[COURT OF CRIMINAL APPEAL]

1952 *Present :* **Gunasekara J. (President), Pulle J. and L. M. D. de Silva J.**

L. H. SOYSA, Appellant, *and* THE QUEEN, Respondent

APPEAL 61 WITH APPLICATION 89 OF 1952

S. C. 30—M. C. Kurunegala, 5,687

Charge of murder—Plea of self-defence—Right of private defence exceeded—Proper direction to jury—Penal Code, s. 294, Exception 2—Jury's rider recommending mercy—Effect on reasonableness of verdict.

Appellant, who was convicted of murder, gave evidence at the trial stating that he had killed the deceased in self-defence. As regards the second exception to section 294 of the Penal Code, the presiding Judge directed the jury that if the accused exceeded the right of private defence he was guilty of culpable homicide not amounting to murder. It was contended for the appellant that the jury should also have been directed to consider whether the appellant had acted without any intention of doing more harm than was necessary for the purpose of such defence, and that the omission of such a direction made the direction that was given a misdirection.

Held, that there was no misdirection. On the contrary the direction was unduly favourable to the appellant.

R. v. Kirinel's (1946) 47 N. L. R. 443, distinguished.

Held further, that a jury's rider recommending mercy cannot be assumed to involve a view of the facts that is inconsistent with the verdict.

APPEAL, with application for leave to appeal, against a conviction in a trial before a Judge and Jury.

E. B. Sattrukulasinghe, for the accused appellant.

Boyd Jayasuriya, Crown Counsel, for the Crown.

Cur. adv. vult.

October 21, 1952. GUNASEKARA J.—

The appellant was convicted of murder. The statement that he made before the committing magistrate in answer to the charge had been "I am guilty". At the trial he pleaded not guilty and he gave evidence to the effect that he had killed the deceased in self-defence. Referring to this evidence the presiding judge said in his summing-up :

"You know the story he related in the witness-box and you know the submission made by counsel for the defence. Counsel for the defence said that the one and only verdict that you can bring in this case, if you accept the evidence of the accused, was that of culpable homicide not amounting to murder on the ground that the accused was defending himself and exceeded that right."

The main ground of appeal was that the learned judge had misdirected the jury in regard to the second exception to section 294 of the Penal Code upon which this plea was based. The exception reads :

> " Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence ."

The learned judge explained to the jury the right of private defence and its limits and directed them that if the appellant had acted in self-defence and " within the ambit of the right given to him by law " he was guilty of no offence. As regards the exception in question he said :

> " But if you think he was defending himself but that he exceeded the right of private defence your verdict will be culpable homicide not amounting to murder."

It was contended for the appellant that the jury should also have been directed to consider whether the appellant had acted without any intention of doing more harm than was necessary for the purpose of such defence, and that the omission of such a direction made the direction that was given a misdirection. We were referred to the judgment of this court in the case of *R. v. Kirinelis* [1] and it was contended, in the words of that judgment, that " the jury were not given the opportunity of considering the special kind of *intention* contained in section 294, exception 2, and they could well have had the impression from the charge that, if they found *in fact* that more harm was done than was necessary for the purpose of defence, the proper verdict was that of murder and not culpable homicide not amounting to murder ".

The present case, however, is clearly distinguishable from *R. v. Kirinelis*. In that case the jury had been directed that if the accused had done no more harm than was necessary for the purpose of defence he was guilty of culpable homicide not amounting to murder, and that if he had done more harm than was necessary he was guilty of murder. The trial judge had said in his summing-up :

> " Secondly, if you prefer to consider his case under the plea of self-defence, in order to find culpable homicide not amounting to murder you must be satisfied that an occasion arose for him to defend himself and that in defending himself in the way he did defend himself he cannot reasonably be said to have done more harm than was necessary to have defended himself . . . . You will find him guilty of murder if you are satisfied that he caused the death of the deceased with the intention of causing death . . . . and that there wasn't either of these mitigating circumstances, that is to say, that there was nothing that could reasonably be said to amount to grave and sudden provocation sufficient to deprive a man of ordinary temper

[1] *(1946) 47 N. L. R. 443.*

to use (lose ?) his power of self-control or that there was no occasion for the accused to defend himself at all, or that if there was such an occasion to defend himself, that he inflicted more harm than was necessary to inflict . . . . ".

This court held that from the language used by the trial judge the jury "may have understood that if the accused in fact exceeded the right of private defence he was to be convicted of the offence of murder,—and they would never have applied their minds to the question whether the accused had an *intention* to do more harm than was necessary for the purpose of defence"; and observed that this intention was a special intention, and it had not been explained to the jury.

The summing-up in the present case could not lead the jury to a similar view, for they were expressly directed that if the appellant had exceeded the right of private defence he must be convicted of culpable homicide not amounting to murder. In the circumstances of this case, therefore, unlike in *R. v. Kirinelis*, no prejudice was caused to the appellant by the learned judge's omission to direct the jury to consider whether the appellant had acted without any intention of doing more harm than was necessary for the purpose of defence. On the contrary this omission rendered the direction on the exception unduly favourable to the appellant.

It was also contended for the appellant that the verdict was unreasonable. This contention was based mainly on contradictions in the prosecution evidence and a rider recommending mercy that the jury added to their verdict. It was submitted that the only possible justification for the rider was a view that the appellant acted in self-defence and it must therefore be inferred that the jury took that view but held that the appellant had exceeded the power given to him by law.

The jury gave no indication of the grounds upon which the recommendation to mercy was based, and the argument that was addressed to us presupposes that they are necessarily ascertainable from the evidence in the case. We are unable to accept this view. A jury is never directed that there are only certain grounds and no others upon which they may recommend a prisoner to mercy, for that is not the law. Therefore it cannot be assumed that a recommendation to mercy involves a view of the facts that is inconsistent with the verdict merely because the evidence may not disclose what may seem to us to be a proper ground for mercy if the verdict is correct: the recommendation may well be based on some consideration outside the evidence in the case, or the jury may have taken a different view from ours as to what facts disclosed by the evidence can be a proper ground for such a recommendation.

We were unable to accept the contention that the learned judge had misdirected the jury or the contention that the verdict was unreasonable and we accordingly dismissed the appeal.

Appeal dismissed.