Privy Council Appeal No. 9 *of* 1935

Dennis Romain Renouf - - - - - *Appellant*

v.

The Attorney-General for Jersey - - - - *Respondent*

FROM

THE ROYAL COURT OF THE ISLAND OF JERSEY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH APRIL, 1936.

Present at the Hearing:

THE LORD CHANCELLOR
(VISCOUNT HAILSHAM)

LORD THANKERTON.

LORD MAUGHAM.

SIR GEORGE LOWNDES.

SIR SIDNEY ROWLATT

[*Delivered by* LORD MAUGHAM.]

This is an appeal by special leave from a judgment and conviction of the Royal Court of the Island of Jersey dated the 8th November, 1934. The trial of the appellant was by way of an indictment presented by and on behalf of the respondent, the Attorney-General for Jersey, and took place on the 8th November, 1934, before the Full Court consisting of the Bailiff and eight jurats with a jury of twenty-four. The indictment charged the appellant with having on the 19th August, 1934, driven his motor car in the town of St. Helier at a dangerous speed and to the danger of the public and with having by his criminal imprudence, carelessness, or negligence (*par suite de son imprudence, son impéritie ou sa négligence criminelles*) collided with Frederick William Whiting and having inflicted injuries upon him which caused his death. The appellant pleaded not guilty, but was found guilty by the unanimous verdict of the jury and was sentenced to twelve months' imprisonment with hard labour, and his driving licence was withdrawn. Special leave to appeal was given by Order in Council dated the 20th December, 1934, but without prejudice to the right of the respondent to argue that the appeal is incompetent. The contention of the respondent is that the decision of the Royal Court of Jersey in a criminal case is final and is not open to question or appeal even with special leave of His Majesty in Council.

There are thus two entirely distinct questions for consideration: first, whether special leave to appeal from the verdict and sentence could properly be given in this or any other criminal case from Jersey, and, secondly, whether, if the answer is in the affirmative, the present appeal from verdict and sentence is within the class of exceptional circumstances in which their Lordships could advise His Majesty to intervene.

It seems to their Lordships beyond doubt that there is no right of appeal from the decision of the Royal Court in a criminal case to His Majesty in Council, using the term " right of appeal " in its proper sense. It will be remembered that (subject to certain limitations or exceptions not material to the present case) there was no right of appeal in a criminal matter either in this country or in any of the dominions of the Crown until a recent date (in this country the date of the Criminal Appeal Act, 1907). The verdict of the jury was for centuries considered to be conclusive.

It may be added that the Island of Jersey is not a colony or to use the old phrase " a plantation ". It is part or parcel of the ancient Duchy of Normandy which came into the possession of William, Duke of Normandy in A.D. 933 and remained attached to the English Crown when Philip II of France conquered the rest of Normandy from King John. It has its own constitution and is governed by its own laws; and, apart from enactment, it would be strange to find that there was a right of appeal properly so called in criminal matters to the King in Council. In fact as will be seen there is no trace in any legislation or in any authoritative work of any such right of appeal. The evidence is uniformly against the existence of such a right.

The question of the power of the King to admit an appeal in such a case as an act of grace gives rise to very different considerations. The discretion of the King in Council to grant special leave to appeal has been often described, not inconveniently, as the prerogative right; and there is a whole body of authority tending to show that this prerogative right can only be taken away by the express words or the necessary intendment of a statute or other equivalent act of state. A short account of the way in which the different methods of reaching the Sovereign as the fountain of justice, namely by appeal as of right and by appeal after special leave obtained, have grown up, will be found in the cases of *Nadan* v. *The King* [1926] A.C. 482 at page 491, and *British Coal Corporation* v. *The King* [1935] A.C. 500 at page 511. The judgment of the Board delivered by Viscount Cave L.C. in the former of these cases contains a reference to most of the previous decisions of the Board in which the question of the prerogative right of the Crown to grant special leave has been considered and it is unnecessary to repeat his observations here. In dealing with the case of a Court of great antiquity such as the Royal Court of Jersey, the question must be whether in any of the constitutions,

charters, Orders in Council, or other acts of state there is any ground for holding that the prerogative right has been taken away, bearing in mind that precise words, or the necessary effect of them, alone can result in such a conclusion.

Their Lordships have been supplied with a very complete statement of the relevant historical documents (see appendix I and appendix II to the record of proceedings); and with the assistance of counsel they have carefully examined the whole of these papers whether they consist of charters, Orders in Council, letters, representations, statements of the law, Acts of the States of Jersey, or other instruments, or writings. They propose to deal seriatim with the main contentions of the respondent. The first point is founded on the Constitutions of King John, established in relation to the Islands of Jersey and Guernsey after Normandy was alienated. The original has long disappeared and the precise date of it is unknown. After providing for the election of twelve jurats who were to be sworn to keep the pleas and rights pertaining to the Crown it was declared that they in the absence of the justices and together with the justices " when they shall come to those parts ", were to judge " touching all cases in the said Island howsoever arising, except cases that are too difficult (*exceptis casibus nimis arduis*) and if any shall be lawfully convicted as a traitor of having departed from loyalty to the Lord the King or of having laid violent hands upon the ministers of the Lord the King in exercising their duty in a lawful manner." It has been conjectured that the words " and if " (*et si*) are a slip for " as if " (*ut si*). The original was in Latin and mistakes in transcription and translation are, of course, possible. Their Lordships do not propose to enter upon this question because whatever the result it seems to be plain that there is in this clause nothing whatever to interfere with the prerogative of the King.

The privileges granted by the Constitutions of King John were from time to time confirmed, re-granted and enlarged during the succeeding reigns, but nothing of any importance for the present purpose took place until the year 1562. Queen Elizabeth in that year granted by Letters Patent under the Great Seal a charter to the Bailiff and jurats and other natives and inhabitants of the Island of Jersey. This charter contained an elaborate confirmation of all and singular the laws and customs duly and lawfully used in the Island, and also confirmed and granted to the Bailiff and jurats and all other magistrates, officers of justice, and any other persons appointed there in any office or duty full, absolute and complete authority touching all sorts of pleas, processes, law suits, actions, disputes and cases of any kind whatsoever arising in the Island as well real, personal, and mixed as criminal and capital, and there and not elsewhere to plead, proceed with, prosecute, and defend all these things and in the same matters either to

proceed or supersede, to examine, hear, end, acquit, condemn, decide and put their sentences in execution according to the laws and customs of the Island heretofore used and approved, and here follow the words " without any challenge or appeal whatosever except in cases which according to the ancient custom of the Island . . . are reserved to our royal cognisance or which by our royal right or privilege ought to be reserved ". The charter was never regarded as taking away a right of appeal to the Queen in Council in civil cases (see the *Reglement touchant Appels* of the 13th May, 1572), and there are no words purporting to take away the prerogative of the Queen in criminal cases, the reference to the cases which by " our royal right or privilege ought to be reserved " being quite wide enough to save the special prerogative with which their Lordships are concerned. Moreover there is a saving clause in the charter in these terms:—

> " Saving also all possible appeals and challenges of the said Island and of others dwelling or living there in all such cases which by the laws and customs of the Island and aforesaid places are reserved to our royal cognisance and examination or ought by our royal right or privilege to be reserved notwithstanding any sentence clause thing or matter whatever expressed and set out above in these presents to the contrary."

