In the Privy Council.

No. 14 of 1952.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF CEYLON

BETWEEN

THE ATTORNEY-GENERAL OF CEYLON ... ... APPELLANT

AND

KUMARASINGHEGE DON JOHN PERERA ... ... RESPONDENT.

CASE FOR THE APPELLANT

RECORD

1.—This is an Appeal by special leave from a decision of the Court of Criminal Appeal of Ceylon delivered on the 29th November, 1951, which allowed by the majority of four judges to one an appeal by the Respondent against his conviction at his trial before Mr. Justice Gratiaen and a jury on the 3rd September, 1951, of the murder of a woman named Kumarihamy. The Court did not quash the Respondent's conviction and direct a judgment of acquittal to be entered, but ordered a new trial as the Court is entitled to do " if they are of opinion that there was evidence before the jury . . . " upon which the accused might reasonably have been convicted but for the " irregularity upon which the appeal was allowed."

p. 95, ll. 11-14

p. 76, l. 23

2.—Kumarihamy was the wife of one Samaranayake. Kumarihamy Samaranayake, and five of their children, Walter, Cyril, Nandawathie, Quintus and Gladwyn, lived on an adjoining plot of land to that on which the Respondent lived with his family. Kamalawathie, the eldest daughter of Samaranayake who was married to one Abayasekera, lived in a house nearby. There had been much ill-feeling between the Respondent and the family of the deceased, and on the 29th July, 1950, at about 9.30 a.m. the Respondent shot and killed Kumarihamy, Samaranayake, Cyril and Kamalawathie, and he wounded Nandawathie and Walter. He used a single-barrelled 16 bore breach-loading gun. He was brought to trial before Mr. Justice Gratiaen, as above stated, when he raised the defence that he had acted in self-defence. He further pleaded that he was insane when he did the act, and furthermore that he acted under a sudden and grave provocation. The jury, after a full summing up by Mr. Justice Gratiaen, returned a verdict of guilty.

pp. 49–76 ; p. 76, l. 23

pp. 79–80

3.—No point now arises on the pleas of insanity and self-defence. The Respondent, however, appealed to the Court of Criminal Appeal, and the only ground on which his appeal was argued was that Mr. Justice Gratiaen had wrongly directed the jury that the defence of provocation could not succeed and the charge of murder could not therefore be reduced to culpable homicide not amounting to murder unless the action of the Respondent taken by him in consequence of the provocation was reasonably commensurate with the degree of provocation offered to him. The provocation on which the Respondent relied consisted of insulting language and behaviour and stone-throwing.

p. 42, l. 6—p. 43, l. 11

4.—The circumstances in which culpable homicide is not murder are set out in Section 294 of the Penal Code, the material parts of which are printed in the record.

p. 97, l. 36—p. 99, l. 20

5.—The Court of Criminal Appeal in Ceylon had, by a majority, in *Rex* v. *Naide* (1951) 53 New Law Reports 207, laid it down that the law of Ceylon as to provocation was identical with the law of England, and accordingly the plea of provocation could not succeed if the force used by the Respondent was wholly disproportionate to the provocation offered. The Appellant submits that in the present case the Court of Criminal Appeal was bound to follow this decision. The three judges who constituted the Court when the Respondent's appeal was first heard, were divided in opinion, the majority doubting the correctness of the decision in *Rex* v. *Naide* The Court therefore expressed the view that the further hearing should be before a fuller Bench. Accordingly, the Chief Justice constituted a Court of five judges to hear the appeal.

p. 81

pp. 49–76

6.—In his summing up Gratiaen, J., carefully reviewed the evidence and directed the jury on the law. He made it clear that before they could convict the jury had to be satisfied that the Respondent had a murderous intention in his heart or must have intended the inevitable consequences of his actions. If they were so satisfied, the learned judge told them that they must then consider fairly two further defences of which the first was that the offence should be reduced to culpable homicide not amounting to murder on the ground that there was grave and sudden provocation of a kind sufficient so to reduce the offence. After dealing with the evidence relating to provocation and discussing whether the provocation alleged was sudden and grave, the learned judge told the jury that they must ask themselves whether the manner in which the Respondent showed his resentment of the provocation was violently disproportionate to the kind of provocation which the jury might think was given. He indicated general principles of law applicable to the matter and told the jury that they must ask themselves what probably did happen and whether there was any provocation at all. He told the jury that having decided what probably happened, they should ask themselves whether the mode of resentment was violently disproportionate or not to the kind of provocation. The Appellant submits that the

p. 70, ll. 30–42

p. 73, ll. 17–37

summing up in respect of provocation was not only in accord with authority but was in accord also with the proper interpretation of Section 294 of the Penal Code. RECORD

7.—The Judgment of the Court of Criminal Appeal was delivered by the presiding Judge, Nagalingam, J. After setting out the part of the summing up of which complaint was made and which is summarised in the preceding paragraph, Nagalingam, J., noted that the learned trial judge had at the beginning and end of the passage directed the jury to consider whether the retaliation was not altogether of an outrageous nature in comparison with the possible provocation, creating the impression that where the mode of resentment was totally disproportionate to the provocation the plea of provocation would be of little avail. pp. 82–94 p. 84, ll. 13–21

8.—Nagalingam, J. then considered whether, under the law of Ceylon, this was a proper direction. After pointing out that it was based on English law, he distinguished between English law and the law of Ceylon by saying that under the former the elements necessary to constitute murder and manslaughter are different, since in the case of murder there must be an intention to kill, in the case of manslaughter no such intention can exist. In Ceylon, however, an intention to kill is, he said, an essential element in both the offences of murder and culpable homicide not amounting to murder. Nagalingam, J., considered the English rule to be based either on the principle that the existence of an intention to kill negatives manslaughter in spite of provocation or on the principle that an average Englishman is expected to control his passion and not let himself give way to excesses. p 84, l. 44—p. 92, l.2 p. 86, ll. 21–30 p. 86, l. 31—p .87, l.46

9.—Nagalingam, J., then contrasted the law of Ceylon under which mere abuse without physical violence had been held sufficient provocation to reduce murder to lesser culpable homicide. The Code required, in his view, that a prisoner, to bring himself within exception 1 to Section 294, had to establish five and only five things : (1) provocation, (2) sudden, (3) grave, (4) resulting in his loss of self-control, and (5) that the act charged was done whilst he was thus deprived of the power of self-control. Intention to kill is consistent with these requirements ; and English principles were deliberately made inapplicable because of the temperament, nature and habits of the people of Ceylon, where killing by knives under provocation by unarmed blows or abusive words, is common. Nagalingam, J., then examined each of these requirements, and stated that four of the five judges thought that the invitation to the jury to approach their task by reference to whether the mode of retaliation was violently disproportionate to the provocation, was unjustified and resulted in serious prejudice to the Respondent. Accordingly the Court set aside the conviction and ordered a new trial. p. 88, ll. 1–25 p. 88, l. 26—p. 89, l. 36 p. 89, l. 37—p. 92, l. 2 p. 92, ll. 3–6

p. 92, l. 7—p. 94, l. 14

10.—Nagalingam, J., then held that the Court hearing the appeal was a Full Bench not bound by previous decisions of the Court. The majority thought that *Rex* v. *Naide* (1951) 53 New Law Reports 207 had been wrongly decided, and they overruled it.

11.—Although, pending the result of this appeal the decision in the present case is treated as binding in Ceylon, it has unsettled the law relating to provocation. On the 24th April, 1952, a court of five judges by a majority of three to two dismissed an application (No. 18 of 1952) by a convicted murderer who complained that it was misdirection to say that the provocation to come within exception 1 of Section 294 must be of a kind likely to have caused an average man of the class of society to which the accused belonged to lose his self-control. In the course of the Judgment, delivered by Gratiaen, J., it is stated that the judges who heard the present case regard certain incidental observations as *obiter dicta*, and that two of them in *The King* v. *David Appuhamy* (1952) 53 New Law Reports 313 refused to follow, as unsatisfactory, Nagalingam, J.'s, statement in the present case that provocation would be grave where an ordinary man of the Respondent's class would feel annoyed or irritated by the provocation to the extent that, smarting under it, he would resent the provocation or retaliate.

p. 90, ll. 17-20

12.—The Appellant submits that the direction of Gratiaen, J., in the present case was in entire accord with the provisions of Section 294 of the Penal Code ; and in particular that the explanation of exception 1 shows clearly that provocation may be grave and sudden but yet not sufficiently grave or sudden to prevent the killing from being murder.

13.—The Appellant also submits that it was the duty of the Court of Criminal Appeal to follow its own decision in *Rex* v. *Naide*, that the criticisms of that case are unsound, and that that case accurately stated the relevant law of Ceylon as identical with that of England in that the defence of provocation cannot succeed if the jury are of opinion that the force used by the Respondent was wholly disproportionate to the provocation offered to him.

14.—The Appellant accordingly submits that this appeal should be allowed, that the decree of the Court of Criminal Appeal dated the 29th November, 1951, should be set aside, and that the conviction of the Respondent for murder and the sentence of death passed upon him should be restored, for the following, amongst other

REASONS

1. BECAUSE Gratiaen, J., accurately directed the jury on the relevant law.

2. BECAUSE the Court of Criminal Appeal should have followed the Court's previous decision in *Rex* v. *Naide*.

3. BECAUSE *Rex* v. *Naide* was rightly decided and ought not to have been overruled.

4. BECAUSE the Court of Criminal Appeal misconstrued Section 294 of the Penal Code, whereas Gratiaen, J., had rightly construed the section.

FRANK SOSKICE.
FRANK GAHAN.

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