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

In the matter of a petition of appeal in terms of section 331 (1) of the code of criminal Procedure Act No 15 of 1979

High Court (Embilipitiya)
Case No: H.C.E.199/2006

Democratic Socialist Republic of Sri Lanka

(Complainant)

Vs:-

CA 02/2008

01. Hiniduma Dahanayakage Siripala alias Kiri Mahaththaya
02. Henapita Gamage Shantha
03. Kandambige Piyarathne alias Appuhami
04. Karivila Kandhage Upul Priyashantha

Accused

And

01. Hiniduma Dahanayakage Siripala alias Kiri Mahaththaya
Reka Stores Bare
Sudugalahena, Jandura,Panamura

02. Henapita Gamage Shantha
Sisirs Stores Bare
Sudugalahena, Jandura,Panamura

Accused Appellants

Vs:-

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

RESPONDENT

BEFORE : SISIRA J DE ABREW, J (P/CA)(Acting)
UPALI ABEYRATNE, J
P.W.D.C. JAYATHILAKE, J

COUNSEL : Indika Mallawarachchi for the 1st Accused Appellant

Neranjan Jayasigha for the 2nd Accused Appellant

Kapila Waidyaratne A.S.G for the Respondent

Argued On : 20.01.2014

Decided On : 19.02.2014

P.W.D.C. Jayathilake J.

Accused Appellants along with two others have been indicted under Sec.296, 315 and 369 of the Penal Code for murder, grievous hurt and theft respectively. Accused Appellants have been convicted for murder and grievous hurt after trial and sentenced to death. Being aggrieved by the said conviction and the sentence, Accused Appellants have submitted this appeal. The argument raised on behalf of both the Accused Appellants was that they have been denied a fair trial for the reason that the charges have not been

explained to them and not been given an opportunity to plead for the charges under Sec. 196 of the Code of Criminal Procedure Act.

The Respondent has issued the indictment dated 03.10.2002 against the Accused Appellants for committing the murder of Arachchige Premarathna on 31.12.1997, causing grievous hurt to Kankanamge Hinnihami by stabbing and committing the theft of Rs.5000 in the same course of action. Upon receiving the said indictment High Court Judge of Rathnapura has ordered to issue summons on Accused Appellants and other two accused. This order has been made on 18.10.2002. On the summons returnable date namely 13.12.2002 four accused of the indictment were present before the Court and the copies of indictment were served on them in open court of the High Court of Rathnapura.

The relevant journal entry of the case record appears as follows;

A.

12.20.01

වූ/ 1. එච්. ඩී. සිරිපාල
2. එච්. පී. ගාන්ත
3. කේ. ජයරත්න
4. කේ. කේ. උපුල් ප්‍රියගාන්ත

සිටි.

1-4 වුදිත සිතාසි නිකුත් කරන්න.

සටහන් බලන්න.

ජූරි සභාවක් කැඳවන්න.

පැ.සා.සිතාසි.

5/3

අත්:කළේ...

මහාධිකරණ විනිසුරු.

(page 10 of the brief)

The proceedings mentioned in that journal entry appear in the page 35 of the brief. Said proceedings appear as follows;

AA.

<u>රත්නපුර මහාධිකරණ නඩු අංක: 91/2002.</u>

<u>දිනය: 2002.12.13</u>

<u>රත්නපුර මහාධිකරණ විනිසුරු නලින් පෙරේරා මැතිතුමා ඉදිරිපිටදි ය.</u>

1,2,3,4 විත්තිකරුවන් සිටි.

විත්තිකරුවන් වෙනුවෙන් නිතිඥ ජස්ටින් මහතා පෙනි සිටි.

පැමිණිල්ලට රජයේ අධි නිතිඥ දිලිප පීරිස් මහතා පෙනි සිටි.

චුදිතයන්ට අධි චෝදනා පත්‍ර සහ ඇමුණුම් භාර දෙමි.

ඇගිලි සලකුණු වාර්තාවක් කැඳවන්න. විත්තිකරුවන් වෙනුවෙන් රජයෙන් නිතිඥ අන්ද්‍රයස් මහතා පත් කරමි.

ජූරි සභාවක් කැඳවන්න. පැ. සා සිතාසි නිකුත් කරන්න.

චුදිතයින් දැනට තබා ඇති ඇප මත මුදා හරිමි.

විභාගය 2003.03.05 වැනි දිනට නියම කරමි.

නලින් පෙරේරා

මහාධිකරණ විනිසුරු - රත්නපුර.

2002.12.13.

05.03.2003 was the 1st date of trial. All four Accused and witnesses No: 1, 2, 4 and 5 were present and it was ordered to re-issue summons to witness No: 3 and also to summon a jury. Witnesses present were warned to appear on the next date and trial postponed to 19.05.2003. The relevant journal entry of the original record appears as follows.

5.3.2003.

වූ/ 1. එච්. ඩී. සිරිපාල
2. එච්. පී. ශාන්ත
3. කේ. ජයරත්න
4. කේ. කේ. උපුල් ප්‍රියශාන්ත
} සිටී.

පැ.සා.සි.

1,2 හා ඇත.

ඉතිරි සි.භා.නැත.

පැමිණ සිටින සාක්ෂි 1,2,4,5 අවවාද.

ජූරි සභාවක් කැඳවන්න. සටහන් බලන්න

විභාගය 19.05.2003

අත්:කළේ...

මහාධිකරණ විනිසුරු.

The 2nd trial date was 19.05.2003. All accused and witnesses No: 1, 2, 4 and 5 were present on that day. Court ordered to issue summons to witness No: 3 and summon a jury. Trial was postponed for 03.09.2003.

Defense Counsel filed a list of witnesses for the Accused on 12.08.2003 and moved to issue summons on the witness. Court ordered to issue summons accordingly.

On next three trial dates namely 03.09.2003, 29.09.2003 and 19.01.2004 Accused and the same witnesses were present while witness No: 03 was absent. Another list of witnesses had been filed by the Defense Counsel on 03.05.2004.On 29.09.2003 an application had been made to Court to try the case without a jury and the said application had been allowed.

The trial was postponed for the reasons recorded as well as not recorded up to the 10th trial date according to the record namely 26.06.2006 on which day the accused and witnesses were informed to appear before the High Court of Embilipitiya as this case came within the territorial jurisdiction of that newly established court . The examination of the witnesses commenced before the High Court Judge of Embilipiya following two postponements of the trial in that Court as well. By then the prosecution witnesses who were present before the Court on trial dates had been warned at least fourteen times.

Beginning of the proceeding of 19.06.2007 appears as follows;

ඇඹිලිපිටිය මහාධිකරණ විනිසුරු එස්. ද. එල්. තෙන්නකෝන් මැතිණිය ඉදිරිපිටදිය.

නඩු අංකය :- එච්.සි.ජ. 199/2006

දිනය :- 2007.06.19

1,2,3, වුදිතයින් සිටී.

චූදිතයින් වෙනුවෙන් නීතිඥ සමිත් ලියනගේ මහතා පෙනී සිටී.

පැ.සා.1 සිටී.

පැමිණිල්ල වෙනුවෙන් රජයේ අධිනීතිඥ යුහාන් අබේවික්‍රම මහතා පෙනී සිටී.

මෙම නඩුව අද දින විභාගය සඳහා නියමිතව ඇත.

සුදානම් බව දන්වා සිටී.

විභාගයට ගනිමි.

The prosecution case has been closed on 24.07.2007 after leading evidence of witness No: 1 to 5 and marking the productions No: 1 to 4. An application had been made on behalf of the Accused Appellants to discharge them under Sec.200 (1) of the Code of Criminal Procedure Act without calling the defense for the reason that prosecution had not proved the case beyond reasonable doubt. Learned Trial Judge rejected the said application after hearing the submission and decided to call for the defense. As the trial had been adjourned for the said purpose on 18.09.2007, Accused Appellants had made dock statements and closed their case on the next trial date. When the case was called on 07.01.2008 for addresses, the Trial Judge who so far heard the case had been transferred and the case had been called before the succeeding High Court Judge. It has been submitted on behalf of the Accused Appellants that they had no objection for the adoption of proceedings which took place before the predecessor and the judgment to be pronounced by the succeeding High Court Judge. Accordingly the new High Court Judge had decided to adopt the proceedings and pronounce the judgment after the addresses. The judgment of this case had been pronounced on 21.01.2008 after the addresses of prosecuting counsel and the defense counsel.

General procedure of a trial before High Court has been provided in chapter XVIII of the Code of Criminal Procedure Act. The role of a High Court Judge, when the indictment is received has been provided in Sec.195. Causing the Accused to appear before the Court and serving a copy of the indictment along with its annexes on each of the Accused, inquiring from the Accused whether the trial be conducted with or without a jury, are the fundamental duties.

It is now a well settled Law that the said jury option should be given directly to the Accused irrespective of the fact that whether they were represented or not by an Attorney at Law. It is the discretion of the Accused that should choose either a jury trial or a non jury trial. Failure to give jury option to the Accused necessarily causes setting aside the entire proceedings with an order for a re-trial in an appeal against a conviction. According to the provisions that follow, Accused shall present themselves before the Court at the commencement of the trial, the indictment shall be read over and explained to him and the Accused shall be asked whether he is guilty or not of the charges.

Right of the Accused to a fair trial and qualities of a fair trial have been discussed in the case of Attorney General V. Aponso (SC Appeal No: 24/2008). It has been emphasized among the other matters that the right of an Accused person to be informed of promptly and in detail in a language he understands of the nature and cause of the charge against him, and that the trial judge to inquire from the Accused at the time of the serving the indictment whether or not the Accused elects to be tried by a jury.

Vithanage Gunawardane V. Attorney General (CA 22/2002) is a case in which the counsel who appeared for the Respondent accepted the fact that the charge has not been read and explained to the Accused Appellant.

Accordingly the Court of Appeal has set aside the conviction and the case was sent for a retrial.

This case has been followed in the case, Vijesingha Rajakaruna and another V. Attorney General (CA 206-207/2010).

In that case Respondent has cited an English decision, namely, R V.Williams reported in 1977(1) AER at page 874. It is a case where the court has decided where an accused intended to plead not guilty, the omission of a formal arraignment and consequent failure to take a plea did not vitiate the trial provided that a plea of not guilty had been vicariously or tacitly conveyed or a formal arraignment had been impliedly waved by the accused. The Court of Appeal has not accepted this decision. Reason given is that the procedure adopted in English Court was much different to the procedure adopted in Sri Lanka.

In Kodituwakku V. Republic, (CA Appeal No: 144/2005 – 2010(BLR) 167) it has been decided by Justice Sisira De Abrew & Justice Upali Abeyratne that

a. Before the commencement of the trial, the accused must be asked whether he is guilty or not guilty of the charge. This is a fundamental requirement in criminal Law.

b. The right to plead guilty or not guilty to the indictment is a statutory right given to an accused person which must be safeguarded by courts.

According to the provisions of Law and the judicial precedents, it leaves no room for trial judges to flout the above pre-trial requirements. Failure to

fulfill anyone of them leads to a nullification of the entire exercise. The responsibility of this is entirely attributed to none other than the trial judge. The procedure followed by the trial judges of the instant case has been discussed earlier. The proceedings of 13.12.2002 deserve the attention to be paid once again.

The knowledge as to how this practically takes place in a trial court is much more important than what is found in books. Not a single trial judge himself reads and explains indictments to the accused in our courts. It is always done by the interpreter who is an officer of the court appointed by the judicial service commission for that purpose. Similarly no trial judge record proceedings other than making journal entries. Recording the proceedings is done by the stenographers appointed by the judicial service commission for that purpose.

One journal entry and proceedings thereof have been quoted in this judgment as A and AA. Journal entry A is relevant to the proceeding referred to as AA. Journal entry A is stated in two parts. First part of it which is in bold type is an entry by the subject clerk. The second part is the note made by the trial judge in his own hand writing.

The nature of these entries differs from judge to judge. Some are in detail while others in brief. This particular journal entry is a brief one. For his convenience there is a request to refer the proceedings. Those proceedings which have been marked as AA in this judgment are prepared by the stenographer, who takes notes in shorthand in open court and transformed in to typewriting form in the office. It is forwarded for the judge's signature on a later day. When careful attention is paid to the aforesaid proceedings, it transpires, what actually has happened on that day. It shows that the judge

has performed the duties and practices laid down in Sec. 195 (a) to 195(g) of the Code of Criminal Procedure Act.

First he has served the indictment with annexes to the Accused. Next he has followed Sec. 195(e). Thereafter he has nominated an assign Counsel following Sec. 195(g).

Even though there is no mention about inquiring from the Accused whether they elect a jury or not, that objection has not been raised for the Accused Appellants because the fact that there is an order to summon a jury implies that it has been actually inquired. The judge has followed Sec. 195 (d) by making an order to release the Accused on bail bonds that they had already entered.

The trial judge has further followed Sec.195 (c) by informing the Accused of the date of trial. This has gone to the record in the proceedings recorded by the stenographer as **"the trial fixed for 05.03.2003".** The judge has stated, "vide proceedings" in his hand writing in the journal entry made on 05.03.2003 which was the 1st date of trial. The said clause, "vide proceedings" which appears in the original case record is not included in the brief. There is no need for the trial judge to mention this clause unless he has followed Sec.196 on that 1st date of trial.

The learned Additional Solicitor General appeared for the Respondent opposed to the application made for the Accused Appellants. He made submission on relevant sections of Code of Criminal Procedure Act with regard to the commencement of the trial. According to Sec. 196, if the Accused tenders a plea of guilty and the judge is satisfied that the Accused has accurately realized the effect of the plea the said plea shall be recorded and the Accused could be convicted. Provided that Accused remain silent or plead not guilty of the charges a trial shall be conducted. Accordingly three

options are available to the Accused under Sec. 196 of the Code of Criminal Procedure Act at the commencement of the trial,

Namely

(a). To admit the culpability by tendering a plea of guilty.

(b). To remain silent without tendering a plea.

(c). To tender plea of not guilty.

To choose the 1st option more likely leads to a conviction and to choose 2nd and 3rd options necessarily result in facing a trial.

It must be noted that only in the Sec.197 necessity arises to record the "plea" on the indictment if the Accused tenders a plea of guilty. But where the Accused pleads "not guilty" or remains silent, recording is not a requirement. What is to be done is accused to be tried. Learned trial judge who had taken up the case on, 19.06.2007 has acted under Sec.198 of the Code of Criminal Procedure Act, as Accused were ready to face for the trial. Thus it is evident that what is to be done has been correctly followed in this case. That is why the learned counsel who had appeared for the Accused in the trial court has taken early steps to get ready for the trial by filing several lists of witnesses.

At the time of the adoption of proceedings before the new trial judge, the learned counsel who had appeared for the Accused had been courteous enough to request the court to note the fact that the Accused had requested the court to try them without a jury and withdrawn their 1st application to try before a jury. It is evident that this particular request confirms that no irregularity had taken place during the cause of the trial proceedings.

Hence non appearance of certain words in relevant proceedings of the case record it should not be interpreted to give the effect that the indictment was not read and explained to the accused which necessarily results in the nullification of the entire trial proceedings. Nullification of proceedings done on a technical matter which leads to a retrial is only harassment to the affected parties by enlarges is an injustice to the society.

Since the reasons discussed above are such, I am of the view that, there is no merit in the preliminary objection raised for the Accused Appellants as a ground of appeal. I therefore dismiss the application made on the preliminary objection.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

UPALI ABEYRATNE, J

I agree.

JUDGE OF THE COURT OF APPEAL