[IN THE COURT OF CRIMINAL APPEAL]

1955 *Present:* Gratiaen, J. (President), Gunasekara, J., and K. D. de Silva, J.

REGINA *v.* K. PIYASENA

S. C. 5—M. C. Kalutara, 21,304

Provocation—Charge of murder—Mere abuse may amount to grave and sudden provocation—Question of fact for jury—Penal Code, s. 294, Exception 1.

In a trial for murder the accused gave evidence stating that he stabbed the deceased in self-defence when the latter struck him with a club. At the same time the evidence of two of the prosecution witnesses indicated that the stabbing was immediately preceded by "foul abuse" on the part of the deceased.

Held, that the jury should have been directed in the course of the summing-up that it was for them to decide, after due consideration of the evidence of the prosecution witnesses and of the accused, whether the deceased man gave the accused provocation and, if he did, whether such provocation was grave enough to reduce his offence to culpable homicide not amounting to murder within the meaning of Exception 1 to Section 294 of the Penal Code.

APPEAL against a conviction in a trial before the Supreme Court.

M. M. Kumarakulasingham, with *P. B. Tampoe* and *L. F. Ekanayake*, for the accused appellant.

V. T. Thamotheram, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 2, 1955. GRATIAEN, J.—

This was an appeal against a conviction for murder. At the conclusion of the argument we substituted a conviction for culpable homicide not amounting to murder and sentenced the appellant to a term of 8 years' rigorous imprisonment. The reasons for our decision must now be stated.

The deceased Andy Singho admittedly came by his death in consequence of a stab injury inflicted on him by the appellant on 25th April 1954. According to the witness Alpi Singho who was called by the Crown, the appellant and the deceased were standing together on the ridge of a paddy field and "exchanging foul abuse"; whereupon the appellant stabbed the deceased. Lihinis Appuhamy, who was the deceased's brother, also claimed to have heard "some foul language" after which the appellant, immediately before the stabbing, said "You set fire to my house, are you now trying to show me your pride ?". (Somebody had in fact set fire to the appellant's house about a year

previously, and suspicion had, rightly or wrongly, fallen on the deceased. The evidence of Lihinis therefore indicates that the appellant protested that the deceased was arrogantly adding insult to past injury, real or assumed.)

The appellant admitted the stabbing, but alleged that he stabbed the deceased in self-defence when the latter struck him with a club.

In his charge to the jury, the learned Commissioner correctly directed them that, *if they accepted the appellant's version*, there was room for them to return a verdict based on the plea of self-defence or alternately on the plea of having acted under grave and sudden provocation.

To this extent the summing-up is unexceptionable. Mr. Kumarakulasingham complains, however, that in certain other passages of the charge the learned Commissioner directed the jury that *if they believed the evidence of Alpi Singho and Lihinis*, the only verdicts which they could properly return were that the appellant was guilty of murder or (if they were not satisfied that a murderous intention was established) of culpable homicide not amounting to murder ; that is to say, he directed them by implication that in that event it was not open to them to take the view that the appellant had acted under grave and sudden provocation within the meaning of Exception 1 to Section 294 of the Code. He also directed them to the effect that if they accepted that evidence they must necessarily reject the whole of the defence version of the circumstances of the homicide, and that the appellant could get the benefit of this exception only if they held it to be probable that the circumstances were substantially as described by him. He did not invite them to consider whether the appellant's version, though exaggerated, was truthful in so far as it mentioned certain acts of provocation in addition to the " foul abuse " spoken to by Alpi Singho and Lihinis.

In our opinion, the learned Commissioner was not justified in directing the jury that a verdict of culpable homicide not amounting to murder on the ground of grave and sudden provocation was permissible only if they rejected the evidence of Alpi Singho and Lihinis. In this country, mere abuse, even if unaccompanied by physical violence, may in certain circumstances afford sufficient provocation to reduce the offence of murder to culpable homicide not amounting to murder ; and the question whether such provocation was grave enough to mitigate the intentional killing of a man is a question of fact for the jury, properly directed on the law, to determine. *The King v. Coomaraswamy*[1], *The King v. Kirigoris*[2]. It is not proper for the presiding Judge to withdraw the issue of provocation from the jury unless a verdict under Exception 1 would, on any view of the evidence, be wholly unreasonable. The Judicial Committee, in laying down the test of " gravity " in *Attorney-General v. Perera*[3], did not formulate a rule to the effect that abuse, however provocative in degree, can never by itself bring a case within Exception 1 to Section 294 of our Code.

[1] *(1940) 41 N. L. R. 289.*

[2] *(1947) 48 N. L. R. 407.*

[3] *(1952) 54 N. L. R. 265.*

In the present case the jury should have been directed that it was for them to decide, after due consideration of the evidence of the prosecution witnesses and of the appellant, whether the deceased man gave the appellant provocation and, if he did, whether such provocation was grave enough to reduce his offence to culpable homicide not amounting to murder. We were unable to hold that, if this issue had been left open as it should have been, they could not reasonably have returned a verdict convicting the appellant only of the lesser offence. For these reasons we substituted a conviction under Exception 1 to Section 294 and passed sentence accordingly.

Conviction altered.