THILAKARATNE
v.
ATTORNEY-GENERAL

COURT OF APPEAL
RAMANATHAN, J., W. N. D. PERERA, J.
AND WIJEYARATNE, J.
C.A. NO. 106/87
H. C. ANURADHAPURA NO. 23/86
MARCH 03, 1989

Criminal Procedure – Accused tried in absentia – Should court assign a counsel for such an accused? – Code of Criminal Procedure Act, No. 15 of 1979, ss. 241(1), 241(2), 241(4), 195(g).

Where an accused is being tried in absentia under section 241(1) of the Criminal Procedure Code, it is undesirable for court to assign a counsel to defend him, without his consent, even though it is for his benefit, as such a step would deprive him of the valuable right of re-opening the proceedings (vide section 241(4)).

Section 195(g) contemplates a case where the accused is present in court and requests that counsel be assigned to him on being questioned by court.

Section 241(2) does not make it obligatory for court to assign a counsel to defend an absent accused. This subsection applies to a case where an absent accused or someone on his behalf retains a counsel to defend him in absentia, or to a case where a counsel (assigned or retained) is defending an accused who absconds during the course of the trial.

APPEAL from judgment of High Court of Anuradhapura.

W. P. Wijenayake for 1st accused-appellant

Mrs. B. J. Tillakaratne, State Counsel for Attorney-General.

Cur. adv. vult.

April 27, 1989.

WIJEYARATNE, J.

In this case the 1st, 2nd and 3rd accused were charged in the High Court of Anuradhapura on two counts as follows:-

(1) With having on 21.1.1983 at Halmillakulama committed robbery of cash Rs. 18,552/40 and a bicycle valued at Rs. 600/-, property in the possession of Ukkubanda Semasinghe and having caused hurt to the said Semasinghe in committing the

said robbery, an offence punishable under sections 380 and 382 read with section 32 of the Penal Code.

(2) With having at the same time and place aforesaid and in the course of the same transaction committed robbery of a bicycle valued at Rs. 700/-, property in the possession of Punchi Bandage Ratnayake, an offence punishable under section 380 read with section 32 of the Penal Code.

On this indictment all three accused appeared in Court on 22.9.1986 and they were represented by Mr. Mahinda Bulankulama, Attorney-at-Law. Copies of the indictment along with the annexures were served on all three accused and the trial was fixed for 17.1.86. Bail in Rs. 1,500/- was ordered on each accused.

On 17.1.86 when the case was taken up for trial the 1st accused was absent, but the 2nd and 3rd accused were present. Mr. Mahinda Bulankulama along with Mr. Benny Wickramasinghe appeared for the 2nd and 3rd accused. No excuse was proferred for the absence of the 1st accused. Accordingly a warrant was issued on the 1st accused for 20.1.87 and the trial too was refixed for the same date.

On 20.1.87 when the case was taken up for trial, the 1st accused was absent, but the 2nd and 3rd accused were present and they were represented by Mr. Benny Wickramasinghe, Attorney-at-Law.

In the proceedings of that date it is recorded that before the case was called on that date, the 1st accused and his surety were present in court, but when the names of the accused were called for the purpose of taking up the trial, the 1st accused was absent but his surety was present.

Thereupon the surety of the 1st accused, one Kongalla Liyanage Jayawardena was called to give evidence. It is not clear from the proceedings whether this surety was called as a witness on the application of learned State Counsel for the prosecution or at the instance of court. However, this is immaterial. The surety stated in evidence that the 1st accused came with him that morning to court at about 9 a.m. and that the 1st accused was with him and that he saw him at about 9.30 a.m. After the court Police Officer came and inquired from him the whereabouts of the 1st accused, he too looked for the 1st accused in the court house premises and also on the road outside, but he was not to be seen. He stated that it was his belief that the accused had gone away because the trial was going to be taken up that day.

After recording this evidence the learned trial Judge made the order that on the evidence of the surety of the 1st accused, he was satisfied that the 1st accused was absconding and made order that the trial against the 1st accused do proceed in his absence. He also issued an open warrant against the 1st accused.

Thereafter the indictment was read out to the 2nd and 3rd accused, who pleaded not guilty, and the case was taken up for trial. As the 1st witness had just commenced giving his evidence, the 2nd and 3rd accused pleaded guilty to both counts in the indictment. The learned trial Judge sentenced each of them to 3 years' rigorous imprisonment and a fine of Rs. 100, in default one month's rigorous imprisonment on each count, the jail sentences to run concurrently.

Thereafter the trial proceeded against the 1st accused in his absence. On behalf of the prosecution, Ukkubanda Semasinghe (Principal of Galadivulwewa Maha Vidyalaya), Punchi Bandage Ratnayake (a school teacher), A. M. Somawansa Esq. (District Judge of Kuliyapitiya, and formerly Magistrate of Anuradhapura), and Police Inspector Padmasiri Pathirana (then officer in charge of Nochchiyagama Police Station) gave evidence.

According to the prosecution case, School Principal Semasinghe along with Ratnayake, another teacher of his school, had gone on this day on two bicycles to the Nochchiyagama Branch of the Peoples' Bank and at about 12 noon cashed the pay cheque of the school staff amounting to Rs. 18,552/40. After obtaining this money, both Semasinghe and Ratnayake set out on their bicycles with the money inside an envelope, and while passing a stretch of shrub jungle they were accosted by all the three accused. The 1st accused who was armed with a pistol held Semasinghe by hand and the 3rd accused, armed with a knife, held Ratnayake. The 2nd accused was also present at the scene. After a struggle, in the course of which the 1st accused had fired the pistol and later pulled out a knife and caused injuries to Semasinghe, he had snatched the money. The 2nd and 3rd accused made off with the two bicycles along with the 1st accused.

Semasinghe and Ratnayake obtained assistance from some workmen at a work site closeby and were taken to Nochchiyagama Police Station and from there Semasinghe was taken to Hospital.

On receiving information from Ratnayake about these offences, Police Inspector Padmasiri Pathirana set out with a Police party for

inquiry at about 2.40 p.m. He visited the scene as pointed out by Ratnayake and found marks of a struggle and stains like blood at the scene. Thereafter he searched the area for these accused and placed guard at the likely exit points. They searched the surrounding jungle and at about 7.00 p.m. arrested all three accused after a struggle. The 1st accused was found with a loaded locally manufactured pistol (P1) and the 2nd accused was found with a knife (P2), both of which were subsequently identified by the witnesses at the trial.

The 2nd accused also had an envelope bearing the words "The Principal, Galadivulwewa Maha Vidyalaya, Galadivulwewa, Anuradhapura" and a sum of Rs. 18,154/- was found therein. In consequence of a statement made by the 1st accused (which portion was marked P7), the two bicycles were recovered from a jungle patch at Halmillakulam.

At an identification parade held on 22.2.1983 by Mr. A.M. Somawansa, the then Magistrate of Anuradhapura, all three accused were identified by Semasinghe and Ratnayake.

At the conclusion of the trial, on the same day the learned High Court Judge delivered judgment, finding the 1st accused guilty on both counts. He sentenced the 1st accused to 10 years' rigorous imprisonment and a fine of Rs. 100/- in default one month's rigorous imprisonment on the 1st count, and 7 years' rigorous imprisonment and a fine of Rs. 100/- in default one month's rigorous imprisonment on the 2nd count. The jail sentences were to run concurrently.

Thereafter the learned trial Judge issued an open warrant on the 1st accused and his surety was given time till 16.2.87 to produce the 1st accused.

On 16.2.87 when the case was called in court, the surety obtained time till 5.3.87 to produce him. On 5.3.87 Mr. Denzil Gunaratne, Attorney-at-Law appeared for the surety and stated that the surety had made every effort to apprehend the 1st accused but was unable to do so and was willing to forfeit the amount of the bail, namely Rs. 1,500/- tendered by him. Accordingly the learned High Court Judge made order forfeiting this amount and issuing an open warrant on the 1st accused.

On 7.12.87 the 1st accused was arrested and produced in court, but as the learned High Court Judge was on leave he was remanded

by the Anuradhapura Magistrate till 21.12.87, and as the learned High Court Judge was on leave on this date too, the 1st accused was again remanded till 4.1.88.

On 4.1.88 the 1st accused was produced in court before the learned High Court Judge, but there was no appearance for him. On the application of the learned State Counsel for the prosecution, the case was ordered to be called on 13.1.88 and the 1st accused was remanded till then.

On 13.1.88 the 1st accused was produced in court from remand custody and Attorney-at-Law Mr. Illangasinghe appeared for him. According to the proceedings, Mr. Illangasinghe had made certain submissions on behalf of the 1st accused and moved for bail. He had also stated that the accused was not well, but he has not stated to court on what date or period the 1st accused was unwell; no medical certificate was submitted on his behalf.

Learned State Counsel for the prosecution stated that on the trial date the 1st accused, though present earlier, had left the court premises without presenting himself for the trial and that he was now produced in court on an open warrant. Thereafter the learned High Court Judge refused the application for bail and made order that the sentences passed on the 1st accused be carried out.

It is noteworthy that on this occasion no application was made by learned counsel for the 1st accused under section 241(3) of the Criminal Procedure Code to satisfy the court that his absence was bona fide and that the conviction and sentence should be set aside.

If the 1st accused was in fact unwell on 20.1.87 or during any other subsequent period, it is inexplicable why the surety had failed to mention this fact either on that day itself or on any subsequent date. No medical certificate was ever tendered on his behalf. It was only about one year later on 13.1.88, after he had been arrested on a warrant and remanded, that it was mentioned for the first time that the 1st accused was unwell, but no medical certificate was ever produced. Thereafter the 1st accused by his Attorney-at-Law Mr. G.B. Illangasinghe filed this petition of appeal on 26.1.88 and moved to have the judgment and sentence passed on him set aside and the case against him be reopened.

At the hearing of this appeal learned counsel for the 1st accused-appellant urged two grounds, namely,

(1) that there were no sufficient evidence of absconding by the 1st accused and the order made on 20.1.87 ordering the trial of the 1st accused in absentia was made on insufficient material and therefore bad in law.

(2) In any event the 1st accused was undefended and counsel should have been assigned to him as contemplated in section 195(g) of the Criminal Procedure Code. The failure to assign a counsel to defend the 1st accused at his trial in absentia, it was argued, vitiated the conviction.

As regards the first ground, the 1st accused was present in court on 17.9.86 (along with the other two accused) when the indictment and the annexures were served and trial was fixed for 17.1.87. On 17.1.87 the 1st accused was absent without any excuse. Thereafter a warrant was issued against him for 20.1.87 and trial was refixed for the same date.

On 20.1.87 the 1st accused had been present earlier in the court premises, but when his name was called for the purpose of taking up the trial, he was not present. No excuse whatsoever was given for his absence by his surety or anyone else on his behalf. It was only about a year later on 13.1.88 after the accused had been arrested, remanded and produced in court that it was sought to make out that he was unwell. Even on that occasion no attempt was made by the 1st accused to satisfy court that his absence was due to bona fide reasons. The conclusion is inescapable that the 1st accused was absconding.

The learned trial Judge has correctly recorded the evidence on 20.1.87 and made the order that he was satisfied that the 1st accused was absconding and that the trial do proceed in his absence. Therefore I reject this contention.

As regards the second ground urged that the failure to assign a counsel to defend the 1st accused vitiates his conviction, it is important to note that section 195(g) contemplates the case where the accused is present in court and requests that counsel be assigned to him on being questioned by court.

