

GLLG-2 1, 1961

1.

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
M.A.
1961
INSTITUTE OF ADVANCED
LEGAL STUDIES

63701

CASE FOR THE APPELLANT

10 1. This is an appeal by Special Leave from a Judgment of the Court of Criminal Appeal of Ceylon, dated the 26th day of January, 1959, allowing the Respondent's appeal from a Judgment of a Criminal Sessions of the Supreme Court of Ceylon for the Eastern Circuit held at Batticaloa, dated the 11th day of September, 1958.

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pp.5-9

p.5, Ll.6-7

20 2. This appeal raises the question of the powers of the Court of Criminal Appeal under S.6(1) of the Court of Criminal Appeal Ordinance No.23 of 1938 which is identical in terms with S.5(1) of the Criminal Appeal Act of 1907 of England and reads as follows:-

30 "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 on which the Court consider that the appellant has been properly convicted."

3. The Respondent (hereinafter called "the 1st accused") was indicted with his son E.G. Pillai (hereinafter called "the 2nd accused") on the following charges:-

pp.1-2

- Record
p.2, Ll.1-7 (1) That on or about the 27th day of July, 1957 at Kothiyapulai in the division of Batticaloa, they did commit murder, by causing the death of one Sembakutti Kandapodi, and that they thereby committed an offence punishable under Section 296 of the Penal Code.
- p.2, Ll.8-17 (2) That at the time and place aforesaid and in the course of the same transaction, they did shoot one Palipody Nagamany with a gun, with such intention or knowledge and under such circumstances that had they by such act caused the death of the said Palipody Nagamany they would have been guilty of murder and that they by such act caused hurt to the said Palipody Nagamany and that they thereby committed an offence punishable under Section 300 of the Penal Code. 10
- p.2, Ll.18-26 (3) That at the time and place aforesaid and in the course of the same transaction they did shoot at one Eliyathamby Palipody with a gun with such intention or knowledge and under such circumstances that had they by such act caused the death of the said Eliyathamby Palipody they would have been guilty of murder and that they thereby committed an offence punishable under Section 300 of the Penal Code. 20
4. The Crown's case as presented at the trial was that the 1st and 2nd accused went to the house of Eliyathamby Palipody with the intention of shooting him and others who might be in the house at the time. 30
- p.6, L.41 -
p.7, L.12 5. The events that preceded the shooting have been summarised in the judgment of the Court of Criminal Appeal as follows:-
- "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 out 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 nearby went towards the accused and asked them "Why are you shooting?" Then the 40

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."

10 6. The 1st accused did not give evidence on his own behalf but the 2nd accused did and tried to prove an alibi. At the conclusion of the trial, the jury by their unanimous verdict found both the accused guilty on all counts of the indictment, whereupon the learned trial Judge said:

"Inform the verdict to the accused. Tell the first accused that I sentence him to rigorous imprisonment for life. I sentence the second accused to rigorous imprisonment for life."

p.5, Ll.6-11

20 7. The 1st and 2nd accused appealed against their convictions. The Court of Criminal Appeal, having heard argument, adjudged that the conviction of the 1st accused in respect of the charge of murder be quashed as the evidence adduced at the trial was not sufficient in law to render him liable under the provisions of section 32 of the Penal Code and directed that a judgment of acquittal on this charge should be entered in his favour.

No question arises in this appeal as to this judgment of acquittal.

30 8. The Court of Criminal Appeal, being of the opinion that the learned trial Judge had not passed a sentence on the 1st accused in respect of the 2nd and 3rd counts of the indictment (viz. the charges of attempted murder of which he had been found guilty by the Jury) requested further argument as to whether it had jurisdiction to pass sentence in respect of these charges.

40 9. Counsel for the 1st accused contended that the Section empowered the Court of Criminal Appeal to pass a sentence in substitution for the sentence passed at the trial but that the Court had no power to pass a sentence where no such sentence had been passed at the trial since to do so would not be to pass a sentence "in substitution". The words "in substitution" it was contended, implied an existing sentence in respect of the offence.

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10. The Crown submitted that the section empowered the Court to pass a sentence in these circumstances and contended that the "substitution" could be in respect of the sentence passed at the trial upon the charge or part of the indictment in respect of which the 1st accused was held by the Court to have not been properly convicted, it being immaterial that no sentence had been passed in respect of those charges on which the accused had been properly convicted. The Crown relied upon the judgments in Rex v. Dorothy Pamela O'Grady 28 Cr. App. R. 33, Rex v. Harvey and Goodwin 27 Cr. App. R.146 and in Regina v. Lovelock 40 Cr. App. R.137 (1956) 1 W.L.R. 1217. After the conclusion of the argument but before the judgment was delivered, Counsel for the Crown referred the Court to its own unreported decision in Regina v. K.G. Seditris 13/M.C. Gampaha 26876 (decided on 5th March 1956) where in an almost identical case the Court had passed sentence, the trial Court having omitted to do so. 10

p.9, Ll.37-38 11. The Court of Criminal Appeal adjudged that it lacked power to pass such sentence and ordered that the 1st accused should be discharged from prison. In the course of his judgment, which was the judgment of the Court, the President, Basnayake C.J., referred to O'Grady's case and said:

p.9, Ll.9-12 "We are unable to accept O'Grady's case as having any persuasive force as no reasons have been given for what seems to us a disregard of the words of the Section"; 30

Of the Court's own decision in Regina v. K.G. Seditris S.C. 13/M.C. Gampaha 26876, the President said:

p.9, Ll.14-19 "..... the question does not appear to have been argued fully as it has been on this occasion. The fact that sub-section 1 of Section 6 empowered this Court to pass a sentence in substitution for the sentence passed on the appellant at the trial seems to have passed unnoticed.";

p.8, Ll.33-36 The President distinguished the cases of Lovelock and Goodwin from that of O'Grady. 40

pp.10-12 12. Special Leave to Appeal to Her Majesty in Council was granted by Order in Council dated the 12th day of August, 1959.

13. The Appellant humbly submits that this Appeal should be allowed and the case remitted to the Court of Criminal Appeal of Ceylon for the following among other

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R E A S O N S

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- (1) The Court of Criminal Appeal should have followed its own decision in The Queen v. K.G. Seditis.
 - (2) The Court of Criminal Appeal should have followed the decision in Rex v. O'Grady, 28 Cr. App. R. 33.
 - (3) The Court of Criminal Appeal misconstrued section 6(1) of the Court of Criminal Appeal Ordinance. On the correct construction of the said section in the circumstances of this case it had power to pass a sentence.

F.H. LAWTON

THOMAS O. KELLOCK

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Respondent

CASE FOR THE APPELLANT

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