IN THE COURT OF APPEAL
OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Don Chandra Maximus Illangakoon
2794, D.S.Senanayake Mawatha
3rd Stage, Anuradhapura

2nd Accused-Petitioner-Appellant

Vs

CA (PHC) 28/2009
HC ANURADHAPURA
CASE HC.REV.26/08

1. Officer-In-Charge of Police Station, Anuradhapura

MAGISTRATE COURT OF
THAMBUTTEGAMA
CASE NO. 24789

2. Hon.Attorney General
Attorney General's Department
Colombo 12.

Respondent-Respondents

BEFORE: **K.T. Chitrasiri, J. &**

W.M.M. Malanie Gunaratne, J.

COUNSEL: Saliya Peiris with Lisitha Sachindra for the 2nd Accused-Petitioner-Appellant.

Anoopa De Silva SSC for the two Respondent-Respondents.

ARGUED &
DECIDED ON: 21.11.2014

K.T. CHITRASIRI, J.

The 2nd Accused-Petitioner-Appellant (hereinafter referred to as the 2nd accused) was charged in the Magistrate's Court of

Thambuttegama for committing the offences of unlawful assembly and mischief by fire that are punishable under Sections 140 and 419 of the Penal Code respectively. Except for the 2nd accused, all the other accused were acquitted by the learned Magistrate after trial. The 2nd accused was convicted for the second count namely committing mischief by fire punishable under Section 419 of the Penal Code and was acquitted from the first count under Section 140 of the Penal Code.

Being aggrieved by the aforesaid conviction, the 2nd accused filed an appeal to the High Court of Anuradhapura. It was dismissed by the learned High Court Judge on the basis that the said appeal was filed before the sentence was passed. Upon the dismissal of the said appeal, the 2nd accused filed a revision application in this Court to have the said decision of the High Court reversed.

The said revision application was also dismissed having accepted the reasons assigned by the High Court Judge, without looking at the merits of the case. The 2nd accused, being aggrieved by the aforesaid decision of this Court, made an application for special leave to appeal. It was also refused by the Supreme Court.

As stated above, all those decisions had been made on a pure question of law. Therefore, the fact remain that no Court has considered the merits of the case by then. Thereafter, the 2nd accused filed this revision application dated 24.07.2008 in the High Court of

Anuradhapura. Learned High Court Judge dismissed the same on 26.02.2009, on the basis that it was filed after a lapse of many years. The 2nd accused thereafter preferred this appeal to challenge the aforesaid decision dated 24.07.2006 of the learned High Court Judge.

Admittedly four years have lapsed from the date of the impugned decision, by the time this revision application was filed in the High Court. Learned Counsel for the appellant submitted that the cause for such a long delay is due to the filing of the appeal referred to above, without following the correct procedure stipulated in the Code of Criminal Procedure Act. He then submitted that the said delay had occurred basically due to the mistake on the part of lawyers and such a reason should not be a bar to consider merits of the case in a revision application provided the petitioner in such an application proves that a serious miscarriage of justice has been caused to that petitioner by the decisions that are being challenged. Accordingly, he submitted that the learned Magistrate has misdirected himself when he convicted the 2nd accused without evaluating the evidence as required by law.

Admittedly, the reason for the dismissal of the original appeal filed by the 2nd accused had been that it was filed before the sentence was passed. Therefore, the said dismissal of the appeal had been purely a question of law that has arisen due to the mistake on the part of the lawyers. Therefore, having adverted to those matters, we decide to consider the merits of this appeal particularly to ascertain whether there

had been a serious miscarriage of justice, caused to the 2nd accused in this instance with the view of invoking the revisionary jurisdiction.

Moreover, it is trite law that the delay in coming to Court is not the sole criteria to dismiss a revision application if the petitioner is in a position to explain the delay. In this instance, the delay is due to the failure to file the appeal at the appropriate stage in the original action. Therefore, it is clear that the petitioner has successfully explained the delay in filing the revision application. Then the issue is whether it is correct to look at the merits of the case at this stage.

In the case of Rustom V Hapangama [1978-1979 (2) S L R 225] it was held thus:

"Even where an appeal was taken but was abated on technical grounds the Supreme Court has granted relief by way of revision, as not to do so would be a denial of justice."

In Read V Samsudin [1 N L R 393] held as follows:

"It is not the duty of a judge to throw technical difficulties in the way of the administration of justice, but where he sees that he is prevented from receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of way upon proper terms as costs and otherwise."

Relying upon the aforesaid authorities, we decide to look into the merits of this case despite the delay in filing the revision application particularly because the learned Counsel for the appellant is of the view that a serious miscarriage of justice had been caused to the 2nd accused due to the conviction imposed on him.

Out of the four lay witnesses who gave evidence before the learned Magistrate, only the first witness namely Bandulasena who said that he saw the 2nd accused setting fire to the house that he was in occupation. (vide at page 69 and 70 in the appeal brief) The other three lay witnesses have not implicated the 2nd accused for committing the alleged offence. The Police witness who investigated into the complaint has stated that he recovered a bottle, containing petrol consequent upon the matters revealed by the statement made to the Police by the 4th accused who was acquitted at the end of the trial. However, no evidence is forthcoming to connect the 2nd accused committing the offence using the petrol recovered from the possession of the 4th accused. Therefore it is seen that the only evidence forthcoming to implicate the 2nd accused for the alleged offence is the evidence of witness Bandulasena. This position is conceded by the learned Senior State Counsel as well.

More importantly, it is seen that the learned Magistrate has not looked at the evidence of the 2nd accused who gave evidence having come into the witness box. 2nd accused, in the capacity as a witness has categorically denied having set fire to the house occupied by the witness

Bandulasena. Significantly, no questions had been posed to the 2nd accused, at least by way of suggesting the position alleged by the prosecution. In such a situation, trial judge should have assigned reasons for the rejection of that evidence of the 2nd accused, if he is to disregard his evidence.

Then the question arises as to whether the evidence of Bandulasena is sufficient to impose a conviction on the 2nd accused. At this stage, it is also necessary to note that it is not an impediment to convict a person for a criminal offence relying upon the evidence of one single witness provided the trial judge believes his/her evidence in order to prove the charges so framed, beyond reasonable doubt.

As referred to above, it is only the evidence of Bandulasena that is available against the 2nd accused even though his wife and the two children had been present at the premises that came under fire. Instead, the Police have called three other witnesses who did not give evidence against the 2nd accused. No explanation had been given as to why only one witness had been called leaving out the other three persons who had been present at the house particularly when such a grave offence is to be established.

The learned Magistrate seems to have been under the impression that he is in a position to infer that it was the 2nd accused who set fire to the house merely because Bandulasena has said so. Such an inference

could not have been made by the learned Magistrate when uncontested evidence is available to the contrary. Therefore, it is clear that the learned Magistrate has inferred matters without addressing his mind to the totality of the evidence.

It is necessary to note that the matters elicited through the evidence of the accused had gone uncontroverted. He specifically has said that he did not participate in setting fire to the house. That evidence was not subjected to in cross-examination. Under those circumstances the learned Magistrate should not have rejected his evidence. Learned Senior State Counsel also concedes this position.

Moreover, it is seen that the learned Magistrate has not considered the evidence in relation to the agreement that had been arrived at between Bandulasena and the 2nd accused, at the police station in respect of this house that came under fire. By that agreement Bandulasena has agreed to vacate the house in question, on the fifteenth day of the next month handing over the same to the 2nd accused who is the owner of the said premises. Under those circumstances, it is clear that the learned Magistrate has not analyzed and evaluated the evidence of both the virtual complainant Bandulasena and of the 2nd accused as required by law when he convicted the 2nd accused.

Under those circumstances, the learned High Court Judge too should not have dismissed the revision application on the ground of laches without looking at the merits of the case. Indeed, the circumstances show that the delay is basically due to the mistakes on the part of the persons who had given legal advice to file an appeal before the sentence was passed. It is the reason that prevented the court to look at the merits of the appeal filed in the High Court. Therefore, it is our view that it is a matter that shocks the conscience of the Court and if not for our intervention there will be serious injustice caused to the 2nd accused appellant.

For the reason set out hereinbefore, we set-aside the judgment dated 2.02.2004 of the learned High Court Judge and the judgment dated 11.02.2004 of the Magistrate and the sentence dated 02.03.2004 imposed on the 2nd accused appellant. Accordingly, we make order acquitting the 2nd accused of the charge of causing mischief by setting fire to the house in question framed under Section 419 of the Penal Code. Accordingly, this appeal is allowed.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

W.M.M. Malanie Gunaratne, J.

I agree.

JUDGE OF THE COURT OF APPEAL

Mm/-.