[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present :* **Basnayake, A.C.J. (President), Pulle, J., and Weerasooriya, J.**

REGINA *v.* V. DIAS APPUHAMY *et al.*

APPEALS 111–112 OF 1955 WITH APPLICATIONS 171–172

S. C. 22—M. C. Galle, 16,768

Charge of murder—Plea of guilty to a lesser offence—Stage at which it may be taken—Criminal Procedure Code, ss. 6, 221.

The appellants were indicted on a charge of murder. After two of the eye witnesses had been examined the Court permitted the accused, in the presence of the Jury, to plead guilty to the lesser offence of culpable homicide not amounting to murder. The Court then briefly summarised the evidence already led and asked the Jury whether they wished to accept the plea tendered by the appellants. The Jury, however, were unwilling to accept the plea. The trial then continued and at its conclusion the Jury returned a verdict of murder against the appellants.

It was contended in appeal that the appellants should not have been asked to plead until the Jury had first been asked whether they were willing to accept the plea and signified their willingness.

Held, that the procedure adopted by the trial Judge was not illegal.

Per Curiam :—" It has been the practice for a considerable length of time to accept a plea of guilty to a lesser offence when tendered in the course of a trial even after the accused has been placed in chargo of the Jury, the procedure adopted being that prescribed in section 221 (2) with modifications to suit a trial by Jury. Our practice is the same as the English practice and section 6 of our Criminal Procedure Code affords sufficient authority for the adoption of that practice which is not in conflict or inconsistent with the provisions of our Code. "

APPEALS, with applications for leave to appeal, against two convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *K. Sivasubramaniam* and *K. Charavanamuttu* (Assigned), for the 1st and 2nd accused-appellants.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 13, 1955. BASNAYAKE A.C.J.—

The two appellants and two others (hereinafter referred to as the 3rd and 4th accused) were indicted on a charge of murder of one Jakoris. The evidence against them was to the effect that the 1st appellant

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followed by the 2nd appellant, the 3rd and 4th accused came armed with deadly weapons and attacked the deceased who was seated on the ridge of a paddy field which was being harvested under his supervision. The 1st appellant struck him with a club, the second with a katty, and the 3rd and 4th accused with clubs. The deceased died almost instantaneously, his head being badly battered and cut.

After two of the eye witnesses had been examined the Court at the request of the senior pleader for the appellants and the 3rd and 4th accused asked the Jury to retire. They did so. Thereafter the following proceedings took place according to the record :—

" Mr. Karunaratne states that he is prepared to advise the 1st and 2nd accused to plead guilty to culpable homicide not amounting to murder in the course of a sudden fight. Crown Counsel states that it seems to him on reading the Information Book extracts that there was some incident other than the incident deposed to by the witnesses. He further states that there are certain witnesses who are not called by him who speak to this fact. He states that he feels that there is something more than what the witnesses depose to. One witness leaves out the 4th accused and the other the 3rd accused. Court states it is a matter for the jury to decide at this stage.

Crown Counsel states that if the jury accepts this plea he is prepared to withdraw the indictment against the 3rd and 4th accused.

Jury returns.

1st and 2nd accused plead guilty to culpable homicide not amounting to murder in the course of a sudden fight. His Lordship briefly summarises the evidence already led and asks the jury whether they wish to accept the plea tendered by the 1st and 2nd accused.

Foreman states that they wish to retire and consider the matter. They retire at 11.30 and return at 11.35 a.m.

Foreman to Court : We agree that the 3rd and 4th accused are not guilty but we wish to go on with the case against the 1st and 2nd accused.

Court : I feel you want to hear further evidence as against the 1st and 2nd accused ?

Foreman : Yes.

Court : I think the proper course is to proceed with the case against all the accused although the evidence against the 3rd and 4th accused is not strong.

Foreman : Yes.

Court : I think, in the circumstances, it is better to go on with the case against all four accused. Is that what you feel ?

Foreman : Yes.

Court to Mr. Karunaratne : Do you wish to put any further questions to the two witnesses ?

Mr. Karunaratne : No.

Court : I think it is better to go on with the case against all four accused ?

Foreman : Yes ".

The trial proceeded as the Jury were unwilling to accept the plea of culpable homicide not amounting to murder tendered by the appellants. At the conclusion of the trial the Jury returned a verdict of murder against the appellants and a verdict of not guilty against the 3rd and 4th accused.

On being asked under section 305 of the Criminal Procedure Code why judgment of death should not be pronounced against them the 1st appellant stated—

" I request that I be convicted of culpable homicide not amounting to murder. That is all ".

The 2nd appellant in a long statement, gave his version of the case. In the course of it he stated that, in the exercise of his right of private defence of person, he struck the deceased two blows with a katty which felled him to the ground.

The appellants were sentenced to death and the 3rd and 4th accused were acquitted.

Thirteen grounds of appeal were taken in the petition of appeal, but learned Counsel confined himself to two of the grounds, namely, that the verdict was unreasonable and that proceedings in which the Jury were invited to accept the verdict of culpable homicide not amounting to murder were illegal. Having regard to the evidence in the case we do not think that the submission that the verdict is unreasonable is entitled to succeed. There is ample evidence from which the Jury could have found a verdict against the appellants on the charge of murder.

Learned Counsel's submission in regard to the taking of the plea was that the 1st and 2nd appellants should not have been asked to plead until the Jury had first been asked whether they were willing to accept the plea and signified their willingness. He submitted that the tendering of a plea by the appellants without first ascertaining whether the Jury were willing to accept the plea caused grave prejudice to the appellants, in that thereafter the Jury were left with the impression that the appellants had caused the death and that they had only to decide whether the offence was murder or culpable homicide.

It was also submitted that the words of caution addressed to them by the trial Judge in his summing up advising them to erase from their minds the fact that a plea had been tendered, could have had little effect in removing the prejudice created by the incident.

We are unable to uphold this contention. Learned Counsel did not maintain that once a trial commences a plea cannot be accepted from the accused under any circumstances ; but he submitted that the procedure observed in the instant case did not conform with that laid down by this Court in the case of *Sittampalam v. The King* [1] which is as follows :—

" (1) if the Crown is not prepared to accept the plea of guilt in respect of the lesser offence, the case against the accused should proceed on the whole indictment ;

(2) if, on the other hand, the Crown intimates its willingness to accept the plea, the presiding Judge must himself decide whether, upon the evidence so far recorded and upon the depositions recorded by the committing Magistrate, it would be in the interests of justice for the Court to accept the plea ;

(3) if the presiding Judge, notwithstanding the Crown's willingness to accept the plea, decides that it should not be accepted by the Court, the case against the accused must proceed on the whole indictment ;

(4) if, on the other hand, the Judge considers that the plea may properly be accepted by the Court, he should invite the jury, in whose charge the accused has been given after they were empanelled to try the case, to state whether they would accept the plea ; and the Judge may inform the jury at this stage of the reasons why acceptance of the plea is recommended by him ;

(5) if the jury state that they are willing to return a verdict on that basis, the unqualified admission of guilt of the accused should, if this has not been already done, be recorded in the presence of the Judge and jury ; this admission becomes additional evidence on which the jury may act, and they should then be directed to pronounce a verdict accordingly ".

Learned Counsel submitted that the trial Judge had omitted to take the fourth and fifth steps outlined above and that that omission caused grave prejudice to the appellants.

We do not think that the procedure adopted by the Judge was illegal, nor do we think that the appellants suffered any prejudice in being permitted to tender their pleas in the presence of the jury before it was ascertained whether they were willing to accept the pleas, especially in view of the fact that both appellants urge in their petition of appeal that the verdict of murder be set aside and that a verdict of guilty of culpable homicide not amounting to murder be substituted therefor.

[1] *(1951) 52 N. L. R. 374.*

The judgment referred to above does not lay down the precise stage at which the accused should be permitted to tender his plea in the presence of the Jury. There is little difference between informing the Jury that the accused are willing to plead guilty to a lesser offence and actually taking the plea in their presence.

In regard to the procedure outlined in the judgment of this Court the only essential requirement is that, before the Jury are invited to consider whether they are willing to accept a plea of guilty of a lesser offence, the prosecuting Counsel and the presiding Judge should agree that the plea is one that can be accepted.

Our attention was drawn to the case of *Dingiri Banda v. The Queen* [1]. In that case after three witnesses for the prosecution had given evidence and before the case for the Crown had been closed, the following proceedings took place :—

"The Jury retire on the motion of Mr. Nissanka.

Counsel. My Lord, I can take a horse to water but I cannot make it drink. I have shown every possible reason why these three gentlemen, whom the Crown have called, should not be believed *in toto*. In all the circumstances of the case, I would submit that a plea of culpable homicide not amounting to murder be accepted and I would suggest that the matter be put to the jury at this stage.

Crown Counsel : I am not willing to take the responsibility.

Court : I shall put it to the Jury.

The Jury return.

Court to Jury : The accused in this case, gentlemen of the Jury, is willing to tender a plea of guilty to the lesser offence of culpable homicide not amounting to murder on the ground that he killed the deceased under grave and sudden provocation. Crown Counsel is not prepared to accept the plea. Nor am I prepared to commend it to you. But if you are prepared to accept the plea, I will consider it and the man will plead in your presence. It is hardly necessary for me to tell you that once a case is entrusted to the care of the Jury, it is for the Jury to say whether on the material elicited in cross-examination of the prosecution witnesses the picture arises that this was not a premeditated murder but something that happened while the accused had lost his power of self-control by reason of some grave and sudden provocation that transpired at the bagatelle table. If you are willing to accept the plea I shall get the accused to plead. I say nothing. The case is entirely in your hands. I am merely saying that Crown Counsel is not prepared to accept the plea. It is not a question of his accepting the plea or not. If he was I would recommend it. (Here follows directions in regard to the facts.) If anyone of you wants to go on with the case, the case will proceed. If you are prepared to

[1] *(1952) 54 N. L. R. 514*

accept the plea, it must be unanimous. The responsibility for the verdict is yours and yours alone. I have told that to Juries from the time I became a Commissioner of Assize and thereafter a Judge of the Supreme Court. If I had accepted the plea earlier it would have been my responsibility. (Here follows further directions in regard to the facts.) If anyone of you wants to go on with the case it will proceed.

Foreman : We wish to retire and consider the matter.

(The Jury retire and the Court adjourns for 15 minutes.)

Foreman : We are unanimously of opinion that the case should proceed. "

This Court held that the accused had not been prejudiced by the refusal of the Jury to accept the plea and refused to interfere with the conviction of murder.

Learned Counsel also referred us to the three English cases which are cited in the case of *Sittampalam v. The King* (*supra*). In the first of those cases, *R. v. Hancock* [1], the appellant had been given in charge of the Jury after he had pleaded not guilty to a charge of rape. At a later stage of the proceedings he made a statement which apparently amounted to a confession in the presence and hearing of the Jury, and the confession was acted upon, and the appellant was convicted and sentenced to three years' penal servitude. No verdict was taken and the Jury was discharged. The Lord Chief Justice held that in those circumstances a verdict of the Jury should have been taken.

In the second case, *Dorothy Clara Soanes* [2], the applicant was charged with the murder of her child. When the applicant had been given in charge of the Jury on the charge of murder, her Counsel informed the Judge that she was willing to plead guilty to infanticide, and Counsel for the Crown expressed his willingness to accept that plea. The Presiding Judge, however, refused to allow it to be accepted on the ground that there was no indication in the depositions of the circumstances which must exist before a verdict of infanticide can be returned, and the trial for murder proceeded, and the appellant was found guilty of infanticide and sentenced to three years' penal servitude. In the course of the judgment the Lord Chief Justice stated :

" The Judge's reason for refusing to allow a plea of guilty of infanticide to be accepted was that he could find no indication on the depositions that the circumstances existed which must exist before a verdict of infanticide, as distinct from one of murder, can be returned. While it is impossible to lay down a hard-and-fast rule in any class of case when a plea for a lesser offence should be accepted by Counsel for the Crown—and it must always be in the discretion of the Judge whether he will allow it to be accepted—in the opinon of the Court, where nothing appears on the depositions which can be said to reduce

[1] *(1931) 23 Cr. App. R. 16.* [2] *(1948) 32 Cr. App. R. 136.*

the crime from the more serious offence charged to some lesser offence for which a verdict may be returned, the duty of counsel for the Crown would be to present the offence charged in the indictment, leaving it as a matter for the jury, if they see fit in the exercise of their undoubted prerogative, to find a verdict of guilty of the lesser offence only. In this case we think that the learned Judge was not only right, but, indeed, bound to insist on the applicant being tried for murder. There was nothing disclosed on the depositions which would have justified a reduction of the charge from murder to infanticide, and, accordingly, this application is refused ".

In the third case of *R. v. Heyes* [1], the appellant was charged on an indictment containing counts for stealing and receiving bicycles. He pleaded not guilty to all the counts, but after he had been given to the charge of the Jury and subsequently granted legal aid, he stated, in the presence of the Jury, that he desired to admit his guilt on the counts for receiving. No verdict was taken, and the prisoner was sentenced by the Recorder to three years' imprisonment.

In the course of his judgment the Lord Chief Justice said :

" The shorthand note rather unfortunately does not contain any indication that the appellant himself was asked to plead, but merely a statement that his counsel said that he wished to plead guilty. Of course, that is not enough ; the prisoner must himself plead. However, we are told by both learned counsel that that in fact happened. Thereupon, the jury having heard the prisoner state that he wished to withdraw his plea and to admit his guilt, the proper proceeding was that they should have been told to return a verdict. Apparently counsel suggested to the learned Recorder that that was the proper course, but the learned Recorder said that it did not matter. It does matter, because once a prisoner is in charge of a jury he can only be either convicted or discharged by the verdict of the jury, and as there was no verdict of the jury here, the trial was a nullity. His admission in the hearing of the jury, without the jury being asked to return a verdict which ought to have been returned, was treated as equivalent to a plea. In the case of a plea of guilty, he never would have been in charge of a jury at all ".

None of these cases assist the appellants. Our Criminal Procedure Code only makes express provision for the acceptance of a plea of guilty to a lesser offence before the Jurors are chosen ; but makes no specific provision for the acceptance of a plea of guilty to a lesser offence, after the Jurors have been sworn. The provisions governing the acceptance of a plea of guilty to a lesser offence read as follows :—

" 221 (1). If the accused does not plead or if he pleads not guilty jurors shall be chosen to try the case as hereinafter provided.

[1] *(1950) 34 Cr. App. R. 161.*

(2) If the accused pleads not guilty but states that he is willing to plead guilty to a lesser offence for which he might have been convicted on that indictment and the prosecuting counsel is willing to accept such plea, the Judge may if he thinks that the interests of justice will be satisfied by so doing order such plea of guilty to be recorded and may pass judgment thereon accordingly, and thereupon the accused shall be discharged of the offence laid in the indictment and such discharge shall amount to an acquittal. "

It has been the practice for a considerable length of time to accept a plea of guilty to a lesser offence when tendered in the course of a trial even after the accused has been placed in charge of the Jury, the procedure adopted being that prescribed in section 221 (2) with modifications to suit a trial by Jury. Our practice is the same as the English practice and section 6 of our Criminal Procedure Code affords sufficient authority for the adoption of that practice which is not in conflict or inconsistent with the provisions of our Code.

At the close of the arguments in this case, we announced our decision that the appeals were dismissed and that the applications were refused, and stated that our reasons would be given at a later date. We accordingly deliver our reasons.

Appeals dismissed.