[COURT OF CRIMINAL APPEAL.]

1947 *Present:* **Keuneman A.C.J. (President), Wijeyewardene S.P.J. and Jayetileke J.**

THE KING *v.* KIRIGORIS.

Application 159 of 1947.

S. C. 35—M. C. Walasmulla, 616.

Provocation—Charge of murder—Plea of grave and sudden provocation—Mere abuse may amount to sufficient provocation—Question of fact for jury.

In Ceylon, mere abuse unaccompanied by some physical act may in certain circumstances be regarded as sufficient provocation, and, in a charge of murder, the jury are the sole judges as to whether there was sufficient provocation to support a plea of grave and sudden provocation.

APPLICATION for leave to appeal against a conviction in a trial before a Judge and Jury.

Mackenzie Pereira, for the petitioner.

T. S. Fernando, C.C. (with him *E. L. W. de Zoysa, C.C.*), for the Crown.

July 23, 1947. KEUNEMAN A.C.J.—

The accused in this case was convicted of the murder of T. Babahamy. According to the story for the prosecution, the accused had struck the woman on the head with a rice-pounder and caused her death, and no mitigating circumstances were disclosed. The accused admitted the act, but raised the plea of grave and sudden provocation. He said he went to the house of the deceased, and asked her daughter Podihamy—who was his mistress—to return home with him. The deceased then intervened

"She is a very interfering sort of woman. On that day when I called Podihamy to go, my mother-in-law abused me unmercifully in bad language. The abuse was unbearable and I became so provoked that I struck her. I had completely lost control of myself and I struck my mother-in-law. I struck her with a door bar".

The accused gave some details of the language used by the deceased, which the trial Judge described as "uttering obscene words and attributing immorality to one's mother".

The trial Judge in his charge dealt with the plea of grave and sudden provocation. He pointed out that provocation must be both grave and sudden, and must by its gravity and suddenness deprive the accused of his power of self-control. The trial Judge continued :—

"There must be adequate cause for the provocation. The test is, was the provocation in the circumstances of the case likely to result in a normal, reasonable man losing control of himself to such an extent as to cause such an injury as was inflicted in this case? Would the normal villager of the country say in the particular circumstances of the case that there was grave and sudden provocation? Apart from

words or gestures, there was only abuse here. Could insult, even by words or gestures, afford sufficient provocation for a person to act in the way he had done? Uttering obscene words and attributing immorality to one's mother must not be understood to be trivial provocation, but would that justify the commission of an act of an outrageous nature beyond all proportion to the provocation? In such circumstances grave and sudden provocation would be hardly any defence, and where death has been caused the offence would be murder notwithstanding the little provocation that had been given."

It seems possible that the trial Judge was trying to emphasise the fact that the act committed should not be "beyond all proportion" to the provocation, or, to use the words of Viscount Simon in *Mancini's case*[1] "the mode of resentment must bear a reasonable relationship to the provocation, if the offence is to be treated as manslaughter". But the charge is subject to this criticism—namely that it may have led the jury to believe that mere abuse, or insult by words or gestures may never be regarded as sufficient provocation, as to support the plea of grave and sudden provocation. This is not the law of Ceylon. Here it has been held that mere abuse unaccompanied by some physical act may be sufficient provocation to reduce the offence of murder to culpable homicide not amounting to murder. See *The King v. Coomaraswamy*[2]. The trial Judge has failed to direct the jury that this is the law of Ceylon, and the jury may well have been left with the impression that there were no circumstances under which mere abuse would be a sufficient provocation. The trial Judge has used these words:—

> "in such circumstances grave and sudden provocation will be hardly any defence, and where death has been caused the offence would be murder notwithstanding the little provocation that had been given."

The use of the words later "whether there was provocation in this case for the accused to have committed the act is also a question of fact," and the warning to the jury that they were the sole judges of the facts in the case, do not cure the failure to explain the law on this subject. The jury were not definitely instructed that mere abuse may in certain circumstances be regarded as sufficient provocation, and that they were the sole judges as to whether there was sufficient provocation to support the plea of grave and sudden provocation.

In our opinion this failure amounts to a misdirection, and we do not think it is possible to say that if the jury had been properly instructed, they would still have brought in a verdict of murder.

In these circumstances, we have already set aside the verdict of "Guilty of Murder" and the sentence of death, and substituted a verdict of "Guilty of culpable homicide not amounting to murder," and imposed a sentence of 12 years' rigorous imprisonment.

Verdict altered.

[1] *(1941) 28 C. A. R. 65 at 74.*

[2] *(1940) 41 N. L. R. 289.*