Section 41(1) and (2) of the Judicature Act, No. 2 of 1978, lays down that any party to any proceedings shall be entitled to be represented by an Attorney-at-Law. Chapter 3 of our Constitution of 1978 under the heading "Fundamental Rights" lays down in section 13(3) that any person charged with an offence shall be entitled to be heard in person or by an Attorney-at-Law.

Section 241(2) of the Criminal Procedure Code lays down that the commencement or continuance of a trial (where order has been made to try an accused in absentia) shall not be deemed or construed to affect or prejudice the rights of such person to be defended by an Attorney-at-Law at such trial.

In this case when all three accused first appeared in court on 22.9.86, they were represented by one attorney-at-law, namely, Mr. Mahinda Bulankulama. Therefore it was unnecessary for the court under section 195(g) to ask the 1st accused whether it was necessary to assign a counsel for his defence.

In practice, sometimes at High Court trials, counsel are assigned to defend an accused person who is being tried in his absence. In such cases it is not possible to obtain his consent, but it is for his benefit. Generally speaking such an assigned counsel is unable to get instructions from his client as to his defence, but he is expected to do his best on behalf of the absent accused. He can object to inadmissible questions and evidence; he can cross-examine prosecution witnesses with the material available to him; he can point out the deficiencies and weaknesses in the prosecution case and submit that the charge has not been proved beyond reasonable doubt. In short he assists the court in the administration of justice.

The Supreme Court has recently held in the case of *Sudharman de Silva vs. The Attorney-General,* (1986 – 1 S.L.R. 9) that an accused who was tried and convicted in absentia is entitled to file an appeal and be heard in appeal.

However, different considerations apply at a trial. Section 196(g) contemplates a case where an accused person is physically present in court and, on being questioned, requests an assigned counsel. Section 241(2) contemplates a case where an absent accused or someone else on his behalf retains a counsel to appear for him in absentia. It can also apply in a case where, at the commencement of a High Court trial, the accused is represented by counsel (assigned or retained), and during the course of the trial the accused absconds. In such a case it is possible for a counsel to continue to appear for him in absentia right till the end of the trial.

However, when an accused person is absent, it is not possible to get his consent to have a counsel assigned to him or even to get his consent to be defended by that particular assigned counsel. Even

though assigning a counsel without his consent is for the benefit of the accused, once a counsel had been assigned to defend him, then section 241(4) comes into operation.

Section 241(4) lays down that if an absent accused had been defended by an Attorney-at-Law, he will be precluded from coming before court later on and satisfying court that his absence was bona fide and to have the proceedings re-opened under section 241(3). Therefore, assigning a counsel to such an absent accused will deprive him of that valuable right of having the proceedings re-opened under section 241(3).

Therefore, trial Judges in the High Court should keep this provision of law in mind before they assign a counsel to defend an absent accused.

In this particular case the conduct of the 1st accused made it impossible for court to validly assign a counsel to defend him. If a counsel had been assigned to defend him in his absence and without his consent, then he would have been deprived of his right to re-open proceedings under section 241(3). Therefore I hold that there was no merit in the submissions of learned counsel for the 1st accused.

However, as the 1st accused was undefended, I have carefully perused the evidence against him at the trial. There is overwhelming evidence against the 1st accused which justifies his conviction on both counts.

I have considered the sentences imposed on the 1st accused in the light of the sentences passed on the 2nd and 3rd accused. There is a disparity in the sentences passed on the 1st accused and those passed on the 2nd and 3rd accused. Generally speaking, uniformity in sentencing is desirable, but not where the facts and circumstances against each accused are different. The evidence in this case revealed that the 1st accused was armed with a pistol, fired a shot with it, and then proceeded to cause extensive injuries with a knife on Semasinghe during the course of this robbery. Further, the 1st accused has previous convictions. Therefore, I see no reason to interfere with the sentences passed on the 1st accused-appellant.

For the reasons stated herein, the appeal is dismissed and the conviction and sentences are affirmed.

RAMANATHAN, J. – I agree.
W. N. D. PERERA, J. – I agree.

Appeal dismissed.