IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of Section 331 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.

Raveendran Surendran *alias* 'Bole'.

Court of Appeal Case No.
CA/HCC/0315/2016
High Court of Colombo
Case No. HC 7137/2014

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **P. KUMARARATNAM, J**
K.M.G.H. KULATUNGA, J

COUNSEL : Rajinda Kandegedara with Akila Ranawaka for the Accused-Appellant.
Anoopa De Silva, DSG for the Respondent.

ARGUED ON : 14. 02. 2025
DECIDED ON : 12. 06. 2025

JUDGEMENT

K.M.G.H. Kulatunga, J.

1. The accused-appellant (hereinafter also referred to as the "appellant") along with two others, were indicted for the murder of Krishna Kumar Dushanthini punishable under Section 296 read with Section 32 of the Penal Code. The prosecution called 12 witnesses including official witnesses, lay witnesses and two expert witnesses to prove the charge.

2. On behalf of the defence, the Appellant made a statement from the dock, and called his father to testify. The learned High Court Judge delivered the judgement on 25.10. 2016 and acquitted the 2nd and the 3rd accused but proceeded to convict the appellant who was the 1st accused for the offence of murder as charged.

3. Dissatisfied with the above judgement, the appellant now prefers the present appeal based on the following grounds of appeal:
   I. Conviction of the appellant without giving him the benefit of the doubt arising from the prosecution witnesses;
   II. The evidence submitted by the prosecution has been analysed in a manner contrary to law;
   III. Conviction of the appellant on the ground that the prosecution case has not been proved beyond reasonable doubt;
   IV. Conviction of the appellant without taking into account the facts raised by the prosecution witnesses, even though they lack uniformity and probability; and
   V. Failure to consider the defence and the statement made by the appellant from the dock in accordance with law.

4. Though the appellant had raised several grounds of appeal in the written submissions and the petition of appeal, when this matter was taken up for argument, the learned Counsel for the appellant did not pursue with the said grounds, but argued that the trial judge failed to consider the culpability of the appellant in respect of the lesser offence

under Section 297 based on knowledge. This argument was basically formulated on the premise that the evidence failed to disclose the entertaining of the murderous intention to bring this within Section. 296, Murder.

5. Then, the learned Counsel also submitted that in view of the amended Section 53 of the Penal Code as amended in 2022, read with Article 6(5) of the ICCPR, the sentence of death could not have been imposed on the appellant as he was less than 18 years of age as at the alleged date of offence.

Facts.

6. The facts of the case, are as follows. The victim was 06 years old and the accused was 17 years and a few months old, related to the deceased, and all of them lived along a road at Kirulapone abutting a canal. According to PW-07, Manivel Kuvin Mary, the mother of the deceased, who was called to testify by the prosecution said that she along with her 06-year-old daughter, Krishna Kumar Dushanthini (the deceased), and her son (PW-04) watched a church procession on 30.06.2012 between 8:30 and 8:45 PM. After the procession, all of them had gone to the appellant's house, which is her aunt's house (where the appellant was also residing). Having spent some time there, when preparing to return to her house at around 9:00 PM, she found her daughter (the deceased) was not in the house. Failing to find her, she along with the help of other relatives searched for the deceased. On the same night, they found the body of the deceased in a garbage canal at Rasikwatta, located a short distance away.

7. PW-04, the son of PW-07 and the brother of the deceased, confirm the above in his evidence, and also has seen the deceased being taken away by the appellant. It is also his evidence that when the accused returned, the sister was not there and when asked as to the whereabouts, the accused had merely denied, by stating that he does not know and he

did not see. Neither PW-04 nor PW-07 had been subject to cross-examination.

8. Moreover, according to the evidence of PW-12, Chaminda Anil Prasanna Weeraratne, the then Officer-In-Charge of the Crime Unit of the Kirulapone Police Station, when investigations were carried out that night, the body of the deceased was found near the canal near the Ilma International School, which is about 80-100 metres away from the house in the road area, at around 9:00 PM. On the same night, a small slipper was found near the canal and was identified as belonging to the deceased by the mother of the deceased, and the body of the deceased was found 400-500 metres away from the canal.

9. In support of the first ground urged, during the argument it was submitted that the cause of death as deposed to by the pathologist is drowning. Further, the height of the victim as observed by the pathologist is 3 feet and 4 inches (*vide* page 334 of the brief). Then, according to the Investigating Officer, the depth of the water in the canal where the body was found is around 90 centimetres (*vide* page 552 of the brief). The argument advanced is that even if the appellant is proved to have thrown the victim into the water, you cannot attribute to the appellant that he intended to drown her as her height was more than the depth of the water. On that basis, it was argued that if at all the appellant would have entertained and acted with the knowledge and no more, citing **Kumara De Silva vs. AG** [(2010) 2 SLR 169], it was submitted that the proper conviction if at all would be one of culpable homicide not amounting to murder, on the basis of knowledge, punishable by Section 297 of the Penal Code.

10. The learned Deputy Solicitor General very passionately argued that throwing a girl into the water in the circumstances of this incident necessarily leads to the inference of entertaining a murderous intention on the part of the appellant. It was submitted that there were nail marks and imprints around her neck. Further, there was evidence of sexual

interference and that this cannot by any means be reduced to culpable homicide as submitted by the counsel for the appellant.

11. Let me consider this submission and its merits in the first instance. The starting point would be that this is a case in which the prosecution relied on circumstantial evidence. The relevant circumstances that were elicited from the witnesses and proved, are:
    a. That the deceased was seen on a bicycle being ridden by the accused-appellant between 9:00 and 9:05 PM (*vide* evidence of PW-01);
    b. That the deceased was seen leaving the house holding the hand of the accused-appellant between 9:00 and 9:30 PM (*vide* evidence of PW-04);
    c. That the sound of a child falling into the water screaming "mother" ("'අම්මේ' කියන ශබ්දයක් සමඟ") was heard at around 9:30 PM (*vide* evidence of PW-09);
    d. That the accused-appellant was proved to have had long nails corresponding to nail marks/ imprints found on the deceased's neck area (*vide* evidence of PW-10);
    e. That the last meal of rice was consumed by the deceased between 8:30 and 9:00 PM; and
    f. That a pair of slippers (identified by the deceased's mother to be the deceased's) was found near the canal close to where the deceased's body was discovered (vide evidence of PW-12).

12. This being a case dependent on circumstantial evidence, it is trite law that the only irresistible inference that should be consistent from the said circumstances should be one which is only consistent with the guilt of the appellant. If there be any other hypothesis which may be consistent with the innocence of the appellant, the benefit of the same should be afforded to the appellant (*vide* ***The King vs. Abeywickrama* 44 NLR 254, *The King vs. Appuhamy* 46 NLR 128).**

13. When taken separately the circumstances of the case may not lead to an inference of guilt against the appellant, but considered cumulatively should lead to only one conclusion and that is that the appellant and no one else caused the death of the deceased. Conviction may follow on such evidence if inculpatory facts proved are incompatible with innocence of the accused. [(DB) PLD 1953 BJ 17, **Ali Muhammad v. Crown**].

14. The trier of fact certainly has the advantage of seeing the demeanour and deportment of the witnesses and coming to a finding of fact based on the totality of the evidence which includes considering the credibility of the witnesses and the reliability of the evidence. Appellate Courts, not having the full benefit of the demeanour and deportment, is somewhat handicapped in making a full and wholesome evaluation. It is for this reason that Appellate Courts have developed the principle of non-interference of findings of primary fact as a matter of course. However, it is within the purview of the Appellate Court to consider if the inferences drawn by the trier of fact are reasonable.

15. The relevant circumstances proved are summarised above. The appellant was seen taking and accompanying the deceased from his house that evening, may be around 9 PM. Then he is also seen on his bicycle with the deceased, proceeding along the road abutting canal, somewhere close to where the body was subsequently found. Then two independent and unrelated witnesses testify that they did hear a splash and someone struggling in the water around that area at that time, which fact they have promptly informed the Police. Then, the Police have recovered the body in the canal within close proximity thereof.

16. When the appellant returned to his house and was inquired as to the whereabouts of the deceased, he has simply denied of any knowledge and pleaded ignorance. According to the pathologist, he had confirmed that the time of death to be between 9:00 and 10:00 PM, being half an

hour to 2 hours after the deceased's last meal. The Police had recovered the body towards the early hours of the following day. The sum total of this evidence is that the deceased was last seen alive with the appellant shortly before her death. The 'Last Seen' theory would be applicable here (which I will consider subsequently). Then as I see, the denial of the appellant after returning home in the normal course of events is so improbable that it should be false in all probabilities. When the appellant has left with the deceased and then was seen on a bicycle within a space of 1 ½ to 2 hours, the appellant cannot be heard to say that he does not know. This is especially so as the age of the deceased was around 6 years at the time. When a person takes a girl of such tender age it is highly unusual for him to just leave her alone and return. You would necessarily expect him to bring her back home when he returns, if not, he should have informed as to where he left her. In these circumstances, there is a strong inference that the appellant had made a false assertion because of his guilty mind.

