[IN THE PRIVY COUNCIL]

1952 *Present :* **The Lord Chief Justice of England (Lord Goddard), Lord Oaksey, Lord Reid, Lord Asquith of Bishopstone and Sir Lionel Leach**

ATTORNEY-GENERAL, Appellant, *and* K. D. JOHN PERERA, Respondent

PRIVY COUNCIL APPEAL No. 14 OF 1952

C. C. A. Application 85—M. C. Badulla, 11,357

Privy Council—Appeal by Crown in criminal case—Jurisdiction to entertain it—Charge of murder—Plea of grave and sudden provocation—Retaliation—Must bear some relation to the provocation—Penal Code, s. 294, Exception 1.

The Privy Council has jurisdiction to entertain an appeal by the Crown in a criminal case. One ground upon which the Board would entertain such an appeal is that the decision appealed from tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.

Where the mitigatory plea of grave and sudden provocation is taken under Exception 1 to Section 294 of the Penal Code, the accused must show that the kind of provocation actually given was the kind of provocation which the jury as reasonable men would regard as sufficiently grave to mitigate the actual killing of the deceased person.

" The words ' grave ' and ' sudden ' are both of them relative terms and must at least to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation ; otherwise some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon."

APPEAL by special leave from a judgment of the Court of Criminal Appeal reported in (*1951*) *53 N. L. R. 193.*

Sir Frank Soskice, Q.C., with *Frank Gahan, Q.C.*, and *H. A. Wijemanne*, for the Attorney-General, appellant.

Dingle Foot, with *A. B. Perera* and *Biden Ashbrooke*, for the accused respondent.

Cur. adv. vult.

2——J. N. B 28105–1,592 (1/53)

November 19, 1952. [*Delivered by* LORD GODDARD]—

This is an appeal by special leave from a decision of the Court of Criminal Appeal of Ceylon delivered on the 29th November, 1951, which by a majority of four to one allowed an appeal by the respondent against his conviction before Mr. Justice Gratiaen and a jury for the murder of a woman named Kumarihamy. The Court of Criminal Appeal set aside the verdict and sentence and ordered a new trial as they are entitled to do if, in the words of the Ordinance establishing the Court, "they are of opinion that there was evidence before the jury upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed". At the conclusion of the argument Their Lordships announced that they would humbly advise Her Majesty that the appeal should be allowed and that the judgment and order of the Court of Criminal Appeal should be set aside and that the verdict of the jury and the sentence passed thereunder should be restored. They now proceed to give their reasons.

The question raised by this appeal is one of considerable importance in the law of Ceylon for not only does there appear to be a considerable conflict of judicial opinion on the matter among the Judges forming the Court of Criminal Appeal but in the previous case of *R. v. Naide*[1] a judgment was given in direct conflict with that now under appeal. The three Judges who first heard this appeal were divided in opinion and the majority doubted the correctness of the decision in *Naide's* case and accordingly a further hearing was directed by the Chief Justice and a Court of five Judges was constituted to hear this appeal. The ground upon which the appeal was argued before the Court of Criminal Appeal was that the learned trial Judge had wrongly directed the jury that a defence of provocation could not succeed and the charge of murder could not therefore be reduced to culpable homicide not amounting to murder unless the action of the respondent taken by him in consequence of the provocation was reasonably commensurate with the degree of provocation offered to him. The Court of Criminal Appeal held that this was a misdirection and it is against that decision that this appeal is brought. Various other grounds were raised in the notices of appeal both to the Court of Criminal Appeal and to the Board, but they were not pursued and this particular alleged misdirection was the only matter argued before Their Lordships. A preliminary point, however, was taken by counsel for the respondent who submitted that the Board had no jurisdiction to entertain an appeal by the Crown in a criminal case. It was submitted that if a decision had once been given in favour of the prisoner no appeal could be brought, reliance being placed upon the doctrine that after an acquittal a prisoner could never be put in peril again. The order of the Court of Criminal Appeal in this case does not amount to an acquittal. It merely sets aside the verdict and sentence and orders a new trial though no doubt the effect of the order is to restore the prisoner to the position of one who has not yet been tried. It is not on this ground that the Board decided they had jurisdiction to entertain the appeal but because a series of cases has decided, in their opinion, that Her Majesty in

[1] (*1951*) *53 N. L. R. 207.*

Council has power to entertain an appeal from any Dominion or Dependency of the Crown in any matter whether civil or criminal by whichever party to the proceedings the appeal is brought unless that right has been expressly renounced.

The first case to which Their Lordships refer and which has been repeatedly cited with approval is *Reg v. Bertrand* [1]. That was an appeal by the Attorney-General of New South Wales on behalf of Her Majesty against an order of the Supreme Court who made absolute a rule nisi for a new trial obtained by the respondent who had been convicted of murder. It was objected that the Board ought not to entertain the appeal. The matter was argued before a Board consisting of Sir John Coleridge, Sir William Erle, Sir Edward Vaughan Williams, The Lord Chief Baron and Sir Richard Kindersley. In giving the judgment of the Board Sir John Coleridge said " Upon principle, and reference to the decisions of this Committee, it seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a Charter or Statute, the authority has not been parted with, it is the inherent prerogative right, and, on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally. The interest of the Crown, duly considered, is at least as great in these respects in criminal as in civil cases " and he then proceeded to point out that for reasons which are nowadays well understood these appeals would necessarily be rare. In *R. v. Murphy* [2], *Bertrand's* case was followed and special leave to appeal was granted to the Crown. In *R. v. Coote* [3], the Board entertained an appeal against a judgment of the Court of Queen's Bench of Quebec and though that case was argued only by the Crown, the respondent not being represented, Their Lordships who heard the case evidently had no doubt as to their power for they allowed the appeal and ordered that the judgment which had quashed the conviction should be reversed ; they affirmed the conviction and directed the Court to cause the proper sentence to be passed thereon. Coming to more recent times in *Ibrahim v. Rex* [4], Lord Sumner in giving the judgment of the Board dealt with the grounds upon which the Board entertained appeals in criminal cases. He said " There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future " and for this he cited *Bertrand's* case. In *Nadan v. Rex* [5], Lord Cave said " The right (i.e. of appeal) extends (apart from legislation) to judgments in criminal as well as in civil cases " and for this he cited *Bertrand's* case and that case was again cited in *Ambard v. Attorney-General for Trinidad* [6], on the point as to whether the Board had jurisdiction to entertain the appeal. In not one of these cases does there appear to have been any doubt expressed as to the right of the Board to entertain an appeal by the Crown in a criminal case

[1] *L. R. 1 P. C. 520.*
[2] *L. R. 2 P. C. 35.*
[3] *L. R. 4 P. C. 599.*
[4] *(1914) A. C. 599.*
[5] *(1926) A. C. at page 491.*
[6] *(1936) A. C. 322.*

and Their Lordships accordingly held that they had jurisdiction to entertain the appeal. In view of the conflict of authority and judicial opinion existing in Ceylon on the subject-matter of this appeal to which reference has been made above, this is eminently a case fit to be considered by Her Majesty in Council and would seem to fall directly within the concluding words quoted above in Lord Sumner's judgment in *Ibrahim v. Rex.*

Turning now to the facts, it is enough to say that the case made at the trial was that ill-feeling had long existed between the respondent and the family of the deceased and on the day in question he shot and killed the woman Kumarihamy and other members of her family and it was sought to reduce the crime from murder to manslaughter by reason of certain provocation consisting of stone-throwing by the woman's family, and threats uttered by them, so that, the respondent said, he was suddenly provoked and at the same time felt serious danger to his life and that he did not know what happened as he had lost control over himself. It is unnecessary for the purposes of this appeal to further set out the facts as the only question raised was with regard to the direction which the learned Judge gave and which has already been stated. The Court of Criminal Appeal were at pains to consider whether the law relating to homicide and the reduction of a crime from murder to manslaughter in England was the same as in Ceylon where the lesser crime is known as culpable homicide not amounting to murder. The Court were of opinion that while it was undoubtedly the law in England that the act of retaliation must be reasonably commensurate with the provocation received, this was not the law of Ceylon. The question that falls for decision is one in the opinion of Their Lordships which depends entirely upon the true construction of section 294 of the Penal Code. That Code does not provide for any doctrines of English law to be imported into the criminal law of Ceylon. There is no provision similar to that which is found in the Code of Criminal Procedure whereby the English criminal law can be used to fill any gap which may be found to exist in that Code. But as the Court of Criminal Appeal set out in their judgment what they conceived to be the English law relating to manslaughter Their Lordships feel bound to observe that in one respect the Court were in error. They said in reference to English law "if it is established or clear from the evidence that though provocation of howsoever grievous a kind may have been offered, nevertheless, if it could be shewn that the accused caused the death with an intention to kill, the offence is one of murder and not manslaughter. This is one of the fundamental differences between our Law and that of England." A little further down in the judgment they said "in the case of murder, there must be an intention to kill, in the case of manslaughter, no such intention can exist". With all respect to the Court that is not the law of England. In English law no doubt there is a distinction between what is generally called involuntary and voluntary manslaughter. The former expression is used to describe that class of manslaughter where the death is caused by gross and culpable negligence, the most common example of which is death caused by the dangerous driving of a motor vehicle. In such a case there is of course no intention either to kill or to cause grievous bodily harm and no question of provocation can arise in such a

case. The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. An illustration is to be found in the case of a man finding his wife in the act of adultery who kills her or her paramour and the law has always regarded that, although an intentional act, as amounting only to manslaughter by reason of the provocation received although no doubt the accused person intended to cause death or grievous bodily harm. Now section 294 of the Ceylon Penal Code provides that culpable homicide is murder firstly if the act by which the death is caused is done with the intention of causing death, secondly if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused and there are two other provisions which it is unnecessary to set out. The Code then goes on to set out an exception in these terms : " Culpable homicide is not murder if the offender while deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident." It also provides that " Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact." In order to reduce the crime from murder to manslaughter the offender must show first that he was deprived of self-control and secondly that that deprivation was caused by provocation which in the opinion of a jury was both grave and sudden. In directing the jury that they must ask themselves whether the kind of provocation actually given was the kind of provocation which they as reasonable men would regard as sufficiently grave to mitigate the actual killing of the woman, in the opinion of Their Lordships the learned Judge was merely directing the jury as to how they should determine whether the provocation was grave. The words " grave " and " sudden " are both of them relative terms and must at least to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation ; otherwise some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon. A blow with a fist or with the open hand is undoubtedly provocation and provocation which may cause the sufferer to lose a degree of control but will not excuse the use of a deadly weapon, and in the opinion of Their Lordships it is quite wrong to say that because the Code does not in so many words say that the retaliation must bear some relation to the provocation it is true to say that the contrary is the case.

Their Lordships having considered with care the whole of the summing-up are of opinion that it was quite impeccable and was in accordance with the Law of Ceylon and for these reasons have tendered to Her Majesty their humble advice that the appeal should be allowed.

Appeal allowed.

2*——J. N. B 23106 (1/53)