

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

Thangiah Sathyaseelan alias
Shakthi

Accused-Appellant.

**C.A.No.40/2010.
H.C. Kalmunai No.110/2009**

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

Respondent.

BEFORE : M.M.A. Gaffoor J. and
K.K.Wickremasinghe,J.

COUNSEL : Amila Palliyage with Upul Dissanayake ,
Eranda Sinharage for the Accused-Appellant
A. Jinasena SDSG for the A.G.

**Argued and
Decided on** : 06/09/2016

M.M.A. Gaffoor J.,

The Accused-Appellant was indicted in the High Court of Kalmunai for committing the murder of One Ponniah Navaratnam which is punishable under Section 296 of the Penal Code. At the conclusion of the trial learned High Court Judge found the accused guilty as charged and sentenced him to death. The accused –appellant has preferred this appeal against the said conviction and sentence.

This matter came up for argument the Counsel for the accused-appellant

Were confined to following grounds of appeal:

1. The prosecution has failed to comply with Section 199 (3) of the Code of Criminal Procedure Act No. 15 of 1979 and non-compliance of the said procedure stipulated in Section 199 (3) necessarily vitiates the conviction and the death sentence.
2. The Procedure adopted by the learned trial Judge contrary to the provisions of section 165 of the Evidence Ordinance and violating the norms and principles of an adversary system of Criminal Justice.

The counsel for the accused-appellant further submitted that upon perusal of the above mentioned proceedings and the corresponding journal entries and the indictment of the brief, it is apparent that there is a total failure on the part of the learned Trial judge to comply with the aforementioned mandatory Provisions as embodied in Section 199 (3) of the CPC and he further submitted that the Provisions relating to adducing all statement of the accused at the non-summery inquiry, have not been comply by the learned trial Judge, wherein the procedure adopted by the learned trial judge not in accordance with Section 199(3) of the CPC.

Counsel for the accused-appellant further draws the attention of Court to the following pages Pw1- pgs 58 to 61, Pw2- Pgs. 69,70,73,75,78 ,80 to 84 , Pw-12 Pgs.88,90,97 to102 Pw10- Pgs.107 to 111, Pw6 – Pgs. 113 to119, Pw8- Pgs.124 to 126 of the appeal brief in order to satisfy the nature question put and the extend of intervention of the learned trial Judge during the course of the trial. Upon perusal of the questions put by the learned trial judge in the above said pages it is manifestly clear that the learned trial judge had encroached the duties and descending to the arena of the prosecuting

counsel. Some of the questions put by the learned trial judge are leading questions and some amount to irrelevant whilst not relating to the fact in issue. Counsel for the accused-appellant further cited to case in *queen vs Aluthge don Hemalapa 64 NLR* citing *Abdul Rahaman Vs. The King Emperor 4 (4) (7926-27 I.A.96 at 104)* Five Honorabel Justices of the Supreme Court held thus “ they wish to be understood that no serious defect in mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused.” It was further held thus “ that it is a fundamental right of an accused person to be tried in accordance with the procedure prescribed in the Criminal Procedure Code and the practice established there under. It is illegal in a criminal trial to follow a procedure to warranted by the code or the practice there under. He recall the following words of Lord Herschell L.C. in *Sumrthwaite vs. Hannay 1 (1 (1984)A.C.494 at 501)* “ If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity”.

Learned S.D.S.G. states that he has no objection for sending this case back for re-trial based on the premise that the brief

demonstrates the involvement of learned trial judge in the leading of the evidence.

Taking all these matter into consideration and the submissions made by the both counsel, we are of the view that there is a fit and proper case to send back for re-trial.

We direct to the Learned trial Judge to re- hear and determine this case on priority basis expeditiously according to Law.

Re-trial ordered.

JUDGE OF THE COURT OF APPEAL

K.K.WickremasingheJ.,

I agree.

JUDGE OF THE COURT OF APPEAL