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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Court of Appeal Case No.
CA/HCC/0089/2020
High Court of Trincomalee
Case No. HCT/913/2019

Complainant

Vs.

Nambukaragamage Nandasena alias M.P. Nandasiri.

Accused

AND NOW BETWEEN

Nambukaragamage Nandasena alias M.P. Nandasiri

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J

WICKUM A. KALUARACHCHI, J

COUNSEL : Rienzie Arsecularatne, PC with Chamindri Arsecularatne and Himasha Silva for the Accused-Appellant.

Azard Navavi, SDSG for the Respondent.

ARGUED ON : 30.07.2024

DECIDED ON : 28.08.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Trincomalee for three counts of Grave Sexual Abuse committed between 01st of March 2010 and 31st of December 2010. After trial, the appellant was convicted of all three counts. He was sentenced for 10 years RI for the 1st Count, 07 years RI for the 2nd Count, 07 years RI for the 3rd Count and the sentences were ordered to run concurrently. Fines and compensation were also ordered.

A written submission has been filed only on behalf of the Appellant prior to the hearing of the appeal. At the hearing, the learned Senior Deputy Solicitor General (SDSG) for the Respondent conceded that the learned Trial Judge had adopted totally a wrong procedure in taking evidence and thus the conviction cannot stand. However, the learned SDSG urged to send back the case for retrial as there is cogent evidence to establish the charges leveled against the Accused-Appellant.

The learned President's Counsel for the Appellant vehemently objected for sending the case for retrial and contended that there is no cogent evidence to prove the charges. The learned President's Counsel pointed out that what has been stated by PW-1 in her evidence had not been stated in giving history to the doctor who examined PW-1 after the

alleged incident. He also contended that PW-1 stated in her evidence about penetration, but according to the doctor, there was no penetration and thus, her evidence is not credible.

The learned President's Counsel filed of the record the entire proceedings of the case bearing number HCT/914/2019 in the High Court of Trincomalee. In the said case, this accused-Appellant was indicted for three counts of rape. The victim in the said case is the same victim of the instant case bearing number HCT/913/2019. The learned SDSG admitted that the evidence is identical in both cases and it is clear that evidence was taken once and the same evidence had been adopted in both cases. It is apparent that evidence was taken only in one case among the aforementioned cases of HCT/913/2019 and HCT/914/2019 and the learned High Court Judge had adopted the same evidence to the other case as well. When there are two indictments in two cases, evidence led in one case cannot be adopted to the other case, especially when the charges in one case are Rape charges and the charges in the other case are Grave Sexual Abuse charges and that is entirely a wrong and illegal procedure. In addition, serious issues arise from this illegal procedure adopted by the learned High Court Judge are that the learned Judge had not at least taken the consent of the parties to do so and that no one knows in which case the evidence was taken. At the commencement of the trial, in none of the cases, it is recorded that the same evidence is adopted in both cases. Not only the consent of the parties has not been taken to adopt the same evidence in both cases, but also the learned Trial Judge has not even informed the parties that the same evidence would be adopted in both cases. The instant case, and the case bearing number HCT/914/2019 were determined by the learned High Court Judge using the same set of evidence and in the case bearing number HCT/914/2019, this accused-appellant was acquitted of all three charges and in the case bearing number HCT/913/2019, the accused-appellant was convicted of all three charges.

It is strange to see how the learned High Court Judge adopted the same evidence in this way because apart from the fact that the offences of the two indictments are different, the time periods that the alleged offences were committed are also different. In the case bearing number 914/2019, the 1st count of rape is alleged to be committed between 01st March 2010 and 31st March 2010 (the learned High Court Judge wrongly mentioned the period in his judgment as "between the dates of 1st March 2010 and 21st December 2010") and in the instant case, the 1st Charge of Grave Sexual Abuse is alleged to be committed between 01st March 2010 and 31st December 2010, in the case bearing number 914/2019, the second charge of Rape is alleged to be committed between 01st April 2010 and 30th April 2010 and in the instant case, the 2nd charge of Grave Sexual Abuse is alleged to be committed between 01st March 2010 and 31st December 2010, in the case bearing number 914/2019, the 3rd charge of Rape was alleged to be committed between 01st December 2010 and 31st December 2010 and in the instant case the 3rd count of Grave Sexual abuse is alleged to be committed between 01st March 2010 and 31st December 2010. Not only the nature of the offences is different in two cases, but also the time periods are also different. However, the learned High Court Judge adopted the same evidence in both cases without informing the parties and determined the two cases.