17. Further to the aforesaid circumstances, it also is in evidence that there were certain nail imprint marks found on the deceased's body including the neck. Correspondingly, the appellant had been examined by the pathologist who has observed the appellant having unusually long fingernails. The same pathologist had examined the dead body and has expressed the opinion that these nail marks and imprints, considering their nature, have very likely been caused by the fingernails of the appellant. In the above circumstances, especially considering the proximity of the time of death from the time the deceased was last seen with the appellant, and considered along with two witnesses hearing someone struggle in the water leads to the irresistible inference that the appellant himself had caused the deceased to be put into the canal. When a girl of 6 years of age is put or thrown to a canal with water, even of a depth of 90 centimetres, anyone of average intelligence would know for certain that her death would be caused by drowning. This is the only natural and probable consequence of the act of a person who throws or

causes a girl of 6 years to be put into a canal with water. The law presumes that persons intend the natural and probable consequences of their conduct. Accordingly, there is a strong and irresistible inference that the appellant acted with a murderous intention when the girl was put into the water. To cap it all, the appellant upon returning home makes a false denial of any knowledge as to the whereabouts of the victim. In a case based on circumstantial evidence, the utterance of any falsehood, in or outside Court, would amount to corroboration of the prosecution case based on circumstantial evidence.

18. The Trial Judge had considered the above circumstances and had come to the above conclusion. The said inferences drawn and conclusions arrived at are certainly reasonable and correct. In these circumstances, there is no reason in law or otherwise to interfere with the said finding or fact.

"Last Seen" theory.

19. PW-04 had testified that on the fatal night, between 8:30 PM and 9:00 PM he, along with the deceased (his sister) and their mother, came to the house of the appellant, after watching the procession. Having so returned, the younger sister of the appellant had fed the deceased some rice and then PW-04 had observed the appellant dressed in a t-shirt and a pair of shorts, taking the deceased by her hand and leaving the house, stating that he was going to a boutique nearby. Thereafter, PW-04 had looked for the deceased to return home. In a short while, the appellant too had returned and when inquired as to where the deceased was, the appellant had merely responded that *he does not know, and that he did not see*, and also had abused him and then appeared to have joined in the search for the girl.

20. Correspondingly, PW-01, Suppiah Nawanidan, who happened to be an independent witness who is not related or connected to either party claims to have seen the deceased on the crossbar of a bicycle ridden by

the appellant, between 9:00 and 9:05 PM. He had seen them somewhere close to the Ilma International School, in the vicinity where the body of the girl was discovered. PW-01 had been living in the same area and had seen and known both the deceased as well as the appellant for some time. He had identified them with the assistance of a streetlight.

21. These two witnesses together bring in evidence of the deceased being seen last with and in the company of the appellant. As for the evidence of PW-04, there had been no challenge or cross-examination. He had clearly seen the appellant taking the deceased and then returning without her. Correspondingly, PW-01 had also seen the appellant with the deceased at or about that time. This evidence considered together clearly establishes the fact that the deceased was last seen with the appellant.

22. As for the timeframe of so being seen is between 9:00 and 9:30 PM. As for the probable time of death, the medical evidence has established that the death had occurred between half an hour to two hours after the deceased's last meal. Both PW-04, the deceased's brother and PW-07, the deceased's mother confirm that the deceased did have a rice meal between 8:30 and 9:00 PM. The pathologist also confirmed that the cause of death was asphyxia due to drowning. The cumulative effect of these items of circumstantial evidence is that the deceased was with the appellant at or about the time of her death. The fact that the time of death is narrowed down to that extent leads to the necessary inference that in all possibilities, the appellant is the author of the death of the deceased, and no other. In addition to this evidence, it is directly relevant and significant that a sound of someone struggling in the water was heard by PW-08 and PW-09 at or about that time. To cap it all, very significant nail imprints caused by an unusually long fingernail was also observed on the neck area of the victim. The pathologist confirms that the appellant did have unusually long fingernails and had expressed his opinion that the nail imprints found in and around the neck and the

upper body, in all probabilities had been caused by these fingernails of this appellant.

23. When the deceased is last seen alive in the company of the appellant shortly before the time she was proved to have met with her death at or near the place of occurrence; and the accused failed to furnish an explanation, then it is reasonable to infer that the survivor was responsible for her death. (**Allah Ditta v. Crown. SC**, 1969 SCMR 558, 1969 P.Cr.LJ 1108).

24. Keunemen, J in ***The King vs. Appuhamy*** **46 NLR 128,** considering the 'Last Seen' theory held that "*In considering the force and effect of circumstantial evidence, in a trial for murder, the fact that the deceased was last seen in the company of the accused loses a considerable part of its significance if the prosecution has failed to fix the exact time of the death of the deceased.*" Then Keuneman, J also observed that *"…it must be emphasized that, last seen with the accused is not sufficient by itself to sustain a charge of murder. More evidence is required to link the accused with the murder.*"

25. Then, the Indian Supreme Court in the case of **Surajdeo Mahto vs. The State of Bihar** (Cr A 1677 of 2011 decided on 4th August 2021 – Indian SC) observed that: *"Briefly put, the last seen theory is applied where the time interval between the point of when the accused and the deceased were last seen together, and when the victim is found dead, is so small that the possibility of any other person other than the accused being the perpetrator of the crime becomes impossible."*

26. Further, Ajith Pasayat J, in the case of **State of Uttar Pradesh vs. Satish [AIR 2005 SC 1000]** held that, "*The last seen theory comes into play where the time gap between the point of time when the Accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the Accused being the author of the crime becomes impossible.*" The above was followed in the

case of **Remreddy Rajeshkhanna Reddy vs. State of Andhra Pradesh** AIR 2006 SC (2) 1656 where Justice S.B, Sinha, J held that; "*The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case Courts should look for some corroboration.*"

27. The sum total of the above dicta is that when a case is based on circumstantial evidence and the prosecution is relying on the Last Seen theory, the proof of the exact time of death is of paramount importance. There should be circumstances which establish that the probable time of death is small and insignificant that it should be at or about the time last seen with the accused. The time period the deceased is found dead should be so small that the possibility of any other person other than the accused, being the author of the crime, is impossible and that when all circumstances are taken into account, it should be highly improbable that anyone other than the accused could be the perpetrator of the alleged death.

28. It is settled law that when the accused is last seen with the deceased and the probable time of death is narrowed down to that point of time, then it leaves no room for any other person other than the accused to be the author of the death of the deceased. In this instance, the time of death is clearly established, and there are further circumstances of nail marks, and the appellant being seen in the same vicinity where the body was found, hearing of someone struggling in the water at that time. That's not all, when the accused returned and in response to the inquiry made by PW-04 the appellant simply says that *he did not see and does not know*.

29. The evidence of PW-04 remains unassailed when the opportunity to cross-examine an assail is given and evidence which is not so challenged

or impugned in cross-examination will come within the meaning of the word "proved" as defined in Section 03 of the Evidence Ordinance. This is a fact that the Trial Judge is required to necessarily take into consideration when adjudicating an issue before Court (*vide* **Edrick De Silva vs. Chandradasa De Silva** 70 NLR 169 at page 170; **Sarvan Singh vs. The State of Punjab** 2002 AIR Supreme Court at 3655 and 3656; and **Wannaku Arachchilage Gunapala vs. AG** 2007 1 SLR 273, where it was held that *"Absence of cross examination of certain facts leads to the inference of admission of that fact."*)

30. The main ground raised for the first time during the argument is that the circumstances warrant a conviction for the lesser offence under Section 297 on the basis of knowledge. To this end, the learned Counsel for the appellant submitted that considering the height of the victim and the depth of the water, one cannot necessarily draw the inference that throwing the girl into the water was done with a murderous intention. The apparent rationale of this argument appears to be that a girl of 3 feet and 4 inches in height could have her nose a few inches above a water level of 90 centimetres. In reality if someone carefully places the victim in a standing position, this may be possible. However, when a girl of 6 years of age is thrown into a water, 90 centimetres would be a depth certainly sufficient to drown the victim and cause her death. Accordingly this argument is fanciful and totally unrealistic and improbable. Accordingly this ground is misconceived and is rejected.

