

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

In the matter of an Appeal from the High Court of
Badulla under section 331 of the Code of Criminal
Procedure Act No. 15 of 1979

Court of Appeal case no. CA 227/13

H.C. Badulla case no. 2/2008

Attorney General

Complainant

Vs.

W.D.Ajith Kumara Dissanayake

Accused

And Now Between

W.D.Ajith Kumara Dissanayake

Accused - Appellant

Vs.

Attorney General

Complainant - Respondent.

Before : L.T.B. Dehideniya J. (P/CA)

: K.K. Wickramasinghe J.

Counsel : Dulinda Weerasooriya PC with Chamath Marapana and
Kanishka Silva for the Accused Appellant.

: Madawa Tennakoon SSC for the Complainant Respondent.

Argued on : 10.07.2017 and 04.08.2017

Written submissions filed on 06.09.2017

Decided on : 31. 10.2017

L.T.B. Dehideniya J. (P/CA)

The Accused Appellant Was indicted before the High Court of Badulla on a charge of murder of Senawirathne Mudiyansele Padmalika Priyadarshani on or about 03rd September 2005, punishable under section 296 Of the Penal Code. After trial the Appellant was convicted and sentenced to death. Being aggrieved, the appellant presented this appeal.

The first ground of appeal is that the learned High Court Judge had failed to sufficiently complied with the mandatory requirement of section 195 (e e) of the Criminal Procedure Code Act No. 15 of 1979 as amended which amounts to non complies.

Section 195 (e e) of the Criminal Procedure Code reads thus;

195. Upon the indictment being received in the High Court, the Judge of the High Court presiding at the sessions of the High Court holden in the judicial zone whereat the trial is to be held shall -

(a).....

(b).....

(c).....

(d).....

(e).....

(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 necessity to introduce this provision in to the Criminal Procedure Code arose because of the amendment made to the section 161 of the Code. Section 161 as amended reads

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.

By the proviso of this section the accused was given a right to try his case by a jury. If the accused elects his case to be tried by a jury, the Court has to take appropriate steps to try the case by a jury. To enforce this right, an obligation or a duty casted upon the Judge, by section 195 (e e), to inquire from the accused whether or not he elects to be tried by a jury.

There is a series of cases that the superior courts have held that the non compliance is fatal and vitiate the conviction.

Wijesena Silva and others V. Attorney General [1998] 3 Sri L R 309

1. Court is required to inquire from the accused whether or not he elects to be tried by a Jury. This is a duty imposed on the trial

judge upon receipt of indictment. This duty implies no discretion but a mandatory obligation on the part of the High Court judge.

This is a recognition of the basic right of an accused person to be tried by his peers.

Nimal Bandara V. The State [1996] 1 Sri L R 214

(1) That the amendment to section 195 of the Criminal Procedure Act by introducing sub-section (ee) was necessitated, as a result of the introduction of new section 161 in place of the original section 161. Per Gunawardana, J., "it is to be noted that by virtue of the new section 161 of the Criminal Procedure Code, whilst trials before the High Courts are to be before the High Court Judge, a right has been given to an accused under the Proviso to that section, to elect to be tried by a jury in the specified offences.

This is a recognition of the basic right of an accused person to be tried by his peers".

Rajah and another V. Republic of Sri Lanka [1996] 2 Sri L R 403

(1) Failure of learned Trial Judge to comply with the provisions of sections 195(ee) and (f) is a fatal irregularity which vitiates the conviction.

(2) Accused should be given the opportunity to exercise the right whether to be tried by a jury or not. This is a recognition of the basic right of an accused person being tried by his peers.

(3) In view of the Amendment No. 11 of 1988 at a Trial before the High Court, the Court is required to inquire from the accused whether or, not he elects to be tried by a jury.

The requirement of inquiring from the accuse whether he exercise his right to be tried by a jury has been expanded by Anil Goonaratne J in the case of *Kopi wattage Jayasinghe v. Hon. Attorney General* C.A. No. 07/2011 CA Minute dated 28.11.2015 by holding that it is preferable to record it in question and answer form. His Lordship further referred to J.A.N.Silva J. in the case of S.C 24/2008 where it was held that;

As long as it is in the statute book that the accuse can elect to be tried by a jury the trial fudge has an obligation not only to inquire from him whether he is to be tried by a jury, judge must inform that the accused has a legal right to that effect. Nonobservance of this procedure is an illegality and not a mere irregularity.

and formulated two matters that are immerging from this section. They are;

- a. Trial Judge has an obligation to inquire from the accused whether he elects to be tried by a jury,*
- b. Judge has to inform the accused that he had a right to that effect.*

His Lordship further held that if (a) and (b) above are not adhered to, it could be argued that the Accused Appellant had been denied a fair trial. The concept of a fair trial is imperative and recognized by the Constitution, and could not be denied.

Article 3 of the Constitution contemplate that the sovereignty is with the people and the Article 4 provides that the judicial power of the people is exercised by Court through parliament. The Article 4 reads thus;

4 The Sovereignty of the People shall be exercised and enjoyed in the following manner :-

- (a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;*
- (b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;*
- (c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law;*

Trial by a jury is not a Constitutional provision. G.L.Peiris in his book on Criminal Procedure in Sri Lanka 3rd edition at page 402 states that "Under the laws of Sri Lanka trial by a jury is not tantamount to a provision enacted by the Constitution, but is merely a creation of the Legislature" The people, while exercising their legislative power through the Parliament, they have retained their judicial power with them in relation to the grave crimes such as murder, attempted murder and rape; without handing them over to courts. Court has to be mindful of this fact in asking for the jury option. The Accused must be informed of his right to be tried his case by his peers. If not it amounts to a noncompliance of section 195 (ee).

In the present case the question put to the accused was not recorded and further the accused was not informed of his right to be tried by a jury. This seems to be a breach of section 195 (e e) of the Criminal Procedure Code.

Therefore we proceed to set aside the conviction and sentence and send the case back to the High Court for a fresh trial. We direct the learned High Court Judge to give priority and conclude this case at his earliest.

Fresh trial ordered.

President of the Court of Appeal

K.K.Wickramasinghe J.

I agree.

Judge of the Court of Appeal