In the case of ***Jayathilaka v Attorney-general***- 2008 (2) Sri L.R 117, it was held that *"In a charge of rape, the prosecution must prove the penetration. In a charge of grave sexual abuse prosecution is not required to prove penetration. Thus, the ingredients in a charge of rape are different from the ingredients that must be proved in a charge of grave sexual abuse. When the accused was convicted without being charged, grave prejudice is caused to the accused since he was not given an opportunity to answer the charge. Since the accused was not given an opportunity to defend the charge of grave sexual abuse, we hold that grave prejudice has been caused to the accused. Thus, the procedure*

adopted by the learned trial Judge amounts to a gross violation of the rules of natural justice." The basis of this Judgment was that when the accused was required to defend the charge of rape, he cannot be convicted for a charge of grave sexual abuse without giving him an opportunity to defend the charge of grave sexual abuse.

When delivering the Judgement in HCT/914/2019 the learned Judge stated in his conclusion as follows.

"*It is stated that as a result of the act of this accused, a sexual abuse case has been filed in the Trincomalee High Court under case number HCT/913/2019 in the Trincomalee High Court by the Attorney General.*

However, the case before us is HCT/914/2019. Since the statutory rape in this case has not been proved beyond reasonable doubt by the prosecution the Court in its Judgment discharges the accused from all charges and orders for his acquittal."

From the aforesaid conclusion, it appears that the evidence was taken in the case bearing number HCT/914/2019 because when analyzing the evidence and coming to a conclusion, the learned Judge has stated that the case before us is HCT/914/2019. The learned Judge had decided that the rape charges in the case HCT/914/2019 have not been proved on the evidence presented before him. However, without informing the appellant, the learned Judge used the same evidence and convicted the accused-appellant for three charges of grave sexual abuse in the case bearing number HCT/913/2019. The accused-appellant did not have opportunity to defend the three counts of grave sexual abuse. Therefore, the illegal procedure that has been adopted by the learned Trial Judge is not only in deprivation of right to a fair trial of the accused but also a total violation of the rules of natural justice. Therefore, as both the learned SDSG for the Respondent and the Learned President's Counsel for the Appellant agreed, the impugned Judgement must be set aside.

The next matter to be considered is whether a retrial could be ordered in this case. When considering this issue, it is needless to say that adopting the same evidence to determine different charges in two different cases is a fundamental error done by the learned High Court Judge. There is a maxim "*Actus Curiae Neminem Gravabit*". The meaning of this maxim is that an act of the Court shall prejudice no man. In the case of ***Kariawasam v. Priyadharshani- 2004 (1) Sri L.R 189*** also, it is stated as follows: "*I am also mindful of the often quoted legal principle that no man shall be put in jeopardy by a mistake made by a Court.*" In legal terms, "jeopardy" refers to the risk or danger of conviction and punishment that a defendant faces in a criminal trial. The Court must ensure that individuals are not subject to multiple prosecutions for the same offence.

In view of the aforesaid maxim and the aforesaid judicial authority, the accused-appellant of this case should not be tried again by sending this case for retrial for the grave error done by the learned Trial Judge. On the other hand, the victim who was 09 years at the time of the offence would be 23 years at present and giving evidence again regarding the unpleasant incident that she faced fourteen years ago would be a harassment for her as well.

In addition, it was held in the case of ***Nandana V. Attorney General*** – (2008) 1 Sri L.R. 51, as follows: *"therefore, a discretion is vested in the Court whether or not to order a retrial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice, taking into consideration the nature of the evidence available, the time duration since the date of the offence, the period of incarceration the accused person had already suffered, and last but not least, the trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime."*

In the said Judgment of ***Nandana V. Attorney General,*** it is also stated as follows: *"as regards the second ground as to the time duration, it must be noted as the alleged offence has been committed on 07.02.99, almost ten years have elapsed since the date of the offence. In a long line of case law authorities, our Courts have consistently refused to exercise the discretion to order a retrial where the time duration is substantial.*

In ***Peter Singho V. Werapotiya*** *– 55 NLR 157, Gration, J. refused to order a retrial where the time duration was over 04 years.*

In ***Queen V. Jayasinghe*** *- 69 NLR 413, Sansoni, J. refused to order a retrial where the time duration was over 03 years."*

In the instant action, according to the charges, the offence had been committed in 2010. Now, fourteen years have elapsed since the date of the offence. Hence, it is obvious that the instant case is not a fit and proper case to order a retrial even if only the time duration is considered.

For the reasons stated above, this Court decides to set aside the convictions and the sentences dated 21.09.2020. The accused-appellant is acquitted of all three counts.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL