

**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. 36-37/2016**

Vs,

1. Basnayake Mudiyanseelage Gunaratne
2. Algiyawanna Mohottilalage Chandana
Priyashantha Alagiyawanna

Accused

And Now Between

1. Basnayake Mudiyanseelage Gunaratne
2. Algiyawanna Mohottilalage Chandana
Priyashantha Alagiyawanna

Accused-Appellants

**High Court of Chilaw
Case No. 62/2010**

Vs,

The Attorney General of the Democratic
Socialist Republic of Sri Lanka

Complainant-Respondent

**Before : S. Thurairaja PC, J &
A.L. Shiran Gooneratne J**

Counsel : Anil Silva, PC with Sahan Kulatunga AAL, for the 1st Accused-Appellant.
Saliya Peiris, PC with Danushka Rahubadda AAL for the 2nd Appellant.
A. Navavi, SSC, for the Complainant-Respondent

Inquiry on : 18th June 2018

Judgment on : 26th June 2018

ORDER

S. Thurairaja, PC. J

The Accused-Appellants were indicted for Unlawful Assembly and Murder before the High Court of Chilaw. After the trial, both Accused-Appellants were found guilty. Accordingly, they were convicted and sentenced to death. Being aggrieved with the said Conviction and Sentence they preferred an appeal to the Court of Appeal.

Counsels raised a preliminary issue, stating that proceedings were not properly adopted by the learned trial judge, which is a violation of Section 48 of the Judicature Act.

Both counsels for the Accused-Appellants and the Senior State Counsel admitted that there was no entry made in the proceedings or Journal Entry (JE). I perused the case record and observed that the indictment was served on the 15th of March 2012 and trial commenced on the 19th of November 2012, Evidence of K. L. R. Wijesiri (Page 60), J. A. R. Priyadharshini (Page 86), and Dr. P. Rupasingham (Page 105), were led before the High Court Judge of Chilaw. On the 8th of October 2013 this matter was taken up before another Judge, both parties adopted the previous evidence led before the previous Judge and continued with the trial. Evidence of PC. G. Jayawardane (Page 123), PC. P.A.N. Pathiraja (Page 129), PS. W. F. Fernando (Page 131), PC. R. S. Gunaratne (Page 136), SI. H. Ariyaratne (Page 151), and Dr. P. Rupasingham (Page 159) (recalled by the prosecution for identification of production. On the 22nd of May 2014, the new

High Court Judge took over the trial, both Counsels informed the Court that they were willing to accept the previous proceedings accordingly and, the trial continued. S. M. MohamedThamby (Page 164) the court interpreter, gave evidence and the State Counsel closed the case for the Prosecution and the Judge called the Accused Persons for their defence.

On the 21st of May 2015 this matter came up before a new High Court Judge. Without adopting the evidence, the court proceeded to hear the evidence of the First Accused (Page 168), the Second Accused also gave evidence (Page 232) and the defence called P.N. Somaratne (Page 257). Thereafter both counsels made submissions and the learned Trial Judge delivered his Judgment. (Page 271).

Learned Senior State Counsel (SSC) submits to court the following submissions to justify the lack of formal adoption.

1. There is no legal requirement for the succeeding Judge to adopt the proceeding
2. There are no legal obligations on the High Court Judge to explain the rights of the accused, as required by Sections 196 and 200 of the Code of Procedure Act. (CCPA).
3. If the accused wants, he can make the request to the Court.

Counsel for the Accused-Appellant submits that non-adoption is a violation of a fair trial. Further, he submits it is mandatory for the Judge to formally adopt and inform the accused of his rights.

It will be necessary for us to consider the relevant law. Section 48 of the Judicature Act 2 of 1978, deals with this issue, hence Section 48 is reproduced below for ease of reference.

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)

It is observed that a country like Sri Lanka has very limited resources, a limitation which extends to the conduct of Judicial services. When a case is taken up before a Judge there are situations in which, due to various reasons, the case cannot be concluded before that same Judge. There have been some occasions where this ability has been misused by the parties who seek to exploit the use of Section 48. Therefore, the relevant section was amended in 1999 (27 of 1999) to rectify this mischief in the law.

On a plain reading, Section 48 makes transitional provisions from one Judge to another. The Succeeding Judge is expected to read the brief and acquaint himself with the evidence and, satisfy themselves with the proceedings, so far recorded and to decide whether he/she wishes to continue with the proceedings or not. If the Judge wishes to continue with conditions, such as re-calling of a/all witnesses for cross examination, they can do so. If the Succeeding Judge is satisfied with the available materials to continue, the Judge is entitled to proceed. It is clear that the Succeeding Judge is given the right to clarify whether to proceed or not to proceed. What is expected out of this action is, in my view, the intent of the legislators to ensure that the Accused receives a Fair Trial.

The question before this court is, whether the trial Judge should make the endorsement/entry regarding his decision in the Court record. SSC submits that there are no legal requirements spelled out in the said section to make such an entry.

In practice, when there is change of Trial Judge, the parties make an application to adopt the evidence. In the majority of occasions, we do not see the endorsement by the Trial Judge.

Considering the proviso of Section 48, the accused **may demand** the witnesses to be re-summoned and reheard. SSC submits that, when there is a transition from one Judge to another, the accused should make an application on their own. He further submits that this is a privilege and not a right.

Reading the section fully, it gives us a clear indication that this section provides an opportunity of a Fair Trial to the parties, especially the accused. Section 48 is an extension of the rights entrenched in Article 13 of the Constitution.

(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.

Principles of a Fair Trial has been discussed domestically and universally for centuries. There are a plethora of cases discussing Fair Trial rights. Recently the Sri Lankan Supreme Court discussed this concept in the following case;

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]

Considering Section 48, I am of the view that this is another golden provision which is intended to protect the rights of the citizen, especially the accused, and the presumption of innocence - a fundamental right provided by the Constitution.

The right of an accused is considered in two limbs, primarily the presumption of innocence and, the right to a transparent and public hearing.

Carefully considering the concept of transparency and public hearing, we can observe that these two are intricately interwoven with Judicial Accountability. If one is expected to be transparent, then he is expected to exhibit the reasons for his decision. If not, it will pave the way for others to give a different interpretation, which may be incorrect and inappropriate. Eventually, this may result in depriving a fair trial for the Accused and the Prosecution.

SSC submits that it will be practically impossible to make such an endorsement. Considering this submission, the court must carefully consider the right of an accused to have fair trial.

It is imperative that Judges expressly state on record their intention on whether they choose to formally adopt the proceedings. It is imperative because it fulfils the Fair Trial responsibility that is bestowed upon any civilised judiciary, the rule that "Justice needs to be seen to be done".

When the accused fundamental rights to a fair trial have been violated, this illegality vitiates the whole proceedings, including the judgements (*Hettiarachchi v Attorney-General 2005*) and therefore constitutes a re-trial.

As rightly expressed in ***Thiyagarajah v Attorney-General 2014*** this is a right that should not be taken likely or overlooked. This is a strict requirement of accountability placed upon Judges. Moreover, this accountability is demanded by International Law.

Sri Lanka is a signatory to the International Covenant on Civil and Political Rights.

Article 14 of the ICCPR supports this interpretation of Section 48.

Article 14(1) states:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

Particular attention must be brought to significant phrases in Article 14(1) that demands that 'everyone shall be entitled to a *fair* and *public* hearing'. Additionally, within this single provision, **Article 14(1)** further emphasizes that any judgement rendered in a criminal case or in a suit in at law "*shall be made public*". This places a responsibility upon the Judiciary, it places a responsibility upon the Judge, not the legal counsel, defendant or accused, but the Judge to ensure that the accused has a Right to a Public Trial. Hence, Section 48 must be read with this in mind, requiring that the formal adoption/ non-adopting of proceedings.

In support of this position, we also have **Section 14(3)(a) of the ICCPR:**

"In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him."

This provision of the ICCPR draws attention to the Convention's intention to *protect* the *accused*. An accused Fair Trial rights, upon a Section 48 transfer of adjudicator, require that he is notified of this change in judicial officer as it is with regards to the nature of the charge against him, and thus he must understand this process clearly and have it delivered publicly on record.

This position is also supported by another powerful document in International Law and Human Rights. Article **10 of the Universal Declaration of Human Rights** demands that:

"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."

Moreover, Ancients texts dating back to 1215 protect the sacred institution of Justice a right to Fair Trial. The Fair Trial propositions made thus far are synonymous with the text of the **Magna Carta**:

(39) No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

(40) To no one will we sell, to no one deny or delay right or justice.

As clearly evident, the right to a Fair and Public hearing is a right protected and entrenched in a number of international treaties and conventions. We must respect the sheer gravitas of this inclusion. An assembly of countries all around the globe have come together, in unity, on the world stage and collectively decided that this a right worth protecting and a right held in such high esteem that all nations must seek to protect it. Despite the varying Jurisdictions and Judicial provisions of these all the differing nations – they have come together on this particular right – a right so important that it should be universally protected. Let us not simply disregard the significance of this right. It would be irresponsible and callous of us to do so, and further an embarrassment on the world stage of our failure to adhere to the international commitments we are bound by.

Sri Lanka made a formal legal commitment to the International Covenant on Civil and Political Rights and the Universal Declaration on Human Rights many years ago. I hope that decades later, we can finally fulfil the proper requirement of the commitment we have made to the citizens of this nation.

Abdul Salam j. in **Kaluwahum Purage Somapala vs The Commission to Investigate Bribery and Corruption** CA (PHC) 37/09 decided on 03/12/2010 quoted, in the case of **Roberts vs. Hopwood** and others 1925 AC 578 at page 613 Lord Wrenbury of House of Lords voiced his opinion as to the manner in which a Judicial discretion should be exercised. The dictum reads as follows:

The person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so, he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the cause which reasons direct. He must act reasonably.

Sharp v Wakefield [1891] A.C. 17, **Lord Halsbury** L.C said at page 179

"An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion...; according to law," and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular.

Further, I wish to consider the submission made by the SSC on the presumption that Section 114 of the Evidence Ordinance can be applied in this situation.

114 (d) the judicial and official acts have been regularly performed;

The Evidence Ordinance was created in 1895, more than a century ago. Section 48 was not even a considered thought at this time. The intent behind the Evidence Ordinance of 1895 and the current Judicature Act is clearly different as the Court, judicial and social environment was not at the same time in history.

I wish to mention a lay example to indicate this situation. Few decades ago, when Medical Practitioners would prescribe medicine, they would usually instruct the patient to take medicine by simply mentioning the colours of those pills. Presently, a doctor must not only hand over the medication, but also formally record the prescription, intake and side effect of the said medication in a document presented to the patient. Similarly, I do not see much difference in the field of law.

Although it is within the Judge's discretion to choose whether to adopt the case, according to Lord Wrenbury, as per the decision in *Roberts v. Hopwood (1925)*, even a discretionary decision *must still give reasons*. This is affirmed in *Somapala v. Bribery Commission* (page 5 & 6).

The right to be informed is entrenched within Article 13 of the Sri Lankan constitution which expressly guarantees the 'right to a fair trial'. The authority held in *Attorney-General v. Aponso*, and later affirmed in *Dissanayake v. Attorney-General*, provides that a 'fair trial' includes 'the right of an accused person to be informed of prompt and in detail in a language he understands the nature and cause of the charge against him'. Further, this includes that the 'accused has a right to be informed of his rights'. In this case, the succeeding Judge did *not* adequately inform the accused of his rights protected in the proviso of Section 48, nor did he give reasons for his decision to adopt and continue with the case. This constitutes a denial of the accused's right to be informed, and thus a breach of his right to a fair trial under Article 13 of the Constitution.

Moreover, to emphasize the sheer gravitas of this breach, the learned Judge in *Attorney-General v. Aponso* stated that the failure to inform an accused of his legal right is an *illegality* and not merely an irregularity. Further, *Rajah v. Republic of Sri Lanka (1996)* affirms that this failure to inform is a direct breach of one's fair trial rights under the

Constitution. This emphasises the strict accountability that Judges have to ensure the accused is adequately informed of their rights.

We live in an era of the right to information, at this period it will not be fair to say that we cannot give reasons for our legal orders.

Section 48 of the Judicature Act was considered in many cases; there were two schools of thought, one to say that the Judge should formally adopt, and the other to say that it is not necessary to record the adoption.

In **Ratnayake vs Attorney General** 2004 (1) Sri LR 390 the court observed as follows;

This I think is a violation of a fundamental procedural requirement which justifies a re-trial in the interests of justice.

In **Kaluwahum Purage Somapala vs. The Commission to investigate Bribery and Corruption**. CA/(PHC) APN 37/2009 Decided on 03/02/2010. Abdul Salam J, considered the proviso of Section 48 as follows;

*'In terms of the proviso to section 48 of the Judicature Act, the accused has a right to demand that the witnesses already testified before the previous Judge be re summoned and reheard and it is within the exclusive jurisdiction of the Judge to allow such an application or to refuse it for reasons to be stated as inasmuch the accused has a right to make the demand, **he has the unfettered right to know the reason for complying or not complying with his demand as well.**'*

(Emphasis added)

In **Singharam Thiyagarajah vs. Attorney General** CA/216/2010 Decided on 10/10/2014 Anil Gooneratne J considering section 48, had held that,

*"There **is no automatic continuation of the trial**, vested in the succeeding Judge. The succeeding Judge is under in any circumstances bound to give fair hearing to the Accused party or to the parties in a case as recognised by article 13 of the Constitution"*

(Emphasis added)

Further held,

"But a continuation by the trial Judge without formally adopting the proceedings would be unacceptable and it is essential to record that fact of adopting proceedings, which would be on one hand the usual practical approach. On the other hand, an integral part of fair trial, to adopt the proceedings and to go ahead with the case"

The above case was appealed to the Supreme Court by the Director General of Commission to Investigate Allegations of Bribery and Corruption.

In Director General of Commission to Investigate Allegations of Bribery and Corruptions vs Sinharam Thiyagaraja SC. Special. LA. 03/2015. B.P. Aluvihare PC, J granted leave to appeal and held as follows;

"in view of the issue raised, both learned President's Counsel as well as the Senior State Counsel submit that they have no objection if the matter is sent back for retrial.

This Court I of the view that the Court of Appeal had set aside the order by the learned High Court Judge based on the irregularity with regard to adoption of proceedings.

This Court is also of the view, under the circumstances the proper order would have been to have the matter sent back for retrial as the Court of Appeal had not decided, the guilt or otherwise of the Accused Appellant Respondent, on the merits of the matter."

It is appropriate to place it on record, that within the last three weeks in several cases Counsels for the Appellant had taken up this objection and the State conceded it to be an incurable error and referred it for re-trial. In one case the State took up this issue and moved it for re-trial. We cannot have conflicting precedents from case to case, and thus I motion that this present case should be tried according to the previous Supreme Court cases and be referred for re-trial as well.

Considering Section 48 and the line of court decisions, I am of the view that the Trial Judge should formally adopt the proceedings and that it should be clearly stated in the court record. If this is not done it will result in trial de novo.

In this case, the learned Trial Judge had not complied with the mandatory requirements of adopting the proceedings formally and I order trial de novo.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL