RAJAPAKSE

v.

THE STATE

COURT OF APPEAL
YAPA, J (P/CA)
KULATILAKA, J.
C.A. NO. 80/98
H.C. ANURADHAPURA 22/98
OCTOBER 24, 30, 2000
NOVEMBER 8, 2001.

Penal Code S. 357 - Rape - Trial in absentia - Code of Criminal Procedure Code Act, No. 15 of 1979 - S 203, 331, 241 (3), 283 and 364 - Judgment read out to accused when he was produced later - Petition of Appeal out of time? - Revisionary powers.

The accused appellant was indicted on two grounds, one under S. 357 - and on the second count that in the course of the same transaction the accused appellant abetted a person unknown to the prosecution in the commission of rape.

The High Court Judge trying the case in absentia found the accused appellant guilty on both counts on 22.7.1998. Later the accused appellant was arrested and on 2.9.99, the trial Judge read out to the accused appellant the sentence imposed on him. The accused appellant on 17.9.99 lodged an appeal against his conviction and sentence.

In appeal it was contended that there was no evidence of absconding to commence and proceed with the trial in absentia, and that the trial Judge failed to act under S. 241 (3) of the Criminal Procedure Code and that there was no proper judgment in terms of S. 283.

The State urged that the petition of appeal was out of time and facts and circumstances would not warrant the accused to invite court to exercise its revisionary jurisdiction.

Held :

(i) The journal entries indicate that the accused - appellant did not give any reasons for his absence from court and it was only then that the trial Judge had proceeded to enforce the sentence imposed on him on 22.7.98 to be operative from 2.9.99.

In terms of S. 241 (3) the accused person if he appears before Court and satisfies court that his absence at the trial was bona fide, the court shall set aside the conviction/sentence/order and the trial then would be fixed de - novo.

(ii) The essence of a judgment consist in the reason for conviction of acquittal of an accused person. The judgment in this case is a well reasoned out judgment.

(iii) The period of time within which an appeal should be preferred must be calculated from the date on which the reasons are given. The conviction/sentence was given on 22.7.98. The Petition of Appeal was lodged on 17.9.1999. The appeal is therefore out of time.

(iv) An application in Revision should not be entertained save in exceptional circumstances. When considering this issue court must necessarily have regard to the contumacious conduct of the accused in jumping bail and thereafter his conduct in a manner to circumvent and subvert the process of the law and judicial institutions. In addition, the party should come before Court without unreasonable delay.

Appeal from the Judgment of the High Court of Anuradhapura.

Cases referred to :

1. Thilakaratne v. Attorney General - 1989 2 SLR 191.
2. Thiagarajah v. Annaikoddai Police - 50 NLR 109.
3. Haramanis Appuhamy v. Inspector of Police, Bandaragama 66 NLR 526.
4. Solicitor General v. Nadaraja Muturajah - 79 NLR 63.
5. Attorney General v. Podi Singho - 51 NLR 385.
6. Camillus Ignatious v. OIC of Uhana Police Station (Rev) CA 907/89 M.C Ampara 2587.
7. Sudarman de Silva and Another v. Attorney General 1986 1 SLR 11
8. Opatha Mudiyanselage Nimal Perera v. Attorney General CA (Rev) 532/97 - Kandy HC 1239/92, CAM 21.10.98.

Dr. Ranjith Fernando with Anoja Jayaratne and Sandamali Munasinghe for the Accused - Appellant.

Kumudini Wickramasinghe Senior State Counsel, for the Attorney - General.

Cur. adv. vult.

January 10, 2001.
KULATILAKA, J.

In this prosecution before the High Court of Anuradhapura the accused-appellant stood trial on a plea of "not guilty" to two counts in the indictment. In the first count it was alleged that on 23.2.95 the accused-appellant along with persons unknown to the prosecution abducted Gunasekerage Lasadawathie in order to force or induce her to illicit intercourse without her consent, an offence punishable under Section 357 of the Penal Code and the second count alleged that in the course of the same transaction the accused-appellant abetted a person unknown to the prosecution in the commission of rape on the said Lasadawathie.

At the trial the High Court Judge sitting without a jury commenced and proceeded with the trial in the absence of the accused-appellant and pronounced his judgment on 22.7.98 whereby he found the accused-appellant guilty on both counts and sentenced him to a term of five years rigorous imprisonment and to a fine of Rs. 2000/- with a default term of six months rigorous imprisonment on the first count and to a term of fifteen years rigorous imprisonment and to pay a sum of Rs. 10,000/- as compensation with a default term of two years rigorous imprisonment on the second count. Both sentences were to run concurrently. Further he ordered that in the event of accused-appellant failing to pay the fine and compensation imposed on him the sentences on both counts to run consecutively. Thereafter the learned trial Judge had issued an open warrant against the accused-appellant.

Consequent upon the issuance of the warrant the army had arrested the accused-appellant and had handed him to the custody of the Medawatchiya police who in turn had produced him before the High Court on 2.9.99.

The learned High Court Judge had read out to the (accused-appellant) the sentences imposed on him by the learned trial

Judge. On 17.9.99 the accused-appellant had filed a petition of appeal against his conviction and sentence.

At the hearing of the appeal the learned counsel who appeared for the accused-appellant urged the following grounds:

(1) that there was no evidence of absconding for the trial Judge to make his order dated 20.05.98 to commence and proceed with the trial in absentia in terms of Section 241 (1) of the Code of Criminal Procedure Act No. 15 of 1979 and as such there was no proper trial.

(2) that the trial Judge has failed to act in terms of Section 241 (3) (a) of the said Act.

(3) that there was no proper judgment in terms of Section 283 of the Code of Criminal Procedure Act.

On the other hand the learned Senior State Counsel urged the following grounds:

(1) that the petition of appeal is out of time.

(2) that the facts and circumstances of this case would not warrant the accused to invite the Court of Appeal to exercise its revisionary jurisdiction in the event this Court were to hold that the appeal is out of time.

Before giving our mind to the above matters it is pertinent to refer briefly to the facts of this case. The prosecution has adduced the evidence of the prosecutrix Lasadawathie, her sister Chandrawathie, medical expert Dr. Upul Ajit Kumara Tennekoon and the investigations carried out by the police.

The prosecutrix Lasadawathie testified that in the year 1995 she used to sleep in the house of her uncle Buddadasa because of threats to harm her coming from the accused-appellant Gamini Rajapakse who was her nephew. The accused-appellant was married to Lasadawathie's sister's (Chandrawathie's)

daughter. He had threatened to shoot her or rape her. When she went to her uncle's place to sleep her mother used to chaperon her. On 23.2.95 she left home alone around 7 p.m. for her mother was sick. Whilst she was on her way to her uncle's place the accused-appellant had come with three others on two bicycles, held her and carried her by force to a lonely place. Thereafter two persons had raped her, one after the other whilst on both occasions the accused-appellant Gamini Rajapakse was holding her. They left her there naked and unconscious. When she gained consciousness it was dawn and she was feeling lifeless. The abductors and rapists had inserted two sticks into her private parts. These sticks were marked P1 and P2. The abductors had gagged her mouth with her own brassiere. It was a dastardly act, a gruesome crime. Early morning Chandrawathie had gone in search of her sister Lasadawathie accompanied by the police. She found her sister Lasadawathie lying naked at a lonely spot. Her mouth was gagged with a brassiere. She was very weak and on being questioned by Chandrawathie she had said "it was Gamini Rajapakse who is married to your daughter who is responsible."

The medical evidence was adduced by the medical expert Dr. U.A.K. Tennakoon who had examined the prosecutrix on 24.2.95 at the Anuradhapura hospital. She had been transferred to Anuradhapura from Medawachiya on the same day. He had observed two injuries on the prosecutrix, namely,

(1) swollen buccal mucosa of upper pallet.

(2) 1/2" long linear abrasion on the buttocks area. further he observed "two plant sticks (1/4" in diameter, 4 1/2" long, and o.1" in diameter, 7 1/2" long) found in the vagina in situ." The patient had given a history of rape. His report has been produced marked P6. Further in her short history to the Doctor she had implicated the accused-appellant. Thus the testimony of the prosecutrix has been amply corroborated by the medical evidence to the effect that she had been ravished.

The Inspector of Police Keerthi Bandara testified to the investigations carried out by him at the crime scene. He had personally accompanied the complainant Chandrawathie in search of the prosecutrix and found her lying naked at a lonely spot on Maligawa Road 3 miles away from Lindawewa junction. He found her mouth gagged with a brassiere. This brassiere had been produced marked P1. After despatching the prosecutrix to the hospital he went in search of the accused-appellant to his house. He found that the accused-appellant had run away, but he was able to arrest him at Mediriigiriya on 28.2.95.

We now consider the arguments advanced by the learned counsel for the accused-appellant in support of his contentions.

According to Section 241 (3) of the Code of Criminal Procedure Act, No. 15 of 1979 after the conclusion of the trial of an accused person in his absence if he appears before Court and satisfies the Court that his absence at the trial was bona fide the Court shall set aside the conviction and sentence and order that the accused be tried de novo.

The learned counsel at the commencement of the argument made submissions to the effect that when the accused-appellant was produced before the High Court on 2.9.99 by the police the learned High Court Judge had merely read over to the accused-appellant the sentence imposed on him by the trial Judge in his judgment dated 22.7.98 albeit, the learned Judge failed to comply with the provisions of Section 241 (3) of the Act. However, when he was confronted with the journal entry of 2.9.99 he chose to abandon that contention. The journal entry indicates that the accused-appellant did not give any reasons for his absence from Court and it was only then that the learned High Court Judge had proceeded to enforce the sentence imposed on him by the learned trial Judge on 22.7.98 to be operative from 2.9.99. Nevertheless the learned counsel persisted with his contention that the High Court did not have sufficient evidence of absconding for him to justify the order he made on

20.5.1998 in terms of Section 241 (1) of the Act to commence and proceed to trial in the absence of the accused. The learned counsel seems to have conveniently forgotten the fact that when the accused-appellant was arrested by the army and produced before Court by the police after a lapse of 13 months from the date of the pronouncement of the judgment and sentence by the trial Judge he did not give any reasons for his absence at the trial. This factor by itself would demolish the contention that there was no evidence of absconding before Court when the Judge made an order in terms of Section 241 (1) of the Code of Criminal Procedure Act for a trial in absentia.

According to the proceedings in the Magistrate's Court the accused-appellant had been enlarged on bail on 13.3.96 after signing a bail bond and a recognizance whereby he bound himself to continue to appear in Court. In that bail bond he had given his name and address. The journal entry of 9.3.98 indicates that the Court had noticed the accused-appellant to appear on 25.3.98 to serve his indictment. According to the journal entry of 25.3.98 when the case was called on that date to serve the indictment the accused was absent. It was reported to Court that the accused had been missing for a period of about two years. Thus the accused-appellant had flouted and violated the conditions and assurances in the bail bond solemnly signed by him.

The surety had been present. He had been released on personal bail with the assurance given by him that he would produce the accused-appellant in Court. It is on record that on 18.5.98 when the case was called Attorney-at-Law Hatangala had made submissions on behalf of the surety to the effect that the accused-appellant whilst he was on bail in connection with the instant case he had robbed a gun and cartridges from a Grama Arakshaka and thereafter had proceeded to murder his own wife. Subsequently he was involved in a robbery as well. Thereafter he had disappeared from the village. Apart from these concrete facts which are on record, the learned High Court Judge had before him the evidence of the Grama Sevaka of the area

where the accused had been living. He had testified to the effect that he had never seen the accused-appellant in his area. The father of the accused Suddahamy testified that he did not see his son since April 1996 and he did not know his whereabouts. Thus we are of the view that there was concrete and cogent evidence before the learned trial Judge to justify the order he made on 20.5.1998 to commence the trial and proceed in the absence of the accused-appellant. In this regard vide the judgment of Wijeyaratne, J in *Thilakaratne vs. The Attorney-General*[1].

Another point urged by the learned counsel for the accused-appellant was that the judgment of the learned trial Judge dated 22.7.98 was not a proper judgment in terms of Section 283 of the Code of Criminal Procedure Act. Our Courts have stressed now and then that the essence of a judgment consist in the reasons for conviction or acquittal of an accused person. Vide *Thiagarajah vs. Annalkoddai Police*[2], *Haramanis Appuhamy vs. Inspector of Police Bandaragama*[3]. The learned trial Judge has given his mind to the vivid description of events testified to by the prosecutrix, corroborative evidence adduced by an independent source namely Chandrawathie relating to the utterances made by the prosecutrix to Chandrawathie soon after Chandrawathie and the police found her, to the effect that it was Chandrawathie's son-in-law Gamini Rajapakse who was responsible for the gruesome act to which she was subjected to and the fact that the prosecutrix was lying naked with a gagged mouth. The learned trial Judge has considered the relevance of medical evidence as well before he arrived at the conclusion that the accused-appellant was guilty on both counts in the indictment. The judgment in this case is a well reasoned out judgment. Hence we hold that the submissions made in this regard lacks substance and merit.

The learned Senior State Counsel took up a preliminary objection that the appeal was out of time. She referred us to Section 203 of the Code of Criminal Procedure Act which read as follows:

"When the cases for the prosecution and defence are concluded the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving his reasons therefor and if the verdict is one of conviction pass sentence on the accused according to law."

She submitted that in all cases irrespective of whether the accused was present or tried in absentia the trial Judge has to comply with Section 203 of the Code of Criminal Procedure Act and in terms of Section 331 of the Code the petition of appeal has to be lodged with the Registrar of the High Court within 14 days from the date when the conviction, sentence or order sought to be appealed against was pronounced. This position has been looked into by Sri Skanda Rajah, J in *Haramanis Appuhamy vs. Inspector of Police Bandaragama* (Supra) and Pathirana, J in *Solicitor-General vs. Nadarajah Muthurajah*[4] where it was held that the period of time within which an appeal should be preferred must be calculated from the date on which the reasons for the decision are given.

In the instant case the reasons for the conviction and the sentence were given on 22.7.98. The petition of appeal had been lodged in the High Court on 17.9.1999. Therefore the submission made by the learned Senior State Counsel to the effect that the appeal is out of time should succeed.

The learned counsel for the accused-appellant also submitted that if this Court were to hold that the petition of appeal is out time it would not preclude him from inviting this Court to exercise the revisionary powers in terms of Section 364 of the Code of Criminal Procedure Act. We agree that the powers of revision of the Court of Appeal are wide enough to embrace a case where an appeal lay was not taken. However an application in revision should not be entertained save in exceptional circumstances. Vide the judgment of Dias, SPJ in *Attorney-General vs. Podisinghoe*[5]. When considering this issue this Court must necessarily have

regard to the contumacious conduct of the accused in jumping bail and thereafter conducted himself in such a manner to circumvent and subvert the process of the law and judicial institutions. In addition if this Court were to act in revision the party must come before Court without unreasonable delay. In the instant case there is a delay of 13 months. In this regard vide Justice Ismail's judgment in *Camillus Ignatious vs. OIC of Uhana Police Station*[6] (Application in revision) where His Lordship was of the view that a mere delay of 4 months in filing revision application was fatal to the prosecution of the revision application before the Court of Appeal. Accused's contumacious conduct and unreasonable delay would necessarily preclude him from inviting this Court to act in revision in terms of Section 364 of the Code of Criminal Procedure Act.

In *Sudarman de Silva & Another vs. Attorney General*[7] at 14 and 15 Sharvananda, J observed that the contumacious conduct on the part of an applicant is a relevant consideration in an application in revision. In this regard vide the judgment of F.N.D. Jayasuriya, J in *Opatha Mudiyanselage Nimal Perera vs. Attorney-General*[8]. In that case too the trial against the accused was held in absentia and he had filed an application in revision three 3/4 years since the pronouncement of the judgment and the sentence. His Lordship remarked:

> "These matters must be considered in limine before the Court decides to hear the accused-petitioner on the merits of his application. Before he could pass the gateway to relief his aforesaid contumacious conduct and his unreasonable and undue delay in filing the application must be considered and determination made upon those matters before he is heard on the merits of the application."

In these circumstances we are not disposed to exercise our revisionary powers of this Court and interfere with the judgment of the learned High Court Judge made on 22.7.98. Besides, on the facts of this case there is no merit.

We observe that the learned Judge has ordered the sentences to run consecutively, in the event the accused-appellant failed to comply with the terms in respect of the fine and compensation imposed on him on counts one and two respectively. We order that this portion of his sentence to be struck off since there is no legal basis to make such an order. Subject to this variation, we proceed to dismiss the appeal and also the application for revision made to this Court in terms of Section 364 of the Code of Criminal Procedure Act.

HECTOR YAPA, J. (P/CA) - I agree.

Appeal dismissed.

Application in revision refused.