H.C.(Badulla)182/2007 **CA 156,157/2014**

Before : S. Devika de L. Tennekoon, J
S. Thurairaja, PC, J

Decided on : 20.09.2017

Counsel : Saliya Pieris PC with Yohan Pieris
for the Accused-Appellant.
Thusitha Mudalige DGS for the A.G.

Counsel for the Accused – Appellant submits as follows:

Initially the accused appellants were indicted by the Hon. Attorney General on two counts under the torture Act. Subsequently, on 01.04.2010, the indictment had been amended in terms of section 167 of the Criminal Procedure Code on two counts under section 317 of the Penal Code. On 2nd count under section 314 of the Penal Code, subsequently although the indictment was amended. At the end of the trial the learned High Court Judge convicted the accused appellant of the changes in the original indictment and not on the amended charges. Those circumstances, that the conviction cannot stand.

My next submissions would be that, on the evidence available in this matter could not be appropriate to be send back for re-trial. My submissions are that the evidence of the two main witnesses, the witness

no. 01 and 02, the manner in which they have narrated the incident and the assault described, corroborated by the medical evidence. The nature of the assault described by them are not consistent with the injuries which are found in the medical legal reports. My respectful submissions are in those circumstances, that this should not be an appropriate matter in which the re trial would be merits.

Thusith Mudalige DSG submits as follows:

The learned President's Counsel submitted to Court that the basis on which the conviction for the original indictment for torture has been on the basis of which the accused appellant was convicted on the original indictment despite the fact that the indictment was subsequently amended.

I am in agreement, since the indictment was amended and then the accused appellants are convicted for the original indictment on the legal basis of which the conviction for the original indictment. Then the issue is as to whether the case merits a retrial based on the following matters, it is my view that the nature of the evidence that has been led in the case does not come within the meaning of matter which deserve the re trial mainly. The prosecution case is that the 1st witness Sulthan Mohamed Nalim, he was arrested by the Police and thereafter assault, the facts indicates, my lady and my load that the basis on which they were arrested

as far as the police is concerned it that the possession of the particular quantity of anemias as far as the defense is concerned. The suspects for the accused had made a dock statement on the basis that they saw this witness Mohamad Nalim driving with the brother in the motor bicycle and they were without helmets and they were order to stop and they did not that order and returned the police officers to pursue to them and thereafter they chase them and finally took them in to custody.

I draw your attention to pages numbered 66,77 and 78 of the brief. In these three pages the first witness for the complainant in the case proceeds on the basis that when he was taken in to the police station, his father who happened to be a priest came to the police station and pleaded with the suspects in this case to not to prosecute the witness for possession of cannabis. If I read that portion in the brief in all three places, which I mentioned the witness says (page no.66) then also at page 77 the witness repeats the same thing in page on top and also and page 78 the witness refers to the same item of evidence namely with the father pleading with the police officers who arrested the witness not to prosecute the witness for procession of cannabis so these facts taken together with the dock statement made by the accused in my view makes it clear that this witness has been arrested for the commission of an nature namely possession of cannabis, otherwise my contention is the father does not have pleaded with the police not to prosecute the son for an offence of that nature. On the other hand, the prosecution witness says that they were stopped by

the police, arrested and assaulted, then the question arises what was the reason for the assault. Taking the totality of the matters in to consideration, I don't see any possible reason for the police officers to just to assault these two persons. Then, if I draw your attention in page 79 the witness admits the position that he did not possess a valid license to ride a motorbike, the fact that the witness did not possess the driving license is opposite to the position taken up by both suspects with their dock statements. They were not wearing helmets were not compulsory to ride motor cycle at that time. If I draw your attention to the definition of torture in the act no 22 of 1994. One of the main offence of torture is that whatever the assault, that is complained about there has to be for a purpose that is either to the information to extract the compression or something of that nature in this case, when we look at the prosecution evidence I do not see any purpose or any reason as to why this assault on the witnesses had taken place.

Taking all these circumstances into consideration, it is my view that the facts of the case, evidence of lay witness that has been led in this case when we applied the test of probability does not warrant a retrial fails a test of probability.

JUDGMENT

S. Thurairaja, PC, J

Heard submissions of both counsel. Counsel for the accused appellants submits that these two accused appellants were originally indicted under the Torture Act. Subsequently it was amended to an offence under the Penal Code.

After the trial, the learned trial judge has convicted the accused appellants on the original indictment which is basically wrong. Therefore, he moves that the conviction cannot stand and the case to be sent for retrial. Considering the available evidence, there is no substantive evidence against accused appellants to have a conviction even under the amended indictment. The learned Deputy Solicitor General, maintaining the highest tradition of the Attorney General's Department, concedes to the 1st submission of the learned President's Counsel and submits that technically the conviction cannot stand. Therefore, it has to be send for re trial.

Considering the question of retrial, the learned DSG submits, detailed account of all evidence available before the trial judge and submits that the evidence contradicts each other and appraised the test of probability. Considering the totality of the evidence available, and the submissions made by the learned President's counsel the learned DSG submits that he cannot make an application to send this case for re-trial.

Considering submissions of both counsel and the proceedings, we inclined to agree with counsels and order that the conviction under the original indictment is patently wrong. Therefore, conviction cannot stand.

Considering all other available material, this is not a fit and proper case, for us to send it for re trial. Therefore, we allow the appeal and acquit the accused appellant.

Appeal allowed.

Judge of the Court of Appeal

S. Devika de L. Tennekoon, J

I agree

Judge of the Court of Appeal

Na/-