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

In the matter of an appeal under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 as Amended.

C.A. Case No:-228-230/2005

H.C.Colombo Case No:1870/2004

1. E.M.Gamini Edirisuriya
2. M.A.D. Shantha Kumara Perera
3. A.M.Ariyapala

Accused-Appellants

V.

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

Respondent

Before:- H.N.J.Perera, J &

P.W.D.C.Jayathilake, J.

Counsel:-Shanaka Ranasinghe P.C. with Suraj Rajapakshe and Chanaka Ratnayaka for the 1st & 3rd Accused-Appellants

Prashanthalal de Alwis P.C. for the 2nd accused-Appellant

Rohantha Abeysuriya D.S.G. for the Respondent

Argued On:-23.10.2014

Written Submissions:-11.12.2014

Decided On:-18.06.2015

H.N.J.Perera, J.

The accused-appellants were indicted before the High Court of Colombo for having committed an offence punishable under section 308 A (2) of the Penal Code read with section 32 of the Penal Code. After trial all three accused-appellants were convicted and sentenced to seven years rigorous imprisonment. Aggrieved by the said conviction and sentence the accused-appellants had preferred this appeal to this court.

Section 308A is as follows:-

(1)Whoever, having the custody of, charge or care of any person under eighteen years of age, wilfully assaults, ill-treats, neglects, or abandons such person or causes or procures such person to be assaulted, ill-treated, neglected, or abandoned in a manner likely to cause him suffering or injury to health (including injury to, or loss of sight or hearing, or limb or organ of the body or any mental derangement), commits the offence of cruelty to children."

For section 308A to apply the accused should have the custody, charge or care of the complainant. Section 308A should be given a strict interpretation which means that it should be interpreted such a way that it would not apply to a person who does not have the custody, charge or care. It is the contention of the Counsel for the

accused-appellants that the learned trial Judge has failed to consider this important aspect in this case.

In this case the complainant has stated that the 1st accused-appellant called him when he was at the swimming pool. It is common ground that the complainant was wearing a black trouser at that time. It was in these circumstances that the 1st accused-appellant called the complainant. The complainant went up to the 1st accused-appellant who was the teacher in charge of discipline of the school at that time. It is the position of the complainant that when he went up to the 1st accused-appellant, the 1st accused-appellant held the complainant by his shirt. The complainant states that he found it difficult to breath and he threw his hand away. The complainant in his evidence has clearly stated that the 1st accused-appellant thought that the complainant was trying to hit the 1st accused-appellant. It is very pertinent to note that at this stage the 1st accused-appellant is alleged to have said that "during the past 27 years no one has tried to do this to me. "

The 2nd & 3rd accused-appellants came to the scene after the initial assault. Major assault which affected the complainant's ear was caused by the 1st accused-appellant. The 2nd & 3rd accused-appellants too have been charged for assaulting the complainant under section 32 of the Penal Code. It is very clear from the evidence led in this case that the 1st accused-appellant mistakenly believed that the complainant tried to assault him.

For section 308A to apply the 1st accused-appellant should act wilfully. It is the contention of the learned Counsel for the accused-appellants that the learned High Court Judge has failed to consider this important aspect of the case.On a perusal of the evidence in this case it is clearly seen that the said incident has taken place quite

suddenly. It was not a pre-planned attack on the complainant. It is manifestly clear that the 1st accused-appellant has acted on the spur of the moment without really thinking or without any intention of causing hurt to the complainant.

In Black's Law Dictionary the term "wilfull" is defined as "proceeding from a conscious motion of will; voluntary; knowingly; deliberate, intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntarily.

The learned D.S.G. for the Respondent conceded that the learned trial Judge in his order has not referred to these important factors- "willfull" and "common intention"-- and therefore he cannot support the judgment.

In L.C.Fernando V. Republic of Sri Lanka 1979 (2) N.L.R 313 at 374, Wijesundera, J. held that:-

"It is a basic principle of the criminal law of our land, that a re-trial is to be ordered only, if it appears to the court that the interests of justice so required."

In this case the offence was committed in 2004 about 11 years ago and the conviction was in 2005 about ten years back. In a long line of case law authorities, our courts have consistently refused to exercise the discretion to order a re-trial where time duration is substantial.

In Peter Singho V. Werapitiya 55 N.L.R157, Gratien, J. refused to consider a retrial where time duration was over four years.

In Queen V. Jayasinghe 69 N.L.R 314, Sansoni, J. refused to order re-trial where the time duration was over three years.

Shoni 19th Edition V0l. V1 page 4133 states:-

"An order of re-trial of a criminal case is made in exceptional cases and not unless the Appellate Court is satisfied that the court trying the proceeding had no jurisdiction to try it or that trial was vitiated by serious illegalities or irregularities proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control prevented from leading or tendering evidence material to the charge and in the interest of justice, Appellate Court deems it appropriate having regard to the circumstances of the case, that the accused should be put on his trial again, an order of re-trial wipes out from the record the earlier proceedings and exposes the person accused to another trial. In addition to this, a re-trial should not be ordered when the court finds that it would be superfluous for the reason that the evidence relied on by the prosecution will never be able to prove the charges beyond reasonable doubt and the like especially when the court is of the opinion that the prosecution will be, put at an advantage by allowing them to provide the gaps or what is wanting that resulted due to their own lapses."

Under the circumstances I hold that this is not a fit and proper case to order re-trial.For the foregoing reasons, I allow the appeal and set aside the conviction and sentence dated 13.09.2005 and acquit the accused-appellants.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C.Jayathilake,J.

I agree.

JUDGE OF THE COURT OF APPEAL