

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

CA PHC APN 137/2011

Mamangam Parimalarajah
Koduwamadu,
Chenkalady.

Appellant

Vs.

Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondent

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

Counsel : S. Sinnatamby with R. Sasikumar & Ganeshwaran
for the Accused-Petitioner.

Harippriya Hayasundara SSC for the Respondent.

Argued &
Decided on : **21.05.2012**

Sisira de Abrew, J

Heard both counsel in support of their respective cases. In this case the accused petitioner was charged under Section.296 of the Penal Code. Trial against the accused petitioner commenced on 29.09.2005. After the evidence was recorded on 29.09.2005 the trial was postponed for 29.11.2005. On both days accused petitioner was present in court. On 29.11.2005 the trial was postponed for 01.12.2005 on which date the accused was absent.

The learned High Court Judge issued a warrant against the accused as the accused was absent on 01.12.2005. Learned High Court Judge there after on 22.06.2006 recorded the evidence of the RPC 15645 Jinna who was the warrant Executing Officer attached to

Eravur Police Station. According to the evidence of the said police officer he could not go to the residence of the accused petitioner since the said area was an uncleared area.

He has recorded a statement from the Gramasevaka and has said that the accused could not be arrested. Learned High Court Judge has considered the said evidence and the statement made by the Gramasevaka and decided to fix the matter for trial in the absence of the accused petitioner. Under Section 241 of Criminal Procedure Code for the learned High Court Judge to make an order fixing the case for trial in the absence of the accused, he must be satisfied on evidence that the accused was absconding. In our view there was no legal evidence before the learned High Court Judge to make an order under Section 241 of the Criminal Procedure Code. We note that the learned High Court Judge has based his order on the statement made by Gramasevaka to the warrant Executing Officer. Gramasevaka has not given evidence before the learned High Court Judge. Therefore the statement made by Gramasevaka to the Police Officer could not have been considered as evidence by the learned High Court Judge. In these circumstances, we hold that the order made by learned High Court Judge on 22.06.2006 fixing the matter for trial in the absence of the accused petitioner is wrong. We therefore set aside the order dated 22.06.2006. Since we set aside the order of the learned High Court Judge dated 22.06.2006, all other subsequent orders made by the learned High Court Judge should be set aside. The learned High Court Judge has convicted the accused appellant on 28.07.2006 and sentenced him to death. This conviction has been entered in the absence of the accused petitioner.

We set aside the conviction of murder and the death sentence and the order dated 27.01.2011 wherein he refused to order a fresh trial. We direct the learned High Court Judge to rehear the case on the same indictment.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera,J

I agree

JUDGE OF THE COURT OF APPEAL

Na/-