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

In the matter of an Application For Special Leave to Appeal in the Supreme Court under ` Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Arumabadadurage Ariyaratne,
Bolhinda, Weragama,
Ambalantota.

Accused Appellant Petitioner

S.C. Appeal 23A/2009
S.C. (Spl.) L.A. No. 26/2009
C.A. No. 156/2005
H.C. Hambantota 63/99

Vs.

Honouable Attorney General,
Attorney General's Department,
Colombo 12

Respondent.

BEFORE : K. SRIPAVAN, J.
P, DEP ,P.C.,J.
R. MARASINGHE, J.

COUNSEL **:** Dr. Ranjit Fernando for Accused Appellant Petitioner .
Sarath Jayamanne, Deputy Solicitor General for Respondent

ARGUED ON : 29.04.2014

DECIDED ON : 16.05.2014

K. SRIPAVAN, J.

The Accused Appellant Petitioner (hereinafter referred to as the "Appellant") was indicted before the High Court of Hambantota on the following two counts :

Count 1. That he did on the 28th of September, 1977 kidnap one Jayamunigedera Suramya from the lawful custody of her guardian Anulawathie thereby committing an offence contrary to Section 354 of the Penal Code.

Count 2 That he did commit the offence of Rape on the said Jayamunigedera Suramya during the period 28th September 1997 and 26th October 1997 thereby committing an offence contrary to Section 364(2) of the Penal Code.

The High Court found the Appellant guilty on both counts at the trial and sentenced him on 28.09.2005 as follows:-

Count 1 Five years Rigorous Imprisonment.

Count 2 Ten years Rigorous Imprisonment with a fine of Rs. 2500/= and an order for compensation in a sum of Rs. 5000/= with a default term of six months Rigorous Imprisonment.

The Court further ordered that both sentences to run concurrently.

The Appellant preferred an appeal to the Court of Appeal against his conviction and sentence. When the matter came up on 20.09.2006 for support, the Appellant was represented by Dr. Ranjit Fernando and the Respondent was represented by Mr. Nawana, Senior State Counsel. The Argument was fixed for 12.06.2007.

On 12.06.2007, Dr. Ranjit Fernando appeared for the Appellant and State Counsel, Mr. Serasinghe moved for a date on behalf of Senior State Coursel Mr. Nawana on his personal grounds. Accordingly, Argument was re-fixed for 23.10.2007.

On 23.10.2007, too Dr. Ranjit Fernando appeared for the Appellant and the Respondent was represented by Mr. Nawana, Senior State Counsel. However, Argument was re-fixed for 21.05.2008 as the Bench was not properly constituted. The journal entry of 21.05.2008 did not indicate the appearances of any Counsel. It only demonstrates that since there was no time to take up the matter, Argument was re-fixed for 02.06.2008.

Again on 02.06.2008, Argument was re-fixed for 02.02.2009. The appearances of Counsel were not reflected in the Journal Entry. When the matter came up on 02.02.2009, it is minuted as follows :-

> "Accused Appellant absent and unrepresented.
>
> Sarath Jayamanne D.S.G. For the Respondent. Appeal dismissed"

Thus, it is apparent that the Court of Appeal proceeded to hear the matter exparte on 02.02.2009 and dismissed the Appeal. It is against the Judgment made on 02.02.2009, the Appellant sought this Special Leave to Appeal. The learned Senior State Counsel who appeared for the Respondent did not object to Special Leave to Appeal being granted, considering the special circumstances of the case. Accordingly, on 07.05.2009, Special Leave was granted on three questions of law. However, both Counsel confined their argument only on the following question of law:-

> "Should the Court of Appeal in the interest of fair play and justice given an opportunity to the Appellant to be heard by himself or by his Counsel on record, at the hearing of the appeal."

It is to be noted that the journal entries of 21.05.2008 and 02.06.2008 did not indicate the appearances of any Counsel. The said journal entries as appear in the case record is reproduced below for convenience.

"21.05.2008

Before : Sisira de Abrew, J. and
Eric Basnayake, J.

C.A. 117/2003 is to be taken time.

No time.

Case is re-fixed for argument.

Argument on 2/6/2008.

Sgd./

02.06.2008

Before : Sisira de Abrew, J
Eric Basnayake, J.

C.A. No. 135 is taken up for argument.

No time.

Case is re-fixed for argument on 02.02.2009.

Sgd./ "

However the learned Counsel for the Appellant indicated that on 02.06.2008 when the matter was re-fixed for argument he had taken down the date as 18.01.2009 instead of 02.02.2009. In fact, Dr. Ranjit Fernando had filed an Affidavit dated 16.02.2009 in this Court indicating, inter alia, the reason for not being present in Court in the following manner.

"8. In fact after the last occasion, way back on the 2nd of June 2008 I had erroneously intimated to my client the Accused Appellant , that the matter is coming up for Argument on the 18th of Jan. 2009 and to ensure his presence in Court on that day. This had been done by me, as is the usual practice, without realizing that I had

bona fide and by mistake taken down the wrong date of Argument which in fact was the 2nd of February, 2009.

9. In the circumstances I take full responsibility for the absence of the Accused Appellant and him not being represented on the date of the Argument viz. 2nd Feb. 2009 which was due to an inadvertent omission on my part which I admit and humbly tender my unreserved apology.

10. Consequently my inadvertence and omission had resulted in the Accused not being able to prosecute his Appeal against his conviction and sentence thus causing him irreparable harm and damage."

Having taken down the date of argument as 18.01.2009 (which was a Sunday as submitted by Counsel) Counsel should have taken the precaution of ascertaining from the Registry, the correct date of hearing thereafter on a working day. He has however failed to do so until the case was dismissed on 02.02.2009. The Court of Appeal too had failed to direct the Appellant to be present in Court on 02.02.2009 with no indication on record that he had been noticed to appear, when in fact Counsel had appeared for him on three occasions previously.

From the contents of the affidavit, I do not think that Counsel had the intention to offend the dignity of the Court or to abuse the process of Court. It is not always possible to lay down any rigid, inflexible or invariable rule which would govern all cases of default by Counsel. Each case has to be considered on its own merits. If, however, the default was in fact accidental and committed without any evil or ulterior motive, latitude has to be given to Counsel to plead his case.

The legal profession is a noble one and the mark of nobility includes the straightforward habit of owning mistakes or errors and apologizing to the opposite party and/or to Court once such mistakes or errors are realized. When

Counsel tenders an unreserved apology and explained to the satisfaction of Court, the circumstances under which the mistakes or errors were committed, it may be appropriate for the Court to accept it. Once the Counsel regrets his act, it is the duty of Court to make him feel that he is an essential link in the administration of justice and that his apology is accepted with a view that he will henceforth uphold the highest tradition with due diligence and thereby uphold the prestige of the Court.

No Counsel in my view, should be punished for bona fide mistakes. The learned Counsel frankly admitted his default on 02.02.2009 for reasons adduced in his affidavit. It appears to me that it was really a slip on his part not to have taken the date of hearing correctly. Slips of Counsel have been held to be sufficient to set aside decrees or dismissal for default. The following remarks made by Sir George Jessel M.R. In the case of *Burgoine* vs. *Taylor* (1878) 9. Ch. D. 1 at 4 may be useful to be quoted here.

> "*We think that the order asked for by the defendant ought to be made. Solicitors cannot any more than other men, conduct their business without sometimes making slips; and where a Solicitor watches the list, and happened to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice and with the course of practice to restore the action to the paper on the terms of the party in default paying the costs of the day ……"*

It is absolutely basic to our system that justice must not only be done but manifestly be seen to be done. If justice was so clearly not seen to be done, the foundation of justice would ultimately suffer.

The Court has an inherent power by virtue of its duty to do justice between the parties before it. When the learned Deputy Solicitor General was asked whether

he had any doubt about the contents of the affidavit dated 16.02.2009 filed by Dr. Ranjit Fernando, Counsel emphatically answered in the negative. The fear expressed by the learned Deputy Solicitor General was that if this application is allowed it would lead to floodgates in future applications. While I agree with the submission of learned Deputy Solicitor General, I must emphasize that cases have to be considered on their merits and this order will not create a precedent to future cases. The consequence that would follow by reason of default by the Counsel is a matter falling within the discretion of the Court, to be exercised after careful consideration of the nature of the default as well as the excuse or explanation therefore in the context of the particular case. In the matter of exercise of its discretion, one of the relevant factors the Court had to consider is whether there is likelyhood of the combat being unequal entailing a miscarriage or failure of justice and a denial of a real and reasonable opportunity for defence by reason of Appellant being pitted against a competent State Counsel who is trained in law. The right to legal representation is lucidly stated by Lord Denning MR in *Pett* Vs. *Greyhound Racing Association Ltd.* (1968) 2 All E.R. 545 at 549 in the following words :

> "*It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence; He cannot examine or cross-examins witnesses. We see it every day. A Magistrate says to a man: "You can ask questions you like"; whereupon the man immediately starts to make a speech.* ***If justice is to be done he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?*** *……..." (emphasis added).*

The aforesaid observation re-iterates that legal representation before a Court is an elementary feature of the fair dispensation of justice. The pure foundation of justice must not only remain unsullied from within but must also even on the outside appear to remain, unsullied so that confidence of the citizens in the judicial administration may remain unshaken.

Before parting with the judgment, I must mention that it had been a long standing practice to file papers in the same Court which delivered the order to set aside same which was made exparte. This rule of practice has become deeply ingrained in our legal system. The affidavit dated 16.02.2009 had been filed in this Court by Dr. Ranjit Fernando explaining the default of his appearance before the Court of Appeal on 02.02.2009. The Court of Appeal thus, did not have the opportunity of considering the affidavit and then to decide whether the judgment dated 02.02.2009 be set aside with notice to the Hon. Attorney General. Dr. Ranjit Fernando argued that once judgment is delivered by the Court of Appeal, it becomes ".functus officio" and cannot set aside its own judgment. Learned Deputy Solicitor General on the other hand, submitted that the matter be sent back to the Court of Appeal to consider whether the judgment made on 02.02.2009 be set aside. I do not wish to make any pronouncement on this issue. Credibility in the functioning of the justice delivery system and the reasonable perception of the affected parties are relevant considerations to ensure the continuance of public confidence in the credibility and impartiality of the judiciary. This is necessary not only for doing justice but also for ensuring that justice is seen to be done.

For the reasons stated and considering the undue and long time period that had been taken in this Court, I am of the view that ends of justice would be met if the Appellant's appeal be considered afresh by the Court of Appeal after noticing the

parties concerned. The question of law on which special leave was granted is answered in the affirmative. Accordingly, the judgment of the Court of Appeal dated 02.02.2009 is set aside and the matter is sent to the Court of Appeal to be heard afresh on the merits after affording the Appellant an opportunity of being heard either by himself or through a Counsel.

The Registrar is directed to communicate this order to the Registrar of the Court of Appeal forthwith.

JUDGE OF THE SUPREME COURT.

P.DEP, P.C.,J.

I agree.

R. MARASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT.