IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal to the Supreme Court after grant of Special Leave under Article 128 of the Constitution.

Gusthinggna Waduge Somasiri
No. B/14, Jayanthipura-Yaya 11

Accused-Appellant-Petitioner

SC (Appeal) 79/2009
SC (SPL) .L.A. No. 190/2008
CA Case No. 75/2002
HC Anuradhapura 31/2000

Vs.

Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondent -Respondent

Before	:	Mohan Pieris, PC, CJ Ekanayake, J & Dep, PC J
Counsel	:	Dr. Ranjith Fernando for Accused-Appellant-Appellant Dappula de Livera , DSG for Respondent-Respondent
Argued on	:	29.04.2013
Decided on	:	11.07.2014

Priyasath Dep, PC, J

This is an Appeal against the judgment of the Court of Appeal which affirmed the conviction and sentence imposed by the High Court of Anuradhapura in Case No. 31/2000.

The Accused-Appellant was indicted in the High Court of Anuradhapura by the Attorney General alleging that on or about 12th July 1998 in Jayanthipura he did commit rape on Devika Iranganie, an offence punishable under section 364(2)(e) of the Penal Code as amended by Act No. 22 of 1995.

I shall refer to the facts of this case briefly. According to the prosecutrix , the accused appellant is a distant relative of her family and with the knowledge of her parents, the accused used to visit her house and helped her in her studies. She was at that time 15 years of age and was preparing for the Ordinary Level Examination. On 12th July 1998 when she was studying in the room , the accused came to the room and closed the door and after removing her clothes forcibly had intercourse with her. She raised cries and the accused threatened her stating that he will throw acid on her and prevent her from attending school in the future. At that time her parents were away at work and her younger brothers were playing in the school playground. After the accused left the premises she had a bath and washed her clothes. She did not tell her parents about this incident. Few days after the said incident on 19th July 1998 when she was ironing her clothes, the accused came to the house and placed a letter on the top of her school books. Her brother took the letter and gave it to her mother. Two days later her parents having read the contents of the letter and questioned her. She narrated the whole incident. Her parents took her to the police station and she made a complaint.

The brother of the prosecutrix Dinesh gave evidence to the effect that the accused had given a letter to her sister and he in turn gave his mother. The mother of the prosecutrix, Malkanthi Karunaratne in her evidence stated that the accused is a distant relative of the family and he used to come to the house to help her daughter in her studies. They trusted him as the accused had a daughter of the same age and that he will not harm her. She stated that her son Dinesh gave a letter to her stating that it was given by the accused to his sister and she read the letter and discussed the contents of the letter with her husband and decided to question her daughter. Her daughter narrated the incident that took place. Thereafter a complaint was made to the police.

Dr. Wilson who examined the prosecutrix found that there is a tear in the hymen and it was partly healed. He gave evidence to the effect that the injury is consistent with the history given by the prosecutrix. The Medical Legal Report was marked as P2. The letter was produced and marked as P3. In the letter the accused had expressed his attachment towards the prosecutrix and the sexual relationship he had with her. He regretted that the prosecutrix since of late had changed her mind and was avoiding him.

Police Sergeant Leelaratne and Chief Inspector of Police Kottearachchi gave evidence regarding the investigations carried out by them.

After the close of the case, the learned High Court Judge called upon the accused for his defence. The accused elected to make a statement from the dock. In his statement he denied the allegation made against him and stated that he was falsely implicated. He stated that he had financial transactions with prosecutrix's family which resulted in disputes among the families and due to this he was falsely implicated. He denied giving a letter to the prosecutrix.

The learned High Court Judge rejected the dock statement and held that the prosecution had proved the case beyond reasonable doubt and convicted and sentenced the accused. The High Court sentenced the accused to a term of 10 years rigorous imprisonment and ordered the accused to pay Rs. 10,000/- to the prosecutrix as compensation and imposed a fine of Rs. 2,000/-. In default of payment of compensation and the fine , a further two years RI each was imposed.

Being aggrieved by the judgment of the High Court, the Accused appealed to the Court of Appeal. In the Court of Appeal the learned counsel for the defence submitted that the honourable High Court Judge failed to properly consider the dock statement. The approach adopted by the honourable High Court Judge is erroneous and contrary to the principles referred to in the judgments of the Supreme Court. The Court of Appeal accepted the position that the honourable High Court Judge did not adopt the proper approach in evaluating the dock statement. However, the Court of Appeal applied the proviso to section 334(1) of the Criminal Procedure Code and the proviso to Section 138 of the Constitution and held that there was no miscarriage of justice. The Court of Appeal dismissed the appeal and affirmed the conviction and the sentence.

Being aggrieved by the judgment of the Court of Appeal, the Accused filed a special leave to appeal application and obtained leave on two substantial questions of law. I will deal with the questions of law separately.

First Question of Law

Did the Court of Appeal grievously err in Law by applying the "Proviso" to section 334 of the Code of Criminal Procedure Act read together with Article 138 of the Constitution notwithstanding the fact that the Court of Appeal was firmly of the view that the Trial Judge misdirected himself when he evaluated the dock statement stating that " a dock statement does not become evidence although it has some evidential value. The failure of the Accused to give reasons for his defence bolsters and strengthens the prosecution case. If there was any truth in the allegation of fabrication he should have given evidence on oath and not doing so ensures to the benefit of the prosecution".

It is appropriate at this stage to consider the approach adopted by the learned High Court Judge in the light of the decisions of the Supreme Court. In Queen V. Kularatne 71 NLR 529 at page 531it was held that:-

> ' when an unsworn statement is made by the accused from the dock, the jurors must be informed that such statement must be looked upon as evidence, subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony. But the jury must also be directed that (a) if they believe the unsworn statement it must be acted upon, (b) if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and (c) that it should not be used against another accused. The dock statement of the 1st accused was dealt with in such a manner in the present case that it was likely that the jury thought that they were not called upon to pay any attention at all to that statement.

This decision was followed in cases Somasiri Vs. AG- 1983 (2) SLLR 225,Lionel Vs. AG- 1988 (1) SLLR 4, Gunapala Vs. Republic of Sri lanka- 1994 (3) SLLR 180.

In view of the above judgments it is abundantly clear that the learned High Court Judge failed to adopt the correct approach in evaluating the dock statement. The Court of Appeal held that the approach adopted by the learned trial judge is erroneous nevertheless applied the "Proviso" to section 334 of the Code of Criminal Procedure Act

read with the proviso to Article 138 of the Constitution and proceeded to dismiss the appeal.

The learned Counsel for the Appellant submits that when there is a serious error of this nature, the Court of Appeal should not have applied the proviso to section 334 of the Criminal Procedure Code and the proviso to Article 138 of the Constitution. The learned Counsel for the Appellant further submits that these provisos are applicable only for technical and procedural errors and not for serious misdirections or errors on fundamental matters of law.

I agree that the trial judge failed to adopt the correct approach in relation to the dock statement. The question that arises is when there is a wrong decision on a question of law of this nature is it proper for the Court of Appeal to apply the proviso to section 334 of the Criminal Procedure Code and the proviso to Article 138 of the Constitution.

At this stage it is necessary to refer to the provisos. The Section 334(1) of the Criminal Procedure Code and its proviso read thus:

Proviso to 334(1)

> The Court of Appeal on any appeal against conviction on a verdict of a jury shall allow the appeal if it thinks that such verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before which the Appellant was convicted should be set aside on the ground of a wrong decision of any question of any 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, not withstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(Section 334 of the Code of Criminal Procedure Act No 15 of 1979 is identical to section 5 of the Court of Criminal Appeal Ordinance No.23 of 1938 which was repealed by section 3 of the Administration of Justice Law No. 44 of 1973. The corresponding section of the Administration of Justice Law is section 350)

Proviso to Article 138(1) of the Constitution reads thus:

The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes , suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance:

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

The applicability of the proviso to section 334(1) of the Criminal Procedure Code was exhaustively dealt with in *Mannar Mannan v. The Republic of Sri Lanka* 1990. 1 SLR (Page 280).It reads thus:

> "1. The enacting part of the sub-section (1) of section 334 'mandates' the court to allow the appeal where –
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> (a) the verdict is unreasonable or cannot be supported having regard to the evidence; or
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> (b) there is a wrong decision on any question of law; or
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> (c) there is a miscarriage of justice on any ground.
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> The proviso clearly vests a discretion in the court and recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. There is no warrant to the view that the court is precluded from applying the proviso in any particular category of 'wrong decision' or misdirection on questions of law as for instance, burden of proof.
>
> There is no hard and fast rule that the proviso is inapplicable where there is non direction amounting to a misdirection in regard to the burden of proof. What is important is that each case, falls to be decided on a consideration of (a) the nature and intent of the non-direction amounting to a misdirection on the burden of proof (b) all facts and circumstances of the case, the quality of the evidence adduced and the weight to be attached to it."

In the above case the trial judge failed to direct the jury that if the dock statement created a reasonable doubt in the prosecution case, the accused is entitled to an acquittal. The learned Counsel who appeared for the Appellant strenuously argued that if there is an error in relation to a fundamental matter such as burden of proof, the Court should not apply the proviso and dismiss the Appeal. However the Supreme Court held that non direction did not cause miscarriage of justice and dismissed the appeal.

