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.

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

Court of Appeal Case No.
CA/HCC/0267/2016

Complainant

High Court of Chilaw
Case No. HC/35/2011

Vs.

Warnakulasooriya Arachchilage Anil Priyankara.

Accused

AND NOW BETWEEN

Warnakulasooriya Arachchilage Anil Priyankara.

Accused-Appellant

Vs.

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

Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Yalith Wijesundera for the Accused Appellant.
Rohantha Abeysuriya, ASG for the Respondent.

ARGUED ON : 03.07.2024

DECIDED ON : 23.07.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Chilaw in terms of Section 296 of the Penal Code for causing the death of Warnakulasooriya Julian Calistus and in terms of Section 300 of the Penal Code for attempting to cause the death of Makalage Kanthimala Peiris.

After trial, the accused-appellant was convicted of both counts by the Judgement dated 07.12.2016 and he was sentenced to death for the first count of murder and sentenced him to 15 years of rigorous imprisonment and a fine of Rs.7500/- with a default sentence of six months imprisonment for the second count of attempt to murder.

At the hearing of the appeal, the learned Counsel for the appellant raised only one legal issue regarding the death sentence imposed by the learned High Court Judge. The learned Counsel informed that he is not contesting the convictions or the sentence imposed to the offence of attempt to murder.

The learned Counsel for the appellant contended that the accused-appellant was 17 years old at the time of committing the offence and according to Section 53 of the Penal Code, a sentence of death cannot be pronounced against the accused-appellant, as he was 17 years of age at the time of committing the offence of murder. Therefore, the only legal issue that has to be considered in this appeal is whether the accused-appellant who was at the age of 17 years at the time of committing the offence could be sentenced to death for the offence of murder.

The learned Additional Solicitor General (ASG) appearing for the respondent contended that there was no proof that the accused-appellant was 17 years at the time of committing the offence. It is correct that there was no proof regarding the age of the accused-appellant at the time of committing the offence. However, in his dock statement, the accused-appellant has stated that his date of birth is 21st of June 1990 and he was 17 years old at the time of the incident. The accused-appellant was convicted and he was sentenced to death on 07th of December 2016. On his own admission, if the appellant was born in 1990, he was about 26 years at the time that the death sentence was pronounced against him in 2016. Prior to the No. 50 of 1980 amendment to the Penal Code, Section 53 was as follows:

> *Sentence of death shall not be pronounced on or recorded against any person who, in the opinion of the court, is under the age of* ***sixteen years****; but, in lieu of that punishment, the court shall sentence such*

person to be detained during the President's pleasure. (Emphasis added)

However, as the accused-appellant was indicted for offences committed in 2007, Section 53 of the Penal Code as amended by the Act No.50 of 1980 is applicable.

Section 53 of the Penal Code as amended by the Act No.50 of 1980 reads as follows:

Sentence of death shall not be pronounced on or recorded against any person who, in the opinion of the court, is under the age of ***eighteen years****; but, in lieu of that punishment, the court shall sentence such person to be detained during the President's pleasure.* (Emphasis added)

According to this amendment, sentence of death shall not be pronounced on or recorded against any person who is under the age of 18 years. The contention of the learned Counsel for the appellant was that this age limit should be considered applicable to the time of committing the offence. He contended that since the accused-appellant was 17 years at the time of committing the offence, the death sentence cannot be imposed on him. The learned ASG contended that the age limit should be considered applicable to the time of sentencing and not the time of committing the offence.

In substantiating his argument, the learned Counsel for the appellant submitted the case of ***Ponnambalam Koneshwaran V. The Honourable Attorney General***- CA No. 85/2010 decided on 18th November 2016. The learned ASG submitted the case of ***Kodituwakkulage Pradeep Samantha alias Fredie V. The Hon. Attorney General*** - SC Appeal No.139/2014 - Decided on: 21.11.2018 and contended that the Supreme

Court has taken a contrary view and decided that the age limit of 18 years has to be considered at the time of sentencing the accused-appellant.

In the aforesaid Court of Appeal Judgment cited by the learned Counsel for the appellant, it had been held that according to Section 53 of the Penal Code as amended by Act No. 50 of 1980, a person below the age of eighteen cannot be sentenced to death. The said observation is perfectly correct. However, in the said case, the sentence of death has been set aside because the accused-appellant was 16 years of age at the time of committing the offence. With all due respect I state that I am unable to agree with that finding because it is clear from Section 53 of the Penal Code that the age limit of 18 years should be considered at the time of sentencing the accused-appellant and not the time of committing the offence. This legal issue has been extensively dealt with in the aforesaid case of ***Kodituwakkulage Pradeep Samantha alias Fredie V. The Hon. Attorney General*** and it was decided that what is relevant is the age of the offender at the point of imposition of the sentence and not at the point of the commission of the offence.

