NANDANA
v
ATTORNEY-GENERAL

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA 58/2005
HC 1520/2000 PANADURA
NOVEMBER 23, 2006
APRIL 4, 2007
JULY 18, 2007
FEBRUARY 6, 2008
APRIL 28, 2008
AUGUST 20, 2008

Penal Code – S296 – Convicted – Placing burden on the defence to rebut prosecution evidence – Is it fatal? Retrial – Would it meet the ends of justice? – Discretion vested in Court – Criminal Procedure Code S335 (2) a – Constitution Art 13 (5) Art 138 – Evidence Ordinance S114.

The accused-appellant was indicted and convicted for the murder of his own father, and sentenced to death. In the appeal it was contended that, the trial Judge has committed a very serious and fundamental misdirection of law by attaching a burden on the defence to rebut the prosecution evidence, and due to the filmsy nature of the evidence and due to the long lapse of time since the date of the incident, ordering a retrial would not meet the ends of justice.

Held:

(1) Imposing a burden on the accused to prove his innocence is totally foreign to the accepted fundamental principles of our Criminal Law as to the presumption of evidence.

Per Sarath Abrew, J.

"The mis-statements of law by the trial Judge would tantamount to a denial of a fundamental right of any accused as enshrined in Art 13(5) of the Constitution – a misdirection on the burden of proof is so fundamental in a criminal trial that it cannot be condoned and could necessarily vitiate the conviction."

Held further

(2) A discretion is vested in the Court whether or not to order a retrial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice taking into consideration the nature of the evidence available, the time duration. Since the date of appeal, the period of incarceration the accused had already suffered, the trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime, should be considered.

(3) In the circumstances of this case, the interests of justice would not require the appellant to be subjected to a protracted second trial, especially so where the only eye witness has made a belated statement and the time duration since the date of the incident is almost 10 years.

APPEAL from a judgment of the High Court of Panadura.

Cases referred to:

(1) In *Re M.A.S. de Alwis* – (1972) 75 NLR 337

(2) *Keerthi Bandara* v *Attorney General* – 2SLR 245 at 261

(3) *Peter Singho* v *Warapitiya* – 55 NLR 157

(4) *Queen* v *Jayasinghe* – 69 NLR 413

(5) *L.C. Fernando* v *Republic of Sri Lanka* – 79(2) 313 at 374

Ranjith Abeysuriya PC with *Thanoja Rodrigo* for appellant.

Priyantha Navana, Senior State Counsel for Attorney-General

October 19, 2008

SARATH DE ABREW, J.

The accused-appellant (hereinafter sometimes referred to as the "Appellant") was indicted before the High Court of Panadura for having committed the murder of his own father Warnagodage Punyasiri Ratnasuriya on 07.02.1999 at Wadduwa under section 296 of the Penal Code. After trial without a jury the learned trial Judge had convicted the appellant for the offence of murder under section 296 of the Penal Code and sentenced him to death. Being aggrieved of the aforesaid conviction and sentence the appellant had preferred this Appeal to this Court.

The only eyewitness Meegama Archarige Isira, a neighbour, had given evidence for the prosecution followed by I.P. Karunatilleke Bopitiya, then OIC Crimes, Wadduwa Police Station, who had conducted the investigations. Thereafter, then AJMO Colombo, Dr. Chandrasiri Herath had given evidence regarding the post-mortem Examination and injuries on the body followed by the Interpreter Mudaliyar Suduhetti, whereupon the prosecution had closed its case producing in evidence P1-P3 as productions. Thereafter the accused has given evidence from the witness-box denying complicity and the defence had called one Malini Ariyaratne, a Medical Records Officer of the Colombo General Hospital.

The facts pertaining to this case briefly are as follows. The deceased, whose second son was the accused, used to live at Gnanatilleke Road, Morontuduwa, Wadduwa, about 04 to 05 houses away from the residence of eyewitness Isira. The deceased was subsequently estranged from the family, lived elsewhere and used to visit his family often. At the time of the incident the deceased Punyasiri was staying with elder brother Sumanadasa a couple of houses away from that of witness Isira, where the appellant was residing at Wellaboda about 01 mile away.

According to eyewitness Isira, on the morning of 07.02.99, he was working in their garden getting ready to put a concrete layer at their kitchen furnace while his parents, younger brother and sister too were present at their house. Around 10.30 - 11.00 a.m. that

morning the deceased had come running towards the house of Isira from the direction of the road with his son the accused-appellant in hot pursuit around 10 feet behind. The deceased had told Isira that his son is coming to assault him and the appellant too had uttered an obscenity to the effect that that he is going to kill the deceased. As the deceased reached the front step of Isira's house, the appellant had picked up a milla club (P1) which had been there for use in the concrete work of Isira, and dealt a blow on the head of the deceased. After the deceased fell on the step of the house, the appellant had dealt a second blow on the forehead of the deceased, at which point Isira had intervened and wrested the club from the appellant and thrown it away, while himself suffering a club blow into the bargain. Thereafter witness Isira had dragged away the accused-appellant towards the road and sent him away and subsequently had rushed the injured person to the Colombo General Hospital where he was pronounced dead the following day after emergency surgery. Witness Isira had made a statement to the police two days later on 09.02.1999. According to Isira the motive for the attack was not known. The appellant, who had apparently, attended the funeral too, had surrendered to the police on 15.02.1999.

I.P. Bopitiya had testified as to the presence of blood stains at the front step of Isira's house and as to the recovery of the club (P1) from the compound of Isira. AJMO Dr. Herath had testified to the presence of 05 external injuries on the skull and forehead of the deceased and that the injuries were necessarily fatal. The cause of death given was due to Craniocerebral injuries caused by "blunt" weapon.

The accused-appellant, while denying complicity, testified that his father the deceased had deserted his mother and family when he was about 08 to 09 years of age and had gone to Negombo to live with another woman. The appellant further stated that he was a fisherman by profession and on the fateful day 07.02.1999, he was engaged in "madal fishing". Thereafter he had gone to his fiancee's house closely and attended a birthday party of his fiancee's elder sisters daughter the following day. Subsequently he had gone Galle to visit a friend who had informed the appellant that his father was in hospital on the night of 08.02.1999. He had gone

to the cemetery where his father's funeral was held. Subsequently, on learning that he was wanted by the police in connection with his fathers' death he had surrendered to the police. Another witness was called on behalf of the defence to testify to the history of the patient as recorded on the bed-head ticket.

At the hearing of the Appeal, the learned Counsel for the appellant adduced the following contentions in support.

1. In the judgment, the learned trial judge has committed a very serious and fundamental misdirection of law, as reflected in page 154 of the original record which vitiated the conviction, by attaching a burden on the defence to rebut the prosecution evidence, which would necessitate a retrial, as conceded by the learned Senior State Counsel.

2. Adducing several authorities in support, the learned Counsel for the appellant submitted that due to the ostensibly flimsy nature of the evidence available and due to the long lapse of time since the date of the incident, ordering a retrial would not meet the ends of justice.

On the other hand, the learned senior State Counsel, while conceding that the fundamental defect in the judgment of the learned trial judge imposing a burden of proof of innocence on the accused (page 151 of the original record) vitiated the conviction, nevertheless submitted that as the evidence of eyewitness Isira is corroborated by the medical evidence and well-supported by the evidence of IP Bopitiya who had observed blood stains at the door-step of the house of the eyewitness, there was ample evidence to justify a conviction, and therefore this is a fit and proper case to be sent for re-trial.

I have perused the totality of the proceedings, the Information Book Extracts and the written submissions tendered by both parties. On a perusal of the judgment of the learned trial judge the following glaring misdirection of law as to the required burden of proof appear on the record which would necessarily vitiate the conviction and sentence. The learned Senior State Counsel too has conceded this fundamental error on the part of the learned trial judge which would have prejudiced the substantial rights of the

appellant and occasioned a failure of justice under the proviso to article 138 of the Constitution.

At pages 150-151 of the original record, in her judgment, the learned trial judge had stated "පැමිණිල්ල විසින්, පැහැදිලි ප්‍රබල සාක්ෂි නිබියදී පදනම් රහිත ස්ථාවරයක් මත පිහිටා චිත්තිවාචිකයක් ඉදිරිපත් කිරීම කිසියේත්ම චිත්තිකරුගේ නිර්දෝෂිභාවය ඔප්පු කිරීමක් නොවේ." The leaned trial judge had therefore sounded a death knell on the conviction and death sentence *per se* by imposing a burden on the accused to prove his innocence which is totally foreign to the accepted fundamental principles of our criminal law as to the presumption of innocence. Further at page 154 of the original record, the learned trial judge in her judgment, further ventures to state "මෙහිදී පැමිණිල්ල විසින් ඉදිරිපත් කරන ලද ප්‍රබල සාක්ෂි කිසියේත් බිඳහෙළීමට චිත්තියට නුපුළුවන් විය." There too she introduces a concept foreign to our Criminal Law that there is a burden on the defence to rebut the prosecution evidence.

The above mis-statements of law by the learned trial judge would tantamount to a denial of a fundamental right of any accused person as enshrined in Article 13(5) of our Constitution which stipulates that "Every person shall be presumed innocent until he is proved guilty." In the case of *M.A.S. de Alwis*[1] G.P.A. de Silva S.P.J. held that a misdirection on the burden of proof is so fundamental in a criminal trial that it cannot be condoned and would necessarily vitiate the conviction.

