REV. MAHARAGAMA SUNEETHA

VS.

ATTORNEY GENERAL

COURT OF APPEAL.
IMAM, J.
RANJITH SILVA J.
CA 180/1999
HC HAMBANTOTA 77/99.
SEPTEMBER 21, 2005.

Penal Code- sections 365 (B) 1(a), 365 B 2(b), 365 B(a) a- section 365(1) (b) -Accused appellant absconding-Criminal Procedure Code section 325(2) - Applicability - Proof of a former inconsistent statement? – Pure question of fact - Could an appellate Court interfere? – Perverse judgment?

The appellant was indicted under *section* 365 (B) 1 (a) and Section 365 B (a) (a), and after trial he was found guilty and convicted. He appealed and during the pendency of the appeal escaped from prison and an open warrant was issued for his arrest.

Acting in terms of Section 325(2) the Court of Appeal considered the appeal.

The contention of the appellant in the petition of appeal is that -

(1) a particular piece of evidence which the appellant claims to be a contradiction, significant and quite material was disregarded by the trial Judge.

(2) That there was misdirection or non-direction amounting to misdirection.

HELD:

(1) Before proof can be given of a former inconsistent statement and if the statement is in writing although it need not be shown to the witness or be proved in the first instance, if it is intended to contradict him by it, his attention must be drawn to those parts of it to be used for contradicting him and he should also be afforded with an opportunity to explain such contradictions.

This procedure has not been followed in this case. Therefore Court cannot take into cognizance the so called contradiction or omission at the stage of the appeal.

(2) Even it there is material omission amounting to a contradiction in the evidence of the witness, yet his evidence could be relied on and acted upon as there is expert medical evidence corroborating that part of his evidence.

(3) A question of fact is a compendious expression comprising of three distinct issues. In the **first** place what are proved, in the **second** place, what are the proper inferences to be drawn from the facts which are either proved or admitted. In the **third** place - what witnesses are to be believed?

It is only on the last question that any special sancity attaches to the decision of the trial Court. On the first two questions no special sanctity attaches. By any special sanctity is meant the disinclination on the part of the appellate body to correct a judgment as being erroneous.

Per Ranjith Silva, J.

"It is seen that an appellate body can and should interfere even on questions of facts although those findings cannot be branded as 'perverse', unless the issue is one of credibility of witnesses".

Appeal from the judgment of the High Court of Hambantota.

Cases referred to :

1. *R vs. Seneviratne* 38 NLR 208
2. *R vs. Cooray* - 28 NLR 74
3. *R vs. Silva* - 30 NLR 193 at 196
4. *King vs. Don Samuel* - 47 NLR 449
5. *R vs. Julis* - 65 NLR 505
6. *Samaraweera vs. Attorney General* - 1990 - 1 Sri LR 256 at 260
7. *Bharwada Bhoginbhae Harijibhai vs. the State of Gujarat* - AIR 1983 (SC) 753 (1983 Cr. LJ 1096)
8. *A. G. vs. D. Seneviratne* - 1982 - 1 Sri LR 302
9. *Wickramasooriya vs. Dedolina* - 1996 2 Sri LR 95
10. *Fraad vs. Brown & Co. Ltd.* 20 NLR 282.

Accused absent and unrepresented
Achala Vengappuli SSC for State

Cur.adv.vult.

March, 18th 2006.

RANJITH SILVA, J.

When this matter came up for argument before this court on 24.02.2006 the Accused Appellant (Appellant) was absent and unrepresented whilst Mr. Achala Vengappuli, Senior State Counsel, appeared for the Respondent and stated to court that he did not propose to make any oral submissions and invited the Court to pass judgment on the written submissions already tendered by him on behalf of the Respondent.

The Appellant was indicted in the High Court of Hambanthota by the Attorney General on the following counts :

(1) That the accused did commit an offence under 365 B(1) *(a)* of the Penal Code on Kankanamge Shelton Jayaweera between 01-01-1998 and 31-10-1998, punishable under section 365B (2) (b) on the Penal Code.

(2) That the accused did committ an offence under Section 365 B(1) (a) of the Penal Code on Priya Sujith Ratnayake between 01-01-1998 and 31-10-1998, punishable under section 365(1)(b) of the Penal Code.

After trial the appellant was found guilty and was convicted on both counts by the learned High Court judge and was sentenced to 20 years rigorous imprisonment in respect of each count to run consecutively. In addition to the term of imprisonment imposed, a fine of Rs. 10,000 was imposed on each count and a sum of Rs. 50,000 was ordered as compensation to be paid to each of the victims.

Aggrieved by the said conviction, the sentence and the compensation ordered against him the Appellant has now appealed to this court praying that the case be remitted for a re-trial and or for a reduction of the prison term imposed on him.

During the pendency of this Appeal the Appellant escaped from the prison, and an open warrant for his arrest, was issued by this court, which has not been executed so far, This explains the absence of the Appellant on the date fixed for argument. In the circumstances, this

court is of the view that this court is empowered to act under section 325(2) of the Criminal Procedure Code. This section empowers this courts to consider the appeal of the Appellant in his absence and make an order as this court may deem fit.

Section 325(2), reads thus :

'If the appellant does not appear to support his appeal the court shall consider the appeal and may make such order thereon as it may deem fit.'

