[COURT OF CRIMINAL APPEAL]

1951 *Present:* **Gratiaen J. (President), Gunasekara J. and Pulle J.**

SITTAMPALAM *et al.*, Petitioners, *and* THE KING, Respondent

APPLICATIONS 28 AND 29 OF 1951

S. C. 23—M. C. Point Pedro, 13,520

Court of Criminal Appeal—Trial—Plea——Plea of guilty of lesser offence—Circumstances when it will be accepted or rejected—Sentence—Alteration of illegal sentence.

The following is the correct procedure to be adopted when an accused person who had previously pleaded not guilty seeks, after his trial has commenced before a jury empanelled for the purpose, to retract his earlier plea and to tender an unqualified admission that he is guilty of some lesser offence on which a verdict against him may properly be recorded without an amendment to the indictment:—

(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;

[1] *(1950) 52 N. L. R. 89.*

(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.

Held, further, that when a sentence passed on an accused exceeds the maximum which the law authorises, the Court of Criminal Appeal has power to substitute a legal sentence when dealing with the application for leave to appeal.

APPLICATIONS made by two prisoners for leave to appeal against their convictions and sentences.

M. M. Kumarakulasingham, for the accused appellants.

T. S. Fernando, Crown Counsel, with *H. A. Wijemanne*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 8, 1951. GRATIAEN J.—

The first petitioner was indicted at the Jaffna Assizes for the murder of Thamotharampillai Selvakulasingham, and the second petitioner was indicted in the same proceedings for the abetment of the commission of this offence. Both petitioners pleaded "not guilty", and a jury was duly empanelled to try the case.

After three witnesses for the prosecution had given evidence, but before the case for the Crown had been closed, counsel for the defence requested permission to make a submission to the learned presiding Judge in the absence of the jury. The jury then retired, and counsel for the defence informed the Judge that the 1st petitioner was willing, on his advice, to tender a plea of guilt on the lesser count of culpable homicide not amounting to murder, and that the 2nd petitioner was similarly prepared to tender a plea on the lesser count of abetment of culpable homicide not amounting to murder. What took place thereafter is recorded as follows :—

"*Court :* What do you say, Mr. Crown Counsel ?

Crown Counsel : It is a matter for the jury.

Court : Do you have any objection to my putting it to the jury ?

Crown Counsel : No".

We infer from the shorthand note of the proceedings that Crown Counsel intended by his first reply to indicate that he was not disposed to accept a plea of guilt to a lesser offence in the case of either petitioner. His second reply, however, indicates equally clearly that, although he had earlier stated what his attitude was in the matter, he had no objection to the jury being invited by the learned Judge to indicate whether they were willing to accept the pleas tendered by the defence. The jury were then recalled, and were addressed at some length by the learned Judge. He pointed out to them what seemed to him to be the effect of the evidence which had so far been led by the prosecution, and also of the medical evidence which would be led if the trial on the charges of murder and abetment respectively were to continue. "Evidently", he said, "their intention (i.e., the intention of the petitioners) was not to kill the man but to punish him. That seems to be the intention".

He then informed the jury that the petitioners had, through their counsel, expressed their willingness to plead guilty to the lesser offences, and concluded his address to the jury in the following terms :—" it is for you to say whether you are prepared to accept the plea of culpable homicide not amounting to murder in which case they are prepared to plead that way. It is a matter for you. If you like we can go on with the case ".

The foreman replied that they wished to retire in order to consider this proposal. What took place when they returned to the Court is recorded as follows :—

" *Court :* Are you prepared to accept that plea ?

Foreman : Yes. We unanimously find the 1st accused guilty of culpable homicide not amounting to murder, and the 2nd accused guilty of aiding and abetting the commission of culpable homicide not amounting to murder. We are also of opinion that the accused should be given the maximum punishment.

Court : That is a matter for me to decide ".

It is apparent from what took place that instead of answering the specific question which was put to them—namely, whether they were prepared to accept the pleas which the petitioners proposed to tender, the jury prematurely and, we think improperly, returned a verdict finding them respectively guilty of culpable homicide not amounting to murder and of the abetment of that offence. After the verdict had been pronounced, each petitioner pleaded guilty in accordance with the verdict which had already been pronounced against him. Previous convictions were then proved against the petitioners, and the learned Judge sentenced the 1st petitioner to a term of 12 years rigorous imprisonment and the 2nd petitioner to a term of 10 years rigorous imprisonment.

