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 (Galle)

Case No: H.C. 3020

CA 135/2011

Democratic Socialist Republic of Sri Lanka

(Complainant)

Vs:-

01. Shelton Wannaku Korala
02. Sham Wannaku Korala
03. Nanayakkara Vithanage Padmasiri
04. Kumarawadu Lalith Nishantha

Accused

And : Now

Nanayakkara Vithanage Padmasiri,

Milla,

Hikkaduwa.

03 Accused Appellant

Vs:-

The Hon Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

BEFORE	:	SISIRA J DE ABREW, J (P/CA) P.W.D.C. JAYATHILAKE, J
COUNSEL	:	Saliya Peiris with Gayan Maduwage for the Accused Appellant. Haripriya Jayasundara D.S.G. for the Respondent.
Argued On	:	18.11.2013
Decided On	:	14.03.2014

P.W.D.C. Jayathilake J.

Nanayakkara Vithanage Pathmasiri the Accused Appellant was indicted with three others for being a member of an unlawful assembly, with the common intention of causing hurt to Pinnaduwage Yasarathna De Silva, attempting to murder said Yasarathna De Silva while being a member of said unlawful assembly and attempting to murder said Yasarathna De Silva acting with common intention, under Sec. 140, 300 read with 146 and 300 read with 32 of the Penal Code respectively. As the 1st the 2nd and the 4th accused of the indictment were dead at the time of the commencement of the trial, the Accused Appellant was tried on the said counts in the amended indictment. He was acquitted from counts No: 1 and 2 and convicted for the 3rd count. The learned trial judge has imposed him two years rigorous imprisonment and a fine of Rs: 5000/- carrying a default sentence of six months simple imprisonment. Being aggrieved with the said conviction and the sentence, the Accused Appellant has submitted this appeal.

Pinnaduwage Yasarathna De Silva was an inspector of Police. By the time of 1997 he was attached to the Rathnapura Police Station. His permanent residence was at Hikkaduwa. As he had served attached to the Police Station Galle prior to his tenure of office at Rathnapura he had to travel once or twice a month to Courts in Galle. He was in the habit of visiting his residence on those occasions. As he had a case in the Additional Magistrate Court of Galle on 29.10.1997, he came on the previous day namely 28.10.1997, to his permanent residence which was at said address. While he was seated in the sitting room of his house having a conversation with his mother around 5.00

p.m. a gang of men who came on two motor bikes, shot at him with a revolver. He identified three persons among five. The Accused Appellant is one among the said identified persons.

Yasarathna ran inside the house. Then he heard the sound of another two revolver shots. Yasarathna identified the Accused Appellant at the identification parade held in the Magistrate Court.

Even though the only evidence available to relate the Accused Appellant to the shooting incident was the testimony of Yasarathna, the learned trial judge decided without any hesitation that his evidence has to be believed when considering the evidence of his mother and the investigating officer. Although Yasarathna has stated that five men were involved in the incident in his evidence in the trial court, he has accepted the truthfulness of the evidence given before the Magistrate where he has mentioned the participation only four persons. The trial judge has acted on that evidence and decided that the unlawful assembly had not taken place. Yet she has come to the conclusion that the Accused Appellant has acted with the common intention of shooting incident for the reason that he has come with the person who fired three revolver shots at Yasarathna.

Indictment of this case has been received by the High Court of Galle on 13.12.2007 and the High Court has ordered to issue summons to the accused to appear on 04.03.2008. On the summons returnable date namely 04.03.2008 only the first accused was present. It has been informed that the 2nd and 4th accused were dead by producing their death certificates. The Accused Appellant who was the 3rd accused had been represented by an Attorney at Law. The said Attorney at Law has informed the court that the Accused Appellant was abroad. An assigned counsel has been appointed for

the 1st accused as he was unrepresented. The court has directed the first accused to give necessary instructions to the assigned counsel and bail order had been made in respect of him. There is no mention about the steps under the provisions of Sec. 195(e) and (e e) of the Code of Criminal Procedure Act. But step under Sec. 195(c) is not arising as the judge has given a calling date to take steps under Sec.241 of the Code of Criminal Procedure Act in respect of the Accused Appellant. On 09.09.2008 which was a calling date given to take steps under Sec. 241 it has been informed that the 1st accused was dead. As the prosecution has led evidence under Sec.241 on the next calling date court has decided to proceed the case against the Accused Appellant in absentia. A copy of the indictment has been given to the Attorney at Law who represented the Accused Appellant on that day. There is no mention about the step under Sec. 195 (e e). The case has been fixed for trial. The trial was postponed to 10.06.2009 as the Attorney at Law of the Accused Appellant was not ready on the 1st date of trial.

When the case was taken up for trial on said date the Attorney at Law who appeared for the Accused Appellant had informed the court that the Accused Appellant was employed in a Middle East country and the Accused Appellant had expected to be present in court on that date. However, he had been unable to come because he had been under medical treatment for a lung disease in a hospital in that country. Therefore the Attorney at Law has moved for a postponement of the trial to surrender the Accused Appellant to the court and further informed that the Accused Appellant was willing to tender a plea of guilty. The trial judge has postponed the trial on the said application. But on the next trial date witness No: 1 had informed the court he had some information of the presence of the Accused

Appellant in Sri Lanka. On the said statement the case had been taken out of the trial role and warrant of arrest was issued by the trial judge to arrest the Accused Appellant. However the Accused Appellant had never been present in court nor had surrendered to the court until the date of the commencement of the trial.

Learned Counsel for the Accused Appellant submitted that the trial judge had failed to comply with Sec.195 (ee) of the Code of Criminal Procedure Act. The argument of the learned counsel for the Accused Appellant was that the step of inquiring whether the trial to be conducted with or without a jury was mandatory even when the accused was absent but represented by an Attorney at Law.

A common and frequent argument put forward before the Court of Criminal Appeal with regard to the trials where said step has been overlooked is that it is the discretion of the Accused to make a choice between a trial with a jury or without a jury. This argument has been extended up to the fact that the said inquiry has to be made not from the Attorney at Law, but from the Accused and the answer should come from the mouth of the Accused.

Even though the learned Deputy Solicitor General appeared for the Respondent was deeply concerned about the issue, she invited the court to consider the relevant provisions of the Code of Criminal Procedure Act with regard to the trials in the High Court in the absence of the accused.

The relevant procedure with regard to the trials in the High Court in the absence of the accused has been provided in Sec.241 of the Code of Criminal Procedure Act. It is quite clear as per the said section that the trials of both types, namely jury trials and non jury trials could take place even

when the accused is absent. There are two parts in Sec.241, out of which one is that the indictment has been served on accused but he gets absent subsequently and the other one is that the accused is absconding or has left the island and it has not been possible to serve indictment on him.

The occasions fall into the first category all requirements under Sec. 195 of the Code of Criminal Procedure Act have to necessarily be followed which includes inquiring the jury option from the accused. Therefore it appears that if the accused has opted a jury trial at the time of a copy of the indictment to be served on the accused under Sec.195, a jury trial has to be conducted even in the absence of the accused. The question arises with regard to the procedure to be followed in the 2nd category. It is provided in Sec 241(2), the absence of the accused shall not be deemed or construed to affect or prejudice the right of the accused to be defended by Attorney at Law. Therefore the accused has the right to give instructions to an Attorney at Law to defend himself in his absence. Here, it should be mentioned that it is to be considered as a maxim that an Attorney at Law appearing before a court to defend an accused only on instructions of such person and not otherwise. Therefore an Attorney at Law who is appearing to defend an accused person under Sec. 241(2) of the Code of Criminal Procedure Act has no discretion to opt for a jury trial or non jury trial without proper instructions received from such person.

When trial shall be by jury and when not, has been provided in Sec.161 of the Code of Criminal Procedure Act. Sec 161 as amended by Act No.11 of 1988 is as follows;

"Subject to the provisions of this Code or any other Law, all prosecutions on indictment instituted in the High Court shall be tried by a Judge of that Court:

Provided that in any case where at least one of the offences falls within the list of offences set out in the second schedule to the Judicature Act, No. 2 of 1978, trial shall be by a jury, before a Judge, if and only if, the accused elects to be tried by a jury"

Accordingly trial shall be by a jury, before a judge, if an only if, the accused elects to be tried by a jury according to the above section. Sec. 195 (e e) which should be followed by the trial judge at the time of a copy of the indictment to be served on the accused under Sec.195 was introduced by the same amendment Act to the Code of Criminal Procedure Act. It is impossible to follow steps under Sec.195 at the instances fallen under Sec.241 (b). The Attorney at Law, who is appearing on the instructions received from an accused person to defend him under above mentioned Section, has a professional duty to make such applications to the court according to the instructions that he has received from his client. Therefore if the accused has given instructions to the Attorney at Law appearing to defend himself the duty lies on said Attorney at Law to inform court that accused wishes himself to be tried by a jury and make necessary application in that regard. Trial Court cannot inquire from the accused as he was absent. If the Attorney at Law who appeared for the accused had received instructions to get a jury trial he would have informed Court and made an

application for a jury trial. His failure suggests that he had not received such instructions. If the Attorney at Law does not request a jury trial when the accused tried in absentia what is the next step that trial Court should take. The judge should proceed with the trial following Sec.161 of the Code of Criminal Procedure Act. Under those circumstances one cannot contend that trial Court had not complied with Sec.195 (ee) of the Code of Criminal Procedure Act.

Learned Counsel for the Accused Appellant did not raise any other ground. For the above reason, we hold that there is no merit in this appeal. We affirm the conviction and sentence and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

SISIRA J DE ABREW, J (P/CA)

I agree.

PRESIDENT OF THE COURT OF APPEAL