The short point that needs consideration of this court is whether a particular piece of evidence which the appellant claims to be a contradiction, significant and quite material according to him, although at best it could be regarded as an omission, was disregarded or not considered by the learned trial judge, to the prejudice of the accused. The contention of the appellant is that witness Jayaweera, one of the complainants in this case who mentioned in his statement to the police that the Appellant placed his penis between his legs, later in the course of his evidence, at the trial held in court, shifted from his earlier position, by giving a differed version to the effect that the Appellant inserted his penis into his anus. However, this position has not been put to the witness at the trial and the witness has not been afforded an opportunity to explain his position. Therefore now it is too late in the day for the appellant to argue that the learned judge has failed to consider this omission. What is more on a perusal of the evidence lead in the High Court it is evident that the defence did not bring this to the notice of the court either. Evidence of a former statement by a witness cannot be given without previous cross examination. (***Vide R vs. Seneviratne***)[1]. Before proof can be given of a former inconsistent statement and if the statement is in writing although it need not be shown to the witness or be proved in the first instance, it it is intended to contradict him by it, his attention must be drawn to those parts of it to be used for contradicting him and he should also be afforded with an opportunity to explain such contradictions. (See Se. 145[1])

This procedure has not been followed in this case. Therefore this court cannot take cognizance of the so called contradiction or omission at this stage of the case in determining this appeal. When a statement

had been contradicted by an earlier statement which is not the case here, the earlier statement does not become evidence of the fact stated therein and the inconsistency is relevant only regarding the credibility of the witness. The same principle applies to omissions as well. It can never be substantive evidence. It could only be used to contradict or corroborate the witness and using it otherwise would be a misdirection. (*Vide. R. Vs. Cooray*[2] *R Vs. Silva*[3] at 196 and *King Vs. Don Samuel*[4]).

Even if this Court were to *assume arguendo* that there is a material omission amounting to a contradiction in the evidence of the witness Jayaweera, yet his evidence could be relied on and acted upon as there is expert medical evidence corroborating that part of his evidence. The learned High Court judge has quite correctly considered the evidence of witness Jayaweera, in the light of the medical evidence which corroborated the evidence of the victim and proved the matter beyond any doubt. (*Vide R vs. Julis*[5])

In *Samaraweera Vs. The Attorney General*[6] at 260 P. R. P. Perera, J observed as follows; I quote, "..... I see absolutely no contradiction in this medical evidence in the case, but I must observe that the medical evidence in the case strongly corroborates the evidence of the two eye witnesses...."

The same has to be said in this case too. The medical expert evidence lead in this case is to the effect that injuries found in and around the anus of witness Jayaweera was due to the insertion of a penis in to the anus of the witness. This is strong corroboration of the evidence of the two eye witnesses in this case.

The Senior State Counsel has in his written submissions stated that the statement made by witness Jayaweera, to the police, clearly indicate, that what the police recorded was only a summarised version of the witness. Be that as it may when a witness, unlike in a police station, is being questioned in a court of law, where the counsel on both sides who may be, inevitably well versed or at least familiar, in the art of cross-examination, bore in-to the witness relentlessly, the witness on the face of such onslaught has no alternative but to cringe and make a clean breast of every thing that happened.

On the other hand a witness of tender years, who had undergone such trauma both mental and physical, will be, due to embarrassment and other similar considerations, hesitant to divulge all the intricate details of the sexual exploitation that took place especially the details that would be most humiliating to the witness. In *Bharwada Bhoginbhai Harijibhai Vs. State of Gujarat*[7] Thakkar, J. observed "A girl or a woman in the traditional bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred."

In my view the same considerations should govern the case of a small boy who is the victim of sexual exploitation even in Sri Lanka.

This brings to my mind, the recurring question, as to how far the Court of Appeal could interfere with the findings of a trial judge on pure questions of fact in the absence of any material misdirection or non-direction amounting to misdirection on the law. Generally, it is not the function of an appellate court to re-try a case already tried. (*vide. Attorney General Vs. D. Seneviratne)* [8]

A question of fact is a compendious expression comprising of three distinct issues. In the first place what facts are proved? in the second place, what are the proper inferences to be drawn from the facts which are either proved or admitted? And in the last place what witnesses are to be believed? It is only in the last question any special sanctity attaches to the decision of a court of first instance. On the first two questions no special sanctity attaches. By any special sanctity is meant the disinclination on the part of an appellate body to correct a judgment as being erroneous. (*Vide. Wickramasooriya Vs. Dedoleena* [9]

I believe that it would be pertinent to refer to the dictum in the following case namely, *Fraad Vs. Brown & Co. Ltd.*[10]. What was held in that case is that when the issue is mainly on the credibility of witnesses an appellate court should not interfere unless the findings of the judge are perverse.

Therefore it is seen that an appellate court can and should interfere even on questions of facts although those findings cannot be branded as "perverse" unless the issue in one of credibility or witnesses.

The learned High Court Judge has correctly viewed and analyzed the evidence of the two main witnesses in the correct perspective. He has considered the credibility of the two witnesses in the back ground of their age and education before he reached his findings. The learned Judge has ruled out the possibility of the witnesses having uttered any deliberate falsehood.

The decision reached by the learned Trial Judge on the totality of the evidence does not contain any substantial misdirection or non direction either on the facts or law. There is no reasonable basis, upon which, his decision could be interfered with.

. For the aforesaid reasons I find that there is no merit in this appeal, hence the same is hereby dismissed. The Registrar is directed to forward the main case record to the relevant High court for further action.

IMAM, J. - *I agree*

Appeal dismissed.