SARATHCHANDRA
v
ATTORNEY-GENERAL

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA 169/2003
HC GAMPAHA 48/94
MARCH 12, 2008
APRIL 29, 2008
JUNE 16, 2008

Penal Code – Sections 296, 297 – Code of Criminal Procedure Act, No.15 of 1979 – Sections 196, 207, 204 and 436 – Retrial – Failure to read out the charge and record a plea – Is it fatal? – Constitution Article 138, Articles 13(3),13(4) – Circumstances warranting a fresh trial? – Fair Trial – A Fundamental Right?

The accused-appellant along with his brother were originally indicted for having committed the murder of one N. After trial without a jury, the trial Judge convicted the accused under Section 297 and acquitted his brother. The appeal lodged by the accused-appellant was upheld and a retrial was ordered.

At the conclusion of the retrial – without a jury – the trial Judge convicted the accused-appellant under Section 296 and sentenced him to death.

In appeal it was contended that (1) the indictment and the charge had not been read out to the accused and a plea recorded at the second trial (2) the charge had not been appropriately amended at the second trial, deleting the name of the other accused who had been acquitted (3) in view of the infirmities and the unsatisfactory nature of the only eye witness, the conviction could not stand.

Held:

(1) On a plain reading of Sections 196, 197 and Sections198, 204 of the Code, in a High Court trial with or without a jury, it is abundantly clear that (1) the indictment containing the charge/charges shall be read over and explained to the accused, irrespective of the fact whether he is defended by Counsel (2) the plea of guilty or not guilty shall be obtained and recorded, unless he refused to plea.

(2) A retrial is not a continuation of the abortive first trial, but a distinct and separate trial where the mandatory provisions of the Criminal Procedure Code have to be adhered to.

Compliance of the provisions of Section 196 of the Code at the trial does not discharge or absolve the trial-Judge from desisting in his duty to comply with the mandatory provisions at the second trial.

Per Sarath de Abrew J.

"Section 436 of the Criminal Procedure Code and Article 138 of the Constitution cannot be regarded as a panacea for all ills especially where the fundamental mandatory provisions are blatantly disregarded which would occasion a failure of justice."

(3) It is a fundamental right of an accused to be entitled to a fair trial in accordance with the procedure established by law in accordance with Article 13(3) and Article 13(4) of the Constitution.

(4) Section 207 of the Code provides for an accused to plead not guilty to the charge presented in the indictment, but to plead guilty to a lesser offence; the non-compliance of Section 196 would have denied this opportunity to the accused, which would become a failure of justice.

(5) In view of the infirmities and the unsatisfactory nature of the evidence of the eye-witness the circumstances do not warrant a fresh trial; twenty years have already elapsed since the incident in 1988. The appellant had undergone the hazards of two High Court trials already.

Per Sarath de Abrew, J.

"As the appellant has already undergone eight years of incarceration, I am satisfied that the ends of Justice have been already met".

APPEAL from the judgment of the High Court of Gampaha.

Dr. Ranjith Fernando with *Ms. Chanya Perera* for accused-appellant.

Palitha Fernando PC Addl. Solicitor-General with *Rohantha Abeysuriya* SSC for Attorney-General.

December 5, 2008

SARATH DE ABREW, J.

The present accused-appellant (2nd accused), along with his brother Amaratunga Arachchige Nihal Padmasiri (1st accused), originally were indicted before the High Court of Gampaha for having committed the murder of one Wijesinghe Pedige Nimal on 13.05.1998 at Halwatha, Keerithitha under Section 296 of the Penal Code. After trial without a Jury, the learned High Court Judge acquitted the 1st accused and convicted the 2nd accused, the present accused-appellant, under Section 297 of the Penal Code for culpable homicide

not amounting to murder on the basis of sudden fight and sentenced the Accused-Appellant to a term of 05 years imprisonment.

The Accused-Appellant (hereinafter sometimes referred to as the appellant) appealed to this Court against the conviction and sentence and the Court of Appeal ordered a re-trial in CA No. 207/96, on the basis that there had been a complete failure to elicit from the doctor who gave evidence as to whether the injuries would constitute a great antecedent probability of death resulting as opposed to a mere likelihood. At the conclusion of the re-trial by the Gampaha High Court Judge without a jury, the learned trial Judge on 23.10.2003 convicted the appellant under Section 296 of the Penal Code for the offence of murder and sentenced him to death. Being aggrieved of the above, the Appellant has preferred the present Appeal against the above conviction and sentence.

The facts pertaining to this case may be set out briefly as follows. This incident had occurred around 7.30 p.m. on 13.05.1998 at Halwatta, Keerithitha in Weliveriya Police Area. The Appellant Wimal, his younger brother Nihal (who was acquitted as the 1st accused in the original trial) and their mother Yasawathi lived in close proximity to the cadjan hut of the deceased, where the deceased Nimal, his elder brother Sunil and elder sister Ranjani, who were witnesses for the prosecution and the husband and children of Ranjani were residing. According to the main witness Ranjani, elder sister of the deceased, on the day of the incident the appellant and the deceased have had lunch together at Ranjani's house and both of them had gone together to have a bath. Towards evening that day, Ranjani, on hearing a noise of a quarrel from the direction of the house of the appellant, had rushed there to investigate. The accused-appellant (Lokka) and his younger brother (Rala) had been present there along with the deceased. Ranjani had implored on them not to harm the deceased. Inspite of her pleas, the younger brother of the appellant (Rala) had stabbed the deceased with a knife and as the deceased fell down, the appellant had repeatedly dealt blows on the deceased with a long knife like weapon. Thereafter a police jeep had arrived at the scene and removed the deceased to the Gampaha Hospital where he was pronounced dead. Elder brother of the deceased, Wijesinghe Pedige Sunil too had given evidence to the effect that on hearing cries of Ranjani that the deceased was being done to death, he too rushed to

the scene to find his brother the deceased fallen on the ground opposite the house of the appellant with severe bleeding injuries, while the accused-appellant was standing there with a weapon like a long knife or a katty. Thereafter the villagers had gathered there with torches to dispel the darkness while Ranjani had wept embracing the fallen deceased.

Then Officer-in-Charge, Weliveriya Police Station retired Inspector of Police Ratnayake had given evidence as to visiting the scene the following day morning and recovery of the knife P2. I.P. Dharmadasa, then a Sub-Inspector attached to Weliveriya Police, on mobile duty that fateful night, had given evidence to the effect that on receipt of a message from the Police Station, he arrived at the scene by 10.30 p.m. that night and removed the deceased in the jeep to Gampaha Hospital where the deceased was pronounced dead. Dr. Asoka Premaratne, then DMO Gampaha, had produced the Post-Mortem Report and given evidence to the effect that there were 10 external injuries on the face and right side of the neck of the deceased out of which 09 injuries were cut wounds. The Post-Mortem Report (P5) had disclosed that the cause of death was due to shock and hemorrhage following flow of blood to the brain due to multiple cut injuries.

After the closure of the prosecution case, the appellant has made a dock statement denying complicity to the effect that he returned from Ambatale that evening around 11 p.m. having gone there for work to give manual help for masonry work. On his return he went to the house of his grandmother who had informed him that the the deceased had attempted to rape his mother whereupon his younger brother had attacked the deceased. The mother Yasawathi, who had given evidence for the defence to the above effect at the first trial, had failed to do so at the second trial.

The learned trial Judge had rejected the plea of *alibi*, and also the mitigatory pleas of sudden fight and grave and sudden provocation, and convicted the appellant for the offence of murder under section 296 of the Penal Code.

At the hearing of the Appeal, the learned Counsel for the appellant raised the following grounds in support.

(1) The indictment and the charge had not been read out to the accused and a plea recorded at the second trial.

(2) The charge on the indictment had not been appropriately amended at the second trial, deleting the name of the 1st accused in the first trial, who had been acquitted.

(3) (a) The evidence of the main witness Ranjani was unreliable as she had categorically told the police that the deceased was attacked with a club (V4) and at the first trial too she had stated the same (V1).

(b) Witness Sunil too had told the police that his sister Ranjani had told him that deceased was attacked with a club (page 217).

(c) I.P. Ratnayake had recovered a blood stained piece of firewood (P4), which had not been sent to the Government Analyst.

(d) Ranjani had also testified that the brother of the present appellant, (who had been acquitted at the first trial) who had given the first information to the police about the incident, too had attacked the deceased with a bread knife. Therefore the defence contended that the evidence of the prosecution witnesses were unsatisfactory as to the vital aspect as to the nature of the weapon used.

(4) The *alibi* adduced by the appellant had not been given due consideration by the learned trial Judge.

(5) In any event the conviction for the offence of murder was not justifiable as the evidence disclosed mitigatory pleas of grave and sudden provocation and/or sudden fight.

I have carefully perused the Information Book Extracts, the totality of the proceedings and the written submissions adduced by both sides. I now propose to examine the main contention adduced on behalf of the appellants as to the failure to read out the charge to the accused-appellant and record a plea at the commencement of the second trial which would have a conclusive effect in deciding this appeal.

The mandatory provisions of Section 196 (Trial without a Jury) and Section 204 (Trial by Jury) of the Code of Criminal Procedure Act, No. 15 of 1979 with regard to the arraignment of accused persons at the commencement of a trial before the High Court read as follows:-

"When the Court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged."

Section 197 of the Code further 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."*

Section 198 of the Code also provides that *"if the accused does not plead or if he pleads not guilty, he shall be tried."*

On a plain reading of the above provisions of the Criminal Procedure Code, in a High Court trial with or without a Jury, it is abundantly clear that the following mandatory requirements have to be fulfilled before a verdict is entered. The use of the word shall in Section 196 of the Code, to my mind, is not merely directory but mandatory, and confers jurisdiction to try the accused only after compliance of this mandatory provision.

(a) The indictment containing the charge or charges should be read over and explained to the accused, irrespective of the fact whether he is defended by Counsel.

(b) His plea of guilty or not guilty should be obtained and recorded, unless he refused to plead.

A perusal of the proceedings of 15.10.1999, 22.02.2000, 24.07.2000, 21.06.2001, 12.11.2001, and finally 29.09.2003 on which date the second trial commenced before the High Court of Gampaha disclose that the learned trial Judge had failed to comply with the mandatory provisions of Section 196 of the Code as stated above. (Pages 182-187 of the Record). It is most unfortunate that the learned trial Judge had failed to perform his sacrosanct duty in this regard.

The learned Additional Solicitor-General endeavoured to circumvent this procedural disaster by taking refuge under the *proviso* to Article 138 of the Constitution which reads as follows: *"Provided that no judgment, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."* The learned Additional Solicitor-General, though conceding

that the reading of the charge to the accused in the second trial was necessary, submitted that the failure to do so would constitute only a procedural irregularity, as the accused was already familiar with the charge as it had been read over to him at the abortive first trial, and therefore it cannot be said that this irregularity caused material prejudice to the accused which occasioned a failure of Justice.

I am unable to agree with the above contention of the learned Additional Solicitor-General for the following reasons.

(a) A re-trial is not a continuation of the abortive first trial, but a distinct and separate trial where the mandatory procedural provisions of the Criminal Procedure Code have to be adhered to. Compliance of the provisions of Section 196 of the Code at the first trial does not discharge or absolve the learned trial Judge from desisting in his duty to comply with this mandatory provision at the second trial. Further, this argument cannot hold water as the accused is always informed of the charge at the Non-summary Inquiry, and this cannot be regarded as an excuse for not reading out the charge and recording his plea at the High Court trial.

(b) Section 436 of the Code of Criminal Procedure, Act No. 15 of 1979 and the *proviso* to Article 138 of the Constitution quoted above cannot be regarded as a panacea for all ills, especially where the fundamental mandatory procedural provisions are blatantly disregarded which would occasion a failure of justice.

(c) It is a Fundamental R ight of an accused person to be entitled to a fair trial in accordance with procedure established by law, in accordance with Article 13(3) and 13(4) of the Constitution. In the absence of the charge being read out to the accused and his plea recorded, it is unfair and unreasonable to subject an accused person to a trial where he would be handicapped as to giving proper and necessary instructions to his defending Counsel and preparing his defence. As this was a retrial, and not a fresh trial, there was no serving of the indictment on the accused, in which event, there is

nothing on record to indicate that the accused was aware of the details of the indictment.

(d) Further Section 207 of the Code provides for an Accused person to plead not guilty to the charge presented in the indictment, but to plead guilty to a lesser offence. In this case, if the accused-appellant was willing to plead guilty to the lessor offence of culpable homicide not amounting to murder under Section 297 of the Penal Code on the basis of grave and sudden provocation or sudden fight, the non-compliance of the provisions of Section 196 of the Code would have denied this opportunity to the accused, which would occasion a failure of justice.

In the present case, there was a duty cast on the learned trial Judge to delete the name of the 1st accused who was acquitted in the first trial and amend the indictment accordingly and then comply with the provisions of Section 196 of the Code and read out the amended charge to the present accused-appellant. I am satisfied that the failure to do so has occasioned a failure of justice. Non-compliance of Section 196 of the Code is not a mere technical irregularity but a fundamental defect which would vitiate the conviction and sentence.

I have also perused the totality of the evidence in this case and in view of the infirmities and unsatisfactory nature of the evidence of the only eye-witness Ranjani, I am satisfied that the circumstances do not warrant ordering a fresh trial. Twenty years have already elapsed since the incident in 1988. The appellant had undergone the hazards of two High Court trials already. As the appellant has already undergone eight years of incarceration, I am satisfied that the ends of justice have been already met, taking into consideration all aspects led in evidence in this case.

In view of the above the main contention adduced on behalf of the appellant should succeed. In the event, I do not propose to examine the other contentions in detail, as it would be a futile exercise.

For the foregoing reasons, I allow the Appeal of the appellant and set aside the conviction for murder under Section 296 of the Penal Code and the consequent death penalty imposed on the appellant by the learned High Court Judge of Gampaha dated 13th May 1998 and acquit the accused-appellant.

The Registrar is directed to inform the Prison authorities accordingly and to send a copy of this Judgment to the High Court of Gampaha forthwith.

IMAM, J. – I agree.

Appeal allowed.

Conviction set aside.