

**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 123/2018

Vs.

High Court of Ratnapura
Case No: HC 268/2006

- 1) Thangaraj Jesudasan
- 2) Thangaraj Dewawiniwiti
- 3) Arumugam Shantha Kumar

Accused

And Now Between

- 1) Thangaraj Jesudasan

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : N. Bandula Karunaratna, J.

: R. Gurusinghe, J.

COUNSEL : Darshana Kuruppu with Sajini Elvitigala,
Dineru Bandara, Buddhika Thilakarathna,
Sudanha de Silva and Chinthaka Udadeniya
for the Accused-Appellant

Anoopa de Silva, DSG

for the Respondent

ARGUED ON : 27/09/2022

ORDER ON : 20/10/2022

R. Gurusinghe, J.

The accused-appellant was indicted in the High Court of Ratnapura, along with the 2nd and 3rd accused, for committing the murder of Ramalingam Balasubramaniam on the 14th of May 2002, an offence punishable under Section 296 read with section 32 of the Penal Code.

By judgment dated 3rd October 2018, the learned High Court Judge of Ratnapura convicted the appellant as charged and acquitted the 2nd and 3rd accused. The appellant was sentenced to death.

Being aggrieved by the said conviction and the sentence, the appellant appealed to this court.

When this appeal was taken up for hearing, Counsel for the appellant pointed out that the appellant was only 15 years old at the time of the commission of the offence, and she argued that the punishment of death should not have been imposed on him, in terms of section 53 of the Penal Code.

Section 53 of the Penal Code was amended by Act No. 25 of 2021, which was certified on 26.10.2021. The new Section 53 of the Penal Code reads as follows:

- 53.1. Sentence of death shall not be pronounced on or recorded against any person who is under the age of 18 years, at the time of the commission of an offence by such person.
- 53.2. 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 18, for a period specified in the sentence and subject to the provisions of such written law.

The learned Deputy Solicitor General appearing for the respondent conceded the fact that the appellant was below 16 years of age at the time of the offence. However, she pointed out that the amended section 53 of the Penal Code came into operation in October 2021, and it has no retrospective effect. As such, the appellant cannot take refuge in the amended section 53 of the Penal Code, as the judgment of the High Court was pronounced in 2018.

Counsel for the appellant further submitted that there had been a sudden fight and the deceased had only one injury, which was not necessarily fatal. Further, even if the prosecution case was believed, the appellant had only a

cricket stump, and no deadly weapons were used. The appellant did not have a murderous intention. Counsel for the appellant further argued that the appellant should not have been found guilty of murder in view of the above.

By the time the learned High Court Judge had pronounced the sentence of death on the appellant, there was no alternative punishment to impose on him except for the sentence of death, if he was found guilty of an offence, punishable under section 296 of the Penal Code.

The fact that the Appeal Court affirmed a punishment that was imposed by the High Court, does not mean that it has imposed a new sentence, but such ruling shall have the force of a new sentence. If this court varies the sentence, then there is a new sentence in lieu of the earlier sentence. As section 53 of the Penal Code (as amended by Act No.25 of 2021) stands now, affirming a death sentence on an appellant who was 15 years, at the time of the commission of the offence, in my view, would amount to a violation of the provisions of section 53 of the Penal Code.

In the circumstances, I shall refrain from affirming the death sentence imposed on the appellant. Therefore, the death sentence imposed on the appellant is set aside.

I now consider an appropriate punishment for the appellant. Sub-section 2 of section 53 of the Penal Code provides that such a person be detained in an institution established for the detention of persons under the age of 18 years for a period specified in the sentence. However, the appellant now is not a person under the age of 18 years. Therefore, detaining him in an institution is not possible at this stage, and a sentence of imprisonment would therefore be an appropriate punishment.

As per the evidence, there was a fight between one of the brothers of the appellant and a brother of the deceased. It seems that both sustained injuries.

The incident of the appellant dealt a blow on the deceased, which had happened shortly after the previous incident as a result. The appellant had not used any deadly weapons. He had dealt the deceased only one blow. When the deceased fell on the ground, the appellant had not attempted to deal any further blows. The doctor confirmed that there was one injury which was not necessarily a fatal one.

In the case of Pannangalage Don Nilanka and another vs Hon. Attorney General SC Appeal 139 /2014, his Lordship Justice Aluvihare quoted the following passage from an American judgment of Thompson vs Oklahoma 487 US 815 (1988):

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 that *“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”*.

Considering the above-mentioned mitigating factors, I impose on the appellant Seven years Rigorous Imprisonment, to take effect from the date of conviction namely, 03/10/2018.

The appeal is partially allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal