IN THE COURT OF APPEAL OF THE DEMOCRAIC SOCIALIST REPUBLIC OF SRI LANKA.

1. Fathima Rinsa
   No.256/1/1, Tyre Craft Flats,
   Vauxhall Street, Colombo 2.

2. Mohomad Jawfer Mufeer
   (Deceased)
   No.256/1/1, Tyre Craft Flats,
   Vauxhall Street, Colombo 2.

Accused Petitioners Appellants

Vs.

C A Application No.

CA(PHC) 48/2009

HC Hambanthota Application No HCRA 14/2008

MC Hambanthota Case No. 48745

Officer In Charge,
Special Crimes Investigation Bureau,
Hambanthota.

Complainant Respondent Respondent

Reeta Princy Josephen Ranasinghe Perera,
(Deceased)
No. 318, Deens Road, Colombo 10.

Petitioner Respondent

The Hon. Attoeney General
Attorney General's Deperatment,
Colombo 12.

Respondent Respondent

Before : Malinie Gunarathne J.

: L.T.B. Dehideniya J.

Counsel : Ranil Samarasooriya with Madhawa Wijesiriwardane for the 1st accused Respondent Appellant

: Tenny Fernando for the 1st Respondent

V.Hettige SSC for the Attorney General

Argued on: 14.01.2016

Decided on: 30.03.2016

L.T.B. Dehideniya J.

The 1st Accused Appellant (the 1st Appellant) and the deceased 2nd Accused Appellant were charged before the Magistrate Court of Hambanthota on charges punishable under section 454 and 457/459 of the Penal Code. Both accused pleaded not guilty to the charges the trial began with the evidence of the 1st witness, the party aggrieved, the deceased Petitioner Respondent. After conclusion of her evidence, both accused withdrew the former plea and tendered an unconditional plea of guilt, and thereafter, the case was adjourned for the identification and sentence. On the next date, the accused made an application to withdraw the former plea and to plead not guilty to the charges. After an inquiry, the learned Magistrate allowed the application. Being aggrieved by the said order, the aggrieved party, the deceased Petitioner Respondent presented a revision application to the High Court of Hambanthotha where the Learned High Court Judge allowed the revision application and set aside the order of the learned Magistrate allowing the application to withdraw the plea of guilty. Being aggrieved by the said order, the 1st Appellant and the deceased 2nd Accused Appellant tendered this appeal.

This being a criminal appeal, the Court made an order on 25.06.12 that it is not necessary to substitute heirs in place of 2nd deceased Accused Appellant. The Petitioner Respondent, the aggrieved party, is also demised and the parties agreed

that it is not necessary to substitute on her behalf too on 25.02.2014. As such, the case was taken up for argument.

Section 183 (1) of the Criminal Procedure Code Act of 15 of 1979 read thus;

> *183. (1) If the accused upon being asked if he has any cause to show why he should not be convicted makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused, his statement shall be recorded as nearly as possible in the words used by him; and the Magistrate shall record a verdict of guilty and pass sentence upon him according to law and shall record such sentence:*
>
> *Provided that the accused may with the leave of the Magistrate withdraw his plea of guilt at any time before sentence is passed upon him, and in that event the Magistrate shall proceed to trial as if a conviction has not been entered.*

With the enactment of this Act, the Legislature has given authority to the Magistrate to allow an accused to withdraw a plea of guilt "with the leave of the Magistrate". The law prior to the Act was that that there was no express provision regarding the withdrawal of a plea of guilty in written law. The issue regulated by the Judge made law. The section 188 (1) of the Criminal Procedure Code Ordinance is that;

> *188.(1) If the accused upon being asked if he has any cause to show why he should not be convicted makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused, his statement shall be recorded as nearly as possible in the words used by him; and the Magistrate shall record a verdict of guilty and pass sentence upon him according to law and shall record such sentence.*

The proviso to section 183(1) which is included in the Act No. 15 of 1979 was there in the section 188 (1) of the Ordinance No. 15 of 1898 which was in

operation from 1st March 1899 until the enactment of the Administration of Justice Law No. 44 of 1973, which was also silent on the withdrawal of a plea of guilt. The authorities governing the principal of withdrawal of a plea of guilt decided prior to the enactment of the Criminal Procedure Code Act No. 15 of 1979 has to be applied while considering of the change of the law.

The Learned High Court Judge referred to the case of Pandiyan v. Sugsthapala BALR 1984 Vol. 1 part iv page 148 where Abdul Carder J. referred to John v. Charles 54 NLR 20 and has come to the conclusion that the order of the learned Magistrate is not in accordance with the judgment of the John v. Charles (supra) and as per Pandiyan v. Sugsthapala (supra) the same Magistrate who recorded the plea of guilt must consider the application to withdraw the plea of guilty.

John v. Charles (supra) was a case decided on 1st of April 1952 which was prior to the enactment of the Criminal Procedure Code Act No 15 of 1979 when there was no express provision to withdraw the plea of guilt. In that case it was held that;

> *"In my opinion an accused person has no right to withdraw a plea of guilt once tendered If he has, through misapprehension or under inducement or threat, tendered a plea of guilty and the Magistrate has not recorded a verdict of guilty, the accused may be permitted by the Magistrate, if he is satisfied that the original plea was not an unqualified admission of guilt, to withdraw it. If the Magistrate has, in fact, recorded a verdict of guilty he has no jurisdiction to vacate it. In such a case if, in truth, the plea was tendered through misapprehension or under inducement or threat, the accused will have to seek his remedy by way of revision."*

This decision is entirely based on the footing that the Magistrate has no jurisdiction to allow an accused person to withdraw a plea of guilty tendered by him. The law has been changed and now the magistrate is vested with the power to allow such an application on his discretion.

In the case of Pandiyan v. Sugsthapala (supra) the Court has considered the change of the law and held that the proviso to section 183 (1) of the Criminal

Procedure Code Act was introduced to meet this situation. At page 24 it was held that;

> *I take the view that the proviso to Section 183(1) has been introduced to meet this situation, but that has not taken away the discretion of the Magistrate to, grant or not to grant leave. If the accused could, withdraw his plea without any qualification what so ever, the proviso would have then read that the accused may withdraw his plea of guilt at any time without the phrase "with the leave of the Magistrate". The proviso as it now stands requires the Magistrate to exercise his discretion.*

The Legislature enacted the proviso to section 183 (1) with the intention of allowing an accused person an opportunity to withdraw his unqualified plea of guilty, but has vested the discretion with the Magistrate by inserting the words "with the leave of the Magistrate". The legislature has not imposed any other restriction on the Magistrate. In such a situation can a higher Court impose conditions on a lower Court? The higher Court can set guide lines for the lower Court to consider how the discretion should be exercised.

Learned Counsel for the 1st Appellant drew our attention to the case of R. J. Daryanani v. Eastern Silk Emporium Ltd. 64 NLR 529 where the discretion under section 93 of the Civil Procedure Code has been considered. It has been held in page 539 that;

> *Unless the Legislature has passed laws limiting the exercise of this power either directly or by Rules or Orders having the force of law, the Courts have no power to lay down rigid and inflexible rules for the exercise of a judicial discretion. The normally accepted rules or principles for the exercise of such a discretion, enunciated by the Courts of the highest authority, are therefore only meant for the practical guidance of other Courts. They do not have the force of law. In that sense, I hold that the statement of the learned Chief Justice laying down what may appear to be*

rules for the exercise of the discretionary power of the Courts under section 93, are not rules of law binding on our Courts. We are, therefore, free in this case to consider if there are good reasons to set aside the exercise of the discretion by the learned trial judge who allowed the amendment.

The Learned Counsel for the deceased Petitioner Respondent referred to some Indian authorities and argue that the discretion of Court must be exercised according to well established judicial principles, according to reasons, and fair play and not according to whim and caprice. I am in total agreement with this argument, but when the exercise of the discretion of a lower Court is considered by a higher Court, it regulated by well established principles. It has been held in the case of Wijewardane v. Lenora 60 NLR 457 at 463 that;

The mode of approach of an appellate Court to an appeal against an exercise of discretion is regulated by well established principles. It is not enough that the Judges composing the appellate Court consider that, if they had been in the position of the trial Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. It must appear that the Judge has acted illegally, arbitrarily or upon a wrong principle of law or allowed extraneous or irrelevant considerations to guide or affect him, or that he has mistaken the facts, or not taken into account some material consideration. Then only can his determination be reviewed by the appellate Court.

I will set down the chronological events of the case with the relevant dates. The accused were surrendered to Court on 17.09.1999 by an Attorney at Law. The charges were read over only on 24.11.2004, which was after five years where both accused pleaded not guilty to the charges. The case first fixed for trial on 18.05.2005, a part of first witness's evidence was recorded on 25.01.2006, and her evidence was concluded on 32.08.2006. Thereafter, the case could not take up for several days. On 06.03.2008, the both accused withdrew the former plea and pleaded guilty to the charges. Even on that date, there was no return to the summons issued to the 2 and 3 witnesses.

The Counsel for the accused appeared in the Magistrate Court submitted that the accused (withdrew the former plea of not guilty and) pleaded guilty to avoid the long delay and to conclude the case early. I do not blame the Court for the delay, there were reasons, but when it is looked from the accuseds' point of view, there was a considerable delay. The Counsel further submitted that the accused were not well on that day. The learned Magistrate, in his order says that he considered the submissions made by the Counsel. That means that the reasons, led the accused to plead guilty, has been considered by the learned Magistrate. He allowed the application as he has the jurisdiction to exercise the discretion when the application is made prior to the sentence. One cannot say that the learned Magistrate acted unreasonably, arbitrary, or illegally. He exercised his discretion judicially. It need not be revived by Appellate Court.

Accordingly, I set aside the order of the Learned High Court Judge dated 12.05.2009 and direct the learned Magistrate to proceed as per the order of the learned Magistrate of Hambanthotha dated 12.03.2008.

I do not order cost as the Petitioner Respondent is not among living.

Judge of the Court of Appeal

Malinie Gunarathne J.

I agree.

Judge of the Court of Appeal