[IN THE COURT OF CRIMINAL APPEAL]

1959 *Present :* **Basnayake, C.J. (President), T. S. Fernando, J., and Sinnetamby, J.**

THE QUEEN *v.* M. E. A. FERNANDO

APPEAL No. 123 OF 1959, WITH APPLICATION No. 154

S. C. 19—M .C. Panadura, 54733

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1959 *Present :* **Basnayake, C.J. (President), T. S. Fernando, J., and Sinnetamby, J.**

THE QUEEN *v.* P. H. CAROLIS

APPEAL No. 124 OF 1959, WITH APPLICATION No. 155

S. C. 16—M. C. Dambulla, 9172

Murder—Sentence of death—Legality—Penal Code, s. 296—Effect of Regulation of October 2, 1959, made under s. 5 of the Public Security Ordinance—Suspension of Capital Punishment Act, No. 20 of 1958—Suspension of Capital Punishment (Repeal) Act, No. 25 of 1959—Interpretation Ordinance, s. 6—Difference between the expressions " retrospective " and " retroactive ".

By the Regulation made under section 5 of the Public Security Ordinance and published in the *Gazette* on October 2, 1959—

" During the continuance in force of this Regulation the operation of the Suspension of Capital Act, No. 20 of 1958, shall be suspended."

Held, that the Regulation cannot be construed as being retroactive. " It must be construed as applying only to offences of murder committed after it came into operation and the suspension of the Suspension of Capital Punishment Act operates as a suspension only as respects those who committed murder while the Regulation was in force and are also tried and convicted during that time. In the case of offences of murder committed before the date of the Regulation the punishment is as prescribed in the Suspension of Capital Punishment Act as the Regulation did not have the effect of suspending the Act in respect of offences committed before it came into operation."

Accordingly, a person who committed the offence of murder on October 6, 1958, and was convicted on October 16, 1959, cannot be sentenced to death.

APPEALS against convictions in two trials before the Supreme Court.

Colvin R. de Silva, with *M. L. de Silva* and *J. N. David* (assigned), for Accused-Appellant in Appeal No. 123.

G. E. Chitty, Q.C., with *E. B. Vannitamby, R. Rajasingham, Tissa Dias Bandaranayake*, and *Lucian Jayetileke* (assigned), for Accused-Appellant in Appeal No. 124.

V. T. Thamotheram, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

December 21, 1959. BASNAYAKE, C.J.—

The appeals in the above mentioned cases were heard together in the sense that learned counsel for the respective appellants in the two cases were permitted to address us one after the other and learned counsel for the Crown was heard in reply to both. This course was adopted on the ground of convenience as the sole question argued in both appeals is the legality of the sentence of death passed on the appellants.

On 27th December 1958 the appellant in the first appeal committed the offence of murder for which he was indicted on 18th March 1959 and convicted on 9th October 1959. In the second appeal the appellant committed the same offence on 6th December 1958 and was indicted on 16th June 1959 and convicted on 16th October 1959. The trial of the first case commenced on 2nd October and that of the second on 12th October 1959. At the time the offences were committed the Suspension of Capital Punishment Act, No. 20 of 1958, which came into force on 9th May 1958 was in operation. Sections 2 and 3 of that Act read :

"2. During the continuance in force of this Act—

(*a*) capital punishment shall not be imposed under section 296 of the Penal Code for the commission of murder and under section 299 of the Penal Code for the abetment of suicide, and

(*b*) sections 296 and 299 of the Penal Code shall have effect as if for the word 'death' occurring in each of those sections, there were substituted the words 'rigorous imprisonment for life'.

"3. This Act shall continue in force for three years and shall then expire :

"Provided, however, that if the Senate and the House of Representatives by resolution so declare, this Act shall continue in force for such further period as may be specified in such resolution."

When the appellants were tried and convicted and sentenced there was in force a Proclamation made under section 2 of the Public Security Ordinance, No. 25 of 1947, as amended by Act No. 22 of 1949, Act No. 34

of 1953 and Act No. 8 of 1959 (hereinafter referred to as the Public Security Ordinance) and published in Gazette No. 11,863 of 25th September 1959. That Proclamation reads :

"Whereas I am of opinion that, by reason of the imminence of a state of public emergency in Ceylon, it is expedient so to do in the interests of public security, the preservation of public order and the maintenance of supplies and services essential to the life of the community :

"Know Ye that I, Oliver Ernest Goonetilleke, Governor-General, do, by virtue of the powers vested in me by Section 2 of the Public Security Ordinance, No. 25 of 1947, as amended by Act No. 22 of 1949, Act No. 34 of 1953 and Act No. 8 of 1959, by this Proclamation declare that the Provisions of Part II of that Ordinance shall come into operation throughout Ceylon on the Twenty-fifth day of September One thousand Nine hundred and Fifty-nine."