31. It was also submitted in the passing that the learned Trial Judge has failed to evaluate and consider the evidence of the defence. On a perusal of the judgment, the learned Trial Judge has summarised and considered the evidence called on behalf of the 1st accused as well as his dock statement. At pages 121 and 122 of the Judgement, the learned Trial Judge had considered and evaluated the defence position. She had specifically concluded that the appellant had deliberately uttered certain falsehoods and that it was because the appellant was acting with a guilty

mind. Then, considering the evidence of the defence witness (father of the appellant), the Trial Judge had concluded that the evidence was false. In these circumstances, the Trial Judge, upon considering in detail both the defence evidence and the dock statement, has rejected the same on the basis that the said evidence is false. Finally, concluded that the defence position has failed to create any reasonable doubt on the prosecution case. This conclusion is well reasoned and considering the totality of the evidence, I see no reason to interfere with this finding of fact.

Section 53 of the Penal Code.

32. The learned counsel for the appellant submitted that since the accused was less than 18 years as at the date of offence, he is entitled to the benefit of Section 53 of the Penal Code as amended by Act No. 25 of 2021. Section 53 (1) as amended reads as follows:

> *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.*

Accordingly, it was submitted that since the appellant was under the age of 18 years at the time of the commission of the offence, death sentence could not have been imposed.

33. The learned DSG relying on the decision of this Court in **Warnakulasuriya Arachchige Anil Priyankara vs. Attorney General** (CA/HCC/0267/2016), CAM 23.07.2024, submitted that Section 53 as amended by Act No. 25 of 2021 would not be applicable to this appellant as the date of conviction and sentence is 25.10.2016. It is her contention

that as the law prevailed as at that time, the relevant consideration was the age of the accused as at the date of conviction and sentence. In the aforesaid case of **Anil Priyankara**, Justice Kaluarachchi had considered the applicability of Section 53 as amended by Act No. 25 of 2021 to a conviction and death sentence imposed on 07.12.2016. In that case too, the appellant had been 17 years of age as at the date of offence. So, to that extent, the issue considered and the relevant facts are almost identical. His Lordship, upon considering these issues, held that:

> *"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 as he was bound to impose the death sentence on the accused-appellant who had been convicted for murder."*

34. The sum total and the principle determined is that the amended provision will not apply in respect of any conviction entered before coming into operation of Act No. 25 of 2021. As for the plain reading of the previous Section 53 as it was prior to Act No. 25 of 2021, the operative consideration is the age of the appellant at the date of conviction and sentence. The learned Counsel for the appellant made an attempt to impress upon this Court that, these provisions, being in the nature of procedural law, would have retrospective application. Section 53 of the Penal Code is basically a provision of a substantive law. This determines the liability of an appellant to be subjected to the sentence of death. The law up until 2021 has specified the relevant age as at the of conviction. Therefore, the conviction for murder and sentence of death imposed prior to the amendment should be in accordance with the law that prevailed at that time. However, in respect of any conviction and sentence after the coming into operation of the said Amendment, such accused would certainly have the benefit of the same. This is exactly what Justice Kaluarachchi had held in the case of **Anil Priyankara**. To my mind, the reasoning is sound and correct, and I am inclined to follow

the same. The change of the operative date was by an amendment and not interpretation.

35. In this context, one should be mindful of the effect and import of a change brought about to a provision by statute as opposed to a subsequent change of interpretation of a provision by a binding Court of law. When it involves a different interpretation of the same provision, then the subsequent interpretation will determine as to how the law ought to have been. Therefore, a subsequent interpretation may affect a previous decision made on the interpretation as it was then. As opposed to that, if the substantive provision of law is amended, then its operation, unless expressly so provided, will be prospective. Section 53 prior to the amendment 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*." It is clear on a plain reading that the relevant age of the offender is at the time of imposition of the sentence and not the commission of the offence. However, upon the Amendment, Section 53 (1) was enacted and clearly states that the sentence of death shall not be pronounced against a person who was under 18 years of age at the time of the commission of the offence. The change as to the point at which the accused ought to be less that 18 years, was thus changed by a statutory amendment. In the absence of any provision for its retrospective effect, the application of Section 53 upon the Amendment shall be prospective. This is the rationale and the reasoning of the decision in **Warnakulasuriya Arachchige Anil Priyankara vs. Attorney General** (supra). Accordingly the submission made on behalf of the appellant based on the application of Section 53 is misconceived.

36. In the above circumstance, I see no merit in this appeal, and accordingly, the appeal is dismissed.

The conviction and sentence are accordingly affirmed.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J

I agree.

JUDGE OF THE COURT OF APPEAL