[COURT OF CRIMINAL APPEAL]

1973 *Present :* **Alles, J. (President), Thamotheram, J., and Wimalaratne, J.**

A. WIJESURIYA and another, Appellants, *and* THE STATE, Respondent

C. C. A. APPEALS NOS. 34-35 OF 1973, WITH APPLICATIONS 38-39

S. C. 623/71—M. C. Hambantota, 65988

Criminal law—Insurrection to overthrow the Government—Declaration of state of emergency and promulgation of Emergency Regulations—A suspected insurgent held in custody—Whether the prisoner can be killed by a military officer when there is a lull in the fighting—Prosecution instituted against the officer—Defences open to the accused—Burden of proof—Duty of a soldier to obey an order given by his superior officer—Limitations thereon—Penal Code, ss. 2, 4, 69, 72, 89, 96—Public Security Act (Cap. 40), as amended by Act No. 8 of 1959, ss. 5, 8, 9, 12, 20, 23—Emergency Regulations published on 15th April 1971, Regulations 19(1), 19(8)(a), 19(8)(b), 20(2), 22, 23, 63—Army Act (Cap. 357), ss. 70, 100—Evidence Ordinance, s. 114—Court of Criminal Appeal Ordinance (Cap. 7), s. 2(6).

Summing-up—Disputed questions of law—Duty of the Judge not to allow the jury to decide upon them.

The 1st accused-appellant, who was a Lieutenant and a Volunteer member of the Ceylon Army, and the 2nd accused-appellant, who was a member of the Voluntary Force, were found guilty, at a trial before the Supreme Court, of the attempted murder of a young woman Premawathie (22 years of age) by shooting her with machine guns on 17th April, 1971. Premawathie was shot dead by an unidentified soldier soon after she had been shot at by the appellants. At the time when the offences were committed at Kataragama there was an armed insurrection amounting to civil war in the country, which commenced on 5th April 1971. A state of emergency had been declared on 16th March 1971 under the provisions of the Public Security Ordinance, and Emergency Regulations were promulgated for the preservation of public order and for the suppression of riots and civil commotions. Members of the armed forces had been called out by the Prime Minister on 7th March 1971 under section 12 (1) of the Public Security Ordinance.

There were sporadic attacks by the insurgents on the armed forces, but the shooting of the deceased Premawathie, who was a suspected insurgent held in custody after she had been arrested by the Police, occurred when there was a lull in the fighting. Nor was there evidence that there was a state of actual war prevailing at Kataragama on that day.

The main submission for the 1st accused was that the factual situation which existed at Kataragama on 17th April 1971 justified the shooting of Premawathie during a period of combat. It was submitted, upon certain evidence led in the case, that in shooting the deceased, the 1st accused was only carrying out the order of his superior officer (a Colonel who was the Co-ordinating Officer of the District) to destroy ("bump off") certain prisoners and that the 2nd accused shot the deceased on the order of the 1st accused, his superior officer.

Held, that, whether there was a period of combat on 17th April 1971 or a state of actual war, in either case there was no justification for the shooting of a prisoner who was held in custody. In a situation such as that which existed on that date, a soldier subject to Military Law "continues to remain the custodian of the civil law and it will be his duty to shoulder the responsibility of police duties, in the discharge of which he is as much subject to the civil law as the ordinary policeman". The accused-appellants were not entitled to plead section 69 of the Penal Code in defence or to rely on any of the provisions of the Public Security Act and the Emergency Regulations made thereunder or on the Army Act.

Section 69 of the Penal Code which states that "Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it" can have no application when a person obeys an order which is manifestly and obviously illegal. Except in the case of any special law in consequence of which the provisions of section 69 are suspended, a soldier stands on the same footing as an ordinary citizen as far as his legal liability is concerned and if he wishes to seek the protection of section 69 either under the Military Law or the Emergency Regulations passed under the Public Security Act, the burden is on him to prove that he is entitled to protection under that Section. Illustration (*d*) of section 114 of the Evidence Ordinance relates to the due performance and regularity of matters of procedure only and could not be relied upon by the 1st appellant to presume the *lawfulness* of the order given by the Co-ordinating Officer.

The Public Security Act and the Regulations made thereunder give no authority to shoot a prisoner held in custody. Sections 8 and 9 of the Public Security Ordinance have, therefore, no application to the present case.

Section 100 of the Army Act requires a person subject to military law to obey only the *lawful commands* given by his superior officers. It is not applicable to a command which is obviously unlawful.

Held further, that it would be an irregularity if the Judge, in his summing-up, places before the jury for their consideration and decision conflicting views of the law from the cases and commentaries cited by Counsel on either side. It is not a function of the jury to make decisions on disputed questions of law. However, it could not be said that, in the present case, the jury were confused or misled in regard to the questions of law involved, although the Judge referred to the authorities cited by Counsel on either side.

APPEALS against two convictions at a trial before the Supreme Court.

G. E. Chitty, with *Eardley Perera, Kumar Chitty, G. L. M. de Silva, K. C. Kamalasabason, N. M. Gunawardena* and *Asoka Gunaratne,* for the 1st accused-appellant.

E. R. S. R. Coomaraswamy, with *Eardley Perera, T. Joganathan, Palitha Wijetunga* and *Denzil Gunaratna,* for the 2nd accused-appellant.

Kenneth Seneviratne, Senior State Counsel, with *D. S. Wijesinghe* and *Shibly Aziz,* State Counsel, for the State.

Cur. adv. vult.

November 5, 1973. ALLES, J.—

The first appellant Lieutenant Wijesuriya, a Volunteer member of the Ceylon Army, attached to the 3rd Gemunu Watch, and Amaradasa Ratnayake a member of the Volunteer Force were charged on two separate counts on an indictment with having committed the offences of attempted murder of Premawathie Manamperi by shooting her with Sterling sub-machine guns and causing serious injuries to her. The offences are alleged to have been committed at Kataragama on the morning of 17th April 1971. Soon afterwards Premawathie Manamperi was shot dead through the head with a rifle by an unidentified soldier, and she was buried in a pit in a vacant plot of land. Both appellants were unanimously convicted by the verdict of the jury, and sentenced to 16 years rigorous imprisonment each. Premawathie Manamperi was the eldest daughter of Hendrick Appuhamy, a watcher attached to the Wild Life Department at Kataragama, and lived with her parents, ten other brothers and sisters in a house by the side of the road which ran from Tissamaharama to Kataragama. She was a young woman, 22 years of age at the time of her death, and had been chosen the Festival Queen of Kataragama the previous year.

It is now an established fact that on and after the 5th of April, 1971, serious disturbances amounting to civil war occurred throughout the greater part of the country in which several young people lost their lives. The Courts have to take judicial notice of the fact that there was an armed insurrection in the country, which commenced on 5th April, 1971, resulting in considerable loss of life and destruction of property, which made it necessary for the Government to take stern measures to restore law and order. Since one of the main submissions of Counsel for the 1st appellant centred on the factual situation which existed at Kataragama on 17th April which in his view justified the shooting of Premawathie Manamperi during a period of combat, it becomes necessary to examine the evidence, and arrive at a conclusion as to whether such a situation did exist as a fact.

In Ceylon the Public Security Act, No. 25 of 1947, provides for the enactment of Emergency Regulations and the adoption of other measures in cases of public emergency. Under Part II of that Act the President is empowered to make emergency regulations as " appears to him to be necessary or expedient in the interest of public security, and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community." These are very wide powers and in the plenitude of these powers it was appropriate that a state of emergency should have been declared when there was actual warfare, and the Armed Forces of the country were compelled to meet with force

of arms an effective challenge by a group of insurgents, whose main object was to overthrow the established Government of the country. Although the commencement of hostilities between warring parties may be a question that can be determined with some degree of certainty, the question when such a state of affairs ceases to exist can always be a matter of controversy. There may be a lull in the fighting which is only preparatory to the enemy forces re-grouping themselves and attacking the other party with renewed vigour. On the other hand the cessation of actual hostilities may be due to the fact that the State Forces had effectively quelled the rebellion.

When two countries are at war, a date and time when hostilities actually cease can be determined, because very often there is a joint declaration by the combatants to that effect, which is given wide publicity. But what is the position in the case of civil commotion, when sporadic attacks continue for an indefinite period ? For instance is a lull in the fighting indicative of the fact that the state of combat has ceased, or is it not possible for there to be a fresh outburst of combat taking place even though the authorities may think that hostilities have ceased ? These are difficult and complex questions of fact which have been raised by Mr. Chitty in the course of his argument and in respect of which the Court has to give a decision. During a time of actual war, the killing of enemy forces would be justified on the principle that the public security of the State requires this drastic action. In my view this would be an extension of the right of private defence available to the armed forces of the country against the enemy. In the light of Mr. Chitty's submission I shall now proceed to examine the factual position that existed on the 17th of April, 1971 in the town of Kataragama.

The town of Kataragama, which has recently been declared a sacred city, is a well known place of religious worship in South Ceylon and is situated 11 miles from Tissamaharama. The road from Tissamaharama to Kataragama runs through a belt of jungle, and ends at Kataragama. Kataragama is a prosperous town having a Post Office, a C. T. B. bus stand, several hotels, eating houses and a Pilgrims' rest, which caters to the needs of the pilgrims who flock to this jungle shrine. Needless to mention, it is only during the pilgrim season that the town would be crowded, otherwise it would be one that is generally isolated and, having regard to the geography of the area, a place which was very vulnerable to insurgent attack.

Two witnesses have testified to the factual situation which existed at Kataragama on 17th April, Colonel Nugawela the Co-ordinating Officer of the Hambantota District, and defence

witness Lieutenant Wijeratne. After his appointment as Co-ordinating Officer on 10th April, Colonel Nugawela left for Hambantota on the 11th and reached Hambantota the same afternoon at 4 p.m. His force consisted of a Major, 2 Lieutenants, and approximately 35 men. There were already troops stationed at Tangalle—one officer, and 25 men, and at Tissamaharama, 2 officers and about 50 men. One of the two officers stationed at Tissamaharama was the first appellant Wijesuriya. Nugawela has stated that about 11th April, the situation at Tangalle, Hambantota, and Tissamaharama was very serious. Food was in very short supply, there was a shortage of oil and petrol, and the troops and Police were confined to limited areas and were having a very tough time. At Kataragama the whole area was overrun by insurgents, the civil administration had broken down, there was no supply of food except for whatever was distributed by the Government Agent, Monaragala, and Nugawela gathered that the insurgents were very active in the area.

Kataragama Police Station consisting of 1 Inspector, a Sergeant and 7 Constables had been attacked on 5th and 6th April. On 5th April, the officer-in-charge, Inspector Udawatte had left for Matara leaving the station in charge of Sergeant Munidasa. Munidasa states that on the 5th of April there were two attacks on the station by the insurgents using bombs and firearms. The insurgents were repulsed by the Police and in the morning two insurgents were found dead as a result of the police firing. On the 6th there was a second attack on the station and Sub-Inspector Udawatte, who had returned to the station by that time, gave the order that the station should be abandoned and that the police should retreat to Hambantota. There was damage to the police station as a result of the bombs being thrown and firearms being used by the insurgents. Nugawela had his first briefing session with his officers on the 12th and he decided to leave Kataragama, to be overrun by the insurgents for a few days because he was short of troops and ammunition and in his opinion it would have been a hazardous venture to try and capture Kataragama at that stage, particularly in view of its vulnerable position. Nugawela also realised that Kataragama was a problem for several reasons. Firstly, even if he took over the administration at Kataragama he was going to be vulnerable to any subsequent attack because of the terrain and his information was that insurgents in this area were very active. There was also the threat that if he sent out any troops they might have been surrounded and wiped out. He also had information that the road-blocks between Tissamaharama and Kataragama had been cleared and that the insurgents were running a skeleton bus service.

The situation at Tissamaharama also had been bad but Wijesuriya and his men had been able to establish a base at Tissamaharama between the 10th and 12th April, and the police station had been re-established. Nugawela decided to attack Kataragama on the 16th and ordered Wijesuriya and his platoon of 25 men to proceed to Kataragama. At 5.30 p.m. on the 16th after a short briefing session at Tissamaharama at which Nugawela gave a talk to boost the morale of the men, Wijesuriya and his platoon set out for Kataragama in a jeep and two Tippers, and was able to reach Kataragama without any incident and set up his quarters at the Pilgrims' Rest. Lieutenant Wijeratne with 4 jeeps and 16 men kept the lines of communication from Kataragama to Tissamaharama clear. The success of Wijesuriya's mission was reported to Nugawela at Hambantota, and after 11 days the Army were able to establish a base at Kataragama. The police officers who had been attached to the Kataragama Police Station were directed to take up residence at the Army camp since the Police Station was damaged. Wijesuriya's plan of action after setting up his base at Kataragama was firstly to repulse any possible attacks on his temporary headquarters and once his base was firmly established to sally forth and flush out the insurgents from the neighbouring areas. This was undoubtedly a dangerous operation particularly as it was reported that there were about 500 insurgents in the jungles surrounding Kataragama. Nugawela has paid a handsome tribute to the combat qualities of the 1st appellant. He has referred to him as a perfectly reliable combat officer in regard to whose bravery he had no doubt. He had brought Tissamaharama to normal and the advance on Kataragama on the 16th was carried out at considerable risk to himself and his men. It is singularly unfortunate that with this record the 1st appellant should find himself being charged with the serious offence of Attempted Murder.

Wijeratne has also given evidence in regard to the critical situation that existed in Hambantota District up to 16th April. He stated that up to the 14th April the movement of troops was restricted to Tissamaharama and that Kataragama was completely in the hands of the insurgents. Nugawela wanted Kataragama captured at the earliest possible opportunity using the maximum force necessary. Although there were no clashes between the Army and the insurgents on the 16th and Wijesuriya appears to have been consolidating his position at Kataragama during the whole of the 16th, this does not necessarily mean that the danger of insurgent attack was not present even thereafter.

About 9 a.m. on the 16th Inspector Udawatte and three constables came in a jeep to the house of Leelawathie Ubesinghe, the mother of the deceased girl and forcibly removed the girl

from the house and took her to the Army camp. When the mother inquired from the Police why her daughter was being taken, Udawatte gave the cryptic reply that she was being taken to find out the reason. Four other girls had been brought to the Army Camp the same day and detained and when Nugawela visited Kataragama on the evening of the 16th he saw four or five girls at the Camp and was informed that they were women insurgents who had been ferreted out by Wijesuriya. It has been suggested to Leelawathie Ubesinghe that her daughter was arrested because she was a suspected woman insurgent leader. There is no evidence to positively establish this, but it is quite possible that this was so in fact, otherwise there was no reason why she should have been arrested on the morning of the 16th and why she was singled out the following morning for the brutal and humiliating treatment to which reference will presently be made. A witness Oliver Silva saw her being questioned at length by Wijesuriya on the morning of the 17th and when she was made to walk nude along the main road soon afterwards, she was asked by Wijesuriya to recite the words "I attended all five classes", which was a part of the indoctrination programme of the insurgent movement. I do not think it therefore unreasonable to infer that the girl was being questioned by Wijesuriya in regard to her suspected insurgent activities.

On the whole of the 16th Wijeratne with four jeeps patrolled the road between Tissamaharama and Kataragama and at Kataragama itself there were no attacks on the Army Camp although there was information that there was insurgent activity around. Kataragama appeared to be returning to normal on the evening of the 16th. On the 17th morning Oliver Silva, a member of Nugawela's volunteer force was on Internal Security Service and about 9 a.m. escorted the mails that had to be brought from Hambantota to Kataragama. The road was clear and he reached Kataragama about 10 or 10.15 a.m. and saw about 50 soldiers in the Army Camp. The soldiers would have comprised the members of Wijesuriya's platoon and members of Wijeratne's patrolling party. According to Oliver Silva there were people outside the buildings, buses were plying along the main road and everything appeared normal. Another witness Perera, an employee of Brown's Hotel, Yala, his father and Mr. White of the Wild Life Department had been invited for lunch by Wijesuriya two days earlier when Wijesuriya had come to Brown's Hotel and commandeered two jeeps. Yala is approached from Tissamaharama in a different direction and Perera met with no obstruction up to Kataragama. According to Perera a sumptuous lunch consisting of beef, roast pork and peacock flesh had been prepared. He however, was not able to partake of the meal since

he had been a witness to the shooting of the girl a little while earlier. In spite of the prevailing tension conditions could not have been that bad on the morning of the 17th if such a lunch could have been prepared at the Army Camp.

Wijeratne gives more positive evidence about the conditions at Kataragama. According to him on the 16th life was gradually coming back to normal. The 1st appellant was directing the buses at the C. T. B. Depot and getting people to open their boutiques, the Milk Bar was being opened and Wijesuriya was distributing free milk to the people.

There is no evidence of any clashes between the Army and the insurgents on and after the 16th, but there is evidence that while the Army troops were moving into Kataragama one person was shot. There was also the body of a priest with injuries found close to the Post Office. Having regard to these facts, was the uneasy situation that existed, a lull before a possible storm and could the 1st appellant and the members of his small platoon have been confident that they had successfully staved off any future attacks on Kataragama by establishing a base at the Pilgrims' Rest ? Or should one re-echo the words of Nugawela that " one afternoon you won't hear of anything and the next morning it will come up again " and assume that the danger of attack was still imminent ? Wijesuriya was stationed at Kataragama until the end of April and in the Hambantota District for a further period of a month to ensure that law and order was restored.

I have dealt in some detail with the situation that existed in the Hambantota District and Kataragama in particular, not only in view of Mr. Chitty's submission that a period of combat existed, but also because, in my view, the background of the case has a bearing on the sentences that have been imposed on the appellants.

In view of the live possibility of an attack on Kataragama on the 17th, I am prepared to agree with Mr. Chitty's submission that a *period of combat* existed at Kataragama on the 17th but this cannot lay the foundation for the further submission, in the absence of evidence, that there was a *state of actual war* prevailing at Kataragama on that day. In either case there was *no justification for the shooting of a suspected insurgent taken into custody.* What then is the position of a soldier subject to Military Law in such situation ? He continues to remain the custodian of the civil law and it will be his duty to shoulder the responsibility of police duties, in the discharge of which he is as much subject to the civil law as the ordinary policeman. If he

claims that he acted on the orders of his superior officer as justification, such a defence must be related to the provisions of the civil law. A soldier may sometimes find himself in an embarrassing situation having to obey the orders of his superior officers, but under Military Law he is only required to obey such orders if they are *lawful commands.*

Before dealing with the defence raised by Mr. Chitty under the Civil Law and his criticisms of the charge of the trial Judge, I might recount the facts that led to the shooting of the deceased. These facts have been deposed to by three eye witnesses—Oliver Silva, D. D. Perera and Aladin—and briefly their evidence is to the following effect :—The deceased was being questioned by Wijesuriya at the Army Camp and Oliver Silva got the impression that she was being asked about her complicity in the insurgent activities. Wijesuriya then asked her to remove her clothes and in spite of her protests and pleadings she was compelled to take off all her clothes. Wijesuriya then asked her to walk along the main road with her hands held over her head exposing her nakedness reciting the words " I have followed all five lectures ". The two appellants armed with Sterling submachine guns and another soldier walked on either side. When she had proceeded about 200 yards along the road she turned towards the post office. The 1st appellant then kicked her on the hip and opened a short burst of fire on her. The girl fell down. She crawled some distance and again got up and walked and fell again. The appellants then returned to the camp. Then one of Wijesuriya's men mentioned that the girl was still alive whereupon the 1st appellant ordered the 2nd appellant to go and shoot her. The 2nd appellant then went up to the place where the girl lay fallen and opened another short burst of fire on her. Aladin who had been asked by the Army personnel to dig a pit and bury the girl reported twice that she was still alive and it was only thereafter that an unidentified soldier went up and shot her through the head with his rifle. She died immediately and was buried with her clothes in a pit.

Since the appellants have not given any explanation and stated the reasons which prompted them to act in this brutal manner after humiliating her one can only speculate as to why she received this sordid treatment at their hands. The suggestion that she was an insurgent may well be true and it is possible that she was not prepared to disclose anything to Wijesuriya in spite of his persistent questioning. It may be that the 1st appellant, in the state of tension that must have prevailed at the time, intended that the public humiliation and killing of the girl should serve as a deterrent to the other insurgents who were surrounding the jungles of Kataragama at the time.

I shall now proceed to examine Mr. Chitty's submission that in shooting the deceased, Wijesuriya was only carrying out the orders of his superior officer Nugawela to "bump off" the prisoners. Counsel for the 2nd appellant also made the same submission. There was, of course, in the case of the 2nd appellant, positive evidence of the prosecution itself that he shot the girl on the orders of the 1st appellant.

Nugawela has denied that he ever gave any instructions to his officers to the effect that since they could not be bothered with prisoners they should be "bumped off". His position is that he directed that all prisoners should be handed over to the civil authorities. Wijeratne stated that on the 14th he took charge of five prisoners—3 men and 2 women—and that he received orders from Nugawela that the prisoners should be handed to Wijesuriya with instructions that the women should be released and male prisoners disposed of. This position was however, not suggested to Nugawela when he was giving evidence. The other defence witness Shiromani stated that when Nugawela came to Kataragama on the 16th evening he heard him tell the 1st appellant to "bump off" the prisoners. Judging from certain questions put by the foreman of the jury to Shiromani at the conclusion of his evidence it would appear that the jury were doubtful whether Shiromani's evidence on this point was true. Although the evidence discloses a dispute on this question of fact as to whether Nugawela gave such an order or not, it is not possible to state what view the jury took in regard to this issue and one must proceed on the basis, however unlikely it may seem, that *they believed that such an order was given.* The trial Judge dealt fully with the evidence in regard to the factual position whether an order was given or not and directed the jury that if they came to the conclusion that there was no order the protection afforded to the 1st appellant under the law did not arise and thereafter proceeded to deal with the position in law if such an order was in fact given. In either case it was open to the jury to arrive at a verdict adverse to the appellants. This being a direction on a question of law it became necessary for the Judge to explain the law under Section 69 of the Penal Code.

Section 69 is the first of the General Exceptions specified in the Penal Code and the Judge had necessarily to deal at the outset with the burden of proof which lay on the defence to prove that they were entitled to the protection afforded under the Section. It was Mr. Chitty's submission that this burden had been discharged because under Section 114 of the Evidence Act a presumption arises in regard to the lawfulness of official acts. The presumption however, that arises under Section 114 is confined to presumptions on questions of fact and not of law.

The presumption arises in regard to the regularity of the order given but cannot affect its lawfulness which must be proved independently.

Mr. Chitty criticised the directions of the learned trial Judge on the law and has claimed that as a result of the misdirections and non-directions on the law his client is entitled to claim a retrial. It was his submission that there was an inadequate direction on the law in regard to Section 69 ; that the views on questions of law by lay witnesses Nugawela and Wijeratne were adopted by the Judge as a statement of the law ; that there was a misdirection in regard to the applicability of the Public Security Act and the Emergency Regulations made thereunder and that the jury have been confused by an elaborate discussion on the law where passages from judgments and the conflicting legal views of commentators have been read *in extenso* to the jury which effectively prevented the learned trial Judge from performing his duties of laying down the law as required under the Criminal Procedure Code.

Section 69 of the Penal Code states that—

> " Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it. "

The first illustration to the section has relevance to the facts of the present case.

> " A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence."

To entitle a person to plead Section 69 as a defence it is essential that the order given by the superior, even if it be not strictly lawful, prompted the person obeying the order to consider himself bound by law, in good faith to act on the basis that it was a lawful order. The Section can have no application where in terms of the enabling statute the order is one that is lawful, because in such a case the question of bona fides and sufficient grounds is immaterial. In the case of a lawful order there was a duty to do and it was done whatever may be the doer's motive. For instance, if a superior officer orders his subordinate to shoot a member of the enemy forces in the act of blowing up a bridge the order would be clearly a lawful order. An examination of the illustration to the Section referred to clarifies the position. The Section does not state whether the order is lawful or not but the illustration implies that it is

wrong. If it had been right, then the act would have been legal apart from good faith and his belief in its legality. It is only when the order is illegal that the questions of good faith and belief in its legality arise. If the order is manifestly and obviously illegal, and this may be apparent to any lay person from the nature of the order itself, as for instance when a superior orders his subordinate to commit rape or shoot a prisoner, it negatives the issue of good faith and the person obeying the order is not protected under Section 69.

The learned trial Judge in dealing with Section 69 first explained the presumption that everyone is presumed to know the law. He stated in the passage which I shall mark as 'A':—

> "There is a presumption that everyone knows the law, otherwise the law becomes unworkable. There is that presumption to start with, and I must tell you, though there is a state of emergency, it does not mean that the ordinary law of the country is suspended. The ordinary law remains and that law may have been added to by various Emergency Regulations but the civil law remains. I must also tell you that the normal law applies as much to every citizen, whether he be a private citizen or whether he be a mobilised soldier. Everyone is bound by the ordinary law. It may be that soldiers are armed they can use force, but they must use force according to the ordinary law. They cannot use indiscriminate force but the ordinary law gives a certain kind of protection to persons who obey superior orders, and that protection is given by virtue of Section 69 of the Penal Code."

Mr. Chitty submits that this is an incomplete statement of the legal issues since soldiers subject to Military Law are not governed by the civil law. He also submitted that in respect of members of the armed services reference should have been made to the provisions of the Public Security Act which extended the scope of the ordinary law. I do not agree this was an inadequate statement of the law. *Except in the case of actual combat, where the provisions of Section 69 are suspended, a soldier stands on the same footing as an ordinary citizen as far as his legal liability is concerned and if he wishes to seek the protection of Section 69 either under the Military Law or the Emergency Regulations passed under the Public Security Act the burden is on him to prove that he is entitled to protection under the Section.*

In directing the jury on the law as laid down in Section 69 the learned trial Judge indicated that the Section had no application if the superior's order was a lawful order, as for instance when

he orders a soldier to fire at a mob which is violent and comes forward to attack, because in such a case there is an immediate fear that they would cause serious damage to person and property. In such a case the order is one that is lawful and the section has no application. He then dealt with the position of an order which was not strictly lawful in the following terms (Passage marked 'B'):—

> "If there is a mob which is not violent, which probably has no weapons and which is not restive, and a superior officer tells a soldier to fire, and the soldier fires at the mob, the order itself was not a strictly lawful order, because an order cannot be given to fire at a mob, which is quiet, and in those circumstances the soldier, of course, acts on the order of his superior, and he fires. In such a case, the soldier is protected. The position there is, the soldier must carry out the lawful command of his superior officer. Because there are circumstances when a soldier cannot have the time to think, whether it is a lawful or unlawful order; he cannot do these things, but he has to decide on the spur of the moment and *if he honestly believes that under the prevailing circumstances the order given by his superior officer was lawful, and he is bound to carry it out,* he is protected. That is the protection that is given to him under the section."

In the passages "A" and "B" the learned trial Judge has dealt with the essential matters that must be taken into consideration by the jury in dealing with Section 69—the presumption that every person, be he a soldier or an ordinary citizen, is presumed to know the law, the effect of a lawful order given by a superior officer, the legal consequences that arise when the order is not strictly lawful and the issue of good faith. He then directed the jury that the "mere fact that there was such an order does not absolve the 1st appellant" and proceeded to examine the legal position on the footing that Nugawela had given the order that the prisoners should be destroyed. Fifteen pages of his charge then proceeded to deal with the cases cited by Counsel on either side and to deal with passages from the Commentaries. These were quoted at length to the jury and one does not know what impression the citation of conflicting passages on the law had on the minds of the lay jury. Mr. Chitty submitted that this amounted to a non-direction and misdirection on the most crucial and vital issues of law and this procedure effectively prevented the judge from laying down the law with certainty and authority in accordance with the imperative requirements of procedure. I think Counsel's criticisms on this issue are partly justified and that it would have been better if the trial Judge refrained from adopting this method of explaining the law to the jury which is

likely to create confusion in their minds. Counsel for the State, who was the same Counsel who prosecuted at the trial informed us that when Counsel for the defence was addressing the jury he cited the South African case of *R. v. Smith* and read passages from the report in support of the legal position that the 1st appellant was protected under Section 69. This prompted him to reply by citing authorities to the contrary from the well known Commentaries on the Indian Penal Code and passages from the Manual of Military Law. If Counsel for the defence chose to cite authorities it was surely for the benefit of the Judge and I think it might have been more desirable that the citations on either side should have been made to the judge in the absence of the jury and the learned trial Judge having had the benefit of the citations on either side could then have proceeded to lay down the law to the jury in simple and concise language which could be understood by laymen. The reason for discouraging citations from cases and commentaries to the jury is obvious since a lay jury cannot be expected to know the law and still less make decisions on disputed questions of law. The Calcutta High Court in *Jabanullah v. Emperor*[1] (1929) 32 Cr. L. J. 111 at 113 made the following observations in regard to this matter :—

> "It is often useful to illustrate the meaning of a legal doctrine by relevant examples culled from the books or stated by the learned judge in his own words but the practice of reading out head-notes or other portions of the report of a case not before them to the members of the jury is a dangerous practice which is to be discouraged as more likely to mystify than enlighten the jury."

There is of course, no objection to a judge citing well known dicta or referring to the pronouncements of eminent judges when such references are expressed in easy and understandable language but the position is quite different when conflicting views of the law are placed before the jury for their consideration and decision. In regard to the citing of cases by Counsel in the course of the trial, Lord Abinger C. B. in *Regina v. Parish*[2] 8 C. & P. 95 had the following remarks to make :—

> "Mr. W, I cannot allow you to read cases to the jury. It is the duty of the jury to take the law from the Judge. It no doubt often happens that, in an address to the jury, Counsel cite cases ; but then it is considered that that part of the speech of the Counsel is addressed to the Judge. That cannot be so here, as you very properly in the first instance referred me to the case, and you have my opinion on it ; you can therefore make no further legitimate use of the case, and the only

[1] *(1929) 32 Cr. L. J. 111 at 113.*

[2] *8 C. & P. 95.*

effect of reading it would be to discuss propositions of law with the jury with which they have nothing to do, and which they ought to take from me."

The Calcutta High Court again made the following observations in *Meher Sardar v. Emperor* (1912) 13 Cr. L. J. 26 :—

> " We notice that he (Counsel) has cited and commented on a number of rulings of this Court and told the jury that it was for them to say whether any of these rulings of this Court are exactly on all fours with the circumstances of the present case ..... No ruling or authorities are ever to be cited to the jury nor are they to be asked to differentiate or form any opinion whatever on any authorities. It is for the Judge and the Judge only to tell the jury what the law is, and before he tells them what it is he may consult as many authorities as he pleases and these authorities are, no doubt binding upon him. The minds of the jury should never be confused by having a number of conflicting authorities or indeed any authorities laid before them."

Finally there are these wise words of Sir Francis Maclean, Chief Justice of the Calcutta High Court, in *Chakraverti v. Emperor*[2] (1905) 2 Cr. L. J. 157 at 158 and 159 :—

> " The duty of a Judge in charging a jury in a criminal case is to make up his mind as to what the law is, and to tell the jury what it is, as succinctly and clearly as he can. If he turns out to be wrong, a higher tribunal can set him right. But to cite to the jury a large number of cases which the jury cannot possibly understand is calculated to confuse them and to lead to a miscarriage of justice."

Apart from the case of *Smith* cited by Counsel for the defence, Counsel for the State cited two cases from the Commentary on the Indian Penal Code by Ratanlal and Thakore, passages from Gour's Commentary and passages from the Manual of Military Law.

I might have been inclined to accede to Mr. Chitty's application that this was a case of a mistrial and remit the case for a fresh trial had I not been satisfied that in spite of this irregularity the jury have not been confused in regard to the real issue which was sought to be placed before them for their consideration. All the citations dealt with the issue whether the order of the superior officer was so manifestly and obviously illegal that it did not provide a defence under Section 69. In dealing with the South African case the Judge directed the jury " that if the

[1] *(1912) 13 Cr. L. J. 26.* [2] *(1905) 2 Cr. L. J. 157 at 158 and 159.*

order is obviously and manifestly illegal according to the ordinary law of the land, it is the duty of the soldier to refuse to carry out such an order." Again in respect of a case cited by Counsel for the State he told the jury that although it was an order carried out in obedience to the direction of a superior officer the accused was not protected as it was obviously and manifestly an illegal order since there was no violent mob outside. In respect of a passage cited from the Manual of Military Law the learned Judge unfortunately used the following language which has been the subject of Counsel's criticism :—

> "I *would not recommend* that construction because it is a recent construction. If we were to adopt that construction then the purpose of Section 69 would be lost. Section 69 protects unlawful orders being carried out on a superior's orders, but only certain types of unlawful orders, namely, an unlawful order which is not obviously and manifestly illegal."

But even here the learned Judge stated that if the order was obviously and manifestly illegal it did not serve as a defence. When one takes the directions of the Judge as a whole, after considering the facts of the cases cited, it seems to me that the Judge prominently placed before the jury the issue as to whether Nugawela's order was a manifestly and obviously illegal order and in the circumstances of the case it was an issue on which the jury could arrive at a decision without difficulty.

After quoting the law from the authorities and citations the Judge summed up the legal position in the following terms when he stated :—

> "Although the authorities that I cited show you that where under a given set of circumstances, probably under combat conditions or even otherwise, if an order is given by a superior and a private thinks that this order does not appear to be strictly correct, like firing into an inoffensive mob, but still because he honestly believes that he is bound by the superior's orders to carry it out and he carries it out and probably kills some, then certainly Section 69 still protects him, although that order was still unlawful and should not have been given ; but on the other hand if a superior officer gives a private an order to shoot a volley into a crowded street, then the private must exercise his judgment and he must see that this is a manifestly and obviously illegal order and therefore refuses to carry it out and if he does carry out such an order then he will be doing it at his own peril and he would be responsible for all the criminal consequences.

These are the considerations that apply if you come to the conclusion on a balance of probability that Colonel Nugawela did in fact give an order to the 1st accused to bump off the prisoners. *Would any reasonable man under the circumstances in which the 1st accused was, if such an order was given to him, honestly believe that he was bound to carry it out because it is not or manifestly illegal ? Or on the other hand would any ordinary person in the circumstances in which the 1st accused was, if such an order was given at once have seen that this is an obviously and manifestly illegal order and should not be carried out ?* If it is the first conclusion that you come to, then of course the 1st accused is protected ; if however you come to the latter conclusion then the 1st accused is not protected."

I do not think that the jury would have had any hesitation in understanding the legal position after this clear exposition of the law. Mr. Chitty submitted that by repeatedly using the phrase "manifestly and obviously" illegal order that the lawfulness of the order has been withdrawn from the jury. The passage from the summing-up quoted above indicates that the lawfulness of the order was left to the jury to decide. When one considers the charge as a whole including the passages marked "A" and "B" referred to earlier, it seems to me that there has been a proper and adequate direction on the law in regard to Section 69 of the Penal Code.

In regard to the case against the 1st appellant there remains for consideration two other matters which were raised by Mr. Chitty—that the Judge accepted the statement of the law from Nugawela and Wijeratne and that the Judge had misdirected the jury in regard to the applicability of the Public Security Act.

In regard to the first matter Nugawela stated in answer to State Counsel that it would be contrary to law and against instructions to kill prisoners who had been taken into custody. Wijeratne gave evidence to the same effect when he stated that an order to kill a prisoner would not be a lawful command if given by a superior officer. In cross-examination Wijeratne was questioned by State Counsel in regard to the terms of the Geneva Conventions which prohibited the killing of prisoners, humiliating and degrading them and which sought to lay down codes of conduct in regard to the treatment of prisoners of war. Counsel for the 1st appellant has criticised the conduct of State Counsel in eliciting these matters and also stated that the learned trial Judge was in error when he referred to Wijeratne's evidence on this point because in his submission the learned trial Judge was

inviting the jury to accept the law from Wijeratne. I am unable to agree that on both these matters there was either misreception of evidence or a wrong direction on the law by the Judge. In eliciting the contents of the Geneva Convention learned State Counsel was only placing before the jury Wijeratne's knowledge of the factual situation as a member of the Armed Forces in regard to a relevant matter—the treatment of prisoners taken into custody by the Army. Learned State Counsel has drawn attention to the fact that according to the Treaty Series No. 9 of 1959 the Government of Sri Lanka has been a signatory to the Conventions and ratified and accepted its terms which deal, *inter alia,* with the removal of prisoners, their detention and release. The Conventions after signature were presented and ratified by Parliament. These are official acts of the State in regard to which judicial notice may be taken under the Evidence Act. Nor do I think that in recounting Wijeratne's evidence for the benefit of the jury, including his views on the Geneva Conventions and his opinion that an order to kill prisoners was obviously unlawful and that he would not carry out such orders, the trial Judge was inviting the jury to accept the law from Wijeratne.

Finally there was Mr. Chitty's submission that the trial Judge was in error in withdrawing from the jury that the Public Security Act had no application to the case of his client. It was his submission that an argument was available to him under Section 9 of the Public Security (Amendment) Act 8 of 1959 that no prosecution shall lie against any person for any act in good faith done in pursuance or supposed pursuance of any provision of the Emergency Regulations. Part 4 of the Emergency Regulation 19(8)(*a*) provides for the removal of any person arrested from the place of arrest to any other place anywhere in Ceylon and detained in custody, and 19 (8) (*b*) entitles the persons making the arrest to use such force, including armed force as may be necessary. Regulation 20(2) states that "any person detained in pursuance of Regulation 19.... in a place authorised by the Inspector-General of Police may be so detained for a period not exceeding 15 days ..... and shall be released at the end of that period by the officer-in-charge of that place, unless such person has been produced by such officer before the expiry of that period before a Court of competent jurisdiction". Regulation 23 enables such persons to be dealt with as though he has been produced in accordance with the provisions of Sections 36 and 37 of the Criminal Procedure Code.

Under Part III of the Public Security (Amendment) Act the Prime Minister has the power to call out the Armed Services when the Prime Minister considers that circumstances

endangering the public security in any area have arisen, or are imminent and is of opinion that the powers of the Police are inadequate to deal with the situation in that area. The members of the Armed Forces so called out have the same powers as the Police to search and arrest persons, but Section 20 of the Amendment Act specifically makes provision that " any person arrested by any member of the Armed Forces who is called out by Order made under section 12 *shall without unnecessary delay be delivered to the custody of a police officer to be dealt with according to law* ".

Therefore under the Emergency Regulations although the Armed Forces have the same powers as the Police to arrest and search persons taken into their custody they must without unnecessary delay deliver them to the custody of the civil authorities. Section 20 is wide enough to apply to persons who are even arrested in actual combat. I have already indicated that there was ample opportunity for the 1st appellant to have despatched the prisoners in his custody to Tissamaharama or Hambantota. The Public Security Act and the regulations made thereunder give no authority to destroy prisoners. The learned trial Judge therefore quite rightly directed the jury that as a matter of law Sections 8 and 9 of the Public Security Act had no application to this case.

Mr. Coomaraswamy for the 2nd appellant sought to draw a difference in regard to the culpability of his client as distinct from that of the 1st appellant. He submitted that his client being a volunteer and a person who was not present at any of the briefing sessions could not have known that the order, admittedly given to him by the 1st appellant, was a manifestly illegal order. He also submits that unlike the 1st appellant who received his orders from Nugawela on the evening of the 16th, his client received the order to shoot at the time of the transaction and was compelled to act on the spur of the moment. Under Section 100 of the Army Act (Chapter 357) every person subject to Military Law is only bound to obey the *lawful commands* given personally by his superior officers. The 1st appellant's order to shoot the deceased being obviously an unlawful command no defence was available to the 2nd appellant even under Military Law.

I do not think that there could be any real distinction between the cases of the two appellants. The evidence indicates that the 2nd appellant was present at the time the girl was questioned and was made to strip ; that he accompanied the 1st appellant armed with a gun ; that he was present at the time the 1st appellant shot and that when he received the orders from the 1st

appellant he knew the girl was still alive and carried out the orders without protest. This entire sordid episode was witnessed by all the soldiers who were present at the compound of the Pilgrims' Rest. When the girl in her dying moments called for water one of the soldiers from the compound shouted that if anyone dared to give water to her he would be shot. In spite of this threat however a member of the public gave her three bottles of orange barley. Wijeratne stated in evidence that if the order to shoot was given by a superior officer it was manifestly an illegal order and he would have refused to carry it out. This was knowledge of which the 2nd appellant, as the second in command of Wijesuriya's platoon, would have been aware of. It seems to me that the shooting and killing of Premawathie Manamperi was one for which the appellants must share responsibility and in the circumstances it is difficult for this Court to draw a distinction between the culpability of the two appellants.

I have given my anxious consideration to the sentences imposed in this case particularly as the other members of this Court do not agree that the sentences imposed on the appellants should be reduced. In normal times the nature of the crime is one that would have deserved the maximum punishment, but I cannot lose sight of the fact that these offences occurred during a period of great stress and tension in the country, the brunt of which had to be borne by the Police and the Armed Forces. Insurgent activity was at its peak in April 1971 and the lives and liberties of the inhabitants of Kataragama depended on the bravery and the qualities of leadership displayed by Wijesuriya to which ample testimony has been paid by Nugawela and Wijeratne. The tension that prevailed at Kataragama on the 16th and 17th April must have severely affected the morale of Wijesuriya and his small platoon of 25 men who had to face the danger of possible attack from the insurgents who were lurking in large numbers in the jungles of Kataragama. Having regard to the fact that this unfortunate incident took place during a period of combat and the possibility that Wijesuriya did receive an order from Nugawela to destroy the prisoners I am of opinion that the sentence of 16 years rigorous imprisonment imposed on the appellants is too severe. I would reduce the sentence imposed on each appellant to 7 years rigorous imprisonment. Subject to this variation in the sentence the applications are refused and the appeals are dismissed.

In view of the important issues of law that have been argued in the course of this appeal, the Court decided in terms of Section 2 (6) of the Court of Criminal Appeal Ordinance to deliver separate judgments.

THAMOTHERAM, J.—

The jury by their unanimous verdict found the two appellants guilty of the attempted murder of Premawathie Manamperi, a young girl of 22 years of age, by shooting her. The girl was killed by a shot from a rifle fired by an unidentified soldier, after she had been shot at by the two appellants with sub-machine guns.

The State charged the appellants on two separate counts of attempted murder on the basis of their individual acts of shooting. The girl was discovered to be still alive when she was about to be buried. The final act which completed the killing was that of a soldier who was not before court and who by his act put an end to her misery.

The case for the prosecution was that she was killed in circumstances of very great aggravation and brutality—a premeditated offence committed with sadistic delight. It was the accident that death did not swiftly follow the shooting by the two appellants which saved them from having to face a charge of murder. Whether the Attorney-General could still have brought a murder charge, notwithstanding the fact that an unidentified soldier had fired the actual shot which killed her, is a matter which need not be discussed here. The two appellants and another soldier had participated in the killing playing their respective parts in achieving their object and putting into effect the 1st appellant's intention manifested when he came out into the compound.

Mr. Chitty for the 1st appellant commenced his argument suggesting that the bizarre account by the prosecution witnesses of what happened had clouded the real issues in the case. Neither Mr. Chitty nor Mr. E. R. S. R. Coomaraswamy who appeared for the 2nd appellant, seriously contested the facts as spoken to by the prosecution. There can be no doubt that the 1st appellant fired at the helpless girl, rendered more helpless by having to walk nude with her hands upraised and the 2nd appellant fired when she lay fallen equally helpless. There can be no doubt that each had an intention to kill. There was no question of grave and sudden provocation, of a suddent fight, or of the exercise of the right of private defence. The resulting position was that in the event of the defence not establishing that there were circumstances which justified or exonerated them in view of some provision of law, there was for the prosecution evidence of killing which in itself was manifestly and obviously illegal and any order to kill equally illegal.

There were two matters about which both counsel complained and which could be disposed of, before I deal with the main points stressed in appeal.

The first was that the question of whether the deceased was raped before she was killed, was raised by asking the witness Aladin about his seeing blood on her thighs and by questioning the J.M.O. as to whether the tears on the girl's hymen could have been caused by sexual intercourse. As there was no charge of rape this would have caused prejudice. In our view the learned judge had adequately directed the jury asking them to ignore this evidence.

The other was that two defence witnesses were asked about their being charged with rape of another girl who was also taken into custody on suspicion of being concerned with insurgent activities in the area. The point was that only convictions can be proved in a court of law and not the mere fact of a pending charge.

I do not think that even a conviction on a charge of rape can by itself be relevant to show that a witness is not worthy of credit. The relevance of the fact that both witnesses were facing a charge of rape lay in the fact that they too were charged, as the appellants were, of committing an offence against a girl taken about the same time on suspicion of being concerned with the insurgency and that therefore liable to be biased. In any event we do not think this could have caused sufficient prejudice in the context of the total evidence in the case, so as to result in a miscarriage of justice.

Much of Mr. Chitty's legal argument was based on the grave situation which obtained in the country at the time. He freely used terms such as " in actual combat ", " in the field ", " at the time of combat ", " prisoners of war ", " subject to military law " " military necessity ", and so on. These terms can mean nothing and have no relevance unless they can be reduced to a legal basis. In order to see if there is such legal basis, and if so, on what provisions of law they are based, it is necessary to examine the situation in the country and more the actual situations which confronted the appellants between the 11th of April and 17th April 1971.

We need no evidence to hold that on the 5th April 1971 and for sometime thereafter there was an insurrection where certain elements in the country sought to topple the Government by using force. There was a serious threat facing the Government and she had still not overcome the insurgents.

Colonel Nugawela who had been appointed Co-ordinating officer for this area said that when he went on the 11th April the situation in the whole area was bad. At Tangalle, Tissa and Hambantota the morale was very low, the food situation was ir

very short supply and the troops and the police were confined to limited areas and were having a very tough time. At Kataragama the whole area was overrun by the insurgents, and civil administration was broken down. There was no supply of food except for whatever was being distributed by the Government Agent, Moneragala.

The Kataragama police station was under S. I. Udawatte and there were seven constables attached to it. On the night of 5th and in the early hours of the 6th there were two attacks on the police station. S. I. Udawatte was away from the station. The seven constables repulsed both attacks. In the morning they found two insurgents killed by their firing at them.

As their stock of ammunition was running low they left the station. They went to Tissa and on the 16th when the army took over the C.T.B. Pilgrims' Rest at Kataragama for their quarters these officers returned and stayed in the same premises.

Colonel Nugawela went to Hambantota on the 11th April, to assume duties as co-ordinating officer. Among the soldiers who went with him was the prosecution witness Lesley Oliver Silva. They did not encounter any insurgents on the way. There is no evidence of any direct encounter with insurgents during the whole of the period between 11th to the 17th. The witness Oliver Silva who was on internal security duties which necessitated patrolling the area assigned to him did not meet any insurgents in combat or otherwise. On the 16th April the 1st appellant went to Kataragama and established his headquarters at Kataragama. He did not meet any resistance from the insurgents.

K. B. Attanayake, Inspector of Police in charge of Tissa police said that the 1st appellant handed to him three men and two women who were suspected insurgents. He handed them to Inspector Sirisena of the Hambantota police. S. I. Sirisena handed these suspects to the remand prison at Hambantota. They were to be detained till the army called for them. The witnesses called by the defence themselves admitted that there was sufficient room at the Pilgrims' Rest itself for the detention of suspected insurgents by the police. Further they could have been sent to Hambantota and Tissa police stations.

On the 14th April, Lieutenant Wijeyeratne took charge of these five prisoners at the Hambantota lock-up and handed them over to the 1st appellant. There is no evidence of what happened to them. There is no suggestion that any suspected insurgents taken into custody during this period were shot other than the deceased.

The deceased was the eldest daughter among eleven children. At the time of the incident she had left school and while results were pending she was teaching in a Government School. Exactly one year before her death on 17.4.70 she was crowned " Aurudu Kumari ".

On the 16th April, at about 9 a.m. the deceased was combing her hair in her home at Kataragama. A police officer questioned her mother where her daughter was. Constables Siripala and Opatha of the Kataragama Police walked into the room, held her by the konde and pulled her out. She shouted out " Aiyo Ralahamy, what is this for ? " Constable Aladin held her by the konde and pulled her almost up to the gate. Constable Siripala then prodded her with the butt end of the rifle on her shoulder. They pulled her almost up to the jeep near which was S. I. Udawatte. When she was asked to get into the jeep she asked " What is the reason ? Why should I get into the jeep ? " One Officer replied " We are taking you to find the reason ".

At this time, as already pointed out the Kataragama Police were housed in the same premises as were the army unit under the 1st appellant. Rightly or wrongly she was in police custody. The next piece of evidence we have is that on the next day she was questioned by the 1st appellant, a soldier, and put to death by three soldiers the chief of whom was the 1st appellant. How she could be called a prisoner of war beats me. How her shooting can be a matter of military necessity is again beyond me.

In fairness to the deceased girl it must be said that there was no evidence to show that she was an insurgent. If the police had material for suspicion this was not before court. Her mother emphatically denied she was an insurgent.

It has seldom become necessary to refer to Sections 2 and 4 of the Penal Code. In the present case it is relevant to remind us that under Section 2 of the Penal Code " every person shall be liable to punishment under the Code and not otherwise for every act or omission contrary to the provisions thereof of which he shall be guilty within this island ". Under Section 4 " Nothing in the Code is intended to repeal, vary, suspend or affect any of the provisions of any special or local law ". A special law is a law applicable to a particular subject. The resulting position is that soldiers shall be liable as any other person unless there is a special law governing them which exempts them from being subject to it.

Mr. Chitty in his written submissions stated that the relevant civil law in the present case consists of the provisions of the Penal Code, the Army Act and Sections 8 and 9 of the Public

Security (Amendment) Act and complained that the Army Act had not been referred to in name or substance and the application of Sections 8 and 9 of the Act No. 8 of 1959 has been denied by the learned judge.

He has not referred us to any special law which places a soldier outside the category of every person who shall be liable under the Penal Code nor has he referred us to the specific Section or Sections of the Army Act which the learned judge should have referred to in his charge.

The fact that a person is subject to military law does not affect his liability to be tried by the civil courts. Section 77 of the Army Act states that nothing in the Army Act shall affect the jurisdiction of a civil court to try or to punish for any civil offence any person subject to military law. The only other Section of the Army Act which has relevance to the present case is Section 100 which lays down the rule that a soldier has to obey the lawful command of his superior officer. I shall refer to this Section later.

In the course of the argument reference was made to Sections 8 and 9 of the Public Security Act. Section 8 reads "No emergency regulation and no order, rule or direction made or given thereunder shall be called in question in any Court".

I do not know why this Section was even cited because the evidence does not disclose the existence of any order, rule or direction made or given under any emergency regulation. There is evidence that Colonel Nugawela gave an order to bump off prisoners of war which was denied by Colonel Nugawela himself. There was no evidence that this order was made or given under any emergency regulation. No occasion arose to question such an order as there was no evidence that such an order was made.

Section 9 of the Public Security (Amendment) Act reads "No prosecution or other criminal proceeding against any person for any act purporting to be done under any provision of any emergency regulation or of any order or direction made or given thereunder shall be instituted in any court except by or with the written sanction of the Attorney-General and no such prosecution or other proceeding civil or criminal shall lie against any person for any act in good faith done in pursuance or supposed pursuance of any such provision".

It was open to the defence to have taken up the position that the case was instituted in the Magistrate's Court wrongly without the Attorney-General's sanction. The appellants were facing a charge at the trial presented by the Attorney-General. The point should have been argued at the commencement. The defence

could have at the commencement urged that no prosecution lay against the appellants as their acts of shooting the deceased were "in good faith done in pursuance or supposed pursuance of any order or direction given under Emergency Regulations."

Mr. Chitty said it was not done at the commencement as some evidence had to be led. Even the leading of the necessary evidence could have been done at the commencement, but at whatever stage done, it was a matter for decision by the judge. It is my opinion that the learned judge was right when he told the Jury "I would direct you as a matter of law that Sections 8 and 9 of the Public Security Act will have no application to an order such as the order alleged to have been given by Col. Nugawela".

Gour in his Commentary (7th edition page 285) states that a soldier may be ordered to use force in four cases—

(1) When his country is at war with another ;

(2) When an area is proclaimed under martial law ;

(3) When he is called in to aid the civil authorities to preserve or restore order ;

(4) When the civil authorities withdraw leaving the military to preserve or restore order.

In the first two cases the civil law is suspended. In the 3rd case the responsibility to maintain public order remains with the civil authority. In the last case that responsibility is thrown on the military who are called on to perform police duties in the discharge of which they are as much subject to the ordinary law as they would be, if instead of being directly charged with the duty of restoring order they were still under the civil power, the only difference being that the directionary control is shifted from the civil to the military.

Factually the situation at the time in Sri Lanka did not fall under the first two classes ; we were not at war against another country ; martial law had not been declared ; for our purpose it does not matter if civil administration had broken down or not and whether the situation was as set out in (3) or (4) above mentioned. In the one case the military is called in to assist the civil authority to maintain public order, in the other they take direct responsibility for it ; in both cases they are subject to the ordinary law of the land. The military was certainly not called to wage a civil war. Their duties could include the duty to kill in which event they must be covered by one of the general exceptions to the Penal Code. They do not have any more power than a police officer in the circumstances.

This position is clearly brought out when we consider the powers of the Prime Minister to call out the armed services.

Section 12 (1) of the Public Security (Amendment) Act states—

> " (1) Where circumstances endangering the public security in any area have arisen or are imminent and the Prime Minister is of the opinion that the police are inadequate to deal with such situation in the area, he may, by Order published in the Gazette, call out all or any of the armed forces for the maintenance of public order in that area.
>
> (2) The members of any of the armed forces who are called out by Order made under subsection (1) for the purpose of maintaining public order in any area shall for such purpose have the powers, including the powers of search and arrest, conferred on police officers by any provision of this part or of any other written law, other than the powers specified in Chapter XII of the Criminal Procedure Code."

This provision clearly indicates the purpose of calling out the armed forces. It is for the maintenance of public order. The power of the armed services is not more than that of the police for this purpose and they do not have power of investigation ; which the police have under Chapter XII of the Criminal Procedure Code.

Not only the factual situation but the position in law of the armed services show how singularly inapposite are the terms such as " in combat ", " in the field ", " prisoners of war " and " military necessity ".

The Penal Code applies to every person including a person subject to military law and in the absence of any special law giving rise to a special defence, it is necessary to come in by way of the Exceptions in the Penal Code in order to be exonerated, if the criminal act alleged has been proved or admitted.

Section 69 of the Penal Code is the only exception under the Code which has relevance to the defence taken, viz., that the girl was killed in pursuance of an order given by Col. Nugawela.

Section 69 reads :—

> " Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by a mistake of law in good faith believes himself to be, bound by law to do it. "

Now Section 100 of the Army Act says that every person subject to military law who disobeys any lawful command given by a superior officer commits an offence. This means that a soldier is bound by law to obey a lawful command of his superior officer.

Section 69 being an Exception it was for the defence to establish on a balance of probability that there was a lawful order given by Col. Nugawela and therefore he was bound by law to carry out the order to kill.

It seems to me that it was almost an impossibility to prove that the order given was lawful when the person who was alleged to have given the order denied he gave it and the person who carried out the alleged order himself kept silent. It is not possible to prove the lawfulness of the order by calling a person who only claims that he overheard the order being given.

Mr. Chitty relied on illustration (*d*) of Section 114 of the Evidence Ordinance to prove the lawfulness of the order. Section 114 states that " the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case." The illustration says " the court may presume that judicial and official acts have been regularly performed ".

This is a presumption of fact which may or may not be drawn and in my opinion cannot be drawn in the instant case in regard to the order of Col. Nugawela as he himself had denied that he made such an order. Moreover I do not think that the lawfulness of the order can be presumed when such an inference does not arise from the common course of natural events, human conduct, public and private business in their relation to the facts of the present case.

There are many Indian authorities in support of my view. The illustration permits a presumption to be drawn in matters of procedure. But it does not permit a presumption to be drawn where the question does not relate to the manner of doing an official act but goes to the root of the validity of that order. See *Swadeshi Cotton Mills Co. Ltd. v. State Industrial Tribunal.*[1] U. P. 1956 All. 689 ; *Emperor v. Bhiku*[2] 1950 Bombay 330.

It has been held that the validity of a warrant or detention order cannot be presumed. In short when something has to be proved it cannot be done by means of a presumption which may or may not be drawn. Though official acts may be presumed to have been regularly performed, such presumption cannot supply

[1] *U. P. 1956 All. 689.* [2] *(1950) Bombay 330.*

deficiency in the proof. See *Mookram Ali v. Cultack Municipality,*[1] 14 Cr. L. J. 91. The words "regularly performed" in the illustration mean done with due regard to form and procedure. The presumption applies to procedure only.... There can be no presumption that the court will always be correct in its decision on points of law—*P. Chowdhury v. Juffar Mahammad*[2] 1914 Cal. 849.

Counsel on both sides at the trial had been drawn into an argument as to what extent a soldier was bound to obey the orders of his superior.

The first time the matter was raised at the trial as far as I can see, is when the defence counsel asked the prosecution witness Lesley Silva :

"Q 291. Whatever orders given by Col. Nugawela would have to be complied by Lieut. Wijeyaratne or Lieut. Wanigasekera ?

A. Yes or by one of the sergeants".

Then again the defence counsel asked his own witness Lieut. Wijeyaratne.

"Q 2204. Were you under any obligation as the local head to follow any orders given by Col. Nugawela ?

A. I am under obligation to carry out the legal orders of Col. Nugawela."

The State Counsel then proceeded to underline this answer pursuing this matter.

"Q 2221. That is to say that a person belonging either to the regular army or the volunteer force of the army has to obey only the lawful and legal commands given by a superior officer ?

A. Yes."

"Q 2222. An order to kill a prisoner would not be lawaful command if given by a superior officer ?

A. Yes ....."

"Q 2227. Why do you say that an order to kill a prisoner would be lawful ?

A. Under the Geneva Convention a captured prisoner cannot be done away with."

It was this evidence about which Mr. Chitty bitterly complained as being misreception of evidence and that a mistrial had resulted by asking witnesses their opinion about the law on the subject.

[1] *14 Cr. L. J. 91.* [2] *1914 Cal. 849.*

After the witnesses from the army were asked what they would have done if they were faced with a similar order and whether they would have considered themselves bound by law to carry out the order, Counsel on both sides had continued this argument in their addresses citing books and authorities.

The judge is required to charge the jury summing up the evidence and laying down the law by which the jury are to be guided.

The first question we have to ask ourselves is whether counsel should have been allowed to go into the questions of law involved. Mr. Chitty conceded that an answer was difficult. This is because much will depend on the facts and the nature of the defence in each case. I cannot see how defence counsel could have refrained from discussing the law when he had to prove on a balance of probability—

(1) that the appellants were bound by law to kill the deceased ; or

(2) that they by reason of a mistake of fact and not by reason of a mistake of law in good faith believed themselves bound by law to kill the deceased.

A discussion of the law by counsel under the control of the judge was necessary in view of the defence taken. Then, the judge, in summing up, had to refer to the arguments of counsel so that the jury might be guided. I do not see how this could have misled the jury into arriving at a wrong verdict so long as nothing was presented to the jury erroneously as the law governing the subject when in fact it was not.

The discussion of law really centred on to what extent a person subject to military law is bound to obey the command of his superior officer. Three different positions emerged—

(1) A soldier must obey the command of his superior whether it was lawful or not.

(2) A soldier must obey the command of his superior only if it was lawful. This view came into conflict with the requirement that a soldier must give his unquestioning obedience to his superior's order. Very often he will not have time to consider its lawfulness. He does not give his mind to it. It is wrong in such cases to say that he has reason to believe it to be lawful. It is just that he does not think it to be unlawful.

From this there emerged the third view that a soldier was bound to obey only orders which were not manifestly and obviously illegal. That is, where the illegality strikes one in the face. In such cases if he obeys such an order the law will presume that he has obeyed with knowledge of its illegality. This view is more favourable to the appellants as Section 100 of the Army Act says that a soldier is bound to obey the lawful command of his superior officer. It is this view the learned judge directed the jury to follow, when he asked the jury at page 452 of his charge " So gentlemen these are the considerations that apply if you come to the conclusion on a balance of probability that Col. Nugawela did in fact give an order to the first appellant to bump off prisoners.

Would any reasonable man under the circumstances in which the 1st accused was, if such an order was given to him, honestly believe that he was bound to carry it out because it is not obviously or manifestly illegal ? On the other hand, gentlemen, would any ordinary person in the circumstances in which the 1st accused was, if such an order was given at once have seen that this is an obviously and manifestly illegal order and should not be carried out ? If it is the first conclusion that you come to, then of course the first accused is protected, if however you come to the latter conclusion then the first accused is not protected."

The same questions the learned judge posed in regard to the 2nd appellant at page 454 of his charge and said " if you come to the conclusion that the 2nd accused honestly believed that he was bound by law to carry it out because it was not an obviously and manifestly illegal order then the 2nd accused is protected."

The learned judge had made it quite clear what, in his view, was the law applicable to the facts of the case. He had told them, in unmistakable terms, they must take the law from him. He however first discussed the authorities cited by counsel. I think that we make a mistake, if we think that the jurors of today cannot follow a discussion on the law but have to depend on the " ipse dixits " of the judge. Law is common sense and I am satisfied the judge could not have confused the jury by his dealing with the law discussed by counsel.

I think it must be kept in mind that the second limb of Section 69 does not come into play in this case as there was no mistake of fact, which could have led the appellants in good faith to believe themselves to be bound by law to do the act.

The authorities cited merely sought to modify the meaning of the word " lawful " to mean something which was not manifestly and obviously illegal and that in such a case a soldier is bound by law to do what he is ordered to do.

If on the facts of this case it is sought to come under the second limb it can be argued that a mistake of law under the section is no defence however reasonable the belief is as a result of the mistake of law. The law is that a soldier is bound by law to obey the orders of his superior so long as what is ordered is not manifestly and obviously illegal. In this view of the matter the learned judge had no need to leave the issue of the lawfulness of the order to the jury nor was there a burden on the appellants to prove on a balance of probability that the order was lawful. All they had to prove was that the order was not obviously and manifestly illegal and it is this issue which the learned judge left in the jury. There was no evidence at all of the lawfulness of the order. In these circumstances the appellants could have still succeeded if they could have shown that the order was not manifestly and obviously illegal. The facts in the case were against the appellants and we need not refer to the Geneva Convention to prove that the killing of this girl in the circumstances was manifestly and obviously illegal.

An attempt was made to distinguish the case of the 2nd appellant. The prosecution evidence disclosed that he fired at the fallen girl when ordered to do so by the 1st appellant. It was an act of mercy—He had not caused serious injuries. These were all arguments Mr. Coomaraswamy urged in an effort to place the 2nd appellant in a different and more favourable position. He urged that as an officer under the 1st appellant he could not have refused to carry out the order.

When the conduct of the 2nd appellant is considered from the beginning of this transaction I find it difficult to see any difference in their respective liability. There had been willing and ready co-operation with the first appellant. In these circumstances he is equally liable.

Mr. Coomaraswamy also suggested that the 2nd appellant's sentence should be reduced though Mr. Chitty said nothing about sentence. Even on the question of sentence I find it difficult to draw a distinction. I cannot see any mitigating circumstances in the whole transaction for us to interfere with the sentences of either appellant.

Applications are refused, and appeals dismissed.

WIMALARATNE, J.—

In view of the submission of learned Counsel for the 1st accused-appellant that upon a general survey of this extraordinary case and its background of events, in particular the armed insurrection which began on 5th April, 1971, it becomes apparent that the application of the provisions of the Penal Code alone is inadequate to meet the exigencies of the situation and to determine the rights and liabilities of the members of the Armed services in the field in time of combat; and his further submission that a consideration of the issues involved is of the greatest public importance, in principle much more far-reaching than the specific facts of the present case, because of the conflict of duty that may result from a soldier's obedience to superior's orders under the Army Act, I consider it pertinent to make my own observations on some aspects of this case.

Due to the existence of a state of emergency, the Governor-General by Proclamation dated 16th March, 1971, declared that the provisions of Part II of the Public Security Ordinance (Chapter 40) shall come into operation throughout the Island. On the same day, certain Emergency Regulations were promulgated under Section 5 for the preservation of public order and for the suppression of riots and civil commotions. Under Section 12 (1) of the same Ordinance, members of the Armed forces had on 7th March, 1971 been called out for the maintenance of public order. That the country faced a serious situation as a result of the activities of the insurgents was not in issue at the trial.

