

C.A. No.132/2015 - H.C. Anuradhapura Case No.HC 89/2003

BEFORE : S. DEVIKA DE L. TENNEKOON J AND
S. THURAIRAJA PC J

COUNSEL : Indica Mallawaratchi for the Accused-Appellant
A. Jinasena SDSG for the AG

ARGUED AND
DECIDED ON : 26.09.2017

S. THURAIRAJA PC J

Accused-appellant is present in Court produced by Prison Authorities and represented by Counsel.

Counsel for the accused-appellant takes up an issue that the accused-appellant was not given a fair trial at the High Court namely, he had not been given a right enshrined in Section 195(ee) of the Criminal Procedure Code. Further, she submits that the indictment was served on the accused-appellant and he was not given the jury option. Further, almost at the tail end of the trial, after about six years, it was brought to the notice of the High Court Judge by the State Counsel that the jury option was not given and the Counsel who was appearing for the accused-appellant in the original Court has conceded to proceed with the trial and he said that he can adopt the proceedings and matter could be tried before

Judge. The Counsel for the accused-appellant submits that, it is insufficient under Section 195(ee) and several authorities decided by this Court and the Supreme Court. In **Hettiarachchi vs. The Attorney General** in CA No.130/2005 decided on 13.07.2012, it was held that –

“It is not a mere irregularity but an illegality that cannot be cured, an illegality that vitiates the whole proceedings including the judgment.”

Further, she supports the argument with **Queen vs. Hemapala** 64 NLR Page 1 – a decision by H/L Justice Godart. Further, she says that there was no fair trial enshrined as stipulated by **The Attorney General vs. Apponsu** - Supreme Court - 2008 BLR 145 and she moves the Court to hold that there is no trial held. Therefore, the conviction and the sentence cannot stand and she moves that the matter be sent for retrial.

Senior Deputy Solicitor General Miss. Ayesha Jinasena who is appearing for the Attorney General, upholding the highest tradition of the Attorney General’s Department submits to Court that she is agreeing with the Counsel for the accused-appellant and submits, that there is no proper jury option given to the accused-appellant. Further, she submits that since the incident has happened in 1998 and the trial commenced in 2009 she moves the Court to send the case for retrial and direct the High Court Judge to expedite the trial.

Considering the submissions of both Counsel, we are of the view that the accused-appellant was not given the right as enshrined in

Section 195(ee) of the Code of Criminal Procedure Act No. 15 of 1979 (as amended.) Time and again this Court and the Supreme Court held, the option of selecting the jury is a right of an accused to ensure that he had a proper and fair trial. Therefore, this Court upholds the submissions by both Counsels and set aside the conviction and the sentence and send this case for retrial to the High Court of Anuradhapura. Further, we request the High Court Judge to give priority to this case and conclude as soon as possible.

Registrar is directed to forward the case record to the Registrar, High court of Anuradhapura forthwith.

JUDGE OF THE COURT OF APPEAL

S. DEVIKA DE L. TENNEKOON J

I agree.

JUDGE OF THE COURT OF APPEAL

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