JAYAWARDENA & OTHERS
v.
THE STATE

COURT OF APPEAL
HECTOR YAPA, J.
KULATILAKE, J.
CA 98 - 100/97
HC COLOMBO 8160/96
13RD DECEMBER 1999

Penal Code - S.32, S.140, S.146, S.380 - Unlawful Assembly - Robbery - Belated complaint - After 5 years - Evidence lack consistency - Means of Knowledge - Motive - Infirmities in Evidence.

The Three Accused Appellants with others unknown, were indicted on three counts, and were convicted by the High Court.

It was contended by the accused Appellants that, this case was instituted consequent to a belated complaint made by the complainant, that the evidence of the Complainant was unreliable, and he had uttered falsehoods, and that there was strong motive for the complainant to implicate the three accused.

Held :

(1) The incident had taken place on 28. 12. 1989 and the 1st Complaint had been made in 1995. Even assuming that during the period 1989 - 1990 there was a fear psychosis that prevailed in the country, it is common knowledge that by 1991, conditions had improved and it was possible for any citizen to lodge a complaint at any Police Station. It would be dangerous to act on the evidence of the complainant in view of the long delay which has not been satisfactorily explained.

(2) The failure of the complainant to mention the names of the 1st and 3rd Accused Appellants in the complaint made to the Police would show that a complainant's evidence lack consistency and therefore unreliable.

(3) The three accused Appellants were suspected by the complainant for the murder of his son. This would show very clearly that the complainant had a very strong motive to implicate the three accused falsely.

APPEAL from the Judgment of the High Court of Colombo.

A.R.C. Perera for 1st and 3rd Accused Appellants.

Ms. Priyadharshani Dias Assigned Counsel for 2nd Accused Appellant.

B. Aluvihare, S.S.C. for the State.

Cur. adv. vult.

December 13, 1999.

HECTOR YAPA, J.

Three accused-appellants with others unknown to the prosecution were indicted in the High Court of Colombo, on three counts. In the first count accused-appellants were charged that on or about 28. 12. 1989 they were members of an unlawful assembly whose common object was to commit robbery, an offence punishable under Section 140 of the Penal Code. In the second count they were charged that in the course of the same transaction, while being members of the said unlawful assembly, they committed robbery of cash in a sum of Rs. 8,000/=, jewellery (two chains and four bangles) and a wrist watch from the possession of Ranpathi Dewage Sarathsena, an offence punishable under Section 380 read with Section 146 of the Penal Code. The third count was a common intention count for committing the robbery of cash, jewellery and a wrist watch (as referred to in count two), an offence punishable under Section 380 read with Section 32 of the Penal Code. After trial the three accused-appellants were found guilty of all three counts and thereafter they were sentenced to a term of 6 months rigorous imprisonment on the first count. On the 2nd and 3rd counts, each of the accused-appellants was sentenced to a term of 6 year's rigorous imprisonment and to a fine of Rs. 8,000/= in respect of each count. The sentences of 6 year's rigorous imprisonment imposed on each of the accused-appellants in respect of the 2nd and 3rd counts were to run concurrently. Further a default term of two year's rigorous imprisonment was imposed on each of the accused-appellants in respect of the fine of Rs. 16,000/= ordered on the 2nd and 3rd counts.

At the trial the prosecution led the evidence of the complainant Sarathsena, A. S. P. Abeynayake, and P. C. Wickremapala. The complainant Sarathsena in his evidence

stated that on 28. 12. 1989 he was residing at Kalalgoda in the Pannipitiya area. On that day around midnight some persons knocked at the door of his house and when the complainant questioned them, he was told that they were from the Army. When the complainant Sarathsena opened the door, he was able to identify the first accused Sergeant Jayawardana, the third accused Suraweera and the second accused Dixon, since there was a chimney lamp burning in the house. Sarathsena said that he knew the first accused-appellant as he had come to his house with I. P. Ranagala on a previous occasion in search of his son. He knew the second and third accused-appellants since they were living in the Ragama area not very far from his house. These accused-appellants who came there ordered him to put out the lamp that was burning and then the first accused-appellant went to the room followed by the third and the second accused-appellants. At that time the 2nd accused-appellant had a torch with him. Thereafter the 2nd accused-appellant opened a jar which contained the jewellery of his daughter and his wife and took the contents. The first accused-appellant had opened Sarathsena's almirah and had taken charge of the bills, letters, pass books and horoscopes of his children. Thereafter these accused-appellants had ordered the complainant to close the door and then left the place. After they left Sarathsena had observed that the cash, jewellery, the horoscopes, bank pass books etc. had been removed. This witness further stated that on 29. 12. 1989, he had come to know that his son had been taken away by the police. Therefore he had proceeded to the Koswatta police station looking for his son, when he had been told to check from the Ragama police. Thereupon when Sarathsena went to the Ragama police station, he was not allowed to make a complaint there. Witness further recounted that he knew the first accused-appellant who was working at the Ragama police station during that time. Complainant Sarathsena also admitted that he made a complaint to the police with regard to the robbery which took place on 28. 12. 1989, only on

18. 01. 1995. According to him the delay in making the complainant was due to the conditions that prevailed in the country. In this case in addition to the evidence of the complainant Sarathsena, prosecution led the evidence of two police witnesses.

At the hearing of the appeal, it was submitted by learned Counsel for the accused-appellants that this case was instituted consequent to a belated complaint made by the complainant. Counsel submitted that the incident had taken place on 28. 12. 1989 and the 1st complaint had been made in the year 1995, five years after the incident. Therefore it was contended that a conviction should not be based on such belated material specially in view of the fact that the complainant Sarathsena has failed to explain the long delay satisfactorily and cogently. When the complainant was questioned with regard to the long delay in making the complaint to the police in respect of the robbery that took place on the night of 28. 12. 1989, he had taken up the position that the police were not accepting complaints from the public during the period. At the same time he tried to explain the delay, by saying that due to the fear he had that his family may be destroyed, presumably by the police, he did not make a complaint to the police. According to the complainant, it was on hearing that the government had requested the public to make complaints in respect of missing persons to the commissions, that he decided to make a complaint. We cannot accept this position taken up by the complainant that till 1995, he could not make a complaint to the police with regard to the robbery, due to the reasons given by him as referred to above. Even assuming that during the period 1989 to 1990, there was a fear psychosis that prevailed in the country, it is common knowledge that by 1991 conditions had improved and it was possible for any citizen to lodge a complaint at any police station. On this matter one cannot disregard the evidence of Chief Inspector Ranagala who was called by the defence. It was

Inspector Ranagala's evidence that, when he assumed duties as Officer-in-Charge Ragama police station in 1990, people were able to come to his police station to make any complaint. In addition I. P. Ranagala said that the conditions during that time was so peaceful that he was able to organize New Year celebrations during the three year period he served at the Ragama Police Station. In these circumstances it would appear that the complainant had given false evidence, when trying to explain his long delay to make a complaint to the police with regard to the robbery. It is needless to say that such a long delay without reasonable grounds would make the evidence of the complainant, who is the only witness to the robbery suspicious and unsatisfactory having regard to the test of spontaneity and contemporaneity. It is common knowledge that, when complaints are not made promptly after an incident, there is always room for false implication motivated by ill will or on hearsay material. Therefore in our view there is merit in this argument advanced by learned Counsel that it would be dangerous to act on the evidence of the complainant in view of the long delay which has not been satisfactorily explained.

Another submission made by learned Counsel for the accused-appellants was to show that the evidence of Sarathsena was unreliable owing to two vital omissions observed in the complaint made by Sarathsena to the police on 18. 01. 1995. It would appear from the complaint recorded by P. C. Wickremapala, that the complainant had omitted to mention the names of the 1st and 3rd accused-appellants as persons who came to rob his house on the night of 28. 12. 1989. Sarathsena had only mentioned the name of the second accused-appellant Dixon and referred to others as police officers. It was only in the prepared statement of the complainant which had been tendered to the police at the time of making his complaint that he had referred to the names of all three accused-appellants. At the High Court trial the prepared statement had been produced marked P1 presumably as the 1st complaint.

