

WEERAWARDANE

v.

STATE

COURT OF APPEAL
HECTOR YAPA, J.
KULATILAKE, J.
CA. No. 52/98
H. C. NEGOMBO 55/96
21ST OCTOBER, 1999

Penal Code S.296, S.300 - Murder and attempted murder - Trial without Jury - Convicted on the plea - Life imprisonment and four years rigorous imprisonment - Legality of such sentence? - Code of Criminal Procedure Act S. S. 161, 197, 205 - Amendment Act, No. 11 of 1988, S.S. 3, 4 - Judicature Act No. 2 of 1978, S.11 - Amendment Act No. 37 of 1979.

The Accused - Appellant was indicted on two counts viz: Murder of one R and the attempted murder of one N. He elected to be tried without a jury. When the indictment was read over and explained he pleaded guilty to both counts. The High Court Judge after having accepted the plea, postponed the case for the purpose of sentencing. Thereafter the High Court Judge convicted the accused and sentenced him to a term of life imprisonment on the 1st count and to a term of four years rigorous imprisonment on the 2nd count; the sentences to run concurrently.

It was contended in appeal that the High Court Judge had erred in not following the provisions of S.197 and S.205 of the Criminal Procedure Code.

Held :

- (i) S.205 of the Criminal Procedure Code is applicable to cases where there is a trial by jury, whereas S.197 is applicable to cases where there is a trial by a Judge of the High Court without a jury.
- (ii) As Act No. 11 of 1988 was in operation the High Court Judge had to follow the procedure in Cap. XVIII Part B which provides for

trial by Judge of the High Court without a jury, and should necessarily have had to decide the question whether he should accept the said plea tendered, in terms of S.197 bearing in mind that when the legislature enacted S.197, it did not envisage a situation where a High Court Judge is called upon to consider a plea of guilt tendered by an accused person for murder in terms of S.197.

- (iii) Although the High Court Judge had very correctly given his mind to S.205, he had failed to appreciate the effect and the wisdom enshrined in the said proviso and more particularly the guidance he could have had from it when deciding the issue before him, viz: whether he should accept the plea tendered.
- (iv) It would appear that the High Court Judge decided not to be guided by S.205 - This is a grave error.

Per Yapa J.,

"The High Court Judge should have known that in view of the proviso to S.205, as a matter of practice courts never accept a plea of guilt in a charge of murder. Besides it is always advisable for a High Court Judge not to accept a plea of guilt in a murder charge for the reason that the evidence led at the trial may not disclose an offence of murder but some lesser offence.

"It is clear that before Act 11 of 1988, came into operation S.11 of the Judicature Act and in terms of S.161 of the Code the trial of an accused person indicted for murder/attempted murder, had to be in the High Court by a Jury before a Judge. In the circumstances if an accused person tendered a plea of guilt to a charge of murder the High Court Judge had to give effect to the proviso to S.205 of the Code.

Under the Administration of Justice Law similar provision was made in S.204(2) of the said Law. Further S.220 of the old Code contained a similar provision.

- (v) Therefore prior to Act No. 11 of 1988 when an accused person pleaded guilty to a charge of murder, the trial Judge had no alternative but to refuse to receive the plea and cause the trial to proceed in like manner as if the accused person had pleaded not guilty.

- (vi) The change that was brought by Act No. 11 of 1988 is that in the case of certain offences, the accused person is given a choice to decide whether he opted to be tried by a jury before a Judge or tried by a Judge alone.

APPEAL from the Judgment of the High Court of Negombo.

Dr. Ranjith Fernando with Ms. Anoja Jayaratne and Ms. Sandamali Munasinghe for Accused Appellant.

Yasantha Kodagoda, S. S. C. for Attorney General.

Cur. adv. vult.

October 21, 1999.

HECTOR YAPA, J.

The accused-appellant in this case was indicted in the High Court of Negombo under two counts. In the first count he was charged with having committed the murder of Kankani Arachchi Appuhamilage Suwarnalatha Rajani on 26.12.1993, an offence punishable under Section 296 of the Penal Code. In the 2nd count the accused-appellant was charged with having committed the attempted murder of Patikiri Arachchige Roslin Nona an offence punishable under Section 300 of the Penal Code.

This case was taken up for trial on 24.09.1998 and when the indictment was read over and explained to the accused-appellant, he pleaded guilty to both counts in the indictment namely, the charge of murder and attempted murder. When the accused-appellant pleaded guilty to the said charges, in the indictment, the learned High Court Judge proceeded to read and explain the two charges to the accused-appellant for the second time. Thereafter when the accused-appellant was questioned as to whether he was guilty or not guilty to the said charges in the indictment, he pleaded

guilty. Thereupon the High Court Judge convicted the accused-appellant on the plea tendered and sentenced him to a term of life imprisonment on the 1st count and to a term of 4 years rigorous imprisonment on the 2nd count. He further ordered the sentences to run concurrently. It is difficult to understand why the learned High Court Judge after having accepted the plea tendered by the accused-appellant to the charge of murder set out in count No. 1 decided to sentence him to a term of life imprisonment when the only punishment permitted by law is death. The accused-appellant has appealed against the said conviction and the sentence.

