[IN THE COURT OF CRIMINAL APPEAL]

1959 *Present :* **Basnayake, C.J. (President), Pulle, J., and H. N. G. Fernando, J.**

THE QUEEN *v.* GOPALAPILLAI and another

Appeals 106 and 107 of 1958, with Applications 142 and 143

*S. C. 4—M. C. Batticaloa 1,925*

*Sentence—Conviction on several counts—Omission of trial Judge to pass sentence regarding some counts—Power of Court of Criminal Appeal to rectify the omission—Court of Criminal Appeal Ordinance, s. 6 (1).*

*Common intention—Scope of section 32 of the Penal Code.*

(i) Where an accused person is convicted on several counts but the trial Judge passes sentence in respect of some only of the counts and omits to pass sentence in respect of the remaining counts, the Court of Criminal Appeal has no power under section 6 (1) of the Court of Criminal Appeal Ordinance to impose any sentence in respect of the remaining counts if it acquits the accused on the counts in respect of which sentence was passed by the trial Judge.

(ii) A and B were indicted for murder. The evidence showed that A directed B to shoot C. When B was attempting to shoot C, the deceased, who was nearby, went towards A and B and asked them "Why are you shooting?". Then B, who was aiming his gun at C, aimed it at the deceased and killed him.

*Held*, that section 32 of the Penal Code was not applicable inasmuch as there was no common intention between A and B in regard to the act of B in killing the deceased. A was therefore entitled to be acquitted.

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

*Colvin R. de Silva*, with *J. A. P. Cherubim*, *S. Saravanamuttu*, *A. C. M. Amit*, *M. L. de Silva*, and *A. C. M. Uvais* ( assigned), for Accused-Appellants.

*A. C. Alles*, Deputy Solicitor-General, with *R. A. de Silva*, Crown Counsel, for the Crown.

*Cur. adv. vult.*

January 26, 1959. BASNAYAKE, C.J.—

The appellants who are father and son were convicted on the following charges :—

"1. That on or about the 27th day of July 1957, at Kothiyapulai in the division of Batticaloa, within the jurisdiction of this Court, you did commit murder, by causing the death of one Sembakutti Kandapodi, and that you have thereby committed an offence punishable under section 296 of the Penal Code.

"2. That at the time and place aforesaid and in the course of the same transaction, you did shoot one Palipody Nagamany with a gun, with such intention or knowledge, and under such circumstances, that had you by such act caused the death of the said Palipody Nagamany, you would have been guilty of murder, and that you by such act caused hurt to the said Palipody Nagamany, and that you have thereby committed an offence punishable under section 300 of the Penal Code.

"3. That at the time and place aforesaid, and in the course of the same transaction, you did shoot at one Eliyathamby Palipody with a gun, with such intention or knowledge and under such circumstances, that had you by such act caused the death of the said Eliyathamby Palipody, you would have been guilty of murder, and that you have thereby committed an offence punishable under section 300 of the Penal Code."

Learned counsel for the appellants did not challenge the verdict against the 2nd accused, nor did he challenge the verdict on the 2nd and 3rd charges against the 1st accused. He maintained that the verdict against the 1st accused on the 1st charge was not supported by the evidence. We shall therefore confine our attention to the matters urged on behalf of the 1st accused in respect of the verdict of murder against him.

The charge is that both the accused-appellants committed murder by causing the death of Sembakutti Kandapodi. Shortly the prosecution case is as follows :—The 1st accused with a bag in his hand and his son the 2nd accused carrying a gun approached the western boundary of the deceased's garden. The 1st accused took out a cartridge and handing it over to the 2nd accused said, "There goes Palau's son Nagamany, shoot him." The 2nd accused loaded his gun and shot him. Next the 1st accused handed over to the 2nd accused another cartridge and he loaded his gun and attempted to shoot Palipody. Then the deceased who was near by went towards the accused and asked them "Why are you shooting ?". Then the 2nd accused who was aiming his gun at Eliyathamby Palipody aimed it at the deceased. He turned to run but was injured by the shot fired by the 2nd accused and he fell. The 1st accused took yet another cartridge from his bag and handed it over to the 2nd accused, who loaded his gun and fired it at Eliyathamby Palipody, whom he missed.

On this evidence it is clear that it was not the 1st accused who shot the deceased. It is also clear that when he handed the cartridge which was fired at the deceased he did not intend that the 2nd accused should shoot the deceased. The question that arises for decision then is whether by the operation of section 32 of the Penal Code he is liable for the act of the 2nd accused in the same manner as if it were done by him alone. In our opinion the evidence does not bring section 32 into operation. The conviction of the 1st accused on the 1st charge of the indictment should therefore be quashed and we direct that a judgment of acquittal be entered in respect of that charge.

The learned trial Judge has not imposed a sentence on the 1st accused in respect of the 2nd and 3rd charges of which he has been found guilty. As we were not agreed that we have power under the Court of Criminal Appeal Ordinance to impose a sentence in respect of a charge on which the learned trial Judge had omitted to impose a sentence we directed that this appeal be listed for further argument on that point. Learned counsel for the appellant contended that section 6 of the Court of Criminal Appeal Ordinance did not empower this Court to impose a sentence in a case such as this. Sub-section (1) of that section reads—

> " If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some charge or part of the indictment, has been properly convicted on some other charge or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as they think proper and as may be warranted in law by the verdict on the charge or part of the indictment on which the court consider that the appellant has been properly convicted. "

Learned counsel stressed the fact that the section empowered the Court to pass a sentence in substitution of the sentence passed by the trial Judge and that where the trial Judge had passed no sentence at all the question of substitution does not arise.

Learned counsel for the Crown relied on the cases of *Dorothy Pamela O'Grady* [1] ; *Thomas Henry James Lovelock* [2] ; and *Victor Frank Cochrane Hervey & William Goodwin* [3]. After we had reserved judgment he also brought to our notice the decision of this Court in S. C. No. 13—M. C. Gampaha 26876 decided on 5th March 1956. In *O'Grady's* case the appellant (a woman) was tried on an indictment containing nine counts. She was acquitted on counts 1 and 4 and convicted on the other seven counts. She was sentenced to death on the two charges under the Treachery Act, 1940, but no sentence was passed in respect of the other charges. In appeal the convictions of the charges under the Treachery Act were quashed and the sentence of death was set aside. The Court proceeded to impose a sentence of fourteen years' penal servitude on the

[1] *28 Cr. App. R. 33.* [2] *40 Cr. App. R. 137, (1956) 1 W. L. R. 1217.*
[3] *27 Cr. App. R. 146.*

remaining convictions. It does not appear from the report that the scope of the power conferred by section 5 (1) of the Criminal Appeal Act, 1907, which is the same as our section 6 (1), was considered when the sentence was imposed on the remaining convictions. *Lovelock's* and *Goodwin's* cases are different and in those cases the sentences that were imposed were in substitution of those passed at the trial. In the former case the appellant was convicted of attempted rape. He was sentenced to six years' imprisonment in respect of it. He had pleaded guilty to an alternative count of indecent assault arising out of the same incident for which he received a concurrent sentence of two years' imprisonment. The conviction for attempted rape was quashed. Acting under section 5 (1) of the Criminal Appeal Act, 1907, the Court substituted for the sentence of two years' imprisonment a sentence of six years' preventive detention. In the latter case the appellants Hervey and Goodwin were convicted on four out of five charges. Hervey was sentenced to three years' penal servitude and Goodwin to two years' imprisonment. Goodwin appealed against his conviction. The Court of Criminal Appeal held that Goodwin's conviction on charges 4 and 5 could not be supported and ought to be quashed. while his conviction on charges 1 and 2 was affirmed (he had been acquitted on charge 3 at the trial). The Court reduced Goodwin's sentence to eighteen months' imprisonment.

We are unable to accept *O'Grady's* case as having any persuasive force as no reasons have been given for what seems to us a disregard of the words of the section. In the previous decision of this Court to which learned counsel for the Crown has drawn our attention the question does not appear to have been argued as fully as it has been on this occasion. The fact that sub-section (1) of section 6 empowered this Court to pass a sentence in substitution for the sentence passed on the appellant at the trial seems to have passed unnoticed.

In the instant case as the learned Judge has not passed any sentence at all on the 2nd and 3rd charges we are unable to pass a sentence in substitution of that passed at the trial. The Ordinance does not empower this Court to supply the omission of the trial Judge. The legislature has assumed that an offender who is found guilty would in the ordinary course be sentenced to the punishment the Judge of trial thinks he deserves and has not contemplated a case in which the Judge refrains deliberately or otherwise from performing the duty of imposing a sentence on the charges on which a prisoner has been properly convicted. It has been stated over and over again that the Court of Criminal Appeal can only exercise such powers as are expressly entrusted to it by the statute and no other.

The 1st accused is accordingly entitled to be discharged from prison. The appeal of the 2nd accused is dismissed.

*First accused discharged.*

*Appeal of 2nd accused dismissed.*