Doole v. Republic of Sri Lanka

COURT OF APPEAL.
COLIN-THOME, J., RODRIGO, J., AND TAMBIAH, J.
C. A. (S. C.) 203/76—H. C. BADULLA 1876.
FEBRUARY 6, 7, 8, 9, 12, 13, 14, 1979.

Penal Code (Cap. 19), sections 92, 294, 296, 300—Power of arrest without warrant—Administration of Justice Law, No. 44 of 1973, section 85 (1), 90, 190 (1)—Police Ordinance (Cap. 53, section 56—Was arrest legal?—Was accused exercising his right of private defence?—Can witnesses' not on back of indictment be added whilst the trial is proceeding?—Is this fair by the accused?—When should such an application to amend indictment be allowed—Sudden fight—Factors reducing murder to culpable homicide.

Held

(1) As the acts of the police in attempting to arrest the accused-appellant were justified and did not constitute any offence and the police were acting lawfully under section 85(1) (*a*) of the Administration of Justice Law, the accused appellant was not entitled to plead the right of private defence against such acts which caused him a reasonable apprehension of death or grievous hurt. The accused-appellant, who on the evidence in this case must have known that they were a police party attempting to arrest him could not avail himself of the right of private defence. There was no necessity therefore for the learned trial judge to make reference to section 92 of the Penal Code in his summoning up. An examination of the relevant evidence in relation to the law is necessary in determining this question as it is a mixed question of fact and law.

(2) Exception 3 of section 294 of the Penal Code was not applicable and relevant on the evidence in this case and therefore there was no obligation on the trial judge to charge the jury accordingly. Exception 4 to this section which was urged by the defence at the trial, is not confined to a sudden fight between civilians exclusively.

(3) That as a rule an amendment to an indictment should be allowed if it would have the effect of convicting the guilty or securing the acquittal of the innocent, but it should not be allowed if it would cause substantial injustice or prejudice to the accused.

(4) As soon as a witness reads an extract from the information book defence is entitled to examine the entries to ascertain whether they were so recorded but in the present case not only was no objection taken, but contents of the Information Book were also elicited in cross-examination by the defence. The failure to produce certified copies of these extracts was therefore only a technical irregularity and no prejudice was caused to the accused.

Cases referred to

(1) *Christie v. Leachinsky, (1947) 1 All E.R. 567; (1947) A.C. 573; 176 L.T. 443; 63 T.C.R. 231.*

(2) *Corea v. R., (1954) 55 N.L.R. 457.*

(3) *R. v. Wannaku Tissahamy, (1949) 51 N.L.R. 402.*

APPEAL from a conviction in the High Court, Badulla.

Dr. Colvin R. de Silva, with *Mrs. Manouri Muttetuwegama,* for the accused-appellant.
T. Marapana, Deputy Director of Public Prosecutions, for the State.

Cur. adv. vult.

April 5, 1979.

COLIN-THOME, J.

The accused-appellant in this case was indicted under two counts with having :—

(1) On or about 14th June, 1975, within the jurisdiction of Haputale, committed the murder of M. A. Rajakaruna, Sub-Inspector, and thereby committed an offence punishable under section 296 of the Penal Code.

(2) At the time and place aforesaid and in the course of the same transaction, he did shoot at P.C. 11492 Nandapala with a revolver with such intention and knowledge and under such circumstances that had he by such act caused the death of the said Nandapala he would have been guilty of murder, and that he has thereby committed an offence punishable under section 300 of the Penal Code.

At the end of the trial the jury unanimously found him guilty under count 1 of culpable homicide not amounting to murder on the basis of a sudden fight. On count 2 he was unanimously found guilty of attempted culpable homicide not amounting to attempted murder. He was sentenced to ten years rigorous imprisonment on count 1 and to two years rigorous imprisonment on count 2, the sentences to run consecutively.

Dr. S. P. Balakrishnan, Medical Officer, General Hospital, Badulla, who was acting Judicial Medical Officer, Badulla on 14.6.1975 examined the deceased Rajakaruna at about 2.30 p.m. at the Badulla Hospital. He was in a state of shock but conscious. He was able to talk. He asked him how he received his injuries and he replied that on the 14th of June, 1975, at about 10.45 a.m. when he went to arrest one Doole, Doole shot him. An operation was performed on Rajakaruna to prevent peritonitis and to check the haemorrhage. There was no delay in the operation. However, on 16.6.1975 at about 4.30 a.m. Rajakaruna died.

On 16.6.1975 he conducted a post-mortm examination on the body of the deceased Rajakaruna. He had an injury 1" in circumference in the form of a circle in the lower part of the abdomen, which had been caused by a bullet. There was an internal injury on the back of the spine near the rectum from which he removed

a bullet and he handed this over to S.I. Wijesekara (P2(a)). Both the small and large intestines were perforated by this bullet and the cause of death was due to haemorrhage, shock, toxaemia and peritonitis as a result of a bullet wound in the abdomen.

He also examined P. C. Nandapala on 15.6.1975 at 10.45 a.m. He had been entered into the Badulla Hospital on 14.6.1975 about 12.45 p.m. He had an injury on the index finger of his right hand— 1/5 of an inch in width which may have been caused by a grazing bullet. He also had scratch mark on his right leg which could have been caused by falling or in a struggle.

P. C. 11494 Abeypala stated that on 13.6.1975 he was attached to the Mt. Lavinia Police Station. He had already been there for about 3 years. He was attached to the Tourist section and occasionally did crime work. The deceased Sub-Inspector Rajakaruna was also attached to the same police station. He was in the crime branch. He knew the accused-appellant before this date as Baba Farook Doole. He was residing at Dehiwala within the Dehiwala police area.

About 6 months prior to this incident he knew the accused-appellant and had met him in connection with an official matter. He had a discussion with the accused-appellant outside the police station in regard to this official matter and that was how he came to know him. About two months later he met the accused-appellant again outside the police station. He saw him near the court but on that occasion he did not speak to him.

On 13.6.1975 S.I. Rajakaruna made an entry that he wanted to take Doole into custody and he directed Abeypala to get ready to join the party that afternoon. S.I. Rajakaruna, P.C. Abeypala, P.C. Nandapala and P.C. Chandrapala Peiris proceeded to Nuwara Eliya that evening after making the necessary entries in the Information Book of their intention to arrest the accused-appellant against whom criminal charges had been made. Two of the complainants came with the police party on this journey, namely, Joseph Antony Fernando and Tudor Antony. Both these persons resided in Mt. Lavinia.

Joseph Antony was a clerk and Tudor Antony was a lab assistant at St. Thomas' College, Mt. Lavinia. In addition to these two persons, Devapura *alias* Paniya, a police informant, joined the police party. The party commenced their journey on the 13th of June, 1975 at 8 p.m. Inspector Rajakaruna took a revolver (P1) together with some bullets (P4). The rest were unarmed. He did not know whether Rajakaruna tested the revolver whether it could be fired. Normally they do not check it. They went to Nuwara Eliya in a small van which belonged to one of the complainants. It was driven by a driver.

They reached Nuwara Eliya at 4 a.m. on the 14th and they went to the police station there. The Officer-in-Charge of the Nuwara Eliya Police Station lent them a police constable armed with a rifle. From there they went to a bakery at about 4.30 a.m., but the accused-appellant was not there. Thereafter they went to a boarding house at the request of Paniya but the accused-appellant was not there. From there they went to a beef stall and met the proprietor Razack. At this stage all the police officers were in uniform. Paniya led them to all these places in Nuwara Eliya.

After speaking to Razack the party proceeded to Bandarawela which they reached at about 10 a.m. The police constable of the Nuwara Eliya Police Station was left behind. About 5 miles from Nuwara Eliya all the police officers changed into mufti. Rajakaruna got into a sarong and 'T' shirt; Abeypala wore a red 'T' shirt, white shorts and shoes. The other two police officers were dressed in trousers. They changed their clothes to conceal from a person called Seether at Bandarawela that they were police officers. Rajakaruna and Razack went to meet Seether so that they could obtain information from him as to the whereabouts of the accused-appellant. Thereafter, they returned with Seether who joined the party and they proceeded to Haputale.

At the request of Seether they stopped near a tea estate at Haputale. It was about 11 a.m. and the four police officers got down from the van together with Seether. The others remained in the van. They then proceeded towards a bungalow which was about 75 yards away, led by Seether. Seether, Nandapala and Peiris went towards the front door of the house while Rajakaruna and Abeypala went towards the rear of the house. When Rajakaruna and he reached the back of the house the persons came running from the back of the house. They were Herbert Fernando and the accused-appellant Doole. Herbert Fernando *alias* Leslie was about 10 feet ahead of Doole. Doole who was armed with a pistol stretched out in front of him threatened to shoot them if they approached him. The revolver was aimed at Abeypala. Abeypala grabbed Herbert Fernando and held him between himself and Doole. Thereafter, Doole fired his revolver at Rajakaruna. Rajakaruna was a yard away from Abeypala to the right at the time. Rajakaruna also had his revolver with him. Doole and Rajakaruna simultaneously fired. Rajakaruna's shot did not hit Doole but the shot fired by Doole hit Rajakaruna and he held his stomach and doubled up shouting that he was shot. Then Nandapala came from the front towards them and jumped on the accused-appellant. As Nandapala jumped the accused-appellant fired another shot at him which struck Nandapala's left-hand. Nandapala fell with the accused-appellant. Both of them were struggling on the

ground while he held Herbert Fernando. Then Peiris came and he also struggled with the accused-appellant for about three minutes and snatched the revolver from his hand. This was similar to P2. They managed to bring the accused-appellant under control and hand-cuffed him. They took the accused-appellant and Herbert Fernando to the van and proceeded to the Haputale Hospital where they admitted Rajakaruna and Nandapala. Doole and Herbert Fernando were also admitted to the hospital.

Under cross-examination it was suggested to Abeypala that he had a personal grudge against the accused-appellant. He rejected this suggestion. He also denied that he was armed with a kris knife 6" long when they went to arrest the accused-appellant. There were bullets in Rajakaruna's revolver but he did not know how many were in it.

Abeypala denied the suggestion that they struck the accused-appellant with an arrack bottle and galvanized pipe. He also rejected the suggestion that Joseph Antony and Tudor Antony went ahead of the police party and participated in an attack on the accused-appellant and Herbert Fernando. The witness also denied the suggestion that the police party went with the intention of killing the accused-appellant. He stated that the two complainants Joseph Antony and Tudor Antony had made complaints to the Mt. Lavinia Police that the accused-appellant had smashed their houses and cut Tudor Antony's wife with a sword.

P.C. 11492 Nandapala stated that he had been attached to the Mt. Lavinia Police from about 1972. He had met the accused-appellant about a year before the death of Inspector Rajakaruna. This was not in connection with any official matter. He had seen him twice or thrice but he had not spoken to him.

With regard to the incident at Haputale he stated that Seether went ahead and knocked at the door and spoke some words. Peiris and he accompanied Seether to the front door, while Rajakaruna and Abeypala went behind the house. This was according to the orders of Inspector Rajakaruna. They waited hoping that the suspect would come out. Nobody opened the door. After two or three minutes they heard Rajakaruna calling for Peiris and while running in that direction they heard a report of a gun, followed by another report. When they went up Rajakaruna was holding his stomach crying "Aiyo!". Abeypala was holding Herbert Fernando. Doole aimed a pistol at him and said "don't advance." At that stage he jumped to grab the accused-appellant and as he jumped the accused-appellant shot at him and his right hand got wounded. He embraced the accused-appellant and they both fell down and while they were

struggling Peiris came and got hold of the accused-appellant's wrist and dashed his hand on the ground and snatched the pistol from his hand. The accused-appellant tried to run away but they held him back and hand-cuffed him. After that they took the two suspects to the van. After the suspects were arrested Joseph Antony and Tudor Antony came up to that place. Razack and Seether did not come up.

Under cross-examination Nandapala stated that according to his knowledge Rajakaruna and the accused-appellant knew each other before this incident. He knew Joseph Antony and Tudor Antony, who was also known as "Chochi Antony." There was a case against Joseph Antony for causing a disturbance in the Sea Breeze Hotel, Mt. Lavinia. Both were thugs.

In answer to defence counsel Nandapala stated that there was a reason to set out to arrest the accused-appellant. There were five complaints against him. Tudor Antony and Joseph Antony and some others had made complaints against him. There was also a complaint against him for robbery of a watch.

It was again suggested to the witness that Joseph Antony and Tudor Antony were sent to get hold of the suspects and to assault them. Nandapala rejected this suggestion. It was also suggested to Nandapala that all these persons participated in the fight and nobody knew who fired. Nandapala rejected this suggestion too. In answer to the jury he said that when he heard the cry—"Peiris! Peiris!" simultaneously with that cry he heard two shots.

H. A. Devapura *alias* Paniya had known Doole for 4 years before this incident and generally associated with him. He first met Inspector Rajakaruna on 13.6.1975 at the Mt. Lavinia Police Station when he went there to make a statement. About five days before he had met Doole who came to his house at Wattala. He accompanied Doole and three others for a holiday to Nuwara Eliya about a week prior to the 13th. One of these persons was H. L. and another was Herbert Fernando. There was a third person from Dehiwela but he did not know his name. They stayed in a bakery in Nuwara Eliya and while they were there the accused-appellant showed him a revolver which he took from his waist from under his shirt. He kept the revolver under his pillow. It was similar to P2. He asked the accused-appellant why he had a revolver and the accused-appellant told him that he had obtained the revolver after cutting Tudor Antony's wife at Mt. Lavinia and smashing a boutique and house and shooting Antony. Devapura got frightened when he heard this and decided to leave for Colombo immediately. He borrowed Rs. 10 from a friend and left Nuwara Eliya. The accused-appellant

also told him that if anybody comes from the police to arrest him he will shoot and kill him. He also said that if he gave information and if someone came to arrest him whoever came will be killed.

Devapura stated that he went to the Mt. Lavinia Police Station and informed them about this threat.

It transpired under cross-examination that Devapura gave this information to the Mt. Lavinia Police three days after he returned to Wattala. He explained that he gave this information to the police because Antony and others came to kill him and smashed a glass in his house because he had accompanied Doole to Nuwara Eliya.

He accompanied the police party on the 13th of June to Nuwara Eliya and took them to the various places where Doole and he had stayed. At Haputale he remained throughout the incident in the van.

After a few minutes he heard three shots. Soon after the sound of the shots both Antonys ran from the van towards the tea estate but he remained in the van. After that he saw Rajakaruna being helped by the two Antonys to the van and he saw Abeypala and Peiris bring Doole and Herbert Fernando

Dr. (Mrs.) I. Murugesu of the Government Hospital, Haputale, stated that on 14.6.1975 she examined the accused-appellant at about 11.45 a.m. He was produced by the Officer-in-Charge of the Haputale Police. He had nine external injuries. A lacerated wound shaped like a 'V' 1½" long on the right side of the skull ¼" deep. A lacerated wound ½" long on his nose ⅛" deep; a lacerated wound on the lower lip ¼" long ⅛" deep; contusions on the left side and right side of his back 3" × 1". There were small abrasions on his back and right shoulder and a lacerated wound on his hip and right ankle. He could have got these lacerated wound by falling on the ground or by hard blows with a fist or blunt weapon. Similar such wounds could be caused as a result of a struggle. The abrasions and contusions could have been caused by a fall or in a struggle on rough ground. These were non-grievous. The head injury could also have been caused by a blunt weapon such as a baton or a galvanized pipe. An unbroken bottle, and not a broken bottle, could have caused the contusions.

Herbert Fernando also had five injuries; two lacerated wounds and three abrasions.

The deceased was admitted to the Haputale hospital at about 10.45 a.m. or 11.00 a.m. and as he had a gun shot injury below the umbilicus caused by a bullet she transferred him to the Badulla Hospital for surgical treatment.

P.C. 5771 Chandrapala Peiris stated that on the 14th of June he and Nandapala went to the front door with Seether while Rajakaruna and Abeypala went behind the house. After he heard a shot immediately Nandapala and he started running in that direction and he heard another shot. He saw Rajakaruna lower himself holding his stomach saying "Aiyo Peiris!". Abeypala was holding Herbert Fernando towards Doole. The accused-appellant aimed his pistol at them and shot at Nandapala. The shot struck Nandapala's hand. Then they jumped at the accused-appellant. Nandapala and the accused-appellant fell down and he also fell along with them. Nandapala struck the accused-appellant's hand on the ground and tried to take the pistol from him. Then Peiris caught him by his hand and snatched the pistol from him. After that they hand-cuffed the accused-appellant and took him and Herbert Fernando to the van. The pistol which he took from the accused-appellant was P2. Rajakaruna also had a similar pistol P1. He gave charge of the accused-appellant's pistol and Rajakaruna's pistol to Inspector Wilson of the Haputale Police at the Haputale Hospital.

He examined Inspector Rajakaruna's pistol and saw that a bullet was stuck in the muzzle on the verge of coming out. There were 5 other unused bullets in this gun.

The accused-appellant's pistol had 6 sockets in its chamber. There were only three bullets in this pistol. Two of them had been used and were empty and one was still in good order.

P.C. 5997 R. B. Wijesinghe stated that he served at the Dehiwela Police Station from 1.7.1974 and he came to know S.I. Rajakaruna during this time. Both of them served in the crime section. He also knew the accused-appellant in this case from 1973. The deceased Rajakaruna had met this accused-appellant on several occasions. At the time they met he was with Rajakaruna. They first met somewhere in October, 1974. He had seen the accused-appellant and Rajakaruna talking on about 3 or 4 occasions.

Sub-Inspector T. M. Bangsa Jayah served as a Sub-Inspector at the Mt. Lavinia Police Station from June, 1974. He and Rajakaruna served as officers of the same grade. He brought to Court the Information Book in which Rajakaruna made his entries at the time he set out from Mt. Lavinia to Haputale on 13.6.1975. Rajakaruna had made an 'Out' entry at 6.45 p.m. on

13.6.1975. With the permission of the Acting Headquarters Inspector he first got a 7 mm. machine gun with 56 bullets. However, as he was getting ready to set out the permanent Headquarters Inspector gave fresh orders directing him to take only his revolver instead of the machine gun and he was issued 24 bullets. Accordingly he had made an entry that was taking a revolver and 24 cartridges of .450 calibre.

The 3 police constables Nandapala, Abeyapala and Peiris according to the Information Book were not issued with any weapons. It was also recorded that they were leaving for Nuwara Eliya for inquiry on information received. Pistols were issued only to police officers above the rank of Sub-Inspector. Bangsa Jayah stated that he knew the accused-appellant and that prior to 13.6.1975 he was wanted by the Mt. Lavinia Police for an alleged offence for which he could have been arrested without a warrant. He was wanted in connection with a charge of attempted murder, on a complaint made by Tudor Antony, a Lab Assistant at St. Thomas' College, at 12.15 a.m. round about midnight on 8.6.1975. He gave this evidence according to the entries in the Information Book.

M. A. J. Mendis, Assistant Government Analyst, who had specialized in ballistics, stated that on 18th and 27th June, 1975, he received two parcels from the police. The first parcel contained the revolvers P1 and P2. P2අ and P2ආ were two spent cartridges. P2ඇ the bullet recovered from the deceased's body was received in the second parcel.

P1 (which was used by Rajakaruna) was an ordinary service revolver capable of firing .450 or .455 calibre bullets. Six cartridges can be loaded into it. This revolver had a firing pin fixed to the trigger which could strike the central part of a cartridge and fire it off. It was a double action revolver which could be worked either by cocking the hammer and pulling the trigger or releasing the hammer. P4 consisted of 5 cartridges that could be used in P1. Out of these five cartridges, two were unused and two had been used unsuccessfully. The range of P1 was 800 yards but the lethal range was 200 yards. A bullet was stuck in the barrel of the revolver P1 because of some defect in the cartridge probably because it was old stock. Even though the bullet had not been ejected the usual sound of firing would have taken place. If another shot had been fired after the one that got stuck both bullets could have gone off if the second bullet was new. On the other hand, sometimes the barrel could have cracked or got broken. If the second cartridge was also an old one it could also have got jammed in the barrel. There were

two live cartridges in the drum of P1 that had not gone off. He could not say with certainty whether the marks on these two cartridges had been made by the pin of the revolver P1. When the bullet got stuck in the barrel these two bullets were in the drum.

The revolver P2 (used by the accused-appellant) was manufactured by Webley and Scott. This revolver had also a range of 800 yards and could also be used by cartridges of the calibre of .450 and .455. The drum could hold six bullets. Although P2 was slightly different from P1 and slight defects were present, it was in working order. When he received P2 nothing was inside it. P2ඌ was a bullet discovered in the body of Rajakaruna. This was a .450 bullet which had been fired from the revolver P2. This bullet had the pitting marks of the barrel of P2. The cartridges of P2ඉ and P2ඌ had been fired from the revolver P2. They were spent .450 cartridges.

Sub-Inspector K. Wilson of the Haputale Police took charge of both these revolvers from P.C. Peiris on the day of the incident. He opened the revolver P2 and found two empty cartridge cases in it and one unused cartridge. The unused cartridge was not sent to the Government Analyst for examination. The two used cartridges were P2ඉ and P2ඌ.

In the barrel of the revolver P1 a bullet had got stuck and there were five unused cartridges in the drum. He dispatched the injured police officer to the Badulla Hospital. He visited the scene of the incident and found plants and creepers crushed and the surface was rocky. There were signs of a struggle.

On the 16th at the post-mortem examination he took charge of the bullet found in the body of Rajakaruna.

At the conclusion of the prosecution case the accused-appellant was called upon for his defence. He made an unsworn statement from the dock. He stated that after he had opened a pittu and babath boutique in Dehiwela some of his so-called friends Tudor Antony *alias* Kochi Antony and companions started harassing him. They used to eat in his boutique by force during his absence and take money from the cashier. His friends tried to involve him in various acts of violence without success. After sometime they fell out and one day when he was going to visit his younger sister, close to the house of Tudor Antony, Antony and his companions assaulted him.

Subsequently, he went along with Devapura *alias* Paniya, Herbert Fernando, H. L. Sirisena and Leslie to Nuwara Eliya to take a rest. After two days as the conduct of Devapura, Sirisena

and Leslie got out of control he sent them back to Colombo keeping only Herbert Fernando with him. From Nuwara Eliya the two of them went to the Haputale Estate. On the 14th between 9.30 and 10 a.m. Herbert Fernando woke him saying that Tudor Antony and his companions were knocking at the front door. He got afraid and asked Herbert Fernando not to shout. Then he and Herbert Fernando moved a dining table close to the wall. Suddenly Herbert Fernando left him and ran away through the back door. After a few seconds he heard him shout that he was being assaulted. Then he went through the back door to help him. Suddenly Joseph Antony and Tudor Antony fell upon him and one person shot at him with a gun. While falling down out of fear and for self protection he fired as he was induced to fire. At the Haputale Hospital while he was being taken towards the surgery on a stretcher Tudor Antony and others assaulted him. Tudor Antony had a galvanised pipe and Joseph Antony had an empty arrack bottle.

Dr. Balakrishnan was re-called by the defence. He stated that he examined the accused-appellant at the Prison Hospital on 15.6.1975. He had :

(1) Several linear abrasions on both buttocks.

(2) A sutured injury on the right buttock about ½" long and curved.

(3) Several diffused abrasions on the right leg.

(4) An abrasion in the form of dots on the upper part of the right thigh.

(5) A diffused contusion over the lower abdomen.

(6) Several abrasions in the form of dots over the right nipple.

(7) A diffused contusion over the right shoulder.

(8) A lacerated wound on the inner side of the right wrist about ¾" in length.

(9) An abrasion on the right knee.

(10) A sutured incised wound ¾" in length on the nose.

(11) A lacerated wound about 1" long on the eye-brow.

(12) A contusion ½" × ½" on the forehead about 1½" over the left eye-brow.

(13) A contusion on the left index finger.

(14) A diffused abrasion near the left wrist.

All these were non-grievous injuries. There were no fractures. Injuries Nos. 2 and 10 could have been caused by a sharp cutting weapon. Some of the injuries can be caused as a result of an

assault by a blunt weapon such as injury No. 5. No operation was performed as it was not necessary. He complained of pain in his right testicle which was swollen.

He also examined Herbert Fernando. He had four injuries.

(1) A sutured incised wound 1" long on the right index finger.

(2) An incised wound ¾" long on right palm.

(3) An incised wound ¾" long on skull.

(4) A simple abrasion near the left 7th rib.

These were non-grievous.

Under cross-examination Dr. Balakrishnan stated that injuries Nos. 2 and 10 on Doole may have been cut open by a doctor to facilitate healing. It is likely that these injuries were caused at noon on the 15th. The injuries on the buttocks were more likely caused by a fall. The other injuries may have been caused by a struggle on a hard surface. On the 15th when he examined him he did not see any injuries on his private parts. But when he examined him on the 20th a testicle was swollen.

Under re-examination the doctor said that the injuries Nos. 1, 2 and 3 on Herbert Fernando can be caused by a sharp cutting instrument. Injury No. 1 was stitched.

Herbert Fernando was the next witness for the defence. He said that he knew the accused-appellant. In June 1975 the accused-appellant invited him to go on a picnic to Nuwara Eliya and they went with the accused-appellant, H. L. Sirisena, Paniya, Ivor and Leslie. They stayed at the "Star Bakery"; from there the accused-appellant and he went to Badulla. From Badulla they went to Haputale two days before the incident. The others had a quarrel with some persons in a bus queue at Nuwara Eliya and they were sent away by Doole.

Doole took him to the house of the tea maker named Elias in the Haputale Estate. On the 14th of June, 1975, at about 10.30 or 11 a.m. he heard a knock at the door. At that time Doole was sleeping. He spoke to him and said that someone was speaking. Then Doole came to the front and looked out and came running into the house. Doole was excited and called him to pull a table. He heard a sound of someone running at the back. Then he got excited and got out through the back. He did not ask Doole why the table was pulled and why he was excited.

When he went through the back door he saw a crowd. Kochi Antony and Joseph Antony and four or five others were there. Joseph Antony caught him and pulled and assaulted him. All got round him. He was stabbed and he shouted. Then the accused-appellant came out running. He was also caught and

assaulted. After he was assaulted a person dressed in a sarong took out a pistol and aimed it at him. At that time the accused-appellant was caught and was being assaulted. As the person in sarong pointed a pistol at Doole he fell down. Then he heard two shots. He did not see who fired. At that time he received a blow on his head. Then he saw Doole having a pistol. They snatched the pistol that was in Doole's hand. They were assaulted and taken to the van and from there they were taken to the hospital. Till they went to the hospital they were assaulted.

He got about 2 or 3 stabs with a knife. About three persons had knives. Doole was also stabbed. After he was treated at the Haputale Hospital he was brought to the Badulla Remand Prison where a doctor treated him.

Under cross-examination he stated that he saw a pistol in Doole's hand only at the last moment of the incident. He did not see a pistol in his hand earlier.

He said that when he heard a knock on the front door as he did not know anyone in the area he did not open to see who was knocking. He told the accused-appellant that someone was knocking at the door. The accused-appellant got up and went and looked. He went to the front door and came running back, and asked for the table to be pulled to the side of the room. The accused-appellant came in, in an excited state.

The accused-appellant slept dressed in his trouser. Doole did not come out for tea. He brought tea for him from a boutique. Doole went to Bandarawela to see a film called "Radam" the previous evening.

Learned counsel for the accused-appellant submitted that the police party in the instant case did not have the power of arrest. Under section 85 (1) of the Administration of Justice Law, No. 44 of 1973 :

> "Any police officer may without a warrant arrest—
>
> (*a*) any person who in his presence commits any breach of the peace ;
>
> (*b*) any person who has been concerned in any offence in respect of which he may be arrested without a warrant or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned.
>
> Nothing under this section shall be held to interfere with or modify the operation of any other law empowering a police officer to arrest without a warrant."

An assault in the sense of a threatened battery is a breach of the peace. (Hale, P.C. ii 88-9; East, P.C. 306). An instance which involves some danger to the person "is the general meaning of a breach of the peace in criminal law."—See "Arrest for breach of the Peace" by Dr. Glanville Williams—1954 Crim. L.R. 578 at 579.

The offences in respect of which a police officer may arrest without a warrant as set out in the Schedule under the Administration of Justice Law include offences such as attempted murder under section 300 of the Penal Code; causing hurt with a dangerous weapon under section 315 of the Penal Code, and robbery under section 380 of the Penal Code.

Section 85 (1) of the Administration of Justice Law should also be read with section 56 of the Police Ordinance (Cap. 53) which states:

> "Every police officer shall for all purposes in this Ordinance contained be considered to be always on duty, and shall have the powers of a police officer in every part of Ceylon.
>
> It shall be his duty—
>
> (*a*) to use his best endeavours and ability to prevent all crimes, offences, and public nuisances;
>
> (*b*) to preserve the peace;
>
> (*c*) to apprehend disorderly and suspicious characters;
>
> (*d*) to detect and bring offenders to justice."

As the power of arrest of the police in this case is a mixed question of law and fact an examination of the relevant evidence in relation to the law is necessary. According to P.C. Abeyapala the police party set out from Mt. Lavinia on the 13th June to arrest the accused-appellant against whom a charge had been made. Under cross-examination he stated that Tudor Antony and Joseph Antony had made complaints to the Mt. Lavinia Police that the accused-appellant had smashed their houses and cut Tudor Antony's wife with a sword.

P.C. Nandapala stated, in answer to defence counsel, that the reason for setting out to arrest the accused-appellant was because there were five complaints against him. Tudor Antony and Joseph Antony and some others had made complaints against him. There was also a complaint against him for robbery of a watch.

Devapura *alias* Paniya stated that the accused-appellant confessed to nim at Nuwara Eliya that he had obtained a revolver after cutting the wife of Tudor Antony at Mt. Lavinia and smashing a boutique and house and shooting Antony. The accused-appellant had told him that if anyone from the police came to arrest him he would shoot and kill him. Devapura conveyed this threat to the Mt. Lavinia Police about three days later. The 'picnic' to Nuwara Eliya was to evade arrest.

Inspector Bangsa Jayah stated after examining the relevant entries in the Information Book that the accused-appellant was wanted in connection with a charge of attempted murder on a complaint made by Tudor Antony on 8.6.1975 and that Inspector Rajakaruna had made an 'Out Entry' at 6.45 p.m. on 13.6.1975 that he was leaving on the instructions of the Headquarters Inspector to take the accused-appellant into custody. Rajakaruna obtained the permission of the acting Headquarters Inspector to take a machine gun but this order was later revoked by the Permanent Headquarters Inspector who directed Rajakaruna to take only his revolver. Inspector Rajakaruna was induced to take a revolver for his own protection in view of the threat by the accused-appellant to kill any police officer who came to arrest him.

It is clear from the above evidence that there was information which lawfully empowered Inspector Rajakaruna under section 85 (1) (*b*) to arrest the accused-appellant without a warrant.

Further, I hold that when the accused-appellant came rushing out of the rear of the house with a loaded pistol stretched out in front of him and uttered the words "Don't come, I'll shoot!" he was committing a breach of the peace in the presence of the Police Officers Rajakaruna and Abeyapala. They were, therefore, acting lawfully under section 85 (1) (*a*) when they tried to arrest him.

Learned counsel for the accused-appellant submitted that the extracts from the Information Book concerning these complaints had not been properly proved and, therefore, the prosecution had not established beyond reasonable doubt that the police party had the power to arrest the accused-appellant.

Inspector Bangsa Jayah had the Information Book before him when he was giving evidence in Court. He read extracts from the Information Book. This was not objected to by counsel for the accused-appellant at the trial, who also elicited contents of the Information Book under cross-examination. Nor was Bangsa Jayah's evidence challenged. The moment Bangsa Jayah

read an extract from the Information Book counsel for the accused-appellant was entitled to examine the entries to ascertain whether they were so recorded. Learned counsel for the accused-appellant did not avail himself of this opportunity as he did not challenge Bangsa Jayah's evidence but accepted it. I, therefore, hold that the failure to produce certified copies of these extracts was only a technical irregularity and no prejudice was caused to the accused-appellant by the omission to do so.

The next important issue in this case was whether the manner of arrest was legal. Section 90 of the Administration of Justice Law reads as follows :

> 90. (1) In making an arrest the person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action. If such person forcibly resists the endeavour to arrest him or attempts to evade the arrest, the person making the arrest may use all means necessary to effect the arrest. Nothing in this subsection shall, however, give the right to cause the death of a person who is not accused of an offence punishable with death.

The relevant part of subsection (8) reads :

> "..... Where a person is arrested without a warrant, the person making the arrest shall at the time of the arrest inform such person, as far as practicable, of the reasons for his arrest."

Learned counsel submitted that the police party did not make it known to the accused-appellant that they were police officers and that the accused-appellant was not informed of the charge, and, therefore, the manner of the arrest was illegal.

Inspector Rajakaruna and P. C. Abeyapala at the confrontation with Herbert Fernando and the accused-appellant did not say that they were police officers nor did they inform the accused-appellant of the charge. It remains to be examined whether there were circumstances which caused this omission on the part of the police officers. According to Abeyapala soon after Rajakaruna and he went to the rear of the house Herbert Fernando and the accused-appellant came running out of the rear of the house. The accused-appellant had a revolver stretched out in front of him, and as he saw them he aimed the revolver at them and said : "Don't come, I'll shoot!"

In *Christie v. Leachinsky* (1), at 572, Viscount Simon laid down the following propositions:

"1. If a policeman arrests without a warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not a true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized.

2. If the citizen is not so informed, but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.

3. The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.

4. The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and is only required to submit to restraint on his freedom if he knows in substances the reason why it is claimed that this restraint should be imposed.

5. The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, e.g., by immediate counter-attack or running away.

These principles equally apply to a private person who arrests on suspicion."

In *D. H. R. A. Corea v. The Queen* (2), at 463, Gratiaen, J. adopted the above propositions of the House of Lords' case and held that a police officer acts illegally in Ceylon (as in England) if he arrests a man without a warrant on a mere "unexpressed suspicion" that a particular cognizable offence has been committed—unless, of course, "the circumstances are such that the man must know the general nature of the offence for which he is detained" or unless the man "himself produces the situation which makes it practically impossible to inform him."

In the instant case, as the confrontation with the accused-appellant was sudden when he was running away and as he was armed with a revolver and immediately threatened to shoot the police officers if they advanced I hold that the accused-appellant himself produced the situation which made it practically impossible for the police officers Rajakaruna and Abeyapala to inform him that they were police officers and of the reasons for his arrest in terms of section 90 (8) of the Administration of Justice Law. The manner of the arrest was in the circumstances lawful.

The further question whether the accused-appellant was exercising his right of private defence remains to be examined.

Learned counsel submitted that as the accused-appellant had many enemies and as he did not know the police officers who came to arrest him and as they failed to inform him that they were police officers and did not inform him of the charge, the accused-appellant was entitled to exercise his right of private defence. It was submitted further that the accused-appellant had an apprehension of death or grievous hurt when he saw Inspector Rajakaruna having a revolver in his hand, and when P.C. Abeyapala suddenly seized Herbert Fernando without informing him of the reasons for doing so. The accused-appellant was, therefore, lawfully exercising his right of private defence.

P.C. Abeyapala stated in evidence that about six months prior to this incident he came to know the accused-appellant. He had met him in connection with an official matter and had discussions with him outside the police station with regard to this matter. Under cross-examination the fact that Abeyapala and the accused-appellant knew each other and that the accused-appellant knew that he was a police officer was not seriously challenged. Counsel for the accused-appellant suggested to Abeyapala that he had a 'personal grudge' against the accused-appellant prior to the incident which he denied. A personal grudge presupposes that the parties knew each other.

P.C. Nandapala stated that he met the accused-appellant about a year before the death of Inspector Rajakaruna. He was the police officer who went with P.C. Peiris and Seether and knocked at the front door of the house.

According to Herbert Fernando, who gave evidence for the defence, on 14.6.1975 at about 10.30 a.m. or 11 a.m., when he heard a knock at the door he awakened Doole. Then Doole came to the front and looked out and ran into the house in a very excited manner and asked him to pull a table towards the wall. Herbert Fernando did not say that Joseph Antony and Tudor

Antony were at the front door. In these circumstances, it must be presumed that when the accused-appellant ran to the front door and looked out he became aware that Seether had come with police officers to arrest him and that was why he tried to escape through the rear door.

P.C. Wijesinghe stated that he knew the accused-appellant from 1973, and that both he and Inspector Rajakaruna together had met the accused-appellant on several occasions. They first met somewhere in October 1973. He had seen the accused-appellant and Rajakaruna talking to each other on about 3 or 4 occasions.

Learned Counsel submitted that P.C. Wijesinghe was unfairly brought late into the prosecution case on an application by State Counsel and that the defence was taken by surprise.

Under section 190 (1) of the Administration of Justice Law nothing shall be deemed or construed to debar the prosecution, after notice to the accused, from calling any witness not specified in the indictment.

The trial commenced on 6.9.1976. On 7.9.1976 State Counsel made an application to Court to add to the list of witnesses which included the Headquarters Inspector, Mt. Lavinia Police Station, to speak to the issue of firearms to the police party before their departure on 13.6.1975 and to produce any entries in the Information Book to prove the fact that the deceased police officer had recorded a statement from the accused-appellant on some earlier occasion. This application was allowed by the trial Judge.

On 13.9.1976 State Counsel moved to enter the names of witnesses on the indictment which included the name of P.C Wijesinghe. Counsel for the defence objected to P.C. Wijesinghe's name being entered in the list of witnesses.

Learned State Counsel submitted that he had stated in open Court on 7.9.1976 that he would be calling a police officer to speak to the fact that Sub-Inspector Rajakaruna and the accused-appellant had met each other before this incident and to establish that at the time the shooting took place the accused-appellant was aware that the deceased was a police officer. He stated his application was to bring that witness' name on to the indictment, namely, P.C. 5997 Wijesinghe. Mr. Jalaldeen, defence counsel, submitted that on the 7th, State Counsel did not mention the name of the witness and that was why he did not object but now he objected to the application, as the defence had been taken by surprise. The Court allowed the application of State Counsel stating that as the State gave notice of this application in open Court without mentioning the name of P.C

Wijesinghe he did not think that this omission mattered when the defence had notice of the purpose for which the witness was being called and did not object to the application made by State Counsel to lead that particular evidence.

Thereafter, the evidence of P.C. Wijesinghe was led precisely on the lines of the application to show that the accused-appellant and the deceased knew each other before this incident. As a rule an amendment to an indictment should be allowed if it would have the effect of convicting the guilty or securing the acquittal of the innocent, but it should not be allowed if it would cause substantial injustice or prejudice to the accused. I hold that the adding of P.C. Wijesinghe's name to the indictment and the evidence deposed to by him did not cause substantial injustice or prejudice to the accused-appellant who had notice of the substance of this evidence. I also hold that was sufficient evidence, direct and circumstantial, to, enable the jury to conclude that the accused-appellant and the deceased were known to each other before 13.6.1975, and that the accused-appellant must have known, or had reason to believe, that the party in pursuit of him was a police party.

A further point was argued dealing with the scope of section 92 of the Penal Code. Section 92(1) reads as follows :

> "There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.
>
> Explanation 1—A person is not deprived of the right of private defence against an act done, or attempted to be done by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.
>
> Explanation 2—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction ; or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority, if demanded."

In *The King v. Wannaku Tissahamy* (3), at 404: it was held that an accused person is not entitled to plead the right of private defence against an act of a public servant which caused him reasonable apprehension of death or grievous hurt

if the act of the public servant did not constitute any offence and was justified in law. In such a case there is no necessity for the presiding Judge to make any reference to section 92 (1) of the Penal Code in his summing-up.

In the instant case as the acts of the police party attempting to arrest the accused-appellant did not constitute any offence and were justified in law the accused-appellant was not entitled to plead the right of private defence against the acts of the police party which caused him reasonable apprehension of death or grievous hurt.

Furthermore, since what the police party did was not an offence, then the accused-appellant, who on the evidence must have known that they were a police party attempting to arrest him, could not avail himself of the right of private defence. There was no necessity, therefore, for the learned trial Judge to refer to section 92 of the Penal Code in his summing-up.

Learned counsel submitted that the learned trial Judge's charge was inadequate on the right of private defence, and the law was not related to the facts. I am unable to agree with this submission. The learned trial Judge had charged the jury fully on the right of private defence and had also referred to section 92 of the Penal Code. The learned Judge had also dealt with exceeding of the right of private defence. In the course of his charge he had explained the material facts fully to the jury and when dealing with the right of private defence he had related the relevant facts to the law.

Counsel submitted that the trial Judge had omitted to charge the Jury on section 294, Exception 3, which states that culpable homicide is not murder if the offender, being a public servant, exceeds the powers given to him by law and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty and without illwill towards the person whose death is caused.

On the facts of this case there was evidence for the jury to hold that the deceased was acting within his powers at the time of the incident. There was no obligation, therefore, on the Judge to charge the jury under Exception 3 for exceeding his powers.

Learned counsel also complained that at the trial a great deal of evidence was elicited reflecting the bad character of the accused-appellant. Most of this evidence was elicited under cross-examination. The complaints against the accused-appellant had to be elicited in order to justify the conduct of the police party in setting out to apprehend him. The learned trial Judge several

times in his charge cautioned the jury that any allegations against the accused-appellant must not be construed as evidence of bad character. I, therefore, hold that no prejudice was caused to the accused-appellant by eliciting the evidence with regard to the complaints against him. It was relevant to the issue in this case whether the arrest of the accused-appellant was lawful and a step in the process of investigation.

Learned counsel submitted that the verdict of the jury based on the exception of sudden fight indicated that they accepted the position that the accused-appellant did not realise that the party coming to arrest him consisted of police officers. Learned counsel also submitted that this verdict was unreasonable in view of the evidence in the case. The defence based on a sudden fight could only arise in a fight between civilians and not between civilian suspects and police officers.

Exception 4 of section 294 of the Penal Code reads :

> "Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner."

This exception deals with a provocation not covered by the first exception under section 294. It is founded upon the same principle for in both there is the absence of premeditation, but while in one case there is the total deprivation of self-control, in this there is only the heat of passion which clouds the sober reason of a man and urges him to deeds which he would not otherwise do. "A sudden fight" implies mutual provocation and blows on each side. The homicide committed is not traceable to unilateral provocation. A fight suddenly takes place for which both parties are more or less to blame. It may be that one of them starts it, but if the other has not aggravated it by his own conduct, it would not have taken the serious turn it did. There is then mutual provocation and aggravation and it is difficult to apportion the share of blame which attaches to each fighter. They are, therefore, both equally liable.

I have held that the submission that the accused-appellant did not know that the party attempting to arrest him were police officers is untenable. According to the evidence of P. C. Abeyapala the incident commenced when he seized Herbert Fernando and grappled with him, although there was no charge against Herbert Fernando and the police party had not set out from Mt. Lavinia as a result of complaints against him. It is likely that the jury held that the way in which Herbert Fernando was manhandled

was a provocation to the accused-appellant. The jury may have also taken into account the fact that the accused-appellant uttered a warning before shooting and that the trajectory of the bullet was downwards and only one shot was fired at the deceased and the shot fired at Nandapala only caused a superficial injury to a finger. The jury may have concluded that in the circumstances of this case the accused-appellant had acted in the heat of passion upon a sudden quarrel without having taken undue advantage as the deceased himself was armed with a loaded revolver. The jury may have held that the accused-appellant did not act in a cruel or unusual manner as he fired only once at the deceased.

Learned defence counsel had strenuously urged the exception of a sudden fight at the trial and the learned trial Judge had accordingly charged the jury on this exception. There is nothing in the Penal Code to suggest that the mitigatory plea of a sudden fight is to be confined to a sudden fight between civilians exclusively, and is not available in a sudden fight between civilians and a police party or against a mixed party of police officers and civilians, or between police officers among themselves. I hold that Exception 4 of section 294 of the Penal Code has no such restrictions.

I, therefore, hold that there was no misdirection when the learned trial Judge directed the jury on the exception based on a sudden fight, and that the verdict of the jury was not unreasonable.

For the above reasons I dismiss the appeal and affirm the conviction and sentences imposed on the accused-appellant.

RODRIGO, J.—I agree.

TAMBIAH, J.—I agree.

Appeal dismissed.

G. G. Ponnambalam (Jnr.)
Attorney-at-law.