WIJESENA SILVA AND OTHERS
v.
ATTORNEY-GENERAL

COURT OF APPEAL
ISMAIL, J.,
DE SILVA, J.
C.A. NO. 126 – 130/96
H.C. NEGOMBO NO. 48/93
NOVEMBER 20, 24, 26, 1997
DECEMBER 08, 09, 16, 1997

Murder – Unlawful assembly – Common object – Penal Code – S. 32, 140, 296, 315, 146 – Criminal Procedure Code 15 of 1979 amended by Act 11 0f 1988 – S.16, 195(ee), 283 (1) (2) – Duty imposed on a Trial Judge to inquire from the accused – Whether or not the accused elects to be tried by a jury – Mandatory or comparative.

The 5 accused-appellants members of one family were indicted before the High Court under sec. 149, 296, 315 of the Penal Code. After Trial (Second Trial) before a judge sitting without a jury all five accused were convicted. It was contended that the trial judge erred in not complying with the mandatory provisions of S. 195 (*e*) (*e*) and 7 of the Code of Criminal Procedure.

Held:

1. Court is required to inquire from the accused whether or not he elects to be tried by a Jury. This is a duty imposed on the trial judge upon receipt of indictment. This duty implies no discretion but a mandatory obligation on the part of the High Court judge.

   "This is a recognition of the basic right of an accused person to be tried by his peers". *Per* de Silva, J.

   "It can never be said that if an accused is defended by a counsel the Trial Judge is relieved of his statutory obligations. The right to be tried by a jury is not given to the counsel but to the accused person.

2. It cannot be said that retrial is not a fresh Trial different from the first trial and that the provisions of the Criminal Procedure Code would therefore not apply or would apply only in part. For all purposes even in a retrial which is no different from the first trial every provision of law applicable to any trial before a High Court would be *mutatis mutandis* applicable at a retrial.

APPEAL from the judgment of the High Court of Negombo.

Cases referred to:

1. *Nimal Bandara v. State*–1956 1SLR 214.
2. *R. V. William* – 1971 1AER 874.

Dr. Ranjith Fernando with *Ms. Anoja Jayaratne* for accused-appellant.

C. R. de Silva, PC ASG with *S. Samaranayake,* SC for Attorney-General.

Cur. adv. vult.

January 16, 1998.

DE SILVA, J.

The five accused-appellants are members of one family. The 1st, 2nd, 3rd and 5th accused are brothers while the 4th accused is their father. The first three charges against them in the indictment were:

That on 11th May, 1989, at Heenatiyana, they were members of an unlawful assembly the common object of which was to cause hurt to Koronchige Etin Silva and that in the course of the same transaction they did commit the murder of the said Koronchige Etin Silva and cause hurt to Madampage Charlotte Ariyawathie offences punishable under section 140, sections 296 and 315 respectively, read with section 146 of the Penal Code.

The 4th and 5th counts related to committing the murder of the said Koronchige Etin Silva and causing hurt to Madampage Charlotte Ariyawathie on the basis that they acted in furtherance of a common intention under sections 296 and 315 read with section 32 of the Penal Code.

After a trial before a Judge sitting without a jury all five accused-appellants were convicted on 04.04.96 as charged on counts 1, 2 and 3. They were sentenced to 6 months, imprisonment on count 1 and to 1 year's rigorous imprisonment on count 3. They were sentenced to death on count 2. The trial Judge has failed to arrive at a finding on counts 4 and 5 of the indictment.

The prosecution relied on the testimony of Madampage Charlotte Ariyawathie, the widow of the deceased and the injured referred to

in counts 3 and 5 of the indictment. According to her evidence she was living with her husband together with their two children in their house at Heenatiyana. Three days prior to this incident her husband had been released after serving a sentence of five years for having caused the death of a family member of the accused-appellants. On 11. 5. 1989 after having dinner at about 8.00 pm her husband having lighted a beedi stepped out of the house through the rear door. Shortly thereafter within about five minutes he had rushed back into the house shouting out in pain. All five accused-appellants who were armed followed him inside the house and attacked him further. Ariyawathie too received blows when she went to the assistance of her husband. She was assaulted by the 1st accused on the back of her chest.

The deceased was then dragged out of the house by his feet by the 1st and 2nd accused and was further assaulted. Ariyawathie raised cries and after the accused-appellants left the scene her brother who had come there accompanied her to the Police Station. She was admitted to hospital and her statement was later recorded.

