SARATHCHANDRA

v

ATTORNEY-GENERAL

COURT OF APPEAL.
FERNANDO, J.
NANAYAKKARA, J.
BALAPATABENDI, J.
CA 16/2002 (DB).
HC BALAPITIYA NO. 370.
JUNE 10TH, 2003.
FEBRUARY 19th, 2004.

Penal Code, amended by Act, No. 22 of 1995, sections 363, 363 (e) – 364 (2) Rape – Defence of marriage by habit and repute – Proof – Criminal Procedure Code section, 164 (4) –165, 166, and 174 – Framing of charges? – Requirements of the relevant question to be communicated via the charge? – Is it imperative?

The accused-appellant was indicted on a charge of rape and after trial was convicted by the High Court.

In appeal it was contended that the trial judge failed to consider the evidence regarding the marriage between the parties by habit and repute and that at the time of the incident the prosecutrix was the wife of the accused.

Held:

Balapatabendi, J . and *Fernando, J.:*

(1) There is no evidence or even a suggestion that there was any ceremony, rite or customs observed whatsoever at any point of their living together. In addition a presumption of marriage by habit and repute cannot be drawn in the absence of evidence that the society or the relations accepted or recognized them as husband and wife.

(2) The only inference that could be drawn was that the family members intended to have them married on a future date.

Nanayakkara, J . (dissenting):

(1) Even if one were to assume that this association or the union between the accused and the prosecutrix does not meet the requirements of civil law concept of marriage by habit and repute the factual circumstances of this case do not warrant the inference that the accused had an inention of committing rape.

(2) Even in the absence of a ceremony as contemplated by civil law in a case of marriage by habit and repute the possibility of raising such a defence in a criminal matter should not be overlooked.

(3) The Code of Criminal Procedure section: 164(4) states that the law and the section under which the offence is said to have been committed is punishable shall be mentioned in the charge. Sec. 166 lays down that any error stating whether the offence or the particular reference to be stated in a charge and any omission or particulars will not be regarded as material unless the accused has been misled by such omission or error.

(4) The accused has been charged on the basis that he has committed rape within the period of 7 months. The charge should be formulated on the basis that accused did commit rape under section 362 (2) (e) read with section 363 (e). A blank statement that the section under which liability is entailed section 364 (2) *perse* would not suffice, and charges should be separated.

Per Nanayakkara, J.

> "I do not think the civil law concept which the State Counsel attempted to bring into this issue would help one to formulate the criteria for the determination of a criminal charge which is levelled against the accused."

APPEAL from the judgment of the High Court of Balapitiya.

Cases referred to:

1. *Dinohamy* v *Balahamy* – 29 NLR 114
2. *Punchi Nona* v *Charles Appuhamy* – 33 NLR 227

Dr. Ranjit Fernando with *Harshani Gunasekera, Himali Kularatne* and *Ramani de Silva* for accused-appellant.

N. D. Priyantha Nawana State Counsel for the Attorney-General

March 23rd, 2004.

BALAPATABENDI, J.

The accused-appellant was indicted on a charge of rape committed on Vithanage Nirosha during the period from 04.02.1998 - 04.09.1998 under section 364(2) of the Penal Code as amended by Act No. 22 of 1995.

The learned trial judge after trial, convicted the accused-appellant, of the offence as charged and a sentence of 10 years RI, and a fine of Rs. 2500/- was imposed. In addition the accused-appellant was ordered to pay Rs. 5000/- as compensation to the victim.

This appeal is preferred against the conviction and sentence.

At the hearing of the appeal, the counsel for the accused-appellant contended that, a) the learned trial judge had erred on the facts, by failing to consider the evidence regarding the marriage between the accused-appellant and the prosecutrix, by "Habit and Repute."

b) the learned trial judge had erred in law by not focusing her mind to the applicability of section 363 (e) of the Penal Code as amended by the Act No. 22 of 1995, as the prosecutrix was the wife of the accused-appellant at the time of the incident, as such the accused-appellant had committed no offence. Further he

contended that the failure on the part of the accused-appellant to take up such defence at the trial does not estop him from raising such a defence at the Appeal.

Of course I agree with the counsel for the accused-appellant, that the accused-appellant is entitled to take up any defence in appeal, based on the evidence.

It was an admitted fact, that the prosecutrix was under 16 years of age at the time of the incident.

