

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

SC Appeal No.139/2014

SC (SPL) LA Application
No.105/2014

CA Appeal No. CA21-22/2009

High Court Colombo Case
No.861/2002

In the matter of an application for
Special Leave to Appeal in terms
of Article 127 read with Article
128 of the Constitution of the
Democratic Socialist Republic of
Sri Lanka

Democratic Socialist Republic of
Sri Lanka

Complainant

Vs.

1. Panangalage Don Nilanka
2. Kodituwakkulage Pradeep
Samantha *alias* Freddie

Accused

And Now

1. Panangalage Don Nilanka
2. Kodituwakkulage Pradeep
Samantha *alias* Freddie

Accused-Appellants

Vs.

The Hon. Attorney General,

Attorney General's Department,
Colombo 12.

Respondent

And Now Between

Kodituwakkulage Pradeep
Samantha alias Freddie

Presently at

Welikada Prison
Baseline Road
Borella.

2nd Accused-Appellant-Petitioner

Vs.

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

Complainant-Respondent-Respondent

Before:

Eva Wanasundera, PC, J
Buwaneka Aluwihare, PC, J &
Vijith K. Malalgoda, PC. J

Counsel: Amila Palliyage with Upul Dissanayake for the
accused-Appellant-Petitioner instructed by
Eranda Sinharge

Thusith Mudalige, DSG for AG.

Argued on: 21.07.2017

Decided on: 21.11.2018

Aluwihare PC.J.,

The 2nd Accused-Appellant-Appellant (hereinafter referred to as the accused-Appellant) was indicted along with another for the murder of one A. D. Dilrukshan Silva (hereinafter referred to as the deceased) before the High Court of Colombo. At the conclusion of the trial, both the accused were convicted of the offence as indicted on the basis of joint liability under Section 32 of the Penal Code, (Common intention).

The accused-appellant aggrieved by the judgment, appealed against the conviction and the sentence to the Court of Appeal. Their Lordships by their judgment of 30.05.2014 affirmed the conviction of both the accused. However, the sentence of death imposed on the accused-appellant was substituted with a sentence of life imprisonment by invoking provisions of the Code of Criminal Procedure Act and the Penal Code, to which I shall advert later.

Aggrieved by the judgment of their Lordships of the Court of Appeal the accused-appellant sought special leave to appeal and special leave to appeal was granted on the following questions of law.

- (1) 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.

- (2) Can the Court of Appeal decide that the sentence is a life imprisonment in terms 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, when the discretion is vested with his Excellency the President.

In view of the nature of the questions of law on which special leave was granted, I do not see a necessity to address the facts of the case, but suffice it to state that the accused-appellant was a boy of 16 years of age at the time the offence was committed.

It was the contention of the learned counsel for the accused-appellant that the learned trial judge erred in imposing the death sentence, which was violative of Section 281 of the Code of Criminal Procedure Act and Section 53 of the Penal Code. Section 281 of the Code of Criminal Procedure Act No.15 of 1979 as amended (hereinafter, the Code of Criminal Procedure) stipulates that-

*“Where any person convicted of an offence punishable with death, appears to the court to be under the age of eighteen years, the court **shall pronounce on that person in lieu of the sentence of death, the sentence provided by the Section 53 of the Penal Code.**”* (emphasis added)

Section 53 of the Penal Code 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)

In the context of the above provisions, it was argued on behalf of the accused-appellant that the power of sentencing is vested with the head of State and that the court has no power to decide on the sentence when the offender was under 18 years of age.

As far as the imposition of the sentence of death was concerned, the issue stands resolved; as their Lordships of the Court of Appeal have set aside the sentence of death and *in lieu* of that, a sentence of life imprisonment had been imposed—the legality of which I shall advert to, in answering the second question of law on which special leave to appeal was granted.

Although, it may not be directly relevant to the issue, it would be pertinent to consider Sections 75 and Section 76 of the Penal Code which governs the capacity for criminal liability. According to these provisions (*as they stood as at the date relevant to this case*) a child under the age of 8 years has absolute protection from culpable liability (Section 75) while a child who is, between 8 and 12 years of age has qualified protection from criminal liability (Section 76). Thus, when the capacity of criminal culpability of an accused is not disputed, all accused must be treated equally as far as criminal liability is concerned. The tender age, however, of an accused could be considered by the court as a mitigatory factor in deciding the appropriate sentence that is to be imposed. This, however, is only in instances where the penal sanction prescribed for the crime, vests the judge with a discretion

and not in instances where the law has prescribed a sanction without vesting any discretion in the judge. 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.

The only exception to this requirement is Section 53 of the Penal Code.

In the present case, the accused-appellant was 23 years at the time the sentence was imposed, although 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 learned Deputy Solicitor general on the other hand, argued that the provisions are without any ambiguity whatsoever and that, what is material with regard to the application of the statutory provisions aforesaid is the age of the accused at the point of imposition of the sentence and not the age of the accused at the time offence was committed.

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.

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.

With regard to the 2nd question of law on which special leave was granted, the learned counsel for the appellant contended that the Court of Appeal erred, when their lordships substituted the death sentence imposed by the learned High Court Judge with a sentence of life imprisonment.

