[COURT OF CRIMINAL APPEAL.]

1946 *Present :* **Keuneman S.P.J. (President), Wijeyewardene and Jayetileke JJ.**

THE KING *v.* KIRINELIS.

Application 162 of 1946.

S. C. 27—M. C. Colombo, 8,673.

Charge of murder—Plea of self-defence—Right of self-defence exceeded—Proper direction relating to culpable homicide not amounting to murder—Duty of Court to explain special nature of " intention " in Penal Code, s. 294, Exception 2.

The intention which is referred to in section 294, Exception 2, of the Penal Code is a special kind of intention and should be explained to the Jury. In order to earn the clemency of the exception the harm caused must have been caused solely with the intention of private defence.

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

F. A. Hayley, K.C. (with him *K. A. P. Rajakaruna* and *S. Saravanamuttu*), for the accused, applicant.

H. A. Wijemanne, C.C., for the Crown.

October 1, 1946. KEUNEMAN S.P.J.—

The accused was convicted of murder. The principal matter argued in this application was whether the learned trial Judge gave a proper direction to the Jury. The defence of the accused was that he had acted under grave and sudden provocation. On that the trial Judge gave the Jury a full and adequate direction. The trial Judge however went further and put before the Jury the defence that the accused was acting in the exercise of the right of private defence. Counsel for the accused does not appear to have raised this defence but the trial Judge very properly dealt with this matter also because the evidence led by the accused indicated this defence as well.

The trial Judge quoted to the Jury the terms of section 294, Exception 2, of the Penal Code which runs as follows :—

" Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the

person against whom he is exercising such right of defence without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence."

and stated—

"Then I would say a word or two, although Crown Counsel, from his point of view quite properly, did not refer to the matter, and that is with regard to the other possible plea of self-defence, because the accused himself gave his evidence in those terms. He said he was struck and kicked and he fell, and then he was afraid; the implication of that appears to be that he was afraid he might be either injured or even killed and therefore acted in self-defence.

"Now, in short, Gentlemen of the Jury, the right of private defence may be put in this form. Every human being is entitled to defend his body against any offence affecting the human body. You and I are entitled to defend ourselves against any attack on our bodies, but that right is subject to two exceptions. It is necessary for me to invite your attention to one, and that exception says that in the course of defending yourself against an offence affecting your body you must not do more harm than is necessary for the purpose of defending yourself. In other words, if I attack you in some way you cannot take the occasion to cause me wanton harm; you must cause me such harm as is necessary for you to defend yourself.

"I mean, looking at it reasonably, you cannot expect a man to measure and weigh his retaliation very accurately, but on a reasonable view you must not exceed the limits placed by the law; that is to say, you must not do more harm than you need for the purpose of defending yourself. In this case, Gentlemen of the Jury, if the accused was struck and kicked and he fell there was certainly an offence against his body; then the only question is whether in defending himself he kept within the law or whether he exceeded it; in other words, did he do more harm than was necessary to defend himself".

And the learned Judge further said—

"Therefore in order to come within that exception the accused must satisfy you that he was kicked and struck and dealt with in that way, and that in retaliating as he did he was not doing more harm than was necessary for the purpose of such defence.

"To sum up then in regard to this part of the case, in order to find the accused guilty of culpable homicide not amounting to murder you must be satisfied reasonably that at the time he caused the death of the deceased man he had lost his power of self-control by grave and sudden provocation,—it is not every provocation but grave and sudden provocation.

"Secondly, if you prefer to consider his case under the plea of self-defence, in order to find culpable homicide not amounting to murder you must be satisfied that an occasion arose for him to defend himself and that in defending himself in the way he did defend himself he cannot reasonably be said to have done more harm than was necessary to have defended himself.

"If you are in doubt as to whether he is entitled to the exception either on the ground of grave and sudden provocation or on the ground of only exceeding the right of self-defence, the benefit of the doubt must be given to the prisoner. You will find him guilty of murder if you are satisfied that he caused the death of the deceased with the intention of causing death or with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death, and that there wasn't either of these mitigating circumstances, that is to say, that there was nothing that could reasonably be said to amount to grave and sudden provocation sufficient to deprive a man of ordinary temper to use his power of self-control, or that there was no occasion for the accused to defend himself at all, or that if there was such an occasion to defend himself, that he inflicted more harm than was necessary to inflict; in other words, that his retaliation—in the words of the Lord Chancellor—or his resentment was not in proportion to the provocation"

It was argued that this direction indicated or may have been understood by the Jury to indicate that if the accused did more harm than was necessary for the purpose of defence the verdict of culpable homicide not amounting to murder was not available, and that the trial Judge failed to tell the Jury that it was only when the accused had an *intention* of doing more harm than was necessary for the purpose of defence that the offence of murder was made out.

We have considered the language used by the trial Judge. The Jury may have understood that if the accused in fact exceeded the right of private defence he was to be convicted of the offence of murder,—and they would never have applied their minds to the question whether the accused had an *intention* to do more harm than was necessary for the purpose of defence. This *intention* is a special intention, and has not been explained to the Jury.

In commenting on the corresponding section of the Indian Penal Code (section 300, Exception 2) Gour in his Penal Law of India (para 2855) says—

"It is only when the right conferred by sections 96–105 (*i.e.*, the sections relating to private defence) is *exceeded* that there is room for its operation. And even then it does not apply indiscriminately to all cases. For in the first place the rule postulates the exercise in good faith of the right of private defence, and this implies that there can be no mitigation under it if the enforcement of the right is used merely as a pretext for committing murder. This accounts for the other requirements of the clause, namely, that the excessive harm caused must be unintentional. The combined effect of these two requisites is that in order to earn the clemency of the rule the harm caused must have been caused solely with the intention of private defence. It must not be maliciously excessive nor vindictively unnecessary".

The illustration given in the section of the Ordinance supports this view.

In the present case the Jury were not given the opportunity of considering the special kind of *intention* contained in section 294, Exception 2, and they could well have had the impression from the charge that, if they

found *in fact* that more harm was done than was necessary for the purpose of defence, the proper verdict was that of murder and not culpable homicide not amounting to murder. We do not think the direction given was a proper or adequate direction. Further, it cannot be said that had the proper direction been given the Jury must necessarily have returned the same verdict. No doubt the Jury have rejected the defence that the accused acted under grave and sudden provocation, and that finding tells strongly against the story of the accused and his witness. It is also the case that the only defence urged by Counsel for the accused was grave and sudden provocation. But the trial Judge rightly put before the Jury the fact that the right of private defence also arose and had he not done so there would have been a misdirection.

The elements necessary to establish these two defences were different, and we do not think it is possible for us to say in this case that, had the Jury been adequately instructed as to the law, they could not have come to the conclusion that the accused was only guilty of culpable homicide not amounting to murder in that he exceeded the right of private defence.

For these reasons we have already set aside the verdit of guilty of murder and substituted therefor the verdict of guilty of culpable homicide not amounting to murder, and have imposed on the accused a sentence of eight years' rigorous imprisonment.

Verdict varied.