[FULL BENCH.]

1920.

Present : Bertram C.J. and Ennis and De Sampayo JJ.

KACHCHERI MUDALIYAR *v.* MOHOMADU.

1,002—P. C. Anuradhapura, 48,906.

Attempt to commit an offence—Limitation of s. 490 of the Penal Code—The English and Roman-Dutch Criminal law in Ceylon.

An attempt to commit an offence not punishable under the Ceylon Penal Code is itself not an offence, except when the particular enactment creating the offence makes such attempt punishable.

The Ceylon Penal Code abolished not only the law administered in this Colony known as " the Criminal law of the United Provinces " or as " the Roman-Dutch law, " but also the English criminal law, which, to a certain extent, had been imported into the jurisprudence of this Colony.

THE facts are set out in the judgment.

Arulanandan, for appellant.—The accused had not crossed the boundary with the bags of paddy, and hence he cannot be convicted of transporting the paddy into the Central Province. Granting

[1] *(1910) 14 N. L. R. 47.*

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argumenti causa, that the facts proved in the case constitute an attempt to transport the paddy into the Central Province, such an attempt is not punishable under our law. Section 490 of the Penal Code does not help the prosecution, for it is expressly limited to offences punishable under the Code. The breach of the regulations made by the Food Controller is not an offence under the Penal Code, nor can the English law come to the rescue of the prosecution, for the English criminal law was never introduced into Ceylon. If the decision of the Full Court in *Regina v. Mendis* [1] meant to hold that the English criminal law prevails in Ceylon, that view is wrong. The following qualification of Chief Justice Burnside is worthy of notice: "And although it may be that no direct expression of the Sovereign's will or express legislation can be found declaring English criminal law in force . . . . "

On the other hand, both the Proclamation of September 23, 1799, and Ordinance No. 5 of 1835 expressly declare the Roman-Dutch criminal law as the law in force in Ceylon. The Penal Code abolished the Roman-Dutch criminal law, and, therefore, the only criminal law in force in Ceylon is the Penal Code. The case of *Andris v. Salman* [2] is no authority, as it merely follows the case of *Regina v. Mendis*.[1]

Garvin, S.-G. (with him *Jansz, C.C.*), for the Crown.—Before the passing of the Ceylon Penal Code, it was held by the Collective Court in *Regina v. Mendis* [1] that much of the English criminal law was in force in this Colony. The Penal Code, while it expressly abolished the Criminal law known as the Criminal law of the United Provinces or as the Roman-Dutch law, did not make any mention of the English criminal law. Therefore, on the principle *expressio unius exclusio alterius*, the Legislature must have intended to retain the English criminal law. After the passing of the Penal Code, Clarence J. held that it did not abolish the English criminal law. *Andris v. Salman* [2]. It was never clearly understood how much of the English law had been introduced into the Colony.

Cur. adv. vult.

February 3, 1920. BERTRAM C.J.—

This is a case which has been reserved for the consideration of the Full Court on a point of some importance, namely, the question whether by the law of this Colony, independently of section 490 of the Penal Code, an attempt to commit an offence is itself an offence. The question arose in this way. The accused was prosecuted for the breach of an order made by the Food Conntroller in pursuance of regulations made by the Governor by virtue of an Order of the King in Council promulgated in view of the circumstances of the recent war. I may remark incidentally that, in order to

[1] *(1883) 5 S. C. C. 186.*

[2] *(1889) 9 S. C. C. 20.*

enable the Court to deal with this offence, it is necessary for us to refer to publications only accessible in various numbers of the *Government Gazette;* and, further, speaking generally, to enable this Court to deal with cases of breaches of these food regulations, it may be necessary to refer to detached orders and amendments of these orders appearing in various numbers of the same publications. It would be a great convenience for the administration of justice, in this particular, if all these regulations and orders, and the enactment on which they are based, were collected in a convenient form, and such a publication would be of assistance, not only to the Court, but also to those who have to advise the inhabitants of the Colony with regard to their legal obligations. We brought this matter to the attention of the Solicitor-General in the course of the argument, and I have no doubt that appropriate measures will in due course be taken.

The charge against the accused was that he committed a breach of an order, which prohibited the transport, by any means, from the North-Central Province, except on permit from the Government Agent. The accused had, in fact, obtained a permit to transport paddy, but the means by which he was to transport it were specified, namely, " rail. " In disregard of this stipulation, he was carrying paddy towards the border of the North-Central Province, when he was stopped. He, therefore, had not completed the offence. The learned Magistrate thought himself justified in convicting him of an attempt, and imposed a sentence upon him, which included the forfeiture of the paddy which he was attempting to carry out of the Province.

The regulations under the Order in Council do not make it an offence to attempt to contravene any of the orders issued by the Food Controller. Section 490 of the Penal Code in terms is restricted to offences against the Code. We have to consider, therefore, whether the accused in this case, even supposing what he had done would in law constitute an attempt to infringe the regulation in question, had by virtue of that attempt been guilty of any legal offence.

This is a question which has a history. It depends upon the theory that at a certain period of the history of this Colony there was in force a certain substratum of law derived from the English criminal law. In the year 1883, before the enactment of our present Penal Code, this question was discussed in a judgment of the Supreme Court, see *Regina v. Mendis*,[1] and the opinion was there expressed that, in a way not very clearly defined, a certain body of the English criminal law had been imported into the jurisprudence of this Colony. It was pointed out that the Legislature had for some time proceeded upon the supposition that a certain portion of the English criminal law was in force in the

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Colony, and that Judges had also given judgments upon the same supposition, and the Full Court, therefore, expressed the opinion that there had been a certain gradual importation of the English criminal law into the Colony by means of judicial interpretation. After that judgment our Penal Code was enacted. But shortly after the enactment of the Penal Code, this precise question came up for consideration before Clarence J., who was one of the Judges who had previously considered the general question of the introduction of the English criminal law into our own criminal system. See *Andris v. Salman.*[1] He there definitely expressed the view that the rule of English law under which an attempt manifested by a sufficiently distinct overt act to commit an offence, whether *malum in se or malum prohibitum*, is itself an offence. That decision is dated in the year 1889; and it never appears to have been considered by this Court since that date. If that decision is right, then the question brought before us must be answered in the affirmative. I am not, however, prepared to hold that the views there expressed by Clarence J. are in accordance with the principles of the law of this Colony.

The question really depends upon the interpretation of the Penal Code. It may very well be that the Legislature supposed that the English criminal law was to a certain undefined extent in force in this Colony. It is also noticeable, as the Solicitor-General has pointed out, that section 8 of Ordinance No. 12 of 1852 pre-supposes that according to the law of this Colony an attempt to commit an offence is itself an offence. But we have to consider not the presuppositions of the Legislature, but what was the intention of the Legislature in enacting the Penal Code in the year 1883.

To begin with, when a Code of this kind is enacted, the *primâ facie* intention is that it should be exhaustive. That intention requires no specific expression in the Code to give it effect. It is understood in the nature of the case. But by section 2 the Code expressly declared that " every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty." These words do not expressly repeal any existing legislation or common law, but they indicate a general intention on the part of the authors of the Code that this Code was to be looked to as the real source of criminal justice.

Then, there is a saving in section 4 of the provisions of any special or any local law. These expressions are defined, " special law " being a law applicable to a particular subject, and " local law " being a law applicable only to a particular part of Ceylon. It was, therefore, clearly intended, though not declared, that all general legislation of the nature of this Code should be repealed, except special and local laws. The only difficulty is caused by section 3,

[1] *(1889) 9 S. C. C. 20.*

which declares that so much of the criminal law heretofore administered in this Colony as is known as " the Criminal law of the United Provinces, " or as " the Roman-Dutch law, " is hereby abolished.

Here is an express abolition of a certain body of the common law. It is suggested that as the Supreme Court, before the enactment of this Code, had declared that there was in force in this Colony, in addition to the Roman-Dutch law, which was itself the common law, also a certain portion of the English criminal law, therefore, on the principle *expressio unius exclusio alterius*, the Legislature must have intended to retain in force that body of English law which was said to exist on the authority of the Supreme Court.

I do not think that that is a correct inference. The special reference to " the Criminal law of the United Provinces " and to " the Roman-Dutch law " must be explained, I think, historically. In the year 1799 a Proclamation of the King was issued declaring that the administration of justice and police in the Island of Ceylon shall be exercised by all Courts, civil and criminal, according to the laws and institutions that subsisted under the ancient Government of the United Provinces. In the year 1835, by Ordinance No. 5 of that year, certain old Proclamations were repealed. But there was an express saving of this declaration that the administration of justice and police shall be exercised by all Courts, civil and criminal, according to the laws and institutions of the ancient Government of the United Provinces, which laws and institutions, the Ordinance proceeded, " are hereby declared to be still law, and shall henceforth continue to be binding and administered throughout the said maritime provinces and their dependencies. "

In 1852, by Ordinance No. 5 of that year, it was declared that the law administered within the maritime provinces for the trial and conviction of any person for any crime or offence committed within such provinces is hereby declared to extend and thereby apply to like crimes and offences within the Kandyan Provinces. There was, thus, by express statutory enactment, an establishment of the Criminal law of the United Provinces in this Colony, and it was only natural that the compilers of the Code should take steps to repeal this express statutory provision. I do not think that by so doing they intended to retain in force an undefined body of criminal law which had insinuated itself into the system of this Colony. Such a course would be contrary to the whole policy of the Code, which is that the criminal law should be defined and should be in such form as to be capable of administration in all parts of the Colony by both principal and subsidiary Courts, and further, that it should be in such a form that the population of the Colony should clearly understand their obligations.

The Solicitor-General, who argued the question before us with great fairness, pointed out to us the great inconvenience which

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would exist if this unascertained body of law were held in force in this Colony. There is no provision as to punishment, unless we suppose that the undefined punishments of the English law are also in force. There is no provision as to jurisdiction. Further, it would be a remarkable state of affairs if all the common law misdemeanours of the English criminal law might at any moment be said to be in force in this Colony for the purpose of the consideration of any case outside our own Penal Code, which might by argument be brought within some English principle. The Solicitor-General also pointed out to us that, as a matter of fact, in the case of statutory offences, it is only very seldom that an attempt to commit an offence is a matter with which those interested in the administration of the statute have any occasion to concern themselves. It might very well be that, in this case, as suggested by my brother De Sampayo, it was not the intention of the Food Controller to punish an attempt to transport. If the attempt was successfully impeded, the object would be already attained. That is a matter which we need not determine, as, I think, we are of opinion that the general principle laid down by Clarence J. in his judgment is not one which should receive the endorsement of the Full Bench of this Court.

As the matter is of public importance, I might incidentally point out that there appears to be no justification for the action of the learned Magistrate in forfeiting the bags of rice, which were the subject of the supposed offence. The regulations themselves do not impose forfeiture as one of the punishments to which a person infringing the regulations may make himself liable. nor does it appear to me that the Order in Council authorizes the imposition of such a punishment, although it is possible that special regulations for the forfeiture by civil proceedings of property used in connection with the offence might be framed under another part of the Order in Council. In my opinion, for the reasons I have explained, the appeal should be allowed.

ENNIS J.—I agree.

DE SAMPAYO J.—I agree.

Appeal allowed.