In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

In the matter of an appeal under and in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Mohamed Mustapah Faiz

Accused-Appellant

CA 86/2006

HC/Ampara/936/05

Vs.

Hon. Attorney-General

Respondent

Before: W.L.R. Silva J and

D.S.C. Lecamwasam J

Counsel: Dr. Ranjith Fernando for the Accused Appellant

Kapila Waidyaratne DSG for the Attorney General

Argued on: 23/08/2011

Decided on: 15/11/2011

D.S.C. Lecamwasam J.

The accused- appellant was a teacher attached to the school where the virtual complainant i.e. the victim, was a student of 11 years of age. On the day of the alleged incident the accused had requested the victim to fetch some cool water from a nearby house which request the victim refused as he has an injured toe. Upon which, the accused had propelled the victim into one of the class rooms and had struck the victim a few times on the legs with a cricket bat and in addition had slapped the victim's face. Thereafter upon making a complaint to police, the boy was produced before a medical officer and the accused was arrested. With this background the accused was indicted before the High Court of Ampara, under section 308(b) (2) of the Penal Code (It ought to have been section 308A (2)) for causing cruelty to children. After trial, he was convicted and sentenced to 2 ½ years Rigorous Imprisonment and a fine of Rs. 1000/= in default 6 months Rigorous Imprisonment and ordered to pay Rs. 10,000/= as compensation in default 2 years imprisonment. Being aggrieved by the said conviction and sentence the appellant has preferred this appeal.

Counsel for the accused appellant at the very outset of the argument submitted to court that he is not contesting the conviction but sought some relief regarding the sentence and pleaded in mitigation. As the learned counsel confined his appeal only to the sentence, I do not wish to elaborate on the other material facts.

Section 308A (1) of the Penal Code states thus;

"Whoever, having the custody, charge or care of any person under eighteen years of age, *wilfully assaults*,(emphasis added) ill- treats, neglects or abandons such person...."

"Wilful" connotes a deliberate intention on the part of the doer as opposed to an inadvertent act. Considering the facts that led to this incident, it is apparent that this is not the result of a pre meditated or preplanned act. It was more a sudden reaction and in the absence of any evidence of personal animosity or a vendetta the act is devoid of any venom or vengeance. Whether asking the child to bring a bottle of cool water from a neighbouring house is permissible or not is not the point of argument in this instance. Whether it is permissible or otherwise, as the child had not complied with the request the appellant had reacted in the manner as unfolded in evidence. His manner of approaching the situation could be viewed as excessive. However as evident from the whole episode it was a spontaneous reaction without any malice, ill-will, hatred or venom, which if been present would have led to the inference of such act being "wilful".

Nevertheless this ought not to be construed as a condoning of cruelty in the guise of discipline. Discipline is necessary in any education system and moreover it is a prerogative of a teacher to discipline his students. Cruelty is intentional and malicious. But discipline while being intentional is devoid of malice. It is an endeavour to instill obedience and acceptance of authority. The random isolated act of the teacher in this case is in my opinion a case of "severe discipline" which may amount to hurt but not to the more aggravated act of cruelty.

Even though the trial judge has alluded to the contradictions in his judgment I observe that he has not considered those contradictions in their

correct perspective. If he had done so, it would have given rise to a deliberation as to whether the act complained of is an act coming within the purview of 'hurt' or 'cruelty'.

Since the learned counsel for the appellant does not contest the conviction, I do not wish to embark on a voyage of discovery as to the thin line of demarcation between hurt and cruelty on one hand and discipline and cruelty on the other at this stage.

However under the circumstances, in the absence of any criminal intention on the part of the accused- appellant I find a term of imprisonment to be obnoxious to justice. After all, "Justice cannot be for one side alone, but must be for both" as espoused by Eleanor Roosevelt. The accused- appellant is a public servant and should not be deprived of his employment due to a 'Solitary incident' that had taken place without any premeditation and moreover because there is an absence of any evidence of prior similar behaviour. Therefore even though the appellant does not contest the conviction, I feel that this is a fit and proper situation for clemency to be bestowed upon the appellant. From the mouth of Abraham Lincoln "I have found that mercy bears richer fruits than strict justice" especially when such strictness vitiates the very spirit of justice. Hence even though Section 308A (2) carries a mandatory jail term for the reasons enumerated I am of the belief that this is an occasion where this court should exercise its discretion in favour of the accused. Hence fortified by the decision of the judgment of His Lordship Justice P. A. Ratnayake in SC 03/ 2008 I reduce the term of imprisonment from 2 ½ years to two (2) years and suspend the same for a period of five (5) years and I further order the fine of Rs.1000/= to be treated as state cost of Rs.

1000/=. This order would enable the appellant to avail himself of the concessions conferred by Section ~~308~~ 303 (8) of Code of Criminal Procedure Act No. 15 of 1979 as Amended by Act No.47 of 1999.

Judge of the Court of Appeal

W.L.R. Silva J

I agree.

Judge of the Court of Appeal