VIRAJ PERERA VS. ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW, J.
ABEYRATNE, J.
CA 155/2004
HC COLOMBO 1947
SEPTEMBER 1, 2, 3, 8, 2009

Penal Code - Section 356 - Section 359 - Evidence of witness rejected on a certain point - Can his evidence be accepted to establish another point? - Falsus in uno - Falsus in Omnibus - Delay in making statement? Admissibility - Ingredients to prove a charge under Section 359? Abduction by Police?

The 1st - 6th accused were charged for abducting three persons with intention of secretly and wrongfully confining them (Section 356), the 7th accused - appellant the OIC of the Police Station was charged for wrongfully keeping in confinement the said persons (Section 359). The 7th accused was convicted of the offences leveled against him. The High court held that the three persons were detained at the Police Station but did not fall into the category of arrested persons - but abducted persons.

In appeal it was contended that once the evidence of a witness was rejected on a certain point his evidence cannot be accepted to establish another point and that the evidence of witness 'J' should not be accepted in view of the delay in making his statement.

Held

(1) The maxim 'falsus in uno falsus in omnibus' is not applicable in the instant case. The maxim cannot be considered as the absolute rule and that the Judge in deciding whether or not he should apply the maxim must consider the entirety of the evidence of the witness and the entire evidence led at the trial

(2) The delay in making a statement to the Police has not shaken the credibility of the witness.

Per Sisira de Abrew, J.

> "The appellant was the OIC of the Police Station. It was his duty to maintain the detention and the diet register. The appellant had admitted to witness J, that three persons would be released after recording their evidence, the appellant knew that these persons were abducted persons - failure on the part of the appellant to enter their names in the detention register or the diet register proves that he wrongfully kept them in confinement".

(3) To prove a charge under Section 359 the prosecution must prove the following ingredients:-

(i) Person against whom the offence was committed is a person who was kidnapped or abducted

(ii) The accused knew that the said person is a person who was either kidnapped or abducted

(iii) The accused concealed or kept the said person in confinement

(iv) When the accused concealed or kept the said person in confinement, he did so wrongfully.

APPEAL from the Judgment of the High Court of Colombo.

Cases referred to :-

(1) *Q vs. Vellasamy* - 63 NLR 265

(2) *Q vs Jubis* - 65 NLR 505

(3) *R. P. Kendict vs. Sl Police Norton Bridge* - 66 NLR 424

(4) *Francis Appuhamy vs. Q* - 68 NLR 437

(5) *Mohamed Faiz Ballish vs. Q* - 1958 Al 167

(6) *Samaraweera vs. AG* - 1990 - 1 Sri LR 256

Rienzi Arsakularatne for accused - appellant.
Sarath Jayamanne DSG for AG.

Octomber 15th 2009

SISIRA DE ABREW J.

First to sixth accused in this case were charged for abducting Bandula, Padumasena, and Jayantha with the intention of secretly and wrongfully confining them,

an offence punishable under Section 356 of the Penal Code. The 7th accused (the appellant) was charged for wrongfully keeping in confinement the said persons which is an offence punishable under Section 359 read with Section 356 of the Penal Code. After trial 1st to 6th accused were acquitted of the charges but convicted the 7th accused (the appellant) of the offences levelled against him. He was, on each count, sentenced to a term of seven years rigorous imprisonment (RI) and to pay a fine of Rs. 5,000/- carrying a default sentence of one year RI. This appeal is against the said conviction and the sentence.

The case for the prosecution is that the 1st to 6th accused took Bandula, Padumasena, and Jayantha into their custody and brought them to Yakalamulla Police Station and that thereafter the appellant, the OIC of Yakkalamulla Police station wrongfully kept them in confinement in the said Police Station from 20.6.90 to 4.7.90.

Sujatha, Siripala, Kusumawathi and Asilin said that 1st to 6th accused took Bandula, Padmasena and Jayantha into their custody and later they saw the said person in Yakkalamulla Police Station [herein after referred to as the Police Station]. Sujatha, Kusumawathi and Asilin stated in evidence that they could identify the 1st accused because long prior to the arrest of the said persons he had come to their village for inquires. In fact Sujatha said that she knew the 1st accused for about one year prior to the said arrest which was on 20.6.90. But the defence had produced evidence to prove that the 1st accused came to the Police Station only on 10.6.90. Witnesses have said that the 2nd accused was in Police uniforms. But the defence produced evidence that the 2nd accused could not wear police uniforms since he was a home guard. Asilin has said that his two sons including Jayantha went missing when they went to Imaduwa. Thus

her claim that Jayantha was arrested by 1st to 6th accused becomes doubtful. The learned trial Judge after considering all these matters did not rely on the evidence of the said prosecution witnesses with regard to the arrest of the said persons and acquitted the 1st to 6th accused. Learned trial Judge observed that the evidence of the prosecution witnesses with regard to the identity of the 1st to 6th accuse could not be accepted due to the difficulties in their identification and acquitted them but remarked that this acquittal was not due to the fact that they gave false evidence. Learned trial Judge accepted the evidence of Siripala and Kusumawathi with regard to the detention of the said persons to prove the fact that the said persons were detained in the Police Station. Learned President's Counsel contended that once the evidence of a witness was rejected on a certain point, his evidence cannot be accepted to establish another point. He cited *Queen vs. Vellasamy*[1] *Queen vs. Julis*[2], *RP Kandiah vs. SI Police Norton Bridge*[3] and *Francis Appuhamy vs. Queen*[4] to support his contention.

In *Queen vs. Vellasamy [supra]* Basnayake CJ held: "When evidence of a witness is disbelieved in respect of one offence it cannot be accepted to convict the accused of any other offence."

In *Queen vs. Julis [supra]* Basnayake CJ affter considering the decision in *Mohamad Faiz Baltsh vs. The Queen*[5] held: "that, by falsely implicating the 1st accused, the two witnesses gave false evidence on a material point. Applying the maxim *falsus in uno, falsus in omnibus* (He who speaks falsely on one point will speak falsely upon all), their evidence implicating the 4th and 5th accused should also be rejected. When such evidence is given by witnesses, the question whether other

portions of their evidence can be accepted as true should not be resolved in their favour unless there is some compelling reason for doing so."

In *RP Kandiah vs. SI Police Norton Bridge (supra)* Thambiah J remarked thus: "It is not permissible, in a criminal case, to disbelieve a witness on a material point and, at the same time, believe him on other points without corroborative evidence."

If *Francis Appuhamay vs. Queen (supra)* TS Fernando J after considering the Privy Council decision in Mohamad Faiz Baltsh held: "The remarks contained in the judgment of the Privy Counsil in *Mohamed Fiaz Baltsh v. The Queen (supra)* that the credibility of witnesses cannot be treated as divisible and accepted against one accused and rejected against another (a) was inapplicable in the circumstances of the present case and (b) cannot be the foundation for a principle that the evidence of a witness must be accepted completely or not at all." His Lordship Justice TS Fernando at 443 further observed: "Certainly in this Country it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witnesses. In that situation the judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true."

In *Samaraweera vs. The Attorney General*[6] this court considered how the maxim *falsus in uno falses im ominibus* should be applied. That was a case where "four accused were indicted for murder on charges under sections 296, 315,

314 of the Penal Code. At the end of the prosecution case the 1st and 4th accused were acquitted on the directions of the Judge to the jury. At the conclusion of the trial the 2nd accused was acquitted by the unanimous verdict of the jury while the 3rd accused-appellant was found guilty of culpable homicide not amounting to murder on the basis of grave and sudden provocation on the count of murder and acquitted on the other counts. The main challenge to the verdict was on the ground that it was unreasonable having regard to the fact that the same two witnesses who testified against the 3rd accused had testified against the 2nd accused who was acquitted. Having disbelieved the two witnesses as against the second accused, the jury should not have accepted their evidence against the 3rd accused - appellant. The maxim *falsus in uno falsus in omnibus* should have been applied. "His Lordship Justice PRP Perera observed thus: "The verdict was supportable in that the acquittal of the 2nd accused could be attributable to the fact that vicarious liability on the basis of common intention could not be imputed to him on the evidence even if the two witnesses were believed. The maxim *falsus in uno falsus in omnibus* could not be applied in such circumstances. Further all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim. Nor does the maxim apply to cases of testimony on the same point between different witnesses. In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless

there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true."

In the instant case, the learned trial judge having rejected the evidence of Siripala and Kusumawathi with regard to the identity of the accused who abducted Bandula, Padumasena and Jayantha used their evidence to establish that the said three persons were detained at the Police Station. The detention of the three persons was witnessed by Jayawickrama. The appellant even admitted to Jayawickrama that they were detained at the Police Station. Siripala says that he knows in and out of the Police Station since he was, on an earlier occasion, detained in the Police Station for 52 days. He even says that at certain times these three persons were detained in a shed behind the Police Station. In these circumstances can the court apply the maxim and decide that the said three persons were not detained at the police Station? I say no. For these reasons I hold that the maxim *'falsus in uno falsus in ominibus'* (He who speaks falsely on one point will speak falsely upon all) is not applicable in this case. For the above reasons I further hold that the said maxim cannot be considered as an absolute rule and that the Judge in deciding whether or not he should apply the maxim must consider the entirety of the evidence of the witness and the entire evidence led at the trial. I therefore hold that the decision of the learned trial Judge not to apply the maxim is right. For these reasons I reject the submission of the learned President's Counsel on this point.