By a Commission issued by the Queen herself in 1590 to Tertullian Pyne, doctor of laws, and Robert Napper, authority was given to these commissioners amongst other things " to establish and confirme suche good orders and constitucions as by you with the advise and consent of the Captaine Bailiff and jurates and States of the said Isle shall be thought profitable and necessarie for the common wealthe of the said Isle, and agreeable to the ancient lawes and customes thereof ". Among the ordinances made and said to have been established by the said Pyne and Napper in the year 1591 in relation to the Isle of Jersey was Ordinance No. 4 relating to appeals. It begins with a recital in these terms:—

> " And forasmuch as My Lords of Her Majesty's Privy Council are greatly importuned from time to time about many causes in which no definitive sentence has been given which is contrary to the ancient privileges in this Island and contrary to the express orders thereupon laid down and approved by the said Lords. And also about many appeal causes well judged and wrongly appealed in. And about many sentences given in criminal cases or others in which no appeal lies or ought to be suffered—a thing which redounds to the great trouble of many good subjects of Her Majesty in this Isle."

For redress thereof it was ordered that " whosoever shall make request to my Lords of the Council in such causes wherein definitive sentence has not previously been given or in any cause above specified which ought to be ordered and adjudged by the Bailiff and jurats, shall forfeit to Her Majesty her heirs and successors ten pounds sterling ". The Ordinance clearly refers (amongst other matters) to an Order

in Council of the 13th May, 1572, limiting appeals in civil cases to causes or matters over a certain value and prohibiting appeals in any cause or matter great or small before a definitive sentence or other judgment having the force and effect of a definitive sentence. It is a reasonable conclusion that all the appeals mentioned in the recital are appeals as of right and that the clause has no reference to an appeal by special leave. Here again however there is a saving clause in wide terms which extends to " all rights, titles and royalties and pre-eminences whatsoever which Her Majesty has had or can and might or ought to have in this Isle notwithstanding those orders, letters, and constitutions hereinbefore recited or anything herein contained which might be contrary thereto ". The necessary conclusion is that the discretion of the Crown to give special leave to appeal was not taken away.

It was argued before their Lordships that the Ordinances of Pyne and Napper never became the law in Jersey. It cannot now be proved that they were ever registered in the records of the Island, or that they were ever confirmed by Order in Council. In Le Quesne's Constitutional History of Jersey (published 1856) it is even stated that there is no allusion to these ordinances in any Order in Council and that it is probable that they were never presented at the Council Board. Further research has however proved that these latter statements are not correct. At a meeting of the Privy Council on the 23rd September, 1772, a letter was read from the Lieutenant Governor of Jersey to one of the principal Secretaries of State " recommending the repeal of certain orders established in the Island of Jersey by royal commissioners in the thirty-third year of the reign of Queen Elizabeth " (the reference is to an article in the Pyne & Napper Ordinances relating to punishment for signing any petition). The matter was referred to the Lords of the Committee of Council for the affairs of Jersey and Guernsey. On the 15th June, 1773, the Lords of the Committee having obtained from the Lieutenant Bailiff and Jurats of the Island "an authenticated copy of the said ordinances", took the matter into consideration and ordered that a copy of the ordinances be transmitted to His Majesty's Attorney General who was required " to draft a proper instrument to be passed under the Great Seal of Great Britain for revoking and annulling the sixth article of the said ordinances established by the Royal Commissioners in the thirty-third year of the Reign of Queen Elizabeth."

In view of these orders and in the light of the present evidence their Lordships have felt constrained to regard the ordinances established by Pyne and Napper as having been properly confirmed by Order in Council and registered and thus having become part of the law of Jersey. They support the view already expressed that there is no appeal as of right in criminal matters, but they throw no light on the question of the prerogative right.

There are traces in various Orders in Council and other documents of causes having arisen in the Island since the Charter of Elizabeth in which the question as to whether an appeal was allowable to His Majesty in Council—sometimes at a matter of right and sometimes by special leave—has been discussed. The case of *Esnouf* v. *Esnouf et Bisson* is a good instance. By an Order in Council dated the 18th June, 1662, the question was raised in relation to an assault and battery alleged to have been committed by John Esnouf and Amice Bisson upon the person of Thomas Esnouf. The defendants had been condemned to pay a fine of two hundred crowns and had appealed, apparently as of right, to His Majesty in Council. The Order states that the question arose " whether the matter was not so criminal as that no appeal might be permitted according to the laws and customs of the Island ", and this was dealt with by ordering the Bailiff or his lieutenant and all the jurats to certify their Lordships whether, as the nature of the case and the judgment in the appeal was, an appeal was allowable to the party aggrieved and condemned by the laws and customs of the Island. No certificate from the Bailiff or his lieutenant and the jurats has been found. The Order in Council tends to support the contention that in purely criminal cases no appeal as of right was permitted according to the laws and customs of the Isle, but it does not touch the question of the prerogative of the Crown to grant special leave. A similar observation applies to the statements by jurats and others in textbooks and in answer to questions asked by the Privy Council relating to the laws and customs of the Island of Jersey.

In the year 1771 a certain Code of Laws agreed upon by the States of the Island and transmitted to His Majesty in Council for approval was duly approved. It will have to be considered later in another connection. It is sufficient to state here that it deals with appeals in civil matters and with the curious appeals called " doléances " which are described as odious " because they are particularly directed against the Judge whose honour must be maintained in the cause of Justice ". It does not however mention appeals in criminal matters.

Royal Commissioners were appointed in 1846 to enquire into the criminal laws then in force in the Channel Islands and into the constitutions and powers of the tribunals and authorities charged with the execution of such laws; and in the course of their commission they made enquiries as to the right of appeal in criminal cases. In the answers made in 1847 it was stated by various jurats that the verdict of the Grand Jury was final and that no further appeal was allowed in any questions of a purely criminal nature. Several of the persons answering the questions stated that the Court in passing sentence always reserved a right to the party convicted of applying to His Majesty for pardon. Nothing

however was said about the right of the Crown in Council to give special leave to appeal. The valuable Report of the Commissions on the criminal law of Jersey made in 1847 does not refer to the prerogative right of the Crown.

The matter had however come before His Majesty in Council a few years previously in the case of *in re Abraham Ames and others* on the petition of Her Majesty's Attorney-General for Jersey, (1841), 3 Moo. P.C.C. 409. Ames and others, masters of fishing smacks in the Island of Jersey, had been brought before the Royal Court in Jersey and sentenced to pay a fine of 300 livres and costs. There was an appeal from this sentence to the Full Court which affirmed the decision of the inferior Court. From this decision Ames on behalf of himself and others of the defendants prayed leave to appeal to Her Majesty, but the Royal Court refused to grant such appeal. Thereupon Ames and others presented a petition in the nature of a "doléance" to Her Majesty praying for leave to appeal and that all proceedings consequent upon the above sentence should be stayed in the meantime. Leave to appeal was given by Order in Council pursuant to the advice of their Lordships. In the year 1841 the Attorney-General of Jersey presented a petition to the Queen in Council complaining that the Order granting leave to appeal was obtained by surprise and praying that it might be rescinded. The Attorney-General argued that the law of the Island allowed no appeal from the Royal Court of Jersey in criminal cases, and he further argued that the Court could not entertain the matter as a "doléance" because there was no complaint against the judge. In delivering the judgment of the Board Baron Parke stated that their Lordships were of opinion that the application to dismiss the appeal must be granted and he added this:

> "We are disposed to say that we ought not to have recommended Her Majesty to have allowed the appeal; but we are not disposed to say that we have not the power so to have done, as Her Majesty is the head of justice and we are sitting here not merely as a judicial body but as Privy Councillors and the matter of the former petition was referred to us generally. But we are fully aware of the difficulties which we should entail on ourselves if we were to grant appeals in matters of criminal prosecutions and under the circumstances of this case we think that the Order of the 18th July, 1836, ought not to have been granted and must be rescinded."

Similar language was used by Lord Blackburn in delivering the judgment of the Board in the case of *Esnouf* v. *A.G. for Jersey*, (1883) 8 A.C. 304. It is reasonably clear that the opinion of the Board in both cases was that in a proper case Her Majesty would be entitled to grant special leave to appeal.

On consideration of all the various matters to which their Lordships have been referred the conclusion must be that there is no Order in Council, charter, or other instrument of authority from which it can be inferred that the

King's prerogative to allow an appeal, if so advised, has been taken away in criminal matters. The cases in which the Board ought to advise His Majesty to exercise his prerogative in a criminal case are of a rare and exceptional character, but that the prerogative still exists is in the opinion of their Lordships beyond doubt.

It is now necessary to state the nature of the case proved against the appellant at the trial. The accident took place in Weighbridge Square, St. Helier, at about 10.15 p.m. on the evening of Sunday the 19th August, 1934. The appellant was driving a 24 h.p. Buick motor-car and he had with him a friend, Mr. Durell, who was sitting beside him and was the only other occupant of the car. It was a dark night with a moon struggling through clouds. The appellant was coming southwards round the curve of Victoria Gardens within about five or six yards of the pavement. Frederick William Whiting, called later the deceased, came out from the dark area which surrounded the gardens at a slow run into the path of the headlights of the car. It was asserted by the appellant and Mr. Durell that on seeing the car the deceased seemed undecided as to running on or stopping, but that he did turn back instead of carrying on. The car then hit him and killed him practically instantaneously. There is no room for doubt as to the violence of the impact. Not only did the deceased suffer dreadful injuries, which need not be detailed, but the bar holding the number plate of the car and the headlamps had been bent inwards towards the radiator; a bulge was caused on the right-hand side of the bonnet and the top of the bonnet was crumpled. A most remarkable fact, as to which there was no dispute, was that the body of the deceased was hurled through the air by the impact of the car and was found at a distance of some 25 feet in front of the place where the car was finally pulled up. There was conflicting evidence as to the precise speed at which the car was travelling for some distance before the collision. There were skid marks on the ground behind the motor-car extending about 11 paces from the rear of the motor-car where it stopped, showing where the appellant had started to apply the brakes with vigour. The appellant who was called as a witness swore that the car was travelling at the moment of impact at ten miles an hour. His friend, Mr. Durell, who gave his evidence for the defence by deposition on oath before the trial (under an Order of the Royal Court) put the speed at the moment of impact at 25 miles per hour. A taxi-driver, named Matson, who saw the accident, swore that the car was travelling at an excessive speed. It is not in dispute that the car though subjected to the brakes for some considerable distance before the collision was yet travelling at a sufficient pace to project the body of the deceased through the air and presumably along the ground for a distance exceeding 25 feet and to kill him on the spot. Their Lordships even if they were a general Court of Appeal

hearing the case would not attempt to usurp, however remotely, the functions of the jury, and the facts above stated are mentioned only to explain the questions which arise for consideration on special leave to appeal granted in a criminal case. They are content here to observe that the undisputed evidence was sufficient to justify a conclusion by the jury that the car was being driven by the appellant with gross negligence in relation to and with entire disregard of the safety of other persons using the road, in the sense that it was being driven at night at an excessive speed and to the danger of the public in the town of St. Helier.

The case was tried as already stated before the Full Court of the Royal Court of Jersey, consisting of the Bailiff and eight jurats with a jury of twenty-four. The Bailiff is a trained lawyer and doubtless his views on questions of law are treated with great respect; but the jurats, who are appointed for life and who need not have any legal qualification, have at any rate in theory the same right of summing-up the case as the Bailiff and of expressing their own views of the law, and some of them are not only lawyers but no doubt possess considerable experience in connection with the proceedings of the Royal Court in criminal matters. In the present case the learned Bailiff (as is usual) alone summed-up the case to the jury and in so doing explained to them the law as to manslaughter. After some prefatory remarks he referred to the statement of the law by the Attorney-General which was in these terms—

> " Fortunately the law upon this subject is one which is abundantly clear, and it can be set out in a minimum of words. The law is this: ' Any person causing the death of another by gross negligence in the performance of a legal duty owed to that other, is guilty at least of manslaughter '. That is the law of the land, as clear a statement of law as any statement can be. Now, you have also to bear in mind, and I place it in the very forefront of my address to you this fact that the question of whether the victim in a case of this kind contributed to his own death or not by any negligence on his part is, so far as you as a jury are concerned, in arriving at your verdict, absolutely immaterial and beside the point . . . . The law is very clear. The charge of manslaughter cannot be maintained unless it is proved that the negligence of the prisoner is the proximate cause of the death."

The Bailiff adopted this statement and said,

> " The Attorney General has told you the law, and he has told you very plainly and correctly; he has told you that every user of the King's highway owes to every other user the duty of doing everything in his power to avoid danger or damage to the other user. You have to decide whether the accused did all a sensible man would have done to avoid danger when he saw a human being in front of him. In Civil Law contributory negligence is a defence. In Criminal Law is it no defence at all. You know that the vehicle driven by the accused killed Whiting, and he is accused by the Crown of having killed him owing to the fact that he drove at a dangerous rate and to the danger of the public and by his imprudence or lack of skill criminally killed that man. The whole case comes down to the question of speed and the precautions

taken. You have to decide whether the vehicle was taken at a suitable and proper pace over the place of the accident, under suitable and proper control, and whether all reasonable steps that a skilful and sensible driver could have taken were taken . . . ."

He concluded as follows :—

" It is for you to judge whether the accused, by his negligence or carelessness or recklessness, did not fail in the duty he owed to that pedestrian. If you think that no reasonably skilful driver could have avoided an accident under the circumstances which occurred, you will acquit the accused, but if you think that the circumstances show that there was a carelessness, a negligence, a lack of skill, call it what you will, by means of which the accused, instead of being in a position to meet and to cope with the sudden emergency was not in such a position, or that he was going at such a pace that the driver was unable to stop his car, again it is for you to say that that was wrong."

The appellant's ground for appeal is based upon the alleged defects of this summing up. It is contended that the Bailiff left the jury under the impression, amongst other things, not only that the question of the contributory negligence of the deceased was altogether immaterial, but that the appellant must be convicted unless the evidence established that he had taken all the steps that a skilful and sensible driver could have taken, and that he could only be acquitted if the jury were satisfied that the death of the deceased was due to a pure accident or misadventure, such an accident as no reasonably skilful driver could have avoided. Their Lordships are far from saying that the summing up in question is not open to criticism, and they are not to be taken as expressing any opinion as to the course which would or might be taken in a general Court of Criminal Appeal if such a summing up were before them. They observe however the Attorney-General for Jersey began by stating the law (assuming that the law of Jersey in this case is similar to that of England) in unobjectionable terms and that his statement was adopted by the Bailiff. Indeed phrases are used which are taken from an English text-book (Law of Collisions on Land, by Roberts & Gibb, 2nd ed. pp. 189 to 195). The Bailiff himself stated plainly that the appellant was accused by the Crown of having killed the man owing to the fact that he drove at a dangerous rate and to the danger of the public, and " by his imprudence or lack of skill criminally killed him ". It is doubtless unfortunate that in the latter part of his address the Bailiff left out (to use the language of Hewart L.C.J. in *Bateman's* Case cited below) " some of the adjectives which have always been used in explaining criminal negligence " to a jury, and that some sentences taken alone are consistent with the view that a hostile verdict might be given on the ground of mere carelessness, negligence or lack of skill such as would justify a verdict in a civil case. On the other hand their Lordships have noted that the Attorney-General had stated the law as being that any person causing the death of another by gross negligence in the performance of a legal duty owed

to that other, is guilty at least of manslaughter, and that the speech of the Advocate for the defence referred repeatedly and without being contradicted to the fact that there was no homicide unless the defendant had been guilty of " negligence tantamount to criminal negligence ".

Moreover there are other difficulties which interpose themselves. In the first place it is by no means clear to their Lordships that the law of Jersey on the subject of manslaughter as the result of a collision on land is precisely the same as that which exists in this country. The criminal law of the Island of Jersey is and has long been in a remarkably fluid state. Historically it should begin with the great repository of early Norman law the Grand Coûtumier of Normandy; but unfortunately this work is very defective in relation to crime, for although some chapters treat of criminal suits and others make mention of crimes and misdemeanours, the punishments are not specified in either and no corporal punishment short of death or loss of limb is anywhere mentioned. There appear to be no Orders of His Majesty in Council or ordinances of the States sanctioned by royal authority which throw light upon the general question of crime, except in the cases of some particular crimes which their Lordships are not here concerned with. In the year 1689 the Attorney-General for the Island made a report to the King's Privy Council in which he stated that according to the laws of the Island there was no distinction made betwixt wilful murder, manslaughter, and " chance medley ". This report was approved by His Majesty in Council and (after discharging a certain prisoner from his imprisonment) His Majesty was pleased to order that if for the future it should appear by good evidence to the Royal Court in Jersey upon the trials of any persons for murder, manslaughter, and chance medley, that there was no premeditated malice, and that the parties were fit objects of mercy, the judges of the said Court should upon such occasions suspend all further proceedings against the criminal until His Majesty was made acquainted with the state of their respective cases and His Royal pleasure should be signified thereupon, and the Bailiff and jurats of the Island of Jersey and all others concerned were to take notice and to cause the order to be registered in the Royal Court of the Island. It may be mentioned here that Orders in Council are registered by the Royal Court and are not binding as law until such registration has taken place.

Apart from the Code of Laws of 1771 to which reference must again be made, there seems to be nothing in the nature of a written law of Jersey dealing with crimes. By the Order of the 28th March, 1771, approving the Code it was declared that " all other political and written laws heretofore made in the said Island and not included in the said Code and not having had the Royal Assent and confirmation shall be from henceforward of no force and validity."

Some doubt has been expressed as to the meaning to be attached to these words, but to their Lordships it seems clear that the clause is dealing only with written laws and is not in any way affecting customary laws. The Code contains, however, only one criminal enactment, that is a provision as to persons who are accessories of criminals and to prison breakers and persons aiding them. It appears from the first (Jersey) report of the Royal Commissioners appointed in 1846 (above referred to) for enquiring into the criminal laws of the Channel Islands, that there was not in any Act, Order in Council, or even in any work of authority published in Jersey, any specific definition of crimes or their punishments. So far indeed as specific enactment is concerned the law in reference to manslaughter would seem to be in the same state as it was in the year 1689. In fact, however, there has been a long established practice in Jersey which has apparently permitted the Royal Court to introduce alterations in regard to the criminal law and its punishment and particularly in the direction of mitigating the severity of the ancient Norman practice. The law of Jersey was indeed during the 18th century considerably more humane than that of England. For example, whilst hanging was the necessary punishment for sheep stealing in England, in Jersey the delinquent was only " exposed to be whipt ", and whilst simple theft was a capital crime in England, in Jersey the criminal forfeited his life only on conviction of a third offence. In modern times, however, it has been usual to refer to English legal works and precedents as authorities, and the Royal Court has in many cases regarded the English law as a guide in laying down the modern law of Jersey. According to the Commissioners who made the report of 1847, this *de facto* alteration of the criminal law is due to two circumstances. In the first place the Royal Court until the Order in Council of 1771 possessed the power of legislation, and while that legislative power existed it is easily to be understood that the members of the Court would not regard themselves as bound to adhere to the previous law in a particular case; more particularly when the ancient law was of an exceedingly harsh character and had ceased to accord with the general feelings of the inhabitants of the Island. This laxity in the application of the existing law seems to have continued after the Royal Court had ceased to possess its power of legislation. On the other hand the peculiar and the popular nature of the ancient tribunal called the Royal Court has contributed to the system of treating the law as not being of a rigid character. The jurats are chosen by a system of election by a widely extended suffrage, the persons selected having seldom received any legal education. They are tempted to act upon their individual notions of justice. Criminal law in Jersey thus rests almost entirely on the modern practice of the Royal Court and this tends more and more to imitate English models. It may not be improper to add that a

similar practice has been adopted in a number of British Dominions, including those where English law does not prevail, without in many cases any statutory authority for such a course.