Therefore I am in total agreement with the learned Counsel for the appellant and the learned Senior State Counsel that the two mis-statements of law highlighted above would suffice to vitiate the conviction and sentence imposed in this case.

It is now left to decide whether the nature of the evidence led in this case and the time duration that has elapsed would justify ordering a retrial to meet the ends of justice. On this issue the learned Counsel for the appellant and the learned Senior Counsel for the Attorney-General are in conflict with each other and have adduced contrasting arguments. I have carefully considered the oral and written submissions of both parties on this issue, and also the case law authorities submitted on behalf of the appellant.

Section 335 (2) (a) of the Code of Criminal Procedure, Act,15 of 1979 provides that in determination of appeals in cases where trial was without a jury, the Court of Appeal may reverse the verdict and sentence and acquit or discharge the accused or order him to be retried. Therefore a discretion is vested in the Court whether or not to order a retrial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice, taking into consideration the nature of the evidence available, the time duration since the date of the offence, the period of incarceration the accused person had already suffered, and last but not the least, the trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime.

The learned counsel for the appellant had based his submissions on two grounds that this is not a fit case to order a retrial, namely:-

(a) The infirmities in the evidence of the prosecution based solely on the only eyewitness Isira.

(b) The time duration from the date of offence 07.02.99 up to now being almost 10 years.

On a consideration of the first ground as to the infirmities in the prosecution evidence the following salient features, as submitted by the learned counsel for the appellant, spring to the eye.

(1) In *Keerthi Bandara* v *Attorney-General*[2] at 261 it has been held that even the Appellate Court may peruse the Information Book Extracts in the interests of justice. The Information Book Extracts reveal that eyewitness Isira had made a belated statement to the police two days after the incident on 09.02.99. Even then it appears that he has not voluntarily done so but had been taken to the police station by I.P. Bopitiya to record his statement. A perusal of the evidence led at the trial indicate that Isira has failed to give a plausible reason to justify this delay.

(2) Neither has Isira divulged to the Colombo General Hospital authorities the true nature of the incident at the time he admitted the deceased to the hospital. The bed-head ticket

produced in evidence indicate a history of an accidental fall and consumption of alcohol.

(3) Even though Isira had stated in evidence that he too had received a club blow from the accused-appellant at the time of wresting the club from the accused, there is no evidence on record to indicate that he too received an injury.

(4) The appellant has given evidence from the witness box and had put forward on *alibi* which had not received the attention of the learned trial Judge.

(5) The subsequent conduct of the accused-appellant in being present as the cemetery where the funeral was held is not in keeping with the normal conduct of a person who had caused the death of the deceased under section 114 of the Evidence Ordinance.

In view of the above, there is some substance in the first ground urged by the learned counsel for the appellant.

As regards the second ground as to the time duration, it must be noted that as the alleged offence has been committed on 07.02.99, almost 10 years have elapsed since the date of the offence. In a long line of case law authorities, our Courts have consistently refused to exercise the discretion to order a retrial where the time duration is substantial.

In *Peter Singho* v *Werapotiya*[3] Gration, J. refused to order a retrial where the time duration was over 04 years.

In *Queen* v *Jayasinghe*[4] Sansoni, J. refused to order a retrial where the time duration was over 03 years.

In *L.C. Fernando* v *Republic of Sri Lanka*[5] at 374 Wijesundara, J. held that "It is a basic principle of the criminal law of our land, that a retrial is to be ordered only, if it appears to the Court that the interests of justice so required.

In this case the original case record reveals that the appellant had suffered incarceration already for over 3 1/2 years since surrendering to the police. The learned Senior State Counsel had submitted that as the trial Judge who delivered the judgment did not have the benefit of recording the evidence of eyewitness Isira and therefore did not have the opportunity of observing the demeanour

and deportment of this witness, a retrial could be justified on this ground. I am unable to agree with the above contention as the interests of justice would not require the appellant to be subjugated to a protracted second trial in remand in the circumstances set forth above in that case, especially so where the only eyewitness has made a belated statement and the time duration since the date of the incident in almost 10 years.

Under the circumstances I uphold the submission of the learned counsel for the appellant that this is not a fit and proper case to order a retrial.

For the foregoing reasons, I allow the Appeal and set aside the conviction and sentence dated 08.07.2005 imposed on the appellant for the offence of murder under section 296 of the Penal Code by the learned High Court Judge of Panadura, and I acquit the appellant. The Registrar is directed to send a certified copy of this order to the High Court of Panadura.

IMAM, J. - I agree.

Appeal is allowed.