

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

The Attorney General of the Democratic  
Socialist Republic of Sri Lanka.

**Complainant**

**Court of Appeal  
Case No. CA/160/2015**

**Vs,**

Mohamed Ali Sameed Smail

**Accused**

**And Now Between**

Mohamed Ali Sameed Smail

**Accused-Appellant**

**High Court  
Case No. 245/2013**

**Vs,**

The Attorney General of the Democratic  
Socialist Republic of Sri Lanka

**Complainant-Respondent**

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

**Counsel : Darshana Kuruppu for the Accused-Appellant  
Shanaka Wijesinghe DSG for the Complainant- Respondent**

**Argued on : 13<sup>th</sup> October 2017**

**Judgment on : 27<sup>th</sup> October 2017**

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## Judgment

### **S. Thurai Raja PC J**

The Accused Appellant was indicted before the High Court of Kandy for committing an offence of Murder punishable under Section 296 of the Penal Code. After the trial he was convicted for the murder and sentenced to death. Being aggrieved with the said order the Appellant had preferred an appeal to this court.

The appellant raised two preliminary issues to be decided before considering the merits of the case namely;

- i) The learned trial judge had not read and explained the charge sheet as required by section 196 of the Code of Criminal Procedure Act (No. 15 of 1979 as amended) (CCPA).
- ii) The trial judge has not explained the defences available to the Appellant as warranted by section 200 (1) of the Code of Criminal Procedure Act (No. 15 of 1979 as amended).

Both, the Counsel for the Appellant and the State filed their written submissions and made oral submissions.

The Counsel for the Appellant submits that reading and explaining of charges to an accused is mandatory under section 196 of the CCPA, further, explaining of the available defence to the accused is also mandatory under section 200(1) of the CCPA. If it is not given to the Accused, it will result in a non-availability of fair trial, which is a violation of article 13(3) of the Constitution.

The learned Deputy Solicitor General (DSG), who appeared for the Attorney General, Respondent, submits that the accused appellant was defended by an Attorney at Law, therefore there is no prejudice caused to the appellant.

The DSG also submits regarding non-explanation of the defences under section 200(1) of the CCPA, that, the law does not stipulate that the High Court Judge should explain the rights of the accused at this stage but, however this was developed as a practice in our legal system.

As per the indictment, the accused appellant was indicted for committing the murder of Noor Mohamed Fathima on or about 08<sup>th</sup> September 2010 at Thalapitiya which is punishable under Section 196 of the Penal Code.

It appears in the court record that the accused appellant was defended by an Attorney at Law and on 13/01/2014 the indictment was served on the accused and he opted to be tried without a jury. On the 19/05/2015 the Attorney at Law who appeared for the accused indicated to the court that his client was willing to plea for a lesser offence of

Culpable Homicide not amounting to murder. On 11/08/2015 once again jury option was given to the accused.

The learned DSG submits that the accused or his counsel could have brought the issue of not reading the indictment to the trial judge.

The counsel for the appellant submits that non-compliance of section 196 will result in violation of Article 13(3) of the Constitution of which fair trial was not awarded and submits a long line of judicial authorities in support of his claim.

For easy reference of Section 196 of CCPA is reproduced below:

*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 guilty of the offence charged. [Emphasis Added]*

When one reads Section 196 of CCPA it says that the judge **shall** read and explain the indictment to the accused and he shall ask whether the accused is guilty or not guilty of the offence charged. It is observed that the word used there is 'shall'.

According to **Black's Law Dictionary 8<sup>th</sup> Edition at page 1407** the word "**shall**" is defined as follows:

*Has a duty to; more broadly, is required to <requestor shall send notice> <notice shall be sent>. This is the mandatory sense that drafters typically intend and that courts typically uphold.*

If in law the word 'shall' is used, it means that it must be complied and there is no discretion available to the person who is complying with the said law.

The Supreme Court in **Attorney General vs. Goniyamalige Kamal Viraj Aponso SC 79A/2007, SC 24/2008, SC 25/2008** spelled out some of the rights that need to be upheld to conduct a fair trial. J.A.N. de Silva J (as then) stated;

"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 of 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]

In addition, my sister judge K.K. Wicramasinghe J in **Tilakaratne Bandara V AG [CA 117/2014]** which was decided on 12/02/2016, had analysed number of cases and concluded that compliance with Section 196 of the Criminal Procedure Code is mandatory and failure to do so vitiates the conviction.

For the purpose of completeness, I wish to cite cases in this line of authority which may help courts and counsels in future.

In **Withanage Gunawardana Vs Hon. Attorney General (CA/22/2002)** decided on 12/11/2003 Shiranee Tilakawardane J (then President Court of Appeal) concluded that "Such failure to read and explain the charge to the accused and record his plea vitiated the conviction and accordingly the conviction and the sentence were set aside and a retrial was ordered".

In **W.R.M. Chamila Wijesinghe and another Vs Attorney General CA 206-207/2010** decided on 21/03/2012 Ranjith Silva J in a similar situation held that "non-compliance of Section 196 will warrant the conviction and the sentence to be set aside and the case to be retried."

In the case of **B.S.H. Kodituwakku Vs the Republic of Sri Lanka (CA 144/2005), 2010 BLR 167** Sisira de Abrew J held that

(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,

(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".

In **Baddurdeen Sajeer Arfeth Vs Attorney General CA 66/2014** decided on 20/01/2016 K.K.Wickramasinghe J held that

"compliance with Section 196 of the Criminal Procedure Code is mandatory and failure to do so vitiates the conviction."

As per the constitution, other laws and international covenants of which Sri Lanka is signatory accepts the concept of fair trial.

Our constitution while safe guarding the rights of the people, specifically provides Article 13;

*(3) Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.*

*[.....]*

*(5) Every person shall be presumed innocent until he is proved guilty: Provided that the burden of proving particular facts may, by law, be placed on an accused person.*

Article 14 of the International Covenant on Civil and Political Rights to which Republic of Sri Lanka ratified and became State party, states as follows:

*(2) "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.*

*(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:*

*(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*

*[.....]*

*(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;"*

Further according to Article 11(1) of the Universal Declaration of Human Rights which was brought about to affirm the faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and to promote social progress and better standards of life in larger freedom, states the following:

*Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*

Considering the decided cases and relevant laws, it can be observed that the protection of rights of a citizen is paramount. When law provides a right, no one can or should convert the right into a privilege or no right.

When a law provides a right, that is the minimum standard. All relevant authorities including the court can provide more but not less. For example, if the accused is provided with more explanation of the charge in a court it can be accepted but not reading and explaining of the charge cannot be accepted. As all of us know that Sri Lankans speak different dialects in different parts of the island, the dialect between Kandy and Matara, Jaffna and Batticaloa are different. Further the written language used in the indictment may not be easily understandable by a layman. The law states that the charge should be **read and explained** to the accused. The legislators were well aware of the written language and different dialects used in different parts of the country that is the reason why the law says that the charge should not only be read but also be explained to an accused.

After carefully considering all relevant authorities, it is my considered view that reading and explaining the charge to the accused is mandatory, whether the accused is represented by a counsel or not. It is the duty of the judge to read and explain if not, it will amount to be a patent error on the part of the system. Hence the accused is entitled for a verdict of no trial.

The second ground of appeal was that the trial judge has not called defence after the case for prosecution was concluded which is a violation under section 200(1) of the CCPA.

For easy reference of Section 200(1) of CCPA it is reproduced below:

*When the case for the prosecution is closed, if the Judge wholly discredits the evidence on the part of the prosecution or is of opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offence of which he might be convicted on such indictment, he shall record verdict of acquittal; if however the Judge considers that there are grounds for proceeding with the trial he shall call upon the accused for his defence.*

The DSG takes up a position that the accused was represented by an Attorney at law therefore there is no prejudice caused to the appellant. Further he submits that the counsel for the accused could have brought it to the notice of the trial judge.

This ground of appeal is also similar to the 1<sup>st</sup> ground of appeal, therefore most of the discussion I had previously in this judgment is applicable hereto.

We should be mindful when a person is charged with an offence, he is on one side and the all mighty the state is on the other side. That is why in many countries in the world

especially the countries which follow Common Law several safe guards are provided, such as legal aid and judicial review to the accused to uphold the Rule of Law which is very vital in protecting the rights of any citizen of a nation. When one considers law with criminal sanctions it can be observed that the law is with absolute certainty and more favourable towards the accused. Further the Human Resource Developments of public servants including Police, Prosecution, Court staffs and the Judiciary is provided for not only serving the victim but also for the main objective of protecting the rights of the accused.

Considering Section 196 of CCPA I hold that reading and explaining of the charge to the accused is mandatory and non-compliance will result in vitiating the trial therefore I set aside the conviction and sentence and make order that the accused is to be retried at the High Court of Kandy.

Since the 1<sup>st</sup> ground of appeal is held in favour of the accused the 2<sup>nd</sup> ground of appeal may not be decided, but for academic purposes I hold that non-awarding of defence as per Section 200(1) of the CCPA for the reason stated above also results vacation of trial. On these circumstances this court will order a retrial.

Conviction and sentence is **set aside** and a trial *de novo* is ordered. Since the incident occurred in 2010, we direct **the learned Judge** of the High Court of Kandy to give priority in listing this case for trial and to conclude as early as possible.

**JUDGE OF THE COURT OF APPEAL**

**S. Devika de L. Tennekoon, J**  
I agree,

**JUDGE OF THE COURT OF APPEAL**