

KARUNADASA AND OTHERS
v.
ATTORNEY GENERAL

COURT OF APPEAL.

SENEVIRATNE, J. (PRESIDENT, COURT OF APPEAL), SIVA SELLIAH, J.

AND BANDARANAYAKE, J.

C. A. APPLICATION No. 1608/84; H. C. RATNAPURA No. 15/83.

MARCH 28 AND 29, 1985.

Trial by jury in murder trial - Plea to lesser offence after commencement of trial - Acceptance of plea by Judge - Validity - Sections 230 and 232 of the Code of Criminal Procedure Act.

The accused-petitioners were indicted for murder. After the empanelling of the jury and the opening address to the Jury by the State Counsel and trial Judge and the formal evidence of a Police Constable was led, the accused pleaded guilty to the lesser offence of culpable homicide not amounting to murder. Without putting the question of acceptance of the plea to the jury, the Judge on his own accepted the plea and convicted and sentenced the accused.

Held -

The Judge has no power to accept a plea from the accused once a jury trial has commenced. The acceptance of a plea is then a function of the Jury. It cannot be said that the trial proper had not commenced as the evidence of eye-witnesses had not yet been led.

APPLICATION in revision from conviction and sentence of the High Court Judge of Ratnapura.

Mrs. M. Muttetuwegama for petitioner.

N. G. Amaratunga, S.C. for Attorney-General.

Cur adv. vult.

May 9, 1985.

SIVA SELLIAH, J.

The three accused-petitioners in this case were indicted in the High Court of Ratnapura for having on 2.2.1980 caused the death of Weerasekara Kankanamge Sirisena, on offence punishable under section 296 of the Penal Code.

The case was taken up for trial on 5.11.84 and the accused pleaded severally not guilty. The jury was thereafter empanelled and on the following date the learned High Court Judge made his preliminary charge to the jury after which the State Counsel opened the case for the prosecution and also proceeded, with the leave of the judge, to amend the indictment by adding an additional witness. Thereafter the prosecution led the evidence of PC 13164 Sunil. After the evidence of this witness was led the accused pleaded guilty to the lesser offence of culpable homicide not amounting to murder and the judge accepted the plea and sentenced the 1, 2 and 4th accused to a term of 10 years R.I. each and the 3rd accused to a term of 2 years R.I., suspended for 10 years. The 1, 2 and 4th accused have on 21.11.84 moved by way of an application in revision to set aside the conviction and sentence imposed on the ground that the judge had no power to accept a plea from the accused once a jury trial had commenced and that it was the function of the jury to do so and that his statement to the jury at that stage that the "trial proper" had not commenced as the evidence of no eye-witness had been led is incorrect.

We are in agreement with this submission of learned counsel for the accused. The provisions governing trial by jury are contained in section 204-238 of the Criminal Procedure Code Act and a scrutiny of section 230 and 232 which set out the relative duties of the judge and the jury at a trial demonstrate quite clearly that the verdict must be that of the jury. The State Counsel has conceded in this case that the trial had commenced before the jury after they were empanelled and addressed by the judge explaining the principles which should guide them in the hearing and determination of the case and the State Counsel had addressed the jury on what was the prosecution case. In the circumstances it was wrong for the learned judge to state to the jury that the trial proper had not commenced and thus withdraw the case from the jury and accept a plea on the lesser offence without in the first instance asking both the State Counsel and the jury whether they accepted such a plea. As I observed earlier the verdict must, in a jury trial, be that of the jury and any departure from such a duty which is enjoined by law cannot be encouraged.

The learned State Counsel contended that we should apply the provisions of section 7 and section 436 of the Criminal Procedure Code Act as the accused had pleaded guilty to the lesser offence on their own and therefore no prejudice has been caused and there has been no failure of justice. He further contended that it was in view of the ground of the sentence of 10 years R.I. imposed that this application has been made. We see no justification whatever in law for applying either the provisions of section 7 or section 436 of the Criminal Procedure Code Act. It is fundamental that a trial must be held according to law and that in a trial by jury where an accused has been given into the charge of the jury the verdict must be that of the jury. We are greatly appreciative of the fact that the learned State Counsel following the highest traditions has brought to our notice the case of *Joe Hancoch*. In that case the appellant was charged at Derbyshire Assizes on an indictment which charged him with having carnal knowledge of a woman without her consent. At first, the appellant pleaded not guilty but afterwards in the course of the trial, in somewhat unsatisfactory circumstances he made a confession of some sort in the presence and hearing of the jury and that confession was acted upon, although no verdict of the jury was taken and the jury was in fact discharged. The Lord Chief Justice held that there was no doubt that, in such circumstances, a verdict of the jury ought to be taken and set aside the conviction and ordered a re-trial.

In the instant case, we are unable to sanction the step taken by the High Court Judge to accept the plea of the accused without consulting the jury into whose charge the accused had been given. To do so would be to encourage short circuits in jury trials and would be in conflict with the principle that the verdict must be that of the jury. As the procedure adopted by the learned judge in this case constitutes a mis-trial, we set aside the conviction and sentence imposed on the accused and order a fresh trial according to law.

SENEVIRATNE, J. (President) – I agree.

BANDARANAYAKE, J. – I agree.

Conviction and sentence set aside and case sent back for fresh trial.