

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

In the matter of an appeal in terms of  
Sec.331 (1) of the Code of Criminal  
Procedure Act No. 15 of 1979

**Court of Appeal No.130-2005  
H.C. Gampaha 04 / 99**

Hettiarachchige Chandana Hettiarachchi

**Accused Appellant**

**Vs**

The Attorney General

**Respondent**

Before : W.L.Ranjith Silva, J. & H.N,J, Perera, J.

Counsel: D.S.Wijesinghe PC for the Appellant

Dilan Ratnayake SSC for the Respondent

Argued : 30-01-2012

W/ S : 13-03-2012

Decided: 13 / 07 / 2012

**W.L.Ranjith Silva, J.**

The accused Appellant, who shall hereinafter be referred to as the Appellant, along with another accused was indicted in the High Court of Gampaha for having committed the murder of one Alankara Pendige Tidman Ratnasiri at Korasa on 13<sup>th</sup> of November 1994, an offence under section 294 of the Penal Code punishable under section 296 read with section 32 of the Penal Code. After trial the 2<sup>nd</sup> accused was acquitted. The 1st accused Appellant was found guilty of the charge and was sentenced to death. This appeal is against the said conviction and the sentence.

The bone of contention in this matter before us is the issue whether the Appellant was deprived of a fair trial in that there was a failure to comply with the mandatory provisions of section 195 (ee ) of the Code of Criminal Procedure which requires the learned High Court Judge to inform the accused whether or not he elects to be tried by a Jury. The relevant provision reads as follows;

**Section 195**

Upon the indictment being received in the High Court, the Judge of the High Court presiding at the sessions of the High Court Holden in the judicial Zorn whereat the trial is to be held shall;

**195(ee)**

If the indictment relates to an offence triable by Jury, inquire from the accused whether or not he elects to be tried by Jury.

It would be pertinent to refer to the proceedings of 08 of March 1999 recorded at page 48 of the brief. It is recorded on 08<sup>th</sup> of March 1999 both accused had been present in court but the 1<sup>st</sup> accused Appellant was not represented by a Counsel. A State Counsel appeared for the prosecution and the indictment along with the annexures were handed over to both accused. On that date it appears that initially there had been no Counsel available to be assigned to represent the 1<sup>st</sup> accused Appellant. On that day the 2<sup>nd</sup> accused was granted bail. The material part of the brief reads as follows;

*"At this stage Mr. Senaka de Silva attorney-at-law is assigned by the state on behalf of the 1<sup>st</sup> accused. The Attorneys At Law on behalf of the 1st and the 2<sup>nd</sup> accused inform court to take up the trial before a Judge without a Jury. Accordingly I order that the trial to be heard before a Judge without a Jury".*

Thus it appears that at the commencement of the proceedings the 1<sup>st</sup> accused Appellant was unrepresented but the 2<sup>nd</sup> accused was represented by several Counsel led by a senior Counsel. The learned Judge having found in the first instance that there was no Counsel available in court to be assigned to the 1<sup>st</sup> accused Appellant subsequently on the same day before the case was adjourned had assigned Mr. Senaka de Silva attorney-at-law to represent the 1<sup>st</sup> accused Appellant. On the same day Counsel who appeared for both the accused informed the learned High Court Judge that the trial should be before the High Court Judge without a Jury. In pursuance to that intimation made by both Counsel the Learned Judge made order that the trial be held before a Judge without a Jury.

The proceedings make it abundantly clear that the learned High Court judge had not directly inquired from the 1<sup>st</sup> accused whether or not he elects to be tried by a Jury. A careful reading of the proceedings makes it manifestly clear that what was conveyed to the Judge was the wish of the Counsel and not the wish of the accused Appellant.

In this regard I have to be guided by the case record and whatever the entries found in the Record cannot be lightly disregarded. The Record is the sole guide to what actually transpired in court and the Record cannot be impeached or supplemented

without a substantial reason. In this regard I would like to refer to one of my own judgments which appeared in Appellate Court Judgments- Criminal Law volume 11 March - July case number **C.A.93-2007 H.C. Ratnapura No.147/03 decided on 18-05-2010**. I held in that case, I quote “in any case we do not have sufficient material to contradict the record and we have to go by the record. The record does not disclose that the Jury option had been given. Therefore we have to sustain this objection and in view of the Supreme Court decision in the **Attorney General Vs Viraj Aponso and Others S.C. 24 / 2008** we hold that there is an illegality that vitiates the entire proceedings”.

It must be emphasized that the right to elect a Jury trial is the right of the accused and not that of his Counsel. The Judges are required by section 195ee of the Code of Criminal Procedure Act to inquire from the accused, directly, whether he wishes to be tried by a Judge or a Jury. This is a mandatory duty cast on the trial Judge and cannot be delegated. The law has advisedly cast this duty on the Trial Judge and not on the Counsel. It is one of the few instances provided in the Code of Criminal Procedure Act where the accused is directly addressed by the Judge over the head of the Counsel. The law has advisedly placed this duty on the judge to directly inquire from the accused whether he wishes to be tried by a Judge or a Jury. This is for the reason that the concept of a Jury trial is the recognition of the basic right of a person to elect to be

tried by his own peers. It has to be born in mind that the Counsel May for various reasons, e.g. Convenience or for the convenience of the Judge or for the convenience of a Senior Counsel and/or for various other reasons not inform the accused of his basic right to a Jury trial or pressurize the accused to agree to his preference. Hence it is a mandatory requirement for the Judges to inform the accused of his right to a Jury trial and record that the accused was so informed. This is a must. In this regard I refer to the dicta in **Nimal Bandara Vs The State 1996 1 SLR 214 and Kadirasan & Others Vs Hon. Attorney general reported in appellate Court judgments C.A. 24/2004 (unreported) 2007 volume 2 page 235 at page 2 239.**

The learned State Counsel contended that the lawyers of the accused have conveyed the option of the accused, to be tried without a Jury, to Court and the Court had duly recorded this option, that there after the trial had been fixed to commence on several dates where the Appellant had ample opportunity to change his option if he so desired and that the Appellant, whilst being represented by Counsel, had not made any effort to change the mode of trial even up to the date of the commencement of the trial in this case. He further contended that the presumption under section 114 (d) of the Evidence Ordinance should apply to this case and therefore what is stated in the case record cannot be contradicted on a mere assertion of the Appellant. In support of his argument he cited the decision of H/L Justice A.De.Z.Gunawardane reported in

**Dharmasena Vs The State 1994 1 SLR at page 212.** In which H/ Lordship held that it is within the competence of Counsel to convey the accused wish to Court in a Jury option case. His Lordship further held I quote “in our view, whilst such an election will no doubt have to be made personally by the accused, the decisions so made by the accused, may nevertheless be conveyed to Court by his Counsel”. (Emphasis is mine)

A.De.Z. Gunawardane,J. in **Dharmasena Vs The State** (supra ) observed as follows, I quote; “ upon an examination of what transpired in court it is clear that it was the accused Appellant who had desired to change the election made by him in the first instance, and that the Counsel had merely conveyed that wish to Court. It is within the competence of the Counsel to do so.” This in our view does not deviate from the views expressed by the Supreme Court in **Attorney General Vs Viraj Aponso and Others S.C. 24 / 2008** or **Nimal Bandara Vs The State 1996 1 SLR 214** and **Kadirasan & Others Vs Hon. Attorney general reported in appellate Court Judgments C.A. 24/2004 (unreported) 2007 volume 2 page 235 at page 239.** **Wijesena Silva Vs Attorney General 1998 3 SLR at page 309.**

Of course a lawyer has a right to appear for an accused and express his views to the bench after consultation with his client. This is an inalienable ‘*right to representation*’ by a lawyer. But a lawyer shall do so only in consultation with his

client and this will not permit a lawyer to act arbitrarily or permit the Judge to overlook, circumvent or transgress the mandatory provisions of the Criminal Procedure Code with regard to the inalienable and fundamental right of a citizen to a fair trial. In this case the facts reveal that on the very same day a lawyer was assigned to appear for the accused Appellant, the Counsel, who was so assigned, to appear for him had consented to a trial without a Jury. It appears that at the beginning there was no Counsel in court to be assigned but later on a Counsel was assigned to appear for him. The record does not show that the learned judge had informed the accused Appellant of his right to a Jury Trial. It also appears that the Counsel was assigned at the *eleventh hour* and had no time to consult his client and that the Counsel or the accused Appellant had no time to make up their minds as to what mode of trial they should adopt. Right to a fair trial is enshrined in Article 13 (3) of our Constitution and thus recognizes the right to representation, which right, to be meaningful; the Counsel must have a decent opportunity to consult his client before reaching a decision on a fundamental issue such as the option for a Jury Trial.

For the reasons adumbrated in the foregoing paragraphs of this Judgment, I am of the view that the accused Appellant's fundamental right to a fair trial has been violated in the instant case which is not merely an irregularity but an illegality that cannot be cured, an illegality that vitiates the whole proceedings including the Judgment.



Therefore I set aside the Judgment and the conviction and remit this case for a retrial by the High Court. The High Court shall give priority to the hearing of this case. The Registrar of this Court is hereby directed to send the main case record together with its annexures and attachments to the relevant High Court forthwith.

Subject to the above direction we set aside the conviction and sentence.

**JUDGE OF THE COURT OF APPEAL**

Nalin Perera, J.

I agree

**JUDGE OF THE COURT OF APPEAL**

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**FIELD REPORT**



Customer Details

Name : .....  
Address : .....  
Tel. : .....  
Contact Person : .....  
Machine Type : .....  
S/N : .....

Date : .....

Technician/Engineer Name : .....

Job No. : .....

Repair Type

Warranty   
Service Contract   
Chargable   
Special Request

Technician

Arrival Time : .....  
Departure Time : .....  
Invoice No. : .....  
Invoice Date : .....

**Fault Description**

**Repaire Action Taken**

**ENGINEERING CHARGES**

VIRUS CLEANING & UPDATING	RS. 1500/-
SOFTWARE INSTALLATION	RS. 1500/-
INSPECTION CHARGES	RS. 1000/-
OTHER CHARGES	RS. ....

**Payment Terms :** Payments should be made by CASH ONLY

**Office Use Only**

The above job has been completed to satisfaction of the Customer

**To be filled by Customer**

The above job has been done to my total satisfaction

Yes   
No

Special Remarks : .....  
.....  
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Customer's Signature

Tech/Eng's Signature

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Manager - Customer Support & Services