# JAYASOORIYA AND OTHERS
# vs
# ATTORNEY GENERAL

COURT OF APPEAL
ROHINI MARASINGHE. J.
SARATH DE ABREW, J
CA 152/2002/HC
PHC (WP) GAMPAHA 20/2001
FEBRUARY 25, 2009
MARCH 30, 2009

*Penal Code - Section 296 - Murder - Offensive Weapons Act - Section 4 (2) - 15 of 1979 - amended by 11 of 1988 - Section 195 (ee) - Section 351, Section 465A - Failure to offer to accused option to be tried by a jury - Statutory duty - Fatal? - Evidence Ordinance - Section 35 - Section 114 (d) - Relevancy - Constitution Art 13 (3) - Code of Criminal Procedure - Section 351 - retrial?*

The 2nd accused-appellant along with two others were indicted and convicted under Section 296 and causing injuries to ten others - punishable under the provisions of the Offensive Weapons Act.

It was contended that, the trial Judge failed to comply with Section 195 (ee) of the Code of Criminal Procedure Act and the failure to offer the accused the option to be tried by a jury is fatal.

It was contended by the respondent that, there is no statutory provision which imposes a duty upon a trial Court to record every such detail, and the presumption in Section 114 (d) Evidence Ordinance should operate in favour of the respondent.

It was further contended that, the failure to aver such a fundamental defect as a ground of appeal in the petition of appeal would lead to the conclusion that the jury option was in fact offered, and that the entry as to a non-jury trial in the official file maintained by the prosecuting State Counsel is relevant under Section 35 of the Evidence Ordinance and further the Court of Appeal in the interest of justice could act under Section 351 of the Criminal Procedure Code.

**Held:**

(1) It is settled law that failure to offer the jury option to an accused person under Section 195 (ee) is a fundamental breach which cannot be cured under Section 465 (A)

Per Sarath de Abrew. J

> "Every trial judge has, an obligation and responsibility to maintain a proper and accurate record of what transpires before him in every trial ..... the appellate Court should always be guided by what transpires in the case record and not on some extrinsic material of which the trial judge had no control whatsoever."

(2) Fundamental defect cannot be cured by invoking the presumption under Section 114(d). It would have been desirable that the petition of appeal pleaded the fundamental breach as a failure to offer the jury option, it would not necessarily debar an appellant from raising such an important question of law at the hearing, if it has occasioned a substantial miscarriage if justice.

Per Sarath de Abrew. J

> "To ensure a fair trial, the legislature in its wisdom from time to time has promulgated several fundamental concepts and statutory duties into our criminal law, the offering of the jury option is one such concept".

(3) The file maintained by the State Counsel is not part of the case record and is not in the custody and control of Court - and is not by itself satisfactory proof that the jury option has in fact been offered.

**APPEAL** from a judgment of the High Court of Gampaha.

**Case referred to:-**

*A.G. vs. Segulebbe Latiff* - SC 794/2007 - SCM.12.9.2008

*Aravinda Athurupane* for 2nd accused-appellant

*Buwaneka Aluvihare* - DSG for Attorney General

June 19, 2009

**SARATH DE ABREW, J.**

The 2nd Accused –Appellant (hereinafter sometimes referred to as the Appellant) along with two other accused were indicted in the High Court of Gampaha and convicted of the following offences:

(a) On or about 10th May 1996 at Gampaha committing the murder of one Peiris Subasinghe punishable under Section 296 of the Penal Code.

(b) Committing the murder of one K. Kaushalya Hapugoda punishable under section 296 of the Penal Code.

(c) Causing injuries to ten others (10 other counts) with a hand grenade punishable under section 4(2) of the offensive Weapons Act.

At the conclusion of the trial the 2nd and 3rd accused were convicted of the aforesaid charges while the 1st accused was acquitted. Being aggrieved of the above convictions the 2nd and 3rd accused preferred appeals to this Court. When the appeals were taken up for hearing the 3rd accused appellant withdrew his appeal. At present only the appeal lodged by the 2nd accused (Appellant) remains for consideration.

On behalf of the Appellant the learned counsel raised a preliminary issue that the learned trial judge had failed to comply with section 195(ee) of the Code of Criminal Procedure as amended as follows:

(a) The failure to offer to the accused the option to be tried by a Jury.

(b) The denial of the right of the accused to be informed of his statutory right to be tried by a jury. The learned

counsel further contended that failure to comply with the aforesaid statutory duty would be to render all proceedings, conviction and sentence invalid. In support several case law authorities were cited including the recent Supreme Court decision in *A.G. Vs. Segulebbe Latiff and others.*[1] At the time of the serving of the indictment, the Court proceedings and the journal entries disclose that the learned trial Judge had failed to record that section 195(ee) of the Code of Criminal Procedure had been complied with.

The learned Deputy Solicitor General did not dispute the fact that the offer of Jury option to the accused by the learned trial Judge is not recorded anywhere in the Court proceedings or the journal entries. However, the learned D.S.G. endeavoured to distinguish the facts in the present case to fall into a category where the Jury option had in fact been offered but due to an oversight and/or some inadvertence, that part of the proceedings has not got recorded in the proceedings. In support of this contention the learned D.S.G. relied heavily on a minute made by the prosecuting State Counsel in the file maintained by the Attorney General's Department that a non-jury trial was fixed pertaining to this case. It was the contention of the respondent that the jury option had in fact been offered though not recorded and the complaint of the appellant therefore is bereft of any merit. Even in the absence of a specific recording to that effect in the Court record, the learned DSG contended, the following factors would enable the Appellate Court to take due cognizance of the fact that the statutory duty embodied in section 195(ee) of the Code of Criminal Procedure as amended has been duty complied with to the satisfaction of Court. In furtherance of the above, the learned DSG submitted the following:

(a) There is no statutory provision or duty cast by law which imposes a duty upon a trial Court to record every such detail.

(b) The presumption contained in section 114(d) of the Evidence Ordinance "that judicial and official acts have been regularly performed" should operate in favour of the respondent, unless the Appellant proves otherwise.

(c) While appreciating the right of the Appellant to raise fresh grounds of appeal not stated in the petition of appeal, it is significant that the Appellant had failed to aver such a fundamental defect as the failure to offer the jury option as a ground of appeal in the petition of appeal, which omission would lead to the reasonable conclusion that the jury option was in fact offered, though not recorded, which the Appellant was well aware of at the time of drafting the petition of appeal, especially so as the very same counsel who defended the Appellant at the trial was responsible for drafting of the petition of appeal.

(d) The entry as to a non jury trial in the official file maintained by the prosecuting state counsel is relevant under section 35 of the Evidence Ordinance to determine as to whether the jury option had in fact been offered.

(e) The Court of Appeal may, if it thinks necessary or expedient in the interest of justice act under section 351 of the Code of Criminal Procedure which enables Court to " order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case," and order the production of the aforesaid official file and peruse the entry concerned.

Having carefully perused the written submissions tendered by both counsel, I am inclined to reject the several contentions urged by the learned D.S.G. for the following reasons.

(a) Section 195(ee) of the Code of Criminal Procedure, Act No.15 of 1979, as amended by Act No. 11 of 1988, reads as follows:

"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." Section 195 further entails other duties cast upon a presiding High Court Judge when an accused person is brought before Court for serving of the indictment. In view of the Supreme Court decision in *AG Vs Segu Lebbe Latiff & other*[2] it is now settled law that failure to offer the jury option to an accused person under section 195(ee) is a fundamental breach which cannot be cured under section 456A of the Code. Even though the learned D.S.G. contended that there is no statutory duty cast by law for the learned trial Judge to record every detail, I am of the view that every trial judge has an obligation and responsibility to maintain a proper and accurate record of what transpires before him in every trial, especially so the compliance with fundamental requirements such as serving of the indictment, offering the jury option, entering a plea of guilty, recording a verdict and sentence. As the learned counsel for the Appellant had pointed out in his written submission all the requirements under section 195 of the Code has been complied with and recorded in the case record except the requirement under section 195(ee), namely the offering of the jury option. Therefore the argument that the jury option has in fact been offered but not recorded due to some inadvertence cannot succeed. The Appellate Court should always be guided by what transpires in the case record, and not on some extrinsic material of which the learned trial Judge had no control whatsoever.

(b) The case record is proof of all judicial acts performed and recorded therein. Where there is no specific record of performance of a fundamental statutory duty cast on a trial Judge, this fundamental defect cannot be cured by invoking the presumption under section 114(d) of the Evidence Ordinance.

(c) Although it would have been desirable that the petition of appeal pleaded the fundamental breach such as a failure to offer the jury option, it would not necessarily debar an Appellant from raising such an important question of law at the time of hearing of the Appeal if it has occasioned a substantial miscarriage of Justice.

(d) The entry as to a non jury trial contained in the official file maintained by the prosecuting State Counsel by itself is not satisfactory proof that the jury option has in fact been offered. The file maintained by the State Counsel is not part of the case record and is not within the control and custody of Court. Even if this file is perused by this Court under section 351 of the Code, it would only give credence to the fact that this instant case was fixed for non-jury trial after serving of the indictment. This particular entry would not establish beyond doubt that section 195(ee) of the Code had been complied with and the Jury option was in fact offered to the accused. It could very well be that the jury option was not offered and no jury was summoned for the trial date and the case was listed for trial as a non-jury case. Therefore the entry in the file of the State Counsel cannot be considered as conclusive on a matter where the case record itself is silent and where a fundamental right of an accused person in our criminal jurisprudence is in question.

Article 13(3) of our Constitution promulgates that "Any person charged with an offence shall be entitled to be

heard, in person or by an attorney-at-law, at a fair trial by a competent court." To ensure a fair trial, the legislature in its wisdom, from time to time, has promulgated several fundamental concepts and statutory duties into our criminal law. The offering of the jury option is one such concept. There is a duty cast on the learned trial judge not only to inform an accused person his right to select as to the jury option but also to accurately record what option the accused had selected. Where there is a dispute whether this fundamental duty had been in fact performed, the Appellate Court would prefer to be guided by the case record and would hesitate to consider extrinsic material such as a file maintained by the State Counsel.

The indictment reveals that the alleged offences have been committed on 10th May 1996, 13 years hence. The learned trial Judge had delivered judgment on 31.07.2002, around 07 years ago. There would be no purpose served in sending this case back for a 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 hazards of a second trial after an intervening period of 13 years. In view of the above, this Court is not inclined to order a retrial.

In view of the foregoing conclusions, I uphold the preliminary issue raised by the Appellant, and set aside the conviction and sentence imposed by the learned trial Judge of Gampaha, and acquit the Accused-Appellant. The appeal is therefore allowed. The Registrar is directed to send a copy of this order with the original case record to the High Court of Gampaha.

**MARASINGHE, J.** - I agree

*Appeal Allowed*