

NISHANTHA JANAKA
v
THE ATTORNEY-GENERAL

COURT OF APPEAL
NANAYAKKARA, J. AND
BALAPATABENDI, J.
C.A. 21/2001
H.C. KURUNEGALA 114/2000
JUNE 12,
JULY 22, AND
AUGUST 25, 2003

Penal Code, section 364(2)(f) – Conviction on wrong charge – Proper charge – Section 364(2)(c) – Amending Act, No. 22 of 1995 – Has it caused a miscarriage of justice? – Code of Criminal Procedure Act, No. 15 of 1979, sections 328(b)(ii) and 334(4)(s).

The accused-appellant was charged with having committed rape, an offence punishable under section 364(2)(f) and was convicted.

It was contended that the offence with which the accused-appellant was charged could be committed only in respect of a woman who has some physical and mental disability and the failure to establish the said disability vitiates the conviction.

Held:

- i) Alleged defect in the charge has not in any manner caused a miscarriage of justice as to vitiate the conviction; defects of this nature are

always curable by having recourse to section 328(b)(ii) of the Criminal Procedure Code, although the evidence in the case in no way indicate the prosecutrix was under any physical or mental disability as contemplated by the section with which the accused-appellant was charged at the trial.

APPEAL from the judgment of the High Court of Kurunegala

D.K.Dhanapala for accused-appellant.

Suhada Gamlath, Deputy Solicitor-General for Attorney-General

Cur.adv.vult

March 9th, 2004

NANAYAKKARA, J.

The accused-appellant in this case was charged at the High Court of Kurunegala, with having committed rape on L.P.D.Nilmini Nuwansiri Rajapaksa, an offence punishable under section 364(2)(f) of the Penal Code.

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At the end of the trial, the learned trial judge convicted the accused-appellant of the charge preferred against him and sentence him to 10 years R.I. and a fine of Rs. 2500/-. The accused-appellant was also ordered to pay compensation in a sum of Rs. 5000/-

The main ground on which the conviction and sentence in the case is assailed is that the accused-appellant was convicted on a wrong charge.

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At the hearing of the appeal it was contended on behalf of the accused-appellant that the offence with which the accused-appellant was charged could be committed only in respect of a woman who has some physical and mental disability and the failure of the prosecution to establish such disability on the part of the prosecutrix in this case vitiates the conviction in the case.

It was also contended that the conviction entered against the accused-appellant in the absence of evidence that the prosecutrix

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was under a physical or mental disability as contemplated by the penal section with which he was charged has caused him a grave prejudice, and resulted in a miscarriage of justice.

It would now be necessary at this stage to consider the validity of this argument advanced on behalf of the accused-appellant. As submitted by the learned Counsel for the accused-appellant, a close examination of the proceedings reveals that the evidence in the case in no way indicates the prosecutrix in this case was under any physical or mental disability as contemplated by the penal section with which the accused-appellant was charged at the trial. Therefore the question that has to be determined is whether the absence of such evidence has vitiated in any manner the conviction and the sentence entered in the case.

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It is true, the proper charge that should have been brought against the accused-appellant was under section 364(2)(c) of the Penal Code (Amendment) Act, No. 22 of 1995 and not under section 364(2)(f) of the Code, under which the accused-appellant was charged at the trial.

The learned Counsel for the State too has conceded this position and has attributed this lapse to a typographical error which has escaped the attention of both the trial judge and the counsel for the State.

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Whatever the cause, in my view the alleged defect in the charge has not in any manner caused a miscarriage of justice so as to vitiate the conviction in the case. Besides defects of this nature are always curable by having recourse to the provisions of the section 328(b)(ii) of the Code of Criminal Procedure. This section has conferred wide powers on the Court of Appeal to rectify defaults or defects of this nature.

Section 334(4) and (5) of the Code of Criminal Procedure Act would also be relevant to the matter.

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"(4) If it appears to the Court of Appeal that an appellant, though not properly convicted on some charge or part of the indictment, has been properly convicted on some other charge or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as it

thinks proper and as may be warranted in law by the verdict on the charge or part of the indictment on which the court considers that the appellant has been properly convicted.”

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“(5) Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the verdict of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilt for that other offence and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.”

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Apart from the ground discussed above, the judgment has not been assailed on any other substantial ground.

Therefore I see no reason to interfere with the conviction and sentence entered in this case. Accordingly the appeal is dismissed and the conviction and sentence affirmed.

BALAPATABENDI, J. - I agree.

Appeal dismissed.