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

In the matter of an Application for Transfer of Case No. HC 8570/16 from the High Court of the Western Province Holden in Colombo, Court No. 06, under and in terms of Section 46 of the Judicature Act

Court of Appeal Application No:
CA Transfer 20/17
HC Colombo Case No: **8570/16**

Basil Rohana Rajapakse
Medamulana,
Weeraketiya.

Accused-Petitioner

-Vs-

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

Respondent

Before : **A.L. Shiran Gooneratne J.**

&

Mahinda Samayawardhena J.

Counsel : Gamini Marapana, PC for the Appellant.

Thusith Mudalige, DSG and Sudharshana De Silva, DSG for the Respondent.

Written Submissions: By the Accused-Petitioner on 03/12/2018

By the Respondent on 30/11/2018

Argued on : 31/07/2019

Judgment on : **27/09/2019**

A.L. Shiran Gooneratne J.

The Petitioner has invoked the jurisdiction of this Court, inter alia, to have an order transferring Case No. HC 8570/16 (sometimes referred to as the "impugned case") from High Court No. 06 to any High Court not presided over by the learned High Court Judge, who presided over the said case at the time material to this application. The application for transfer of the said case is made under and in terms of Section 46 of the Judicature Act.

Section 46(1) of the Judicature Act reads as follows,

"46(1) Whenever it appears to the Court of Appeal –

(a) that a fair and impartial trial cannot be had in any particular court or place; or

(b) that some questions of law of unusual difficulties are likely to arise; or

(c) that a view of the place in or near which any offence is alleged to have been committed may be required for the satisfactory inquiry into or trial of the same; or

(d) that it is so expedient on any other ground;

the court may order upon such terms as to the payment of costs or otherwise as the said court thinks fit, for the transfer of any action, prosecution, proceeding or matter pending before any court to any other court and accordingly in every such case, the court to which any such action, prosecution, proceeding or matter is so transferred shall, notwithstanding anything to the contrary in this or any other law, take cognizance of and have the power and jurisdiction to hear, try, and determine such action, prosecution, proceeding or matter, as fully and effectually to all intents or purposes as if such court had an original power and jurisdiction."

The facts leading to this application can be briefly set out as follows,

At the time of filing this application the Petitioner was indicted in 3 separate cases before the High Court of Colombo, that is, HC 8546/16, HC 8222/16 and HC 8570/16. All 3 cases were listed before the same judge presiding in High Court No. 06.

On 02/02/2017, when Case No. HC 8546/16 was mentioned before the said Court, the learned High Court Judge referred the said case to High Court No. 1 for reallocation on the basis that Case No. HC 8222/16 pending against the same accused was already listed for trial before him, a fact disclosed by the learned judge.

On 15/03/2017, when Case No. 8222/16 was taken up, the learned Counsel for the Petitioner made application to have this case heard before another High Court Judge, on the basis that the presiding judge has been

arrainged as the 3rd Respondent in Writ Application No. CA/89/2017. The said Writ Application was filed to challenge the mandate and proceedings in inquiry bearing No. P.C.I. 549/2015 before the Presidential Commission of Inquiry to investigate and inquire into serious acts of fraud, corruption and abuse of power, state resources and privileges, commonly known as the PRECIFAC, on the basis that the Petitioner was, *inter alia*, denied a fair hearing at the said inquiry. The presiding judge was a member of the PRECIFAC. Having considered the said application, the learned High Court Judge, on 15/03/2017, made order declining to hear the case and referred the case to High Court No. 1 to be reallocated to be heard by another judge.

On 15/06/2017, when Case No. 8570/16 was mentioned before the same judge, the learned Counsel for the Petitioner made the same application and drew the attention of Court to the said Writ Application No. CA/89/2017, and sought a transfer of the case to be heard by another High Court Judge. The learned High Court Judge having considered that notices had not been issued in the said case bearing No. Writ Application No. 89/2017, refused the application made by the Petitioner and declined to transfer the impugned case to be heard by another judge and proceeded to fix the case for trial.

The application for the transfer of the impugned case from the presiding judge to be heard by another judge is primarily based on two grounds, namely,

1. Hearing cases against the Petitioner during the pendency of case bearing No. CA/Writ/89/2017, leads the Petitioner to reasonably apprehend that

the learned High Court Judge is motivated by bias against the Petitioner and/or extraneous considerations.

2. Comments made by the learned Judge in Case No. HC 8026/15 are capable of depriving the Petitioner of having a completely independent and an objective mind devoid of prejudice being brought to bear on the merits and the demerits of the impugned case.

In support of the 1st contention, the learned President's Counsel for the Petitioner submits that the sudden and unexpected change of mind by the learned judge to decline the application to transfer the impugned case to be heard before another judge gives rise to a reasonable apprehension of bias on the part of the trial judge. The sudden and unexpected change of mind is attributed by the Petitioner to the decision of the trial judge to decline to transfer the impugned case to be heard before another judge, after having already decided to transfer case bearing No. HC 8222/16 against the same accused on the ground that the learned judge was a member of the PRECIFAC, which is common to both cases.

In case bearing No. 8222/16, in advance of the hearing, the learned judge was alerted to the pendency of the said Writ application by the Petitioner and an objection was raised by the Petitioner. On ascertaining the facts submitted by the respective counsel, the learned judge recused himself from the case.

Impartiality of a tribunal was considered in Locabail (UK) Ltd. v. Bayfield Properties Ltd; (2000) Q.B. 451, CA (Civ. Div.), where it was held

that *"--- if, before he begins, the judge is alerted to some matter that might, depending on the full facts throw doubt on his fitness to sit, he should inquire into the full facts, so far as they are ascertainable, and make appropriate disclosure. If the matter only emerges during the hearing, he is obliged to disclose what he then knows. He is not bound to fill gaps in his knowledge, which if filled might provide stronger grounds for objection, but if he does make further inquiry and discovers further relevant facts, he is bound to disclose them. However, it is generally undesirable that hearings be aborted unless the reality or appearance of justice require such a step."*

When the impugned case was mentioned before the learned judge on 15/06/2017 against the same accused, the learned judge in the course of the application for transfer of the said case to be heard by another judge, inquired from the counsel regarding the present position of the writ application in order to ascertain whether notices were issued on the Respondents. Since the answer was in the negative, the learned judge proceeded to fix the case for trial. Therefore, the learned judge made the said order from facts which could have been ascertained at the time he made the decision. In his order he further states that in the event notices are issued in the said case, a further application can be considered.

The pending writ application in this Court is the only reason given by the Petitioner to "reasonably apprehend" that the learned judge is motivated by bias and/or extraneous considerations against the Petitioner. *"--- personal*

impartiality of the judge is presumed, until there is proof to the contrary". (Castillo Algar v. Spain, 30 E.H.R.R. 826)

In Re. Medicaments and Related Classes of Goods (No. 2) (2001) 1 WLR 700, CA (Civ. Div.), the Court of Appeal of England considered the compatibility test of bias or apparent bias when raised as a ground of appeal taking into consideration the jurisprudence set out by the European Court of Human Rights in Incal v. Turkey E.H.R.R. 449 where it was held, *inter alia*, on the question of impartiality "two tests are to be applied, the first of which consists of trying to determine the personal conviction of a particular judge in a given case. (the subjective approach) and the second in asserting whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (the objective approach)

In applying the objective approach, the Court needs to be satisfied that the Petitioner has a legitimate reason which is objectively justified.

The Petitioner in paragraphs 10, 11, 44, 45 and 46 in the writ application marked P6(a), *inter alia*, states that,

"the PRECIFAC and the purported investigation and inquiry carried out inter alia against the Petitioner by the PRECIFAC as more fully pleaded hereinafter, forms part of much larger mala fide politically motivated witch hunt against the Petitioner as the brother and a strong supporter of the former President"

"that the above pleaded political back ground and patent political victimization has a material bearing on the subject matter of this application".

The argument in support of the Petitioner is that the learned judge having considered the above stated facts and circumstances considered it appropriate to transfer case bearing No. HC 8222/16 to be heard by another judge, however declined to do so in the impugned case which was similarly circumstanced. This argument in my view, does not hold ground for the simple reason that the order to transfer case bearing No. HC 8222/16 was given taking into consideration the ascertainable facts disclosed to Court at the time of making such order. However, when the order in the impugned case was made the learned judge made directions on the ascertained facts leaving the option to revisit the issue when full facts were known.

In Incal v. Turkey, (supra), the Court went on to say that, *"appearances may be of certain importance; what is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned; in the accused; in deciding whether there is legitimate reason to fear that a particular court lacks independence or impartiality, the stand point of the accused is important without being decisive; what is decisive is whether his doubts are objectively justified."*

This brings me to the 2nd ground urged by the Petitioner that the learned Judge was motivated by bias against the Petitioner and/or extraneous considerations, when he made certain comments which are more fully described in paragraph 22 of the Petition which relates to the convicting and sentencing the accused in case No. HC 8026/15. It is contended that comments made by the learned judge with regard to a certain 'political culture' prevalent

during the previous administration, during which the Petitioner, *inter alia*, held a Cabinet Portfolio, was influenced by an independent personal opinion formed on the basis of extraneous considerations. Such statements, the Petitioner states, are partisan views which will affect all those who were part of the said previous administration. It has been said on high judicial authority that judges, like Caesar's wife, should be above suspicion. (Leeson v. General Council of Medical Education (1889) 43 Ch. D. 366 at p. 385, per Bowen L.J. There must not even be the appearance of bias. (Dimes v. Grand Junction Canal (1852) 3 H.L.C. 759.

At the outset, it is to be noted that comments alleged to have been made by the learned judge are comments not made in the impugned case. In applying the subjective test, as discussed earlier, there is a presumption that the Court has acted impartially, which must be displaced by evidence to the contrary. In applying the objective test, the question is whether a legitimate doubt as to the impartiality of the tribunal can be 'objectively justified'.

In Porter v. Magill; Weeks v. Magill (2001) UKHL 67; (2002) 2A.C. 357, the House of Lords held that the test to be adopted was that put forward in Re. Medicaments and Related Classes of Goods (supra),where *"the court should first ascertain all the relevant circumstances and then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased"*. In Helow v. Secretary of State for the Home Department (2008) UKHL 62; Lord Hope

described a fair minded and informed observer as someone *"who is neither unduly sensitive nor suspicious"*

The test that has often been applied by our courts is whether there is a likelihood of bias. (Simon v. Commissioner of National Housing (1972) 75 NLR 471). In Dr. Karunaratne v. Attorney General and another (1995) 2 SLR 298, answering the main contention of a reasonable apprehension of the Petitioner that a fair and impartial trial cannot be had before the learned trial judge, Gunersekera J. held, at page 302, *"in regard to the application of the test of reasonable suspicion of bias it must be shown that the suspicion is based on reasonable grounds which would appeal to the reasonable right thinking man, it can never be based on conjecture or on flimsy insubstantial grounds"* and further that *"there must be material which shows a tendency to favour one side unfairly at the expense of the other"*. In Re R. Ratnagopal (1968) 70 NLR 409 (Supreme Court), T. S. Fernando J. stated, at page 435, that *"The proper test to be applied is, in my opinion, an objective one, and I would formulate it somewhat on the following lines: Would a reasonable man, in all the circumstances of the case, believe that there was a real likelihood of the Commissioner being biased against him?"* The Supreme Court went on to hold that the allegations of bias are vague and unsubstantial. In Ratnagopal v. The Attorney General (1969) 72 N.L.R. 145, at page 151, the Privy Council agreed with these views (the Privy Council set aside the judgment of the Supreme Court on other grounds). There may be real likelihood of bias where there is, for example, personal friendship or hostility, family or other close relationship

with a party. (See De Smith, Judicial Review of Administrative Action 2nd Edition, pages, 246-252)

In the performance of his judicial functions in case bearing No. HC 8026/15, which is unrelated to the impugned case, the learned High Court Judge has made a finding that certain public servants act with impunity, a comment based on the evidence in that case. Apart from that comment, reference is also made to a certain "political culture" which prevailed at the time, which is an opinion expressed by the learned judge in deciding the said case. The Petitioner is aggrieved by the said comments by the learned judge, citing bias towards him due to the Petitioner's close association with the previous administration. The Petitioner in claiming that the reference to a "certain political culture" as bias or considering extraneous considerations, has failed to give reasons to objectively justify his concerns. The opinion expressed in the course of a judicial finding, unrelated to the impugned case, in my view, cannot be regarded as objectively justifying reasonable apprehension of bias on the part of the learned High Court Judge. It must be stated that when bias or extraneous considerations are not established, impartiality towards the Petitioner should be presumed.

"Views expressed by a judge in open court in the performance of his judicial function, which were not gratuitously outspoken opinions or plainly outside the scope of the proper performance of his duties, would not give rise to a doubt as to a professional judge's ability to perform his duties with an objective judicial

mind" (O'Neill v. HM Advocate (No.2); Lauchlan v. Same (2013) UKSC 36; 2 Cr.App.R.34)

The Petitioner has also not established, that by being a close associate of the previous administration, the opinion expressed by the learned judge has given rise to a doubt as to the judge's ability to perform his judicial duties. Therefore, the Petitioner has failed to 'objectively justify' that the comments expressed by the learned judge in that case have influenced him of bias or extraneous considerations towards the Petitioner, when deciding on the impugned case, as alleged by the Petitioner.

For all the reasons stated above, I refuse the application of the Petitioner and dismiss the application without costs.

Petition dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL