[COURT OF CRIMINAL APPEAL.]

1940 *Present :* **Howard C.J., Keuneman and Cannon JJ.**

THE KING *v.* ALBERT APPUHAMY.

28—M. C. Kandy, 65,526.

Misdirection of law—Defence not set up by prisoner or his Counsel—Where defence arises on evidence—Duty of Judge.

Failure on the part of a prisoner or his Counsel to take up a certain line of defence does not relieve a Judge of the responsibility of putting to the jury such defence if it arises on the evidence.

THIS was an application for leave to appeal against the conviction of the applicant who was convicted of murder at the Midland Assizes and was sentenced to death.

P. A. Senaratne, for the accused, applicant.—The accused had no legal aid in the drafting of the petition which is very meagre. There are two points of law arising in this case. On the evidence the Proctor who defended the accused argued that the accused stabbed the deceased in the course of a sudden fight and the learned Judge in his summing up to the jury put in addition the defence of grave and sudden provocation. But the evidence given by the accused coupled with his statutory statement disclosed that he had acted in self-defence though he had exceeded that right. This defence was not put to the jury. It is the duty of the Judge to put to the jury every defence that arises out of the evidence although it has not been put forward by the accused. See *The King v. Hopper* [1] and *R. v. Dinnick* [2]. The learned Judge in his summing drew the attention of the jury to the accused coming to the scene of the murder with his clasp-knife open, but failed to mention that in his evidence he said that he had it open for the purpose of peeling an arecanut. This evidence negatives the intention that the accused came prepared to stab the deceased.

Nihal Gunesekera, C.C., for the Crown.—Whatever be the defence put forward by Counsel, it is for the Judge to put such questions to the jury as appear to him properly to arise on the evidence (*R. v. William Hopper* [3].) But a Judge is not bound in law to put a particular defence to the jury if that defence has not been made out and the facts do not amount in law to proof of the defence (*R. v. James Honeyands* [4]).

The burden of proving that he acted in the exercise of the right of private defence lies on the accused (Evidence Ordinance, section 105).

On the evidence of the accused the right of private defence did not arise in law (Penal Code, section 95).

Cur adv. vult.

September 24, 1940. HOWARD C.J.—

This application for leave to appeal against conviction is based on two grounds as follows :—

(*a*) That there was misdirection in law inasmuch as the learned Judge in his charge failed to direct the jury on the law of self-defence;

[1] *(1915) 2 K. B. 431.*
[2] *(1909) 3 Cr. App. R. 77.*
[3] *11 Cr. App. R. 136.*
[4] *10 Cr. App. R. 60.*

(b) That there was misdirection on the facts inasmuch as the learned Judge omitted in his charge to refer to that part of the evidence of the appellant in which the latter stated that he was using his knife in the boutique to cut an arecanut. It was submitted that this evidence negatived the suggestion that he came to the boutique armed with an open knife with which he intended to stab the deceased.

We are of opinion that there is no substance in the second ground. The evidence of the appellant was before the jury and there is no reason for suggesting that his reference to the use of the knife to cut the arecanut was not present to their minds when they reached their verdict. The matter was not of such transcending importance as to make it incumbent on the Judge to mention it in his summing up.

The first ground raises a question of considerable importance. There is no suggestion in the evidence tendered by the Crown that the appellant in stabbing the deceased was exercising a right of private defence. Moreover the Proctor who appeared on his behalf did not raise this plea but argued that he stabbed the deceased in the course of a sudden fight thereby bringing the case within the ambit of Exception 4 to section 294 of the Penal Code. On the other hand in his evidence the appellant states as follows :—

"Then the deceased got up and struck me with his hand and dropped his walking stick. Before assaulting me he abused me. I did not return the abuse. The other men in the boutique stood up. They surrounded me and wanted to get hold of me. I stabbed the deceased and got out . . . . On the day of this incident when these people were gathered together I thought they would assault me and get hold of me and I stabbed the deceased."

It has been held in a number of cases that failure on the part of a prisoner or his Counsel to take up a certain line of defence at his trial does not relieve a Judge of the responsibility of putting to the jury such defence if it arises on the evidence. Thus in *The King v. Hopper*[1], after the jury had returned a verdict of murder, on appeal it was held that there was evidence of such provocation as would, if the jury accepted it, justify them in finding a verdict of manslaughter, that the Judge ought to have left to the Jury the question whether the crime was manslaughter only, and that as he had omitted to do so, the Court, acting under section 5 (2) of the Criminal Appeal Act, 1907, would enter a verdict of manslaughter which the jury might have found if they had been directed upon the point. In this case the defence put forward at the trial by Counsel for the accused was that the killing was accidental. *The King v. Hopper* (*supra*) was considered in *R. v. Thomas Clinton*[2], where it was held that on an indictment for murder if defendant's Counsel does not suggest a possible verdict of manslaughter but only acquittal on the ground of accident, the Judge is not bound to suggest that verdict. In that case it was held that on the facts and having regard to the conduct of the case the course adopted was the most favourable to the appellant. On the

[1] *(1915) 2 K. B. 431.*

[2] *12 Cr. App. Rep. 215.*

facts it could not be said that the appellant had any grievance. Both *Hopper* and *Clinton's* cases were considered in *R. v. George Harry Robinson* [1] in which Hewart L.C.J. stated as follows :—

"It was plain that the Commissioner was of opinion that there was no evidence to go to the jury on the question of manslaughter. That being so, he (the Commissioner) was bound to decline to put the question of manslaughter to the jury. When there is no evidence of manslaughter, the question should not be left to the jury as was laid down in this Court in *Phillis* (*32 T. L. R. 414*) and again in *Thomas Clinton* (*12 Cr. App. Rep. 215*). The Commissioner rightly refrained from leaving the question of manslaughter to the jury in this case."

In *R. v. Howard Ball* [2], the same question was again considered. In his judgment Hewart L.C.J. stated that there were materials on which the jury, if they accepted certain evidence and took a certain view, might have reduced their verdict to one of manslaughter. In these circumstances the question should not have been withdrawn from the jury.

The principles laid down in these cases were again affirmed in *Rex. v. Thorpe* [3]. In this case Hewart L.C.J. stated as follows :—

"He (Lord Reading in *Rex. v. Hopper*) then stated the principle as follows :—'We do not assent to the suggestion that as the defence throughout the trial was accident, the Judge was justified in not putting the question as to manslaughter. Whatever the line of defence adopted by Counsel at the trial of a prisoner, we are of opinion that it is for the Judge to put such questions as appear to him properly to arise upon the evidence even although Counsel may not have raised such question himself'.

That principle is not in the smallest decree in conflict with the judgments in cases such as *Rex. v. Clinton* [4], and *Rex. v. Robinson* (*supra*). If there is no evidence on which a verdict of manslaughter can properly be found it is the duty of the Judge not to leave to the jury the question of manslaughter, but if there is evidence, then it is the duty of the Judge to leave the question although it has not been raised by the defence and is inconsistent with the defence actually raised."

Applying the principles that have been so clearly stated by Hewart L.C.J. the only question that arises in this case is whether there was evidence on which a verdict that the appellant in stabbing the deceased had merely exceeded the right of private defence as provided by Exception 2 to section 294 of the Penal Code could properly be found by the jury. The only evidence to suggest such a defence is that of the appellant. The latter contended that after the deceased struck him with his hand he dropped his walking stick. Then the other men in the boutique stood up, surrounded him and wanted to get hold of him. He thought they would assault him and get hold of him and so he stabbed the deceased. The right of private defence by virtue of section 95 of the Penal Code arises when a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed. So far as the deceased was concerned

[1] *16 Cr. App. Rep. 140.*
[2] *16 Cr. App. Rep. 149.*
[3] *28 Cox's Cr. Cases 4.*
[4] *12 Cr. App. Rep. 215.*

there was no threat or attempt to commit an offence on the appellant. The latter could not, therefore, have had a reasonable apprehension of danger to his body arising from a threat by the deceased. In these circumstances it was impossible to say there was any evidence on which the jury could properly say that the case came within Exception 2 to section 294 of the Penal Code. Moreover the learned Judge in putting to the jury the question as to whether the case came within Exception 4 to section 294 adopted a course that was on the facts the most favourable to the appellant.

We are, therefore, of opinion that the failure of the Judge to put the question of private defence to the jury did not in the circumstances of this case amount to misdirection. We are in this connection following the Indian cases referred to on page 364 of *Mukerji, Trial by Jury and Misdirection.*

The application for leave to appeal must, therefore, be refused.

Application refused.