NOTES OF CASES

DEFENCE RAISED FOR THE FIRST TIME ON APPEAL

Mohamed Kunjo v. *P.P.*[1]

The appellant and the deceased were friends. On May 25, 1975 both consumed alcohol and were talking loudly and laughing before argument ensued, which degenerated into wrestling. After that they were punching each other. Suddenly, the appellant went to a store nearby, and returned with an exhaust pipe of a motor vehicle. He struck the deceased on the head with it. The deceased tried to defend himself with his hands, but almost at once fell to the ground. The appellant then hit his head three or four times with the exhaust pipe. The deceased was lying in a pool of blood and died subsequently. Medical evidence showed that the deceased most probably died of a fractured skull resulting from two blows with a blunt instrument behind the ears. The appellant was charged with murder.

At the trial, the judges considered "the main question", *i.e.* the appellant's intention. They came to the conclusion from the evidence that the appellant was not so severely intoxicated that he could not form the intention to inflict the fatal blows.

On appeal, the Court of Criminal Appeal reviewed the evidence and concluded that there were no grounds for disturbing the conviction of murder.

On further appeal to the Privy Council, three questions were canvassed:

(1) the cause of death;

(2) whether the appellant was so intoxicated as to be incapable of forming the intent necessary to constitute the offence;

(3) the defence of "sudden fight" which, if proved by an accused, reduces the offence to one of culpable homicide.

No problem was presented by the first two questions as the Board was satisfied that the trial judges' findings were sound.

There are two brief points worthy of note. The first, which presented the Board with "some difficulty",[2] was whether the exception of sudden fight, which had not been relied on either at the trial or before the Court of Criminal Appeal, could be raised for the first time.

1 [1978] 1 M.L.J. 51 (P.C.). Appeal from Singapore.
2 *Ibid.,* at p. 53.

Sudden fight is provided for under exception 4 of section 300 of the Penal Code:[3]

> Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

The burden of proving the exception rests upon the appellant.[4]

It would appear that this is the first time the Board was faced with the above question. Lord Scarman, delivering the opinion of the Board, pointed to an instance when it would allow the defence to be raised, *i.e.*[5]

> Where trial has been by jury and the burden of proof is upon the prosecution to negative the defence, it is settled law that the judge must put to the jury all matters which upon the evidence could entitle the jury to return a lesser verdict than murder. And, if the judge fails to do so, the Board will intervene, even if the matter was not raised below. For otherwise there would be the risk of a failure of justice.

Kwaku Mensah v. *The King*[6] was cited with approval. There Lord Goddard, giving the reasons of the Board for allowing the appeal, said:[7]

> . . . but when there has been an omission to place before the jury for their consideration a matter of such grave importance that they were never led to consider whether in this respect the prosecution had discharged the onus which lay on them of proving murder as distinct from manslaughter, their Lordships think that they can properly entertain the appeal. They would add that it must be seldom that they consider a matter which was not only not mentioned in the courts below, but was not included in the reasons given by the appellant in his case.

In the instant case Lord Scarman said that different considerations arose where the burden of proving the defence or exception was upon the defendant and the trial was by judge or judges alone. Despite the different considerations his Lordship stated that there would be cases in which justice required the Board to consider matters not mentioned in the Court below, as[8]

> … otherwise there would be a real risk of failure of justice. The test must be whether there is sufficient evidence upon which a reasonable tribunal could find the defence made out. If there be such evidence, the court of trial should have expressly dealt with it in its judgment and the Judicial Committee will deal with it on appeal, even though it has not been raised below.

Lord Scarman has attempted to lay down a test for future guidance and this is to be welcomed. But, it is submitted with respect, that in formulating this test it was unnecessary for his Lordship to have gone on an excursion into the ground of intervention in a trial by jury as gleaned from Lord Goddard's statement in *Kwaku Mensah.* It is clear from Lord Goddard's statement that the trial by jury situation is not analogous to the situation in the present case.

3 Cap. 113, Singapore Statutes, Rev. Ed. 1970.
4 S. 105, Evidence Act, Cap. 5, Singapore Statutes, Rev. Ed. 1970.
5 Note 1, at p. 53.
6 [1946] A.C. 83.
7 *Ibid.,* at p. 94.
8 Note 1, at p. 54.

The Indian case of *Budhwa* v. *The State of Madhya Pradesh*[9] was referred to. There the Supreme Court of India gave effect to the same exception of sudden fight which had not been relied on at the trial and substituted a verdict of culpable homicide. The *Budhwa* Court regarded the evidence there sufficient to satisfy the exception of sudden fight. In so far as the evidence of the instant case was concerned, Lord Scarman said that the appellant would have faced formidable difficulties if he were to attempt to prove that the act causing death was committed "without the offender having taken undue advantage or acted in a cruel or unusual manner".[10] This was because the appellant had gone to get an exhaust pipe of a vehicle and returned to attack the defenceless deceased who did not appear to be aggressive or on his guard. Hence, "There was, therefore, no need for the trial judges to refer to the exception in [the] judgment".

The second noteworthy point is that his Lordship, having dismissed the appeal, nonetheless, observed that "the offence was committed over 2 years ago, and that there are mitigating factors worthy… of consideration before a decision is taken in regard to the sentence."[12] Of course, the "mitigating factors" are not those recognised in law as mitigating circumstances under any of the 7 exceptions to section 300 of the Code that would reduce murder to culpable homicide not amounting to murder. Subsequently, the President of Singapore granted a reprieve and commuted the death sentence to one of life imprisonment. This is the first time in the history of Singapore that a reprieve has been granted under section 8 of the Republic of Singapore Independence Act 1965.[13]

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[9] A.I.R. 1954 S.C. 652.
[10] Note 1, at p. 54.
[11] *Ibid.*
[12] *Ibid.*
[13] 9 of 1965.