

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

*In the matter of an Appeal in terms of section
331 (1) of the Code of Criminal Procedure Act
No- 15 of 1979, read with Article 138 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.*

Court of Appeal No:

Democratic Socialist Republic of Sri Lanka

CA/HCC/0404/18

COMPLAINANT

Vs.

High Court of Panadura

1.Wanniarachchige Sunil Fonseka alias Ajith

Case No: HC/3247/2015

2.Korale Hewage Dayawathi

ACCUSED

AND NOW BETWEEN

1.Wanniarachchige Sunil Fonseka alias Ajith

1st ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Kasun Liyanage for the Accused-Appellant
: Maheshika Silva, DSG for the Respondent

Argued on : 02-11-2022, 24-11-2022

Written Submissions : 25-08-2020, 30-10-2019 (By the Accused-Appellant)
: 18-02-2022 (By the Respondent)

Decided on : 30-01-2023

Sampath B Abayakoon, J.

This is an appeal by the 1st accused appellant (hereinafter referred to as the appellant) on being aggrieved of his conviction and the sentence by the learned High Court Judge of Panadura.

The appellant, along with the second accused, who is his wife, was indicted before the High Court of Panadura for committing cruelty on a person below 18 years of age, between the periods of 16th February 2010 and 13th February 2011, and thereby committing an offence punishable in terms of section 308A (2) read with section 32 of the Penal Code.

It was alleged in the indictment that they used the said minor child for work in their motorcar repair establishment, did not provide him with sufficient food, burned him with iron rods, while holding the guardianship of the said child.

After trial, the learned High Court Judge found the 2nd accused indicted not guilty to the charge and she was acquitted accordingly.

In his judgement, the learned High Court Judge found that there was no evidence to suggest that the appellant engaged the minor in his garage with the intention of subjecting him to cruelty, burned him with iron rods or deprived him of food as mentioned in the charge preferred.

However, it was determined that the child has suffered an eye injury as a result of him being near a grinder operated by the appellant, where some object which escaped from it hit the eye of the minor. It had been determined that this was a result of failing to provide due protection for him, which amounts to negligence. It has also been determined that the appellant has assaulted the minor with the tools used in the garage and thereby willfully harassed or assaulted him. Although it was found that there was no evidence as to the alleged acts of cruelty mentioned in the charge, the appellant was found guilty in terms of section 308A (2) on the basis of his negligence as stated above.

Accordingly, the appellant was sentenced to two years rigorous imprisonment, which was the minimum mandatory that can be imposed in terms of section 308A (2) of the Penal Code.

In the sentencing order, the learned High Court Judge being the judge who heard the case in its entirety, has considered that although the appellant was found guilty, the way the appellant and his wife, the 2nd accused indicted, has treated the minor on other occasions as relevant. He has also considered that the appellant has provided the minor with the best available care when he received the eye injury relevant as well, in sentencing the appellant for the minimum mandatory sentence and not ordering any compensation.

The Grounds of Appeal

At the hearing of the appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

- (1) Whether the learned High Court Judge was justified in rejecting the defence case.
- (2) Whether the alleged assault on the victim child actually took place, if yes, would it constitute cruelty within the meaning of section 308A (1) of the Penal Code.
- (3) Whether the harm to the child's eyes was in consequence of intentional neglect by the appellant as found by the learned High Court Judge.

Consideration of the Grounds of Appeal

The evidence led in this action shows that the minor has come under the care of the appellant and his wife through a known person. Upon coming to know that he is a minor, they have taken steps to inform that to the children and women's bureau of the relevant police station. After reporting facts to the Court and after investigations, it had been found that the minor had lied to the investigators claiming that his parents died during the tsunami. However, after his parents were tracked down, the child has refused to go with his mother, which has resulted in the relevant probation officer recommending the 2nd accused indicted as a fit person to bear the care and protection of him.

The evidence shows that the father of the minor was a person who used to earn money by handing over the minor to various persons, obviously as a domestic servant, which may be the reason why the minor refused to go back to his parents and his initial claim that his parents were dead.

The evidence given by the minor bears testimony that he was not ill-treated but treated well. The evidence has also established that the child was admitted to a

school by the appellant and his wife, but since he was a slow learner, it had not been successful.

It also appears that they have taken the advice of the probation officer of the area and had decided to give him vocational training through their establishment with all the good intentions.

Based on the evidence as stated above, it is clear that the learned High Court Judge has concluded that the alleged acts of cruelty as mentioned in the charge has not been proved, which in my view was a correct determination, given the totality of the evidence placed before the Court.

However, based on the facts revealed that the minor has suffered an eye injury while under the care of the appellant and his wife, and the appellant was in the habit of getting agitated when the minor failed to provide him with the correct tools of his trade when asked, and used to throw them back at him, it had been determined that those incidents amount to neglect and assault, as described in section 308A (1) of the Penal Code. Although the considered incidents were not the incidents upon which the charge was based, he had been convicted of the offence mentioned.

It was the contention of the learned Counsel for the appellant that given the facts and the circumstances of the matter, and in consideration of the determinations of the learned High Court Judge, this is a matter where a conviction in terms of section 308A(1) of the Penal Code cannot be sustained.

He was of the view that the evidence has clearly established that the injury suffered by the minor to his eye was not a result of a negligent act of the appellant, but purely an unintended accident. It was his submission that the alleged throwing of the tools at the minor by the appellant can only attract a conviction on the basis of an assault as described in the Penal Code and nothing else.

The offence of hurt as described in section 310 of the Penal Code reads as follows;

310. Whoever causes bodily pain, disease, or infirmity to any person is said to “cause hurt”.

The offence of voluntary causing hurt as described in section 312 of the Penal Code reads as follows;

312. Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and thereby cause hurt to any person is said to “voluntary to cause hurt”.

The learned Deputy Solicitor General (DSG) having agreed to consider the arguments of the learned Counsel for the appellant, and after considering the facts and the circumstances of this matter in its totality, agreed that the evidence falls short of proving beyond reasonable doubt the offence of cruelty as described in section 308A (1) of the Penal Code.

It was her contention that the evidence establishes that the minor has suffered a permanent injury to his eye and therefore, it should attract a conviction of the appellant in terms of section 316 of the Penal code for causing grievous hurt to the minor.

This argument was formulated on the basis that the minor has suffered an impairment of the eye and it falls within the meaning of section 311(b) of the Penal Code, which is permanent privation or impairment of the sight of either eye.

I am not in a position to agree with the said contention that the conviction should be in terms of the said section.

As determined by the learned High Court Judge, the injury to the eye has been caused due to the negligence of the appellant and not due to a willful act.

The learned High Court Judge has determined the assault, based on the evidence of the minor who has stated in his evidence that the appellant used to throw tools used in the garage at him and on two occasions he was hit, and not based on the injury to the eye.

Even if it was the injury to the eye, it cannot be said that the said injury has caused impairment as the medical evidence does not support such a position.

The Judicial Medical Officer (JMO) who examined the minor after the alleged incident has given evidence at the trial and has marked his Medico-Legal Report as P-02. He has not given evidence to suggest that the eye injury was an injury that has caused any permanent privation or impairment of the sight of the eye. In the Medico-Legal Report marked P-02, the JMO has not provided any opinion to say that the eye injury observed by him falls under the category of a grievous hurt in terms of section 311 of the Penal Code.

Under the circumstance, I am of the view that it is not open for the learned DSG who is not an expert on medical matters to argue contrary to what the JMO has stated in his evidence.

For the reasons as stated above, I set aside the conviction of the appellant on the charge of cruelty in terms of section 308A (1) of the Penal Code and the sentence imposed upon him, as it cannot be allowed to stand.

Accordingly, acting under the provisions of section 177 of the Code of Criminal Procedure Act, I convict the appellant for the offence of voluntarily causing hurt in terms of section 314 of the Penal Code.

I sentence him for a term of three months rigorous imprisonment and impose a fine of Rs. 1000/-. In default, he shall serve a period of one-month simple imprisonment.

As the appellant has no previous conviction and considering his age and other attendant circumstances, I suspend the imprisonment period ordered for a period of five years.

As the learned High Court Judge has decided not to order compensation given the facts and the circumstances of the case, which I find a correct decision, I order no compensation.

The appeal is partly allowed to the above extent.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal