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

Kopiwattegedera Jayasinghe

ACCUSED-APPELLANT

C.A. No. 07/2011

H.C. Kandy 30/2009

Vs.

Hon. Attorney General

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

BEFORE: Anil Gooneratne J. &

P. R. Walgama J.

COUNSEL: Nimal Jayasinghe for the Accused Appellant

Dilipa Peiris S.S.C. for the Complainant-Respondent

ARGUED ON: 11.12.2014

DECIDED ON: 28.01.2015

GOONERATNE J.

This was a murder case, and the case had been originally heard in the High Court of Kandy. The proceedings of 28.11.2006 indicates that the indictment was read to the Accused-Appellant and he pleaded not guilty. On that day itself evidence had been led. This case at a certain stage was transferred to the High Court of Nuwara Eliya. Proceedings of 11.03.2010 indicates that the previous proceedings had been adopted and trial proceeded. The learned counsel for Accused-Appellant at the hearing of this appeal took up a preliminary issue and submitted to court that the required jury option as per Section 195(e)(e) of the Code of Criminal Procedure Act had not been complied with and moved that the conviction and sentence should be quashed and the case sent back to the relevant High Court for a fresh trial.

The learned Senior State Counsel however drew the attention of this court to the proceedings of 28.7.2010 (pg. 100) and submits that at the conclusion of the trial the learned trial Judge had inquired of the above fact

from the parties concerned and it is recorded that the counsel who appeared for the Accused-Appellant had submitted that as from the beginning of the case the Accused had consented for a non-jury trial.

The question is whether at a very late stage such a requirement as in Section 195(e)(e) of the Code could be expressed to court? Further is it the position that the learned High Court Judge should as required by law find out from the Accused himself and record it in such a manner as the Accused had uttered to court by his own words, of a jury option.

In Nimal Bandara Vs. The State 1996(1) SLR 214 wherein it was held that the failure to comply with the Provisions of Section 195 sub-section (ee) and sub-section (F) is a fatal irregularity, at pg. 215 it is stated that 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... This is a recognition of the basic right of an accused person to be tried by his peers .... In Wijesena Silva & Others Vs. A.G 1998 (3) SLR 309 ... held

(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". Per de Silva J.

"It can never be said that if an accused is defended by a counsel the Trial Judge is relieved of his statutory obligations. The right to be tried by a jury is not given to the counsel but to the accused person.

It is the duty of the trial Judge himself to inquire from the Accused-Appellant whether he needs to be tried by a jury or he prefers for a non-jury trial. It appears that such a provision need to be interpreted strictly, may be because it is a basic right of the Accused. It is preferable to record it in question and answer form.

I also note in S.C. 24/2008 per J.A.N. de Silva J.

As long as it is in the statute book that 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. Non observance of this procedure is an illegality and not a mere irregularity.

The two important matters that emerge 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.

If (a) & (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 provisions and our Constitution, and could never be denied. What should be done at the beginning cannot be done at the end. I do not think that a defect could be cured in the manner referred to in proceedings of 28.7.2010 (folio 100). Further it is important to record the very words uttered by the Accused-Appellant. There seems to be a clear breach of Section 195(e)(e) of the Code. Therefore we proceed to set aside the conviction and sentence and send the case back to the High Court for a fresh trial.

Fresh trial ordered.

JUDGE OF THE COURT OF APPEAL

P. R. Walgama J.

I agree.

JUDGE OF THE COURT OF APPEAL