[COURT OF CRIMINAL APPEAL.]

1942 *Present :* **Soertsz, Keuneman, and Wijeyewardene JJ.**

113—M. C. Colombo, 42,290.

THE KING *v.* PUNCHI BANDA.

Maximum sentence—Death or imprisonment for life—Power of Supreme Court to impose less than the maximum—Emergency Powers (Defence) Acts, 1939 and 1940.

Where a person is convicted of an offence under regulation 27D (1) (*b*) of the Emergency Powers (Defence) Acts, 1939 and 1940, it is within the power of the Court to sentence him to a term of years less than the maximum imposed by the regulation.

APPEAL from a conviction by a Judge and jury before the 3rd Western Circuit, 1942. The accused was charged before the Magistrate's Court on May 22, 1942, with having committed an offence punishable under section 113 (B) of the Penal Code read with section 102 of the said Code and regulation 27D (1) (*b*) of the Emergency Powers (Defence) Acts 1939 and 1940. He was indicted on September 22, 1942.

E. F. N. Gratiaen (with him *H. A. Chandrasena* and *H. W. Jayewardene*), for the accused, appellant, who is also applicant in the application.

R. R. Crosette-Thambiah, C.C., for the Crown.

November 19, 1942. SOERTSZ J.—

This is an appeal by the first accused who was indicted before de Kretser J., and an English-speaking Jury, along with eleven others on a charge that alleged that they did " between the 5th April, 1942, and the 14th April, 1942, at Colombo Harbour, in the district of Colombo, agree to commit or did act together with a common purpose for or in committing the offence of stealing in the Colombo Harbour (an area which had been subject to attack by the enemy) certain articles, to wit, cloth, cigarettes, tea, beer, chocolates, fruit, pastilles, dry fish and other articles, which said articles had been left exposed or unprotected as a consequence of war operations and thereby committed the offence of conspiracy to commit the said offence of stealing, which said offence of stealing was committed in pursuance of the said conspiracy ; and that they have thereby committed an offence punishable under section 113B of the Penal Code read with section 102 of the said Code and Regulation 27D (1) (*b*) of the Regulations made by the Governor under the Emergency Powers (Defence) Acts, 1939 and 1940, published in the *Ceylon Government Gazette Extraordinary* No. 8,854 of January 29, 1942, as amended by the Regulation published in the *Ceylon Government Gazette Extraordinary* No. 8,887 of March 18, 1942 ".

After trial, the jury returned a unanimous verdict finding the first, second, fourth, sixth, eighth, and ninth accused guilty of the charge laid against them, and the Judge sentenced the first, second, sixth, and ninth accused to rigorous imprisonment for life and the fourth and eighth to simple imprisonment for life.

On appeal, Counsel for the first accused who is the only appellant before us, made three submissions in support of his appeal :—

Firstly, he contended that the trial and the consequent conviction were vitiated by the fact that the defence regulation which created the offence for the commission of which the accused were alleged to have agreed, or to have acted together with a common purpose, had ceased to be operative before proceedings in this case were initiated. The facts upon which this submission was based are these : The offence indicted is alleged to have been committed between April 5 and 14, 1942. The regulation in force at that time was regulation 27D (1) (*b*) published in *Government Gazette* No. 8,854 of January 29, 1942, as amended by the regulation published in the *Government Gazette* No. 8,887 of March 18, 1942. But, by notification in the *Government Gazette* No. 8,930 of May 8, 1942, the notifications in the two earlier *Gazettes* referred to were amended by substitution of a new section 27D in their place. One of the main purposes of this amendment appears to have been to substitute the words " commits theft " for the word " steals " appearing in the earlier notifications. On these facts Counsel contends that by the time proceedings came to be commenced against the accused, " stealing " had ceased to be an offence and " theft " had taken its place, and that, therefore, the charge preferred in the indictment against the accused which was a charge of conspiring to *steal* disclosed no offence. Consequently, the trial was a nullity inasmuch as it was concerned with something that was not an offence, and the resultant conviction could not stand.

But section 6 (3) (*b*) of the Interpretation Ordinance (Chap. 2 Legislative Enactments) answers and refutes this contention. It provides as follows :—

> " (3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected—
>
> (*b*) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law ; "

The offence charged in the indictment was an offence under the law as it stood before the amendment effected by the notification of May 8, 1942. In this view it is not necessary to consider the other question raised, namely, whether there is any real difference between " stealing " and " committing theft ".

Secondly, Counsel for the appellant contended that this trial was conducted in a manner that must have, or, at least, was likely to have caused prejudice to the accused. The trial commenced at a time when a new sessions of the Court was about to be held, and Counsel says that in order to have this trial disposed of before the date fixed for the opening of that sessions, the Court sat early and late, and on the Saturday and Sunday as well ; in short, that there was an appearance of hurry and rush, and that this must have or was likely to have interfered with the accuseds' right to a calm and careful consideration by the jury of the case presented against them. It was elicited, in the course of the hearing

before us, that the Court sat daily at 10.30 A.M. instead of at 11 A.M., and rose at 4.30 P.M. instead of at 4 P.M. This is, by no means unusual, and it would be unreasonable to regard this as such an undue strain put upon the jury as to have incapacitated them to perform their duties adequately. In regard to the sittings on the Saturday or on the Sunday, it is true that they are, usually, not working days but they are, certainly not *dies non* in any legal sense. Here again, we cannot see that any prejudice has resulted to the accused. There was no complaint of any kind from anyone concerned till the question was raised in appeal. The proceedings and the way in which the jury returned their verdict show that they were fully instructed and had adequate possession of the evidence in the case.

Thirdly, we were addressed in regard to the sentences passed on the accused who were convicted and we were of opinion that this was a question that called for our attention and we, therefore, took time to consider it. It seems quite clear that the Assize Judge was of opinion that he had to pass either sentence of death or of imprisonment for life. In the course of his charge he told the jury that "the penalty is fixed irrevocably by the law", and when he felt he ought to differentiate between the fourth and the eighth accused on the one side, and the rest of the accused on the other, he passed on the former *simple* imprisonment *for life*. Crown Counsel ought to support this view. He submitted that regulations 19 (4), 52, and 27D made any other conclusion impossible. He was referring to the words "not exceeding" that appear in collocation with a certain number of years mentioned in these regulations, when the intention was to fix a limit. But, it is obvious that these words "not exceeding" would have been startling to the point of an Hibernianism in regulation 27D (c), for that regulation would then have read as follows: "Shall be guilty of an offence . . . . and shall on conviction thereof before the Supreme Court be liable to suffer death or imprisonment of either description (not exceeding) for life". A regulation so framed would have been suggestive of a jurisdiction that extended to life after death—a jurisdiction which we do not seem, really, to possess. Moreover, the word "liable" is significant and, in the context, can only mean that a convicted party is in peril of a term of imprisonment that may vary and may extend to the period of his mortal life. That was the view taken—correctly, in our opinion of the meaning of the word "liable" in such a context in the case of *The Queen v. Perumal*[1].

In all the circumstances of this case, and not forgetting the extreme gravity of the offence of which the accused were convicted, we are of opinion that the safety of the community and the interests of justice will be adequately served if we impose in the case of the appellant before us a term of 12 years' rigorous imprisonment.

Subject to this variation the appeal is dismissed.

In regard to the application made by the witness Lenty Weerasooriya against the conviction entered against him under section 439 of the Criminal Procedure Code, we heard him in person. He complains that the sentence imposed on him is too severe. The question of sentence is

[1] *1 S. C. R. 48.*

one entirely for the trial Judge to fix in the proper exercise of the discretion given to him. We are quite unable to say that that discretion was not properly exercised. The sentence is one within the limit fixed by the relevant section of the Penal Code.

We refuse the application.