

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

**In the matter of an appeal under and in
terms of Section 331 of the Criminal
Procedure Code Act No. 15 of 1979.**

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

Complainant

**Court of Appeal
Case No. CA 286/2009**

Vs,

1. Guruge Premadasa
2. Liyanage Gamini Dias
3. Sudesh Perumal Kumar
4. Hewagachaman Pathiramage
Wimalasena
5. Kottage Saman

Accused

And Now Between

1. Guruge Premadasa
[1st accused]
2. Sudesh Perumal Kumar
[3rd Accused]
3. Hewagachaman Pathiramage
Wimalasena
[4th Accused] (Presently dead)
4. Kottage Saman
[5th Accused]

Accused-Appellant

**High Court of Colombo
Case No. HC 115/2006**

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 : Tenny Fernando with Roshan Ranaweera for the 1st Accused-
Appellant

Amila Palliyaye with Nihara Randeniya for the 2nd Accused
Appellant

Asanka Dissanayake with M.P. Hettiarachchi for the 3rd & 4th
Accused Appellant

Chethiya Gunasekara DSG for the Complainant-Respondent

Argued on : 7th November 2017 and 14th September 2017

Written Submissions on : 11th September 2017 – Accused Appellant
31st October 2017 – Complainant- Respondent

Judgment on : 5th December 2017

Judgment

S. Thurairaja PC J

Accused Appellants (hereinafter sometimes referred to as appellants) above mentioned were originally indicted at the High Court of Colombo as follows;

- I) Possession of 4.5 grams of Heroin punishable under section 54 A (d) of the poison, Opium dangerous drugs Act.
- II) On the same date, time and the place and in the same course of transaction trafficking of 4.5 grams of Heroin punishable under section 54 A (b) of the Act above mentioned.

After the trial, accused appellants were found guilty by the trial Judge and was sentenced them to Life Imprisonment.

Being aggrieved with the said conviction and sentence the appellants preferred an appeal to the Court of Appeal. The Counsel for the appellants submitted following grounds of appeal for the consideration of the Court:

- a) The Learned Trial Judge has failed to give sufficient time for the Appellants to prepare for their case, thereby violated their Right to have fair trial.
- b) The learned trial Judge failed to consider Improbability of the detection.
- c) Only one witness gave evidence and the Judge relied on the uncorroborated evidence of the single Police investigating officer.
- d) The learned Trial Judge perused and relied on the notes of the investigating officers, which were not marked or produced at the High Court Trial.

The Counsel for the appellants submits, that the appellants had retained a Counsel and the trial had commenced on the 25-10-2006 and continued till 7-11-2006. On the 2nd of July 2007, this case was taken up before a new Judge. The Counsel who appeared for all the appellants did not represent them. The Court assigned a new Counsel for all appellants, adopted previous proceedings and continued with the trial.

Counsel for the appellants submit that the Attorney at Law who was assigned for the appellants was not given sufficient time to prepare for his case of which resulted in no fair trial to the accused appellants.

The above ground of appeal is a preliminary issue to be dealt with the basic rights of the appellant. If it is held in favour of the appellants, it will result that there was no trial held and it will be referred for a re-trial.

Duty of a High Court Judge upon receiving an indictment is provided in Section 195 of the Code of Criminal Procedure Act (CCPA). More specifically section 195 (g) provides as follows;

where the accused on being asked by court so requests, assign an attorney-at-law for his defence.

In this case, on the date of the trial before a new judge the accused appellants were unrepresented on a charge where, if they are found guilty they could face death penalty or Life imprisonment.

It will be appropriate to refer the relevant provision in our Constitution. Article 13 (3) provides for fair trial and it reads as follows;

(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.

International Covenant on Civil and Political Rights (ICCPR) which was adopted by the General Assembly of the United Nations on 16th December, 1966 and entered into force on 23rd March, 1976. Sri Lanka has acceded to the aforesaid Covenant on 11th June, 1980. It has become necessary for the Government of Sri Lanka to enact appropriate legislation to give effect to those civil and political rights referred to in the aforesaid Covenant, for which no adequate legislative recognition has yet been granted. Therefore, the said ICCPR

was brought in as a legislation by 56 of 2007. (the above is quoted from the preamble of the said Act)

Article 4 (1) provides as follows;

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

(a) to be afforded an opportunity of being tried in his presence;

(b) to defend himself in person or through legal assistance of his own choosing and where he does not have any such assistance, to be informed of that right;

(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:

(d) to examine or to have examined the witnesses against him and to obtain the attendance of witnesses on his behalf, under the same conditions as witnesses called against him;

(e) to have the assistance of an interpreter where such person cannot understand or speak the language in which the trial is being conducted; and

(f) not to be compelled to testify against himself or to confess guilt.

The learned Deputy Solicitor General (DSG) submits that the accused appellants were represented at the beginning of the trial before the High Court and the trial Judge had directed all parties that this trial will be taken on day to day basis. When the case was taken up on the 2nd July 2007 accused appellants were unrepresented and the Counsel on record had informed court that she will not be appearing for the appellants anymore. Trial Judge then had assigned a counsel and continued with the trial. (This fulfil the requirements under Section 195 (g) of the CCPA, hence the appellants had a fair trial.)

Learned DSG also submits that the assigned counsel did not complain or make a request for a postponement hence there is no violation of a fair trial. Counsel quotes an observation of UN Human Rights Committee on **Wright v. Jamaica, Communication No. 349/1989, U.N. Doc. CCPR/C/45/D/349/1989 (1992)**.

8.4 The right of an accused person to have adequate time and facilities for the preparation of his or her defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes "adequate time" requires an assessment of the individual circumstances of each case. There was considerable pressure to start the trial as scheduled on 17 March 1983, particularly because of the return of the deceased's wife from the United States to give evidence; moreover, it is uncontested that Mr. Wright's counsel was instructed only on the very morning the trial was scheduled to start and, accordingly, had less than one day to prepare Mr. Wright's defence and the cross-examination of witnesses. However, it is equally uncontested that no adjournment of the trial was requested by either of Mr. Wright's counsel. The Committee therefore does not consider that the inadequate preparation of the defence may be attributed to the judicial authorities of the State party; if counsel had felt that they were not properly prepared, it was incumbent upon them to request the adjournment of the trial. Accordingly, the Committee finds no violation of article 14, paragraph 3(b).

8.5 With respect to the alleged violation of article 14, paragraph 3(e), it is uncontested that the trial judge refused a request from counsel to call a witness on Mr. Wright's behalf. It is not apparent, however, that the testimony sought from this witness would have buttressed the defence in respect of the charge of murder, as it merely concerned

the nature of the injuries allegedly inflicted on the author by a mob outside the Waterford police station. In the circumstances, the Committee finds no violation of this provision.

Considering the facts and the procedure followed in the said case this in a way support the stance taken up by the appellants. In the above-mentioned case the Prosecution and defence had taken 'sufficient' time to prepare for the case and the procedure followed was much favourable to the accused person. The committee found that after having sufficient time, requesting further time to call a witness can be rejected. We should be mindful that they had several pre-trial conferences before that case was taken up for trial.

The DSG attempted to fortify his argument by referring the Rules of Supreme Court. It will be appropriate to consider the procedure followed in this case.

The alleged incident (raid) had happened on the 15th August 1998, indictment was preferred on 15th November 2001 and the trial commenced on the 25th October 2005. In the meantime, the Second accused had died in the prison due to natural causes. Trial continued till 7th November 2006, then the trial Judge had been elevated to the Court of Appeal. The succeeding Judge took over the case on the 2nd July 2007 and the appellants on that day were unrepresented. On that day the appellants were provided with an assigned counsel and the trial continued. (Vide pages 93 and 94 of the appeal brief) Further examination in chief of the only prosecution witness continued and halted due non-availability of productions of the prosecution. It is noted that the assigned Counsel had made a request to have a copy of the indictment. (vide page 105 of the brief) This shows that the Counsel for the appellants had appeared even without a copy of the basic document namely the indictment. It is needless to say that the assigned counsel was not possessed with any of the information in relation to this case because there is no endorsement to say the counsel was provided with the brief including the indictment and other relevant documents.

Our Constitution has enshrined any person who faces a criminal charge is entitled to a fair trial this is further strengthened by CCPA, ICCPR act and other related laws. Our legal system also time and again confirmed that Justice should not only appears to be done it should in fact be done.

In this present case an Attorney at Law was assigned and he was not given any details about the case. It is mandatory for the court to provide necessary information to the assigned counsel free of charge. Without any or basic information being given to the assigned counsel one cannot say a fair trial offered.

Considering the Laws, decided authorities especially the case cited by the DSG, **Wright v. Jamaica, Communication No. 349/1989, U.N. Doc. CCPR/C/45/D/349/1989 (1992)** it is important that the accused person to have a fair trial, it is the duty of the State (Legal system). If the duty is not fulfilled this court will not hesitate to conclude there is no trial.

Considering the above factors, we find that the accused appellants are entitled to a fresh trial after granting all their rights provided by law.

Since the first ground of appeal is considered favourably to the accused appellants, we do not incline to discuss the other grounds.

We quash the conviction and the sentence dated 20th October 2009 and order a re-trial.

Re-trial ordered.

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

JUDGE OF THE COURT OF APPEAL

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