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

Rankothpedige Harindra Prasad,

Kurusawatta,

Thambagalla,

Kakkapalliya

Presently in United Arab Emirates

ACCUSED-PETITIONER

Case No. CA (PHC) APN 81/2015

High Court of Chilaw Case No. 164/2005

Vs.

Hon. Attorney General

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Dulindra Weerasuriya P.C. with K. Gunawardana for Accused-Petitioner

Varunika Hettige DSG for Complainant-Respondent

Written Submissions tendered on: Accused-Petitioner on 6th November 2017

Complainant-Respondent on 6th November 2017

Argued on: 11th October 2017

Decided on: 26th January 2018

Janak De Silva J.

This is a revision application filed by the accused-petitioner (hereinafter referred to as "accused") against the judgment of the learned High Court judge of Chilaw dated 2014.12.17.

On 20.09.2005, the accused was indicted in the High Court of Chilaw on two counts by the complainant-respondent (hereinafter referred to as "complainant"), namely under sections 354 and 363(e) of the Penal Code. As it was reported that the accused was abroad, trial proceeded against him in absentia. He was found guilty on both counts and sentenced to terms of 5 years R.I. and 12 years R.I. respectively. The sentences were to run separately. Additionally, he was directed to pay a fine of Rs. 7500/- each on the first and second charges in lieu of which a sentence of 6 months simple imprisonment was imposed on each charge. The accused was also directed to pay a sum of Rs. 75,000/- as compensation to the prosecutrix in lieu of which a sentence of 6 months simple imprisonment was imposed.

The accused submitted that he was taken into custody by the Chilaw Police on 22.10.2000 and produced before the Magistrates Court of Chilaw in case bearing No. 20415/NS on an allegation that he had on or about 18.09.2000 committed an offence punishable under sections 354 and 363(e) of the Penal Code. The accused further stated that somewhere in February 2001 he was informed by the Magistrates Court that no further proceedings would be taken against him in the said case in the said Magistrates Court and was warned to appear in the High Court of Chilaw if and when he receives notice/summons from the said High Court. The accused states that he was faced with severe financial hardships and after making inquiries whether proceedings had been instituted in the High Court proceeded abroad for employment on 23.04.2003. Before doing so he states that he advised his mother, one of the sureties for him in the Magistrate's Court, to look out for any notices/summons from the High Court of Chilaw. The accused further stated that he requested the Grama Niladhari of the area he was living to inform his mother if any inquiries are made about his whereabouts so that he could return to Sri Lanka and appear before the said High Court. He stated that later as his mother was the only occupant of the house they were living in, she went to live with her relations at Lunuwila, Wennappuwa.

The accused states that the first time he heard about the proceedings in the High Court of Chilaw is when a news item appeared in a Sinhala daily that a case on the incident referred to above had proceeded against him in absentia in the High Court of Chilaw and that he had been convicted and sentenced to 17 years of rigorous imprisonment. A copy of the said news item was annexed to his petition marked P3. Thereafter he got his mother to obtain a certified copy of the High Court proceedings and filed this revision application.

At the hearing, the learned Deputy Solicitor General (hereinafter referred to as "DSG") appearing for the complainant raised the following preliminary objections:

(1) The accused is guilty of contumacious conduct and as such is not entitled to invoke revisionary jurisdiction of the Court of Appeal.
(2) The petition filed by the accused is supported by an affidavit submitted by his mother. The accused is not entitled to maintain this application without an affidavit of the accused.
(3) No exceptional circumstances have been urged in the petition.
(4) The Petitioner has failed to observe Rule 3(1)(a)(b) of the Court of Appeal (Appellate Procedure) Rules.
(5) The Petitioner has not challenged the judgment of the High Court on the grounds of it being illegal, irregular, capricious and arbitrariness.
(6) The application has been filed after undue delay.

Contumacious Conduct

In *Sudharman De Silva v. Attorney General*[1] the Supreme Court held that contumacious conduct on the part of the applicant is a relevant consideration when the exercise of discretion in his favour is involved. Our courts have proceeded on the principle that a person who by his contumacious conduct placed himself beyond the reach of the law treating the original courts and their authority with contempt should not be allowed to invoke the revisionary jurisdiction of

[1] (1986) 1 Sri.L.R. 9

the appellate courts, particularly the Court of Appeal.[2] The learned President's Counsel for the accused relied on the case of *Seeralathevan v. Attorney General*[3] and submitted that a party that has a right of appeal can file a revision application (even after the appealable period) if he can explain his delay or any other reason for not filing an appeal provided that there are exceptional circumstances (such as mistake of law) committed by the trial judge. While I am in agreement with this formulation, the first objection raised in this application is that a person who by his contumacious conduct placed himself beyond the reach of the law treating the original courts and their authority with contempt should not be allowed to invoke the revisionary jurisdiction of the appellate courts, particularly the Court of Appeal. This was not a point considered in *Seeralathevan v. Attorney General.*[4]

The question then is whether the accused is guilty of contumacious conduct. It is admitted that the accused did not present himself before the High Court for trial. The accused seeks to explain his absence by reference to the alleged delay in filing proceedings in the High Court and his attempts to ascertain whether there were any such proceedings. I am not satisfied with his explanations. On the contrary, as explained below, there is compelling evidence that the accused was aware of the High Court proceedings and thought it fit to keep away.

The original case record of the High Court of Chilaw case No. 164/2005 had been called for by this court when notice was issued in this application. Journal entry dated 28.11.2005 therein shows that one Mr. Hillary Fernando, Attorney-at-Law had, on behalf of the accused, applied for certified copies of the journal entry of 02.11.2005, last journal entry in case No. 50514 as well as the indictment. Only a certified copy of the journal entry dated 02.11.2005 had been issued as the Magistrate's Court case record was not available. There is an entry to show that a sum of Rs. 30/= had been charged for this purpose. The said application is set out below:

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[2] *AG v. Podi Singho* (51 N.L.R. 385); *Opatha Mudiyanselage Nimal Perera v Attorney General* [CA (Rev) 532/ 97, C.A.M. 21.10.98.];*Rajapakse v. The State* [(2001) 2 Sri.L.R. 161]; *Senatileke v. Attorney General et al* [(1998) 3 Sri.L.R. 290]; *Wijayarathna v. Attorney General* [(2010) 2 Sri.L.R. 407]

[3] (2011) 2 Sri.L.R. 242

[4] Ibid.

හලාවත මහාධිකරනයේදීය.

නඩු අංකය:- H.C. 164/05

ඉහත නඩුවේ, අවසාන කාර්ය සටහනේ පිටපතක් හා හලාවත මහේස්ත්‍රාත් අධිකරණයේ අංක 50415 දරන නඩුවේ අවසාන කාර්ය සටහනේ පිටපතක් හා චෝදනා පත්‍රයේ සහතික පිටපතක් අවශ්‍ය මුදල් ගෙවීමෙන් පසු ලබා දෙන මෙන් ඉල්ලමී.

ඉදිරි දිනය: 2006/2/14

පසු දිනය: 2005/11/2 වීත්තියේ නීතිඥ

That application bears the date stamp 28.11.2005. This clearly establishes that the accused knew as at that date that proceedings had been instituted against him in the High Court of Chilaw. Otherwise, his lawyer could not have given the High Court case number in the application. No lawyer will make such an application without instructions. The accused tried to challenge the veracity of that application by contending he was out of the country at that time. However, he has not produced a complete copy of his passport. Only the bio data page and another page indicating that he had made one trip to Sri Lanka was submitted with the revision application. It may well be that the lawyer made the said application on instructions received from a person acting on behalf of the accused. It is interesting to note that the journal entry dated 28.11.2005 was not a part of the certified copy of the High Court record annexed by the accused to his petition marked as P4. He sought to explain that he produced as P4 a complete copy of the High Court record that was issued to him. It may well be a coincidence that an important piece of evidence that cuts across the case of the accused was not a part of the certified copy of the High Court record issued to him.

The revision application was supported by an affidavit of the mother of the accused. Interestingly, at paragraph 16 therein, she states that "I further state that since he or I did not receive any communication/Notice/Summons till the **latter part of 2004**, about 3 ½ years after his case was "No Dated", we believed that **in fact no further proceedings are to be taken at all against him**..." Why did she limit her statement to "till the latter part of 2004"? Nowhere in her affidavit does she deny that neither the accused or she received any communication/notice/summons about the High Court case after the latter part of 2004. Why didn't she do that?

The necessary conclusion the above facts leads to is that the accused was aware of the indictment against him but thought it fit to stay away from judicial proceedings. In any event, even if the explanation of the accused for his absence is considered, still it shows scant regard to judicial procedure. He did not at least try to obtain permission from the Magistrates Court before proceeding abroad.

Another significant aspect of this matter is that the accused did not make an application under section 241(3) of the Criminal Procedure Code to have the conviction and sentence set aside and to have trial *de novo*. In *Wijayarathna v. Attorney General*[5] Ranjith Silva J. referring to a similar situation stated:

> "This fact indicates that he had no valid reasons or justifiable reasons, for that matter, any reasons whatsoever to adduce before the High Court, in order to justify his absence. In other words, the accused by keeping silent and not exercising his rights under section 241 of the Criminal Procedure Code has impliedly admitted that he had no cause to show and that, he was guilty of contumacious conduct."[6]

In these circumstances I am of the view that the accused, who by his contumacious conduct placed himself beyond the reach of the law treating the original courts and their authority with contempt, should not be allowed to invoke the revisionary jurisdiction of the Court of Appeal.

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[5] (2010) 2 Sri.L.R. 407
[6] Ibid. page 411

There is a further reason why the application of the accused should be dismissed in limine. Revision is a discretionary remedy. The conduct of a petitioner is a relevant consideration when he asks for relief by invoking a discretionary remedy such as revision. He must come to court with clean hands. Revision will be refused where a petitioner is guilty of suppression of material facts.[7] If there is anything like deception the Court ought not to go in to the merits, but simply say "we will not listen to your application because of what you have done".[8] The accused has suppressed material facts and failed to come to court with clean hands. He has tried to mislead this Court. This application should on this ground alone be dismissed in limine.

The learned President's Counsel for the accused submitted that even where the conduct attributed to a petitioner is totally reprehensible and cannot be condoned, the Court is justified in exercising its revisionary powers in order to quash and set aside an order made wholly without jurisdiction. [9] However, our courts have consistently held that where a party is guilty of suppression of material facts the court will not go into the merits but dismiss the application in limine.

In any event, the argument based on section 48 of the Judicature Act is devoid of merit. It was argued that the learned High Court judge failed to comply with section 48 of the Judicature Act. The contention is that this section gives the presiding judge a discretion which in this case has been surrendered to the prosecution. Counsel for the accused relied on the decisions in *Attorney General v. Siriwardane et al*[10], *Ocean Envoy and another v. AL-Linshirah Bulk Carriers Limited*[11], *Dharmaratne v. Dassenaike et al*[12] and *Ratnayake v. Attorney General.*[13]

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[7] *Seneviratne v. Francis Fonseka Abeykoon* (1986) 2 Sri.L.R. 1
[8] *Fonseka v. Lt. General Jagath Jayasuriya et al* (2011) 2 Sri.L.R. 372
[9] *Wijayarathna v. Attorney General* (2010) 2 Sri.L.R. 407
[10] (2009) 2 Sri.L.R. 337
[11] (2002) 2 Sri.L.R. 337
[12] (2006) 3 Sri.L.R. 130
[13] (2004) 1 Sri.L.R. 390

Section 48 of the Judicature Act was considered in *Thommeyahakuru Somasiri v. Republic of Sri Lanka*[14] where Sisira De Abrew J. held that:

> "A careful reading of the said section suggests that the successor of the previous Judge has the power to continue with the evidence already recorded before his predecessor. The accused has the right to demand to resummons the witnesses. Thus, it appears that the rule is to continue with the evidence already recorded before his predecessor and the exception is to resummon the witnesses on an application by the accused or in the opinion of the Court. If the proceedings are to commence afresh in a criminal case, on each time that a Judge would change his station, the administration of justice in this country will suffer from an incurable debility resulting in deterioration of public faith in the judicial system."

The proceedings of 08.12.2014 is as follows:

"පැමිණිලි පාර්ශ්වය විසින් මේ දක්වා මෙහයවා ඇති සියලු සාක්ෂි මා ඉදිරිපිටදී පිළිගෙන නඩුව ඉදිරියට පවත්වාගෙන යාමට එකඟවේ."

Here the learned High Court judge has decided to continue with the proceedings and one matter he took into consideration is the consent of the prosecution. There is no error on the part of the learned High Court judge. Certainly, it is not a decision made wholly without jurisdiction. In any case, the proviso to Article 138(1) of the Constitution states that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

The learned President's Counsel for the accused relied on *Premasiri v. Attorney General*[15] and submitted that "it is well settled law that in sexual offences the prosecutrix's evidence should be collaborated be independent evidence to act upon it unless the court is satisfied that her evidence is so convincing to act upon it without looking for corroboration" and hence court

[14] C.A. 112/2006, C.A.M. 11.02.2008
[15] (2006) 3 Sri.L.R. 106

should exercise revisionary powers even in the circumstances of this case. However, what was held is that there is no rule that there must be corroboration in every case before a conviction can be allowed to stand. It is well settled law that a conviction for the offence of rape can be based on the sole testimony of the prosecutrix if it is reliable, unimpeachable and there is no infirmity. The learned High Court judge has held that the evidence of the prosecutrix has been corroborated by her mother and the medical evidence. In these circumstances, I see no merit in the submissions made by the learned President's Counsel for the accused on this aspect.

In summary, I am of the view that the accused is guilty of contumacious conduct and suppression of material facts and that the revision application should be dismissed in limine on those two grounds. In any event, the grounds relied on by the counsel for the accused to assail the merits of the judgment of the learned High Court Judge of Chilaw is devoid of merit.

In view of the findings made above, it is unnecessary to consider the other preliminary objections raised by the learned DSG. For the foregoing reasons, the application of the accused is dismissed in limine with costs.

The revision application filed in this court indicates that the accused is living overseas. It appears that neither the Magistrate's Court or the High Court has informed the Controller of Immigration and Emigration about the criminal proceedings against the accused. Therefore, learned High Court Judge of Chilaw is directed to inform the Controller of Immigration and Emigration about the conviction of the accused with his passport details and take steps according to law to implement the sentence imposed on the accused.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal