

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

In the matter of an Appeal
against an order of the
High Court under Sec. 331 of
the Code of Criminal
Procedure Act No. 15
1979.

Arampath Mudiyansele
Thilakaratne Bandara,
Pothuwewa, Katupotha.

Accused-Appellant

C. A. No. : 117/ 14
H. C. Puttlam Case No. : 230/ 2005

V.

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

Respondent

BEFORE : H. N. J. Perera, J. &
K. K. Wickramasinghe, J.

COUNSEL : Amila Palliyage for the Accused-Appellant.
Chethiya Goonesekara DSG, for the Attorney General.

ARGUED ON : 01st December 2015

DECIDED ON : 12th of February 2016

K.K. WICKRAMASINGHE, J.

The Accused-Appellant (hereinafter referred to as Appellant), Arampath Mudiyansele Thilakaratna Bandara was indicted in the High Court of Puttlam on the following charges:

- 1) Committing Grave Sexual Abuse on Widana Arachchilage Anusha Damayanthi, on or about 20th January 2004 and thereby committing an offence punishable under s.365B (2)(b) of the Penal Code as amended by Act No. 22 of 1995 and Act No.29 of 1998.

The Indictment had been served to the Appellant on 21st February 2006. At the conclusion of the trial the Learned High Court Judge found him guilty as charged and sentenced to a term of 7 years rigorous imprisonment.

Learned Counsel for the Accused Appellant submitted that the Learned High Court Judge had not complied with section 196 of the Code of Criminal Procedure Act No. 15 of 1979 and as such the Conviction and Sentence could not be sustained. Section 196 of the Code of Criminal Procedure Act No. 15 of 1979 provides that '*When the court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not of the offence charged*'.

However the Learned Deputy Solicitor General argued that the mandatory provisions had been followed by the Learned High Court Judge before the commencement of the trial. He further stated that an opportunity had been given to the Learned Counsel for the Accused Appellant to make submissions on behalf of his client at the end of the trial. However even at that stage the Learned Counsel for the Accused Appellant had not stated the fact that the indictment had not been read to his client, this shows that in fact the indictment had been read to his client. Furthermore, the Learned Deputy Solicitor General argued that, nowhere in the petition of appeal does it say that the indictment was not read to the accused. He further stated that when there were so many opportunities for the Learned Counsel for the Accused Appellant to inform Court that the indictment had not been read to his client, none of the opportunities had been availed of by the Learned Counsel for the Accused Appellant. Therefore one cannot come to the conclusion that the indictment had not been read to the Accused.

The Learned Deputy Solicitor General stated that if the indictment had not been read, it is the duty of the Learned Counsel for the Accused Appellant to bring it to the notice of the learned High Court Judge before the commencement of the trial as his client cannot get ready for the trial without knowing the charges against him. He further argued that if the Learned Counsel for the Accused Appellant didn't know the charges against his client how did he cross examine the prosecution witnesses when the prosecution called witnesses in support of the prosecution case.

Furthermore he argued "how the appellant did give evidence if he didn't know the charges against him" and even if the charge was not read to the Appellant even at that stage he could have informed the Court that a mandatory provision had not been followed. Thus, the Learned Deputy Solicitor General stated that the Learned High Court Judge has read the indictment but has failed to record the same on the Court record. He further stated that the Appellant knew the charge against him since he opted to plead guilty to a lesser offence on 23rd January 2012 (Vide page 44). Therefore it is amply demonstrated the fact the indictment was read over to the Appellant.

The Learned Deputy Solicitor General brought to the notice of Court that the judgement of case of **Abdul Sameem Vs. The Bribery Commissioner 1992 (1) SLR76** is entirely different from the present case because in the aforementioned case the Learned Magistrate had proceeded to trial without framing a charge against the accused. However, in this case the situation is entirely different because the indictment was handed over to the Appellant before the trial commenced. The trial commenced six years after service of the indictment to the Appellant. Thus, the Learned Deputy Solicitor General argued that the Appellant had six years to read the indictment and get ready for the trial. He further stated that the Learned Counsel for the Accused Appellant at the trial court had never complained that the indictment was not read to his client. Therefore this shows that the Learned High Court Judge had in fact read the indictment but failed to record the same. He further stated that merely because the plea of not guilty is not recorded in the Court record, an order given by a competent Jurisdiction should not be reversed.

According to section 435 of the Code of Criminal Procedure Act No. 15 of 1979 *"If any court before which a deposition of a witness or a statement of an accused recorded under the provisions of this Code is tendered in evidence finds that the provisions of this Code have not been fully complied with by the Magistrate recording the evidence or statement, it may take evidence that such witness or accused duly gave the evidence or made the statement recorded; and notwithstanding section 91 of the Evidence Ordinance such evidence or statement shall be admitted if the error has not injured the accused as to his defence on the merits."* According to section 436 of the Code of Criminal Procedure Act No. 15 of 1979 *"Subject to the provisions herein before contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account -*

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code ; or

(b) of the want of any sanction required by section 135,

Unless such error, omission, irregularity, or want has occasioned a failure of justice."

According to section 456A *"the failure to comply with any provision of this code shall not affect or be deemed to have affected the validity of any complaint, committal or indictment or the admissibility of any evidence unless such failure has occasioned a substantial miscarriage of justice"*.

In the case of **Banwari Vs. State of U.P., AIR 1962 SC1198**, it was held that *"omission to read over and explain the charges does not vitiate the trial if no prejudice is caused."*

According to the Sohoni's Code of Criminal Procedure, *"before receiving the plea of the accused, the court should be careful to explain the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge to which he is called upon to plead. Simply reading out the charge to the prisoner is not sufficient but it must be explained to him. However, an omission to read over and explain the charge will not vitiate the trial, if no prejudice is thereby caused to the accused."* *"The record must contain the usual entry as to the charge being read over to the accused and as to his plea, though the absence of the same will not affect the validity of the trial, if it is referred to in the judgement."* (**Jagdeo Prasad Vs. Emperor (1920)21 Cr LJ 410**)

According to Sarkar Code of Criminal Procedure (7th ED, pg-757), *"Accused can plead or remain silent or claim to be tried. A rambling statement more or less admitting guilty, or a qualified plea of guilty is equivalent to a plea of not guilty and accused must be tried. Plea must be clear and unqualified. A plea of guilty should be recorded; otherwise the conviction on it will be set aside. According to the case of **Naval Kishore Singh Vs. State of Bihar, AIR 2004 SC 4421**, "the Indian Supreme Court refused to consider plea especially when the accused was not able to show that he was in any way prejudiced by such irregular procedure."*

Therefore the Learned Counsel for the Accused Appellant submitted that however it is necessary to consider when the Appellant appears or is brought before the High Court whether the Court should read and explain the indictment to the Appellant and ask whether he is guilty or not to the offence. The said requirement is a mandatory statutory provision as it is evident by the words "shall" used in the above mentioned section 196 of the Code of Criminal Procedure Act No. 15 of 1979. In the case of **Amarathunga Arachchige Nimal Sarathchndra Vs Attorney General, CA Appeal No. 169/2003**, Justice Sarath De Abrew held thus, "*on a plain reading of the above provisions of the Criminal Procedure Code, In a High Court trial with or without a Jury. It is abundantly clear that the following mandatory requirements have to be fulfilled before a verdict is entered. The use of the word shall in section 196 of the Code, to my mind, is not merely directory but mandatory, and confers jurisdiction to try the accused only after compliance of this mandatory provisions*" His Lordship further held thus;

(a) The indictment containing the charge or charges should be read over and explained to the accused, irrespective of the fact whether he is defended by counsel.

(b) His plea of guilty or not guilty should be obtained and recorded, unless he refuses to plead." Thus section 196 of the Code of Criminal Procedure Act No. 15 of 1979 suggests that when an Accused person appears or is brought before the High Court on an indictment, it is imperative for the learned High Court Judge before commencement of the trial, to read and explain the indictment to him and also ask whether he is guilty or not of the charge. This is a fundamental requirement in criminal law and no trial can commence without following the said procedure.

In the case of **B.S.H. Kodithuwakku Vs The Republic of Sri Lanka, CA Appeal No.144/2005** it was held (a) "*before the commencement of the trial the accused must be asked whether he is guilty or not guilty of the charge. This is a fundamental requirement in criminal law and (b) the right to plead guilty or not guilty to the indictment is a statutory right given to an accused person which must be safeguarded by Courts*". However in this particular case the indictment was not read over and explained to the Appellant and it has not been recorded whether the Appellant was pleading guilty or not as it has been mandated by the section 196 of the Code of Criminal Procedure Act No. 15 of 1979.

Complying with section 196 of the Code Criminal Procedure Act No. 15 of 1979 is a duty cast on the High Court Judge. In the case **Wijesinghe Rajakaruna Mohottalage Chamila Wijesinghe and another Vs Attorney General (CA/206-207/2010)**, it was held that the "*duties cast on the Judge are imperative and wording is very strict. There is no room for non-compliance.*" Thus I hold that compliance with Section 196

of the Code of Criminal Procedure Act No.15 of 1979 is mandatory and failure to do so vitiates the conviction. In the case of **Withanage Gunawardana Vs Hon. Attorney General (CA/22/2002)**, Justice Shiranee Tilakawardena *set aside the conviction and the sentence* on a preliminary issue raised by the Counsel for Appellant to the effect that the Learned High Court Judge has failed to comply with section 196 of the Code of Criminal Procedure Act No.15 1979. Their Lordships Justice Sarath Abrew and H.N.J. Perera set aside the conviction and the sentence imposed by the Learned High Court Judge and ordered a fresh trial on the basis that the Appellant had not been properly arraigned in the case of **Yoganathan Pradeep Dilruksha Vs. The Republic of Sri Lanka, CA Appeal No 223/2010**. Therefore compliance with Section 196 of the Code of Criminal Procedure Act No.15 of 1979 is mandatory and failure to do so vitiates the Conviction and Sentence.

The next issue raised by the Learned Counsel for the Accused Appellant is to determine whether the Learned Counsel for the Respondent is entitled to take sanctuary under the proviso to Article 138 of the Constitution and Section 436 of the Code of Criminal Procedure Act No. 15 of 1979. According to the Proviso to Article 138 of the Constitution *"Provided that no Judgement, decree or order of any courts shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of Justice."* According to Section 436 of the Code of Criminal Procedure Act No. 15 of 1979 *"Subject to the provisions herein before contained any judgement passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account – (a) Of any error, omission or irregularity in the complaint, summon, warrant, charge, judgement, summing up, or other proceeding before or during trial or in any inquiry or other proceedings under this code."* The Learned Counsel for the Accused Appellant argued that non-compliance of section 196 of the Code of Criminal Procedure Code Act No.15 of 1979 does not tantamount to a mere procedural irregularity but a blatant violation of the essential principles governing Criminal Procedure and in the said circumstances the Learned Counsel for the Respondent should be debarred from taking refuge under the proviso to article 138 of the Constitution and section 436 of the Code of Criminal Procedure Act No.15 of 1979. In **CA Appeal No. 169/2003**, Justice Sarath De Abrew has held thus *".....section 436 of the Code of Criminal Procedure Code Act No. 15 of 1979 and the proviso to article 138 of the Constitution quoted above cannot be regarded as a panacea for ills, especially were the fundamental mandatory provisions are bluntly disregarded which would occasion a failure of Justice."*

The next argument raised by the Learned Counsel for the Accused Appellant is whether the fact that the Appellant was represented by a counsel at the trial and the fact that he did not raise any objection or rather tacitly complied with the illegal procedure now debars the Appellant from raising the said complaint in appeal. At this juncture it would be prudent to discuss the relevant authorities pertaining to this issue raised by the Learned Counsel for the Accused Appellant. In **Queen Vs. Aluthge Don Hemapala, 64 NLR 1** citing **Abdul Rahaman Vs. The King Emperor 4[4(7926-27) I.A. 96 at 104]** five honourable Justices of the Supreme Court held thus “..... *they wish to be understood that no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the Accused.*” It was further held thus “*that it is a fundamental right of an accused person to be tried in accordance with the procedure prescribed in the Criminal Procedure Code and the practice established there under.*” Lord Goddard in the case of **E.V. Neal 2[2(1949) 2 All E.R. 438.]**: “*There is no doubt that to deprive an accused person of the protection given by the essential steps in criminal procedure amounts to a miscarriage of justice and leaves the court no option but to quash the conviction.*” In the case of **Crane Vs. Director of Public Prosecutions 3[3(1921) a A.C. 299]** it was held that the fact that neither the accused nor his counsel took objection to be procedure is no ground for refusing to uphold the submissions of counsel. In the case of **Abdul Rahaman Vs. The King Emperor 4[4(7926-27) I.A. 96 at 104]**, Lord Phillimore held that “.....*They wish it to be understood that no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused.*”

Furthermore, it is also well established in criminal law that an accused person cannot waive a rule of evidence or procedure even if it would be an advantage for him to do so (**R. Vs. Gee and Others 1[1(7.936) 1 All E.R. 89.]**), wherein it was held that “*there has been an essential departure from the well-established rules of procedure prescribed for the accused’s trial that we have no option but to hold that there has been no trial of the accused according to Law*”

Furthermore the Learned Counsel for the Accused Appellant stated that though the Learned Deputy Solicitor General sought to draw a distinction between section 195 (e) (e) and section 196 of the CPC where he submitted that in terms of the former provision since the jury option is exercised by the accused it is an imperative and mandatory requirement and that the said provision must be complied with irrespective of the fact that whether he is defended by a counsel or otherwise. He argued that the learned DSG made a valiant effort to distinguish section 196 from

section 195 (e) (e) of the Code of Criminal Procedure Act No.15 of 1979 submitting that since the accused is represented by a counsel the accused is aware and apprised of the charge even in the absence of a formal arraignment, hence no miscarriage of justice is occasioned by the failure on the part of the Learned High Court Judge to comply with section 196 of Code of Criminal Procedure Act No.15 of 1979.

However according to Justice Sarath Abrew and H/L Justice S.I. Iman in **Amaratunga Arachchige Nimal Sarathchandra Vs. The Attorney General, CA Appeal No. 169/2013**, the indictment containing the charge or the charges should be read over and explained to the accused, irrespective of the fact whether he is defended by counsel. Furthermore the Learned Counsel for the Accused Appellant argued that the contention of the Learned Deputy Solicitor General sounds baseless and totally implausible in view of the fact that it is the assessed who pleads and whose pleas is recorded and this inherent right of an accused which is an essential ingredient of a fair trial cannot be abdicated to the Learned Counsel of the Accused Appellant nor can such inherent right be usurped by the counsel for the accused. He further stated that it is the duty of the Learned High Court Judge to adhere to the provisions of section 196 of the Code of Criminal Procedure Act No.15 of 1979 and this function of the learned High Court Judge cannot be usurped by the counsel for the Appellant. The Learned High Court Judge has a fundamental duty to adhere to the mandatory statutory provisions and ensure that the trial is conducted according to the essential principles governing criminal procedure and he further stated that neither the accused nor his counsel is under obligation to jog the memory of the Learned High Court Judge of his sacred duties as a trial judge or to play a supervisory or an advisory role to the judge in the exercise of his judicial functions. He further stated that any lacuna, lapse or negligence on the part of the Learned High Court Judge in conducting a trial in accordance with the mandatory provisions of Code of Criminal Procedure Act No.15 of 1979 should not fall on the shoulders of the accused more so in a case where the accused is charged of a sever offence. In the case of **W.R.M. Chamila Wijesinghe and another Vs. The Attorney General, CA 206-207/2007**, their lordships Justice Ranjith Silva and H.N.J. Perera have held thus *"..... the provisions with regard to the procedure that has to be adopted in the High Court are very much similar and the words and the sections are almost in verbatim. If these requirements are held imperative in Magistrate's Court it should be more so when an accused is arraigned in a High Court for much graver offences. The judges must be concerned about the rule of law and the principals of a fair trial, protection of their interest should be at the forefront of their minds"*.

Therefore the ingredients or the essence of a fair trial encompasses amongst other things, the right of an accused person to be informed of promptly and in detail in language he understands of the nature and cause of the charge against him. In the leading case of **R. Vs. Sussex justices, ex Parte McCarthy** ([1924] 1KB 256, [1923] All E.R. 233), it was held that *“Not only must justice be done; it must also be seen to be done.”*

Having regard to the provision of section 196 of the Criminal Procedure Code, this Court hold that the procedure adopted by the learned High Court Judge is not in accordance with the provisions laid down in the Code. Thus I hold that compliance with section 196 of the Criminal Procedure Code is mandatory and failure to do so vitiates the conviction.

For the above reasons I set aside the conviction and the sentence imposed on the indictment and order a retrial against the appellant on the same indictment.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES AND BOOKS REFERRED TO:

- 1) **Abdul Sameem Vs. The Bribery Commissioner 1992 (1) SLR76**
- 2) **Banwari Vs. State of U.P., AIR 1962 SC1198**
- 3) **Jagdeo Prasad Vs. Emperor (1920)21 Cr LJ 410**
- 4) **Naval Kishore Singh Vs. State of Bihar, AIR 2004 SC 4421**
- 5) ***B.S.H. Kodithuwakku Vs. The Republic of Sri Lanka, CA Appeal No.144/2005***
- 6) ***Wijesinghe Rajakaruna Mohottalage Chamila Wijesinghe and another Vs. Attorney General (CA/206-207/2010)***
- 7) **Withanage Gunawardana Vs. Hon. Attorney General (CA/22/2002)**
- 8) **Yoganathan Pradeep Dilruksha Vs. The Republic of Sri Lanka, CA Appeal No 223/2010**
- 9) **Amaratunga Arachchige Nimal Sarathchandra Vs. The Attorney General, CA Appeal No. 169/2003**
- 10) **Queen Vs. Aluthge Don Hemapala, 64 NLR 1**
- 11) **Abdul Rahaman Vs. The King Emperor 4[4(7926-27) I.A. 96 at 104]**
- 12) **E.V. Neal 2[2(1949) 2 All E.R. 438.]**
- 13) **Crane Vs. Director of Public Prosecutions 3[3(1921) a A.C. 299]**
- 14) **R. Vs. Gee and Others 1[1(7.936) 1 All E.R. 89.]**
- 15) **Amaratunga Arachchige Nimal Sarathchandra Vs. The Attorney General, CA Appeal No. 169/2013**
- 16) **W.R.M. Chamila Wijesinghe and another Vs. The Attorney General, CA 206-207/2007**
- 17) **R. Vs. Sussex justices, ex Parte McCarthy ([1924] 1KB 256, [1923] All E.R. 233)**
- 18) **Sarkar Code of Criminal Procedure, 9th ED, pg-1069, 7th ED pg-757, 9TH ED, pg-1352**
- 19) **Sohoni's Code of Criminal Procedure- vol 03-20th Ed pg-3120**