistent with his innocence.

Therefore, I affirm the judgment dated 30.10.2019, conviction, and the sentence imposed on the accused-appellant.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL