[IN THE PRIVY COUNCIL]

1961 *Present:* **Lord Reid, Lord Tucker, Lord Denning, Lord Morris of Borth-y-Gest, Mr. L. M. D. de Silva**

THE QUEEN, Appellant, *and* P. EDIRIMANASINGHAM, Respondent

Privy Council Appeal No. 12 of 1960

C. C. A. Appeal 106 of 1958

S. C. 4—M. C. Batticaloa, 1925

Sentence—Trial before Supreme Court—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 No. 23 of 1938, s. 6 (1)—Criminal Procedure Code, s. 251.

Where an accused person is convicted on several counts but the trial Judge passes sentence in respect of one or more of the counts and omits to pass sentence in respect of the remaining counts. the Court of Criminal Appeal is entitled under section 6 (1) of the Court of Criminal Appeal Ordinance to pass the appropriate sentences on those counts on which the Judge has omitted so to do if it acquits the accused-appellant on the counts in respect of which sentence was passed by the Judge and considers that the appellant has been properly convicted on the remaining counts.

APPEAL, with special leave, from a judgment of the Court of Criminal Appeal reported in (*1959*) *61 N. L. R. 160.*

F. H. Lawton, Q.C., with *T. O. Kellock*, for the appellant.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardene*, for the accused-respondent.

Cur. adv. vult.

January 17,,1961. [*Delivered by* LORD TUCKER]—

In an indictment dated 8th April 1958 the respondent was charged jointly with his son in the first count that on or about 27th July, 1957 they did murder one Sembakutti Kandapodi and thereby committed an offence punishable under section 296 of the Penal Code of Ceylon. The second count charged them at the time and place aforesaid and in the course of the same transaction with shooting one Palipody Nagamany with a gun and causing him hurt with such intention or knowledge and under such circumstances that had they by such act caused the death of the said Palipody Nagamany they would have been guilty of murder and that they thereby committed an offence punishable under section 300 of the Penal Code. The third count charged them at the time and place aforesaid and in the course of the same transaction with shooting at one Eliyathamby Palipody with a gun with such intention or knowledge and under such circumstances that had they by such act caused the death of the said Eliyathamby Palipody they would have been guilty of murder and thereby committed an offence punishable under section 300 of the Penal Code.

The two accused were tried at a session of the Supreme Court of Ceylon in its Criminal Jurisdiction for the Eastern Circuit at Batticaloa on the 8th September, 1958 and following days.

On 12th September, 1958 after the Judge's summing up the jury retired and on their return to court were asked with regard to each separate count whether they were unanimously agreed on their verdict in respect of each of the accused and by their foreman answered on each count that they found both accused guilty.

The Judge thereupon said : " Inform the verdict to the accused. Tell the first accused that I sentence him to rigorous imprisonment for life. I sentence the second accused for rigorous imprisonment for life. "

The verdict and sentence were formally recorded as follows :—

" The unanimous verdict of the Jurors sworn to try the matter of accusation in this case is that the prisoners (1) P. Edirimanasingham and (2) E. Gopalapillai are guilty of the offences as set out in Counts (1), (2) and (3).

Sgd.

Foreman. "

" Sgd. O. W. Wanniachy
Clerk of Assize, S. C.
Batticaloa.

On this Indictment the sentence of the Court, pronounced and published this day, is that the prisoners (1) P. Edirimanasingham and (2) E. Gopalapillai be kept in rigorous imprisonment for Life.

Sgd. O. W. Wanniachy
Clerk of Assize, S. C.
Batticaloa."

A sentence of rigorous imprisonment for life exceeds the maximum permitted by the Code for the offences charged in counts 2 and 3.

On 26th January, 1959 on appeal to the Court of Criminal Appeal by both accused the appeal of the second accused was dismissed but the appeal of the first accused (the present respondent) against the verdict and sentence on the first count of the indictment was allowed on the ground that the verdict was not warranted by the evidence and a verdict of acquittal in his case was directed to be entered in respect of that charge. The jury's verdict against the respondent on the second and third counts was not challenged by counsel on the appeal.

It is clear from the above narrative of events that the trial Judge passed sentence on the respondent on one count only and that no question of the effect of what is generally referred to as a " general sentence ", i.e. a sentence intended by the Judge to cover more than one count, arises in the present case. Such a sentence which is sometimes to be found in cases in England both before and since the establishment of the Court of Criminal Appeal and the Indictments Act of 1915 appears to be unknown in Ceylon having regard to the provisions of the Criminal Code and may well be illegal, but it is not necessary further to explore this question as no such sentence was in fact imposed in this case.

The Court of Criminal Appeal having quashed the conviction of the respondent on count 1 held they had no jurisdiction to pass the appropriate sentences on counts 2 and 3 on which the jury's verdict of guilty stood.

In Ceylon where the trial Judge has omitted to pass sentence forthwith he may of his own motion or at the instance of the prosecution pass sentence at a later date but not after the close of the sessions. The relevant part of section 251 of the Criminal Procedure Code is as follows :—

> " 251. If the accused is convicted the Judge shall either forthwith or before the close of the sessions pass judgment on him according to law ".

Accordingly the sessions having closed no question of remitting the case to the trial Judge for sentence arose on the appeal.

The Attorney-General on behalf of the prosecution obtained special leave by Order in Council of 12th August, 1959 to appeal against the decision of the Court of Criminal Appeal.

The sole question in the appeal is whether or not the Court of Criminal Appeal were right in holding that section 6 (1) of the Court of Criminal Appeal Ordinance No. 23 of 1938 does not give them jurisdiction in a case such as this to impose the appropriate sentences on those counts of an indictment on which the Judge has omitted so to do.

Section 6 (1) is as follows :—

> " 6. (1) 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."

The Court of Criminal Appeal accepted the argument of counsel for the present respondent that the sub-section only conferred power on the court to pass sentence in substitution for the sentence passed by the trial Judge and that when the trial Judge has passed no sentence at all the question of substitution does not arise. After referring to certain English decisions and in particular to the case of *Rex v. O'Grady* [1] the learned Chief Justice delivering the judgment of the court said they were unable to accept *O'Grady's* case as having any persuasive force as no reasons were given in that case for what seemed to them a disregard of the words of section 5 (1) of the English Criminal Appeal Act of 1907 which are identical with those of section 6 (1) of the Ceylon Ordinance.

The judgment proceeded " 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 ".

Their Lordships with respect feel unable to accept this interpretation of the section. It is in terms dealing with a case where an appellant has not been properly convicted on some charge or part of an indictment. This applies to count 1 in the present case. The conviction and sentence thereon no longer stand, but the court is empowered to substitute for that which has disappeared such sentence as may be warranted in law by the verdict on the charge or part of the indictment on which the appellant has been properly convicted. This in their Lordships' view can only mean that in place of the sentence that has been quashed the court can pass the sentence appropriate to the convictions on the remaining counts on which the appellant has been convicted but not sentenced. The section refers to " the sentence passed on the appellant at the trial ". Where the court affirms such sentence the application of the sub-section

[1] *28 Cr. App. R. 33.*

may be restricted to cases where there has been a general sentence, but where the sentence passed on the appellant at the trial—in this case rigorous imprisonment for life—has been quashed the words of the sub-section in their ordinary and natural meaning appear to their Lordships to confer power on the Court of Criminal Appeal to substitute a proper sentence for that which has been quashed which can only be done by passing sentence on the remaining good counts. This was the course adopted in *O'Grady's* case in this country and their Lordships see no reason to suppose that this was done *per incuriam*.

It is not necessary to express any opinion as to whether or not the sub-section warrants the court in increasing a sentence passed at the trial on some other count with regard to which there has been no appeal against sentence. Their Lordships prefer the view taken by the Court of Criminal Appeal in Ceylon in the unreported case of *Regina v. K. G. Sediris* decided on 5th March, 1956 to that reached in the present case.

For these reasons their Lordships will humbly advise Her Majesty that this appeal be allowed and that the case be remitted to the Court of Criminal Appeal in Ceylon for such action as they may consider appropriate in the circumstances.

Appeal allowed.