Learned Presidents Counsel next contended that the evidence of Jayawickrama should not be accepted in view of the delay in making his statement to the police. The delay was seven years. Jayawickrama, a politician in the area, says that when relations of the said three persons informed about their abduction, he went and inquired from the OIC of the Police Station then he (the appellant) told him that they would be released after recording their statements. He, on a several occasions, saw the said three persons in the police cell. When he, on a subsequent occasion, asked the appellant about the three persons the latter informed him that they had been released on bail. Learned defence counsel did not challenge his evidence. No suggestion was made to him that he was giving false evidence on the account of delay. One should not forget at this stage the admission of the appellant made to him that three persons were detained at the police station. Although he could have made a statement to the police, he did not do so. His statement was recorded by Chief Inspector Jayasinghe attached to the Commission Investigating into disappearances of Persons. He who is not related to the relatives of the persons abducted appears to be an independent witness. When one considers all these matters, it has to be stated here that delay in making a statement to the police has not shaken his credibility. Therefore the learned trial Judge was right when he decided to accept his evidence. For these reasons I reject the submission of the learned Presidents Counsel on this point.

Now the question that remains for consideration is whether the prosecution has proved the fact that Bandula, Padumasena and Jayantha were detained at the Police Station. I now advert to this question. Siripala who even chopped fire wood during his 52 days of detention in the

police station says that one day when he went to the Police station the three persons were seated on a bench in the police station and spoke to Bandula. On other occasions he saw them in the cell and in the hut. He says he could go to the hut without much difficulty since he was known to the police officers as a result of his detention.

Kusumawathi the wife of Padumasena says that she saw all three in the police station and visited them in the Police Station from 20.6.90 to 3.7.90 and on certain occasions gave food to her husband. I have earlier referred to the evidence of Jayawickrama who says that he saw the three persons in the Police Station. When I consider the above matters, I hold that the prosecution has proved that Bandula, Padumasena and Jayantha had been detained at the Police Station.

Now the question that must be considered is whether these three persons were arrested persons or abducted persons. I now advert to this question. If they were arrested persons why didn't the appellant enter their names in the detention register and the diet register? ASP who was called by the defence says when he visited the Police Station on 25.6.90 and 28.6.90 he did not find these three persons in the Police Station nor did he find their names in the detention register or diet register. Siripala says that on certain occasions he saw them in the hut behind the Police Station. When I consider all these matters, I hold that these persons do not fall into the category of arrested persons.

Learned trial Judge at page 38 of the brief observed that if a person is wrongfully detained at a police station it has to be concluded that he was an abducted person. Learned Presidents Counsel contended that this was a wrong conclusion. It is possible for a police officer to wrongfully

detain a person who was lawfully arrested. No doubt the police officer on this occasion violates the law. I therefore hold that above conclusion of the learned trial Judge is wrong. But this misdirection has not caused prejudice to the appellant since there is evidence to establish that three persons were abducted persons. I have earlier held that these three people were detained at the police station. When the ASP visited the Police Station these three persons were not at the Police Station and their names were not found in the detention register or diet register. When I consider all these matters, I hold that these three people were abducted persons. The appellant was the OIC of the Station. Therefore it was his duty to maintain the detention register and the diet register. The appellant had admitted to Jayawickrama that three persons would be released after recording their statements. I therefore hold the appellant knew that these three persons were abducted persons. Prosecution has proved that they were kept in confinement in the Police Station. Faiure on the part of the appellant to enter their names in the detention register or the diet register proves that he wrongfully kept them in confinement.

Section 359 of the Penal Code reads as follows: "Whoever, Knowing that any person has been kidnapped or has been abducted, wrongfully conceals or keeps such person in confinement, shall be punished in the same manner as if he kidnapped or abducted such person with the same intention or knowledge or for the same purpose as that with or for which he conceals or detains such person in confinement."

To prove a charge under Section 359 of the Penal Code prosecution must prove the following ingredients.

1. Person against whom the offence was committed (person mentioned in the body of the charge) is a person who was kidnapped or abducted.
2. The accused knew that the said person is a person who was either kidnapped or abducted.
3. The accused concealed or kept the said person in confinement.
4. When the accused concealed or kept the said person in confinement, he did so wrongfully.

Prosecution as I pointed earlier has proved the above four ingredients in the 4th and 5th counts. Jayarathne was a son of Asilin who said in her statement to the Police that her two sons after going to Imaduwa on 20.6.90 did not return home. I therefore do not want to affirm the conviction of the 6th count. I acquit the appellant on the 6th count and set aside the conviction and the sentence on the said count.

For the above reason I hold that the learned trial Judge has rightly convicted the appellant for 4th and 5th counts. I therefore affirm the convictions and the sentences on the 4th and 5th counts and dismiss the appeal. Terms of imprisonment on the 4th and 5th counts should run concurrently. The appellant on bail should submit to his bail. The sentence affirmed by this court on the 4th and 5th counts should be implemented from the date on which he submits to his bail or is brought before the trial court.

ABEYRATHNE, J. - I agree.

Conviction and the sentence on the 6th count are set aside.

Convictions and the sentences on the 4th and 5th counts are affirmed.

appeal dismissed - subject to variation