

ANANDA

v.

ATTORNEY-GENERAL

COURT OF APPEAL.
S. N. SILVA, J. P/CA.,
R. B. RANARAJA
C.A. 9/82
M. C. BALAPITIYA
APRIL 28, 1995.

Criminal Procedure Code – Grievous hurt – Conviction – Section 328 b (ii) – Long delay – Since date of Commission of offence – Sentence to be confirmed after a long period, after the proved offence – Factors to be considered.

The Appellant was charged with causing grievous hurt on 20.12.76. He was convicted on 9.2.82, to a term of 10 months rigorous Imprisonment. The appeal came up for argument on 28.4.95.

Held:

(1) An accused has a right to be tried and punished for an offence committed within a reasonable period of time, depending on the circumstances of each case. A delay of over 18 years to dispose of a Criminal Case is much long period by any standard, delays of this nature are generally regarded as mitigating factors.

(2) It appears that the Appellant has turned over a New leaf.

(3) It is to be seen that, the appellant had spent a period of 9 months in remand custody from 4.5.81 – 9.2.82, in connection with the instant case, there is no indication on record to show that the Magistrate had considered this matter in passing the sentence of the Appellant.

Case referred to:

1. *Karunaratne v. State* – 78 NLR 413.

APPEAL from the Order of the High Court of Balapitiya.

Dr. Ranjith Fernando with Ms. Vasanthi Kumari and Ms. S. Puvimanasinghe for Appellant.

D. Jayakody, S. C., for the Attorney-General

Cur adv vult.

May 30, 1995.

RANARAJA J.

The appellant was charged in the Magistrate's Court of Balapitiya, with causing grievous hurt to D. A. Ebert Silva on 20.12.76. He was convicted after trial and sentenced to a term of 10 months rigorous imprisonment. This appeal is from the conviction and sentence.

Learned Counsel for the appellant did not challenge the conviction. On the day the appellant was sentenced, he admitted three previous convictions. For one of which, High Court, Galle case No 48, he was sentenced to a period of two years rigorous imprisonment suspended for seven years. The Magistrate directed the accused to serve the two year sentence ordered in that case, as the offence in respect of which the appellant was convicted in the instant case was committed during the operating period of that sentence. Thus in effect, the appellant had to serve a period of two years and ten months rigorous imprisonment in the two cases.

Learned Counsel for the appellant submitted that it is appropriate, considering the circumstances of the case, for this Court to act under section 328 (b) (ii) of the Code of Criminal Procedure and alter the sentence imposed in the present case and make no order for the operation of the suspended sentence imposed on the appellant by the High Court. He urged three special circumstances which may justify such a course. They are (i) the delay of over 18 years since the date of the commission of the offence for the final conclusion of the

case; (2) the fact that the appellant had turned a new leaf; and (3) the character of the complainant in the case.

In support of the first ground, he relied on the judgment of Rajaratnam J. in *Karunaratne v. The State*.⁽¹⁾ In that case the accused was charged with committing the offence of Criminal Breach of Trust in May 1965. He was convicted in August 1972 and his appeal was heard in October 1975. Rajaratnam, J. during the course of his judgment observed, "I am certain that this was not a case where the sentence would have been suspended by the judge in view of the correct view he formed with regard to the gravity of the offence. But on the other hand, when a deserving sentence has to be confirmed ten years after the proved offence, I cannot disregard the serious consequences and dislocation that it can cause in the accused's family. If there was a final determination of this case within a reasonable time the accused by now would have served his sentence and come out of prison to look after his family. I find however, that the charge has been hanging over this accused for the past ten years till it reached a conclusion before us. The effect and consequences of this sentence cannot be totally disregarded when the sentence is imposed ten years after the proved offence The fact that I am unable to lay my hands on any precedent does not deter me from considering this delay in the circumstances of this particular case as a relevant factor for the imposition of an appropriate sentence."

In the instant case, the accused had surrendered to Court on 30.3.77. He was released on bail the following day. He failed to appear in Court on 22.6.78. The reason he gave for his failure to appear was that he went into hiding after the complainant in the case had in the meantime caused the death of the first suspect in the case, Chalmis, by cutting his neck. The plaint was filed on 3.8.78. Again, the appellant did not appear in Court during the period 28.1.80 to 20.2.81. Trial was concluded on 9.2.82. The appellant himself was therefore responsible for the delay of two years out of six in disposing the case in the Magistrate's Court. The record of the case was thereafter received in this Court on 2.8.82. After a delay of

over eleven years, the briefs in the case were ready and the appeal came up for hearing on 23.1.93. The hearing was delayed by a further six months due to applications being made on behalf of the appellant's Counsel. Thus of the eighteen and a half year's delay, only a period of two and a half years could be attributable to the appellant. Vythialingam J. in *Karunaratne v. The State (Supra)* while expressing a dissenting view observed that delays of this nature are generally regarded as mitigating factors. An accused has a right to be tried and punished for an offence committed, within a reasonable period of time depending on the circumstances of each case. A delay of over eighteen years to dispose of a criminal case is a much too long period by any standard.

Learned Counsel for the appellant at the request of Court submitted three certificates, from the Grama Niladari of the area where the appellant is presently residing, the officer in charge of the Ahungalla Police and the Viharadhipathi of Ambarukkarama Viharaya, Balapitiya. It is to be noted the plaint in the instant case was filed by the Balapitiya Police. However, it is reported that the appellant had not brushed against the law since the charge of causing hurt to the complainant in this case. It appears that the appellant is now married, living in Gunasingepura and carrying on business in the Manning Market. Although the matters mentioned in the certificates are not conclusive, *prima facie* it appears that the appellant has turned a new leaf.

It was also submitted that on the evidence on record the complainant in the case himself is not a person of good character. He has admitted having caused the death of Chalmis for which he was serving a sentence. Besides, he has been dealt with for assaulting Inspector of Police Samath and stabbing one Quintin. He has also been ordered to pay compensation for causing damage to a boutique. Although the conduct of the appellant cannot be condoned, it is clear that the appellant had saved himself from the fate suffered by Chalmis at the hands of the complainant, by going into hiding for two years.

It is also noteworthy that the appellant had spent period of nine months in remand custody from 4.5.81 to 9.2.82, in connection with the instant case. There is no indication on record to show the Magistrate had considered this matter in passing sentence of the appellant.

Taking all these matters into consideration we are of the view that the appellant should not be incarcerated for offences committed over eighteen years ago. Ends of justice will be met by substituting a term of ten months rigorous imprisonment suspended for a period of five years from today and in addition, imposing a fine of Rs. 1500/- in default of which, the appellant will serve a period of one years' rigorous imprisonment. We set aside the order of the Magistrate bringing into operation the suspended term of two years rigorous imprisonment imposed by the High Court of Galle in case No. 48. Subject to the above variations, the appeal is dismissed. The Magistrate will take steps to comply with Section 303 (4) and (6) of the Code of Criminal Procedure and also recover the fine of Rs 1500/- imposed by this Court, according to law.

S. N. SILVA J. – I agree.

Appeal dismissed subject to variation.