Facts in brief are as follows:- The father of the prosecutrix is dead, and she was living with her mother, aunt and uncle. The Prosecutrix had met the accused-appellant at Kande Vihare temple in Aluthgama and be-friended him and fallen in love. The accused-appellant had accompanied her, to her residence, where he had expressed his affection towards her to the inmates of the prosecutrix household. As he had refused to leave her, her aunt had given a mattress to the accused-appellant to sleep in a separate room. That night he has had sex with her, and also on the following night. Two days – later the family members of the accused-appellant had ushered her to his parents' house. Having stayed with the prosecutrix for about 1 1/2 months at his parents house he had left her, stating that he has to report back to the Army. Thereafter, the prosecutrix had stayed with the inmates of the accused-appellant's house for about 7 to 8 months, Meantime she was informed that the accused-appellant had suffered a gun shot injury while serving in the Army and was hospitalized. The mother of the accused-appellant believing that the prosecutrix had brought bad-luck to her son, did not allow the prosecutrix to visit him in the hospital. As he returned home he had assaulted the prosecutrix, which compelled her to leave him and come back to her mother.

In support of his contention, the counsel for the accused-appellant drew the attention of court to the following items of evidence by which he argued that a presumption of marriage, by 'habit and repute', between the accused-appellant and the prosecutrix had been established.

The fact that:-

a) the accused-appellant was given a mattress to sleep by her aunt at the first visit.

b) when the family members of the accused-appellant wanted to usher her at first to his parental house, the mother of the prosecutrix had prevented it, as it was a Tuesday and inauspicious day.

c) the prosecutrix lived with the accused-appellant at his parental house, for about one and a half months.

d) the parents of the accused-appellant kept her for about 7 to 8 months with them.

In addition, he stated that the abovementioned items of evidence creates a reasonable doubt as to whether there was a marriage by 'habit and repute' between them, and that benefit of the doubt should be given to the accused-appellant.

The contention of the Senior State Counsel was that, the significance of the above items of evidence, indicate nothing but they lived in 'concubinage' for about 1 1/2 months. Also, he stated that, at the trial, the accused-appellant in his dock statement, had completely denied the incident, and rejected the charge.

Section 363 of the Penal Code as amended by the Act No. 22 of 1995 reads as:- "A man is said to commit 'rape' who has sexual intercourse with a woman under circumstances falling under any of the following descriptions:- (e) "with or without her consent when she is under sixteen years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man".

In the case of *Dinohamy* v *Balahamy* (1) - the facts in brief:- "Don Andiris married Balahamy, with the procession, the giving of gift, and other ceremonials familiar to the law of Ceylon. However the marriage was not registered. They lived together as apparently man and wife for 20 years, during that period eight children were born and all of them lived together as one family." - Privy Council upheld, that there was an existence of marriage by 'habit and repute', between them.

Further, in the above case, it had been observed by Lord Shaw:- that "it is not disputed that according to the Roman Dutch Law, there is a presumption in favour of marriage rather than

concubinage, that according to the law of Ceylon, where a man and a woman are proved to have lived together as man and wife, the law presumes unless the contrary be proved, that they were living together in consequence of a valid marriage, and not in a State of Concubinage."

In the case of *Punchi Nona* v *Charles Appuhamy*(2) Akbar, J. observed that "it is manifest from the details, that there was no ceremony, no native rite, or custom, observed to constitute them as wife and husband. That being so, I consider that the presumption arising from evidence of cohabitation and 'habit and repute' has been effectively rebutted."

In the present case, there was no evidence, (or even a suggestion) that there was any ceremony, rite, or custom observed what so ever at any period of their living together. (about one and half months). In addition a presumption of marriage by habit and repute cannot be drawn in the absence of evidence that the society or the relations, accepted or recognized them as husband and wife, As such the contention of the counsel for the accused-appellant that the evidence creates a reasonable doubt is untenable.

However, the evidence available buttress-concubinage, between them.

The only inference that could be drawn on examination of evidence, was that the family members intended to have them married on a future date, once the bond of the accused-appellant with the Army was completed, as such the issue of a presumption of marriage by habit and repute between the accused-appellant and the prosecutrix would not arise. It is similar to that of a couple engaged to be married on a future date.

The legal issue raised by the counsel is interesting and important. I must say counsel for both sides have been of great assistance to court.

In the above circumstances, I do not agree with the argument advanced by the counsel for the accused-appellant. The appeal is dismissed.

FERNANDO, J. – I agree.

Appeal dismissed.

NANAYAKKARA, J. (dissenting):

I have had the opportunity of going through the draft judgment of my brother Justice Balapatabendi with which my brother Justice Raja Fernando had agreed, but I find myself unable to agree with them.

The accused-appellant in this case who was charged in the High Court of Balapitiya with having committed rape on one Vithanage Nirosha was convicted of the offence and sentenced to 10 years rigorous Imprisonment and a fine of Rs. 2500/=. In default of payment of the fine he was sentenced to a further period of 6 months rigorous imprisonment. He was also ordered to pay a sum of Rs. 5000/= as compensation and in the event of his failure to pay the said sum a further period of 6 months rigorous imprisonment. It is against this conviction and sentence that this appeal has been preferred. The accused-appellant is alleged to have committed this offence which is punishable under section 364(2) of the Penal Code between 4th February 1998 and 4th September 1998 during a period of 7 months.

One could not help but observe the strange coincidence that both the commencement of rape and the terminal date of rape had occurred on the 4th of a month. This lends support to the view that the prosecution has grave doubts in regard to the actual dates on which the accused-appellant is alleged to have committed the offence. This is significant because there is some uncertainty whether the accused-appellant indulged in a spree of rape during the entire period of 8 months or indulged in one solitary or intermittent acts of rape within the said period. This nebulous nature of charge considered in the background of the imperative legal requirements relating to clarity of charges raises serious doubts whether the charge is not basically flawed and defective inasmuch as it tends to mislead an accused person in the preparation of his defence.

It would be useful at this stage to refer briefly to factual circumstances which had led to the incident. At the time of the alleged incident the accused-appellant was attached to the Army and the prosecutrix was living with her uncle and aunt. The accused-appellant and the prosecutrix met each other by chance at

a Buddhist temple while on a pilgrimage. This first meeting kindled their love and affection for each other. Thereafter the prosecutrix had returned home in the same evening accompanied by the accused-appellant but her aunt had upbraided her for coming home with the accused-appellant. Nevertheless, it appears from the evidence that the accused-appellant was received and welcomed by elders at the prosecutrix home, when he was permitted to stay that night at her place. In fact the evidence has been led to the effect that the aunt of the prosecutrix had provided a mat for the accused-appellant to sleep on that night and it was during this night that he was alleged to have indulged in the first act of intercourse with the prosecutrix. The accused-appellant had also proposed love and affection towards the prosecutrix, on this day and expressed his intention to marry her once his period of bonding with the Army was over.

Thereafter the accused-appellant's sisters and brothers had called at the prosecutrix's place and taken the accused-appellant away saying that he had to report for duty at the Army. The prosecutrix thereafter had lived at the accused-appellant's house for about seven months, but during this period exigency of service, kept the accused-appellant away from his home.

It appears that the trouble between the parties arose when the accused-appellant became disabled as a result of some gun shot injuries received in the course of his duties as a soldier.

The accused-appellant's mother who was labouring under supertitious beliefs attributed the disability suffered by her son to the ill luck and misfortune brought into the family fold by the prosecutrix.

This led to disharmony in the family and the accused-appellant when he returned from the Army at the instigation of his mother chased the prosecutrix away from their home. This is how a belated complaint of rape came to be made against the accused-appellant.

At this juncture it will be appropriate to consider the provisions of law applicable to the framing of charges and determine as to whether there is compliance or in the event of a non compliance, whether the accused-appellant has been misled thereby in the conduct of his defence which in turn has prejudiced him.

The Criminal Procedure Code in section 164(4) states that "the law and the section of the law under which the offence said to have been committed is punishable, shall be mentioned in the charge". Section 166 of the Criminal Procedure Code also lays down that any error, in stating either the offence or the particulars required to be stated in a charge and any omission of particulars will not be regarded as material unless the *accused has been misled by such omission or error.*

It would be opportune to consider now as to whether there was an error and if so as to whether it was material enough to warrant one concluding that there was a misleading of the accused.

In this case the charge informs the accused that he has committed rape within the period of seven months – whether the acts be persistent or sporadic is anybody's guess-section 174 of the Criminal Procedure Code deserves consideration at this stage – according to which when a person is accused of committing more offences than one of the same kind committed within the space of twelve months from first to last of such offences he has to be charged with and tried at one and the same trial for any number of them not exceeding three instances and in trials before the High Court charges may be included in one and the same indictment.

On an appraisal and comparison of these two sections with the nature of the charge framed against the accused serious doubt is created in the mind as to whether the apparent non compliance with the imperative requirements has not gravely misled the accused-appellant.

Considering the information with regard to the nature of the charge that the accused has received it is noteworthy that he has been merely intimated to, that he faces liability under section 364(2) of the amendment pertaining to the Penal Code in Act, 22 of 1995.

Section 364(2) encompasses seven instances of liability. In sub sections numbered from a to g.

(a) where a public officer or person in authority abuses his position and rapes a ward -

(b) where a manager of a remand home or custodial institution abuses his position and rapes an inmate.

(c) A hospital employee or officer acting in a likewise manner.

(d) Rape of pregnant woman.

(e) Committing rape on a woman under 18 years of age.

(f) Raping mentally or physically disabled woman.

(g) Gang rape

In such a situation the mentioning of the particular section and the sub section to enlighten the accused or his counsel could be deemed to be a duty incumbent on the part of the prosecution.

The next question to be considered would be whether a blank statement that the section under which liability in entailed is section 364 (2) - *per se.* would suffice-section 364 (2) *states that whoever commits rape on a woman under 18 years of age - pre* supposes the fact that entailment of liability will necessarily be with Raping – Rape is defined in section 364 (2) of the amendment Act 22 of 1995. The Five instances are set out and the applicable sub section would be (2) – wherein, *Rape is committed when sex is had with a woman under sixteen years old with or without her consent. It would not be rape if the subject is over twelve years of age and is not judicially separated from the man.* This is vital information as far as the accused is concerned and according to the requirements of the relevant section should be communicated to him via the charge.

Therefore, I am inclined to the view that the charge/charges should be separate, and if rape has been committed within one year on more than one occasion, it must be set out in three charges within the same indictment as stipulated in section 174(1) of the Criminal Procedure Code and the charges should be formulated on the basis that the accused-appellant did commit rape under section 364(2)(e) read along with section 363 (e) of the amended Penal Code Act 22 of 1995.

It would not be so, then section 166 of the Criminal Procedure Code could be invoked – and it could be regarded as an omission that misled the accused.

As an analogy, section 165(2) of the Criminal Procedure Code, is clearly indicative of the fact that the law in its wisdom provides for situations in so far as different offences are intended to be included in the same indictment it will state the manner in which it could be accomplished. The law, thus provides for Criminal Breach of Trust and Criminal Misappropriation crimes committed by the same accused within the year to be included in the same indictment.

There is another important matter to which some reference should be made in this judgment.

The learned Counsel for the accused-appellant at the hearing of the appeal for the first time called upon this court to determine the issues whether the factual circumstances in the case give rise to the defence of marriage by habit and repute.

On this matter both the Counsel for the accused-appellant and Counsel for the State advanced valuable argument to be considered by this court.

It was the contention of the State that to constitute marriage by habit and repute there should have been some kind of ceremony which clearly indicates that the society had accepted the accused-appellant and the prosecutrix as husband and wife. In order to buttress his argument the learned Counsel drew the attention of this court to a number of authorities which have held that should be some ceremony indicating marriage by habit and repute.

The learned Counsel for the State relied mainly on the Civil Law concept of marriage by habit and repute to substantiate his argument. But one should not be oblivious to the fact that in this case the accused-appellant, is facing a charge of grave criminal nature. It is evident that there has been some kind of association between the accused-appellant and the prosecutrix which had lasted nearly eight months. Even if one were to assume that this association or the union between the accused-appellant and the prosecutrix does not meet the requirements of Civil law concept of marriage by habit and repute, the factual circumstances of this case, do not warrant the inference that the accused-appellant had an intention of committing rape on the prosecutrix.

Considering the circumstantial background of the case, in my view even in the absence of a ceremony as contemplated by Civil Law in a case of marriage by habit and repute the possibility of raising such a defence in a criminal matter should not be overlooked. The view I take in regard to this matter is strengthened by the fact that the prosecutrix had referred to the accused-appellant as her Mahaththya (husband) in her complaint to the police, in the manner a wife in the situation of the prosecutrix normally refers to her husband.

The defence of marriage by habit and repute is a matter which has to be determined solely by the factual circumstances and recognition of such a union may be manifested by evidence of acceptance and approval or by hostility, animosity and ostracism by society and evidence of either kind is acceptable. I do not think the Civil Law concept which the State Counsel attempted to bring into this issue would help one to formulate a criteria for the determination of a criminal charge which is levelled against an accused.

However before ascertaining whether there was a marriage by habit and repute in the instance it would be much more important to determine whether the accused was denied the opportunity of presenting his defence in an effective manner by the inadequacies of the particulars of the charge. This question arises prior to the determination of the defence of habit and repute and in my view the appellant was misled by an unorthodox framing of charges which is not countenanced by the provisions relating to framing of charges by the Criminal Procedure Code. Therefore in my opinion the appeal of the accused-appellant should succeed, on this ground alone.

In view of the abovementioned reasons I disagree with my learned brothers and hold that the conviction and sentence should be set aside and the accused-appellant acquitted.

NANAYAKKARA, J.

Appeal allowed.

By majority decision appeal dismissed.