In the case of ***Kodituwakkulage Pradeep Samantha alias Fredie V. The Hon. Attorney General***, the Supreme Court granted special leave to appeal on two questions of law. The first question of law is as follows: *Was the death sentence imposed by the learned trial judge contrary to the provisions of Section 281 of the Code of Criminal Procedure Act as amended by Act No.52 of 1980 read with Section 53 of the Penal Code.*

In this case, the accused-appellant was 23 years at the time the sentence was imposed, and he was 16 years and a few months when the offence was committed. It was the contention of the learned counsel for the accused -appellant that the reference made to the 'age of the person convicted' in Sections 281 of the Criminal Procedure Code and Section 53

of the Penal Code, is the age of the accused at the time the offence was committed.

The Supreme Court held as follows: "*Section 53 of the penal Code to my mind is without any ambiguity as it clearly states that: sentence of death shall not be pronounced on any person who is under 18 years of age, thus* ***what is relevant is the age of the offender at the point of imposition of the sentence and not at the point of the commission of the offence.*** *As such, I see no impediment for the learned High Court Judge to have imposed the death sentence and in that context the learned High Court Judge cannot be said to have erred."*

It was further held as follows: "*On the other hand, in the absence of any ambiguity, this court cannot go beyond the literal construction of the statutory provision, which is the primary rule of interpretation. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and on natural meaning of the words and sentences. (Per Lord Fitzgerald in the case of Bradlaugh v. Clerk 1883 8 App. cases 354.) The rule of construction is "to intend, the legislature to have meant what they have actually expressed." R v. Banbury (Inhabitants) 1834 1A and E 136 per Park J.*

What Section 53 of the Penal Code prohibits is the pronouncement of death on any person who is under 16 years. *In the present case, as referred to earlier,* ***the appellant was 23 years at the time the death sentence was pronounced on him*** *and as such I see no illegality in the order made by the learned High Court Judge in passing the death sentence. On the other hand, recourse to Section 53 of the Penal Code must be had, in terms of section 281 of the Criminal Procedure Code, when a person is convicted with an offence punishable with death.* ***Here again the emphasis is, the point of conviction and not the point at which the offence was committed.***

Considering the above, I see no merit in the argument of the learned counsel for the Appellant as to the first question of law on which special leave was granted." (Emphasis added)

As it was held in the aforementioned Supreme Court decision, in the case at hand also, the age of the accused-appellant at the time of sentencing must be considered. As stated previously, he was 26 years old at the time of sentencing him for the offence of murder. The aforesaid Supreme Court Judgement had been delivered prior to the Amendment brought to the Penal Code by the Act No. 25 of 2021. By the said amended Act No. 25 of 2021, Section 53 of the Penal Code was repealed and the following section was substituted therefor: -

> 53 (1) *Sentence of death shall not be pronounced on or recorded against any person who, is under the age of eighteen years, at the time of the commission of an offence by such person.*
>
> (2) *The court shall, in lieu of sentencing such person to death, sentence him to be detained in an institution established under any written law for the detention of persons under the age of eighteen years, for a period specified in the sentence and subject to the provisions of such written law.".*

Hence, it is precisely clear from this amendment also that before the 2021 amendment was brought, it had to be considered whether the accused is under the age of 18 years at the time of sentencing and not whether the accused is under the age of 18 years at the time of committing the offence as decided by the said Supreme Court case because the sole intention of bringing this amendment was to apply the age limit of 18 years to the time of commission of the offence.

Therefore, when sentencing the accused-appellant in 2016, the learned High Court Judge need not have followed Section 53 of the Penal Code as the accused-appellant was 26 years old at that time. If Section 53 exception does not apply, the learned Judge had to comply with the Penal Section 296 of the Penal Code when sentencing the accused for the offence of murder. One cannot argue that the learned High Court Judge could have considered the fact that the accused-appellant was below 18 years of age at the time of committing the offence because before the said amendment was brought to the Penal Code in 2021, the learned Judge had no jurisdiction to do so. An accused who had been convicted for murder before 2021 must be sentenced to death if he was not under 18 years of age at the date of sentencing him. The learned High Court Judge had no discretion to impose a lesser sentence for murder and he was bound to impose the death sentence on the accused-appellant who had been convicted for murder.

In the aforesaid case of ***Kodituwakkulage Pradeep Samantha alias Fredie V. The Hon. Attorney General***, it was held that "*The offence of murder is one such offence for which death is prescribed as the only punishment under the law. Hence once an accused is found guilty of the offence of murder, the court has no discretion other than imposing the death penalty.*"

Therefore, the learned High Court Judge, in this case, has correctly imposed the death sentence on the accused-appellant for the offence of murder, according to law.

As no other ground of appeal has been raised by the learned Counsel for the appellant, I find no reason to interfere with the Judgement or the sentences imposed by the learned High Court Judge. The convictions and the sentences imposed on the accused-appellant are affirmed.

The appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL