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.

Court of Appeal
CA HCC-145-148/2015

HC Panadura
Case No. HC 2266/2006

Hon. Attorney General
Attorney General's Department
Colombo 12

Complainant

Vs

1. Lokukawadihennadige Roshan De Silva
2. Mudiyanselage Jayasena
3. Sinhala Virudawalage Deepathi Shantha

Accused

And

1. Lokukawadihennadige Roshan De Silva
2. Mudiyanselage Jayasena
3. Sinhala Virudawalage Deepathi Shantha

Accused-Appellant

VS

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

Respondent

And Now

In the matter of an application under and in terms of the section 358 (1) and (2) of the Code of Criminal Procedure Act No: 15 of 1979 in respect of the conviction of the 1st Accused-Appellant who is now deceased.

Renuka Damayanthi Kalukeerthi,
No. 409A
Nanda De Silva Mawatha
Kuruna, Katunayake

Petitioner

VS

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

Complainant -Respondent

Before : N. Bandula Karunarathna J. (P/CA)

R. Gurusinghe J.

&

K.K.A.V. Swarnadhipathi J.

Counsel : Saliya Pieris, PC with
Pasindu Tilakarathne AAL and Savinda Jayawardena
For the 1st Accused Appellant.

Dileepa Peiris SDSG for the Hon. Attorney General

Argued on : 25.10.2023

Decided on : 14.11.2023

R. Gurusinghe, J.

I have had the advantage of reading the draft judgment of His Lordship Justice Karunaratne, the President of the Court of Appeal, and I respectfully express a divergence of opinion with him. I deem it superfluous to reiterate all the details of this case, as they are comprehensively elucidated in the judgment of Justice Karunaratne. Nevertheless, I shall recount the essential facts to elucidate my reservation.

The individual allegedly killed by the accused in this case was Porage Janinda Kalana Kumara Perera, a sixteen-year-old boy at the time of his death. PW1 and PW2 are the father and mother of the deceased, respectively.

PW2 was taken into custody by the Horana Police on the 7th of November 1989. PW1, a retired police officer visited the Horana Police Station to inquire about his wife's detainment. Then, the Officer-in-Charge of the station, I.P. Linton informed him that his wife would be released if he surrendered his son, Janinda Kalana Kumara Perera. PW1 inquired as to why the police wanted his son. I.P. Linton said that after recording a statement of the son, he would be released. PW1 met the Superintendent of police, Mahinda Hettiarachchi the next day. Following SP Hettiarachchi's advice, PW1 handed over the deceased to I.P. Linton of the Horona police station on the 10th of November 1989. Neither PW1 nor the deceased were informed of any charges against the deceased. The deceased was kept in the custody of the Horana police station, where he was subject to physical assaults from certain police officers during that period. Around December 7, 1989, upon visiting the Horana Police Station, PW2 discovered that her son had been transferred to the Panadura Police Station. Upon arriving at the Assistant Superintendent's office in Panadura Police Station, PW1 met ASP Ariyapala, and ASP instructed a police

constable to show the deceased to PW1. Even at that time, the police had not communicated any allegations against the deceased to PW1 or the deceased.

I refrain from detailing the entirety of the events that happened at the Panadura police station.

The deceased had been kept in a special anti-subversive unit in the Panadura police for nearly three months. As per the evidence of PW 1 and PW 2, the deceased had been tortured physically and mentally. He had also been interrogated extensively by the police officers attached to the special subversive unit. PW 1 and PW2 had visited their son almost every day.

On the 15th of January 1990, PW1 and PW2 had come to see their son, the deceased. They gave lunch and dinner to the deceased and left Panadura around 1.30 p.m.

On 16 January 1990, when PW1 returned home, PW2 informed him that her son had been murdered. PW1 then visited the Panadura police station where the deceased was detained, seeking information as to where his son was. However, the police officers remained unresponsive to PW's inquiry. The deceased was not there. PW1, being a police officer familiar with police station procedures, examined the duty roster. Subsequently, he got to know that the deceased had been transferred to the Ingiriya Police. It was only then PW1 discovered that his son's dead body had been handed over to the Ingiriya Hospital. Upon reaching the hospital, PW1 found that the deceased had sustained gunshot wounds and had been taken away to the hospital's mortuary. The police later took custody of the body.

Later, PW1 found a half-burnt body of his son near the Bope school. PW1 informed his wife and the other two children, and they took the half-burnt body of the deceased to the Bope cemetery and buried the remains of the deceased there.

