

THE ATTORNEY-GENERAL
v
SEGULEBBE LATHEEF AND ANOTHER

SUPREME COURT.

J.A.N. DE SILVA, J.

BALAPATABENDI, J., AND

RATNAYAKE, J.

S.C. APPEAL NO. 79A/2007, 24/2008 AND 25/2008

23 JULY 2008 AND 19 AUGUST 2008

Constitution Article 13(3), Article 138 – Right of a person charged with an offence to be heard, in person or by an Attorney-at-Law – Fair trial – Section 195(ee) of the Code of Criminal Procedure Act, No. 15 of 1979 as amended by Act No. 11 of 1988 – Section 161, Section 236, Section 436 – Obligation on the trial Judge to inquire from the accused whether he is to be tried by a jury? – Illegality or irregularity? – Judicature Act – No. 2 of 1978 – Section 11.

The Supreme Court granted special leave to appeal on the following question of law in case No. SC/79/2007.

"Did the Court of Appeal err in law by holding that section 195(ee) of the Code of Criminal Procedure Act, No. 15 of 1979 as amended by Act, No. 11 of 1988 envisages a mandatory statutory obligation and failure to comply with the said section 195(ee) vitiates the conviction."

Subsequent to the granting of leave in No. SC/79/2007, in other separate cases Viz; SC/24/2008 and SC/25/2008 the Attorney-General raised the same question of law and the Supreme Court granted leave. All these cases were taken up together for argument.

In all these cases the accused-appellants raised the preliminary objection that the trial judges failed to inform the accused of the right to be tried by a jury in terms of the law and such failure is fatal to the conviction as it was a violation of a legal right afforded to them.

Held:

- (1) The Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a fair trial by a competent Court.

Per J.A.N. de Silva, J.

"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."

- (2) Like the concept of fairness, a fair trial is also not capable of a clear definition.

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 or 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.*
- (3) Section 195(ee) of the Code of Criminal Procedure Act, No. 15 of 1979 as amended by Act, No. 11 of 1988 imposed a duty on the trial judge to inquire from the accused at the time of serving the indictment whether or not the accused elects to be tried by a jury. It is left to the discretion of the accused to decide as to who should try him. The judge must also inform that the accused has a legal right to that effect.

Non observance of this procedure is an illegality and not a mere irregularity.

Case referred to:

- (1) *Attorney-General v Thennakoon Arachchige Sunil Ratnasiri* (CA 134/70 C.A.M.19.07.1999).

APPEAL from the judgment of the Court of Appeal.

Sarath Jayamanne D.S.G. with Gihan Kulatunga, S.S.C. for the Attorney-General.

Ranjith Abeysuriya, P.C. with Miss. Thanuja Rodrigo for the respondents in S.C. Appeals in 79A/2007 and 25/2008.

Cur.adv.vult.

September 12, 2008

J.A.N. de Silva, J.

On the 29th of September my lord the Chief Justice sitting with two other judges of the Supreme Court granted special leave to appeal on the following questions of law in case number SC/79/2007.

"Did the Court of Appeal err in law by holding that section 195(ee) of the Code of Criminal Procedure Act, No. 15 of 1979 as amended by Act, No. 11 of 1988 envisages a mandatory statutory obligation and failure to comply with the said section 195(ee) vitiates the conviction".

Subsequent to the granting of leave in case No. SC/79/2007, in two other separate cases viz SC/24/2008 and SC/25/2008 the Hon. Attorney-General raised the same question of law and the Supreme Court granted leave. Hence all three cases are taken up together and will be disposed of in this judgment.

In all these cases, in the course of hearing of the appeals in the Court of Appeal the accused appellants raised preliminary objections that the trial judge failed to inform the accused of the right to be tried by a jury in terms of the law and such a failure is fatal to the conviction as it was a violation of a legal right afforded to them. The Court of Appeal having referred to several decisions of the Court of Appeal, upheld this objection.

At the commencement of the argument the learned Deputy Solicitor-General conceded the fact that the relevant court records do not reflect anywhere that the jury option had been given to the accused. His contention was that since the accused were represented by counsel at the trial no substantial prejudice had been caused to the accused, the proviso to Article 138 of the Constitution and section 436 of the Code of Criminal Procedure should apply to cure the defect.

The learned Deputy Solicitor-General further submitted that even if section 195(ee) is considered to be a mandatory requirement the

failure to comply with the same does not deprive the High Court Judge of jurisdiction to hear and determine the case as this is a technical defect of a procedural nature. In support of this contention he relied upon a judgment of Justice F.N.D. Jayasuriya in *AG v Thennakoon Arachchige Sunil Ratnasiri*¹¹.

Our Constitution does not expressly recognize the right of access to legal advice and assistance to an accused person under arrest.

However, the Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a "fair trial" by a competent court. This right is recognised obviously for the reason that a criminal trial (subject to an appeal) is the final stage of a proceeding at the end of which a person may have to suffer penalties of one sort or another if found guilty.

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 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.

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 or 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.*

Apart from the rights mentioned above there is another remarkable right given to the accused in most jurisdictions. **That is the right to trial by jury.** Some writers say this system was derived from the Celtic tradition based on the Roman Law. There are others who have expressed the view that the jury system may be traced as a gradual and natural sequence from the modes of trial in use amongst the Anglo-Saxon and Anglo-Normans that is before and after the conquest. Greek and Roman history show that trial by jury flourished when the people regained and re-asserted liberties. In England King John was compelled to grant the great Charter known as *Magna Carta*. One of the clauses of which was "that no freeman was to be imprisoned, outlawed, punished or molested except by the judgment of his equals or by the law of the land."

In France the jury system of trial in criminal cases was established in 1791 and it was retained in the Code of Napoleon promulgated in 1905.

In Germany, in the year 1798 the jury system was introduced in the provinces of Rine and Bavaria and extended to the whole country in 1849. In Belgium it was introduced in 1830 when the country was separated from Holland. In Denmark juries are compulsory in criminal cases. The system of trial by jury prevails in Spain only in criminal cases. In the USA too, English principles have been adopted with rare variation and trial by jury is now part of the constitution in most of states.

When the British established their empire in the east they introduced the English Criminal Justice System to the colonies. The jury trials were framed on the English model. When Sri Lanka came under British rule the then Governor Frederick North through the Charter of Justice of 1801 established a Supreme Court of Judicature composed of a Chief Justice and a Puisne Justice. The Supreme Court was given criminal jurisdiction over serious crimes. Criminal jurisdiction of lesser offences was exercised by magistrates, justices of peace and fiscal courts.

In Sri Lanka (Ceylon as it was known then) trial by jury or jury system was introduced during the time of Governor Thomas Maitland by a Charter of Justice in 1810. This was done mainly to get the assistance of local inhabitants to the Supreme Court Judges who were alien to the native society.

Generally a trial before the Supreme Court was preceded by a non summary proceeding or a preliminary inquiry in the Magistrate's Court. This system prevailed in Sri Lanka until the independence and thereafter under the Criminal Procedure Code. Section 216 of the old Criminal Procedure Code reads thus:

"All trials before the Supreme Court shall be by jury or a commissioner of assize, provided always that the Chief Justice may in his discretion order that any trial shall be a trial at bar and thereupon the said trial shall be in held in Colombo by jury before three judges."

With the introduction of Administration of Justice Law No. 44 of 1973 there was a change in the court structure and there came into existence a new court called the "High Court" for each zone (section 116). The original jurisdiction so far exercised by the Supreme Court was transferred to the High Court; Section 193 states thus:

"Subject to the provisions of the law all trials before the High Court shall be by jury before a judge."

The Code of Criminal Procedure Act was enacted in 1979. There was no substantial change in the system until an amendment to section 161 was introduced in 1988. The new section reads as follows.

"Subject to the provisions of this code or any other law all prosecution on indictment in the High Court shall be tried

by a judge of that court provided that in any case at least one of the offences falls within the list of offences set out in the Second Schedule to the Judicature Act, No. 2 of 1978 trial shall be by jury before a judge, if and only if the accused elects to be tried by a jury".

Section 11 of the Judicature Act, No. 2 of 1978 was also amended by the Judicature (Amendment) Act, No. 16 of 1989 to fall in line with the amendment to the Code of Criminal Procedure Act amendment in 1988.

Mr. Ranjith Abeysuriya P.C. (who appeared for the accused was kind enough to point out that both these amendments have been brought into operation on the same day i.e. on the 28th of November 1991).

This amendment necessitated an introduction of a further amendment i.e. section 195 (ee) imposing a duty on the trial judge to inquire from the accused at the time of serving the indictment whether or not the accused elects to be tried by a jury. This is in recognition of the basic right of an accused to be tried by his peers. It is left to the discretion of the accused to decide as to who should try him.

As pointed out earlier for nearly two hundred long years the jury system has been in existence in Sri Lanka with whatever the faults it had. I do not make an endeavour to discuss the merits and the demerits of the jury system. As long as it is in the statute book that the accused can elect to be tried by a jury, the trial judge has an obligation not only to inquire from him whether he is to be tried by a jury, judge must also inform that the accused has a legal right to that effect. Non observance of this procedure is an illegality and not a mere irregularity.

For the above reasons all three State appeals are dismissed. I direct that the case records of all three cases to be sent back to the original High Courts to comply with law and conclude the trials early.

BALAPATABENDI, J. - I agree.

RATNAYAKE, J. - I agree

Appeals dismissed.

Cases sent back to the High Courts.