RAJAH AND ANOTHER
V.
REPUBLIC OF SRI LANKA

COURT OF APPEAL.
DR. A. DE Z. GUNAWARDANA, J. (P/CA)
J. A. N. DE SILVA, J.
C. A. NO 40-41/95.
KURUNEGALA HIGH COURT 09/94.
JUNE 21, 1996.

Criminal Law - Penal Code S 296, 300 - Criminal Procedure Code - Amendment 11 of 1988 - Failure to follow provisions of S 195. S 161 - Option of an accused to be tried before a Jury - Murder - Sentence of death.

Held:

(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 Cout, the Court is required to inquire from the accused whether or, not he elects to be tried by a jury.

AN APPEAL from the High Cout of Kurunegala.

Dr. Ranjith Fernando with *Miss. Samadara Mampitiya* for 1st Accused - Appellant.

S. Panagoda for 2nd Accused Appellant
Kapila Waidyaratne S.S.C. for A.G.

Cur. adv. vult

June 21, 1996.
Dr. GUNAWARDANA, J. (P/CA)

The accused in this case were indicted in the High Court of Kurunegala on 2 counts. The first count was for murder of one

Dayawathie, an offence punishable under section 296 of the Penal Code. The second count was for committing attempted murder of Tissa Mapa, an offence punishable under section 300 of the Penal Code. After trial by judge both accused were convicted of the said offences and were sentenced to death on the 1st count and on the 2nd count they were sentenced to 5 years rigorous imprisonment.

The learned Counsel for the 1st Accused-Appellant submited that the learned Trial judge has failed to follow the provisions of section 195 of the Code of Criminal Procedure (Amendment) Act No. 11 of 1988. The Amending Act has introduced after paragraph (e) of the original section, a new paragraph numbered (ee), which states as follows:-

> "(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".

This Amendment was necessitated by the introduction of new section 161 to the original Criminal Procedure Code. The new section states as follows:-

> "161. Subject to the provisions of this Code or any other law, all prosecutions on indictments 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".

Thus in view of the said Amendment, 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. It is to be noted that by virtue of the new section 161 of the Criminal Procedure Code, whilst trial 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. Thus it is important that, the accused should be

given the opportunity to exercise the right whether to be tried by a jury or not, in this case because the learned Trial Judge has failed to follow the procedure laid down in section 195 (ee), the accused had been denied that right.

Furthermore there is non-compliance with provision of section 195, by failure of Trial Judge to comply with section 195(f) which states as follows:-

> "(f) Where trial is to be by a jury direct the accused to elect from which of the respective panels of jurors the jury shall be taken for his trial and inform him that he shall be bound by and may be tried according to the election so made."

Thus in our view the failure of learned trial judge to comply with the provisions of section 195 subsection (ee) and subsection (f) is a fatal irregularity which vitiates the conviction.

Therefore we hereby set aside the verdict and the sentences of the death and imprisonment imposed on the Accused-Appellants and order that a fresh trial be held in this case, as early as possible.

J. A. N. DE SILVA, J. – I agree.

Appeal allowed.

Fresh Trial Ordered.