The prosecution proved by the police documents and witnesses that the deceased was handed over to the first accused at 10.40 pm on the 15th of January 1990. The identification of the accused was not at issue. The police team that took the deceased was led by the first accused and consisted of the second and third accused and PW6, the driver of the police vehicle.

The first, second, and third accused took the deceased to the vehicle, driven by PW6 to Ingiriya, from the Panadura police station.

The position of the accused is that the deceased had told the first accused that he was aware of the location where a cache of weapons was hidden. It was in the Elabada area near Gamini Vidyalaya in Ingiriya. They arrived at that location around midnight. The three accused got down, and the deceased was made to lead the way. PW6 remained in the jeep.

As per the evidence of the appellants, the second accused and the deceased led the way with the first accused positioned next to the second accused. The third accused followed the first accused. The first accused was armed with a pistol, while the second and the third accused held 84S assault rifles. After advancing approximately 150 to 200 meters along the Alabada road, the deceased attempted to seize the aperture (or the peep sight) of the gun held by the second accused, resulting in both of them falling, and the gun discharging accidentally. The defense case is that the deceased's death was an accident and the death was not due to any intentional act on the part of the accused. This is the explanation provided by the accused.

On behalf of the first accused-appellant, it was submitted as follows:

"there was no evidence presented by the prosecution that would call for any explanation from the accused because it is regarded as an accident only. In other words, the period between the time they set off with the deceased to the time they returned back with the injured deceased, they possess exclusive

knowledge. Whatever, outside the scope of 'exclusive knowledge', as of the settled law in Sri Lanka, is up for the prosecution to prove beyond reasonable doubt."

It is true that the prosecution bears the burden of proving the case against the accused-appellant beyond reasonable doubt. Specifically, the prosecution must prove that the appellant had the intention to kill the deceased.

In situations where an individual is alleged to have died in police custody, obtaining independent evidence becomes challenging.

If we take the incident as described by the appellant in isolation, their explanation seems to be sufficient to create a reasonable doubt that the gun went off by accident.

The intention of the accused must be inferred by considering the entire evidence of this case. The appellant conceded that the deceased succumbed to a gunshot discharged from the rifle held by the second accused. The first accused was right behind the second accused as per the evidence of the defence.

The deceased was taken into police custody on the 10th of November 1989. He was physically and mentally tortured and interrogated extensively throughout the period until he was handed over to the first accused. The officers in a particular anti-subversive unit were trained to investigate and interrogate. Those specially trained police officers with all their expertise in the investigation and interrogations regarding subversion or terrorism, having tortured the deceased and investigated nearly for three months, had found no incriminating evidence against the deceased. A question arises as to whether it was possible for this 16-year-old boy to bear the torture for more than two months without disclosing the information about hidden weapons.

The special unit officers seem incompetent compared to the skill of the first accused, in swiftly extracting information about the hidden weapons from the suspect within a few minutes of interrogation. I do not think any reasonable man would believe the appellants' story. Notably, no 'B' report or 'A' report was filed in any court in Sri Lanka against the deceased.

The first accused had been instructed to bring the deceased to the Ingiriya police station. The trained officers in an anti-subversive unit, investigating for about three months, had not found any evidence as to weapons or any involvement of the deceased in any subversive activities. However, the position of the first accused was that the deceased had disclosed a weapon cache within half an hour after taking into custody of the first accused, implying exceptional investigative skills on the part of the first accused. If this is true, the first accused should have been a genius. Yet, there is no evidence at all to support the notion that the first accused was an extraordinary investigator. The narrative of the hidden weapons, in my view, is a fabricated story to hide the alleged cold-blooded murder of the child. No weapons were found by the accused or the police even after the death of the deceased. If the deceased was a member of a subversive group, it is improbable that the weapons would remain in the same location over three months. There was no urgency for the accused to search for weapons on the same day, in the night. They could have gone there in the daytime of the following day. It was not even a place close to the deceased's house. The learned High Court Judge has rightly rejected this evidence.

There was no evidence suggesting that the deceased had received any training to operate a firearm. Additionally, there is no evidence to show that the appellant or any police officer had arrested individuals suspected of engaging in any subversive or criminal activities with the deceased.

The second accused evaded to answer on how the safety lock in the Gun was released or how exactly the deceased was shot. The appellant's position is that

the deceased had held the aperture of the gun. If this is believed, the grip, trigger, and safety lock were all on the side of the second accused, as per the evidence of the second accused. Notably, all three accused were in their mid-twenties, whereas the deceased was only a sixteen-year-old boy who was physically weak, as he had been subject to torture during the three-month period. All three accused had semi-automatic guns in their hands. It is unbelievable that the physically weakened deceased, who was aware of two armed officers directly behind him, would attempt to seize one of the guns by holding the muzzle directly against his chest. The PMR indicates that the bullet penetrated the middle of the deceased's chest and was fired from a very close distance. The circumstances strongly suggest that the appellants' entire narrative is a deliberate act to cause the death of the deceased and escape liability.

The second and third appellants withdrew their appeals and underwent the punishment imposed by the High Court. The first accused was on bail and died during the pendency of the appeal. Now, the appeal is prosecuted by the wife of the first accused.

The appellants were not able to arrest or at least name any other person alleged to have engaged in any subversive activities with the deceased. The appellant's position is that the deceased was involved in collecting weapons and identity cards and participated in protests. There was no iota of evidence to support this claim. The police have not initiated any sort of proceedings against the deceased in any court in Sri Lanka. At least a 'B' report or 'A' report has not been filed.

The appellant contends that the deceased was not handcuffed. There was no reason for the appellants to take the deceased without being handcuffed. In the evidence, the appellant's senior officer stated that all the officers were instructed to handcuff the suspects when they were taken out. It is improbable that the accused was permitted to escort the suspect from the Panadura Police

station without handcuffs. The first accused said in his evidence that there was no entry in the books whether the deceased was handcuffed, but claimed from his recollection that the deceased was not handcuffed. I believe that the appellants' position that they did not handcuff the deceased is also a fabrication in order to support their made-up story.

(evidence of PW24 page 367)

None of the appellants sustained any injuries. If there was a struggle, it could be expected that the second accused, at the very least, would have sustained some minor injuries.

My brother has cited the case of Dionis vs. The King 52 NLR 547 as identical facts to the instant case. The facts as given in the headnote read as thus;

> *"the appellant was convicted of murder by shooting. He submitted at the trial that the death was caused by the discharge of a gun that was in his hands but he stated that the gun went off in consequence of an attempt made by another man to wrest it from him. The trial judge directed the jury that the question whether the gun was discharged by the appellant deliberately or whether it went off accidentally must be decided upon a balance of probability and that the burden of proof on that issue lay on the appellant."*

It is to be noted that it was a jury trial. The Supreme Court did not acquit the appellant and ordered a re-trial.

In the case of *Ratnayake Tharanga Lakmali vs Niroshan Abeykoon* and others SCFR application 577/2010 decided on 30.09.2019 Justice S. Thurairajah, PC stated as follows:

"In light of the aforesaid circumstances, the 1st Respondent has failed to satisfactorily explain why the deceased was taken out at night without handcuffs with only three officers and the driver, in a faulty van without a door.

Section 8 (b) of the Police Department Standing Order A20 (Rules with regard to Persons in Custody of the Police) requires police officers to provide sufficient security where there is a possibility that the suspect might escape or become hostile. Section 8(I) stipulates that 'A person in Police custody will not be sent out for further inquiry from the Station except for some very good reason and then only under an escort sufficient to ensure his safe custody.' It is evident that the 1st to the 4th Respondents have acted in complete disregard of the said standing orders."

The above observation exactly fits into the circumstances of this case as well.

The explanation provided by the appellant lacks credibility when considering the overall context of the matter. The evidence of the appellant cannot be accepted as truthful. Almost all the police officers called by the prosecution tried, wherever possible, to support the appellants. In a case, especially cases of deaths in police custody where there is no direct evidence available, courts are required to adopt a realistic approach rather than a narrow technical approach.

The appellant tried to say that soon after the deceased received the gunshot injury, the appellant rushed him to the hospital. The bullet had entered from the front of the chest, penetrated through the left lung, and exited through the posterior chest wall. This was necessarily fatal as per the evidence of the doctor. The appellants had not taken the deceased alive to the hospital. In my perspective, they were fully aware that the deceased had already died. The appellants' evidence in this regard was rightly disbelieved by the learned Trial Judge.

The appellants were never able to attribute any particular crime against the deceased child. No evidence was produced except by word of mouth of the accused. No case was filed in any jurisdiction. None of the police officers who gave evidence for the prosecution, though they attempted to support the

appellants, were able to show from any information book maintained by the police an entry regarding the location of hidden weapons. Even if all allegations levelled against the deceased by the accused were true, the accused had no whatsoever right in law to execute the deceased.

In the case of *Gauri Shanker Sharma etc. v. State of U.P. etc., AIR 1990 SC 709*, the Supreme Court of India held:

"....it is generally difficult in cases of deaths in police custody to secure evidence against the policemen responsible for resorting to third-degree methods since they are in charge of police station records which they do not find difficult to manipulate as in this case.

.....The offence is of a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizens and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. It must be curbed with a heavy hand. The punishment should be such as would deter others from indulging in such behaviour. There can be no room for leniency."

In *State of U.P. V. S. Trivedi [1995 KHC 484],* the Supreme Court of India held in paragraph 18 of the judgment as follows:

"The courts are also required to have a change in their outlook and attitude, particularly in cases involving custodial trials and they should exhibit more sensitivity and adopt a realistic rather than a narrow technical approach, while dealing with the cases of custodial crimes so that as far as possible, within their powers, the guilty should not escape so that the victim of the crime has the satisfaction that ultimately the Majesty of Law has prevailed."

In Munshi Singh Gautam & others V. State of M.P. [AIR 2005 SC 402], the Supreme Court held that peculiar type of cases must be looked at from a prism

different from that used for ordinary criminal cases for the reason that in a case where the person is alleged to have died in police custody, it is difficult to get any kind of evidence. The Supreme Court observed as under: "6. Rarely in cases of police torture or custodial death, direct ocular evidence is available of the complicity of the police personnel, who alone can only explain the circumstances in which a person in their custody had died. Bound as they are by the ties of brotherhood, it is not unknown that police Crl.A.No.1267/2014 personnel prefer to remain silent and, more often than not, even pervert the truth to save their colleagues.....

The exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt by the prosecution, at times even when the prosecuting agencies are themselves fixed in the dock, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case, ...often results in miscarriage of justice and makes the justice-delivery system suspect and vulnerable. In the ultimate analysis society suffers and a criminal gets encouraged.....The courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilised society governed by the rule of law and poses a serious threat to an orderly civilised society. Torture in custody flouts the basic rights of the citizens recognised by the Indian Constitution and is an affront to human dignity. Police excesses and the maltreatment of detainees/undertrial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in "khaki" to consider themselves to be above the law and sometimes even to become a law unto themselves. Unless stern measures are taken to check the malady of Crl.A.No.1267/2014 the very fence eating the crop, the foundations of the criminal justice-delivery system would be shaken and civilisation itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism. The courts must, therefore, deal with such cases in a realistic manner and with the sensitivity which they deserve, otherwise the common man may

tend to gradually lose faith in the efficacy of the system of the judiciary itself, which if it happens, will be a sad day, for anyone to reckon with."

In the case of *State Of Madhya Pradesh vs Shyamsunder Trivedi And Ors* decided on 9 May 1995, the Supreme Court of India held as follows:-

"Tortures in police custody, which of late are on the increase, receive encouragement by this type of unrealistic approach of the Courts because it reinforces the belief in the mind of the police that no harm would come to them if an odd prisoner dies in the lock-up, because there would hardly be any evidence available to the prosecution to directly implicate them with the torture. The Courts must not lose sight of the fact that death in police custody is perhaps one of the worst kinds of crime in a civilized society, governed by the rule of law and poses a serious threat to an orderly civilized society."

In this case, the prosecution proved the fact that the deceased was handed over to the accused and within hours the deceased was killed by gunshot injuries. In the period between the times they set off with the deceased and the time they returned with the injured deceased, they must have possessed exclusive knowledge.

The prosecution has succeeded in proving facts from which a reasonable inference can be drawn that the accused had shot and killed the deceased unless the accused, by virtue of their special knowledge, proves such facts, which might drive the Court to draw a different inference. The evidence of the appellant lacks credibility, especially when considering their actions in the matter.

In the case of *State of West Bengal v. Mir Mohammad Omar & Ors. etc., AIR 2000 SC 2988,* the Supreme Court of India held that,

“if a fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It is impossible for prosecution to prove certain facts

particularly within the knowledge of accused. Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 of the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

In the case of *Vithanalage Anura Thushara De Mel and others vs Attorney General, Supreme Court Case No: SC/TAB/2A – D/2017 (Duminda Silva case)* a Divisional Bench of the Supreme Court stated as follows regarding whether there was an unlawful assembly.

"During the Appeal, it was contended on behalf of the 11th Accused that on account of the near-fatal injuries he received, the 11th Accused withdrew and ceased to be a member of the Unlawful Assembly before the final act of shooting took place and therefore cannot be held liable for the offence of murder. The 11th Accused, having suffered damage first, was unaware of what transpired afterwards. His physical presence at the scene was no physical presence as he was unconscious. It was contended that the 11th accused ceased to be a member of the unlawful assembly almost immediately as he suffered injuries to his head.