The petitioners applied to this Court for leave to appeal against their convictions and also against the sentences passed on them. At the conclusion of the argument, we made order dismissing the applications for leave to appeal against the convictions and the application of the 2nd petitioner to appeal against his sentence. We reduced the sentence passed on the 1st petitioner to one of 10 years rigorous imprisonment. I now proceed to pronounce the reasons for our decisions.

It seems to us that the procedure which was adopted after Crown Counsel had refrained from expressing willingness to accept the pleas on the lesser offences was unsatisfactory. Our reason for taking this view will, I think, become sufficiently clear if we indicate what we regard as the correct procedure to follow when an accused person who had previously pleaded not guilty seeks, after his trial has commenced before a jury empanelled for the purpose, to retract his earlier plea and to tender an unqualified admission that he is guilty of some lesser offence on which a verdict against him may properly be recorded without an amendment to the indictment :—

(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 ; we think that, in practice, there would be

little likelihood of the necessity arising for the presiding Judge to consider whether it would be proper for him to over-ride the discretion of prosecuting counsel in this matter :

(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.

The principles which I have summarised above are in accordance with the judgments of the Court of Criminal Appeal in England in *R. v. Hancock* [1], *R. v. Soanes* [2] and *R. v. Heyes* [3].

In the present case Crown Counsel did not express his willingness to accept the plea tendered by counsel for the petitioners, and the trial should therefore have proceeded on the whole indictment. At a later stage, however, the position became complicated by the agreement of Crown Counsel to the learned Judge's proposal that the matter should nevertheless be put to the jury. If he thought that the pleas ought not to have been accepted, he should not have surrendered his undoubted right, as prosecuting counsel, to claim that the case should proceed on the whole indictment. Having examined the evidence and the depositions, we think that there are substantial grounds in support of his view that the case was eminently one for the jury to decide, after a complete trial, whether the charges of murder and abetment respectively had been established beyond reasonable doubt. In *R. v. Soanes* (*supra*) Goddard L.C.J. said, " while it is impossible to lay down a hard and fast rule in any class of case as to whether 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 accept it or not—in the opinion of the Court, where nothing appears on the depositions which can be said to reduce the crime from the more serious offence to some lesser offence for which, under statute, a verdict may be returned, the duty of counsel for the Crown would be to present the offence charged in the indictment, leaving it a matter for the jury if they see fit in the exercise

[1] *(1931) 23 C. A. R. 16* [2] *(1948) 1 A. E. R. 289.*

[3] *34 C. A. R. 161.*

of their undoubted prerogative, to find the lesser verdict ". In that case it was held that prosecuting counsel was not justified in accepting a plea for infanticide by a woman charged with murder, and that the presiding Judge was " *not only right, but, indeed, bound* " to insist on the prisoner being tried for murder.

Having regard to the fact that Crown Counsel seems at a later stage to have waived his right to demand that the trial should proceed on the more serious counts, and to the further fact that the irregularity on the part of the jury in returning a premature verdict was cured by the unqualified admissions of the petitioners, subsequently recorded, that they were guilty of the offences for which sentences were passed on them, we do not think that this is a case in which the applications for leave to appeal against the convictions should be allowed.

With regard to the applications for leave to appeal against the sentences, the verdicts against them were recorded on the basis that the offences were not committed with the intention to cause death, and the maximum sentence which the learned Judge was empowered to impose in each case was therefore a term of 10 years rigorous imprisonment. Having regard to the brutal attack on the deceased and the previous bad records of the petitioners, we cannot say that the decision to impose the maximum sentence was not fully justified in each case. The sentence of 12 years passed on the 1st petitioner, however, exceeded the maximum term which the law authorises, and we accordingly reduced it to one of 10 years. In such a case this Court has power to substitute a legal sentence when dealing with the application for leave to appeal. *R. v. Jowsey* [1]; *R. v. Thomas* [2]. It would involve needless expenditure of public time and money to grant leave to appeal and to bring the 1st petitioner up a second time for a reduction of his sentence. Besides, Mr. Fernando, who appeared before us, very properly informed us that, if leave to appeal was granted, the Crown would concede that the sentence of 12 years imprisonment could not be supported.

Convictions affirmed.
Sentence passed on 1st petitioner reduced.