

~~44.9.2~~

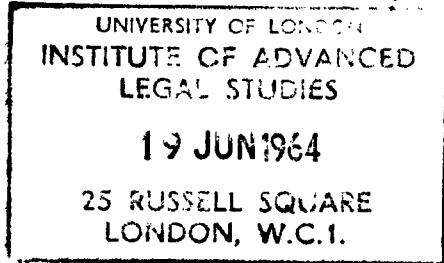
16, 1963

IN THE PRIVY COUNCIL

No.30 of 1962

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL, CEYLON

B E T W E E N :-



ALUTHGE DON HEMAPALA

Appellant

- and -

THE QUEEN

Respondent

—————
CASE FOR THE APPELLANT
—————

74119

Record

- pp.108-109
pp.110-111
pp. 82-108
p. 81
1. This is an appeal in forma pauperis by special leave of Her Majesty in Council dated the 30th day of July 1962 and the 11th day of April 1963 from the judgment and order of the Court of Criminal Appeal of Ceylon dated the 25th day of October 1961 whereby the Appellant's appeal against his conviction and sentence on the 20th day of December 1960 by the Supreme Court at Kalutara was dismissed. The Appellant had been found guilty of murder and sentenced to death.
- pp. 1-2
2. The Appellant was indicted together with one Babbu Singho on a charge that on the 27th day of June 1960 he had murdered Mahawattage Don Carolis and that the said Babbu Singho abetted the said murder.
3. On their committal for trial by the Magistrates Court the accused elected to be tried by an English speaking Jury under section 165B of the Criminal Procedure Code.
4. The issue in this case is whether, when an accused has elected to be tried by an English speaking Jury under section 165 B of the Criminal Procedure Code, a trial conducted wholly or in part in Sinhala is irregular, and if so whether the irregularity is such that the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance is applicable.
- p4 ll 20-44
5. At the trial an English speaking Jury was empanelled and after they had been sworn the following passage occurred :-

(2)

"Court: May I ask you, gentlemen of the jury, whether you are sufficiently conversant with Sinhala to be able to understand well the questions put to witnesses and answers given by them?

Foreman: Yes My Lord.

Court: And also address of Counsel if it is made in Sinhala?

Foreman: Yes.

Court: Mr. Tampoe, are you able to follow the proceedings in Sinhala?

Mr. Tampoe /Defence Counsel/: Yes My Lord.

Court: You are at liberty to put any question in English at any stage of the case if you so desire and you will also be able to follow the translation which the interpreter will make for the benefit of the stenographer.

Crown Counsel opens his case to the Jury. (in Sinhala)."

6. The case for the prosecution was that the deceased had been mortally stabbed outside a boutique, dying in hospital the next day.

7. The evidence implicating the Appellant was:

pp21-41

(a) that two witnesses, N. Aron Singho and M.K. D. Karunawathy, husband and wife and related to the deceased, said that they were in the neighbourhood of the boutique and heard cries of "stabbed with a knife" and then saw the Appellant and Babbu Singho running in the opposite direction; that they saw them in the light of a torch and that the Appellant was carrying a knife;

p23 ll 2-3

(b) that the deceased had said to the said N. Aron Singho who had found him by the boutique "Babbu Singho held me and Hemapala stabbed";

p5 ll 13-16

(c) that the deceased had told the Doctor in the hospital that he was stabbed by one Hemapala and Babbu Singho and immediately he corrected himself

(3)

saying that Babbu Singho held him while Hemapala stabbed him;

(d) that the deceased had made a statement to the Police whilst in hospital as follows :- p42 ll 14-26

"Today at about 8 p.m. I went to a boutique at Kebellagoda to buy some cigarettes. The boutique keeper said that he has no cigarettes. Then I came out. As I came out I met Hemapala and Babbu Singho. The latter embraced me and Hemapala stabbed me with a knife on my left armpit and on the back of my chest. I then went to the same boutique. I shouted out that I was stabbed. I do not know what the motive is. None of them are angry with me."

8. The boutique keeper's wife gave evidence that the deceased had come to their boutique purchased a cigarette then left, but returned about ten or fifteen minutes later bleeding and she turned him out. pp10-20

9. Save that it is noted that the first witness 'says that he prefers to give his evidence in English' there is no note in the record as to the language used by the witnesses; that the learned Chief Justice in his judgment in the Court of Criminal Appeal said :- p5 ll 6-7

"There is also nothing in the transcript to indicate that the evidence given by Sinhalese speaking witnesses were interpreted into the English language in a tone loud enough to be heard by the jury. The transcript does not expressly state in what language Crown Counsel delivered his closing address. But as he opened the case in Sinhala it can be assumed that his address at the close of the case was in that language. The transcript makes no special mention of the language in which counsel for the defence delivered his address. But as the learned Judge did not in the words addressed to him at the outset of the trial inquire whether he was able to address the jury in Sinhala, it may be assumed that he addressed in English. It would appear that whenever it was necessary to address the jury the Judge did so in English and his summing-up was also in that language." p83 l 37
p84 l 6

10. After the summing up by the learned trial Judge the Appellant was found guilty of murder and sentenced p 81

to death and the second accused was acquitted and discharged.

11. On appeal it was argued that because the Appellant had elected to be tried by an English speaking Jury it was a breach of the Criminal Procedure Code to conduct the case in Sinhala.

12. Although this point had not been raised at the trial or in the Notice of Appeal it was heard by a Full Bench of five Judges of the Court of Criminal Appeal.

pp82-86 and
p.108

p.86 ll 5-9

13. Basnayake C.J. and L.B. de Silva, J. held that there had been "an essential departure from the well established Rules of Procedure prescribed for the accused's trial" and "that there had been no trial of the accused according to the law" and would therefore accordingly quash the conviction and direct a new trial.

pp87-93 and
p 86

14. Weerasooriya J. and Gunasekara J. held that the trial had been irregular, but that there had been no substantial miscarriage of justice and therefore were of opinion that the appeal should be dismissed.

pp93-107

15. H.N.G. Fernando J. held that there had been no irregularity and therefore was of opinion that the appeal should be dismissed.

16. In the result the appeal was dismissed by a majority of three to two.

pp108-109

17. Special Leave to Appeal to Her Majesty in Council was granted by Order in Council dated the 30th day of July 1962.

pp110-111

18. Leave to prosecute the Appeal in forma pauperis was granted by Order in Council dated the 11th day of April 1963.

19. The Appellant humbly submits that this Appeal should be allowed and the judgment of the Court of Criminal Appeal in Ceylon dated the 25th day of October 1961 be set aside and his conviction by the Supreme Court at Kalutara on the 20th day of December 1960 quashed for the following among other

R E A S O N S

1. Because the Criminal Procedure Code of Ceylon envisages, in a case to be tried by an English speaking Jury, that the conduct of the case shall be in the English language, and that it being a fundamental right of an accused person to be tried in accordance with the procedure prescribed in the Criminal Procedure Code and the practice established thereunder, the conduct of this case in Sinhala was such an irregularity as to amount to a miscarriage of justice or alternatively to no trial at all.

2. Because an irregularity of this sort goes to the root of the trial and is not such that the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance is applicable.

3. Because by the procedure adopted a substantial miscarriage of justice occurred.

4. Because the judgments of Basnayake C.J. and L.B. de Silva, J. were correct.

5. Because Weerasooriya J. and Gunasekara J. were correct in holding that there had been an irregularity of procedure, but were wrong in applying the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance.

E. F. N. GRATIAEN, Q.C.

THOMAS O. KELLOCK.

MONOURI DE SILVA.

CRIMINAL PROCEDURE CODE

165B. On committing the accused for trial before any higher court the Magistrate shall ask the accused to elect from which of the respective panels of jurors the jury shall be taken for the trial in the event of the trial being held before the Supreme Court, and the Magistrate shall record such election if made. The accused so electing shall, if the trial is held before the Supreme Court be bound by and may be tried according to his election, subject however in all cases to the provisions of section 224.

224. (1) The jury shall be taken from the panel elected by the accused unless the court otherwise directs.

COURT OF CRIMINAL APPEAL ORDINANCE

5. (1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

No. 30 of 1962

IN THE PRIVY COUNCIL.
ON APPEAL FROM THE COURT OF
CRIMINAL APPEAL, CEYLON.

ALUTHGE DON HEMAPALA

v.

THE QUEEN

CASE FOR THE APPELLANT

Messrs. Graham Page & Co.,
41, Whitehall,
London, S.W.1.
Appellant's Solicitors.