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1, 1961

IN THE PRIVY COUNCIL

No. 12 of 1960

ON APPEAL FROM

THE COURT OF CRIMINAL APPEAL OF CEYLON

B E T W E E N :

THE QUEEN

Appellant

- and -

PANIKKAPODY EDIRIMANASINGHAM

Respondent

UNIVERSITY OF LONDON
INSTITUTION
1 SEP 1961
INSTITUTE OF ADVANCED LEGAL STUDIES

63700

CASE FOR THE RESPONDENT

RECORD

- 10 1. This is an appeal, by special leave, from a judgment and order of the Court of Criminal Appeal of Ceylon (Basnayake, C.J., President, Palle, J. and H.N.G. Fernando, J.) dated the 26th January, 1959 in so far as the said Court (having quashed the conviction of the Respondent for murder) refused to apply the provisions of Section 6 (1) of the Court of Criminal Appeal Ordinance of Ceylon (hereinafter called the Ordinance) for the purpose of passing sentence on the Respondent in respect of his convictions for two other offences.
- 20 2. The principal questions arising in this appeal are:-
- (a) Whether upon a proper construction of Section 6 (1) of the Ordinance the Court of Criminal Appeal has the power to impose a sentence in respect of a conviction for which the Presiding Judge had omitted to impose a sentence at the trial
- 30 (b) Whether in any event the present appeal is one in which Her Majesty in Council will interfere at the instance of the Crown.
3. The Respondent was jointly indicted together with his son (the second accused) on the following charges:

pp.10-12.  
p.5; 1.12-  
p.9; 1.40.  
p.9; 11.20-  
23.  
p.1; 1.10-  
p.2; 1.28.

RECORD

- (1) The murder on or about the 27th July, 1957 of Sembakutti Kandapodi, an offence punishable under Section 296 of the Ceylon Penal Code.
- (2) The attempted murder on the same occasion of Palipody Nagamany, an offence punishable under Section 300 of the said Code.
- (3) The attempted murder on the same occasion of Eliyathamby Palipody, an offence punishable under Section 300 of the said Code. 10

4. The facts relied on by the prosecution at the trial have been summarized in the judgment of the Supreme Court as follows:

p.6; 1.38-  
p.7; 1.11.

"The 1st accused with a bag in his hand and his son the 2nd accused carrying a gun approached the western boundary of the deceased's garden. The 1st accused took a cartridge and handing it over to the 2nd accused said, 'There goes Palau's son Nagamany, shoot him.' The 2nd accused loaded his gun and shot him. Next the 1st accused handed over to the 2nd accused another cartridge and he loaded his gun and attempted to shoot Palipody. Then the deceased who was near by went towards the accused and asked them 'Why are you shooting?'. Then the 2nd accused who was aiming his gun at Eliyathamby Palipody aimed it at the deceased. He turned to run but was injured by the shot fired by the 2nd accused and he fell. The 1st accused took yet another cartridge from his bag and handed it over to the 2nd accused, who loaded his gun and fired it at Eliyathamby Palipody, whom he missed." 20 30

p.3; 1.30-  
p.5; 1.6.  
p.5; 11.7-  
11.

5. The jury by a unanimous verdict found the Respondent and his co-accused guilty of all three charges in the indictment. Sansoni, J., the Presiding Judge, sentenced the Respondent to rigorous imprisonment for life in respect of the first charge of the indictment, but no sentence was passed on the Respondent in respect of either the second or the third charge on which he was found guilty. 40

6. The Respondent appealed to the Court of Criminal Appeal and Counsel appearing for him argued that the verdict against the Respondent on the first charge was not supported by the evidence. He did not, however, challenge the verdict against the Respondent on the second or the third charge. p.6; 11.31-34.
7. The Court of Criminal Appeal upheld the contention of Counsel for the Respondent and quashed the conviction of the Respondent on the first charge. An order was accordingly made directing that a judgment of acquittal be entered in respect of the first charge. The question then arose whether Section 6 (1) of the Ordinance empowers the Court to impose a sentence on the Respondent in respect of either of the two charges on which the Presiding Judge had omitted to pass sentence. This question the Court answered in the negative and accordingly ordered that the Respondent, who was at that time serving a term of imprisonment in respect of his conviction which was quashed, be discharged from prison. p.7; 11.23-26.  
p.7; 11.31-35.  
p.9; 11.20-23.  
p.9; 11.37-38.
8. In the present appeal the Crown did not apply for special leave to appeal against the judgment of the Court in so far as it quashed the conviction and directed the acquittal of the Respondent on the first charge. The Crown has, however, appealed against the Court's order based on its interpretation of Section 6 (1) of the Ordinance in respect of the second and third charges. 30
9. Section 6 (1) of the Ordinance is in the following terms:
- "If it appears to the Court of Criminal Appeal that an appellant, though not properly convicted on some charge or part of the indictment, has been properly convicted on some other charge or part of the indictment, the court may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as they think proper and as may be warranted in law by the verdict on the charge or part of the indictment in which the court consider that the appellant has been properly convicted." 40

RECORD

10. The reasons for the judgment of the Court, pronounced by the President, may be briefly summarized as follows:-

- p.9; 11.20-23. (a) That as the trial Judge had passed no sentence in respect of the second or the third charge, the Court of Criminal Appeal has no power to rectify the omission under the provision of Section 6 (1) of the Ordinance.
- p.9; 11.25-32. (b) That the Legislature would not have contemplated a trial Judge refraining deliberately or otherwise from doing what was the legal duty of passing sentence on the charges on which a prisoner has been properly convicted. 10
- p.9; 11.33-37. (c) That the Court of Criminal Appeal can only exercise such powers as are expressly entrusted to it by the Statute and no other.
- p.8; 11.29-33. (d) That the decision of the English Court of Criminal Appeal in the case of Dorothy Pamela O'Grady 28 Cr. App. 33 was not acceptable as having persuasive force as no reasons were given for the decision. 20
- p.9; 11.12-19. (e) That the unreported judgment of the Court of Criminal Appeal in the case of S.C. No.13 - M.C. Gampa 26876 appeared to have been given without full argument and the particular point regarding the Court's power to pass a sentence in substitution appeared to have passed unnoticed. 30

11. It is respectfully submitted that the interpretation of Section 6 (1) of the Ordinance adopted by the Court is right.

12. It is further submitted -

(a) That in a case where a Presiding Judge, upon the conviction of an accused person for any offence, has omitted to pass sentence forthwith in respect of that conviction, the proper and adequate remedy is for the Judge either ex mero motu or at the instance of the prosecution to pass sentence at some later date (but not after

the close of the sessions). The Presiding Judge is empowered to adopt this course by the provisions of Section 251 of the Criminal Procedure Code of Ceylon, Chapter 16 (Legislative Enactments of Ceylon, Vol. 1, 1938 Revision), the relevant part of which is as follows:

10            "If the accused is convicted the Judge shall either forthwith or before the close of the sessions pass judgment on him according to law."

20            (b) That this appeal does not in any event fall within the class of case in which Her Majesty in Privy Council will interfere in criminal proceedings at the instance of the Crown, particularly because the decision of the Court, right or wrong, is not likely to divert the due and orderly administration of the law in Ceylon into a new course. Moreover, there is no reason whatever to anticipate a repetition of the kind of situation which has arisen in the present case.

13. It is respectfully submitted that this appeal should be dismissed for the following among other

R E A S O N S

- (1) Because the interpretation placed by the Court of Criminal Appeal of Ceylon on the meaning and scope of Section 6 (1) or the Ordinance is correct.
- 30            (2) Because in the alternative this appeal does not fall within the class of case in which Her Majesty in Privy Council will interfere.

E.F.N. GRATIAEN Q.C.

WALTER JAYWARDENA

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CASE FOR THE ~~APPELLANT~~

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GOODMAN, DERRICK & CO.,  
30, Bouverie Street,  
Fleet Street,  
London, E.C.4.  
**RESPONDENT**  
Solicitors for the Appellant.