DHARMASENA
v.
THE STATE

COURT OF APPEAL
A. DE Z. GUNAWARDENA, J.
H. S. YAPA, J.
C.A. APPEAL NO. 101/93
HC GALLE NO. 132
MAY 11TH AND 12TH, 1994

Criminal Law – Election of trial by jury – Subsequent change of election to trial by Judge, without a jury – Accused's right to change such election upto the commencement of the trial – Accused bound by the selection of panel of jurors – Code of Criminal Procedure Act, No. 15 of 1979, Section 161, 195(ee) and 195(f).

The accused-appellant first elected to be tried by a jury. On the date of commencement of trial, Counsel for the accused-appellant informed Court that the accused-appellant wishes to be tried by the High Court Judge, without a jury. Accordingly, he was tried by Judge without a jury. An objection was taken at the hearing of the appeal that the learned trial Judge had erred in law, in allowing the Counsel who appeared at the trial, to change the election first made by the accused-appellant, to be tried by a jury.

Held:

(1) That upon an examination of what transpired in Court it is clear that it was the accused-appellant who had desired to change the election made by him in the first instance, and that the Counsel had merely conveyed that wish to Court. It is within the competence of the Counsel to do so.

(2) That the restriction of being bound by the "election so made", in the first instance, applies only the election of a panel of jurors, by whom the accused wishes to be tried.

Per Gunawardena, J.

"Thus, this leaves the accused, with the option of changing the election he makes, in regard to whether he should be tried by a jury or Judge, upto the commencement of the trial."

APPEAL from conviction and sentence entered by the High Court of Galle.

Dr. Ranjit Fernando with *Shanika Atapattu* for *accused-appellant, C. R. de Silva, D.S.G.* for *the State.*

Cases referred to:

1. *Punchiappuhamy v. Wijesinghe:* 49 NLR 216
2. *Saram v. Neina Marikar:* (1900) 4 NLR 154

Dr. Ranjith Fernando with *Shanika Atapattu* for accused-appellant.

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

Cur adv vult.

June 7th, 1994.
A. DE Z. GUNAWARDENA, J.

The accused-appellant in this case was indicted in the High Court of Galle with having committed the murder of one D. K. Wimalasena, on March 25, 1986, an offence punishable under Section 296 of the Penal Code. After trial by Judge, without a Jury, the accused-appellant was convicted of the said offence, and was sentenced to death. This appeal is from the said conviction and sentence.

The learned Counsel for the accused-appellant submitted that the learned trial Judge has erred in law in permitting the Counsel for the accused, at the trial, to change the election made by the accused, to be tried by a Jury and require that the trial be held by a Judge, without a Jury.

He pointed out that Section 161 of the Code of Criminal Procedure Act No. 15 of 1979, which provided for jury trials, was amended by Code of Criminal Procedure (Amendment) Act No. 11 of 1988, whereby section 161 of the principal enactment was repealed and the following new section was substituted therefor:–

> "161. Subject to the provisions of this Code or any other law, all prosecutions on indictment 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 we see that by virtue of the said amendment, the procedure provided for trials in the High Court, in the principal enactment, had been changed. However, the proviso to the new section still provides for a trial by a jury before a Judge of the High Court, if the accused so elects.

In view of the above change in the procedure, a further amendment to the principal enactment had been made by the said amending Act, by adding paragraph (ee) to Section 195 of the principal enactment. The new paragraph 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:"

Hence under the new procedure the accused has to first elect whether or not he wants to be tried by a jury.

Thereafter the accused is required to make a second election, in terms of the provisions of Section 195(f), of the principal enactment, 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:"

In the instant case when the accused appeared in Court on 4.11.1992, for service of indictment, a Counsel had appeared for him. (Not the Counsel who appeared at the trial). In addition, at the request of the accused, a Counsel had also been assigned by Court. Thereafter when the accused was asked whether he wishes to be tried by the High Court Judge without a jury or tried by a jury before a Judge, the accused had replied that he wishes to be tried by a

Sinhala speaking jury before a Judge. Then the trial was fixed for 8.3.1993. On that date the trial was not taken up as the State Counsel was not available and the accused was represented by retained Counsel (i.e. the Counsel who appeared at the trial) as well as assigned Counsel. On 11.3.1993, the case was called and the same Counsel appeared for the accused. The same Counsel appeared for the accused on 26.7.1993, the second trial date, and it was refixed for 22.9.1993. On 22.9.1993, which was the third trial date, the same Counsel appeared for the accused. On this day when the case was marked ready for trial, the retained Counsel who appeared for the accused, submitted to Court that the accused wants him to inform Court that, the accused would like to be tried by the High Court Judge, without a jury. The Counsel had added that he was not present on the day the indictment was served, and that he also would prefer if the trial is held by the High Court Judge, without a jury. Accordingly, he sought permission of Court to conduct the trial, without a jury. The State Counsel had no objection, and the learned High Court Judge allowed the application to have the trial before him, without a jury.

The learned Counsel for accused-appellant submitted that the election made by the accused to be tried by a jury had been changed, by the Counsel, who appeared for the accused. He added that, the Counsel could not do so and that if there was to be a change in the election, it had to be done by the accused personally, and conveyed to Court by him. What actually transpired in Court was set out above, in detail, with a view of assessing objectively, what the factual position is. As referred to above it is apparent from what has been stated by the Counsel for the accused in open Court that, he is conveying the wish of the accused, to change the election the accused had made earlier, to be tried by a jury. It is manifestly clear from the words spoken by the Counsel that he is merely conveying the decision made by the accused, to change the election he had made, at the first instance. The Counsel had added that, he also prefers that the trial be held by the High Court Judge. Although the accused has not directly spoken, and informed the Court personally, his wish to change the election had been conveyed in open Court, in Sinhala, by his Counsel, which the accused also would have heard. It is pertinent to note that, if in fact, the accused had not changed the

election, he had two opportunities at the trial, at least belatedly, to bring it to notice of the trial Judge. One occasion was when he made the statement from the dock and the second was when he was asked under provisions of Section 280 of the Criminal Code, (allocutus) whether he has anything to say why the judgement of death should not be pronounced against him. In addition, he has not taken up this position even in the petition of appeal. Thus from the facts and circumstances enumerated above it is reasonable to infer that the accused had personally opted to change, the election he made, at the first instance, and elected to be tried by the High Court Judge, without a jury. Although the very words of the change of the election has not come out of the mouth of the accused, the intention of the accused had been conveyed to the Court, in clear language, by the Counsel. Therefore, we hold that it is not the Counsel who had changed the election, earlier made by the accused, but it was the accused himself.

The learned Counsel for the accused-appellant further submitted that election to be tried by a jury or Judge, is similar to the situation of recording a plea from the accused at a trial. He pointed out that a plea must be tendered by an accused himself. He cited the case reported in *Punchiappuhamy v. Wijesinghe* [1] where it was held that,

> "Section 188 of the Criminal Procedure Code makes no provision for the pleader of the accused making the statement required thereunder. An accused cannot be punished on an admission of guilt unless that admission is unqualified and made by the accused in person."

This case followed the earlier decision in *Saram v. Neina Marikar.*[2] We are in agreement with the said decisions, but the position that arises in this case, is different.

It is to be noted that Section 197 of the Criminal Procedure Code which deals with a trial in High Court provides that,

> "If the accused pleads guilty and it appears to the satisfaction of the Judge that he rightly comprehends the effect of his plea, the plea shall be recorded on the indictment and he may be convicted thereon."

There is a significant difference in the words in Sections 161 and 195(ee) when compared with Section 197 of the Criminal Procedure Code. It is to be noted that the words, "it appears to the satisfaction of the Judge that he rightly comprehends the effect of his plea", do not appear in Sections 161 and 195(ee). Furthermore, Section 183 of the Criminal Procedure Code provides for the manner in which a plea should be recorded in a trial before the Magistrate. It states that,

> "If the accused . . . makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused, his statement shall be recorded as nearly as possible **in the words used by him;** (my emphasis) . . ."

There is no such requirement in the provisions of Sections 161 and 195(ee) of the Criminal Procedure Code. Thus it is reasonable to infer that, it is not imperative that, the election made by the accused, to be tried by a jury or Judge, should be personally conveyed to Court by the accused himself, provided of course that such election is made by the accused, personally.

The learned Counsel for the State submitted that, it is within the competence of the Counsel for the accused to convey to Court, the election or change of election made by the accused, to be tried by a jury or Judge. He added that in this case the accused had done so through the medium of his Counsel.

In this context it may be observed that there are two other instances, other than the pleading to the indictment in a trial before High Court, where the accused is personally obliged to make the statements required. The two instances are, when the accused exercises his right to make a statement from the dock and when the accused is asked in terms of the provisions of Section 280 of the Criminal Procedure Code "whether he has anything to say why judgment of death should not be pronounced against him." The statements contemplated in both instances by their inherent nature, have to come from the accused, and conveyed to Court by the accused, because of the manifestly evident personal element in them. In our view such is not the situation, in regard to the election to be made whether to be tried by a jury or Judge. In our view, whilst

such an election will no doubt have to be made personally by the accused, the decision so made by the accused, may nevertheless be conveyed to Court by his Counsel.

The learned Counsel for the accused-appellant further submitted that when an election is made by the accused, to be tried by a jury or Judge, the accused is bound by the election so made, in the first instance, and cannot change it. He relied on the provisions in section 195(f) to substantiate his argument. He argued that the words, in section 195(f) of the Criminal Procedure Code " . . . he shall be bound by and may be tried according to the election so made;" are applicable both to the election whether to be tried, by a jury or Judge, in terms of sections 161 and 195(ee), and the election of panel of jurors, under section 195(f) of the Criminal Procedure Code. Firstly, it must be pointed out that there is no mention of the accused being bound by the election made under Section 161 and 195(ee) of the Criminal Procedure Code, in the words of those two sections. Secondly it is clear upon a plain reading of the provisions of section 195(f) of the Criminal Procedure Code that the words ". . . shall be bound . . ." are applicable only to the provisions of that subsection. The learned Counsel for the State also submitted that the said restriction should apply only to the selection of panels of jurors. We are of the view that the restriction of being bound by the "election so made", in the first instance, applies only to the election of a panel of jurors, by whom the accused wishes to be tried. Thus, this leaves the accused, with the option of changing the election he makes, in regard to whether he should be tried by a jury or Judge, upto the commencement of the trial.

In view of the above stated reasons, we are of the view that, no material prejudice has been caused to the accused-appellant. Accordingly we affirm the conviction and sentence of the accused-appellant and dismiss the appeal.

H. S. YAPA, J. – I agree.

Appeal dismissed.