

words "near a street" are no doubt large, but not larger than the words "in any street or place" in the Act of Parliament interpreted in *Case v. Storey*<sup>(1)</sup>, where "place" was taken to mean only a place *ejusdem generis* with a street. The words "near a street" can be construed as meaning open spaces by the sides or at the ends of streets, and thus a plain and sufficient meaning can be given to the section we have to interpret, without the Court resorting to the supposition that while knowing that the older law had been held not to include houses, the Legislature meant to include them here by inference from the word "near." The only possible view is that, if it had meant to interfere to such an enormous extent, it would have used the word house. We reverse the conviction and sentence for the above reasons.

*Conviction and sentence reversed.*

(1) L. R., 4 Ex., 319.

## APPELLATE CRIMINAL.

*Before Mr. Justice Jardine and Mr. Justice Ránade.*

QUEEN-EMPRESS v. REGO MONTOPOULO.\*

*Zanzibár—Jurisdiction—Local allegiance—English Consular Court—Greek residents at Zanzibár—Jurisdiction of the British Consular Court at Zanzibár over foreign subjects enjoying British protection—Order in Council dated 29th November, 1884, Sec. 6.*

The Greek residents at Zanzibár having been by international action placed under British protection are liable to the British criminal law in force at Zanzibár.

The accused, who was a Greek under British protection at Zanzibár, was convicted by the British Consular Court at Zanzibár of culpable homicide not amounting to murder and sentenced to ten years' rigorous imprisonment under section 304 of the Indian Penal Code (Act XLV of 1860). He appealed to the High Court of Bombay, contending (*inter alia*) that he was a Greek subject, and as such not liable to be tried by the Consular Court.

*Held* that it was competent to Her Majesty to exercise jurisdiction in one foreign State over the subjects of another foreign State; that under section 6, clause (b) of Her Majesty's Order in Council dated 29th November, 1884<sup>(1)</sup>, the provisions referring to British subjects were applicable to foreigners enjoying British protection in so far as by treaty, capitulation, grant, usage, sufferance, or other lawful means, Her Majesty had jurisdiction at Zanzibár in relation to such persons; and that the prisoner, being a British protected person within the meaning of section 4, clause (b), of the Order, was amenable to the jurisdiction of the Consular Court.

\*Criminal Appeal, No. 1 of 1895.

(1) See *Bom. Govt. Gazette* for 1885, p. 533.

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THE accused was a Greek under British protection at Zanzibár. He was tried in the Consular Court at Zanzibár on a charge of murder. He was found guilty of culpable homicide not amounting to murder, and sentenced under section 304 of the Indian Penal Code (Act XLV of 1860) to ten years' rigorous imprisonment.

Against this conviction and sentence the accused appealed to the High Court. He contended (*inter alia*) that he was a Greek subject and as such not amenable to the jurisdiction of the Consular Court at Zanzibár.

*Mánekskháh Jehángirsháh* for the accused:—The British Consular Court has no jurisdiction over a Greek subject residing at Zanzibár. There is no evidence to show that the Greek Government made over its own jurisdiction to the British Government. It is doubtful if the Greek Government could do so without renouncing the allegiance of the subject. But supposing it could, such a transfer of jurisdiction must be distinctly proved, and cannot be spelt out of vague diplomatic correspondence, as is attempted by the committing Magistrate. As regards the merits of the case, the Consular Judge has misdirected the jury in material particulars. He told the jury that self-defence was out of the question. This was a question of fact to be left to the jury.

There was no appearance for the Crown.

JARDINE, J.:—The prisoner was tried in the Consular Court at Zanzibár. The jury returned a verdict finding him guilty of culpable homicide not amounting to murder, whereon the Consular Judge, Mr. De Sausmarez, sentenced him, under section 304 of the Indian Penal Code, to ten years' rigorous imprisonment. His appeal here has been fully argued by Mr. Máneksháh.

Mr. Máneksháh contended that the heads of the charge to the jury showed that the Judge did not merely content himself with an expression of opinion, but used such positive language, *e.g.*, where he describes the defence of self-defence as "impossible," as was calculated to leave the jury no loophole for coming to an opinion of their own as the judges of all matters of fact.

The Code of Criminal Procedure (Act X of 1882) in sections 298 and 299 very plainly distinguishes the duties of the Judge and the

jury: and section 297 shows clearly how the Judge is to charge them, namely, by summing up the evidence for the prosecution and defence and laying down the law. The offence of murder being one of the most serious with which a prisoner can be charged, it was highly important that the Judge should discuss the evidence fully; and it does not appear that anything more was said to the jury than is contained in the record of the heads of charge, or that this was supplemented by reading the depositions of the most important witnesses, "a practice universally adopted by English Judges in serious cases, and which precludes the possibility of the jury coming to a decision without having all the facts fresh in their memory." *Per Sargent, J., in Reg. v. Fatchand*<sup>(1)</sup>.

We are of opinion that the Judge, while giving, as he certainly may, his opinion on questions of fact, might well have dealt more fully with the evidence, the material on which the jury had to deliver their verdict. But we do not think the prisoner has been prejudiced. He was defended by a pleader who was entitled, under section 290, to sum up his case after it closed on the third or fourth day of the trial. The record does not show whether he used this opportunity. Moreover, it appears that the jury as judges of the facts rejected the conclusions expressed by the Judge and found the prisoner guilty of culpable homicide only, not murder.

It has been several times ruled by this Court that as section 304 of the Penal Code (Act XLV of 1860) deals with two kinds of culpable homicide, the jury ought to be asked to say under which part they find him guilty. We point this out to the Court below for future guidance. The sentence passed is a legal one under both parts of section 304; and the learned pleader for the appellant has not argued that on the evidence the jury might have held that there was no intention to cause death, and that on such a formal verdict, bringing the case under the second part of section 304, the learned Judge might have refrained from passing the maximum sentence. The pleader here has not dealt with this particular defect in the charge. He has, however, urged that this Court should reduce the sentence as excessive, giving further weight to the provoca-

<sup>(1)</sup> 5 Bom. H. C. Rep., 85 at p. 95 Cr. Cas.

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tion, which was probably the reason why the jury declined to convict of murder. This Court is of opinion that no sufficient reason appears for judicial interference with the sentence on the merits. It is open to the prisoner to petition the Crown.

We have next to deal with the objection taken in the Consular Court to its exercising jurisdiction over the prisoner and faintly urged by Mr. Máneksháh in the appeal. He admits that the prisoner is a Greek under British protection at Zanzibár. It is clear from a letter of the 14th June, 1892, from our Consul-General at Zanzibár to the Consul of France there, that the protection of the Greeks was assumed by the Consul-General with the knowledge of the Sultán of Zanzibár. The record also contains the views of Mr. Berkeley, the Consular Officer who committed the prisoner for trial. It appears therefrom that the Greek Government was a party to this placing of the Greeks under British protection.

The question raised below was whether, under the circumstances of this international action, a Greek coming under the British protection became also liable to the British criminal law in force in Zanzibár. This law is to be ascertained from Her Majesty's Orders in Council, the chief being that of 1884 passed under the Foreign Jurisdiction Acts, 1843 to 1878. It applies several Acts of the Government of India, among them being the Indian Penal Code, the Codes of Civil and Criminal Procedure, and the Indian Evidence Act. It creates a Consular Court with the Consul-General as Sessions Judge under the High Court of Bombay. Later Orders in Council have modified some of the judicial arrangements, but it is only necessary to refer to the Jurisdiction Order of 1893, which makes Chapter 33 of the Criminal Procedure Code inapplicable to Zanzibár.

A substantive law of crimes, a procedure and a forum being thus created, we have next to see what persons are made subject thereto. Section 6, clause (b), applies such provisions of the Order as refer to British subjects to British-protected persons, in so far as by treaty, capitulation, grant, usage, sufferance or other lawful means Her Majesty has jurisdiction in Zanzibár in relation to such persons. Mr. Máneksháh concedes, and it does not seem

open to doubt, that the prisoner comes within the definition in section 4, clause 6, of British-protected person, which means "a person enjoying Her Majesty's protection in Zanzibár."

The question of the Consular Court's jurisdiction over him thus becomes narrowed to the issue whether the lawful effect of the protection arrangements made in 1892 at the transfer, taken along with the treaties made with His Highness the Sultán of Zanzibár, as section 8 requires, was to place the prisoner under the criminal laws and jurisdiction specified in Her Majesty's Order in Council, like the subjects of Indian Princes and States, or the persons brought under by the Order of 1893, natives of any protectorate of Her Majesty outside Zanzibár when within Zanzibár, and certain Zanzibár subjects. As regards these last, see article 17 of the Treaty signed on the 30th April, 1886, and the declaration between Great Britain and Zanzibár of the 16th December, 1892, (cited at p. 211 of a Treatise on Foreign Jurisdiction by W. E. Hall). In article 16 of the Treaty occurs the following provision:—"The authorities of His Highness the Sultán have no right to interfere in disputes between subjects of Her Britannic Majesty amongst themselves, or between them and members of other Christian nations; such questions, whether of a civil or criminal nature, shall be decided by the competent Consular authorities." This makes it clear that the jurisdiction over the prisoner's act is not with the Sultán's Government; and there is nothing on the record to show any claim by that Government, although the First Minister of the Sultán appeared as a witness to the facts; and the record shows that in the Court of Mr. Berkeley, where objection was first taken to the jurisdiction, there was an appearance for the Government of Zanzibár. The case has been argued on the understanding that the Government of Greece has no Consul at Zanzibár. There is no suggestion of any arrangement empowering the British Consul-General to deport the prisoner to Greece for trial. It would appear, therefore, that, unless the Consular Courts assumed jurisdiction in such a case, the foreigner under the British protection might slay British subjects with impunity. We have no information whether the Courts in Greece would punish the offence. Forsyth in his Constitutional Law, p. 233, cites Wheaton and Dana for the

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statement that as a general rule a State will not try its own subjects for offences committed abroad against foreigners.

The record contains a declaration by Her Majesty's Diplomatic Agent and Consul-General, that the two Courts below over-ruled the objection to the jurisdiction after reference to him and with his full approval and authority. The reasons are to be gathered from the minute recorded by Mr. Berkeley; that officer considers that "British Consul protection in Zanzibar connotes British jurisdiction." As a principle this seems in accord or analogy with that on which local allegiance is based by Coke in Calvin's Case <sup>(1)</sup>. "Concerning the local obedience it is observable that as there is a local protection on the King's part, so there is a local ligeance of the subject's part," as when a Frenchman comes into England. The principle seems also in accord with that on which Lord Stowell decided *The Indian Chief* <sup>(2)</sup>, where other cases of older time were mentioned. "In the East," he said, "from the oldest times an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and foreigners as all their fathers were. *Doris amara suam non intermiscuit undam*: not acquiring any national character under the general sovereignty of the country and not trading under any recognized authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade."

In considering what power and jurisdiction is conceded to Great Britain within the territories of a foreign State, it must be borne in mind, as pointed out in Forsyth's Constitutional Law, 13, 231, that the Judicial Committee of the Privy Council, when their Lordships referred with approval to Lord Stowell's judgment, have noticed that in transactions, whether political or mercantile, a difference subsists between Oriental and Christian States. In *Papayanni v. Russian Steam Navigation and Trading Co., The Laconia* <sup>(3)</sup>, it was held that any mode of proof by which it was shown that a privilege is conceded, would be sufficient for

(1) 7 Coke's Rep., 6 a.

(2) 3 Chr. Rob. Adm. Rep., 29.

(3) 2 Moo. P. C., N. S., 161; 33 L. J. Adm. Cas., 11.

the purpose. The consent may be expressed in various ways: by constant usage permitted and acquiesced in by the authorities of the State; active assent or silent acquiescence where there is full knowledge. Thus the Ottoman Government had acquiesced in allowing to the British Government within the Ottoman dominions jurisdiction between British subjects and the subjects of other Christian States. This case shows beyond all doubt that it is competent for Her Majesty to exercise jurisdiction in one foreign State over the subject of another foreign State. One peculiarity of that case was, however, that the part of the Order then interpreted was a proviso similar to that in section 33 of the Zanzibár Order in Council of 1884, restraining the Consular Court from assuming that jurisdiction where the consent of the territorial Sovereign or of the Consul of the state to which the foreigner belonged had not been obtained. No such restriction appears in the Zanzibár orders in Council as regards criminal matters.

There remain to be considered the objections taken for the prisoner by Mr. Lascari in Mr. Berkeley's Court, and apparently also in the Consular Court at the trial. He urged that it was the duty of the Consul-General to forward the prisoner for trial to Athens, as it would have been the duty of the French Consul before 1892. But Mr. Berkeley points out that the deportation could not be made in the absence of any arrangements for extradition. No convention about deportation has been suggested to us, nor has it been argued that the law of Greece extends to a homicidal offence at Zanzibár. Mr. Berkeley makes mention of the only stipulation made by the Greek Government in the arrangement of 1892, *viz.*, that Greek subjects should not be submitted to any measure not equally applicable to the subjects of other European powers established in the island and who have no treaty with the Sultán. Mr. Berkeley says that the subjects of non-treaty nations would necessarily fall under the territorial jurisdiction of the Sultán, a result avoided only by their coming under the protection of a treaty power. On this, however, we would remark that the Sultán had, by article 16 of the Treaty, ceded the jurisdiction over cases like the present to the different Consular authorities. The Government of Greece cannot in the

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year 1892 be presumed ignorant of our treaty of 1886 or of our Consular order of 1884, and its provision about British protected persons. It would be mere surmise to suppose, in the complete absence of any stipulation or any arrangement to that effect, that it intended that in a case like the present the prisoner should be sent to Athens. The presumption that the Court below has acted rightly, is not to be weakened by mere suggestion or surmise. The Act of Parliament, the Foreign Jurisdiction Act, 1890, 53 and 54 Vict., c. 37, provides a means of obtaining a conclusive determination of questions of jurisdiction. On the application of the Court in the manner provided, a Secretary of State shall within a reasonable time send it his decision. This Court has not been moved to use this means; and as it is of high importance that the decision of questions of criminal law should not be delayed, and as we see no sufficient reason to doubt that the Court below had jurisdiction, we do not avail ourselves of the procedure. Mr. Máneksháh was instructed that the Greek community at Zanzibár intended to bring the subject to the notice of the King of the Hellenes. If His Majesty's Government consider that the jurisdiction lay with the Courts of Greece, that view will probably be stated to Her Majesty's Government by the usual diplomatic means, and if Her Majesty's Government are of opinion that the result of past international arrangement is different to what this Court takes to have been the case, it will be able to give appropriate directions. The Court now rejects the appeal of the prisoner.

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