The learned counsel contended that in terms of Section 53 of the Penal Code, it is the prerogative of the Head of the State to decide on the period of detention under Section 53 of the Penal Code and the court has no jurisdiction to impose a sentence.

The learned counsel relied on the wording of Section 53 of the Penal Code, which reads; “The court shall **sentence** such person to be detained during the President’s pleasure...”

By the use of words “**the court shall sentence**” in that section, the power of the court for sentencing has not been taken away; the issue, however, is the determination of the period of detention.

The origins of the phrase “at her majesty’s pleasure” could be traced back to United Kingdom where it was based on the concept that all legitimate authority for the government comes from the Crown. The phrase was used throughout the Commonwealth realms where the monarch was represented by, Governor-General, Governor or Administrator and was modified to read as “Governor’s pleasure” as the Monarch’s representative in the British colonies. The words “**governor’s pleasure**” is found in the original Penal Code, Ordinance No.2 of 1883, an Ordinance to provide a general Penal Code for the Island (Ceylon).

According to William Blackstone, the term is used to describe detention in prison for an indefinite length of time (Blackstone, William (1836) Commentaries on the Laws of England – Volume 2)

This position is reflected in Section 53 of the Penal Code, as the section stipulates “the court shall **sentence** such person to be detained during the **Governor’s** pleasure, which was modified to read as Governor-General upon Ceylon ceasing

to be a British colony in 1948 and subsequently to be read as “the **President**” with the promulgation of the Republican Constitution.

A similar provision (to that of section 53) is found in the “Powers of Criminal Courts (Sentencing) Act 2000 (United Kingdom). Section 90 of the said Act lays down that:

*“Where a person convicted of murder appears to court to **have been aged 18 at the time the offence was committed**, the court shall sentence him to be detained during Her Majesty’s pleasure. (Emphasis added)*

It is interesting to note the contradistinction of the statutory provision referred to above *vis a vis* Section 53 of our Penal Code. The U.K. statute makes explicit reference to the age of the person at the time the offence was committed; (“**aged 18 at the time the offence was committed**”) whereas Section 53 in our Penal Code refers to the prohibition of **pronouncing of the death sentence on a person under the age of eighteen.**

As such the jurisprudence developed in the United Kingdom on this issue is not helpful to resolve the issue before this court.

I wish to express the view that, this is a matter for the legislature to consider, particularly in view of the directive principles of State policy embodied in chapter VI of the constitution, in particular sub article 13 of Article 27 which expresses the state policy in the following terms;

“the state shall promote with special care the interest of children and youth, so as to ensure their full development, physical, mental, moral and social, and to protect them from exploitation and discrimination”

The state also has an international obligation in view of the UN Convention on the Rights of the Child, General Comment No. 10 by the Committee on the rights of the Child, on “Children’s rights in juvenile justice” (2007), United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘Beijing Rules’) (1985) and Administration of Juvenile Justice (‘Vienna Guidelines’) (1997) to treat child offenders in a manner consistent with the promotion of the child's sense of dignity and worth, which takes into account the child's age and the desirability of promoting the child's reintegration in society.

In the United States, the constitutionality of executing persons for crimes committed when they were under the age of 18 is an issue that the Supreme Court has evaluated in several cases since the death penalty was reinstated in 1976.

In the case of *Thompson v. Oklahoma* 487 U.S. 815 (1988) , the Supreme Court of the United States recognized that the age of the offender was an important consideration when trying to determine how the individual should be punished. The Court endorsed the proposition that less culpability should be attached to a crime committed by a juvenile than to a comparable crime committed by an adult:

The Court held “Their inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult”.

As referred to earlier this court, however, is required to give effect to the legislative provision and I quote with approval Henry Cecil (The English Judge, Hamlyn Lectures, 1970, pg. 125), who expressed the view that,

"The object of every court must be to do justice within the law. Admittedly the law sometimes forces an unjust decision. If there is no way about it, it is for Parliament to alter the law if the injustice merits an alteration."

In the case of *Attorney-General and Others v Sumathipala* 2006 2 SLR 126 Her ladyship Justice Dr. Shirani Bandaranayke (as she then was), in considering the impact of Section 47 (1) of the Immigrants and Emigrants Act on the liberty and freedom of an individual held that;

"However, it is to be noted that although the liberty and freedom of an individual is thus restricted in terms of the provisions of section 47 (1) of the Immigrants and Emigrants Act, that injustice cannot be cured by this Court as it is for the legislature, viz., the Parliament to make necessary amendments if there is a conflict between the specific provisions and individual liberty."

As expressed in the American case of *Thompson V. Oklahoma* (supra), it may be desirable to visit, offences committed by persons below the age of 18, with a lessor culpability; the applicable statutory provisions in force, however, leave no room for that.

Considering the above, I see no merit in the argument of the learned counsel with regard to the second question of law on which special leave was granted and I answer the second question on which special leave was granted also in the negative.

I do not, however, wish to disturb the commutation of the death penalty imposed on the Appellant to one of life imprisonment by the Court of Appeal, although I have expressed the view that the learned Judge of the High Court had not erred.

Appeal Dismissed.

Judge of the Supreme Court

Justice Eva Wanasundera P.C

I Agree

Judge of the Supreme Court

Justice Vijith K. Malalgoda P.C

I Agree

Judge of the Supreme Court