There was also in force at that time the following Regulation made by the Governor-General under section 5 of the Public Security Ordinance, and published in Gazette No. 11,881 of 2nd October 1959 :

"During the continuance in force of this regulation the operation of the Suspension of Capital Punishment Act, No. 20 of 1958, shall be suspended."

On the expiry of the Proclamation and Regulation referred to above a Proclamation and Regulation in like terms came into force (Gazettes 11,917 and 11,921 of 25th October 1959). They were succeeded by another Proclamation and Regulation in exactly the same terms on 24th and 25th November respectively (Gazettes 11,963 and 11,966 of 24th and 25th November 1959). The last mentioned Regulation ceased to be in force on the revocation on 3rd December 1959 (Gazette 11,992) of the Proclamation made under section 2 of the Public Security Ordinance. On 2nd December 1959 there came into operation an Act intituled the Suspension of Capital Punishment (Repeal) Act, No. 25 of 1959, designed to restore the punishment of death for murder. That Act reads :

"2. The Suspension of Capital Punishment Act, No. 20 of 1958, is hereby repealed.

"3. Notwithstanding anything in any other written law, capital punishment shall be imposed—

(*a*) under section 296 of the Penal Code on every person who, on or after the date of the commencement of this Act, is convicted of the offence of murder committed prior to that date ; and

(*b*) under section 299 of the Penal Code on every person who, on or after that date, is convicted of the offence of abetment of suicide committed prior to that date."

So much for the relevant enactments and regulations. Now what is the effect of the Regulation which declares that during its continuance in force the operation of the Suspension of Capital Punishment Act,

No. 20 of 1958, shall be suspended ? At the respective trials of the appellants it appears to have been assumed that its effect was to bring into operation section 296 of the Penal Code. That section reads : " whoever commits murder shall be punished with death ". Learned counsel for the first appellant contended that that assumption was wrong. He contended that the effect of the Regulation was to render inoperative both section 296 and the Suspension of Capital Punishment Act and that while the Regulation was in force there was no law in operation which made murder punishable. The main argument of learned counsel for the second appellant was that the Regulation had no retroactive operation.

It was not contended that the effect of the Suspension of Capital Punishment Act was not to prohibit the imposition of the punishment of death and to provide for the imposition of imprisonment for life for the offence of murder even in the case of those who had committed murder before the commencement of that Act when the punishment for murder was death. As the punishment imposed by Suspension of Capital Punishment Act was less severe than that imposed by section 296 of the Penal Code it was not contended that the Act was not retroactive. It had in fact been interpreted and acted upon as being retroactive and on and after the date on which it came into operation all persons convicted of the offence of murder committed before that date were sentenced to imprisonment for life instead of to death. But in regard to the Regulation which suspends the Suspension of Capital Punishment Act it is contended that the suspension of a suspension does not bring into operation the law that was first suspended. Although so far as immediate effect is concerned there is little practical difference between a repeal and a suspension, the repeal of an enactment and its suspension are not the same. The effect of the repeal of an enactment is, subject to the provisions of section 6 of the Interpretation Ordinance and any express provision in the repealing enactment, to obliterate it as completely from the statute book as if it had never been enacted or as if it had never existed. (*Kay v. Goodwin* [1]; *Surtees v. Ellison* [2]). The suspension of an enactment does not have the same effect nor does it attract the provisions of section 6 of the Interpretation Ordinance. In the case of a suspension the statute is not erased from the statute book. It is there but it is dormant and does not speak in so far as the suspension is operative. Its operation is arrested for the duration of the suspension and to the extent to which the suspension operates ; but it is on the statute book and exists and is not erased therefrom and is operative in so far as it is not affected by the written law suspending it (*Brown v. Barry* [3]). The effect of the suspension of the Suspension of Capital Punishment Act is to remove to the extent to which the Regulation is operative and for the time during which it is in force the curb imposed, temporary though it be, on the law whose operation was suspended by the Act. That the effect of the Regulation suspending the Suspension of Capital Punishment Act is to restore the punishment of death for the offence of murder committed after the coming into operation of the Regulation

[1] *(1830) 6 Bing. 576 at 582.*
[2] *(1829) 9 B. & C. 750 at 752.*
[3] *3 U. S. 365.*

and while it is in operation is not in doubt. But the further and more important question of its effect in respect of those who committed the offence of murder before and are tried after it came into operation is not entirely free from difficulty. Is the punishment that is to be inflicted the punishment that is in the Act that has been suspended and during whose operation the offence was committed or the punishment which has come into existence or revived by the suspension of the enactment suspending it ? The answer to that question is largely dependent on the language and scope of the provision of law suspending the suspension. It is a well-settled rule of construction of statutes and statutory instruments that the presumption is that a statute or statutory instrument is prospective and not retrospective or retroactive. There are countless judicial dicta on this topic, but it is sufficient to refer to one or two of the more authoritative of them. In *Gardner v. Lucas*[1], Lord O'Hagan stated : " unless there is some declared intention of the Legislature—clear and unequivocal—or unless there are some circumstances rendering it inevitable that we should take the other view, we ought to presume that an Act is prospective and is not retrospective ". Lord Macnaghten expressed the rule in terms not less effective in *Colonial Sugar Refining Co. v. Irving* [2], when he stated : " statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested ". Although these dicta make no express mention of retroactive legislation it is governed by the same rule. It will thus be seen that Legislation is never presumed to be retrospective or retroactive, and therefore a law will only be applied to cases occurring after its date, unless it appear from the statute itself that it is intended to have retrospective or retroactive effect. This rule is deeply founded on good sense and strict justice because to deprive persons of rights acquired by transactions perfectly valid according to the law at the time or to punish them for what was lawful before the statute or to impose a severer punishment than that which was in force before the time of the new written law would be unjust and oppressive. The rule arises from the ancient maxim : " *nova constitutio futuris formam imponere debet non præteritis* " (A new law ought to impose its conditions on the future, not on the past). The rule is as well established in Roman-Dutch law as it is in the Anglo-American system. In Book I, Tit. 3, s. 17, Voet states :

> " It is certain further that laws give shape to affairs of the future, and are not applied retrospectively to acts of the past. They are rules of action, precepts regulating the lives of men, and they have to be promulgated before they have obligatory force, as we said above. Thus those things which were done prior to a new law under precept or ancient right stand fast. If a penalty has to be imposed for wrong-doing committed before a new law which perhaps sharpens the penalties, then it must be inflicted according to the terms of the old and not of the succeeding new law. How, asks the Emperor, did past time sin when, ignorant of the present law, it pursued the ancient practice of its rights."

[1] *(1878) 3 L. R. App. Cases 582 at 601.* [2] *(1905) A. C. 369.*

Voet instances six exceptions to this rule. They are—

(i) when the legislator has nevertheless expressed himself otherwise in clear words, treating both of past time and of present affairs.

(ii) when the Emperor brings in a new law by written answer or decree on matters clearly in doubt.

(iii) when past affairs to which some obvious and ingrained injustice or disgrace attaches.

(iv) when reason dictates that a law should also be applied to the past when it is not so much a case of incorporating something new in a new law as rather interpreting a previous doubtful law.

(v) when an absurd meaning would spring from the law, if it were not also applied to the past.

(vi) when some exemption or exception is brought in by the new law. (Gane, Vol. I, pp. 47-49).

Turning to the Courts of the Commonwealth we find that the principle is affirmed with equal force in Australia, Canada, India, New Zealand and South Africa. In the last mentioned country it was reasserted as recently as last year in the case of *The Jockey Club of South Africa v. Transvaal Racing Club* [1]—

> "A well known rule of interpretation is that, in the absence of express provision to the contrary, a statute regulates future conduct and is construed as operating only on cases or facts which came into existence after it was passed."

Although the Suspension of Capital Punishment Act of 1958 did not make it clear beyond doubt that it applied to offences committed before as well as after the Act, justice was not offended by its being construed as it if had a retroactive operation and applied to offences committed before it came into force because the punishment created by it was less severe. There is a great and apparent difference between making persons liable to a lighter and a heavier punishment than that in force at the time of the offence. That difference becomes more pronounced when the heavier punishment is death. The Regulation does not indicate with certainty that the Regulation-making authority intended that it should apply to offences committed before the date on which it came into operation. It has left the intention unexpressed and there is nothing in it that goes to rebut the presumption that the regulation is not retroactive. On the other hand the Act repealing the Suspension of Capital Punishment Act makes it clear beyond doubt that it is intended to be retroactive and creates no difficulty of interpretation although it may offend the canons of justice and morality as it plainly overrides the presumption that the Legislature will not unjustly deprive a citizen of his vested rights or make him suffer more severe punishment for an offence than that to which he was liable at the time he committed it. This is a convenient point at which to explain the expressions retrospective and

[1] *(1959) 1 S. A. L. R. 441 at 451.*

retroactive which have been used above without definition and as if they were synonymous. Although writers and Judges do not always use them in their strict sense and use them indiscriminately each of them has a special meaning. A retrospective enactment is an enactment that is brought into operation from a date before that on which it is enacted or in the words of Buckley L. J. in *West v. Gwyne*[1] :

> " If an Act provides that as at past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective."

Such enactments are generally speaking found in the field of taxation law. Our legislation of the last two years contains many examples. A retroactive enactment is one which comes into operation on or after the date on which it is enacted but applies to acts which though partly done before the enactment still remain to be completed or performed after the enactment comes into force or to offences committed before the enactment came into operation but in respect of which the offenders have not been tried or punished. The Suspension of Capital Punishment (Repeal) Act, No. 25 of 1959, is a striking example of retroactive legislation. In other words it is an enactment creating rights or obligations or imposing penal sanctions on the basis of events which have already taken place. In America such legislation is better known as *ex post facto* legislation. *Ex post facto* legislation is thus defined :—

> " 1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal ; and punishes such action.
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> " 2. Every law that aggravates a crime or makes it greater than it was, when committed.
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> " 3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed.
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> " 4. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender. (*Calder v. Bull*, 3 Dall 368 ; 1 L. Ed. 648).

Ex post facto laws which impose a more severe punishment alone are regarded as obnoxious. The rule is thus stated in Crawford on Statutory Construction at p. 575 :—

> " Where the punishment is altered, and, consequently, in the light of human experience and morality, favours the defendant, he cannot complain of the retroactive effect of the law which changes the punishment. Obviously, since the condemnation of *ex post facto* legislation is founded on its inherent harshness, the basis of the condemnation disappears where the alteration operates in favour of the accused or condemned person."

In the light of the principles of interpretation above enunciated the conclusion that the Regulation is prospective is inescapable and it cannot

[1] *104 L. T. 759 at 762.*

with reason be construed as being retroactive. It must be construed as applying only to offences of murder committed after it came into operation and the suspension of the Suspension of Capital Punishment Act operates as a suspension only as respects those who committed murder while the Regulation was in force and are also tried and convicted during that time. In the case of offences of murder committed before the date of the Regulation the punishment is as prescribed in the Suspension of Capital Punishment Act as the Regulation did not have the effect of suspending the Act in respect of offences committed before it came into operation.

The cases of *Director of Public Prosecutions v. Lamb* [1], *Buckman v. Button* [2], and *Wicks v. Director of Public Prosecutions* [3], are of little avail to the Crown. In each of those cases the court held that there was no doubt that the written law it had to construe was retroactive. In the first named case Humphreys J. while affirming the established rule said :

> ". . . where a statute alters rights of persons, or creates fresh liabilities in regard to persons, or creates or imposes obligations upon persons and thereby alters the law, such a statute ought not to be held to be retroactive in its operation unless the words are clear precise and quite free from ambiguity. For such a proposition there is the most ample authority . . . . That doctrine, while I fully subscribe to it, and would willingly give full effect to it in any case where it was possible to do so, to my mind has no effect at all in a case where the language of the statute, or, as in this case, of the order in council, is plain and can mean only that which it says."

For the above reasons we hold that the appellants were not liable to be punished with death but only with imprisonment for life. We accordingly quash the sentence of death passed on them at their respective trials and pass a sentence of rigorous imprisonment for life in substitution therefor in respect of each of them.

Sentence altered.

[1] *(1941) 2 All E. R. 499.* [2] *(1943) 2 All E. R. 82.*
[3] *(1947) 1 All E. R. 205.*