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

In the matter of an Appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No 15 of 1979.

Attorney General
Attorney General's Department
Colombo 12.

COMPLAINANT

CA/285/2006
H/C Colombo case No. 9999/1999

Wanniarachchige Nandalal Fernando

ACCUSED

And,

Wanniarachchige Nandalal Fernando

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

Before: **Vijith K. Malalgoda PC J (P/CA) &**
H.C.J. Madawala J

Counsel: Nimal Muthukumarana for the Accused-Appellant

Haripprya Jayasundera DSG for the AG

Argued on: 28.01.2015, 09.09.2015, 18.02.2016

Judgment on: 07.10.2016

Order

Vijith K. Malalgoda PC J

Accused-Appellant along with two others were indicted before the High Court of Colombo by the Hon. Attorney General for causing the death of one Liyanage Don Hemantha Perera on 19th December 1986 at Rohini Place Dehiwala an offence punishable under section 296 of the Penal Code.

The High Court trial proceeded before the High Court Judge without a jury against the 2nd and the 3rd accused who were present before the High Court along with the 1st accused who was tried in absentia. At the conclusion of the said trial, the Learned High Court Judge convicted the 1st and 2nd accused for the indictment and imposed death sentence on them and acquitted the 3rd accused.

Being aggrieved by the said conviction and sentence the 2nd accused in the said trial had preferred this appeal before this court.

During the argument before us the counsel for the accused-appellant had raised the following grounds of appeal.

a) The Learned Trial Judge had failed to act under section 195 (ee) of the Code of Criminal Procedure Code Act No. 15 of 1978 by granting the accused-appellant the Jury Option.

b) The Learned Trial Judge had failed to follow the section 280 of the Code of Criminal Procedure Act No 15 of 1978 and granted an opportunity to make the allocutus

c) The Court had not followed the proper procedure laid down in section 48 of the Judicature Act in adopting the evidence

d) The Learned Trial Judge erred in law when he conclude that the evidence of the eye witness is corroborated by his own statement made to the police

As the first ground of appeal the Learned Counsel raised that the jury option had not been given to the accused-appellant.

As this court observes, prior to the amendment introduced to the Code of Criminal Procedure Act No 15 of 1978 by Act No 11 of 1988, the trial before the High Court with regard to the offences indentified by the second schedule to the Judicature Act were tried before a Judge by a jury.

Amendment by Act No. 11 of 1988 amended section 161 of the main Act by repealing the said section and introducing the following new section,

Section 161: 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."

"In addition to the above, section 195 of the Code of Criminal Procedure Act was also amended by insertion immediately after paragraph (e) of that section, of the following paragraph.

(ee) if the indictment relates to an offence triable by a jury, inquire from the accused whether or not he elects to be tried by a jury"

The question of granting the above option was discussed in several cases before the Court of Appeal and the Supreme Court until it was finally settled in the Supreme Court in the case of ***The Attorney General V. Segulebbe Latheef and Another 2008 (1) Sri LR (225).*** In the said case J.A.N. de Silva J (As he was then) held, "the trial judge has an obligation not only to inquire from him whether he is to be tried by a jury, judge must also inform that the accused has a legal right to that effect, non-observance of this procedure is an illegality and not a mere irregularity."

However during the arguments before this court it was revealed that when the indictment was served on the 2nd and the 3rd accused who were present before court on 17.10.2010 the Learned Trial Judge whilst acting on the provisions of section 195 of the Code of Criminal Procedure Act,

Served the copies of Indictment along with its annexures on the two accused

Fixed the trial against the 1st accused in absentia after satisfying that he is absconding

Since no counsel is appearing for the 2nd and the 3rd accused, assigned a counsel to appear for them

Finger Print the two accused

Summoned witness 1, 3 and 5 and fixed the trial before the High Court Judge without a jury for 30.11.2000.

According to the said proceedings it is clear that the Learned Trial Judge was mindful of the provisions in the said section of the Code of Criminal Procedure Act and followed each and every step he should have taken under the said provisions. However, whether he was mindful and followed the provision in 195 (ee) is to be considered at this point in the absence of specific reference to the requirements of section 195 (ee) in the said order.

As observed above, the amendment brought to section 161 of the Code of Criminal Procedure Act had made the "trial before a Judge without a Jury" the rule for the trial before the High Court and by the proviso, introduced an exception to the above rule, in cases "where at least one of the offences fall within the list of offences set out in the second schedule to the Judicature Act."

In the said circumstances it is clear as to why their Lordships of the Supreme Court were specific when they concluded that, "as long as it is in the statute book the accused can elect to be tried by a jury, the trial judge has an obligation not only to inquire from him whether he is to be tried by a jury, judge must also inform that the accused has a legal right to that effect."

In the absence of a specific reference to the exception which is mandatory in nature, whether a mere reference to the rule is sufficient, under the provisions of 195 (ee) is the question before us now.

In this regard the Learned Deputy Solicitor General, who represented the Attorney General, relied on the presumption contained in section 114 (d) of the Evidence Ordinance which reads thus,

"That judicial and official acts have regularly performed" and argued that the said provision should operate in favour of the Respondents in the absence of anything contrary.

However this court is reluctant to accept the above argument in the absence of specific reference of following the provisions in section 195 (ee) by at least recording the fact that the accused was given an opportunity to elect his trial, rather than recording "trial without a jury is fixed for....." which only indicates that the trial judge had only followed the rule but not explained the exception.

The Petitioner as his second ground of appeal, argued that there is no proper allocutus recorded before the court. As observed by this court, even if the trial judges had failed to record an allocutus, that was considered by this court as a curable defect and it was always the practice of this court to send the trial back to the relevant High Court in order to record the allocuteus. However with the finding in 1st ground of appeal, this court is not inclined to consider this ground of appeal since a retrial is warranted with the upholding the 1st ground of appeal.

As the next ground of appeal the appellant submitted, that there was a failure by the Learned Trial Judge to follow the provisions of the Judicature Act in adopting the evidence.

Section 48 of the Judicature Act refers to the provisions to be followed when adopting the evidence before a succeeding judge as follows;

> In the case of death, sickness, resignation, removed from officer, absence from Sri Lanka ,or other disability of any judge before whom any action, prosecution, proceeding or matter whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor or such judge who shall have power to act on the evidence already recorded by his predecessor or partly recorded by his predecessor and partly recorded by him or if he thinks fit, to re summon the witness and commence the proceedings afresh.
>
> Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witness be re-summoned and re-heard.

As observed by this court, the relevant provision to the present case is the proviso to the above section and according to the proviso, it is only the accused who may demand that the witness be re-summoned and re-heard and if no request is made by the accused, the trial can proceed after adopting the evidence.

In the present case when the trial judge who heard the entire prosecution case was promoted, and the case was called before the judge who succeeded, he made the following note in the journal entry

> "With the consent of the defence it was agreed to adopt the evidence which was led up to now and proceed with the case"

From the above entry made by the succeeding judge it is clear that the accused had agreed to adopt the evidence already led and to proceed with the trial and he has not made any request under the proviso to section 48 of the Judicature Act. In the said circumstance the accused-appellant is not entitled and is estopped from taking up the position that the court didn't allow him to cross-examine the witnesses before the succeeding judge and therefore we see no merit in this argument.

As observed by this court the prosecution has led the evidence of two eye witnesses at the trial before the Trial Judge namely, Liyanage Don Ajith Niranjan Perera and Liyanage Don Premalal Perera.

According to them, the incident referred to this case had taken place on 19th December 1986 between 10.00-11.00 pm and both these witnesses have come up to the canal on hearing the cries of one Gnanawathy and at that time they have seen their brother Hemantha coming towards them complaining that Ashoka assaulted him. At that time they had seen the 1st accused Lakshman Rajakaruna with two others on the other side of the canal.

Witnesses had seen Lakshman having a pistol with him and the others were armed with clubs. When three of them crossed the canal, their brother Hemantha ran towards their house but three of them had chased behind him and attacked him with the clubs they were having at that time. According to the witnesses all three had attacked the deceased and went away after threating them. When they went up to the deceased, they observed that he is dead.

Out of the two witnesses who corroborated each other, witness Niranjan Managed to identify the 2nd accused at the parade and witness Premalal identified both the 2nd and the 3rd accused at the parade.

As observed by this court, the Learned Trial Judge had correctly analyzed the evidence placed before the High Court, had convicted the 1st accused who was tried in absentia along with the 2nd accused and acquitted the 3rd accused. When acquitting the 3rd accused the Learned Trial Judge was mindful of the fact that the 3rd accused was not identified by the 1st witness at the parade and given reason for his decision.

As observed by the Learned Trial Judge there were no major contradictions or omissions in the evidence of the above witnesses except for one contradiction marked in the evidence of the 1st witness which was marked as 2ඊ 1.

In the said circumstances we see no reason to look in to the ground that was raised before us to the effect that "the Learned Trial Judge erred in law when he conclude that the evidence of the first witness is corroborated by his own police statement" when his evidence is amply corroborated by the evidence of the other witness.

As observed above this court is not inclined to uphold the 3rd and 4th grounds of appeal raised by the petitioner. However when considering the 1st ground of appeal, the court was not infavour of accepting the argument raised by the Learned Deputy Solicitor General. In the said circumstances the next matter to be considered by this court is whether we are going to order a retrial in this case.

In this regard the Learned Counsel for the accused-appellant had relied on the decision of this court in ***Udanattage Lionel Hector Jayasooriya and two others V. The Attorney General CA Appeal 152/2002*** CA minute dated 19.06.2009, where Sarath de. Abrew J had observed that, "the Indictment reveals that the alleged offences have been committed on 10th May 1996, 13 years hence. The Learned Trial Judge had delivered the Judgment on 31.07.2002, around 07 years ago. There would be no purpose served in sending this case back for retrial after such a long period, especially so as the appellant had apparently been in remand for over 10 years before and after being convicted. Due to a vital lapse on the part of the Learned Trial Judge it would be unjustifiable to direct the appellant to

undergo the hazard of second trial after an intervening period of 13 years. In view of the above this court is not inclined to order a retrial."

When looking at the number of trials still pending in the High Courts and several appeals filed before this court during the past few years, we cannot agree with their lordships when they conclude that, lapse of 13 years is unjustifiable to direct a retrial. However when applying the same principle to the present case where the incident had taken place on 19th December 1986 nearly 30 years ago, we are in agreement with the principle followed by their lordship in the above case.

As observed above the accused-appellant was convicted by the High Court on 22.08.2006 and been in remand for over 10 years after conviction.

In these circumstances this court is not in favour of directing a retrial to take place against the accused-appellant after lapse of 30 years.

In the said circumstances we set aside the conviction and sentence imposed by the Learned Trial Judge of Colombo and acquits the accused-appellant.

Appeal allowed.

Accused –appellant acquitted.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL