# BANDARA
# v.
# REPUBLIC OF SRI LANKA

COURT OF APPEAL
FERNANDO, J. AND
AMARATUNGA, J.
CA NO. 134/99
HC KANDY NO. 1210/96
FEBRUARY 15 AND 22, 2002

*Penal Code S. 294, 298, 329 – Rash and negligent driving – Found guilty by High Court – Code of Criminal Procedure Act, No. 15 of 1979, – S. 336 – Right of Court of Appeal to enhance sentence.*

Accused was convicted on his own plea, for causing the death of 16 persons by rash and negligent driving, and for causing grievous hurt to 2 persons by the same act, the total period of imprisonment was 2 1/2 years.

**Held:**

(i) On the evidence available the accused-appellant could have been indicted for murder.

*Per* Amaratunga, J.

"Therefore, in this case he deserves a longer period of imprisonment . . . to deliver a message to all those who have no respect for other persons right to life and property . . . this Court will never hesitate to use its powers under s. 336 in appropriate cases.

(ii) Applying the new provision introduced by Act No. 15 of 1979 whilst affirming the conviction and setting aside the sentence of 30 months imposed by the Trial Judge substituted therefor a period of 60 months.

**APPEAL** from the judgment of the High Court of Kandy.

*Upul Kumarapperuma* (assigned) for the accused-appellant.

*Priyantha Nawana* SC for the Attorney-General.

*Cur. adv. vult.*

March 06, 2002

**GAMINI AMARATUNGA, J.**

The accused-appellant had been indicted in the High Court of Kandy on 14 counts framed under section 298 of the Penal Code for causing the deaths of the 14 persons named in those counts by rash and negligent driving of bus No. 60 Sri 4187 on 16. 04. 1995 and on two counts framed under section 329 of the Penal Code for causing grievous hurt to two persons by the same act of rash and negligent driving. When the case was taken up for trial in the High Court, the accused-appellant pleaded not guilty to all charges. Thereafter, the learned High Court Judge proceeded to hear the evidence of the witnesses for the prosecution. After five witnesses gave their evidence and when the prosecution case was about to be closed, the accused-appellant, perhaps having realized that his fate has been sealed by the evidence adduced by the prosecution, retracted his earlier plea of 'not guilty' and pleaded guilty to all sixteen counts. The learned High Court Judge thereupon convicted the accused-appellant on his own plea of all sixteen counts and proceeded to sentence the accused-appellant in the following manner. Thirty months rigorous imprisonment in respect of each count from count 1 to 14. One year rigorous imprisonment each in respect of counts 15 and 16. All sentences to run concurrently. Thus, the total period of imprisonment was 30 months.

The accused-appellant has preferred this appeal against the sentence imposed by the learned High Court Judge.

According to the evidence led by the prosecution, on that ill-fated day about 45 persons left Ambadeniya in Hemmathagama area for Sri Pada in the bus driven by the accused-appellant. When the bus was stopped at Nawalapitiya for the passengers to have tea, the accused-appellant with the leader of the team of pilgrims called *'nade gura'* and another person consumed a bottle of arrack. After they resumed their journey the accused-appellant started to drive the bus at very high speed. Some of the passengers who were alarmed at the high speed of the bus had appealed to the driver not to drive the bus so fast. The accused-appellant had responded to the pleas of the passengers by telling them that he would take them to the Sri Pada in just half an hour! It is in evidence that when the bus was being driven along the Ginigathhena-Hatton road, which is a hilly

road with sharp bends, the accused-appellant took his hands off the steering wheel and started clapping whilst at the same time looking at the passengers through the mirror affixed above the driver's seat. But, the accused appellant could not continue to perform his antics for a long time.

At Diyagala a wheel of the bus went off the road and the evidence is that as soon as that happened the accused-appellant opened the door on the driver's side and jumped out leaving the bus and its full complement of passengers to their inevitable fate in a driverless bus going down a precipice at full speed. The accused-appellant's aforesaid conduct claimed the lives of 14 pilgrims and maimed two others.

When the accused-appellant's appeal against the sentence came up for hearing before us, the learned State Counsel submitted that having regard to the manner in which the accused-appellant had conducted himself as the driver of a bus which had more than 45 passengers and having regard to the number of persons who lost their lives due to his reprehensible conduct as a driver of a bus carrying passengers, the sentence imposed by the learned trial Judge was manifestly inadequate.

The learned State Counsel having made the above submission, invited this Court's attention to section 336 of the Code of Criminal Procedure Act, No. 15 of 1979 which 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 . . . " (*emphasis added*).

This is a new provision introduced by the Code of Criminal Procedure Act, No. 15 of 1979. There was no similar provision in the Criminal Procedure Code of 1898 which was in force upto 31. 12. 1973. Having quoted the above provision, the learned State Counsel submitted that the Legislature in its wisdom has enacted this new provision to give power to this Court to deal with cases like the present one. We are in agreement with this submission.

We, therefore, called upon the accused-appellant to show cause why his sentence should not be enhanced and we gave him time

to show cause. The learned counsel appearing for the accused-appellant submitted that the accused-appellant is the father of an infant child; that he is the sole bread-winner of the family and that his incarceration will have an adverse impact on his family.

We have carefully considered this submission, but we wish to state that we have also considered plight of the families of those 14 persons who perished in the accident caused due to the rash and negligent conduct of the accused-appellant. Therefore, we cannot give any relief to the accused-appellant on the basis of the submissions made on his behalf.

Having considered the evidence available in the case and the submissions of counsel, it is our considered view that this is a fit case for us to use the power conferred on this Court by the Legislature to enhance the sentence in appropriate cases. Section 336 of the Code of Criminal Procedure Act uses the words "a sentence . . . passed after trial". The accused-appellant was convicted and sentenced on his own plea, but he had tendered his plea in the course of his trial. Therefore, we are satisfied that this case falls within section 336 which deals with sentences passed after trial.

On the evidence available in this case the accused-appellant could have been indicted even for murder on the basis of the 4th limb of section 294 of the Penal Code. Therefore, in this case he deserves a longer period of imprisonment.

However, I am of the view that it is sufficient to impose a period of 60 months imprisonment on the accused-appellant to deliver a message to all those who have no respect for other persons right to life and property that this Court will never hesitate to use its powers under section 336 in appropriate cases.

For the reasons set out above, I formally affirm the conviction of the accused-appellant but set aside the sentence imposed by the learned trial Judge and substitute therefor a period of 60 months rigorous imprisonment to take effect from today, i.e. 06. 03. 2002. Subject to the variation of the sentence I have set out above the appeal of the accused-appellant is dismissed.

**FERNANDO, J.** – I agree.

*Appeal dismissed. Sentence enhanced.*