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

The Petition of Appeal against the Order dated 14th May 2013 in Case No. 19/2010 Revision made by the Southern Province High Court Holden in Hambanthota.

Officer-in-Charge
Special Crimes Division Branch,
Police Station, Tangalle.

Complainant

Case No. CA (PHC) 51/2013
H. C. Hambanthota No. 19/2010/RE
M. C. Walasmulla No. 10076/09

Vs.

1. Malka Siriweera
   No. 57/3, Muslim Street, Tangalle.

2. Lasitha Siriweera
   No. 57/3, Muslim Street, Tangalle.

Accused

AND

1. Malka Siriweera
   No. 57/3, Muslim Street, Tangalle.

2. Lasitha Siriweera
   No. 57/3, Muslim Street, Tangalle.

Accused-Petitioners

Vs.

Officer-in-Charge,
Special Crimes Division Branch,
Police Station, Tangalle.

Complainant-Respondent

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

Respondent

AND NOW BETWEEN

1. Malka Siriweera
   No. 57/3, Muslim Street, Tangalle.

2. Lasitha Siriweera
   No. 57/3, Muslim Street, Tangalle.

Accused-Petitioners-Appellants

Vs.

Officer-in-Charge,
Special Crimes Division Branch,
Police Station, Tangalle.

Complainant-Respondent-Respondent

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

Respondent-Respondent

Before: K.K. Wickremasinghe J.

Janak De Silva J.

Counsel:

Jacob Joseph with Sandamali Wijesekera for the Accused-Petitioners-Appellants

Nayomi Wickremasekera SSC for the Complainant-Respondent-Respondent

Written Submissions tendered on:

Accused-Petitioners-Appellants on 01.10.2018 and 04.01.2019

Complainant-Respondent-Respondent on 11.01.2019

Decided on: 28.10.2019

Janak De Silva J.

This is an appeal against the the order dated 14.05.2013 made by the learned High Court Judge of the High Court of the Southern Province holden in Hambanthota.

The virtual complainant Pujitha Suraweera made a complaint to the SCIB of Tangalle Police on 03.10.2008 about a forged deed no. 5506 purportedly executed by his deceased mother in relation to ancestral property which belonged to all family members. The virtual complainant received knowledge of this deed about a week before the complaint as a result of an argument between the virtual complainant and the Accused-Petitioners-Appellants (Appellants) who are his sisters. The deed no. 5506 is dated 08.04.1989 whereas the mother of the virtual complainant died on 12.10.1988. After inquiry the sequence of events are as follows:

(i) Facts were reported to Walasmulla Magistrate Court under section 115 of the Code of Criminal Procedure on 06.03.2009. Further reports were filed on 06.04.2009.

(ii) Appellants were arrested and produced before the Magistrate on 04.05.2009.

(iii) The Tangalle Police filed three charges against the Appellants on 12.10.2009 which included charges under sections 454, 457 and 459 of the Penal Code.

(iv) On 10.05.2010 when trial was taken up the Appellants raised a preliminary objection in terms of section 456 of the Code of Criminal Procedure that the charges preferred against them are time barred.

The learned Magistrate overruled the preliminary objection against which order the Appellants moved in revision to the High Court of the Southern Province holden in Hambanthota which application was dismissed and hence this appeal.

Time Bar

Section 456 of the Code of Criminal Procedure reads:

> "The right of prosecution for murder or treason shall not be barred by any length of time, but the right of prosecution for any other crime or offence (save and except those as to which special provision is or shall be made by law) shall be barred by the lapse of twenty years from the time when the crime or offence shall have been committed."

This section prescribes a time bar in relation to crimes and offences and is a statutory restriction on the common law principle *nullum tempus occurrit regi* (Time does not run against the King). This common law doctrine was originally expressed by Henry de Bracton in his *"De Legibus et Consuetudinibus Angliae"* (On the Laws and Customs of England) which was composed primarily before c. 1235.

