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

Bimbirigodage Sujith Lal

ACCUSED-APPELLANT

C.A. 38/2006
H.C. Galle 2431/2003

Vs.

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

COMPLAINANT-RESPONDNET

BEFORE: Anil Gooneratne J. &
P.R. Walgama J.

COUNSEL: Rienzy Arsakularatne P.C., with Namal Karunaratne
for the Accused-Appellant

Chethiya Gunasekera D.S.C. for the Complainant-Respondent

ARGUED ON: 30.09.2014 & 01.10.2014

DECIDED ON: 20.10.2014

GOONERATNE J.

The Accused-Appellant was indicted for the murder of one Udumalagala Gamage Punyawathie on or about 20.07.1997. He was convicted and sentenced to death on 02.09.2006. It was the position, at the hearing of this appeal that there is a failure to comply with an imperative statutory requirement as per Section 195(ee) of the Code of Criminal Procedure Act. The said section deals with duty of the Judge upon receipt of indictment to attend to certain basic matters inclusive of ascertaining the jury option from the Accused party. Learned President's Counsel as well as learned Deputy Solicitor General indicated to correct that the journal entry and proceedings of 04.11.2004 clearly demonstrate that there is non-compliance with the said subsection 195 (ee) of the Code. It is imperative to record what exactly was the option of the Accused, as to whether he opts for a non-jury trial, and his preference need to be recorded as stated by the Accused and not his counsel. On this basis this court has no option but to set aside the conviction of sentence and send the case back to the High Court for due compliance with the said section and to commence a fresh trial (trial de nova).

The learned President's Counsel along with the learned Deputy Solicitor General drew the attention of this court to above. Notwithstanding above, learned President's Counsel took a further step by addressing court and pursuing his case on the footing that in the circumstances of this case, justice to his client would be denied due to a long lapse of time if a fresh trial is to be held, and it was his contention that the Accused-Appellant should be acquitted and the appeal be allowed accordingly. To present the case in this way the learned President's Counsel relied on several authorities. However the learned Deputy Solicitor General submitted to this court that the appeal should not be decided in the manner argued by the defence and that he would only agree to have the case sent back for fresh trial. Learned Deputy Solicitor General submitted that this was in fact a brutal murder and that justice demands that the culpability or innocence of the Accused party need to be decided after a fresh trial although the delays highlighted on behalf of the Accused-Appellant.

The procedural lapse that had occurred in this case was due to non-compliance of a statutory requirement and the Accused-Appellant cannot be held liable or responsible in this regard. The date of incident of murder was 20th July 1997. When this Judgment is to be delivered, no doubt there is a very long lapse of time, of at least 17 years, from the date of incident. Further the

Accused was convicted for a capital punishment and was sentenced on 02.09.2006. On that account the Accused-Appellant had been in prison custody for well over 8 years and continues to be incarcerated. The question is whether the ends of justice would be met in these circumstances.

I have been invited by learned counsel on either side to several authorities which demonstrate that the Accused party should not be tried for the second time due to delays and as argued by learned Deputy Solicitor General that due to the serious nature of the case in hand decision to allow the appeal would be an injustice caused to the victims party and society, in general. Learned Deputy Solicitor General also submitted that a decision in this case need to be considered after examining the facts of this case.

The following decided cases are considered and guides me to a very great extent.

In Peter Singho Vs. Werapitiya held:

At pgs. 157/158...

I have anxiously considered whether I should send the case back for re-trial before another Magistrate. The charges against the accused are of a serious nature and it may be that, upon the relevant and admissible evidence, his conviction would have been justified. Btu we are here concerned with offences alleged to have been committed over four years ago, and it does not seem to me just to call upon him to defend himself a second time after such an unconscionable lapse of time. I, therefore, set aside the convictions and acquit the accused.

Seenithamby v. Jansz 47 NLR 496

Judicial notice will not be taken that a "Food Control Guard" is a public servant within the meaning of section 183 of the Penal Code or that he was duly appointed under Regulation 6 of the Defence (Purchase of Foodstuffs) Regulations, 1942

The Court of Appeal will not order a new trial where the proceedings are so irregular that the Court by according to a request for a new trial will merely encourage slackness, negligence and inexactitude on the part of prosecutions.

At pg. 499...

I have been asked to send back the case as against the first to the sixth accused on count 2 for a new trial. I do not think I shall be justified in so doing. To accede to such a request will merely encourage slackness, negligence and inexactitude on the part of prosecutors. (Mendis v. Kaithan Appu; Rosemalecocq v. Kaluwa).

The Queen vs. Jayasighe 69 NLR at 328..

It is always necessary to bear in mind that the power given to a trial Judge to express opinions on questions of fact must be used cautiously, more so in respect of the uncorroborated evidence of an accomplice. Although at the commencement of the summing-up the learned Commissioner made some preliminary observations which were extremely appropriate to a case of this nature, and which correctly directed the Jury on their proper function as Judges of fat, we cannot escape the feeling that the total effect of his later strong expressions of opinion obliterated the good effect of the preliminary observations.

Finally, we quote the following words from that judgment as they express our view of the learned Commissioner's summing-up: "The summing-up as a whole cannot be accepted as a fair presentation of the case to the jury. A fair presentation is essential to a fair trial by jury. The appellant(s) (have) thus been deprived of the substance of a fair trial."

For these reasons we allow the appeals and quash the conviction of the appellants. We have considered whether we should order a new trial in this case. We do not take that course, because there has been already a lapse of over three years since the commission of the offences, and because of our own view of the unreliable nature of the accomplice's evidence on which alone the prosecution rests.

We accordingly direct that a judgment of acquittal be entered.

Ahamed Lebbe Noor Mohamed & others Vs. Republic of Sri Lanka CA 158-159/2002

Thus, in view of inadequate, unconvincing, evidence of the prosecution case, the counsel for the accused-appellants urged Court to acquit all the accuse-appellants.

Thus only issue to be decided, in this case, is whether it should be sent back for re-trial (trial de-novo) or not, on the facts and circumstances mentioned above. Section 335(2) states as follows: "In an appeal from conviction by a Judge of the High Court at a trial without a jury the Court of Appeal may:-

(a) Reverse the verdict and sentence and acquit or discharge the accused or order him to be re-tried; or
(b) Alter the verdict maintaining the sentence or without altering the verdict increase or reduce the amount of the sentence or the nature thereof or substitute a conviction for a different offence of which the accused person could have been found guilty on the

indictment and pass such sentence as may be warranted by law in substitution for the sentence passed."

C.A 146/2010

The offences in this case is alleged to have been committed on 10/10/2005. Trial commenced on 17/01/2008 and was concluded on 01/04/2010. The accused-appellant was sentenced on 26/04/2010. Both counsel admit the accused-appellant has not been released on bail after his conviction. The accused-appellant has been incarcerated for a period of over 3 ½ years. When we consider all these matters, we feel that it is unreasonable to order a retrial. Considering all these matters. We set aside the conviction and the sentence and acquit the accused-appellant.

I have also considered the case reported in C.A. No. 128-130/91 which was sent back for re-trail in a murder case.

In a case such as this, where all the offences of murder appears to have been committed in one transaction, and the prosecution has chosen to charge only some of the accused in respect of a particular murder, it is imperative that the learned trial Judge should have directed the jury adequately to consider whether each of the accused entertained a common murderous intention, in respect of each of the murders, the respective accused are charged with. The failure to give such a direction in our view is a non-direction, which amounted to a misdirection. The learned Counsel for the Accused-Appellants also pointed out that the directions given on the burden of proof are also inaccurate. In the circumstances, we are of the view that, it is unreasonable to allow the verdict of the jury to stand.

Accordingly we set aside the verdict of the jury and the sentences. We order that a re-trail should be held in this case, as soon as possible, since these offences have been committed in April 1982.

This is a case of circumstantial evidence. Material available suggests that the Accused-Appellant was interested in witness No. 1 the daughter of the deceased who was about 16 years old and studying for the G.C.E. (O/L) Examination. The exam was due to be held the day after the incident and she was studying in her room at about 7.00 p.m. At that time only her mother was in the house. The father/sister and brother had gone on a trip to Anuradhapura and Polonnaruwa.

The grand-father who was also a member of the household was not available at the time of the incident. The witness heard a noise and the front door being opened. She saw the Accused entering the house and had come near the room when the witness was studying and was looking at her. Thereafter he had gone to the kitchen and heard an exchange of words between the deceased mother and Accused and later saw Accused running away from the scene of the crime. She went to see the mother who with difficulty uttered the words she was stabbed by the Accused.

When witness No. 1 the daughter gave evidence she was 23 years old and was married with a child. Incident occurred when she was about 16 years old on 20th July 1997. As at the date of delivering of this Judgment over 17 years would have lapsed. Accused is held in prisons custody for the last eight years. Witness No. 1 had no intention according to the material available to have any contact with the Accused although he came after her without success. It appears that his acts and conduct demonstrate that, the Accused at any cost was attempting to get friendly with the girl, which seems to have been resisted.

A long delay to finally conclude the matter is a relevant factor to be taken into consideration. The conviction and sentence may be so deserving. But court cannot forget the fact that when a fresh trial is ordered by the Appellate Court the Accused is tried for the second time, and the process has to be undertaken all over again. The second trial if at all would be after a long lapse of time of over 17 years and after the Accused by law was incarcerated and spent 8 years in prison custody. One cannot forget the fact that all this happened due to no fault of the Accused party but for a procedural irregularity in the Administration of Justice itself. Good part of the blame goes to the system and not the Accused who is called upon to be tried once more .

A fair trial is a worldwide recognized concept to an Accused and could never be denied, in our country.

In this instance long delay would result in serious consequences and disorganization to the Accused as well as the prosecution party and witnesses. My views as above would apply to the case in hand, and I should not be understood or misunderstood to state that this is the rule. This is a decision to be taken, having regard to all the circumstances and consequences, and such decision can be taken only on a case by case basis. In all the above facts and circumstances we set aside the conviction and sentence, and acquit the Accused-Appellant.

Accused Acquitted.

Appeal allowed.

JUDGE OF THE COURT FO APPEAL

P.R. Walgama J.

I agree.

JUDGE OF THE COURT FO APPEAL