

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

In the matter of an Appeal
against an order of the High Court
under Sec. 331 of the Code of
Criminal Procedure Act No. 15 of
1979.

Baddurdeen Sajeer Arfeth,
Ikirigallewa,
Wahamalgollewa.

Accused-Appellant

C. A. No. : 66/ 14

H. C. Anuradhapura Case No. : HC 23/2011

V.

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

Respondent

BEFORE : H. N. J. Perera, J. &

K. K. Wickramasinghe, J.

COUNSEL : Darshana Kuruppu with Aruna Gamage and Menik
Chandrasekera for the Accused-Appellant.
Anoop de Silva SSC, for the Attorney General.

ARGUED ON : 23rd of November 2015

DECIDED ON : 20th of January 2016

K.K. WICKRAMASINGHE, J.

The Accused-Appellant (hereinafter referred to as appellant), Baddurdeen Sajeer Arfeth was indicted in the High Court of Anuradhapura on the following charges:

- 1) Committing Grave Sexual Abuse on Rahamaththulla Maheesha (victim), who was below 16 years of age, on or about 09/11/2006 and thereby committing an offence punishable under s.365B (2)(b) of the Penal Code as amended by Act No. 22 of 1995 and,
- 2) Committing Grave Sexual Abuse on the same victim for sexual gratification by use of his genitals on any orifice (mouth) on the same day and thereby committing an offence punishable under s.365B (2)(b) of the Penal Code as amended by Act No. 22 of 1995 and Act No. 29 of 1998.

The Indictment had been served to the Appellant on 02/05/2011. At the conclusion of the trial the learned High Court Judge convicted the Appellant on all the counts in the indictment and imposed a term of 8 years rigorous imprisonment and a fine of Rs. 25,000 and Rs.100, 000 as compensation to the victim.

Learned counsel for the Appellant submitted that the Learned High Court Judge had not complied with section 196 of the Criminal Procedure Code and as such the conviction could not be sustained. Section 196 of the Criminal Procedure Code provides that *"When the court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not of the offence charged"*.

It is necessary to consider when an Accused is brought before the High Court whether the Court should read and explain the indictment to the Accused and ask whether he is guilty or not for the offence. When finding an answer to this question this Court would like to consider a Judgement of Justice Tilakawardane in **Withanage Gunawardana Vs Hon. Attorney General (CA/22/2002)**, *"that such failure to read and explain the charge to the accused and record his plea vitiated the conviction and accordingly the conviction and the sentence were set aside and a retrial was ordered"*.

Thus section 196 of the Criminal Procedure Code suggests that when an Accused person is brought before the High Court on an indictment, it is imperative for the learned High Court Judge, before commencement of the trial, to read and explain the Indictment to him and also ask whether he is guilty or not of the charge. This is a fundamental requirement in criminal law and no trial can commence without following the said procedure. In the case of **B.S.H. Kodituwakku Vs The Republic of Sri Lanka** it was held (a) *"before the commencement of the trial the accused must be asked whether he is guilty or not guilty of the charge. This is a fundamental requirement in criminal law,* (b) *the right to plead guilty or not guilty to the indictment is a statutory right given to an accused person which must be safeguarded by Courts"*. However in this particular case the Indictment was not read over and explained to the Appellant and it has not been recorded whether the Appellant was pleading guilty or not as it has been mandated by the section 196 of the Criminal Procedure Code. Furthermore, the Indictment served to the Appellant was only in Sinhala Language. Generally, when an accused cannot understand the language in which Indictment has been drafted it is the duty of the Court to obtain the assistance of a translator to translate the Indictment and/or to read out and explain the Indictment to the Appellant in a language which he understands.

In the case of **Wijesinghe Rajakaruna Mohottalage Chamila Wijesinghe and another Vs Attorney General (CA/206-207/2010)**, it was held that the *"duties cast on the Judge are imperative and wording is very strict. There is no room for non-compliance."* Having

regard to the provision of section 196 of the Criminal Procedure Code, this Court hold that the procedure adopted by the Learned High Court Judge is not in accordance with the provisions laid down in the Code. Thus I hold that compliance with Section 196 of the Criminal Procedure Code is mandatory and failure to do so vitiates the conviction.

For the above reasons I set aside the conviction and the sentences imposed on the 1st and 2nd counts of the indictment and order a retrial against the Appellant on the same Indictment.

JUDGE OF THE COURT OF APPEAL

H. N. J. PERERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERRED TO:

- 1) Withanage Gunawardana Vs Hon. Attorney General (CA/22/2002)
- 2) *B.S.H. Kodituwakku Vs The Republic of Sri Lanka*
- 3) *Wijesinghe Rajakaruna Mohottalage Chamila Wijesinghe and another Vs Attorney General (CA/206-207/2010)*