In some jurisdictions the view has been taken that legal maxims must be taken into consideration before a Court arrives at a conclusion.

In *Sarah Mathew v. Institute of Cardio Vascular Diseases & Ors.* [2014(2) SCC 62] the Supreme Court of India held:

> "As we have already noted in reaching this conclusion, light can be drawn from legal maxims. The object of the criminal law is to punish perpetrators of crime. This is in tune with the well-known legal maxim *nullum tempus aut locus occurrit regi*, which means that a crime never dies".

Recently, the Supreme Court of Canada in *R. v. Jordan* [2016 SCC 27] held:

> "Exceptional circumstances lie outside the Crown's control in the sense that (1) they are reasonably unforeseen or reasonably unavoidable, and (2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise. They need not meet a further hurdle of being rare or entirely uncommon".

The view has also been taken that since crime is a wrong against the State and society delay by itself should not be held against a prosecution by the State. In *Japani Sahoo v. Chandra Sekhar Mohanty* [AIR 2007 SC 2762] the Supreme Court of India held:

> "It is settled law that a criminal offence is considered as a wrong against the State and the Society even though it has been committed against an individual. Normally, in serious offences, prosecution is launched by the State and a Court of Law has no power to throw away prosecution solely on the ground of delay. Mere delay in approaching a Court of Law would not by itself afford a ground for dismissing the case though it may be a relevant circumstance in reaching a final verdict."

While such an approach may stand to good reason this approach must be understood in the context of the relevant statutory provisions.

Section 469 of the Code of Criminal Procedure of India (1973) reads:

> "The period of limitation, in relation to an offender, shall commence –
>
> a. on the date of the offence; or
> b. where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier; or
> c. where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

In computing the said period, the day from which such period is to be computed shall be excluded."

Furthermore, section 473 of the Code of Criminal Procedure Code of India (1973) provides for an extension of the period of limitation in certain cases and reads:

"notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice"

A similar approach is there in the French Code of Criminal Procedure which provides that the statute of limitations for the prosecution of hidden or concealed offenses starts running from the date on which the offense has been discovered and established in the conditions that allow public prosecution to be initiated and exercised. A hidden offense is defined in Article 9(1)(4) of the French Code of Criminal Procedure as an offense which, because of its constituent elements, cannot be known to the victim or to the judicial authority while a concealed offense is an offense of which the perpetrator deliberately performs any characteristic maneuver aimed at preventing its discovery as per Article 9(1)(5) therein.

However, in Sri Lanka there is a statutory bar without any such extension of time which this Court must take cognizance. The Court must also take cognizance that the limitation of time for crimes serves a dual purpose. On one hand the interest of the State and society as a whole and on the other the interest of the accused.

It is in the interest of the State and society as a whole that a prosecution should be launched and punishment exacted early as the retributive theory of punishment loses its edge after the expiry of a long period. The deterrence theory loses its practical utility if the prosecution is not launched and punishment is not inflicted before the offence has been wiped off the memory of the person concerned. The time bar ensures that the organs of the State vested with the power and duty of criminal prosecution make every effort to ensure that detection and punishment of the crime expeditiously.

The interests of the accused are that he should not be kept under continuous apprehension that he may be prosecuted at any time particularly due to large number of laws creating offences where many persons commit some crime at some time. There is also the possibility that with passage of time the testimony of witnesses become weaker due to lapse of memory resulting in the evidence becoming uncertain and the danger of error increasing.

Therefore, Court must seek to interpret section 456 of the Code of Criminal Procedure bearing in mind that Article 13(3) of the Constitution guarantees to every person a fundamental right to a fair trial.

In interpreting section 456 of the Code of Criminal Procedure two issues arise, namely:

(i) What is meant by "the right of prosecution"?

(ii) What is the time when the crime or offence was committed?

The second question does not create any difficulty in this case as the alleged offense was committed on 08.04.1989.

Right of Prosecution

The words "the right of prosecution" arose for consideration in similar circumstances in *Queen v. Don Louis* (Ramanathan Law Reports 1863-1868 page 97). In this case the accused was put on trial on 31.03.1864 for having forged a deed of gift in February 1843. The defense contended that the prosecution was time barred in view of section 45 of the Ordinance No. 15 of 1843 which is similar to section 456 of the Code of Criminal Procedure. It read:

> "And it is further enacted, that the right of prosecution for any crime or offence (other than treason or murder) shall be barred by the lapse of 20 years from the time when the crime or offence was committed".

The Supreme Court held that the words "right of prosecution" must be taken to mean "the right to commence a prosecution", or in other words, a prosecution for any offence other than treason or murder must be commenced before the lapse of 20 years from the time the offence was committed. It was further held that a prosecution may be commenced by the information of a private person before a Justice of the Peace, and afterwards continued by the Queen's Advocate, and the court considers that as one and the same prosecution.

Ordinance No. 15 of 1843 was an Ordinance for providing in certain respects for the more efficient Administration of Justice in Criminal Cases. It is an established rule of interpretation that where there are statutes made *in pari materia*, whatever has been determined in the construction of one of them is a sound rule of construction for the other [*Craies on Statute Law*, 7th Ed., page 139]. In *Crosley v. Arkwright* [(1788) 2 T.R. 603, 608, (1788) 100 E.R. 325, 328] Buller J. held that all Acts relating to one subject must be construed *in pari materia*.

I am of the view that section 45 of the Ordinance No. 15 of 1843 and section 456 of the Code of Criminal Procedure are similar statutory provisions and therefore the words "right of prosecution" in section 456 of the Code of Criminal Procedure must be taken to mean "the right to commence a prosecution".

In *Tunnaya alias Gunapala v. Officer-in-Charge, Police Station, Galewela* [(1993) 1 Sri L.R. 61 at 66] Bandaranayake J. stated:

> "A consideration of the meaning and scope of s. 116 and of s. 136 (1) (d) of the Code thus becomes necessary. Section 116 is a section contained in that part of the Code dealing with the investigation of offences and the powers of Police Officers and inquirers to investigate. It is a step in the process of investigation. It is the counterpart of s. 114 which permits the release of an accused if evidence is deficient. Section 116 (1) requires that a suspect be sent in custody to a Magistrate's Court with jurisdiction when the information is well founded in the case of a non-bailable offence. That is to say that the suspect should be so forwarded when the Police Officer or inquirer comes to a conclusion that there is sufficient evidence in the sense that a substantial case is made out at an early stage of an investigation which can properly be sent before a Magistrate. Thereafter it is necessary for the Magistrate to make an order for the detention of the suspect. On the other hand, if the offence is bailable the section even permits the Police Officer or inquirer to take security from the suspect for his appearance before Court. The section also provides for productions to be sent to the Court immediately without being kept at the Police Station for further investigations if necessary, and for witnesses to be bound over to appear and testify at a trial. The fact that the Police can take bail and release the suspect if the offence is bailable under sub-section (1) and the fact that investigations can continue under sub-section (3) and the use of the word "suspect" and not "accused" in the language of sub-section (1) used to refer to this person clearly point to the fact that no proceeding has yet been instituted against that person as an accused. Producing a suspect before a Magistrate's Court in custody in terms of s. 116 (1) has nothing to do with the institution of proceedings under s. 136 (1)(d) of Chapter XIV or any other clause of that section. The purpose of producing a suspect before a Court for a non-bailable offence under s. 116(1) is both for the purpose of detaining such a person as well as enabling the Court to take cognisance of the matter enabling it to make further orders under the section as a Court order is necessary for expert witnesses to examine productions and express opinions. The provisions of s. 116 (1) usually denote the completion of a Policeman's investigative endeavours. The Magistrate once seized of the matter may then require further probing by forensic experts of evidence already gathered; the findings and opinions of such specially skilled persons may tend to confirm the State's case against the prisoner.