At the hearing of this appeal the learned counsel for the appellants submitted the following as the grounds of appeal:

(1) The learned trial Judge erred in law by failing to comply with the mandatory statutory obligation under section 195 (*e*) (*e*) and (7) of the Code of Criminal Procedure Act, No. 15 of 1979, as amended by Act No. 11 of 1988;

(2) That he erred in law failing to pronounce verdict and sentence in respect of counts (4) and (5) of the indictment as required by sections 283 (1) and (2) of the Code of Criminal Procedure Act, No. 15 of 1979;

(3) That he erred in law by misdirecting himself on the legal concepts of unlawful assembly, common object, common intention and common murderous intention; and

(4) That he erred by failing to consider items of evidence favourable to the accused.

On the first ground of appeal it is to be noted that these five accused-appellants had faced a trial before the High Court on the same indictment. That trial had been before a Jury and after the

conclusion of the case all the accused had been convicted on a 5-2 verdict by the Jury on 21.02.1994. Against that conviction and the sentence the accused appealed and the Court of Appeal had ordered a retrial in 1995 on the same indictment.

The accused-appellants faced a retrial and after being convicted before a Judge of the High Court sitting without a Jury were once again found guilty on counts (1), (2) and (3) and sentenced as mentioned before.

Learned counsel for the accused-appellants submitted that the learned trial Judge has failed to follow the provisions of section 195 of the Code of Criminal Procedure Act, No. 11 of 1988. The amending Act has introduced a new paragraph numbered (*ee*) which 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".

This amendment was necessitated by the introduction of new section 161 to the original Criminal Procedure Code. The new section states as follows:

> "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 2nd 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 in view of the said amendment, at a trial before the High Court the court is required to inquire from the accused whether or not he elects to be tried by a Jury. This is a duty imposed on the trial Judge upon receipt of indictment as indicated by the marginal note of section 195. This duty implies no discretion but a mandatory obligation on the part of the High Court Judge. This court in CA 71/93 (HC Kurunagala No. 252/53) decided on 25.03.94 has held that a trial held without compliance with this provision is a nullity. The Court of Appeal has also held that "This is a recognition of the basic right of an accused person to be tried by his peers". (*Nimal Bandara v. State*[1]).

The learned Additional Solicitor-General submitted that since the accused-appellants were represented by counsel no prejudice had been caused to them. Mr. De Silva *referred* to *R. v. William*[2] where there was an omission of formal arraignment of an accused and trial proceeded on the basis of plea of not guilty. The court held that failure to take a plea did not vitiate a trial as there was evidence to establish that the plea of not guilty had been vicariously offered or tacitly conveyed or a formal arraignment had been impliedly waived by the accused.

Additional Solicitor-General further submitted that in this case too the appellants were represented by counsel and it was the duty of the counsel to request for a Jury trial and the failure on the part of the counsel is a tacit approval of the fact that trial was to be held by the High Court Judge alone.

It is relevant to observe that when the case was fixed for trial only the assigned counsel represented the accused. (see proceeding of 23.02.1993 at page 9). However it can never be said that if an accused is defended by a counsel the trial Judge is relieved of his statutory obligations. The right to be tried by a Jury is not given to the counsel but to the accused person.

In the instant case the trial commenced on the 23rd of February, 1996, when a plea was recorded and the court proceeded to hear evidence. Before the commencement of the trial the trial Judge had not complied with section 195 (*e*) (*e*). No option whether they wished to be tried by a Jury had been given to the accused. In fact the trial Judge states that this trial commenced before him without a Jury (page 153). It should also be noted that the accused had in fact opted for a Jury on the first trial on being given the option as required by law.

The learned Additional Solicitor-General further submitted that this trial was as a result of an order of the Court of Appeal. Therefore there is no fresh service of indictment and section 195 does not come in to play at this stage. We are unable to agree with this submission. It cannot be said that retrial is not a fresh trial different from the first trial and that the provisions of the Criminal Procedure Act, No. 15 of 1979 would therefore not apply or would apply only in part. It is observed that for all purposes even in a retrial which is no different from the first trial every provision of law applicable to any trial before a High Court would be *mutatis mutandis* applicable at a retrial.

Furthermore if Additional Solicitor-General's argument is accepted it will be a situation where the accused-appellants have already opted for a Jury at the time the indictment was served on them and the trial Judge has totally disregarded that and proceeded to hear the case contrary to the wishes of the accused.

We therefore hold that the failure on the part of the trial Judge to comply with this new section 195 (*e*) (*e*) necessarily vitiates this trial. Since we take this view it is not necessary to consider the other grounds of appeal. Our courts have held that a 2nd retrial can be permitted but not a 3rd. We set aside the conviction and sentence of the accused-appellants and direct that a fresh trial be held early after the accused-appellants are given an opportunity to elect whether they be tried by a Jury or a Judge alone.

ISMAIL, J. – I agree.

Appeal allowed.