

[COURT OF CRIMINAL APPEAL.]

1946 *Present* : Howard C.J., Keuneman and Jayatileke JJ.

THE KING *v.* H. C. PERERA.

18—*M. C. Chilaw, 25,873.*

Absence of Counsel—Murder trial advanced—Counsel assigned—No explanation of absence—Fair and proper trial of accused.

Where the date of a murder trial was advanced, and in the absence of Counsel, who had been retained, assigned Counsel appeared for the accused and there was no explanation afterwards by Counsel, who was briefed, of the circumstances of his absence—

Held, that the absence of Counsel did not afford a good ground for the Court to hold that the accused did not have a fair and proper trial.

A PPEAL against a conviction by a Judge and Jury.

A. H. C. de Silva (with him *Ananda Pereira*), for appellant.

E. H. T. Gunasekera, C.C., for the Crown.

February 11, 1946. HOWARD C.J.—

The appellant in this case, charged with the offence of murder, was found guilty by a majority verdict of six to one of the offence of culpable homicide not amounting to murder. The main ground of appeal is that the appellant has not received a fair trial by reason of the fact that the date of trial of the case was advanced and his Counsel was not able to be present. The case was taken up for trial by the learned Judge on November 9, 1945. The record on page 1 is as follows :—

“ When the case is taken up Mr. Raja, assigned Counsel for the accused, intimates to Court that the accused has informed him that he has retained Counsel and since the case was originally fixed for hearing on Monday, the 12th instant, but has been advanced for today he has not been able to inform his Counsel of the change in dates and consequently his Counsel is not present.

The Court informs Counsel that since he is there to watch the interests of the accused the case must go on.

The accused pleads not guilty to the charge, and adds that his Counsel has not been able to be present today in view of the fact that this case has been advanced and he has not been able to inform his Counsel of the change in dates ”.

Mr. Raja, assigned Counsel, appeared for the appellant on November 9, and on November 12 and 13. On the latter day the Jury gave their verdict. It does not appear from the record that the name of the Counsel, who the appellant anticipated would appear and conduct his defence, was disclosed to the Court. The case was originally fixed for trial on November 12, but Counsel did not appear before the Court on that day or on the 13th to carry on with the conduct of the defence and explain to the Court that he had been briefed and for some good cause had been unable to appear when the trial commenced on November 9. Nor has any statement from Counsel or assigned Counsel been placed before this Court explaining these matters. In spite of the lack of material put before us, Counsel for the appellant asks us to say that, because the appellant anticipated that this particular Counsel would appear and conduct his defence and did not do so, there has been such a miscarriage of justice as to invalidate the trial. There is no evidence before the Court that Counsel had been briefed. Nor is there any explanation as to why Counsel if briefed could not appear on the 9th. Nor even assuming that he was unable to appear on the 9th why he did not appear on the 12th, the day on which the case had originally been set down for trial. No authority for the setting aside of the verdict in such circumstances has been brought to our notice. In *Galos Hirad and another v. Rex*¹ the appellants were convicted in British Somaliland of the offence of murder and in accordance with the provisions of section 3 (1) of the Poor Persons' Defence Ordinance, 1939, were assigned a Counsel

¹ 28 C. L. W. 97.

permanently practising at Aden and the only person enrolled to practise in British Somaliland. The hearing of the appeal was fixed for June 22, 1942, and the proper authorities had been instructed to arrange for a passage for Counsel. But owing to shipping difficulties, they failed to obtain a passage which would enable him to reach Hargeisa, the place of hearing of the appeal, on or before the date of hearing. On June 22, 1942, the Appeal Court Judge proceeded with the hearing without making any inquiry with regard to the absence of Counsel or as to the date when he might be expected to arrive. He heard some short statements by the appellants and dismissed the appeals. It was held by the Privy Council as follows :—

- “(i.) That the provisions of a statute as regards the right of a convicted person are not of a merely directory character ;
- (ii.) That the necessity for an assignment of Counsel for the purpose of conducting an appeal involves the necessity of seeing that it will be possible for the Counsel to be present at the hearing ;
- (iii.) That the failure to grant an adjournment of the hearing to enable Counsel to be heard has resulted in the appeal not being effectively heard ”.

The facts in *Galos Hirad v. Rex* do not bear comparison with those in the present case. In giving the judgment of the Court *Galos Hirad v. Rex* Lord Maugham said the appellants would probably be illiterate and therefore completely unable to make any criticism on the written judgment even if they could read it. The appeal was heard without the appellants having the assistance of any Counsel. In the present case Mr. Raja who had been assigned appeared for the appellant. In *Galos Hirad v. Rex* it was manifest to Their Lordships of the Privy Council that Counsel assigned for the appellants was unable to reach the Court in time to conduct the appeal without any default on his part. In the present case there is nothing before the Court to make it clear that Counsel had been briefed and if briefed why he could not appear if not on the 9th at any rate on the 12th and 13th. We are therefore of opinion that the principles formulated in the Privy Council case have no application to the facts of the present case. The case of *Rex v. Woodward*¹ was also brought to our notice. In that case an accused person who had been assigned Counsel under the Poor Prisoners' Defence Act 1930 claimed at the beginning of the case the right to conduct his own defence. The Court of Criminal Appeal held that he was entitled to do so and quashed the conviction. We do not for the reasons I have given consider that the absence of the particular Counsel appellant maintained was expected to appear affords any valid ground for holding that the appellant has not had a fair and proper trial.

We are moreover of opinion that the other grounds of appeal are without substance. For the reasons I have given the appeal is dismissed.

Appeal dismissed.