The Kataragama Police station was one of several police stations attacked by the insurgents on the night of 5th April, 1971. There were two attacks each lasting about one hour. Both attacks were repulsed by the police officers, consisting of a sergeant (Munidasa) and seven constables. The insurgents attacked with hand bombs; the police officers defended themselves by firing with sterling sub-machine guns, rifles and shotguns. On the morning of 6th April, the dead bodies of two of the insurgents dressed in blue uniforms were found a short distance away. There were no casualties on the police side, but the rear portion of the roof of the police station and the plaster of the walls had been damaged. On the evening of the 6th, the A. S. P. of Tangalle and Lieutenant Musafer in charge of a platoon stationed at Tangalle came and instructed the police to hold on. By that time, the officer-in-charge, Sub-Inspector Udawatte, who had been absent on duty the previous day, had also returned to station. A further attack on the night of the 6th lasting about half an hour was also repulsed, but as ammunition was running low, the police decided to evacuate and did evacuate the station and left for Hambantota. According to

Munidasa, there was no obstruction to their passage and no insurgents were encountered on the way to Hambantota that night. The only evidence of damage to public property at Kataragama was this damage to the police station and to a Wild Life Department bungalow close by.

On the 10th April Colonel Derrick Nugawela of the Volunteer force was appointed Co-ordinating officer for the Hambantota District, comprising the towns of Tangalle, Hambantota, Tissamaharama and Kataragama. He reached Hambantota on the evening of the 11th and established his headquarters at the Rest House. He had under his command seven commissioned officers (including the 1st accused, Lieutenant Wijesooriya) and about 125 men. He described the situation in his area as very bad. At Tangalle, Tissamaharama and Hambantota the morale was very low. Food and petrol were in short supply and the troops and police were confined to limited areas. The situation in Kataragama was extremely bad. The whole area had, according to reports furnished to him by the 1st accused, been overrun by insurgents. The civil administration had broken down. There was no supply of food except for whatever was being supplied by the Government Agent, Monaragala. He also learnt that this area was very badly infested with insurgents.

Although law and order had to some extent been established by the 1st accused and his men at Tissamaharama by the 12th, Nugawela did not want to attack and take over Kataragama without having sufficient troops and ammunition. As a result of subsequent intelligence reports however, he decided to attack Kataragama on the 16th. His plan was to send one platoon with one officer and to follow up with a group to keep the road from Tissa to Kataragama open. The platoon of 25 men was in charge of the 1st accused and included the 2nd accused, Sergeant Ratnayake. The group to keep the road open was in charge of one Lieutenant Wijeratne. After an initial briefing by Nugawela in the early hours of the morning of the 16th, the platoon under the 1st accused left the Tissa Rest House, proceeded without encountering any obstacles, and established their camp at the C. T. B. pilgrims rest at Kataragama. There was no trouble from the insurgents either on the 16th or the 17th.

All the police officers who had evacuated Kataragama on the 6th night returned to Kataragama on the 16th morning and occupied two rooms in the same pilgrims rest. That same morning, Udawatte and three other police officers had gone in a jeep to the house of the deceased Premawathie Manamperi, about half a mile away from the police station, and had forcibly removed her to the police station despite the protests and entreaties of her mother. Although she made search for her daughter,

the mother was unable to trace the girl. She only saw the dead body of the deceased on the 24th May, 1971 when it was exhumed from a land near the bus stand. She denied that the deceased was an insurgent responsible for the attacks on the police station on the nights of the 5th and 6th, and she also denied that groups of insurgents were fed in her house.

At the trial, three eye witnesses, Oliver de Silva, D. D. Perera and Aladin, gave evidence regarding the shooting and burial of Premawathie Manamperi at about 11 a.m. on the 17th of April. The girl, it would appear, was questioned by the 1st accused at the army camp compound that morning. The 1st accused thereafter asked her to remove her clothes. The girl refused and cried and asked the 1st accused to shoot her if he wanted. The 1st accused replied " shooting is my business. You carry out my orders ". The girl removed her dress. The 1st accused wanted her to remove the balance of her clothes ; whereupon, she removed her brassiere and the underskirt, and she was completely nude. She attempted to cover her nakedness with her hands, but the 1st accused ordered her to put her hands up and to march towards the high road and the town, saying : " I attended all the five classes ". The girl obeyed this order and went on the high road towards Tissamaharama. The two accused and another followed her, and a few yards before they reached the post office, the 1st accused kicked and pushed her, and opened a short burst of fire with a sub-machine gun from behind at close range. After the girl fell down, the two accused went back to the army camp. Then, a soldier from the camp had shouted that the girl was still alive ; whereupon the 1st accused ordered the 2nd accused to go and shoot her. The 2nd accused went up to the place where the girl was lying fallen and opened another short burst of fire also at close range. At some stage, witness Aladin had gone up to her and had given her water or some aerated water to drink. After sometime, on the orders of the army officers, Aladin had dug a pit and placed the body of the girl by the side of the pit. Later, an unidentified soldier went up and shot the girl through the head with a rifle. She died immediately and was buried in the pit.

This was the case presented by the prosecution on the two charges of attempted murder against the accused. The defence raised by the accused at the trial was a defence under Section 69 of the Penal Code, that they acted under the orders of their superior officers. The evidence relating to and relevant to this defence was elicited from three witnesses, namely, Lieutenant Wijeratne, Corporal Shiromani, both called by the defence, and Colonel Nugawela. Lieutenant Wijeratne's evidence related to some instructions given him by Nugawela on the 14th of April

regarding five other prisoners who were then in the Hambantota remand lock-up. He said he was told by Nugawela to remove those prisoners from the lock-up and hand them over to the 1st accused (who was then stationed at Tissa) with instructions to release the two female prisoners and to " bump off " the male prisoners. He complied with that order by handing over the five prisoners to the 1st accused and he also conveyed the instructions of Nugawela. The 1st accused told him on that occasion that he (the 1st accused) too had received similar instructions from Nugawela over the telephone. Witness Shiromani was in the group that was patrolling the roads under the command of Wijeratne. He said that at about 11 a.m. on the 16th when he was at the pilgrims rest, Nugawela came there and spoke to the 1st accused. Although he did not know the nature of the conversation, at a certain stage he heard Nugawela telling the 1st accused " no use of prisoners, bump them off ". Those words were uttered a bit loud with some action or accent, and that is how he heard them, and not the rest of the conversation. Nugawela's evidence, however, was that he went to this camp at Kataragama twice on the 16th and during his second visit in the evening he saw four or five women insurgents inside the building. He did not give the 1st accused any instructions in regard to those girls. When he was questioned as to what instructions he gave his officers at earlier briefings, he replied, " I said, if you go into combat, you will use maximum force. Once we get accomplished, we will establish law and order wherever it has broken down ; as far as the prisoners are concerned, from a logistic point of view, they are a burden on us, and it is the responsibility of the police to take charge of them. Those were my instructions ; and I said all prisoners should be handed over to the police ". Nugawela was cross-examined by the defence in order to establish that *at the initial briefings* held on the 11th and 12th, he ordered his officers to " bump off " prisoners. When he was questioned as to whether he did not give instructions such as " take no prisoners, bump them off ", he denied that he gave such instructions. He also denied that he told his officers that wherever possible, prisoners should be bumped off close to their homes, so that the area would not be smelling of corpses.

The questions the jury had to decide therefore were, whether the accused shot the deceased, inflicting injuries on her, whether they had a murderous intention and whether the defence under Section 69 was available to the accused, under the circumstances of this case. But in the course of his address to the jury, learned Counsel who appeared for the accused also took up the position that by virtue of Sections 8 and 9 of the Public Security Ordinance (Chapter 40) as amended by Act No. 8 of 1959, the

accused could not be tried in the ordinary courts. The learned trial Judge dealt with that plea and directed the jury as a matter of law, that Sections 8 and 9 of the Public Security Ordinance had no application to an order such as the order alleged to have been given by Colonel Nugawela. The contention of learned Counsel for the 1st accused-appellant is that Section 9 prohibits a court from inquiring into the lawfulness of orders given by Colonel Nugawela at a time when the emergency regulations were in operation. Section 9 of the Public Security Ordinance reads as follows :—

> "No prosecution or other criminal proceeding against any person for any act purporting to be done under any provision of any emergency regulation or any order or direction made or given thereunder shall be instituted in any court except by, or with the written sanction of the Attorney-General ; and no suit, prosecution or other proceeding, civil or criminal, shall lie against any person for any act in good faith done in pursuance or supposed pursuance of any such provision."

Learned Senior State Counsel has referred us to the relevant provisions of the Public Security Ordinance and the Emergency Regulations, which have vested the members of the armed forces with powers which they would not have otherwise had. A brief analysis of certain provisions is necessary and are set out below.

Under Section 12 (1) of the Ordinance, where circumstances endangering the public security have arisen or are imminent in any area, and the Prime Minister is of opinion that the police are inadequate to deal with such situation in that area, she may call out all or any of the members of the armed forces for the maintenance of public order in that area. Section 12 (2) provides that the members of the armed forces so called out shall have the powers, including the powers of search and arrest, conferred on police officers by this Ordinance or any other written law, other than the powers specified in Chapter XII of the Criminal Procedure Code (that is, relating to the investigation of offences). Under Section 20 any person arrested by a member of the armed forces must, without unnecessary delay, be delivered to the custody of a police officer to be dealt with according to law. Section 23 is similar to Section 9 except that by Section 23 immunity is conferred in respect of acts done in pursuance or supposed pursuance of any provision of Part III of the Ordinance ; whereas under Section 9 immunity is conferred in respect of acts done in pursuance or supposed pursuance of any provision of an emergency regulation.

Emergency Regulations to deal with this situation were made on 16th March, 1971, and then again on 15th April, 1971. As the alleged offences have been committed on the 17th April, 1971, I shall refer to the Regulations as published on 15th April, 1971. Regulation 19 (1) gives the power to a police officer or a member of the armed forces to arrest without a warrant any person who is committing or has committed or whom he has a reasonable ground of suspecting to be committing or to have committed, an offence under an emergency regulation. Regulation 19 (8) deals with the treatment of persons so arrested. There is the power to remove a person from the place of arrest to any other place to be detained in custody and there is the power to use all such force *including armed force* as may be necessary for the purpose of such removal and detention. Regulation 22 creates and defines certain offences akin to arson, looting and trespass and provides for even the death penalty for those found guilty of such offences. There is also a consequential amendment to Section 96 of the Penal Code whereby the right of private defence of property is extended to the voluntary causing of death, if the offence which occasions the exercise of that right is an offence as defined in regulation 22. Regulation 63 provides that certain categories of police officers and members of the armed forces may order any person found in a public place to remove himself from such a place and on failure to comply with such an order, the officer may proceed to give effect to such an order by force *including armed force.*

What does Section 9 of the Ordinance mean ? It means that no prosecution or other proceedings shall lie against any person for any act done in good faith in pursuance or supposed pursuance of any provision of any emergency regulation. Similarly, Section 23 of the Ordinance means that no prosecution or other proceedings shall lie against any person for any act done in good faith in pursuance or supposed pursuance of any provision of Part III of the Ordinance. In order to seek immunity therefore, it is necessary that the act done must be in relation to an emergency regulation in force or in relation to a provision of Part III of the Ordinance. The doer must act in good faith in pursuance or supposed pursuance of a regulation or provision. It is only then that immunity is conferred under Sections 9 and 23 of the Public Security Ordinance. To take an example, if in pursuance of emergency regulation 19 (8), a member of the armed forces uses more force than is necessary under the circumstances in the removal of a person arrested and he does so in good faith, he is protected. Again, if in good faith he uses more force than is necessary while acting in pursuance of the provisions of regulation 63, he is protected. But one would have to look in vain to discover an emergency regulation which empowers a person

to shoot a prisoner held in custody. Premawathie Manamperi was arrested by the police on the 16th April, 1971, and remained, in my view, in police custody. If the accused questioned her, and if thereafter they shot her with sub-machine guns, they certainly did not do so in pursuance or supposed pursuance of any emergency regulation or provision of the Public Security Ordinance. The learned trial Judge's direction to the Jury regarding the applicability of Sections 8 and 9 of that Ordinance was, therefore, correct.

The next portion of the Judge's charge which has been criticized is the following passage :—

> " Although there is a state of emergency, it does not mean that the ordinary law of the country is suspended. The ordinary law remains and that law may have been added to by various Emergency Regulations, but the civil law remains. I must also tell you that the normal law applies as much to every citizen whether he be a private citizen or whether he be a mobilised soldier ; everyone is bound by the ordinary law. It may be that the soldiers are armed and they can use force, but that means they must use force according to the ordinary law ; they cannot use indiscriminate force, but the ordinary law gives a certain kind of protection to certain officers who obey superiors' orders, and that protection is given by virtue of Section 69 of the Penal Code."

Mr. Chitty's contention is that the ordinary civil law of the land was *pro tanto* suspended in this area where a civil war was prevailing. The acts of the accused were " acts done in time of combat in a threatened area during a time when what amounted to civil war prevailed." The accused are therefore, not liable to be dealt with under the civil law. I understood this argument to be that there can arise certain situations under which the Civil law stands suspended, and the armed forces called upon to establish law and order will then not be subject to the civil law. Quite apart from the facts of this case, which show that on the 17th April there was no civil war raging in the area where the 1st accused and his platoon were stationed, I wish to make my observations on the broad proposition that where the public security is endangered the armed forces called upon to establish law and order will not be subject to the civil law.

The assumption of powers by military commanders for the restoration of order in the event of civil war or insurrection have, under certain systems of law, been termed Martial Law. Martial law has been described as being neither more nor less than the

will of the General who commands the Army ; and that in fact it means no law at all. "*Keir & Lawson*" has this observation to make :—

> "In this sense, Martial Law owes its validity to International Law. It is unsafe to infer that because International Law allows such a power to a military commander, Municipal Law will in any circumstances permit the exercise of corresponding powers by military authorities within the realm."—Cases in Constitutional Law" (5th Edition) page 224.

In those systems of law where a state of Martial Law can come into existence, military authorities have a right not to be interfered with *durante bello.* Even so, the courts have not relinquished the right of adjudicating on the point as to whether or not a state of civil war exists. Although the *ratio decidendi* in *Ex parte Marais*[1] (1902) A. C. 109 is that the ordinary courts, sitting in a martial law area where war was still raging, had no jurisdiction to interfere with the military, O'Conner, M. R. in *Egan v. Macready*[2] (1921) 1 I.R., 265. said, "The military authority, like any other department of the State, is subject to the Supreme Court of the realm." Dealing with the argument that the assumption of extra powers was necessary if the rebellion was to be suppressed, he said :

> "The argument based on military necessity was pressed strongly, and I fully recognise that in cases not touched by special legislation, it is not for the civil courts to decide whether a military act was necessary or not.
>
> That must be left for the military authority. But I think that it should at least appear that there may have been the necessity", at page 277.

Even in those cases where a state of martial law has been held to exist, the degree to which the military may interfere with civilians has been said to vary with the circumstances. The test has always been whether interference was necessary in order to perform the duty of restoring and maintaining order. It has been said that the military authorities would be justified, for example, in ordering civilians to quit their homes or to render services provided such orders are necessary for the restoration of order. It would, on occasions be justified even to shoot an offender ; for example, an officer-in-charge of troops might justifiably order his men to shoot anyone about to cut a cable with intent to assist the enemy. In every case, the action taken has been judged by the test of necessity.

[1] *(1902) A. C. 109.* [2] *(1921) 1 I. R. 265.*

In our country special legislation, namely the Public Security Ordinance has been enacted vesting extra powers in the police and armed forces. Emergency regulations can be made thereunder in the interests of public security and for the preservation of public order and the suppression of mutiny, riot or civil commotion. Besides the immunity conferred by Sections 9 and 23 of that Ordinance and referred to earlier in this judgment there will always be available to the police and armed forces such defences as " obedience to the lawful orders of superiors " under Section 69 of the Penal Code, " justification " under Section 72, and " acts done in the exercise of the right of private defence " under Section 89. But a wide and general plea such as " an act done in time of combat in the field during civil war " is unknown to our law. I am therefore of the opinion that the learned trial judge's direction reproduced above is a correct direction on the law.

The Jury were directed by the trial Judge to decide whether, in fact, Colonel Nugawela did give orders to the 1st accused, as deposed to by the two defence witnesses ; and if he did give such orders, whether Section 69 of the Penal Code affords protection to the 1st accused. The Judge's direction on this aspect of the case has also been criticized by learned Counsel for the 1st accused-appellant. The Jury had before them the evidence of Lieutenant Wijeratne regarding the order of Nugawela given on the 14th about the five prisoners from the Hambantota remand lock-up, and the evidence of Shiromani regarding the order given on the 16th evening by Nugawela in his hearing to the 1st accused to " bump off " prisoners. The Jury also had before them Nugawela's denial that he gave orders at the initial briefings on the 11th and 12th to bump off prisoners. They would also have been mindful of the fact that Nugawela was not cross-examined about the orders alleged to have been given by him to Wijeratne on the 14th and to the 1st accused on the 16th. The Jury were correctly directed by the trial judge to apply the lesser burden of proof in deciding the question as to whether Nugawela did, in fact, give an order to the 1st accused to bump off prisoners or any order similar to that. If the Jury took the view that Nugawela did not give such an order one cannot say that it was a wrong decision. But the learned judge directed the Jury to consider the case also on the basis that he did give such an order. If they believed that Nugawela did give such an order, the judge told the Jury that the accused had to prove, on a balance of probability, that he acted in good faith in carrying out what he considered to be a lawful order which he was bound to carry out. Mr. Chitty's complaint, however, is that the whole

tenor of the judge's charge to the Jury was that an order to shoot prisoners was obviously and manifestly illegal and that the learned Judge did not leave it open to the Jury to consider whether such an order was, in fact, obviously and manifestly illegal under the circumstances of this case. He criticized particularly the following passage in the summing up :

> " The main question is, in the circumstances in which the 1st accused was at that time, would he have known that the order was obviously and manifestly illegal and should not have been carried out. This was an order to kill, to commit murder. This was an order to kill prisoners and this was an order not given in conditions where there was an actual engagement with the enemy. "

In dealing with this criticism, I may also refer to an incidental criticism that the only ground of illegality urged upon the Jury was the proposition that an order to shoot prisoners is illegal because of the terms of an unspecified and unidentified Geneva Convention elicited during the cross-examination of Wijeratne. Wijeratne's reply in answer to State Counsel's question, " Why do you say that an order to kill prisoners would be unlawful ? " was " Under the Geneva Convention, captured prisoners cannot be done away with. " There is, however, no substance in the complaint that the learned Judge commended to the Jury this opinion of Lieutenant Wijeratne about the Geneva Convention. Although he did, in summarising the evidence of Wijeratne, refer to that evidence, he formulated the law concisely in these terms :

> " Would any reasonable man under the circumstances in which the 1st accused was, if such an order was given to him, honestly believe that he is bound to carry it out because it is not obviously and manifestly illegal ? Or on the other hand, would an ordinary person in the circumstances in which the 1st accused was, if such an order was given, at once have seen that this was an obviously and manifestly illegal order and should not be carried out. If it is the first conclusion that you come to, then, of course, the 1st accused is protected. If however, you come to the latter conclusion, then the 1st accused is not protected. "

In dealing with the defence set up by the accused under Section 69, the learned Judge also dealt with three types of situations with which a soldier may be confronted when he said : " If you fire lawfully into a crowd and if it is done lawfully, then you commit no offence. Supposing the crowd is so violent, armed with deadly weapons and they come forward for an attack, under

those circumstances if you fire at the mob, you commit no offence..... If there is a mob which is not violent, which probably has no weapons, and which is not restive, and the superior officer tells a soldier to fire and the soldier fires at the mob, the order itself was not strictly lawful because an order cannot be given to fire at a mob which is quiet, and in those circumstances, the soldier, of course, acts on the order of his superior. In such a case, the soldier is protected ..... If, however, an order is obviously and manifestly illegal according to the ordinary law of the land, it is the duty of the soldier to refuse to carry out such an order." This passage again demonstrates that the Judge left to the Jury the decision of the question as to whether the order given by Nugawela, if given at all, was lawful or not.

In dealing with these three situations, the learned Judge besides directing the Jury on the law, also read out certain passages from a Judgment and from two Commentaries on the Indian Penal Code. This procedure is criticized as an extra-ordinary deviation from practice and procedure "into a disorderly channel" resulting in confusion in the minds of the Jury. What had happened at the trial was this:—Learned Counsel for the defence had read to the Jury, in the course of his address, passages from a judgment in the South African case of *Smith* to illustrate under what circumstances a subordinate soldier acting under the command of his superior was protected. When it came to his turn to address, learned State Counsel also read certain passages from two well known Commentaries on the Indian Penal Code and from the Manual of Military Law. The learned Judge, in his charge to the Jury, himself read out the same passages "in order to refresh your memory", as he put it. There could, in my view, be no serious objection to this procedure, provided the Judge himself lays down and explains the law with certainty. That he has done in the present case; and there is, in my view, no material in the complaint that the accused have been deprived of the protection which the law gives them of having the law applicable to the case laid down with certainty and precision by the Judge himself.

The omission by the trial Judge to refer in name or substance to the Army Act has also been commented upon. The argument is that a soldier can be executed under the Army Act for refusing to carry out an order of a superior officer. On the other hand, it would be extremely difficult to decide whom an armed soldier can shoot in time of combat, without himself running the risk of being charged with murder. Our attention has thus been drawn to the awkward and unhappy position in which a soldier can sometimes be placed. A reading of Section 100

of the Army Act (Cap. 357), however, makes it abundantly clear that it is not every disobedience to a superior's orders that is penalised by the Army Act. It is only disobedience to a lawful command that is punishable. There is therefore no foundation for Mr. Chitty's fears about the "unhappy lot" of members of the armed forces.

Mr. Coomaraswamy for the 2nd accused-appellant attempted to draw a distinction in the case of the 2nd accused on the ground that he carried out the orders of his superior, the 1st accused, who was present at the scene. Although in his case there was an admission that he acted on the orders of his superior, the same considerations regarding the defence under Section 69 applies to his case as well. The fact that the 1st accused was present at the scene does not in my view mitigate the seriousness of the offence committed by him.

I would dismiss the appeals of both accused-appellants, and affirm the convictions and sentences.

Convictions affirmed by the whole Court.
Sentences also affirmed by the majority of the Court, without any reduction.