At the hearing of this appeal it was submitted by the learned Counsel for the accused-appellant that the learned trial Judge has erred in law by accepting and entering a plea of guilt to a charge of murder. In support of this submission, learned Counsel referred us to the provisions of Sections 205 and 197 of the Code of Criminal Procedure Act No. 15 of 1979. Counsel contended that the learned High Court Judge should have been guided by these two sections on this question. Section 205 of the Code of Criminal Procedure Act provides as follows: - **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:**

Provided that when the indictment so pleaded to is one of murder the Judge may refuse to receive the plea and cause the trial to proceed in like manner as if the accused person had pleaded not guilty.

Section 197 of the Code of Criminal Procedure Act provides as follows:-

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.

It should be mentioned here that Section 205 of Code of Criminal Procedure Act is applicable to cases where there is a trial by jury, whereas, Section 197 is applicable to cases where there is a trial by a Judge of the High Court without a jury.

It is important to remember that, before the Code of Criminal Procedure (Amendment) Act, No. 11 of 1988, came into being, Section 11 of the Judicature Act, No. 2 of 1978, provided for jury trials in the case of more serious offences. Section 11 of the Judicature Act provides as follows:-

11. (1) Trial in the High Court shall be by jury before a Judge of the High Court where-
 - (a) at least one of the charges is for an offence referred to in the Second Schedule hereto; or
 - (b) The Attorney-General in any other case so determines in accordance with the law for the time being.
- (2) All other trials shall be before a Judge of the High Court sitting alone without a jury.

Items 1 - 4 of the second schedule to the Judicature Act referred to various offences which have to be tried by a jury before a Judge of the High Court. Item No. 2 in the second schedule specifically refers to offences punishable under Sections 296, 297, 300 and 364 of the Penal Code. In addition

section 161 of the Code of Criminal Procedure Act provides as follows:-

161. Subject to the provisions of this Code and any other written law in every 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, or in any case where the Attorney-General having regard to the nature and circumstances of the offence determines that the trial should be held in the High Court by a jury, trial shall be on indictment in the High Court by a jury. In every other case and whether there was a preliminary inquiry under this Chapter or not, trial shall be on indictment in the High Court without a jury.

It may be noted that the second schedule to the Judicature Act was amended by Judicature (Amendment) Act, No. 37 of 1979. However item No. 2 of the second schedule remained intact except that it was renumbered as item I. (vide Section 5 of the said Judicature (Amendment) Act.)

Therefore it is clear that before the Code of Criminal Procedure (Amendment) Act, No. 11 of 1988, came into operation, Section 11 of the Judicature Act and in terms of Section 161 of the Code of Criminal Procedure Act, the trial of an accused person indicted for murder or attempted murder, had to be in the High Court by a jury before a Judge. In the circumstances if an accused person tendered a plea of guilt to a charge of murder, the High Court Judge had to give effect to the proviso to Section 205 of the Code of Criminal Procedure

Act which states, as follows:- "Provided that when the indictment so pleaded to is one of murder the Judge may refuse to receive the plea and cause the trial to proceed in like manner as if the accused person had pleaded not guilty." Under the Administration of Justice Law, No. 44 of 1973 similar provision had been made in terms of Section 204 (2) of the said law. Further Section 220 of the Old Criminal Procedure Code contained a similar provision. Therefore there can be no controversy in respect of this matter that, prior to the Code of Criminal Procedure (Amendment) Act, No. 11 of 1988, came into operation, when an accused person pleaded guilty to a charge of murder, the trial Judge had no alternative but to refuse to receive the plea and cause the trial to proceed in like manner as if the accused person had pleaded not guilty. This position is made very clear when one reads the Sinhala version of Section 205 of the Code of Criminal Procedure Act. Raison d'être for this provision seems to be that a conviction for murder necessarily entails capital punishment. Vide Section 296 of the Penal Code.

On this matter the change that was brought about by the Code of Criminal Procedure (Amendment) Act, No. 11 of 1988 relates to the amendments that were made to Sections 161 and 195 of the Code of Criminal Procedure Act No. 15 of 1979. Sections 3 and 4 of the said Code of Criminal Procedure (Amendment) Act provide as follows:-

3. Section 161 of the principal enactment is hereby repealed and the following section 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.

4. Section 195 of the principal enactment is hereby amended by the insertion immediately after paragraph (e) of that Section, of the following paragraph:-

“(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;”

The major change that has been brought about by Sections 3 and 4 of the Code of Criminal Procedure (Amendment) Act has been to declare that all prosecutions on indictment instituted in the High Court shall be tried by a Judge of that Court subject to the qualification that where at least one of the offences falls within the list of offences set out in the second schedule to the Judicature Act, the trial shall be by jury before a Judge, if and only if, the accused elects to be tried by a jury. Therefore it would appear that in the case of offences referred to in the second schedule to the Judicature Act, the accused person is given a choice to decide whether he opts to be tried by a jury before a judge or tried by a Judge alone.

In the present case after the indictment was served on the accused-appellant on 29.08.1996, and a Counsel was

assigned to appear on his behalf, he elected to be tried without a jury. Therefore in the absence of any provision being made similar to the proviso to Section 205 of the Code of Criminal Procedure Act, at the time when the Code of Criminal Procedure (Amendment) Act, No. 11 of 1988, was enacted, the High Court Judge had to follow the procedure provided in Chapter XVIII, part B which provides for trial by Judge of the High Court without a jury. Thus when the accused-appellant on 24.09.1998 which was the date fixed for trial, pleaded guilty to both counts in the indictment namely the charges of murder and attempted murder, the trial Judge necessarily had to decide the question whether he should accept the said plea tendered by the accused-appellant in terms of Section 197, of the Code of Criminal Procedure Act, bearing in mind that, when the legislature enacted Section 197, it did not envisage a situation where a High Court Judge is called upon to consider a plea of guilt tendered by an accused person for murder in terms of the said provision i. e. Section 197. However in doing so, as happened in this case, learned High Court Judge very correctly gave his mind to Section 205 of the Code of Criminal Procedure Act, but unfortunately failed to appreciate the effect and the wisdom enshrined in the said proviso, and more particularly the guidance he could have had from it, when deciding the issue before him, namely whether he should accept the plea tendered by the accused-appellant in terms of Section 197 of the Code of Criminal Procedure Act. It would appear from the order of the learned High Court Judge that he decided not to be guided by Section 205 of the Code of Criminal Procedure Act, for the reason that provision has not been made to cater for a situation where a plea has been tendered by an accused person indicted for murder, at a trial before a High Court Judge without a jury. Therefore

in our view it was erroneous for the High Court Judge after having very correctly made the observation that provision has not been made to provide for a situation where a plea of guilt is tendered by an accused person for a charge of murder before a High Court Judge sitting without a jury, to have ignored completely the principle enshrined in the proviso to Section 205 of the Code of Criminal Procedure Act.

Even if the learned High Court Judge decided to act under Section 197 of the Code of Criminal Procedure Act, the Court has to be satisfied that "he (accused-appellant) rightly comprehends the effect of his plea". In deciding so, High Court Judge should have been mindful of the Proviso to Section 205, of the Code of Criminal Procedure Act. Further High Court Judge should have known that, in view of the proviso to Section 205, as a matter of practice Courts never accepted a plea of guilt in a charge of murder. Besides it is always advisable for a High Court Judge not to accept a plea of guilt in a murder charge, for the reason that the evidence led at the trial may not disclose an offence of murder but some lesser offence. In this case the Court should have also acted on the premise that the legislature could never have intended preferential treatment being given to a murder suspect who opted to be tried by a jury and not when such a suspect opted to be tried without a jury. It is to be noted that even in the case of a trial by jury, the accused is required to plead guilty or not guilty to the indictment before the jury is empanelled in terms of Section 204 of the Code of Criminal Procedure Act. Thus it would appear absurd to have a situation where a plea for murder can be accepted only when there is to be a trial by a

Judge without a jury but not when there is a trial by jury. However in both situations the plea is tendered before the High Court Judge only.

It is also pertinent to mention here that the sentence passed by the learned High Court Judge on the accused-appellant after he pleaded guilty to the charge of murder clearly indicates that the High Court Judge has entertained a doubt in his own mind with regard to the question whether the accused-appellant had rightly comprehended the effect of his plea in terms of Section 197 of the Code of Criminal Procedure Act. Otherwise one cannot understand the reason as to why the High Court Judge decided to impose a term of life imprisonment on the accused-appellant without sentencing him to death as required by law. Further it is seen that the High Court Judge after having accepted the plea tendered by the accused-appellant has decided to postpone the case for 28.09.1998 for the purpose of sentencing the accused-appellant. This postponement for sentencing was unnecessary unless the High Court Judge thought there were mitigatory circumstances in favour of the accused-appellant. This position finds further support from the submissions that were made by the assigned Counsel in mitigation of the sentence, showing circumstances which were capable of reducing the charge of murder to a lesser offence.

Finally it must be mentioned here that the assigned Counsel in this case has failed to provide the necessary legal aid to the accused-appellant. In fact the learned High Court Judge has observed that the assigned Counsel remained silent at the stage when the accused-appellant pleaded guilty to the charges in the indictment. In the circumstances it would appear as contended by learned

Counsel for the accused-appellant, that he (accused-appellant) was virtually unrepresented and undefended. Therefore doubt arises as to whether the accused-appellant in fact had a fair trial.

For the aforesaid reasons, we are of the view that the learned High Court Judge was in serious error when he decided to accept the plea tendered by the accused-appellant for the offence of murder. In fact in this case, we are of the considered view that the learned High Court Judge should have refused to receive the plea tendered by the accused-appellant and proceeded with the case as if he has pleaded not-guilty. Therefore we set aside the conviction and the sentences imposed on the accused-appellant and order a fresh trial against him on the same indictment.

KULATILAKA, J.

- I agree.

Appeal allowed. Conviction set aside. Fresh trial ordered.