Now, when a suspect is produced before a Magistrate under s. 116 (1) of the Code in respect of a non-bailable offence it is necessary for the Magistrate to make an order for the detention of the suspect-until the final report under s. 120 of the Code is filed. This he can do under the provisions of s. 120 (1) and the investigation can continue. For instance, the Police may have been making inquiries over a period of time upon a complaint. Having gathered evidence which justifies an arrest a suspect is taken into custody and incriminating evidence such as a weapon of offence or a document connecting the suspect to the crime is found and it is necessary to take blood or saliva samples or specimens of nails or hair for comparison. In such a case it may be said that the Police have sufficient grounds to believe the information is well founded and before the expiry of 24 hours in compliance with the provisions of s. 37 transmit the suspect in custody to the Magistrate. Further investigations regarding the productions will continue under s. 116. A final report made under s. 120 will be filed upon conclusion of the investigation. It is to be noted that S. 115 (3) does not permit a Magistrate to release on bail in the first instance a person arrested for the offence of murder. This means he must make a consequential order of detention when a suspect is produced in custody in connection with an alleged murder under s. 116 (1). The point is that one is still at the investigative stage when a suspect is forwarded under custody to the Court in terms of s. 116 (1). It is wrong to treat it as an automatic institution of proceedings.

When proceedings are instituted under Chapter XIV on the other hand the Magistrate takes cognisance of the accusation contained in the Police report or in a written complaint or upon the taking of evidence as the case may be in terms of s. 136 (1). Section 136 (1) is read with the provisions of s. 135 when appropriate. It is to be noted at this stage that the language of all the clauses in s. 136 (1) contemplates a person accused of an offence and not a mere suspect."

This statement unequivocally holds that it is only when steps are taken in terms of section 136(1) of the Code of Criminal Procedure that it can be said that proceedings have commenced. That is when the persons identified as "suspects" previously become identified as "accused" and is the point at which the right to commence a prosecution has been exercised and the relevant point for the purposes of section 456 of the Code of Criminal Procedure [*Queen v. Don Louis*(supra)].

The impugned deed was executed on 08.04.1989. The first complaint was made to the Police on 03.10.2008 more than 6 months prior to the time bar. But the report under section 136(1)(b) of Code of Criminal Procedure was filed on 12.10.2009 [Appeal Brief page 74] more than six months after the time bar. The learned Senior State Counsel invited Court to take cognizance that the offence was concealed by the Appellants until very close to the time bar and therefore to give an extended meaning to the time bar. However, the legislature has in clear and unambiguous words laid down a time limit and to give an extended or strained meaning to those words would be, in the words of Lord Simonds in *Magor & St. Mellons Rural District Council vs. Newport Corporation* [(1951) 2 All.E.R. 839 at 841], "a naked usurpation of the legislative function under the thin guise of interpretation...If a gap is disclosed, the remedy lies in an amending Act." Article 13(3) of the Constitution guarantees to every person charged with an offence a fair trial by a competent court which includes giving full effect to statutory restrictions on prosecution including the time bar in section 456 of the Code of Criminal Procedure. Therefore, the prosecution of the Appellants is time barred in terms of section 456 of the Code of Criminal Procedure.

For the foregoing reasons, both the learned Magistrate and the High Court Judge erred in overruling the preliminary objection.

Therefore, I set aside the orders dated 14.05.2013 in H.C. Hambanthota Case No. 19/2010 Revision made by the learned High Court Judge of the High Court of the Southern Province holden in Hambanthota and the order dated 27.09.2010 in M.C. Walasmulla Case No. 10076 made by the learned Magistrate.

I hold that the prosecution of the Appellants is time barred in terms of section 456 of the Code of Criminal Procedure and accordingly discharge them.

I wish to place on record my deep appreciation to both counsel who filed comprehensive written submissions which greatly assisted in this deliberation.

Judge of the Court of Appeal

K.K. Wickremasinghe J.

I agree.

Judge of the Court of Appeal