

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/54/2008

Vs,

Ihala Arachchilage Chandrasena alias  
Junda

Accused

And Now Between

Ihala Arachchilage Chandrasena alias  
Junda

Accused-Appellant

High Court of Polonnaruwa  
Case No. 274/2006

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 : Indica Mallawaratchy for the Accused-Appellant  
Yasantha Kodagoda. PC, ASG For the Respondent

Argued on : 12<sup>th</sup> February 2018

Judgment on : 23<sup>rd</sup> February 2018

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## Judgment

S.Thurairaja PC J

The Accused appellant (Hereinafter sometimes referred to as the Appellant), was indicted by the Hon. Attorney General at the High Court of Polonnaruwa for the Murder of Hondamuni Soysage Tilakaweera, an offence punishable under section 296 of the Penal Code. After the trial the Appellant was found guilty and sentenced to Death.

ThwProsecution lead the evidence of 11 witnesses, namely 1. Kadirawala Thambige Podinona. 2. Deewala Gedara Piyaseeli. 3.Kontha Thambi Yogeswari. 4. Inspector of Police (IP) Gabadage Don Namal Gunaratne. 5.Dr. Keerthi Kularatne Weerakody. 6.Ihala Arachchilage Jayantha. 7.IP. Wanasinghe Arachchilage Herby Nihal Jayatileke. 8. PC.2085 Kandekumbura Gedara Weerawanse. 9. Velayuthan Sarojini. 10. Dharmarajage Priyanganie. 11. Court Interpreter Mahesh. When the defence was called the Appellant made a statement from the dock and called 3 witnesses.

The case for the prosecution is that the Appellant had shot the deceased. There is an alleged eye witness to the incident. The Appellant denies committing the murder. The learned Trial Judge being convinced with the evidence against the Appellant found the appellant guilty as charged and sentenced him to Death. Being aggrieved with the said

conviction and the sentence the Appellant had preferred the instant appeal and submitted following grounds of appeal;

1. Appellant was denied of a fair trial by the refusal on the part of the learned trial Judge to recall PW1 who was the sole witness and whose evidence was led before the predecessor.
2. The Learned Trial Judge misdirected himself on a critical issue of fact thereby causing serious prejudice to the appellant.
3. The Conviction which hinges on the unreliable and infirm evidence of the sole eye witness is wholly unsafe.
4. Evaluation of the Dock Statement is legally and factually flawed.

The Prosecution witness number 1, Dharmarajage Priyanganie, was not available at the beginning stage, because she had gone to Middle East for employment. Subsequently when she returned her evidence was led by the prosecution. She is the only eye witness to the incident.

The trial was taken up before several Judges and it was adopted under section 48 of the Judicature act. On the 25<sup>th</sup> July 2007 when this case was taken up a new judge had succeeded to the High Court. The Prosecutor made an application to adopt the evidence up to that time, the Counsel for the Appellant conceded to all evidence but the evidence of the PW1, and made an application to recall the witness. Both counsel made submissions and the learned Trial Judge held that,

මෙම අධිකරණයේ දී විභාග වන නඩු පරීක්ෂා කිරීමේ දී එයින් සියයට අනූවක්ම 90% මෙවැනි තත්ත්වයේ නඩු වන බැවින් මෙකී ඉල්ලීමට ඉඩ දුන්නහොත් අනෙක් සෑම නඩුවකදී ද මෙම ඉල්ලීම කලහොත් එයට ඉඩදීමට සිදු වේ එසේ සිදුවීමෙන් අධිකරණයේ නඩු විභාග කටයුතුවන අවසානයක් දැකීමට නොහැකි වන බැවින් මාගේ තීරණය එකී හේතුව නිසා එම ඉල්ලීමට ඉඩ ලබා නොදිය යුතු බවයි එබැවින් එම ඉල්ලීමට ඉඩ ලබා නොදීමට මා තීරණය කරමි පැමිණිල්ලේ විරුද්ධත්වය පිළිගෙන විත්තියේ ඉල්ලීම ප්‍රතික්ෂේප කරමි

It says, there are more than 90% of the said High Court cases are of similar status, if this application is allowed it would create a wrong precedent and all will be making

same application and the court will be inundated with these type of applications and cases cannot be concluded, therefore this application cannot be allowed.

Adoption of proceedings is governed by section 48 of the Judicature act 2 of 1978. Section 48 makes specific provisions. It will be appropriate to refer section 48, it is reproduced for easy reference as below;

**Section 48- Provision for continuing any case begun before a Judge becoming disabled.**

*In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh :*

*Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be re summoned and reheard.*

(Emphasis added)

In the instant case the appellant had made an application to recall only one witness out of 10 witnesses whose evidence were led earlier.

It is imperative to consider the legal provision, i.e. Section 48 of the Judicature Act which says, that the accused 'MAY DEMAND' the witnesses be re summoned and reheard.

<https://legal-dictionary.thefreedictionary.com> defines the demand as follows;

## *Demand*

*Peremptory allegation or assertion of a legal right.*

*A demand is an emphatic claim, which presumes that no doubt exists regarding its legal force and effect. It is a request made with authority.*

Cambridge Dictionary defines as follows;

*Demand means, to ask for something forcefully, in a way that shows that you do not expect to be refused*

Oxford Dictionary defines as follows;

*An insistent and peremptory request, made as of right*

The Law Dictionary (Black's Dictionary) defines as follows;

What is DEMAND?

v. In practice. To claim as one's due; to require; to ask relief. To summon; to call in court.

When we read the definitions above it appears that the accused has a right to have the witness to be recalled. But I, perused the Sinhala version of the Judicature Act it says (අදාය) that means request.

It will be of academic interest to discuss about the Demand and request. Whether, it is Demand or Request, it stems from the Rights enshrined in the Constitution. Article 13 of our Constitution states as follows;

Art. 13 - Freedom from arbitrary arrest, detention and punishment, and prohibition of retroactive penal legislation.

*(1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.*

*(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.*

*(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.*

*(4) No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.*

*(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.*

*(6) No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.*

*Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.*

*It shall not be a contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed*

*the maximum penalty prescribed for such offence at the time such offence was committed.*

*(7) The arrest, holding in custody, detention or other deprivation of personal liberty of a person, by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or the Indo-Ceylon Agreement (Implementation) Act, or such other law as may be enacted in substitution therefor, shall not be a contravention of this Article.*

Universal Declaration of Human Rights, of which Sri Lanka is a signatory nation, provides for fair trial;

*Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.*

*Article 11: (1) 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. (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.*

J.A.N. De Silva J (as he then) in Attorney General vs. Aponso (SC appeal No. 24/2008) 2008 BLR 145. Held that "*the right of an accused person to a fair trial is recognised in all the criminal justice systems in the civilised 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."*

In the instant case the reason given is that 90% of the case in the said Court are in similar situation, allowing the application will open the flood gate. It appears that we have to decide whether Right of an Accused or Convenience of the Court.

In *Kaluwahumpurage Somapala vs. The Commission to Investigate Bribery and Corruption* CA (PHC) 37/2006 Decided on 03 -02 – 2010. A.W.A.Salam J discussed a similar situation *"In Terms of the proviso to section 48 of the Judicature Act, the Accused has a right demand that the witness already testified before the previous Judge be re summoned and reheard and it is within exclusive discretion of the Judge to allow such an application or refuse it for reasons to be stated as inasmuch the accused has a right to make a demand, he has the unfettered right to know the reason for complying or not complying with his demand as well."*

Considering section 48 of the Judicature in the light of above legal provisions, the law is clear that the Trial Judge must take a Judicial Decision. It is our considered view that the reason given by the Learned Trial Judge does not come with in the ambit of a Judicial decision.

Judicature Act section 48 proviso is a direct flow of Article 13 of the Constitution which is there to safeguard the Right of Fair Trial. When the right is given to a person especially, to an accused, it should not be denied or curtailed without acceptable and valid reasons.

*Jago Russell Said, "Every person accused of a crime should have their guilt or innocence determined by a fair and effective legal process. But the right to a fair trial is not just about protecting suspects and defendants. It also makes societies safer and stronger. Without fair trials, trust in justice and in government collapses."*



Considering the impugned order, we find the reasons given for denial of the request to recall the witness is incorrect and unacceptable, hence further proceedings from that order becomes unacceptable. The formal order at this point is to send back to continue the trial from the place where the denial order was made by the Judge, but we will consider the entire case before we make the final order.

The second ground of appeal is that the Learned Trial Judge has misdirected himself on the facts. The 3<sup>rd</sup> ground is that the Learned High Court Judge had not reasonably considered the contradictions and omissions. The Fourth ground of appeal is that the Learned Judge had not evaluated the Dock Statement legally and factually.

The Prosecution had led evidence of 11 witnesses. As per the Prosecution evidence the story is as follows; on the 24<sup>th</sup> September 1999, the accused appellant who was a Home Guard (Grama araksha Bataya) was seen shooting the deceased Hondamuni Soysage Tilakaweera, with the gun in his possession. After the shooting he went away and arrested late in the night. It appears they had some dispute previously.

Prosecution witness No.1 Dharmarajage Priyanganie, (Page 72 of the brief) was the only eye witness to the incident, she claims that the deceased was related to her was her uncle, on the fateful day at around 5.30 in the evening when she was at the veranda of her home feeding her daughter. She had seen the deceased was going in a bicycle and coming to her house, at that time the accused had also came on a bicycle. She said that she knows the accused from her childhood. The Appellant was in the bicycle and asked the deceased "Shall we Challenge today" ('අද නැවත බලමුද) and shot him once. The deceased collapsed on the spot. She identified the clothing's of the deceased and the weapon used. She was subjected to cross examination there she admitted that the appellant is related to her. The Defence brought to the notice of the Court, that she did not say that the appellant challenged the deceased neither to the Police nor to the Magistrate.

The Appellant had marked a contradiction (V1) to the effect that the Appellant had fired two shots at the non-summary inquiry. Considering the omissions and

contradictions we are of the view that the learned Trial Judge has not given due consideration to the facts.

Further, considering the reasons stated by the Trial Judge in the Judgment, we find that the reasoning does not reveal of a well-considered finding.

After carefully considering the evidence, Judgment, submissions by both Counsels and the written Submission of the Appellant (State had not filed their written submissions) we find is not safe to up hold the Conviction. Therefore, we find that the Accused Appellant is not guilty of the charges preferred against him, accordingly we allow the appeal and acquit the Appellant.

**APPEAL ALLOWED**

**JUDGE OF THE COURT OF APPEAL**

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

I agree,

**JUDGE OF THE COURT OF APPEAL**