WEERAWARNAKULA
v.
THE REPUBLIC OF SRI LANKA

COURT OF APPEAL
FERNANDO, J. AND
AMARATUNGA, J.
CA NOS. 24/2000 AND 25/2000
HC KANDY NOS. 997/93 AND 998/93
MARCH 04, 2002

Penal Code, sections 392 and 467 – Three convictions – Code of Criminal Procedure Act, No. 15 of 1979, sections 16, 300, 321 and 336 – Discretion of court to direct the separate sentences of imprisonment to run concurrently.

The accused-appellant was convicted after trial in No. 996/83, High Court, Kandy, on the charge of committing criminal breach of trust and falsification of accounts. He was found not guilty of the charge of conspiracy to commit criminal breach of trust and was sentenced to a total term of 36 years RI, but as the sentences were ordered to run concurrently, the total period of imprisonment was 8 years.

In case No. 997/83 on 24. 03. 2000 the accused-appellant was charged on 5 counts. On the accused pleading guilty he was sentenced to a term of 8 years RI in respect of counts 1 and 2 and to a term of 3 years RI in respect of counts 4, 5 and 6. The sentences were ordered to run concurrently and the total period was 8 years' RI.

On the same day the accused-appellant pleaded guilty to counts 1, 2, 4, 5 and 6 in case No. 998/93. He was sentenced to 5 years RI each in respect of counts 1 and 2, and a term of 3 years RI, in respect of counts 4-6, the sentences to run concurrently. The total period was 5 years. At the time the accused-appellant was sentenced in No. 997/93, he was serving imprisonment ordered in No. 996/93.

It was contended that the trial Judge should have ordered the sentence of imprisonment in No. 998/93 concurrent with the sentence of imprisonment in No. 997/93 given by him on the same day. It was further contended that, when the accused-appellant was sentenced in case No. 997/93, and thereafter was sentenced in case No. 998/93, on the very same day, he was not actually undergoing imprisonment ordered in case No. 997/93. It was the contention that a person is "actually undergoing imprisonment **only** when he is admitted to and accepted by the prison as a prisoner".

Held:

(1) The general principle regarding sentences is that the sentence takes effect from the time it is pronounced.

(2) A direction that a sentence of imprisonment shall run concurrently with another sentence is strictly speaking, not a part of the sentence but a direction with regard to the execution of same.

Per Amaratunga, J.

> . "The moment a person is sentenced to imprisonment prison officers present in court take charge of the sentenced prisoner and thereafter such person is in the custody of the prison authorities. This signifies the commitment of imprisonment; signing of the committal by the Judge and admitting the prisoner to the prison are mere administrative acts."

(3) The accused was undergoing the 1st sentence of imprisonment when the 2nd and 3rd sentences were passed and accordingly the sentences should run consecutively. Thus, the trial Judge did not have the power to make the sentence of imprisonment ordered in case No. 998/93 concurrent – with the sentence passed in case No. 997/93, and the accused-appellant cannot contend that the trial Judge as a matter of law should have made such an order.

(4) However, as the offences were committed between 1984-1986 and the indictments were filed in 1993, the court taking all matters into consideration, in the exercise of the power under section 336 could substitute lesser sentences in place of the sentences imposed by the trial Judge.

APPEALS from the High Court of Kandy.

Cases referred to :

1. *Shanmugam v. Sinnappen* – (1907) 1 ACR X1.
2. *Godagama v. Mathes* – (1908) 4 ACR VIII.
3. *Emperor v. Bhikki and Others* – (1920) 21 Cr. L.J 398.
4. *King v. Mendra* – (1922) 24 NLR 120.
5. *In re. Muttusamy* – (1905) 2 Weirs Criminal Rulings 451.
6. *Gulzar Mohamed v. The Crown* – (1951) 52 Cr. L.J 238.

Dr. Ranjit Fernando with *Sandamalee Munasinghe, Sandamalee Manatunga* and *Kavindra Nanayakkara* for accused-appellants.

Yasantha Kodagoda, Senior State Counsel for Attorney-General.

Cur. adv. vult.

April 30, 2002

GAMINI AMARATUNGA, J.

The accused-appellant has preferred these two appeals against the sentences imposed on him by the learned High Court Judge of Kandy in case Nos. NJ 997/93 and 998/93 of the High Court of Kandy. The accused-appellant was indicted in the High Court of Kandy in three cases in respect of offences alleged to have been committed by him whilst serving as the Manager of the People's Bank branch in Senkadagala. In the first case, bearing No. 996/93 he was charged with having committed the offences of conspiracy to commit criminal breach of trust, criminal breach of trust and falsification of accounts punishable under sections 392 and 467 of the Penal Code. In this case he was convicted after trial for the charges of committing criminal breach of trust and falsification of accounts. He was found not guilty of the charge of conspiracy to commit criminal breach of trust.

In respect of the charges for which the appellant was found guilty he was sentenced to a total term of 26 years rigorous imprisonment but as the sentences were ordered to run concurrently, the total period of imprisonment was eight years. Against his conviction and sentence the accused-appellant filed CA Appeal No. 12/99 but withdrew it later with permission of Court.

In case No. 997/93 the accused-appellant was charged on five counts. The first charge was a charge of conspiracy to commit criminal breach of trust in respect of Rs. 14,425,975. The other counts were for committing criminal breach of trust and for falsification of accounts. On 24. 03. 2000 when the case came up for trial, the accused-appellant pleaded guilty to charges 1, 2, 4, 5 and 6 framed against him.

He was sentenced to a term of eight years rigorous imprisonment each in respect of counts 1 and 2 and to a term of 3 years rigorous imprisonment in respect of each count from 4th to 6th counts. The sentences were ordered to run concurrently and thus the total period of imprisonment was 8 years.

On the same day the accused-appellant pleaded guilty to counts 1, 2, 4, 5 and 6 in case No. 998/93. Those charges were also in respect of offences similar to those to which the accused-appellant pleaded guilty in case No. 997/93 on the same day. In case No. 998/93, the accused-appellant was sentenced to five years rigorous imprisonment each in respect of counts 1 and 2 and to a term of 3 years rigorous imprisonment in respect of each count from 4th to 6th counts. The sentences were ordered to run concurrently. Thus, the total period of imprisonment was five years. At the time the accused-appellant was sentenced in case No. 997/93 he was serving the imprisonment ordered in case No. 996/93.

The learned counsel for the accused-appellant contended that the learned High Court Judge should have ordered the sentences of imprisonment imposed on the accused-appellant in case No. 998/93 concurrent with the sentences of imprisonment ordered in case No. 997/93 by him on the same day. Section 300 of the Code of Criminal Procedure Act, No. 15 of 1979, provides as follows:

> "When a person actually undergoing imprisonment is sentenced to imprisonment such imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced."

At the time the accused-appellant was sentenced in case No. 997/93, he was serving the imprisonment ordered in case No. 996/93 and in view of the provisions of section 300 quoted above the sentence imposed in case No. 997/93 takes effect only at the expiration of the sentence ordered in No. 996/93. The learned counsel argued that when the accused-appellant was sentenced in case No. 997/93 on the same day, he was not "actually undergoing imprisonment" ordered in case No. 997/93. He contended that a person is actually undergoing imprisonment only when he is admitted to and accepted by the prison as a prisoner. The learned counsel accordingly submitted that the learned High Court Judge should have ordered the sentences imposed in case No. 998/93 to run concurrently with the sentences he has imposed in case No. 997/93.

A direction that a sentence of imprisonment should run concurrently with another sentence is strictly speaking not a part of the sentence

but a direction with regard to the execution of the sentence. The general principle regarding sentences is that the sentence takes effect from the time it is pronounced. In *Shanmugam v. Sinnappan*[1] Middleton, J. stated that a sentence would run from the time it is pronounced unless otherwise ordered. Sections 16 and 300 of the Code of Criminal Procedure Act provide exceptions to this general rule. Section 16 provides for a situation where a person at one trial is convicted of any two or more distinct offences. Then the Court may in its discretion sentence such person for such offences to the several punishments prescribed therefor. Such punishments when consisting of imprisonment to commence, unless the court orders them to run concurrently, the one after the expiration of the other in such order as the court may direct. According to this section, the court has a discretion to direct that the separate sentences of imprisonment shall run concurrently.

Section 300 is applicable to a different situation than that contemplated by section 16 of the Code. It applies to a situation where a person actually undergoing imprisonment is in some other case again sentenced to imprisonment. According to the section the latter imprisonment shall commence to operate at the expiration of the imprisonment to which he has been previously sentenced. This is an exception to the general rule that a sentence begins to operate from the time it is pronounced. Section 300 is couched in imperative terms and in view of the wording of the section no court has the power or discretion to order that a sentence of imprisonment ordered by it shall run concurrently with a sentence of imprisonment ordered in a previous case which the accused is serving when he is sentenced in the 2nd case. In *Godagama v. Mathes*[2] Wood Renton, J. stressing the imperative nature of section 321 of the Criminal Procedure Code of 1898 (which was identical with present section 300 of the Code of Criminal Procedure Act) said that "[I] t is not competent for a Magistrate to order that a sentence passed on an offender who is already sentenced for another offence shall run concurrently with the previous sentence."

The Indian counterpart of section 300 was section 397 of the Indian Criminal Procedure Code of 1898 and presently it is section 427 of the Code of Criminal Procedure Act, No. 2 of 1974. The present Indian section is similar to section 397 of the earlier Code. Under section

397 no discretion was available to court to make the later sentence of imprisonment concurrent with a previous sentence of imprisonment ordered in an earlier case. *Emperor v. Bhikki and Others*[3]. By an amendment to the Indian Criminal Procedure Code in 1923 the words "unless the court directs that the subsequent sentence shall run concurrently with the previous sentence" were added to section 397 and in view of this the courts now have a discretion to order that a subsequent sentence of imprisonment shall run concurrently with a previous sentence of imprisonment. But, there are no similar words in section 300 of our law.

The learned counsel for the accused-appellant cited the case of *King v. Mendra*,[4] where it was held that the court has jurisdiction to order a sentence of imprisonment to run concurrently with a sentence of imprisonment ordered in a previous case which the accused was serving at the time he was sentenced in the subsequent case. In this case the court has not considered the earlier case of *Godagama v. Mathes (supra)*. The Court has also not considered the actual words used in section 321 of the Criminal Procedure Code to see whether the section has left any room for the exercise of discretion by the court when the subsequent sentence of imprisonment was passed. The decision is contrary to the letter as well as the spirit of the section. We hold that *King v. Mendra* has been wrongly decided and accordingly overrule it.

Even if there is no discretion available to court, if the phrase "actually undergoing imprisonment" is interpreted in the way suggested by the learned counsel for the accused-appellant it is possible to argue that the learned High Court Judge had the power to order the sentences of imprisonment ordered in case No. 998/93 to run concurrently with the sentence of imprisonment ordered in case No. 997/93. According to the learned counsel's argument a person can be said to be actually undergoing imprisonment only when he is taken to prison and accepted and admitted as an inmate of the prison. This argument is contrary to the general principle that a sentence takes effect from the time it is pronounced. In criminal courts we every day see this general principle given effect to.

The moment a person is sentenced to imprisonment prison officers present in court take charge of the sentenced prisoner and thereafter such person is in the custody of the prison authorities. This signifies the commencement of imprisonment. Signing of the committal by the Judge and admitting the prisoner to the prison are mere administrative acts.

In the case of *In re Muttusamy*[5] it was held that a person sentenced to imprisonment is undergoing that imprisonment within the meaning of section 397 (of the Indian Code) from the moment the sentence is passed. In *Gulzar Muhammed v. The Crown*[6] the accused was sentenced to imprisonment on the same day in three cases, one after the other by the same Magistrate. It was contended that section 397 of the Indian Criminal Procedure Code was not applicable as the accused was not actually undergoing imprisonment in respect of the first case when he was sentenced in the other two cases. It was held that a person is actually undergoing imprisonment within the meaning of section 397 from the moment the sentence is passed and that he need not actually pass into the portals of the jail. The accused was undergoing the 1st sentence of imprisonment when the 2nd and 3rd sentences were passed and accordingly in view of section 397 the sentences should run consecutively. This makes it clear that when the same person is tried and sentenced to imprisonment on the same day whilst he was still in the well of court after the 1st sentence of imprisonment, the 2nd sentence should run consecutively. Accordingly, we hold that the learned High Court Judge did not have the power to make the sentence of imprisonment ordered in case No. 998/93 concurrent with the sentence passed in case No. 997/93 and that the accused-appellant cannot contend that the learned Judge as a matter of law should have made such an order. In the circumstances we see no merit in this appeal in so far as it relates to the orders made by the learned High Court Judge.

However, it is our view that this Court is not without power to grant relief to the accused-appellant, without offending section 320, if it appears to court that the accused-appellant deserves relief in the circumstances of the case. Section 336 of the Code of Criminal Procedure Act, No. 15 of 1979 enables this court in interfere with the sentence in an appropriate case. Section 336 reads as follows:

"On an appeal against the sentence whether passed after trial by jury or without a jury, the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence and pass other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed and in any other case shall dismiss the appeal."

In this instance although three separate indictments were forwarded against the accused-appellant the subject-matter of all three indictments was a single transaction which continued for over two years. For the offences committed in this single transaction three indictments were presented in order to comply with the provisions of section 165 (2) of the Code of Criminal Procedure. All three cases were based mainly on documentary evidence and in view of this, trials in case Nos. 997/93 and 998/93 would have taken a long time to conclude. By pleading guilty the accused-appellant has saved the time of Court. The accused-appellant has not proceeded with the appeal filed against the conviction and sentence in case No. 996/93. According to the submissions made on behalf of the accused-appellant, the Bank has recovered a substantial part of the money involved in the transaction from the respective account-holders and has filed 16 civil cases against the accused-appellant and the account-holders to recover the balance money. The offences were committed between 1984 and 1986, and the indictments were filed in late 1993.

The accused-appellant was sentenced in May, 2000, nearly fifteen years after the 1st offence. If not for the provisions of section 165 (2) the accused-appellant could have been charged in one case for all offences committed by him in one transaction and in the event of a conviction the accused-appellant would have been entitled to concurrent sentences under section 16 of the Criminal Procedure Code. At the time of the investigation the accused-appellant had been in remand from April, 1987 to September, 1988, nearly 18 months. In 1987 the accused-appellant was 47 years old and presently he is well

over 60. The maximum periods of imprisonment prescribed under sections 392 and 467 are 10 and 7 years, respectively. Taking all those matters into consideration we are of the view that this is a fit case for us, in the exercise of our powers under section 336 quoted above, to substitute lesser sentences in place of the sentences imposed by the learned High Court Judge.

We, accordingly, set aside the sentences of 8 years rigorous imprisonment each imposed in respect of counts 1 and 2 in case No. 997/93 and substitute therefor a sentence of 3 years rigorous imprisonment each in respect of counts 1 and 2. We affirm the learned High Court Judge's direction that all sentences imposed in case No. 997/93 shall run concurrently. Accordingly, the total period of imprisonment in respect of case No. 997/93 is 3 years.

We also set aside the sentence of 5 years rigorous imprisonment each ordered in respect of counts 1 and 2 in case No. 998/93 and substitute therefor a sentence of 3 years rigorous imprisonment each in respect of those counts. We affirm the learned Judge's direction that the sentences in case No. 998/93 shall run concurrently. The total period of imprisonment in respect of case No. 998/93 is 3 years.

In the result the total period of imprisonment in respect of case Nos. 997/93 and 998/93 is reduced from 13 years to 6 years rigorous imprisonment. In view of this the appeal against sentence is partly allowed.

FERNANDO, J. – I agree.

Appeal dismissed; sentence varied.