

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

In the matter of a petition of appeal in
terms of section 331 (1) of the Code of
Criminal Procedure Act No 15 of 1979
Democratic Socialist Republic of Sri
Lanka.

High Court (Colombo)

Case No: HC 101/99

C.A. Case No: 210/2012

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

Complainant

Vs.

Rapiyal Jayaseelan Fernando

No 132/01, Vivekananda Hill,

Colombo 13.

Accused

AND

NOW, BETWEEN

Rapiyal Jayaseelan Fernando

(Presently at Welikada Prison)

Accused Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

BEFORE

: **H.N.J. PERERA, J**

P.W.D.C. JAYATHILAKE, J

COUNSEL

: **Nihal Gunasinghe for the Accused**

Appellant.

Kapila Waidyaratne ASG for the

Respondent.

ARGUED ON

: 07.07.2014

DECIDED ON

: 30.04.2015

P.W.D.C. Jayathilake, J

Rapiel Jayaseelan Fernando, the Accused Appellant was charged under Sec. 54A (d) of dangerous drugs and opium ordinance no 13 of 1984 for having 1006g of heroin in his possession in Pettah on 14th December in 1998. He was convicted after trial and sentenced to life imprisonment. Being dissatisfied with the conviction and the sentence, the Accused Appellant has appealed to this court.

The Police Inspector, Amarajith of Narcotic Bureau had organized a raid on some information received about a deal of heroin near the fish market in Pettah. Inspector Amarajith with several other police officers walked towards

the bus stop near the Kochchikade Fish Market, after parking the vehicle near the said fish market. They caught the Accused Appellant who was walking towards the bus stop on showing him by the spy. The Accused Appellant was then, wearing a pair of shorts and carrying a big shopping bag. Inspector Amarajith found several parcels of heroin in that shopping bag and he arrested the Accused Appellant at that time, that is at 10.10 hours.

The Accused Appellant was a fish monger who ran a fish stall No.54 at St. John fish market. His postal address was No.132/1, Viwekananda Road, Colombo 13. The team of police officers had gone to the Fish Market by 10.15 after the arrest of the Accused Appellant. They had not found any illegal thing there. Then the said team had gone to a house of a relative of the Accused Appellant namely, Francis Saviour in Wattala and searched it. After that they had returned to a place, in the Main Street, Pettah to look for a person on a bit of information given by the Accused Appellant, but such a person had not been found. Finally, they had gone to the Accused Appellant's place at the above address and searched the house, but nothing had been found there too. Next, the said team had arrived at the Narcotic Bureau at 13.15 hours.

The content of the stuff in the bag taken into custody was 2kg and 344g 196mg of heroin. However, Inspector Amarajith had not given evidence as he was away from the Island during the period of trial. The prosecution had led

evidence of two police officers who had assisted Inspector Amarajith in the raid. The leading of the evidence of the prosecution had ended on 09.02.2010. No mention about the concluding of the evidence of the prosecution case and calling for the defence. In the trial, what is mentioned next is commencing the defence case. The Accused Appellant had been called to give evidence for his defence. He starting giving evidence has stated the following matters.

His job was selling fish renting a stall at the fish market. During that period he was residing at 132/2, Viwekananda Hill, Kotahena. He was married and had two children a son and a daughter. On 14.12.1998 he came to the fish stall at 3.30 in the morning and finished selling fish by 9.30 and remained at his fish stall.

At this stage, the learned trial judge had interfered and cautioned the Defence Counsel not to lead evidence to say that the Accused Appellant had not been arrested near the bus stand as stated in the prosecution evidence. The opinion of the trial judge was that if evidence had been led in that way, it would have become defence of alibi and at that stage the Accused Appellant couldn't have taken up the defence of alibi since he had not followed the requirements of Sec. 126A (i) of the Code of Criminal Procedure (amendment) Act No.14 of 2005.

The said Sec is as follows.

126A. (1) No person shall be entitled during a trial on indictment in the High Court, to adduce evidence in support of the defence of an alibi, unless he has

(a) Stated such fact to the police at the time of making his statement during the investigation ; or

(b) Stated such fact at any time during the preliminary inquiry ; or

(c) Raised such defence, after indictment has been served, with notice to the Attorney General at any time prior to fourteen days of the date of commencement of the trial

Provided however, the Court may, if it is of opinion that the accused has adduced reasons which are sufficient to show why he delayed to raise the defence of alibi within the period set out above, permit the accused at any time thereafter but prior to the conclusion of the case for the prosecution, to raise the defence of alibi.

The defence counsel had submitted the court that he had, in no way, the idea of adducing evidence in support of the defence of an alibi. Even though this

matter has been raised by the trial judge on his own, the learned state counsel who conducted the prosecution too, had taken up the view that Accused Appellant should not be allowed to state before the court that he was arrested in another place, not in the place stated by the police. He has submitted that if evidence of such nature was led through the Accused Appellant, it becomes evidence in support of the defence of an alibi under Sec.11 of the Evidence Ordinance.

Sec.11 of the Evidence Ordinance is as follows.

Facts not otherwise relevant are relevant –

(a) If they are inconsistent with any fact in issue or relevant fact :

(b) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustration (a) of Sec. 11 clearly states what defence of alibi is Illustration (a) is as follows.

(a) The question is, whether A committed a crime at Colombo on a certain day.

The fact on that day A was at Galle is relevant.

The fact that near the time when the crime was committed A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

In the instant case the Accused Appellant has committed the offence in Pettah according to the charge described in the indictment.

When the items of evidence of Sergeant Gunaratna and Sergeant Sumanadasa are considered as a whole it gives the idea that all the activities related to the arrest of the Accused Appellant had taken place within one particular area. The police team had left Narcotic Bureau at 9.15 hours and reached the Wimaladharma Clock Tower at 9.35 hours. From the Clock Tower up to the bus stop near the fish market, they had walked at 9.45 hours. Evidence reveals that it is 5 minutes' walk between the said bus stop and the Fish Market. Hence the fact that the arrest of the Accused Appellant had been made in the fish market is not something very impossible. According to the illustration (a) of Sec. 11 if a person who is alleged to have committed an offence at a certain time in Colombo is capable of proving that he was in Galle at that particular time, said person's committing of the said offence is absolutely impossible. Similarly, arresting a person who is alleged to have committed an offence somewhere in Pettah being arrested elsewhere in Pettah itself is not something impossible. It is a question of fact which is to be decided on evidence.

Accordingly, I am of the opinion that the latter cannot be counted as evidence in support of the defence of alibi. However, the trial judge has ruled out the application of the defence counsel to lead evidence of the Accused Appellant for Accused Appellant's defence that he was arrested at his fish stall in the fish market and not near the bus stop.

I see another point with regard to the trial judge's ruling out of the said application. The learned State Counsel who appeared in the trial court has submitted that the defence was attempting to lead evidence astonishing the complainant and the court that the Accused Appellant was arrested in the fish market. What is astonishing is not the said point, but that both the trial judge and the State Counsel had forgotten all about the defence counsel's stating several times in his cross examination that the Accused Appellant was arrested in the fish market. At any time making the said suggestion, either the trial judge or the State Counsel has not responded against it. However, as a result of the said ruling of the trial judge, the Accused Appellant who stood up in the witness box has had to restrict his evidence to a mere denial. The prosecution had not needed to ask one single question in the cross examination.

Yet another matter to be considered is the activities of the police team subsequent to the arrest of the Accused Appellant. They had gone to a place in Wattala and searched a house which was said to belong to a relative of the

Accused Appellant. After that the police team had returned to a place in the Main Street, and had waited expecting a suspected parson. This might cause a reasonable doubt in someone why they look for another suspected person while they had already caught the wanted person with the illegal stuff.

It is the opinion of this court that under these circumstances a prejudice has been caused to the Accused Appellant by the court's act of gagging his mouth. It must be noted that the judges must not be gagged as well as the others must not be gagged by the judges.

The fair trial is a fundamental right of an accused. It appears that the said fundamental right of the Accused Appellant has been deprived of in this case.

J.A.N. de Silva J in the judgment of Attorney General V. Aponso* has referred to that,

"The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice is denied. The right to a fair trial was formally recognized 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."

His Lordship has laid down some of the qualities of a fair trial as follows.

1. *The equality of all persons before the court.*
2. *A fair and public hearing by a competent independent and impartial / 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 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.

In my judgment I would like to add the following to the idea of the item 11 above. The right of an accused to give and call for evidence for their defence without any kind of prevention and/or disturbance and/or harassment shall be safeguarded.

The learned trial judge has referred to several examples to show that some people are used to adopting various strategies in order to earn money while taking a risk. It seems that his opinion is that no mercy should be shown to them. Even though that the judge shall not show mercy on accused judge must perform the duties not only without fear or favour but also without affection or ill-will.

However, our law has been built on the basis that the innocent shall not be made the convicted. Even the person convicted shall be satisfied that they were convicted through a fair trial. Therefore, this court has no alternative but to send this case back for a re-trial. As such, we set aside the conviction and imposed sentence on the Accused Appellant and order the re-trial on the same indictment.

Conviction set aside and re-trial ordered.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA, J

I agree

JUDGE OF THE COURT OF APPEAL

** SC Appeal 24/2008*