1901.
*July 10 and 15 and December 2.*

## KING *v.* KOLONDA.

*D. C., Kurunegala, 2,652.*

*Attorney-General—Indictment presented by him to District Court—Duty of District Courts in regard to such indictments—Culpable homicide—Grievous hurt—Intention of accused.*

LAWRIE, A.C.J.—Under the Courts Ordinance and the Criminal Procedure Code, it is the duty of the Attorney-General to decide on what charges and in what Court an accused shall be tried. If he errs, it is an error which a District Judge cannot correct. It is his duty to hear all the available evidence and give his verdict of conviction or acquittal according to law. He cannot acquit the accused without hearing the evidence for the prosecution.

A man who causes the death of another is not necessarily guilty of culpable homicide. It may be that, though he intended only to cause hurt, such hurt may, from causes beyond his control or knowledge, become grievous and mortal.

The extent of his guilt must be determined by his intention when he struck the blow, and not by its subsequent and possibly unforeseen effects.

MONCREIFF, J.—In order to make out a charge of culpable homicide [against a man who caused hurt to a person suffering from a diseased spleen which was ruptured by such assault], it is necessary to prove that the accused knew that the deceased's spleen was diseased.

A verdict of guilty of grievous hurt is receivable, although there is a charge of culpable homicide against the accused, and a District Judge should not acquit him of grievous hurt because in his opinion the charge should have been one of culpable homicide.

BONSER, C.J.—Many serious offences include a number of minor offences. If a person guilty of murder were indicted in the District Court for grievous hurt, it is the duty of that Court to try that charge and give his verdict, notwithstanding he was of opinion that the facts in the case made out a charge of wilful murder which he had no jurisdiction to try.

If such a case came before a Court competent to try a charge of murder, it would be the duty of the Court to amend the indictment in accordance with the facts proved. But the District Judge, having no power to amend the indictment, must find the man guilty or not guilty of the offence laid in the indictment.

TEN men were indicted in this case for voluntarily causing grievous hurt to one Herathamy on the 24th January, 1901. On the trial day, Ran Menika gave evidence of the assault on her husband Herathamy as follows: "They seized him by the hands "and by the hair. They beat him and knocked him. My husband "seemed lifeless. It was near dawn. The accused then dragged "him from his room over the stile to the other side of the fence. "Shortly afterwards morning dawned. A little later I went and "found my husband lying dead on the cart road."

Without hearing further evidence, the District Judge (Mr. J. D. Mason) called upon the counsel for the prosecution "to justify

1901.
*July 10 and 15 and December 2.*

"the indictment for causing grievous hurt. The hurt caused was " not grievous but mortal, and therefore the case falls under section " 293, explanation 1. The accused were guilty of causing death to " Herathamy."

The medical officer's evidence given before the Police Magistrate was referred to by the District Judge, which was to the effect that the deceased had no external wounds, and that the slight injuries which appeared externally were not sufficient to cause death in the case of a healthy man. There was a contusion on the left side which might have been caused by a kick. It was directly over the spleen, which was very much enlarged, and covered the whole of the left side. It was ruptured, and the man died of hæmorrhage. It was most probable that the blow which caused the contusion on the left side ruptured the spleen.

After hearing counsel the District Judge acquitted the accused, on the ground that the accused should not have been indicted for grievous hurt under section 316, but under section 293, which explains that a person who cause bodily injury to another who is labouring under disorder, disease, &c., and thereby accelerates the death of that other, shall be deemed to have caused his death.

The Attorney-General appeared before the Supreme Court on 10th July, 1901, and moved to revise the order of acquittal made by the District Judge.

*Layard, A. G.*—The offence cannot be regarded as culpable homicide. The man who kicked the deceased is not proved to have known that the deceased had an enlarged spleen, or that he was kicking over the region of the spleen, or that his kick was likely to cause his death. The indictment therefore charged him with the lesser offence of grievous hurt. The District Judge ought to have proceeded with the case and heard all the available evidence instead of abruptly acquitting the accused. He admitted the indictment, and it was not open to him to question it. *Hami v. Appuhamy, 3 N. L. R. 101.* The Attorney-General had directed the Police Magistrate to commit the accused on a charge of grievous hurt, and the District Judge had no power to inquire into the validity of the indictment. It was held by Burnside, C.J., in *Queen v. Kolandavel,* that where the indictment is good on the face of it, the District Judge had no power to inquire into the validity of the commitment (*1 S. C. R. 198*). And in *Queen v. Martino Perera,* it was held that a District Court is bound to try and determine a case where the accused has been duly committed on charges triable by it, notwithstanding that the evidence disclosed also a higher offence beyond its jurisdiction (*3 N. L. R. 43*). In India cases of death from injury to diseased spleen have been

1901. *July 10 and 15 and December 2.*

treated as simple hurt (*Empress v. Randhir Singh, I. L. R. Allahabad 3, p. 597; Empress v. Fox, 2 ibid., p. 253*). If the Court believes it has no jurisdiction, its duty was to discharge the accused, but not to acquit him.

*Cur. adv. vult.*

15th July, 1901. LAWRIE, A.C.J.—

I am of the opinion that the acquittal of the accused was premature, pronounced before the Court had heard all the evidence, especially the evidence of the doctor; I am also of the opinion that the reasons given do not warrant the acquittal.

A man who by his act causes the death of another is not necessarily guilty of culpable homicide. His intention is an important part of the issue to be tried. It may be that, though he intended only to hurt, the hurt from causes beyond his knowledge and control, became grievous, and from grievous became mortal. His guilt must be measured by his intention when he struck, rather than by the after, and possibly unforeseen effects of the blow. No doubt every man is presumed to intend to do what he actually did, and on him who by his violence causes death lies the heavy presumption that he intended to kill, but it is a presumption which can be rebutted. Here the Attorney-General, exercising the responsible duties of his office, decided that these accused intended to do no more than cause grievous hurt; I think that the District Judge would have done well to try that charge, and to have convicted or acquitted them.

In sending this case back for new trial on the indictment, I do not venture to anticipate, or to interfere with, the verdict which the judge will in the end pronounce. In this, as in all cases, he is bound to acquit if the evidence does not support the charge; he is bound to convict if the evidence be sufficient.

In my opinion, under the Courts Ordinance and the Criminal Procedure Code, District Judges must rely on the Attorney-General. On him is laid the burden of deciding on what charges and in what Court an accused shall be tried. If he errs, it is an error which the District Judge is powerless to correct.

District Courts do well to try patiently and carefully all the cases brought before them, on indictments duly signed and presented. In this case I do not know whether the accused should have been put on his trial before a jury for murder or culpable homicide not amounting to murder. I presume that the Attorney-General did right in deciding that a charge of grievous hurt was all that could be laid against him.

The District Judge will renew the trial, and will give his verdict of acquittal or conviction according to law.

1901.
*July 10 and 15 and December 2.*

MONCREIFF, P.J.—

I think the judge was mistaken. It may be his duty to desist from trying a case which plainly appears to be beyond his jurisdiction; but in such a case it may not be necessary for him to acquit the accused.

A verdict of guilty of grievous hurt is receivable, although the accused is charged with culpable homicide; it was therefore quite unnecessary for the judge to acquit the accused of grievous hurt, because in his opinion the charge should have been one of culpable homicide.

The judge was also somewhat hasty in assuming that the evidence pointed to the offence of culpable homicide. The deceased died of a ruptured spleen which was diseased. In order to make out a charge of murder it is necessary that the accused must have known that the spleen was diseased. A charge of culpable homicide involves proof of guilty intention or knowledge. If the judge had trusted, as he might have to the discretion of the Attorney-General, and waited until he heard the evidence, he might have learned that there was no evidence showing that the accused knew that the deceased's spleen was diseased; and that there was evidence showing that but for the disease the spleen would not have been ruptured. He might have found that there was no proof of that intention or knowledge which is essential to support a charge of culpable homicide. I agree that the judgment of acquittal should be set aside, and that the accused should be retried upon the charge preferred against them.

---

On the case being remitted to the Court below, the District Judge heard the case with assessors, and at the conclusion of the trial he recorded that the Assessors Seneviratne and Perera believed the evidence against the third, fourth, fifth, and ninth accused, and that Mr. Assessor Siegertsz believed the evidence against these five men, and also that the second, sixth, seventh, and eighth accused aided and abetted the offence. He himself was of opinion that the evidence adduced did not prove that the accused were guilty of voluntarily causing grievous hurt, but that they should be tried for culpable homicide. "Having come to this conclusion," he said, "I follow the procedure indicated "by Mr. Justice Moncreiff, and I decline to proceed further on the "ground of want of jurisdiction."

The Attorney-General appealed. The case came on for argument on 2nd December, 1901.

1901. *July 10 and 15 and December 2.*

*Walter Pereira*, *Acting S.-G.*, for appellant.—The District Judge is wrong in holding that a hurt is not grievous because it is mortal. If death results directly from hurt, it shows that it endangered life, and is therefore grievous according to the Code. The circumstances of this case as proved do not amount to culpable homicide. As the charge appearing in the indictment was one which the District Court had jurisdiction to try, and which this Court by its order of 20th April last directed it to try, he was bound at the conclusion of the trial to acquit the accused or to convict them. The case should be remitted to him for an order of conviction or acquittal under his hand, if not for a new trial.

2nd December, 1901. BONSER, C.J.—

This is an appeal of a curious nature. It is not an appeal against a conviction or against an acquittal, but it is an appeal by the Attorney-General against an order of the District Judge, who, in trying the case, after hearing evidence, declined to proceed further with the trial on the ground that he had no jurisdiction. The trial cannot be resumed and concluded, because I am told the District Judge has been removed to another Court, and the only order that can be made by this Court is, that the case be sent back to the District Court for a new trial. Strictly speaking, it is not necessary to add anything to this order, because it is obvious that a trial once begun must be concluded in the ordinary way, either by a verdict of acquittal or by a verdict of conviction, or, if a previous conviction or acquittal is pleaded, by a finding on such issue. But I think it is desirable that I should say a few words as to the reason of the District Judge for not proceeding with the trial. It appears that in the course of an assault committed by the respondent and other persons upon a man called Herathami, Herathami received such injuries that he died shortly afterwards. There is evidence that he received a kick from the prisoner on the left side, and the medical evidence showed that there was the mark of a kick, and that under the bruise the spleen was ruptured, and that a ruptured spleen was the cause of the man's death. The spleen also, according to medical evidence, was diseased. It appears, moreover, that there was no evidence that the prisoner, when he gave the kick, knew that the spleen of the deceased was diseased. The Attorney-General, in his discretion, framed an indictment charging the accused with grievous hurt—a charge within the jurisdiction of a District Court. The District Judge, after hearing evidence, said, that, as a matter of law, the offence amounted to culpable homicide, and that, inasmuch as he had no power to try,

1901.
*July 10, 15 and December 2.*

BONSER, C.J.

a case of culpable homicide, he could not proceed with the trial. Now, in this, I think he was wrong. Most serious offences include a number of minor offences. Take a case of deliberate murder by stabbing. When the murderer raises his knife against his victim, he is guilty of assault; when the knife reaches the body of the victim, the offences of criminal force and of voluntarily causing hurt are at once committed. As soon as the knife penetrates further and inflicts an injury endangering life, the offence of grievous hurt is committed, and as soon as the man dies the offence of murder is completed; and so it does not follow, as the District Judge seemed to think, that the greater offence excludes the minor. On the contrary, the greater offence includes the minor. If a man guilty of murder were indicted in the District Court for grievous hurt, it seems to me that it would be the duty of the judge to try the charge of grievous hurt, and, if he found the facts amounted to grievous hurt, to give his verdict accordingly, notwithstanding he was of opinion that the facts in the case made out a charge of wilful murder, which he had no jurisdiction to try. If such a case came before a Court competent to try a charge of murder it would be the duty of the Court to amend the indictment so as to make it apply to a case of culpable homicide, which he thought was the offence of which the accused was guilty. That being so, it was his duty to proceed with the trial, and, according to the evidence, to find the man guilty or not guilty of the offence laid in the indictment. It would seem that the verdict of the District Judge on this charge would not be an answer to an indictment in the Supreme Court for culpable homicide not amounting to murder (see section 330, sub-section 4, of the Criminal Procedure Code). The order will be that the record be remitted to the District Court of Kurunegala that the respondent may be tried on the charge preferred against him by the Attorney-General.