It would appear that the prepared statement (P1) had been pasted by P. C. Wickramapala immediately below Sarathsena's complaint. In our view the failure to mention the names of the 1st and 3rd accused-appellants in the original complaint made to the police, by Sarathsena should therefore be considered as two vital omissions. The complainant Sarathsena sought to explain the two omissions on the basis that in his prepared statement, he had in detail referred to the three accused-appellants and therefore it was unnecessary to give their names again in the complaint made to P. C. Wickremapala. However it is to be noted that even in the complaint made to P. C. Wickramapala, Sarathsena had made a detailed complaint and in the circumstances it would be difficult to understand why he thought it fit to mention the name of the second accused-appellant Dixon and omitted to mention the names of the first (Jayawardana) and third (Suraweera) accused-appellants. If the complainant had prepared a detailed statement with the names of the three accused-appellants, it was really unnecessary for him to make another detailed complaint mentioning only the name of one of the accused-appellant's when there had been two others known to him. One inference that could be drawn from this conduct would be that the prepared statement was not the work of the complainant. If the complainant Sarathsena knew clearly what was in the prepared statement, another detailed complaint mentioning the name of one of the accused-appellant's was unnecessary. If he decided to do so, then he should have referred to all three accused-appellants without any reservation. Therefore in our view the failure of the complainant to mention the names of the 1st and 3rd accused-appellants in the complaint made to the police would show that the complainant's evidence lack consistency and therefore unreliable.

Another matter of importance that was brought to the notice of Court by Counsel for the accused-appellant related to the means of knowledge the complainant Sarathsena had about the 1st accused-appellant. According to the evidence of

Sarathsena on a day prior to the alleged robbery the 1st accused-appellant along with Inspector Ranagala had visited his house in search of his son and on that occasion Inspector Ranagala had dealt a slap on his face. In order to controvert this item of evidence, the defence has adduced the evidence of Inspector Ranagala who categorically denied any knowledge of the complainant Sarathsena. Inspector Ranagala had assumed duties at Ragama police station only on 24. 01. 1990. He denied that he ever visited Sarathsena's house any day prior to 28. 12. 1989. This evidence elicited from Inspector Ranagala was not assailed or impugned by the prosecution. Thus it is manifestly clear that witness Sarathsena was deliberately uttering falsehood when he attributed his means of knowledge by which he identified the 1st accused-appellant to the alleged incident referred to above. This factor would necessarily cast a serious doubt as to the credibility and testimonial trustworthiness of this witness.

One other matter that was highlighted in this case was the presence of a strong motive for the complainant Sarathsena to implicate the three accused-appellants. It is clear from material contained in the prepared statement of Sarathsena given to the police and marked P1 at the trial that the three accused-appellants were suspected by him for the murder of his son. According to the statement P1 that the complainant's suspicion with regard to the involvement of the three accused-appellants along with some others appears to have been based on some hearsay material. However when the complainant Sarathsena was questioned at the trial, as to whether he had any animosity towards the three accused-appellants his prompt reply was that there was no such animosity. It is difficult for the Court to accept this answer of Sarathsena as a truthful answer in view of the material contained in P1, where it would show very clearly that the complainant had a very strong motive to implicate the three accused-appellants falsely and in view of the other serious infirmities in the case. Unfortunately the learned High Court Judge misdirected herself by believing the complainant Sarathsena on this matter. Learned Judge in

the course of her judgment has stated that no where in the evidence of the complainant Sarathsena, did he state that he had any animosity towards the accused. This is obviously a serious error on the part the learned High Court Judge in view of the complainant Sarathsena's statement marked P1, where he says that his son had been attacked and killed by Sergeant Jayawardena (who is the 1st accused-appellant in this case) with the assistance of the other two accused-appellants.

It would appear therefore, that the learned High Court Judge has seriously erred in not considering any of the infirmities in the evidence of the Complainant Sarathsena, the only eye witness to the case against the three accused-appellants. If the learned trial Judge considered these infirmities carefully, there was hardly any convincing material to base a conviction on such doubtful and shaky evidence adduced by the complainant Sarathsena. Therefore we set aside the conviction and the sentence imposed on the three accused-appellants and acquit them. Appeal is allowed.

KULATILAKA, J. - I agree.

Appeal allowed.