

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALI REPUBLIC
OF SRI LANKA**

**In the matter of an application for mandates in
the transferring a case under and in terms of
section 46 of the Judicature Act No. 37 of 1979 as
amended**

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

CA /TR 224/2005

H/ C Colombo, HC 5480/11

Vs,

Ravindra Budhdhadasa Weththasinghe,
485G, Bogahahena Rd,
Baththaramulla.

ACCUSED

And,

Ravindra Budhdhadasa Weththasinghe,
485G, Bogahahena Rd,
Baththaramulla.

ACCUSED-APPLICANT

Vs,

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

COMPLAINANT- RESPONDENT

Before

: Vijith K. Malalgoda PC J (P/CA) &

H. C. J. Madawala J

Counsel : Upul Jayasooriya with Lahiru Gunaratne for the Accused-Applicant.
Lakmali Karunanayake SSC for the Complainant- Respondent.

Inquiry On: 04.09.2015

Order On: 30.11.2015

Order

Vijith K. Malalgoda PC J (P/CA)

The Accused-Applicant (herein after referred to as applicant) has come before this court seeking inter alia,

- b.** Grant interim order staying the further proceeding of case no. HC 5480/11 until a final determination of this action
- c.** Order to transfer the case no. HC 5480/11 to any other High Court in Colombo and /or
- d.** An order not to hear case no. HC 5480/11 before Honorable High Court Judge Ms. Padmini Ranawaka and to have it listed before any other Judge of the High Court

According to the applicant, he was indicated before the High Court of Colombo in case no. HC 5480/11 when he was out of the country. His position before this court was that the said trial had proceeded in his absence since he feared to come to Sri Lanka for personal reasons but was represented by a counsel. In January 2015 his counsel moved the said court to recall the warrant already issued since he is interested in taking part in the said trial which was already fixed for 25.05.2015.

Based on the above submission the High Court recalled the warrant. The applicant has arrived without being arrested on 20th January 2015. On 20th February 2015 he was arrested at the Air Port regarding another warrant issued in connection with non-payment of EPF monies. Subsequent to

the said arrest the prison authorities had taken steps to produce the suspect before court with regard to all the cases pending against him, including the High Court case referred to this application which was pending in High Court Colombo – Court No 6 and another High Court case pending before High Court Colombo –Court No.1.

Applicant further submits that when he was produced before the High Court - 6 in connection with HC 5480/11 the High Court refused granting bail to him. The said order was delivered in court on 02nd April 2015.

However due to the health condition which aggravated during the said period a motion was filed on 16th of April by the counsel for the applicant requesting the High Court to call this case to support the said motion since it was filed when the court was on vacation. The acting judge on that day had made order to call the said case on 22nd April, the 1st working day after the vacation.

However another motion was filed before the High Court on. 20.04.2015 and the said motion was supported before High Court No.3, the High Court Judge who was acting for that day.

The Learned Counsel who appeared for the Applicant on that day relied on two grounds when supporting his application. Firstly he had relied on the medical condition, which aggravated during the period he was in remand custody.

Secondly he had taken up the position that the order made on 02.04.2015 by the Permanent High Court Judge in Court -6 was made Per Incuria.

The Learned Acting High Court Judge who made the order on.20.04.2015 has decided not to consider the second ground submitted by the Applicant, but decided to consider the Health condition which aggravated after the bail order delivered on. 02.04.2015, specially the fact that the applicant was hospitalized in a Government Hospital for the period 12.02.2015 to 16.04.2015 and granted bail on the following strict conditions.

- a) Rs. 1 million cash bail
- b) 4 surety bail Rs. 5 million each
- c) Report to Commercial Crimes Division of CID every Saturday
- d) Place of stay certified by G.S to be submitted to the Registrar of High Court. The said address cannot be changed without permission of Court.
- e) Change of the address has to be informed to court by way of a motion.
- f) The passport which in the custody of the Magistrate should not be released to the Applicant without the approval of the High Court

After making the said order, the case was called before the permanent High Court Judge on several occasions between 23.04.2015 and 29.04.2015 in order to implement the bail conditions imposed by the Acting High Court Judge.

On 23rd April the matter has first come up before the Permanent High Court Judge on a motion filed by the Complainant in order to obtain a ruling from court with regard to the place of stay as referred to the bail order dated 20th April. However during the proceedings on that day, we observe that both parties including the state agitated the question of granting bail and selecting sureties.

Both parties had made detailed submissions and thereafter the Learned High Court Judge too has delivered an order in which the Learned High Court Judge had made following remarks with regard to the granting of bail to the Applicant.

“විත්තිකරු තම මුදල් බලයෙන් නීතියේ රැහැනින් මගහැරීමට සෑම ප්‍රයත්නයක්ම අධිකරණ විවේක කාලය තුළදී දරා ඇති බව මගේ හැඟීමයි”

“ඒ අනුව 2015.04.20 වන දින වැඩබලන විනිසුරුතුමාද නොමග යවමින් ඇප ලබාගෙන ඇති බවත් මෙම අධිකරණයේ අවධානය යොමු කරමි. එම ඇප ලබාගැනීමේදී විත්තිය ක්‍රියාකර ඇති ආකාරය සහ රජයේ අධිනීතිඥවරියගේ දැඩි විරෝධතාවයත් නොසලකා ඇප ලබාදීම සම්බන්ධයෙන් මෙම

අධිකරණයේ 'අවධානයට යොමු කරමි. ඒ අනුව අධිකරණ විවේක කාලය තුළදී විත්තිකරු සම්බන්ධයෙන් ඇප ලබාගැනීම පිළිබඳව කරන ලද ක්‍රියාදාමය මා දැඩි ලෙස හෙලාදකිමි."

However as directed by the Learned Permanent High Court Judge the matter was again called before the same court on 28.04.2014 in order to furnish fresh sureties. Even though the matter was called to furnish sureties, same issue with regard to granting of bail and the medical condition of the complainant was again raised before court and both parties had again made detailed submissions on that day.

After the said submissions, the Learned High Court Judge had made an order with regard to the accepting of sureties and the place the Applicant is going to stay after he was enlarged on bail. In the said order the Learned High Court Judge had made the following remarks,

“මෙම නඩුවේ ඉදිරිපත් කරන සෑම ඇපකාරයෙක්ම හැදෑරුම්පත නැති බවත්, ඔවුන්ගේ අනන්‍යතාව තහවුරු කිරීම ප්‍රමාණවත් නොවන බවත්, එම වූදිත සම්බන්ධයෙන් විවිධ නඩු ගනනාවක් ඇති අතර, මෙම නඩුව එක නඩුවක් වුවද, ඔහුගේ ඉතිහාසය සැලකීමේදී ඔහුව ඇප ලබා දීමේදී වෙනත් නඩුවලට වඩා අධිකරණය දැඩි ලෙස ප්‍රවේශම්කාරීව 'ඇප ලබා දිය යුතු බවට තීරණය කරමි."

“ඔහු සම්බන්ධ අධිකරණ වෛද්‍ය නිලධාරීවරයාගේ වෛද්‍ය වාර්තාව අනුව ඔහුගේ කිසිදු බරපතල රෝගී තත්ත්වයක් නැතිබව සනාථ කර ඇත. මෙම විත්තිකරු විශ්වාස කළනොහැකි අසත්‍ය ප්‍රකාශ කරන තැනැත්තෙක් බව සඳහන් කරමි."

The matter was again mentioned before the same High Court Judge on 29.04.2015 to furnish sureties after accepting the sureties and fixed the matter for trial on 25.05.2015 the court had proceeded to make the following order,

“එසේම විත්තිකරුට විරුද්ධව 24.04.2015 අධිකරණය නොමඟ යැවීමට මෝසමක් මගින් කරන ලද ඉල්ලීම සම්බන්ධයෙන් විමසීමක් ඉදිරියේදී සිදුකරන බවද දැනුම් දෙමි."

As admitted by both parties before this court the Accused- Applicant was facing an Indictment before High Court No.6 of High Court of Colombo. The said case bearing No. 5480/11 was in its concluding stages. The said trial had proceeded before the High Court No.6, in the absence of the Accused. However he was represented by counsel throughout the trial. Section 241 of the Code of Criminal Procedure Act No. 15 of 1979 provides for a trial to proceed in the absence of an Accused, provided the Accused person can consented to be represented by a counsel.

Whether the Accused was genuinely wanted to come before court and fight out the case could only be revealed if he had come before the court on 25.05.2015 without getting arrested prior to that. Even though the High Court Judge in Court No. 6 in her order refusing bail had referred to the fact that the counsel undertook to produce the suspect before court on arrival to Sri Lanka, it is not borne out from the case record and therefore, it is not fair to consider the said ground against him.

Respondents have challenged the manner in which the bail obtained from the High Court, specially, the failure by the Accused-Appellant to file papers to revise the order dated 02.04.2015 in the appropriate court, and to go before the High Court on a different ground, but without waiting for the Permanent Judge to take up the matter, supported the matter before an Acting High Court Judge when there is specific order by another acting High Court Judge to have this matter mentioned on 22.04.2015 the first working day of the term before the Permanent High Court Judge.

This court on careful perusal of the sequence of events took place since 02.04.2015, of the view that the most appropriate conduct would be either the Accused-Applicant to file revision papers or considering the urgency of the matter waited for another two days to go before the same High Court Judge.

However, the question before this court at this stage is not the conduct of the Accused in obtaining bail, but the Learned High Court Judge when implementing the said order acted impartially without bias since the main trial against the Accused-Applicant is going to be decided by the same High Court Judge.

The main contention of the Learned Counsel for the Accused-Applicant before this court was that in view of the above conduct of the Learned High Court Judge during the period of 24.04.2015 to 29.04.2015 where the

Learned High Court Judge made specific remarks with regard to the Accused-Applicant, that the Accused-Applicant reasonably apprehends that he would be deprived of a fair trial.

In the case of *Perera V. Hasheed (Sri Kantha Law Report Volume I 133)* G.P.S.de Silva J (as he then was) made the observation that it must be remembered that a judicial officer is one with a trained legal mind and that it is a serious matter to allege bias against a Judicial Officer and that this court would not lightly entertain such an allegation.

In the case of *Sivasubbramaniam V. Sivasubramanian 1980 (2) Sri LR 58* court held “ a party who seeks the transfer of a pending action in court must adduce sufficient grounds to satisfy the court of Appeal and that a transfer would not be ordered on light grounds and on a consideration of all the material placed before court.

In the said case of *Perera V. Hasheed* two tests for disqualifying bias have been formulated.

- a. The test of real likelihood of bias
- b. The test of reasonable suspicion of bias

In the case of *R.V Camborne Justices ex parte Pearce 1954 (2) AER 145* ruled in favour of the test of real likelihood as follows,

“In the judgment of this court, the right is that prescribed by Blackburn, J. in *R v. Rand*, namely that to disqualify a person from acting in a judicial or quasi judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown... The frequency with which allegations of bias have come before the courts in recent time; seems to indicate that the reminder of Lord Hewart, C.J. in *R V. Sussex JJ ex parte Mc. Carthy*, that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases, on the

flimsiest pretexts of bias. While endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, C.J. this court feels that continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done. In the present case, this court is of opinion that there was no real likelihood of bias and it was for this reason that the court dismissed the application...”

It appears that the facts and circumstances in the above case necessitated the real likelihood test to be applied and therefore it is important to consider the facts of the above case at this stage.

According to the facts, an information was laid against the applicant under the Food and Drugs Act by an officer of the Cornwell County Council. At the trial of the applicant M. Thomas who had been elected a member of the County Council acted as clerk to the Justices. After the Justices had retired to consider their verdict, the Chairmen send for Mr. Thomas to advise them on a point of law. Mr. Thomas advice the Justices on the point of law but the facts of the case were not discussed at all with him. Having given his advice he returned to the court. An order for Certiorari was sought on the basis that there was reasonable suspicion of bias because Mr. Thomas was at the time of the trial, a member of the County Council on whose behalf the information was laid against the applicant.

As against the real likelihood test, which necessitates to apply in the above case, considering the facts of the said case, the test of reasonable suspicion of bias was discussed in the case of *Dr. Karunaratne V. Attorney General 1995 (2) Sri LR 298* as follows,

In regard to the application of the test of reasonable suspicion of bias it must be shown that the suspicion is based on reasonable grounds which would appeal to the reasonable right thinking man. It can never be based on conjecture or on flimsy, in substantial grounds. There must be material which shows a tendency in favour one side unfairly at the expense of the other.

During the argument before this court the Learned Counsel for the Accused-Applicant drew our attention to the orders made by the Learned Trial Judge on 23.04.2015 and 29.04.2014 and submitted that of the said orders the Learned Trial Judge made references that the Accused-Applicant as,

- a. A person who has used his financial power to circumvent the legal system
- b. A person who has misdirected the Judge in obtaining bail
- c. A person having a number of cases against him
- d. Considering the history of him court should be cautious in granting bail
- e. An untrustworthy person
- f. A person who makes false statements.

and therefore submitted that the Learned Trial Judge has already made up her mind against the Accused-Applicant in the High Court case pending before her. It was further submitted by the counsel that the Learned Trial Judge was bias against the suspect over the matters such as “the Accused is a person having number of cases against him.” “Considering the history of him.....” which clearly deals with character of the Accused-Applicant.

It was further argued before us that, in case the Accused- Applicant decides to give evidence Accused – Applicant cannot expect a fair consideration of his evidence from the court since the Judge had already concluded that he is a person who is capable of telling lies and also an unreliable person.

Having submitted the above material before this court the Learned Counsel took up the position that, in the above circumstances an unbiased order or a judgment cannot be obtained from the Honorable High Court Judge in High Court No.6.

As discussed in the case of *Perera V. Hasheed and also in the case of Daya Weththasinghe V. Mala Ranawaka 1989 (1) Sri LR 86* it was decided that “a Judicial Officer is a person with a trained mind and court will not lightly entertain an allegation of bias”

When applying the said dicta to the present case I have to ask the following question to find an answer to decide infavour of the Applicant or against the Applicant.

Is it proper for the Learned High Court Judge being a person with a legally trained mind to make statements in this nature, specially with regard to the character, conduct history and financial ability of the applicant, when the matter before the High Court was only to consider whether the sureties are acceptable in granting bail, very well knowingly that a trial against him is pending before the same Judge.

When considering the material placed before this court, my answer to the above question is; that the High Court Judge should not have made such statements in her orders dated 23.04.2015 and 28.04.2015 which establishes bias against the Applicant.

Having considered the submissions made by both parties and the specific issues I have discussed above, I am of the view that the material placed before us warrants the transfer of the case to be taken up before a different High Court Judge.

Therefore I make order directing the High Court Judge in Court No.1 to nominate a different Judge to hear and determine this case.

Application for transfer is allowed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE CUORT OF APPEAL