

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

In the matter of an Application for Revision of an order  
made by the High Court of Batticaloa in terms of article 138 of the  
Constitution.

CA Application No.68(PHC)APN/2011

High Court Batticaloa

The Attorney General

Case No.1815/2001

Vs.

Isma Lebbe Faizer *alias* Faizal

AND NOW BETWEEN

Isma Lebbe Faizer *alias* Faizal

No 720 Gandhiyar Road,

Eravur 03

Presently of Welikade prison

Petitioner-Convict-Accused

Vs.

The Attorney General

Respondent

**Before** : **Sisira de Abrew, J**

**K. T. Chithrasiri, J**

**Counsel** : **K. S. Ratnavale with Suranga Bandara and S.M.M. Samsudeen**

**for the Petitioner.**

**Decided on** : **25.09.2012**

**Sisira de Abrew, J**

✓ Heard both counsel in support of their respective cases. The Accused-Petitioner in this case was convicted for an offence under section <sup>2(1)</sup>~~21~~ of the Offensive Weapons Act No: 33 of 1969 and for an offence under section 9(2) of Explosive Ordinance. He was tried in absentia. On the 1<sup>st</sup> count he was sentenced to a term of 10 years rigorous imprisonment with a fine of Rs. 5000/-. On the 2<sup>nd</sup> count he was sentenced to a term of two years rigorous imprisonment. The High Court judge made an order to the effect that both sentences should be implemented concurrently. The High Court Judge sentenced the accused-petitioner to a term of 1 year imprisonment in default of the payment of fine of Rs.5000/-.

After the conviction the accused petitioner was produced before the High Court on 18.10.2010 and was sent to jail in terms of the punishment imposed on him. We note that the Learned High Court Judge has failed to comply with section 241(3) of the Criminal Procedure Code, when he <sup>ref</sup> commit the accused petitioner to jail on 18.10.2010. Learned state counsel concedes that the procedure adopted by the learned High Court Judge on 18.10.2010 is erroneous. We note that the Learned High Court Judge has failed to give an opportunity to the accused appellant to explain his bona fides for his absence, which is a requirement under section 241(3) of the Criminal Procedure Code. We therefore decide to set aside <sup>the</sup> order of the Learned High Court Judge dated 18.10.2010. Learned State Counsel concedes to set aside the said order.

On 21.03.2011 the accused petitioner filed a petition in the High Court for a denovo trial in terms of section 241(3) of the Criminal Procedure Code. Learned High Court Judge refused

the application for a denovo trial. This order was made on 05.05.2011. We have earlier observed that failure to give an opportunity to the accused petitioner to explain his absence at the trial is erroneous. We are of the opinion that the Learned High Court Judge should have given an opportunity to the accused appellant to explain his absence at the trial which is a requirement under section 241(3) of the Criminal Procedure Code.

We direct the Learned High Court Judge to hold an inquiry under section 241(3) of the Criminal procedure Code. In view of the conclusion reached by this Court, we are unable to permit the order of the Learned High Court Judge dated 5.05.2011 to stand. We therefore set aside the order of the Learned High Court Judge dated 5.5.2011. The Learned High Court Judge is directed to hold an inquiry under section 241(3) of the Criminal Procedure Code. The accused petitioner is entitled to give evidence at the said inquiry. He is also entitled to call his witnesses at the said inquiry. Proceedings are terminated.

Learned Counsel for the petitioner submits that the accused has been serving the jail sentence from 18.10.2010. He therefore makes an application to release the accused petitioner on bail. We note that the Learned High Court Judge has jurisdiction to enlarge the accused on bail. In these circumstance, we direct the Learned High Court Judge to consider the application for bail in the event of an application being made.

**Judge of the Court of Appeal**

**K. T. Chithrasiri, J**

I agree.

**Judge of the Court of Appeal**