

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF

SRI LANKA

In the matter of an appeal in terms of Section
331 (1) of the Criminal Procedure Act No 15 of
1979.

The Democratic Socialist Republic of Sri
Lanka

Complainant

Court of Appeal Case No:

HCC/042/22

HC of Badulla Case No; HC 31/2001

Kailasan Rajkumar

Accused

AND NOW BETWEEN

Kailasen Rajkumar

Accused-Appellant

V.

The Attorney General,
Attorney General's Department,
Colombo-12.

Complainant- Respondent

**Before: Menaka Wijesundera, J.
 B. Sasi Mahendran, J.**

Counsel : Ershan Ariaratnam for the Accused-Appellant
Maheshika Silva DSG for the Respondent

Written 30.06.2022 (by the Accused-Appellant)

Submissions: 27.10.2022 (by the Respondent)

On

Argued On: 20.11.2023

Decided On: 14.12.2023

Sasi Mahendran, J.

The 1st Accused Appellant (hereinafter referred to as “the Accused”) along with two others was indicted in the High Court of Badulla for murdering Mariappan Selvaraj punishable under section 296 read with section 32 of the Penal Code.

During the trial, 2nd Accused passed away. After the trial, The Learned High Court Judge convicted the Accused appellant for the offence of Murder, imposed the death sentence, and Acquitted the 3rd Accused.

Being aggrieved by the said conviction the Accused has appealed to this Court.

The main ground urged by the Accused was that he was not provided a fair trial.

Following are the facts and circumstances of this case,

According to the brief the indictment was served to the 1st Accused on 14th May 2002, thereafter he was granted bail by the High Court. When the trial commenced on the 31st of August 2005, he was present and represented.

On 6th September 2011 he was absent. Thereafter on the 8th of November 2011, steps were taken under section 241 of the criminal procedure code, and the case proceeded against the 1st Accused in trial in absentia.

6 years later that is on the 27th of June 2013, police produced the Accused to the High Court. And learned High Court Judge had assigned a counsel to him and proceeded to trial for calling witness number 12.

When we perused the proceedings on 27th June 2013, we observed that after assigning the counsel to the accused, the learned High Court Judge had not given reasonable time for the Accused to give instructions to the assigned counsel regarding this case. It should also be noted that a number of witnesses have already given evidence.

Purpose of obtaining an attorney at law.

Section 41 (1) of the Judicature Act, No.2 of 1978, reads as follows:

“Every attorney-at-law shall be entitled to assist and advice clients and appear, plead, or act in every Court or other institution established by law for the administration of justice and every person who is a party to or claims to have the right to be heard in any proceeding in any such court or other such institution shall be entitled to be presented by an attorney-at-law.”

It indicates that the attorney at law who represents the accused should get the instructions from the client and assist and advice him but in the instant case we observe that the Learned High Court judge had not given that opportunity to the Accused.

The issue before us was whether the Accused was given a fair trial.

In the instant case Accused was facing the murder charge which would end up with a death sentence. Also, to defend his case, counsel should receive proper instruction from him.

What is a fair trial?

Justice A.R.B Amarasinghe had to say in his work on “Judicial Conduct Ethics and Responsibilities” at page 780 :-

“Article 13(3) of the Constitution states that the ‘any person charged with an offence shall be entitled to be heard...at a fair trial by a competent Court’. The constitution makes a fair trial ‘a fundamental right’ in the case of person charged with an offence. However, in my view, in the exercise of constitutional duties under Article 4 (c). A Judge is legitimately expected by the people on whose behalf Judges exercise the judicial power

to ensure a fair trial, in every case, whether criminal or civil, although in the latter instance, it is not a 'fundamental right' recognized and declared by the constitution."

Further on page 828;

In Rasiah v. Sithamparapillai the Accused complained that he was tried by the magistrate immediately after his arrest in the magistrate's bungalow on a Sunday before he had time to consider his position or to seek any advice. Bertram CJ said that the magistrate was not bound to give every person brought before him an opportunity of seeking legal advice.' The Chief Justice's view requires reconsideration. One could hardly regard a trial as 'fair' in which an Accused person has not had an opportunity of seeking legal advice. In the case before Bertram CJ the Accused complained not only that he could not seek legal advice but also that he has no time even to personally consider his own position."

"Although, in my view, it is desirable that a person, especially where a person's liberty is at stake, should be able to consult an Attorney, neither the Constitution nor any other law in Sri Lanka recognizes a legally enforceable right of a person in custody to consult an Attorney before proceedings in Court have commenced. Article 13 of the Constitution entitles a party to be heard through an attorney at a trial. Section 260 of the Code of Criminal Procedure gives an Accused the right to legal representation in Court. Section 241 of the Code of Criminal Procedure gives an Accused who is tried in absentia in the High Court the right to be defended by an attorney at law at such trial. Section 148 of the Code of Criminal Procedure gives an absent Accused a right to be represented by an attorney at on inquiry by a magistrate. In civil matters, sections 24-30 of the Civil Procedure Code enables a party to be heard by an attorney."

The concept of fair trial was discussed by **Justice J.A.N. De Silva (as he was then)** in **The Attorney-General V Segulebbe Latheef And Another** 2008 1SLR page 245 Held that ;

"Our Constitution does not expressly recognize the right of access to legal advice and assistance to an Accused person under arrest.

However, the Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a "fair trial" by a competent Court. This right is recognised obviously for the reason that a

criminal trial (subject to an appeal) is the final stage of a proceeding at the end of which a person may have to suffer penalties of one sort or another if found guilty.

The right of an Accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice is denied. The right to a fair trial was formally recognised in International law in 1948 in the United Nations Declaration of Human Rights. Since 1948 the right to a fair trial has been incorporated into many national, regional, and international instruments.

Like the concept of fairness, a fair trial is also not capable of a clear definition, but there are certain aspects or qualities of a fair trial that could be easily identified.

The right to a fair trial amongst other things includes the following:-

- 1. The equality of all persons before the Court.*
- 2. A fair and public hearing by a competent, independent and impartial Court/tribunal established by law.*
- 3. Presumption of innocence until guilt is proven according to law.*
- 4. The right of an Accused person to be informed or promptly and in detail in a language he understands of the nature and cause of the charge against him.*
- 5. The right of an Accused to have time and facilities for preparation for the trial.*
- 6. The right to have a counsel and to communicate with him.*
- 7. The right of an Accused to be tried without much delay..."*
8. The right of an Accused to be tried in his presence and to defend himself or through counsel.
9. The Accused has a right to be informed of his rights.
10. If the Accused is in indigent circumstances to provide legal assistance without any charge from the Accused.

11. The right of an Accused to examine or have examined the witnesses against him and to obtain the evidence and examination of witnesses on his behalf under the same conditions as witnesses against him.
12. If the Accused cannot understand or speak the language in which proceedings are conducted to have the assistance of an interpreter
13. The right of an Accused not to be compelled to testify against himself or to confess guilty. (emphasis added)

The above dictum was considered by **Aluwihare J in Hattuwan Pedige Sugath Karunaratne v Hon. Attorney General SC Appeal 32 / 2020 decided on 20.10.2020 held that;**

“Under the International Covenant on Civil and Political Rights (ICCPR) Act, No.56 of 2007, an Accused now has a statutory entitlement for a counsel to defend him:

Section 4 (1) of the ICCPR Act stipulates;

“A person charged of a criminal offence under any written law, shall be entitled-

(c) to have legal assistance assigned to him in appropriate cases where the interest of justice so requires and without any payment by him, where he does not have sufficient means to pay for such assistance”

In Rathnapalage Hemasiri Subhasingha v. Attorney General, CA 206/2016, Decided on 13.12.2018, S. Thurairaja, PC.J

“The Counsel also submits that the Accused-appellant on 16.05.2016 was present and unrepresented. The Learned Trial Judge had assigned a counsel and taken up the trial on the same date. The counsel submits that the Accused-appellant had no opportunity to instruct his counsel properly.

.....

We carefully perused the proceedings and find that, the Accused-appellant was not given proper opportunity to have a fair trial. Hence, we vacate the conviction and the sentence and order re-trial.”

Therefore, we hold that the learned High Court Judge has not given reasonable time for the Accused to give proper instructions regarding this case. Therefore, we set aside the convictions and sentence imposed by the learned High Court Judge on 03.03.2020. Furthermore, we notice that the Learned High Court Judge has not given sufficient time for the Accused to submit to satisfy the court that his absence from his trial was bona fide. As we observe he was arrested on 27.03.2013 and was remanded till 27.06.2013 when he was produced before the high Court. He was not represented by an attorney-at-law to explain the reason for his absence.

Therefore, we quashed the order made on 03.03.2020 we directed the High Court to have an inquiry under 241(3) of the Criminal Procedure Code and proceed with the trial thereafter.

The appeal is allowed.

The Registrar is directed to send a copy of this judgment to the High Court of Badulla along with the original case record forthwith.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL