JAYATHILAKA
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJITH SILVA. J.
SISIRA DE ABREW, J.
CA 110/2002
HC HAMBANTOTA 45/99
JULY 31, 2007

Penal Code – Section 364(2) e – Charge of rape – Acquitted – Convicted under Section 365(b) 2 – Grave sexual abuse – Prejudice caused to accused by procedure adopted? – Ingredients different – Principles of Natural Justice – Criminal Procedure Code Sections 176 and 177.

Held:

(1) To act under Section 177 the case must fall within the ambit of Section 176. These two Sections cannot properly be applied to a case in which one offence alone is indicated by the facts and in the course of the trial the evidence falls short of the necessary to establish that offence, but discloses another offence.

(2) The accused came to the trial Court to defend a charge of rape. His line of defence is apparently to attack the charge of rape, he was not given an opportunity to defend a charge under Section 365(2) b(2).

(3) In a charge of rape the prosecution must prove penetration, in a charge of grave sexual abuse prosecution is not required to prove penetration. The ingredients in a charge of rape are different from the ingredients that must be proved in a charge of grave sexual abuse. Since the accused was not given an opportunity to defend the charge under Section 365(b) 2 grave prejudice has been caused to the accused.

APPEAL from the judgment of the High Court of Hambantota.

Case referred to:

Q v *Vellasamy* 65 NLR 267 at 271.

Ranjith Fernando for accused-appellant.

Gihan Kulatunga SSC for Attorney-General.

July 31, 2007

SISIRA DE ABREW, J.

The accused-appellant in this case was charged under Section 364(2)(e) of the Penal Code. Thus the accused was charged with the offence of rape. Although the accused was charged with the offence of rape, the accused was finally convicted of the offence of grave sexual abuse which is an offence punishable under Section 365(b)(2)(b) in the Penal Code. The learned Counsel for the appellant complains that the accused was not given any opportunity of defending himself of the charge with which he was convicted. The learned Senior State Counsel contends that the learned trial Judge has acted under Section 177 of the Criminal Procedure Code. Since the learned Senior State Counsel contends that the conviction can be supported in terms of Sections 177 and 176 of the Criminal Procedure Code (CPC), it is necessary to consider these two sections. Section 177 reads: If in the case mentioned in Section 176 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

To act under Section 177 of the Criminal Procedure Code (CPC)

the case must fall within the ambit of Section 176 of the CPC which reads as follows:

If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial and in a trial before the High Court may be included in one and the same indictment; or may be charged with having committed one of the said offences without specifying which one.

Sections 176 and 177 of the Criminal Procedure Code are in terms identical with Sections 181 and 182 of the old Criminal Procedure Code. Basnayake C.J. interpreting the said Sections in *Q v Vellasamy*[1] at 271 stated thus: "These two sections cannot properly be applied to a case in which one offence alone is indicated by the facts and in the course of the trial the evidence falls short of that necessary to establish that offence, but discloses another offences."

In the present case the accused-appellant was charged with one offence namely the charge of rape. He was acquitted of the charge of rape (*vide*: page 198 of the brief). This shows that the evidence led at the trial was not sufficient to convict him for the offence of rape.

Thus, there was no evidence to convict the accused of the offence with which he was charged, but it appears according to the opinion of the learned Trial Judge that a different offence was disclosed in the course of the trial i.e. the offence of grave sexual abuse. There was no charge on the offence of grave sexual abuse.

In view of the above judicial decision, Section 176 and 177 of the Criminal Procedure Code (CPC) cannot be applied in the present case. Therefore the learned trial Judge was wrong when he applied Sections 176 and 177 of the Criminal Procedure Code in this case and as such the conviction has to be set aside. For the above reasons I reject the contention of the learned Senior State Counsel. The learned trial Judge, before convicting the accused, has not given any opportunity to the accused to answer the offence of grave sexual abuse.

The learned trial Judge has not even given any indication that he was going to convict the accused of the offence of grave sexual abuse. Thus in this case what we should consider is whether any

prejudice has been caused to the accused by the procedure adopted by the learned trial Judge.

The accused-appellant came to the trial Court to defend a charge of rape. His line of defence is apparently to attack the charge of rape. He was not given any opportunity to defend a charge under Section 365(2)(b)(2) of the Penal Code.

In a charge of rape the prosecution must prove the penetration. In a charge of grave sexual abuse prosecution is not required to prove penetration. Thus the ingredients in a charge of rape are different from the ingredients that must be proved in a charge of grave sexual abuse. When the accused was convicted without being charged, grave prejudice is caused to the accused since he was not given an opportunity to answer the charge. Since the accused was not given an opportunity to defend the charge of grave sexual abuse, we hold that grave prejudice has been caused to the accused. Thus the procedure adopted by the learned trial Judge amounts to a gross violation of the rules of natural justice.

In this case the accused has been convicted violating the principles of natural justice. Considering these matters, the conviction and the sentence imposed on the accused appellant cannot be permitted to stand. We, therefore, set aside the conviction and the sentence. The question that must be considered is whether we should order a retrial or not. We note that there is evidence suggestive of a charge of grave sexual abuse and it is a matter for the trial Court to weigh this evidence and decide whether a charge under Section 365(b)(2)(b) has been made out or not. Thus we order a re-trial. Prosecution is at liberty to amend the indictment that has been presented on 29.04.1999 at the re-trial.

Conviction and sentence is set aside. Re-trial ordered.

RANJITH SILVA , J. - I agree.

Appeal allowed.

Retrial ordered.