LAKSHMAN DE SILVA
v.
HON.H.W.SENANAYAKE AND ANOTHER

SUPREME COURT
FERNANDO, J. DHEERARATNE, J. AND RAMANATHAN, J.
S.C. (SLA) APPLICATION NO.51 OF 1989.
DECEMBER, 4,1989.

Criminal Procedure - Accused conducting his own defence - Provision of facilities like table and chair for accused to defend himself - Commencement of trial - Code of Criminal Procedure Act, No. 15 of 1979, sections 195 and 196.

The indictment against the accused petitioner was received in the High Court on 15.9.88 and the Court directed the accused to be noticed to appear on 16.9.88. The accused appeared on 16.9.88. The indictment was served on him on 16.9.88 and he was fingerprinted (s. 195 of the Code of Criminal Procedure) and trial was fixed for 29.11.88. The accused petitioner was not called upon to plead on 16.9.88. He was absent on 29.11.88 but from the subsequent dates undertook his own defence. He sought facilities of a chair and table to make his defence and on being refused moved for a *writ of mandamus* in the Court of Appeal. Notice was refused and the accused petitioner sought leave to appeal in the Supreme Court ; eventually the matter was settled by counsel for the State undertaking that the petitioner would be provided with a chair and a table **during the course of the trial** in the High Court. On a complaint of a breach of this undertaking —

Held:

The commencement of the trial is upon the indictment being read to the accused and accused being required to plead (s. 196 of the Code of Criminal Procedure Act). The trial had not commenced and therefore there has been no violation of the undertaking given on 5.10.89.

Per Fernando, J. —

" We did not then, and do not now, express any opinion as to whether the petitioner had a legal right, or a Constitutional right, to be provided with a table inside or outside the dock, although it seems to us very desirable that an undefended accused should have all such facilities as are reasonably necessary for the purpose of conducting his defence.".

" In view of the settlement it has also became unnecessary to come to any finding upon the allegations as to the events of 11.5.89 including the manner in which the petitioner was addressed ; these allegations, are not borne out by the record. (The allegations were refusal by the High Court to accept a motion tendered by the petitioner seeking facilities like a chair and a table to take down notes and place documents, books etc. during the entirety of the trial and the High Court Judge addressing the petitioner humiliatingly as "prisoner".) "

Case referred to :

Mohan v. Carson Cumberbatch & Co - [1988] 2 Sri L.R. 75.

APPLICATION for special leave to appeal to the Supreme Court from an order of the Court of Appeal.

Petitioner in person.

Upawansa Yapa, Deputy Solicitor - General, with *Mrs. Kumudini Wickremasinghe, S.C.,* for the 2nd respondent (Attorney - General).

Cur. adv. vult.

13th December 1989

FERNANDO, J.

High Court Colombo case No. 3576/88 has been pending against the accused petitioner ("the petitioner") since August 1988. The petitioner tendered, at the hearing of this application on 4.12.89, a certified copy of the journal entries for the period 15.8.88 to 30.10.89. According to these journal entries, the indictment was received in the High Court on 15.8.88, and the Court directed that the petitioner be noticed to appear on16.9/88; On 16.9.88 bail was granted, order was made that the petitioner be finger printed, and the trial was fixed for 29.11.88. These were steps in compliance with the provisions of section 195 of the Code of Criminal Procedure Act, and there was no attempt to comply with section 196 that day. The learned Deputy Solicitor - General tendered a certified copy of the proceedings of 16.9.88, which confirms that the indictment was handed over to the Petitioner, but he was not called upon to plead on 16.9.88. It is common ground that on 16.9.88 and 29.11.89 the petitioner was represented by Counsel ; that on 29.11.88 the petitioner was absent

and a medical certificate was tendered on his behalf by Counsel, who informed the Court that he would not be appearing on the next date, namely 1.3.89 ; that the Court ordered that notice be issued on the petitioner informing him of that trial date. On 16.9.88 the Court had ordered the issue of summons on the prosecution witnesses, and on 29.11.88 most of them, including witness No. 3, were present, and were warned to appear on the next date. On and after 1.3.89 the petitioner appeared in person in the proceedings in the High Court, as well as in the Court of Appeal and in this Court. On 1.3.89 the case was not taken up, and was postponed for 11.5.89 ; witness No. 3 was not present and summons was ordered. On 11.5.89, that witness was again absent although summons had been served. On account of the Ceremonial Sitting of the Superior Courts on 11.5.89, the Court sat only in the afternoon. The petitioner states that he attempted to tender a written motion that, *inter alia* -

> "Equal opportunity and facilities afforded to the learned Counsel for the Prosecution be afforded to [him]."
>
> " Facilities to sit (provided with a chair) and to be able to take down notes and to place books, documents (provided with a table) during the entirety of this trial, which may be placed in front of the Dock."

The petitioner says that the learned High Court Judge, the 1st Respondent, refused to accept this motion, whereupon he made an oral application for these facilities, which was refused. The case was postponed for 14.8.89, but the reason for the postponement is not stated in the journal entries or in the proceedings. The petitioner then applied to the Court of Appeal for *Mandamus,* averring that he could not conduct his defence from the dock, as there were no facilities to keep his books and papers, and to take down notes, and "as the wooden bars of the ..... caged dock not only denies petitioner's visibility partially and also partially denies the hearing, due to partial reflection of sound waves, thereby not being able to hear properly the words spoken by witnesses ....." ; he further alleged that the 1st respondent had addressed him as " Prisoner". Claiming that these were violations of his fundamental rights under Articles12 (1) and 13 (3) of the Consititution, he prayed for a Reference to this Court under Article 126 (3) ; for a Reference under Article 125 (1), as to the meaning of a "fair trial" ; and for *Mandamus* on the 1st respondent to accept his motion, to grant the several requests therein, and to treat him in accor-

dance with Articles 12 (1) and 13 (3) during the course of the entire trial. The Court of Appeal refused leave to issue notice of this application, and on 20.7.89 refused leave to appeal to this Court ; the petitioner then applied to this Court on 27.7.89 for special leave to appeal, amplifying his allegations, for instance, that he had been addressed as "prisoner" by the 1st respondent " *in a degrading form in an effort to lower [his] status .... with the additional effect of shaming and humiliating [him]*" . .It is relevant to mention that had the petitioner suceeded in obtaining leave, he would have had to succeed in several other proceedings before obtaining any part of the relief which he sought : first an appeal in this Court, which if successful would have resulted in a direction to the Court of Appeal to issue notice in the Mandamus application ; if the respondents to that application disputed his interpretation of the Constitution, References to this Court would have been required ; the Court of Appeal would then have had to decide the *Mandamus* application in accordance with the determinations of this Court upon such References ; and from that decision a further appeal to this Court was possible. At some stage, the question might also have arisen whether the 1st respondent's action was " administrative action" (within the meaning of Article 126(1) of the Constitution) , and if so whether the only remedy was by way of an application under Article 126.

It was thus manifestly to the petitioner's advantage that the following settlement was reached on 5.10.89 in the course of the hearing of the application for special leave to appeal :

> " ..... in answer to a question from the Court, Mr. Yapa who appears for the 2nd respondent, gives an undertaking that the petitioner will be provided with a table and a chair for the purpose of keeping his books and documents **during the course of the trial** in the High Court. If this table and chair cannot be accommodated within the dock, these facilities will be provided for the petitioner outside the dock. In view of this undertaking the petitioner moves to withdraw this application.".

We did not then, and do not now, express any opinion as to whether the petitioner had a legal right, or a Constitutional right, to be provided with a table, inside or outside the dock, although it seems to us very desirable that an undefended accused should have all such facilities as-are reasonably necessary for the purpose of conducting his defence. In view of

the settlement, it also became unnecessary to come to any finding upon the allegations as to the events of 11.5.89, including the manner in which the petitioner was addressed ; these allegations are not borne out by the record.

On 14.8.89 the case was postponed for 30.10.89, as there were three partly - heard cases ; witness No. 3 was again absent, and a third order for summons was made. On 30.10.89, the petitioner tendered a certified copy of the settlement to be filed of record in the High Court. On the very next day, the petitioner made this application to this Court complaining of a deliberate breach of the undertaking given on 5.10.89.

In his affidavit dated 31.10.89, the petitioner does not state that before the proceedings commenced State Counsel assured him that a table and chair would be provided in terms of the settlement ; however, in his oral submissions to us on 13.11.89, (a summary of which was contemporaneously recorded and confirmed by him to be accurate), he admitted that "prior to the case being called ..... State Counsel had agreed that a table and a chair would be provided in terms of the order of ..... 5th October, 1989, ***When the trial commences***"; in a further affidavit dated 20.11.89, he states that he was assured that " at the commencement **of the hearing** of the case, [he] would be provided a table and chair. " Having regard to the reasons urged on 5.10.89 as to why the table and chair were required, and the phrase emphasized above, it is clear that both State Counsel and the petitioner had in mind a future point of time - the commencement of the trial, or of the actual hearing. The petitioner however vehemently contended at the hearing of this application that the settlement contemplated the provision of these facilities throughout the entire proceedings, including dates on which the case was merely called or mentioned ; that " trial date" (and the Sinhala equivalent used in the journal entries) *referred to any date on which proceedings took place ; that* 11.5.89, 14.8.89 and 30.10.89 were fixed as " trial dates" and were so described in the journal entries ; and accordingly, the proceedings that took place on 30.10.89 were " during the course of the trial" , and that the failure to provide a table constituted a breach of undertaking.

Before considering that submission, it is necessary to refer to the events of that day in some detail. In his first affidavit, the petitioner alleges that " the Hon. Trial Judge [before he came on the bench] also heard the State Counsel with the case brief in his Chambers, in my absence" ; on

13.11.89 his position was that " before this case was called, the State Counsel conferred with the Judge in Chambers, but that he does not know what was discussed"; there was no suggestion of any impropriety, and quite understandably no counter affidavit was filed in reply.

When the present High Court Judge, who had succeeded the 1st Respondent, came on the bench, according to the petitioner, even before he could comply with the Mudaliyar's direction to go into the dock, State Counsel made an application for a postponement on the ground that summons had not been served on witness No. 3, who was absent ; it was submitted that the case could not be commenced without that witness, and if the evidence of that witness was not available, the prosecution might have to be withdrawn. This is borne out by the record, and confirmed by the petitioner's submission to us on 13.11.89 that " when the case was taken up, State Counsel informed the High Court Judge that witness No. 3 was not in Court and that without that witness the State cannot begin the proceedings, and State Counsel applied for a postponement on this basis although other witnesses were present". For the fourth time, order was made for summons on witness No. 3, and the other witnesses were released, being warned to appear when noticed ; no date was mentioned at this stage. In view of the petitioner's categorical submission to us on 13.11.89 it is quite clear that he was then not alleging any impropriety against State Counsel, and that the latter's submissions were heard and understood by him. He further submitted that State Counsel had misled the Court by stating that summons had not been served on witness No. 3, for, he said, summons **had** previously been served ; this is an unwarranted accusation, for what was then relevant was that summons had not been served, despite the order made on 14.8.89, requiring attendance on 30.10.89 (and not whether summons had earlier been served). Another contention, advanced on 4.12.89, was that he did not hear all that was said by State Counsel when applying for the postponement, and that some of the submissions referred to in the proceedings may have been made in Chambers ; this conflicts with the position taken up on 13.11.89, and must be rejected.

Although the petitioner stated in his first affidavit that " the case was postponed **for trial** on 14.12.89", it is clear from the proceedings that this was not a trial date, but only a calling date. According to the petitioner he then sought to make submissions, in English, in regard to the provision of a table, as well as certain legal objections to the indictment; although

State Counsel had been permitted to make submissions in English (which were translated for the record by the learned Judge), the petitioner complains that he was asked to make his submissions in Sinhala ; although in his first affidavit it was suggested that there was a Sinhala - English interpreter available. It later transpired that in fact there was no interpreter, and (according to the petitioner) "the Mudaliyar's Sinhala was not very good". The application for the postponement obviously would not have occasioned any great difficulty in translation, but it is understandable that the learned High Court Judge felt that legal submissions involving the validity of the indictment should be precisely recorded : if the petitioner could not make those submissions in Sinhala, then, in the absence of a competent interpreter, it was desirable that this be done on a subsequent date.

He informed the petitioner that since the case was being postponed, arrangements would be made for his submissions to be made and recorded in English on the next date. Admittedly, the petitioner was so informed. Considering the petitioner's repeated allegations of inaccuracies in the High Court record, these arrangements cannot be faulted. It would have been apparent to the petitioner that no proceedings of any consequence were likely to take place on 30.10.89 after the application for a postponement was allowed.

The petitioner repeatedly stressed that he was the victim of a fabricated case, and that the trial was being unduly delayed on various pretexts ; he was clearly labouring under a tremendous sense of grievance. However, 11.5.89 was the third date ; and one of the two previous postponements had been due to his absence. It would seem from the facts set out above, that the petitioner was too quick to see an injury or a slight, where none existed or was intended ; that his recollection was faulty, and that he was somewhat inclined towards exaggeration and speculation. It is clear that there was no intention on the part of Judge or Counsel to deprive the petitioner of the benefits of the settlement of 5.10.89.

I now turn to the petitioner's contention that the proceedings that took place on 30.10.89 were "during the course of the trial" and that the failure to provide a table constituted a breach of the undertaking. The petitioner relied strongly on the judgment of Seneviratne, J., in *Mohan v. Carson Cumberbatch & Co* , [1988] 2 Sri L.R. 75, who held that there is no discrepency between the English and Sinhala texts of Article 106 (1) of

the Constitution, so that " sittings of Court" in the former is identical to " nadu vibhaga" in the latter. Therefore, he concluded, " trial" as used in the settlement, and " nadu vibhagaya" or "Vibhagaya" as used in the journal entries, referred to any proceedings whatsoever. We are not here concerned with the interpretation or application of Article 106 (1), and I have no difficulty in assuming that the relevant proceedings in the High Court should have taken place at public sittings of the Court. Article 106 (1) does not help in determining whether those proceedings were " during the course of the trial", and that question has to be decided in the context of Article 13 (3), as the settlement was reached [in proceedings involving the question whether the petitioner's right to "a fair trial", under Article 13 (3), required that he be provided] with certain facilities; the " trial" contemplated by the parties was a trial under the Code of Criminal Procedure Act. The undertaking was given in that context, and was clearly understood by both parties to refer to the stage of the " hearing" ; even on 30.10.89, the petitioner's discussion with State Counsel proceeded on the basis that the " trial" or " hearing" had not yet commenced. Apart from the intention of the parties, section 196 of the Code of Criminal Procedure Act indicates that the " commencement of the trial" is upon the indictment being read to the accused and the accused being required to plead ; that has not yet happened in this case, and therefore the trial has not commenced. Faced with this difficulty, the petitioner tried to make out that he had pleaded on 16.9.88, and that the record was faulty, but his description of the events of that day indicates only that after the indictment was served either his Counsel or he had remarked that it was a fabricated case and that he was not guilty.

I hold that there has been neither a violation of the undertaking given on 5.10.89, nor any intention of doing so, and I am confident that when the trial commences, in terms of section 196, that undertaking will be honoured . If there are proceedings prior to that stage at which the petitioner requires such facilities, it will be open to him to make an application to the presiding Judge - but that would be a matter not covered by the undertaking already given.

That finding renders it unnecessary to consider the question whether in these proceedings an order could have been made to compel compliance with that undertaking, by way of proceedings for contempt or otherwise ; or whether the amended petition, tendered by the petitioner, (seeking to add the present High Court Judge and the Deputy Solicitor

- General as respondents) should be accepted. The petitioner's application is dismissed, without costs.

DHEERARATNE, J. - I agree.

RAMANATHAN, J. - I agree.

Application dismissed.