In same vein it was also argued that the act of shooting was unforeseen as it was brought about by the sudden altercation that took place between the parties. This altercation, according to the defence was a supervening incident which fundamentally altered the course of events which took place thereafter. The Prosecution is required to establish that there existed an unlawful assembly with the common object averred in count1 of the Indictment. The question of

whether the 11th Accused was a member of the unlawful assembly or not at the time of the shooting occurred needs to be considered only if the Court comes to a finding that there existed an unlawful assembly. While inference as to the common object of the unlawful assembly can be gathered from the nature of the assembly, arms used and the behavior of the assembly at or before the scene of occurrence, the prosecution will not succeed in discharging its burden by simply demonstrating circumstances which align with the common object. Conversely, it is their burden to not only establish the common object but also prove that the existence of common object is the only conclusion consistent with the facts and circumstances existed at that point.

In my view, it would be artificial to focus exclusively only on the events that took place concerning the group led by the 11th Accused and the entourage of the deceased Baratha Lakshman Premachandra. This last scene must be examined in the background of all the peripheral events that took place throughout the day, a day on which local government elections were held and at a time voting was taking place." (Emphasis is mine)

If one takes the shooting incident in isolation, there can be doubt as to whether the shooting was intentional or accidental. As pointed out in the last-mentioned judgment, the last scene must be examined in the background of all the peripheral events that took place throughout the day. When the entire evidence of the case is considered, I have no doubt that the accused had intentionally planned to kill the deceased and concocted a story to evade liability.

Learned President's Counsel for the appellant pointing to certain parts of the judgment submitted that those parts of the judgment were wrong. Any error in the judgment itself does not make the judgment invalid unless such error, defect or irregularity has prejudiced the substantial rights of the parties or occasioned a failure of justice.

In the case of *Hiniduma Dahanayakage Siripala alias Kiri Mahaththaya and others vs Hon.Attorney General SC Appeal No.115/2014 decided on/01/2020* the Supreme Court stated as follows;

"The threshold to be satisfied to obtain relief from the Court of Appeal in Appeals;

21. With the promulgation of the 1978 Constitution, if relief is to be obtained in an appeal, a party must satisfy the threshold requirement laid down in the ***proviso to Article 138(1)****, which is placed under the heading "The Court of Appeal". The proviso to the said Article of the Constitution lays down that,*

> ***"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice". (Emphasis is mine.)***

22. The proviso aforesaid is couched in mandatory terms and the burden is on the party seeking relief to satisfy the court that the impugned error, defect or irregularity has either prejudiced the substantial rights of the parties or has occasioned a failure of justice. It must be observed that no such Constitutional provision is to be found either in the '1948 Soulbury Constitution' or the 'First Republican Constitution of 1972'.

23. The Constitutional provision embodied in Article 138(1) cannot be overlooked and must be given effect to. None of the decisions (made after 1978) relied upon by the Appellants with regard to the issue that this court is now called upon to decide, appear to have considered the constitutional provision in the proviso to Article 138(1). It is a well-established canon of interpretation, that the Constitution overrides a statute as the grundnorm. All statutes must be construed in line with the highest law. Judges from time immemorial have in their limited capacity, essayed to fill the gaps whenever it occurred to them, in

keeping with the contemporary times, in statutes which do not align with the Constitution. However, such interpretations are not words etched in stone."

I am of the view that when the evidence is considered as a whole, it is sufficient to justify the conviction. Therefore, the errors pointed out by the learned President's Counsel for the appellant do not warrant reversal of the judgment.

In the case of *Munshi Singh Gautam & others V. State of M.P. [AIR 2005 SC 402],* Arijit Pasayat, Judge of the Supreme Court of India, recited the following, which is very relevant to the case in hand as well.

> *"If you once forfeit the confidence of our fellow citizens, you can never regain their respect and esteem. It is true that you can fool all the people some of the time, and some of the people all the time, but you cannot fool all the people all the time", said Abraham Lincoln. This Court in Raghubir Singh v. State of Haryana (AIR 1980 SC 1087) and Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Another (2003 (7) SCC 749), took note of these immortal observations while deprecating custodial torture by the police."*

The Learned Trial Judge should have convicted all the accused of the charge of murder. However, the 2nd and 3rd accused have already completed the jail term imposed on them. The 1st accused-appellant was on bail pending appeal and had died. As such I do not propose to change the verdict.

For the reasons set out above, the appeal is dismissed.

Judge of the Court of Appeal