SURASENA AND ANOTHER
v.
REPUBLIC OF SRI LANKA

COURT OF APPEAL.
P. R. P. PERERA, J. AND
W. N. D. PERERA, J.
M.C. BALAPITIYA NO. 20350
C. N. NO. 51-52/88
AUGUST 22, 23, 1990.

Criminal Law – Murder – Direction to the Jury on conduct of defence counsel – Statement from the dock – Code of Criminal Procedure Act, No. 15 of 1979, sections 230, 231, 232, and 334.

Held:

The strictures made by the trial judge on the defence counsel in the course of the summing up may have caused the jury to disregard whatever submissions that were made by him and thereby have caused grave prejudice to the appellants which would amount to a miscarriage of justice.

APPEAL from an order of the High Court.

Ranjith Abeysuriya, P.C. with *Indrani Seneviratne* and *Achala Wengapuli* for the appellants.

Upawansa Yapa, D.S.G. for the Attorney-General.

Cur. adv. vult.

September 19, 1990.

W. N. D. PERERA J.

The appellants K. H. Surasena and K. H. Shelton were indicted with having on 22.8.84 committed the murder of one Uduwila Arachchige Anilsiri *alias* Suddha. They were found guilty by the unanimous verdict of the jury and were sentenced to death.

The prosecution led the evidence of three witnesses. The first of these, Sumanawathie stated that she was living about a quarter of a mile away from the scene of the incident. When she was staying at home she heard shouting. This was at about 7 p.m. At that time she was putting batteries to a torch. She ran to the spot preceeded by

her son. She saw five persons. The deceased was being attacked by the two appellants while two other persons Richmond and Sarath were trying to prevent the attack. The deceased was being attacked with something like swords. Richmond and Sarath had a bicycle. Sumanawathie says she went up to the spot but did not flash the torch. Shelton said 'මමතනට ගත් ටෝච් එකක් අරගෙන ආවා', snatched the torch and dashed it on the ground. Sarath giving evidence stated that the deceased was his mother's sister's son. When he was at home Richmond came to visit him. He decided to take Richmond on his bicycle to his home. They met the deceased who was after liquor. The three of them were going along the road when they came to the house of Surasena. At this spot the two appellants attacked the deceased with something like iron bands. They tried to prevent the attack but could not do so. They ran away taking the bicycle with them.

Richmond also gave evidence corroborating the evidence of Sarath. Sarath and Richmond made their statements to the police at 9.45 p.m. the same night.

Inspector of Police Mr. de Mel who conducted investigations stated that when he went to the place of incident the same night he could not find anything. The body was found the next morning in a cinnamon plantation close by.

According to the medical evidence the deceased had died of multiple incised wounds. He had nineteen incised wounds.

President's Counsel who appeared for the appellants submitted firstly that the learned trial judge had, at the close of the prosecution case, and in the hearing of the jury, told the appellants that if they failed to give evidence or make a statement from the dock the jury were free to draw an inference it thought fit. He had also, in his charge to the jury told them that they could draw an inference they thought fit on the failure of the appellants to give evidence either from the witness box or by way of a statement from the dock.

It was also the submission of Counsel for the appellants that Sumanawathie's evidence was unreliable in that neither Richmond

nor Sarath had seen her at the scene of the incident. Our attention was also drawn to the contradictions marked in respect of her evidence. She stated in her evidence in court that she had been putting batteries into a torch at the time she heard cries but had told the magistrate at the non-summary inquiry that she had been cutting dried fish at the time. She had also stated at the non-summary inquiry that it was Surasena who had dashed the torch on the ground.

Counsel for the appellants also submitted that the appellants had been denied the substance of a fair trial in that the trial judge had ridiculed the conduct of defence counsel who had appeared at the trial in the course of his summing up. He drew our attention to certain passages in the charge to the jury wherein the trial judge had been critical of the conduct of the defence counsel.

In respect of the first submission, counsel for the appellants submitted that there was no provision in the Criminal Procedure Code for the trial judge to inform the jury that they could draw any inference from the failure of the accused to give evidence and since the jury would necessarily think that they could draw an adverse inference on such failure, this caused grave prejudice to the appellants.

Counsel for the State submitted that there was not, in any case, an illegality. He however conceded that the jury could draw such an adverse inference in circumstances which warranted it. In this case the trial judge has in the course of his charge told the jury that defence counsel had made certain suggestions to the two witnesses Sarath and Richmond that there had been an incident preceeding the one which had resulted in the death of the deceased, and requested the jury to consider the failure of the appellants to give evidence in this context. This, he submitted, was justified and did not cause any prejudice to the appellants. In the circumstances of this case and having regard to the suggestion made by defence counsel to the witnesses in this case, we are of the view that this action of the trial judge could not be said to have caused any prejudice to the appellants.

In respect of the contradictions D1 and D2 marked in the evidence of Sumanawathie and referred to earlier, the trial judge has told the

jury that when Sumanawathie was proved to have said at the non summary inquiry that it was Surasena who had dashed the torch on the ground it was corroborative of her evidence that she had been present at the scene of the incident. Counsel for the appellants contended, and we feel rightly, that the question as to whether this was corroborative of Sumanawathie's evidence should have been left to the jury. It was wrong on the part of the trial judge to have told the jury that it was, in fact, corroboration of Sumanawathie's evidence.

The final submission of the counsel for the appellants was that the defence counsel at the trial had been subjected to ridicule in the course of the summing up by the trial judge. This unfortunately is borne out in a number of instances in the summing up. In one instance the trial judge has told the jury that it is not possible for a counsel 'who jumps in and out of court' to conduct a case. Elsewhere he criticizes counsel for proving a contradiction and states that he would not have done so if he had conducted the case. In fact the summing up by the trial judge seems to be littered with criticisms of the conduct of defence counsel. Whatever may have been the shortcomings of defence counsel, we are of the view that the summing up is not the proper forum for the judge to make such criticisms. There is therefore substance in the submissions of counsel for the appellants that these criticisms tended to ridicule defence counsel in the eyes of the jury and left room for grave prejudice to be caused thereby to the appellants. Sections 230 and 232 of the Criminal Procedure Code sets out the duties of a judge in a case tried by jury and Section 231 thereof permits him to express an opinion as to any question of fact. If the learned trial judge was of the opinion that defence counsel was wanting in his conduct he could very well have taken action in accordance with law. Certainly it was not open to the trial judge to have made the aforesaid observations in the course of his charge to the jury.

Learned Deputy Solicitor-General submitted that while the comments made by the trial judge in the course of the summing up were not warranted in law, we could still apply the proviso to Section 334 of the Criminal Procedure Code as there had been no substantial miscarriage of justice. Counsel for the appellants argued that the proviso to Section 334(1) of the Criminal Procedure Code is

applicable only when there has been a wrong decision on a question of law which this court considers sufficient to set aside a conviction.

The powers of the Court of Appeal on hearing an appeal are set out in section 334 of the Criminal Procedure Code.

Section 334(1) provides that:

> 'The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgement of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal may be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred'

We are of the view that that where the court holds that there has been a miscarriage of justice, the proviso to Section 334(1) of the Criminal Procedure Code does not permit this court to uphold the conviction on the ground that there has not been a substantial miscarriage of justice. In the instant case, the strictures made by the trial judge on the defence counsel in the course of the summing up may have caused the jury to disregard whatever submissions that were made by him and thereby have caused grave prejudice to the appellants which would amount to a miscarriage of justice. In these circumstances we are of the view that the proviso to Section 334(1) of the Criminal Procedure Code is not applicable to the facts of this case. We therefore allow this appeal and set aside the convictions and sentences of death imposed on the appellants in this case. We direct that a fresh trial be held against the appellants on the same indictment.

P. R. P. PERERA, J. – I agree.

Fresh trial ordered.