

REV. RATMALANE SRI SIDARTHA
vs
ATTORNEY GENERAL

COURT OF APPEAL

BALAPATABENDI, J.

IMAM, J.

CA 1329/2004

H. C. RATNAPURA 160/03

OCTOBER 1, NOVEMBER 1, DECEMBER 6, 2004

Judicature Act 2 of 1978 - Section 9, 47(1), 47(2), 47(3) - Transfer of a High Court case (Southern Province) to a High Court in the (Sabaragamuwa Province) - Legality - one province to another Province - Penal Code Section 345, 360(1), 335 - Constitution-Article 154, Article 154(1), 153 P3(a) - 13th Amendment - does it repeal Section 47 of Judicature Act-High Court of the Provinces (Sp. Pro.) Act, 19 of 1990 - Section 2(2) - Application for re-transfer-According to Law? - Discretion of the Attorney-General? - Criminal Procedure Code, S 450 - Trial at Bar - according to Law?.

The non-summary inquiry was transferred from Tissamaharama Magistrate's Court to the Galle Magistrate's Court on a fiat by the Attorney General. The accused was indicted in the High Court of Matara. The trial was fixed to be heard in the High Court of Hambantota. The case was thereafter transferred to the High Court of Ratnapura by the Attorney General by a fiat.

Accused sought a re-transfer of the case on the ground that, after the enactment of the 13th Amendment to the Constitution, a Provincial High Court did not have jurisdiction to try and determine an offence outside that jurisdiction and therefore the Provincial High Court of Sabaragamuwa Province did not have jurisdiction to hear and determine an offence which had been committed in the Southern Province. The accused Appellant contended that Section 47(1) of the Judicature Act does not empower the transfer of a case from one province to another and that jurisdiction of the Provincial High Court could not be transferred by ordinary statute to any other High Court.

Held

- (i) The 13th Amendment does not repeal Section 47 of the Judicature Act and Section 47 is not in conflict with any of the Articles of the 13th Amendment. Under Section 450 of the Criminal Procedure Code, Trials-at-Bar are conducted generally in Colombo outside the provincial jurisdiction of the particular court.
- (ii) According to Section 9, of the Judicature Act the offence should be tried, heard and determined in the manner provided by written law-which includes statutes.
- (iii) According to law means according to the common law and statute law.
- (iv) The directions of the Attorney General is supported by the facts set out in the objections filed by the 2nd Respondent.

APPLICATION to transfer High Court case under Section 47(2) of the Judicature Act.

Cases referred to :

1. *Weragama vs. Eksath Lanka Wathu Samithiya and others* - 1994 1 Sri LR 299.
2. *Saranapala vs Solanga Arachchi* - 1992 - 2 Sri LR 10.
3. *Mohideen vs Goonewardena* - 4 Sriskantha Part 2 at 16

Anil Silva for Accused Petitioner

Navaratne Bandara - S. S. C. for 1st Respondent

Aravinda Athurapane for 2nd Respondent

Imam, J.

This is an application filed by the accused-Petitioner (hereinafter referred to as the Petitioner) under the Provisions of Section 47(2) of the Judicature Act, No. 2 of 1978 praying *inter-alia* for a relief to retransfer High Court *Ratnapura Case* bearing No. 160/03 to the High Court of *Hambantota*. On 25.08.2004 counsel for the 2nd Respondent filed objections, subsequent to which on 01.11.2004, counsel for the petitioner tendered written submissions, on which occasion Mr. Athurupane indicated to Court that he was not appearing for the 2nd Respondent. Senior State Counsel for the 1st Respondent tendered his Written Submissions on 06.12.2004, consequent to which this application was fixed for Order.

The Petitioner who is the Chief Incumbent of the Vedahetikanda Viharaya, Kataragama was earlier in charge of the Sella Kataragama Ganadevi Kovil as well. The Petitioner contends that there was a dispute regarding the possession/management of the Sella Kataragama Kovil between the Petitioner and one Piyadasa Dissanayake, which resulted in certain powerful persons fabricating a case against the Petitioner on the basis that he was in possession of unlicensed firearms. The Petitioner further submits that he was kept under detention for a considerable period, subsequent to which he was indicted in the High Court of Matara. The Petitioner in his petition further states that during this period Piyadasa Dissanayaka took control of the Ganadevi Kovil at Kataragama with the assistance of the aforesaid powerful persons. Nevertheless after a protracted Trial the Petitioner avers that he was acquitted. The Petitioner further avers that after his acquittal, having made representations to the relevant parties he was in the process of regaining the control and management of the Sella Kataragama Ganadevi Kovil when the aforesaid Piyadasa Dissanayaka connived with H. M. Sugathapala the 2nd Respondent in this case which resulted in the 2nd Respondent making a false complaint that the Petitioner had sexually abused his daughters. The Petitioner admits that the Non-summary Inquiry was held in the *Magistrates Court of Galle*, and that he was committed to stand his Trial in the High Court. On receiving summons from the High Court of *Hambantota*, the Petitioner appeared in court on 28.08.2003 and an indictment was served on him, a copy of which is marked as 'P1'. Trial was fixed by the learned High Court Judge of *Hambantota* for 10.12.2003, and the Prosecution witnesses were summoned to appear in court. The Petitioner further contends that when

he appeared at the High Court of Hambantota on 10.12.2003 he was informed by the learned High Court Judge that the case *had been transferred to the High court of Ratnapura* by the Hon. Attorney General by a fiat in writing, and that he would be informed of the *next date by the High Court of Ratnapura*. The Petitioner avers that on 10.12.2003 before the Court began sessions when he was speaking to his lawyers, the 2nd Respondent who is the father of the 1st four Prosecution witnesses abused and threatened him, which was brought to the notice of the learned High Court Judge, who directed the Petitioner to make a complaint to the police. A certified copy of the proceedings of 10.12.2003, is marked as 'P2', and the complaint made by the petitioner is marked as 'P3'. Subsequently the Petitioner received summons from the High Court of Ratnapura requiring his presence in Court on 23.01.2004. It is contended by the Petitioner that he was ill on 23.01.2004, and thus could not attend the High Court of Ratnapura, on that day in support of which a Medical Certificate marked P4A was tendered to Court, Section 47 of the *Judicature Act states as follows* :

47(1) Whenever it appears to the Attorney General that it is expedient that any inquiry into or trial of any criminal offence shall be transferred from any Court or place, to any other Court or place, it shall be lawful for the Attorney General in his discretion by his fiat in writing to designate such last mentioned court or place, and such inquiry or trial shall be held accordingly on the authority of such fiat which shall be filed of record with the proceeding in such inquiry or trial so transferred as aforesaid.

47(2) Any person aggrieved by a transfer made under such fiat of the Attorney General may apply to the Court of Appeal, by motion supported by affidavit, setting out the grounds for such application for retransfer or for transfer to any other court or place of such inquiry or trial, and the Court of Appeal may after notice to the Attorney General, who shall, if he thinks fit, be heard to show cause against such motion, if it considers that good cause has been shown why the application shall be granted, make order accordingly.

The eight offences against the Petitioner as set out in the Indictment relate to three counts of sexual exploitation of children punishable under section 360B of the Penal Code in respect of H. M. Susangika, H. M. Indika and H. M. Ratnamenike. The 4th Count relates to the commission

of the offence of wrongful confinement in respect of H. M. Sujeewa, punishable under section 335 of the Penal Code. The 5th and 6th are counts the commission of statutory rape on H. M. Susangika and H. M. Indika respectively punishable under section 364(2) of the Penal code, the 7th and 8th counts relate to the commission of the offences of sexual harassment punishable under section 345 of the Penal code in respect of H. M. Ratnamenike and H. M. Sujeewa respectively. The complainant girls are said to be sisters of the same family and two of them were said to be minors at the time of the offence. It was contended on behalf of the Petitioner that after the enactment of the 13th amendment to the Constitution, a Provincial High court did not have jurisdiction to try and determine an offence outside that Jurisdiction, and that therefore the Provincial High Court of Sabaragamuwa Province did not have Jurisdiction to hear an offence which had been committed in the Southern Province. Hence the Provisions of Section 47(1) of the Judicature Act does not empower the transfer of the case from one province to another. It was submitted that in transferring a case out of ordinary Jurisdiction the Hon. Attorney General is exercising Judicial Power, which should be justified. It was further pointed out that no Public functionary has an unfettered discretion, that the Hon. Attorney General should place material before Court Justifying his exercise of discretion, and in the absence of such material before Court, this Court should set aside the aforesaid transfer. It was submitted that the facts and circumstances in this case do no warrant the transfer of this case. The Petitioner submits that the objective of the 13th amendment of 1987 to the Constitution was the intention of devolving power to the provinces.

The 2nd Respondent in his Statement of Objections dated 25.08.2004 denies that he connived with Piyadasa Dissanayaka referred to in the complaint to the Police by the Petitioner marked P3. Furthermore the 2nd Respondent denies that he abused and threatened the Petitioner, and alleges that the Petitioner made a false representation to Court on 10.12.2003, only after learning that the case had been transferred out of Hambantota. It is further contended by the 2nd Respondent that the Petitioner is alleged to have connections with notorious persons of ill-repute in Kataragama, Tissamaharama and Hambantota areas and has offered death threats as well as inducements to the 2nd Respondent and family, seeking to have them withdraw the charges against him.

Furthermore the officials of the Children's Home he avers are very reluctant to travel to Hambantota accompanying two of the said victims

due to the threats of the Petitioner and insufficiency of security. The 2nd Respondent further avers that there is an imminent threat to the lives of him and his family including the said 4 victims if the case is tried in the High Court of Hambantota, and thus has no objection to the case being transferred out. Written submissions were not tendered on behalf of the 2nd Respondent.

Senior State Counsel appearing for the 1st Respondent tendered written submissions and sought that the Petition of the Accused-Petitioner be dismissed. This Court considered the application of the Petitioner, the objections of the 2nd Respondent, the Written Submissions tendered on behalf of the Petitioner, the 1st respondent and other material submitted in this case. The Non-Summary Inquiry bearing No. 43097 *Tissamaharama Magistrate's Court was transferred to the Galle Magistrate's Court* on a fiat by the Attorney General possibly taking into consideration the protection of the complainant girls, and subsequently the Non-summary proceedings had taken place at the Galle Magistrate's Court, as illustrated by document marked XI.

This application has been made invoking section 47(2) of the Judicature Act No. 2 of 1978. The relevant procedure to be adopted is set out in section 47(3) of the Judicature Act, and the Court of Appeal Rules do not set out the Jurisdiction which is applicable with regard to section 47(3) of the Judicature Act.

Article 154(1) of the Constitution (the 13th amendment) states that "There shall be a High Court for each of the provinces with effect from the date on which this chapter comes into force. Each such High Court shall be designated as the High Court of the relevant province"

Article 154 P(3) (a) states as follows : "Every such High Court shall exercise according to law, the original Criminal Jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province. It was submitted on behalf of the Petitioner that the Jurisdiction of the Provincial High Court could not be transferred by ordinary statute to any other High Court. However under Section 450 of the Criminal Procedure Code Trials at Bar are conducted generally in Colombo outside the Provincial Jurisdiction of the particular court.

Section 2(2) of the *High Court of the Provinces (Special Provisions) Act, No. 19 of 1990* states as follows.

"The Provisions of the Judicature Act applicable to the transfer of any action, prosecution, proceeding or matter pending before any court to any other Court shall apply to the transfer of any action, prosecution, proceeding or matter pending before any High Court established by Article 154P of the Constitution from a Province to any other High Court established under that Article."

Justice Mark Fernando in *Weragama V. Eksath Lanka Wathu Samithiya and others*⁽¹⁾ held that "There was no intention on the 13th Amendment to devolve judicial power. There was nothing more than a re-arrangement of the Jurisdictions of the Judiciary."

Although it was held in *Saranapala Vs. Solanga Arachchi*⁽²⁾ that the Constitution is the Supreme Law, section 47 of the Judicature Act is not in conflict with any of the Articles of the 13th Amendment. Furthermore the 13th Amendment does not repeal section 47 of the Judicature Act either expressly or impliedly, which provision thus remains as law up to date.

Siva Selliah, J. held in *Mohideen vs Goonewardena*⁽³⁾ and others at 16 that the term "According to Law" means according to the common law and statute law. Section 9 of the Judicature Act states that (1) "The High Court shall ordinarily have power and authority and is hereby required to hear, try and determine in the manner provided for by written law all prosecutions on indictment instituted therein against any person in respect of (a) any offence wholly or partly committed in Sri Lanka....."

Hence it means that the offences should be tried, heard and determined in the manner provided by written law which obviously includes statutes. Hence it is my view that the 13th Amendment does not repeal section 47 of the Judicature Act, and thus initially the Hon. Attorney General acting under section 47(1) of the aforesaid Act had the legal capacity to transfer the case from the High Court of Hambantota to the High Court of Ratnapura, which has Jurisdiction to hear this case. Section 47(1) of the Judicature Act states that "Whenever it appears to the Attorney General that it is expedient that any inquiry into or trial of any criminal offence shall

be transferred from any Court or place, to any other Court or place, it shall be lawful for the Attorney General in his discretion by his fiat in writing to designate such last mentioned Court or place.....”

The direction of the Attorney-General is supported by the facts set out in the objections filed by the 2nd Respondent.

Paragraph 6 of the relevant affidavit states that the officials of the children's home are very reluctant to travel to Hambantota due to threats of the Petitioner and lack of security. The Petitioner is also alleged to have close connections with several notorious persons in Kataragama, Tissamaharama and Hambantota areas, and is said to wield tremendous influence in those areas, which could be detrimental to a fair trial. The 2nd Respondent is said to have received death threats from the petitioner, and inducements are said to have been offered to the family of the 2nd Respondent seeking to withdraw the charges against them. Even at the Non-Summary Inquiry, the 2nd Respondent gave evidence with regard to the death threats which he was subjected to. Thus it appears to be dangerous to the 2nd Respondent and his family if this case is held at the Hambantota High Court. The Petitioner filed this application for a re-transfer of the case on the basis of an alleged threat made to him at the High Court of Hambantota by the 2nd Respondent. The position of the 2nd Respondent is that this complaint was made only after learning that this case had been transferred out of the High Court of Hambantota. On the day in question namely 10.12.2003 counsel for the petitioner on learning that the case had been transferred to Ratnapura, initially objected indicating that he proposed to appeal to this Court against that order of transfer. Consequently he made the complaint of the alleged threat by the 2nd Respondent, as illustrated in Document marked P2. Under these circumstances the allegation of the threat seems more like a false representation to instigate an application for a re-transfer.

When this case was called before the Ratnapura High Court on 23.01.2004 the Petitioner did not appear in courts, and a Medical Certificate was filed on his behalf. On examination of the Medical Certificate marked P4A, which is dated 13.01.2004, the Medical Officer has stated that the petitioner is suffering from chest pain and vertigo and has been recommended bed rest from 20.01.2004 to 27.01.2004 but does not state that he cannot attend Court. Furthermore although the Petitioner in paragraph 11 of the petition states that he was warded at the Intensive Care Unit of the Cardiology

Unit for more than one month, the Petitioner has failed to produce any document to prove this. For the aforesaid reasons I dismiss the application of the Petitioner without costs.

Balapatabendi, J. – I agree.

Application dismissed
