NANDANA SILVA

VS.

ATTORNEY-GENERAL

COURT OF APPEAL
NANAYAKKARA, J.
ABEYRATNE, J.
CA 46/2002
HC PANADURA 1414/2000
NOVEMBER 21, 2003
JANUARY 23, 2004
MARCH 23, 2004

Penal Code amended by Act, No. 22 of 1995 - sections 354, 363(e), 364(2) – Kidnapping-Rape-13 year old prosecutrix's marriage with accused – Validity? – Is the Marriage void? – Section 15 of the Marriage Registration (Amendment) Act, No, 18 of 1996 – Giving false age? – Validity of marriage? – Law and section to be mentioned in charge – Is it imperative? - Criminal Procedure Code, sections 164(4), 166-Marriage Registration Ordinance- Evidance Ordinance - s. 120

The appellant was indicted for having kidnapped one "M" punishable under section 354 Penal Code and also in the course of the same transaction having committed rape on her, section 364(2) as amended.

After trial the appellant was found guilty on both counts and sentenced to 3 years rigorous imprisonment and a fine of Rs. 1500/- on the first count and 10 years rigorous imprisonment with Rs. 5,000/- as compensation to be paid to the prosecutrix.

On appeal it was argued that as the accused-appellant was married to the prosecutrix, the accused could not have been convicted of rape on the prosectrix-his wife, and that even though the marriage was contracted by making a false declaration as to their ages until such marriage is declared null and void by a competent court, the marriage remains a valid marriage.

HELD:

(1) Section 15 of the Marriage Registration Ordinance amended by section 15 of the Marriage Registration Act, No. 18 of 1996 makes it clear that the marriage contracted by the prosecutrix when she was 13 years and few months with accused-appellant was *ab initio* void.

(2) The argument that a valid marriage between the parties exist as long as it is set aside by a competent court is not tenable and cannot be accepted – besides the accused appellant had contracted the so called marriage with the prosecutrix after the commission of the act of rape on the prosecutrix and at the time of the commission of the offence the prosecutrix was not his wife.

HELD FURTHER:

(3) Section 164(4) of the Criminal Procedure Code provides that the law and the section under which the offence is alleged to have been committed should be mentioned in the charge.

(4) When the section envisages several instances of liability it would be paramount to mention clearly the section and the sub section under which the accused was indicted so that he may not be misled or prejudiced in the conduct of his defence. The absence of such sufficient particularity is bound to prejudice and hamper the accused appellant of the defence the prosecution cannot expect to have recourse to section 166 of the Criminal Procedure Code.

(5) The charges under which the accused appellant tried was basically flawed and defective.

APPEAL from the judgment of the High Court of Panadura.

Cases referred to:

1. *Macfoy* vs. *United Africa Company Ltd.* 1961 ALL ER 1169

2. *Dr. Ranjith Fernando* with *Harshini Gunawardane* for accused appellant.

S. Rodrigo, Senior State Counsel for respondent.

Cur.Adv.vult.

NANAYAKKARA, J.

The accused-appellant was indicted in the High Court of Panadura for having kidnapped one S. S. Munasinghe, an offence punishable under section 354 of the Penal Code and also in the course of the same transaction having committed rape on her. An offence punishable under section 364(2) of the penal Code as amended by Act No. 22 of 1995.

At the conclusion of the trial the accused-appellant was found guilty on both counts and sentenced to 3 years R. I. And a find of Rs. 1500/- on the first count and 10 years R. I. with Rs. 5000/- compensation to be paid to the prosecutrix.

At the trial, several witnesses including the prosecutrix had testified for the prosecution.

The factual circumstances which led to the incident are briefly as follows:-

The accused-appellant and the prosecutrix lived in the same village in close proximity to each other. The prosecutrix who was 13 years and 11 months at the time of the alleged incident was studying in the year 9. The accused-appellant was frequent visitor to the prosecutrix's place and was a friend of her brothers.

An affair between the accused-appellant and the prosecutrix developed and the prosecutrix's mother became aware of this affair. On numerous occasions she severely reprimanded and upbraided the prosecutrix and asked her to stop the affair with the accused-appellant. Being unable to bear the harassment of her parents she decided to elope with the accused-appellant.

Her first attempt as elopement had not succeeded. Thereafter on 25.03.1995, she having handed a bag containing her clothes to the accused-appellant who was waiting outside her house had surreptitiously gone away with the accused-appellant on a push bicycle.

Although they had stayed with a relative of the accused-appellant on that day, the accused –appellant has not had any sexual intimacy with the prosecutrix on that night.

Thereafter the prosecutrix giving a false age registered marriage with the accused-appellant under the General Marriage Ordinance.

A few days later, on hearing a complaint had been made by the prosecutrix's family the accused-appellant together with the prosecutrix had surrendered to the Police.

The conviction and the sentence entered in this case was assailed by the learned Counsel for the accused-appellant on several grounds.

At the hearing of this appeal it was argued on behalf of the accused-appellant, as there exists a valid marriage between the accused-appellant and the prosecutrix the accused-appellant could not have convicted of rape on the prosecutrix.

It was also contended even though the marriage between the accused-appellant and the prosecutrix was contracted by making a false declaration as their ages until such marriage is declared null and void by a competent court, the marriage remains a valid marriage.

It was further argued that the prosecutrix being the wife of the accused-appellant was not competent witness in terms of section 120 of the Evidence Ordinance.

It would be useful at this stage to consider the validity of the argument advanced by the learned Counsel for the accused-appellant. The crucial issue to be determined in this case is whether a valid marriage exists between the accused-appellant and the prosecutrix in the eyes of the law.

It is an admitted fact that the prosecutrix was 13 years of age and few months at the time of the alleged incident and there is no dispute in regard to her age. As her age has been proved by the production of a valid certificate of birth at the trial.

In considering the validity of the submissions made on behalf of the accused-appellant, it would be important to focus the attention of section 15 of the Marriage Registration Ordinance as amended by Marriage Registration Amendment act No. 18 of 1996.

Therefore the plain reading of this section makes it clear that the marriage contracted by the prosecutrix when she was 13 years and few months with the accused-appellant was *an initio* void as no person under the age of 18 years could contract a valid marriage in the eyes of the law.

The purported marriage between the prosecutrix and the accused-appellant is void *ab initio* not voidable as the learned Counsel sought to make out in this case and the argument that a valid marriage between the

parties exists as long as it is set aside by a competent court is not tenable and cannot be accepted by this court.

Since the purported marriage between the accused-appellant and the prosecutrix was void *ab initio* and as such a nullity in the eyes of the law the accused-appellant cannot have recourse to the exception provided under section 363(e) on the basis that the prosecutrix was his wife.

Besides, the accused-appellant had contracted the so called marriage with the prosecutrix after commission of the act of rape on the prosecutrix and at the time of the commission of the offence the prosecutrix was not his wife. In this connection the observation made by Lord Denning in the case of *Macfoy vs. United Africa Company Ltd.*, at 1172 to which the learned State Counsel has adverted in his submissions would be appropriate.

> "This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. An every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

Therefore in view of the above mentioned circumstances the grounds on which the conviction and the sentence was assailed cannot be accepted by this court.

However, another important issue to be considered in this case, is whether there has been sufficient compliance with the provisions applicable to the framing of charges contemplated under the Code of Criminal procedure Act and in the event of non compliance whether the accused-appellant had been prejudiced in his defence in any manner at the trial. In this case the charge relating to the act of rape informs the accused-appellant that he committed rape on the prosecutrix an offence punishable under section 354(2) of the Penal Code as amended by Act No. 22 of 1995.

Section 164(4) of the Criminal Procedure Code provides that the law and the section under which the offence is alleged to have been committed should be mentioned in the charge. Similarly section 166 of the Criminal

Procedure Code provides that any error stating whether the offence or the particulars required to be stated in a charge and any omissions of particulars will not be regarded as material unless the accused has been misled by such omission or error.

It would be appropriate to consider whether there was any such error in this case and if so whether it has misled or prejudiced the accused-appellant in the conduct of his defence.

Section under which the accused-appellant was charged envisages several instances of liability. They are as follows :

In a situation as this when the section envisages several instances of liability would be of paramount importance to mention clearly the section and the sub section under which the accused-appellant is indicted so that he may not be misled or prejudiced in the conduct of his defence. It is incumbent on the part of the prosecution to inform an accused the charge he has to face in a trial.

It is important when the section envisages several instances of rape, the penal section under which an accused person is charged is stated with sufficient particularity.

The absence of such sufficient particularity in my view in this instance is bound to prejudice and hamper the accused-appellant in the conduct of his defence, and the prosecution cannot expect to have recourse to section 166 of the Criminal Procedure Code.

Therefore it is my considered view that the charge under which the accused-appellant was tried basically flawed and defective.

In view of the above mentioned reasons I am of the view that the charge relating to the act of rape should fail and the accused-appellant should be acquitted of that charge. Accordingly he is acquitted of the charge of rape and the conviction in regard to the charge of abduction affirmed.

ABEYRATNE, J. – *I agree.*

Accused acqitted of charge of rape. Conviction in regard to charge of deduction affirmed.

Appeal partly allowed.

SILVA
VS
LT. COL. JAYASINGHE, AND OTHERS

COURT OF APPEAL,
CHANDRA EKANAYAKE, J.,
SRISKANDARAJA, -J.
CA 397/2003,
SEPTEMBER 30, 2005.

Writ of Certiorari - Army Act - Army Court of Inquiry - Ultra vires - Not falling within the scope of Court of Inquiry?- No opportunity given to be present throughout the inquiry - Violation ? Matters under inquiry prescribed? Inquirers biased? - Illegality? Irregularity in the proceedings?

An Army Court of Inquiry was appointed to inquire and report on the Inquiry report made by the Military Police on the petitioner. The Court of inquiry found the petitioner guilty of scandalous and disgraceful conduct unbecoming of an officer and recommended that he shall be given the option of retiring from service or be compulsorily retired from service. The petitioner sought to quash the said decision on the grounds that (1) the subject matter of the Court of Inquiry does not fall within the scope of a Court of Inquiry (2), that, the respondents did not afford him an opportunity to be present throughout the inquiry (3), that matter under inquiry is prescribed (4) the inquirers were biased.

Held:

1. Under regulation 3(9) if it is in the opinion of the officer authorized to convene a Court of Inquiry that a Court of Inquiry is necessary to expedite he could convene a Court of Inquiry.

2. Petitioner was given an opportunity to read the evidence led in his absence and an undertaking was given to the petitioner that transport will be provided to him to enable him to be present and cross examine the witness. In the circumstances, the petitioner cannot claim that he was not given an opportunity to be present at the inquiry and cross examine the witnesses.

3. The petitioner cannot raise the objection of bias as he has not raised this objection before the Court of Inquiry, without doing so he could not take up this objection.

4. The Army Court of inquiry Regulations specified the purposes for which a Court of Inquiry may be held but there is no prescriptive

period given for any of the matters specified. The subject matter of the inquiry cannot be said to be prescribed.

APPLICATION For a Writ of Certiorari/Mandamus

Kalinga Indatissa with H. G. Dharmawardane for petitioner
Uresha de Silva, SC for respondent.

Cur. adv. vult.

November 3, 2005

SRISKANDARAJA. J.

The Petitioner joined the regular force of Sri Lanka Army on 21st February 1981 and was promoted time to time to various positions and served in different parts of Sri Lanka. In February 1999 he was posted as officiating Commander Replacement Park at Kanagarayankulam with responsibilities for combat replacement to 3 infantry divisions involved in battle. In November 1999 Wanni debacle took place as a result he had to withdraw his head quarters and stationed at security forces head quarters Vavunia until May 2002. Since May 2002 he has been appointed as staff officer 1 of 55 Division in Jaffna.

On or about 15th of May, 2002, 5th Respondent Commandant of the Sri Lanka Army General Services Corps appointed a Court of Inquiry consisting of the 1st, 2nd and 3rd Respondents to inquire and report, on the inquiry report made by the Special Investigation Unit of the Sri Lanka Corps of Military Police.

The Petitioner in this application has sought a Writ of Certiorari to quash the proceedings and the findings of the Army Court of Inquiry conducted by the 1st to 3rd Respondents against the Petitioner and an order of a Writ of Prohibition against the 8th Respondent from confirming the aforesaid order of the 1st to 3rd Respondents.

The Petitioner submitted that the finding of the court of inquiry conducted by the 1st to 3rd Respondents is ultra vires for the reasons that the subject matter of the purported Court of Inquiry does not fall within the scope of a Court of Inquiry in terms of Army Courts of Inquiry Regulations 1952. The Army Courts of Inquiry Regulations 1952 provides in Regulations 3 :

3. A Court of Inquiry may be held in respect of any of the following matters :

(1)..
(2)..
(3)..
(4)..
(5)...
(6)..
(7)..
(8)..
(9).. In any other case where in the opinion of an officer authorised to convene a court of inquiry, the holding of a court of inquiry appears to be necessary or expedient.

Under regulation 3(9) if it is in the opinion of an officer authorised to convene a cCourt of Inquiry that a Court of Inquiry is necessary or expedient he could convene a Court of Inquiry. In this instant case the Court of Inquiry was convened by the order dated 15th May, 2002 to inquire into the charges whether the Petitioner is carrying on a clandestine affair with the widow of a deceased soldier, W. M. M. Swarnalatha and whether the Petitioner has engaged military personnel and vehicles for the construction of the said W. M. M. Swarnalatha's house. Therefore the submission that the convening of the Court of Inquiry is ultra vires cannot be substantiated.

The petitioner further submitted that the Court of Inquiry has acted in breach of Regulation 15 by not affording him an opportunity to be present throughout the inquiry. The President of the Court of Inquiry the 1st Respondent submitted that the inquiry was due to be held at the Regimental Headquarters in Panagoda on 20th May 2002 and the Petitioner was instructed to attend the same. However the Petitioner informed that he did not have a vehicle to come to Panagoda and instead requested that the said Court of Inquiry be conducted at Dambadeniya to record his evidence and that of his witnesses. Accordingly the Court of Inquiry assembled in a house at Dambadeniya and recorded the evidence of the Petitioner and another six other witnesses in the Petitioner's presence the Petitioner declined to cross examine any of these witnesses. The Petitioner was informed the place and the date of recording the other witnesses evidence but the Petitioner cited frivolous and trivial reasons and failed to attend the said inquiry. In any event the Petitioner was given an opportunity to read the evidence led in his absence and an undertaking was given to the

Petitioner that transport will be provided to him to enable him to be present and cross- examine the said witnesses. In these circumstances the Petitioner cannot claim that he was not given and opportunity to present in the inquiry and cross-examine witnesses.

The Petitioner took up the position that the Court of inquiry were inquiring into matters which allegedly and admittedly have taken place between 1992 and 1997 and hence the matters under inquiry are prescribed. The Army Courts of inquiry Regulation 1952 in Regulation 3 specified for the purpose for which a court of Inquiry may be held but there is no prescriptive period given for any of the matters specified in Regulations 3. Therefore the subject matter of the inquiry cannot be said to have prescribed.

The Petitioner also took up the position that the inquirers appointed to the court of inquiry comprised of Junior officers to the Petitioner and as they are anticipating promotions they acted with bias. The Petitioner has not raised this objection before the Court of Inquiry without doing so he cannot take up this objection in these proceedings. In any event the Army Act or the Army Courts of Inquiry Regulation 1952 does not provide that the court of inquiry should comprise of members senior than the officer who is to be tried before the Court of Inquiry.

The Respondents submitted that the Court of Inquiry recorded seventeen witnesses evidence and it had duly conducted the inquiry in accordance with the provisions of the Army Courts of Inquiry Regulation and submitted its report on the 8th of August, 2002. In the said report the Court of Inquiry had found the Petitioner guilty of carrying on a clandestine affair with W. M. M. Swarnalatha, the widow of a deceased soldier. Pursuant to this report 4th and 7th Respondent expressed opinion that the Petitioner is guilty of scandalous and disgraceful conduct unbecoming of an officer and recommended that he should be given the option of retiring from service or be compulsorily retired from service. Having considered the said report of the Court of Inquiry and the opinion expressed and the recommendation made by the 4th and 7th Respondents the 8th Respondent the Commander of the Army having been satisfied that the Petitioner had carried on a clandestine affairs with the said W. M. M. Swarnalatha the widow of the deceased soldier and Suneetha Kumari by abusing his authority and privileges as a responsible officer of the Sri Lanka Army and he also having been satisfied that the Petitioner had by his aforesaid conduct set a bad

example to his subordinates and brought the army into disrepute.and that the Petitioner's continuation in the army would be inimical to the interest of discipline in the army, recommended on the 18th of March, 2003 that the Petitioner be given the option of retiring or be compulsorily retired from service, The respondents also submitted that in terms of regulation 2(1) (a) of the Army Officers services Regulation (Regular Force) 1992 the 8th Respondent should forward the said recommendation to Her Excellency the President for her approval but this has not be done as the Petitioner had filed this application. The Respondents took up the objection that his application is premature as there is not finality reached in this matter and Her Excellency the President is the sole authority in this matter and the Inquiry report or the recommendation is still not forwarded to Her Excellency.

For the aforesaid reasons this court holds that there is no illegality or irregularities in the proceedings of the aforesaid Court to Inquiry. Therefore there is no reason for this court to quash the proceedings or the findings of the Army Court of Inquiry. Hence this Court dismisses the application of the Petitioner without costs.

EKANAYAKE, J. - *I agree*

Application dismissed.