The main question in the case before us is whether the wrong approach adopted by the learned trial judge in evaluating the dock statement has the effect of vitiating the conviction. Though the learned trial judge adopted a wrong approach in relation to the dock statement, he had rejected the dock statement as false and thereafter considered the prosecution case and held that the prosecution had proved the case beyond reasonable doubt. When considering the facts of this case there is credible and sufficient evidence to convict the accused.

Second Question of Law:

Did the Court of Appeal err by applying the aforesaid "Proviso" to section 334 of the CPC and the relevant Article in the Constitution, in a Non Jury Trial where there was

grievous misdirection on a material concepts of Law - which were not mere procedural /technical irregularity/omission/error or defect.

The learned counsel for the Appellant submitted that the proviso to section 334(1) applies only for jury trials and not applicable for non jury trial. There are numerous instances where the Court of Appeal had considered the applicability of this proviso in non jury trials.

In Sheela Sinharage (1985) 1 Sri L.R. 1 the Court of Appeal held that the proviso applies only to non jury trials. However H.S.Yapa J expressed the contrary view in *Moses v. State* 1999 – 3 SLR 401when he held:

> "Though Section 334(1) refers to cases of trial by jury, it is reasonable and proper to assume that the intention of the legislation must necessarily be the same, whether it is a trial before a Jury or Judge sitting alone. The deciding factor being that there should be evidence upon which the accused might reasonably have been convicted."

The Supreme Court bench which consist of five judges who heard the appeal in a Trial at Bar before the High Court in Wijerathne and others v. The Attorney General 2010 (B.L.R.)169 at page177 considered the proviso in section 334(1) and applied the principle therein to that case which is a non jury case. The Supreme Court in that case held 'it is quite clear that the principles embodied in the proviso to s.334 (1) are equally applicable to an appeal under s.335(1)

In *Mannar Mannan v. The Republic of Sri Lanka* (supra) as there was overwhelming evidence against the accused the Supreme Court applied the proviso in spite of the fact that there was an error on a fundamental matter such as burden of proof and dismissed the appeal. The proviso to section 334(1) of the Code of Criminal Procedure Act is based on sound reasoning that in a case where there is overwhelming evidence the court should not allow the appeal if there is no miscarriage of justice. I am of the view that there is no impediment to apply the same rationale in non jury trials.

Section 334 of the Code of Criminal Procedure Act as set out in the marginal note deals with 'determination of appeals in cases where trial was by jury'. It sets out the grounds where the Court of Appeal could set aside the verdict of the Jury. These grounds are common grounds considered by Appellate Courts when dealing with appeals from lower courts and not peculiar to jury trials.

Section 335 (1) of the Code of Criminal Procedure Act dealing with ' determination of appeals in cases where trial was without a jury' does not refer to any ground whatsoever. It reads thus:

> 'In an appeal from a verdict of a judge of the High Court at a trial without a jury the Court of Appeal may if it considers that there is no sufficient grounds for interfering dismiss the appeal.'

It necessarily follows that if there are sufficient grounds court shall allow the appeal. However this section does not refer to sufficient grounds as it is drafted in the negative. Hence there is no need to have a proviso. Therefore the Court of Appeal should take into

account the general practice adopted by the appellate courts over the years. If the judgment is unreasonable and cannot be supported having regard to the evidence, the judgment shall be set aside. This is a general principle adopted by appellate courts setting aside judgments on the basis of unreasonableness or inadequacy of evidence. When there is a wrong decision on any question of law or miscarriage of justice it may be a ground to set aside the judgment. However before doing so the court should consider what effect the wrong decision or miscarriage of justice had on the judgment. If it has no impact on the judgment, the appellate court could disregard those factors and affirm the judgment. In cases though there was a wrong decision on a question of law or miscarriage of justice, the appellate court if satisfied that the prosecution case was proved beyond reasonable doubt it could affirm the judgment instead of ordering a retrial which entails delay and expense. There is 'no substantial miscarriage of justice' or ' which has not occasion a failure of justice' are the concepts adopted to justify this course of action.

For the reasons stated above I hold that the Court of Appeal correctly dismissed the Appeal as there was no substantial miscarriage of justice. There is credible and sufficient evidence to establish the case beyond reasonable doubt. Therefore I see no reason to disturb the findings of the High Court and the judgment of the Court of Appeal which affirmed the judgment of the High Court. For the aforesaid reasons the conviction and sentence affirmed. The appeal is dismissed.

Registrar is directed to send copies of this judgment to the Court of Appeal and also to the High Court of Anuradhapura. If the original record is in the Supreme Court or in the Court of Appeal, Registrar of the relevant court is directed to forward the same to the High Court.

Judge of the Supreme Court

Mohan Peiris, PC.,CJ.
I agree

Chief Justice

Chandra Ekanayake, J.
I agree

Judge of the Supreme Court