

NIMAL BANDARA  
V.  
THE STATE

COURT OF APPEAL.

C.A. NO. 5/95.

H. C. KURUNEGALA 40/94.

JULY 16, 1996.

*Code of Criminal Procedure Act, No. 15 of 1979 as amended by Act, No. 11 of 1988 – Failure to follow the provisions of section 195 in regard to the election of a jury by an accused person.*

After trial by High Court Judge the accused-appellant was convicted of murder and sentenced to death. The learned Trial Judge has failed to follow the provisions of section 195(ee) and inquire from the accused whether or not he elects to be tried by a jury.

**Held:**

(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".

(2) What is in issue is not the question of jurisdiction but the denial of a right which the Statute has given to the accused and the consequential prejudice.

(3) Consequentially, there is a failure to comply with the provisions of section 195 sub-section (f).

(4) The failure to comply with the provisions of section 195 sub-section (ee) and sub-section (f), is a fatal irregularity which vitiates the conviction.

**APPEAL** against the conviction and sentence of the High Court.

*Dr. Ranjith Fernando for Accused-Appellant.*

C. R. de Silva, D. S. G. for the State.

*Cur. adv. vult.*

16 July, 1996.

**DR. GUNAWARDANA, J. (P/CA.)**

The accused in this case was indicted in the High Court of Kurunegala with having committed the murder of S. Ukku Amma, an offence punishable under section 296 of the Penal Code. After trial by the High Court Judge the accused was convicted of the said offence and was sentenced to death.

Learned Counsel for the Accused-Appellant submitted 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 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 prosecution 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 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. 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.

The learned Counsel for the State argued that the denial of the said right does not deprive the High Court of the jurisdiction to try those offences. What is in issue is not the question of jurisdiction but the denial of a right which the statute has given to the accused and the consequential prejudice.

Furthermore there is non-compliance with the provisions of section 195, by failure of the 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 the 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 death imposed on the Accused-Appellant and order that a fresh trial be held in this case, as early as possible.

**J. A. N. DE SILVA, J.** – I agree.

*Conviction and sentence of death set aside.*

*Retrial ordered.*