There are thus difficulties in laying down for Jersey the same strict rules as to a summing up to a jury which have been formulated in this country in their definite form since the institution of a Court of Criminal Appeal. There are in the Full Court not less than eight judges in all, the Bailiff or his deputy and not less than seven jurats, all of whom have an equal right to address the jury; and the fact that that right might be exercised by several of them in terms which might be by no means identical, makes the criticism of the observations of the Bailiff and jurats a matter of some delicacy. The peculiar and special constitution of the Royal Court and the curiously fluid state of the criminal law afford reasons for hesitating to interfere with a verdict on the ground of a summing up alleged to be objectionable. It may be useful to repeat that the Board has always treated applications for leave to appeal and the hearing of criminal appeals so admitted as being upon the same footing. As Lord Sumner, giving the judgment of the Board in *Ibrahim* v. *Rex* [1914] A.C. 599 at p. 615 remarked:

> "The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it."

He added, what is material in the present case:

> "Misdirection as such, even irregularity as such, will not suffice (*ex parte Macrea* [1893] A.C. 346). There must be something which in the particular case deprives the case of the substance of fair trial and the protection of the law, or which in general tends to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future. (*Regina* v. *Bertrand* L.R. 1 P.C. 520.)

It is unnecessary to repeat the well-known observations of Lord Watson in relation to a review of criminal proceedings before the Privy Council in the case of *in re Dillet* 12 A.C. 459. The appellant relied upon some observations in the judgment of the Board in the case of *B. R. Lawrence* v. *The King* [1933] A.C. 699, at page 707, as involving that the omission of the judge to direct the jury as to the onus of proof and to tell them that the accused is entitled to the benefit of any reasonable doubt is, of itself, such a miscarriage of justice as will lead this Board to set aside the conviction. But the passage relied on clearly does not lay down any such narrow doctrine. It recognises that the question is whether the jury had present to their minds the governing principle of our law as to onus of proof, and that the jury may have this present in their minds otherwise than by any direction of the judge. The particular circumstances of that case, the various groups of charges and the

way in which they were dealt with in the course of the trial, the form of the directions by the judge and the form of the verdict, made it reasonably certain that the jury did not have the principle as to onus of proof clearly before their minds, and it was held by the Board that the appellant had sufficiently established the miscarriage of justice. The decision is not to be regarded as modifying the burden laid on an appellant before this Board by the ruling in *Dillet's* case. In the case of misdirection, as in any other case of an alleged failure in the proper trial of a criminal case, the Board give advice to His Majesty to intervene only if there is shown to be such a violation of the principles of justice that grave and substantial injustice has been done. The Board has repeatedly declined to act as a general Court of Appeal; and even if English law were shown to be applicable in all its details a failure to state the law in the summing up to the jury in the terms carefully considered and expounded in *Bateman's* Case (19 Cr. App. R. 8 at p. 13) or to insist more clearly on the onus of proof lying upon the prosecution would not in the opinion of their Lordships necessarily establish that there had been a serious miscarriage of justice. Apart from the circumstance that a summing up in the dominions or abroad is often imperfectly reported (if it is reported at all), admissions by the prosecuting counsel or other incidents in the course of the trial may well have sufficiently brought home to the minds of a jury some factor in the case or some principle such as that of the onus of proof which might appear to have been omitted from the summing up of the judge.

On a careful review of the facts in the present case, their Lordships are unable to come to the conclusion that there has been here a violation of legal principles resulting in grave and substantial injustice and they must accordingly humbly advise His Majesty that the appeal be dismissed.

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In the Privy Council.

DENNIS ROMAIN RENOUF

v.

THE ATTORNEY-GENERAL FOR JERSEY

DELIVERED BY LORD MAUGHAM.

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