[COURT OF CRIMINAL APPEAL]

1946 *Present:* **Soertsz A.C.J. (President), Wijeyewardene and Canekeratne JJ.**

THE KING *v.* A. C. APPUHAMY.

Appeal 62 of 1946, with application 183.

S. C. 10—M. C. Gampaha, 28,216.

Misdirection—Alternative verdict possible—Duty of Court to give directions regarding it to the Jury.

Where the accused was convicted of the offence of attempt to commit culpable homicide not amounting to murder and the Jury might have found on the evidence that he was guilty of voluntarily causing hurt—

Held, that the Judge should have submitted to the Jury for their consideration the alternative of finding the accused guilty of voluntarily causing hurt and that his omission to do so amounted to misdirection.

APPEAL against a conviction in a trial before the Supreme Court.

F. A. Hayley, K.C. (with him *Ian de Zoysa*), for the appellant.

M. M. Kumarakulasingham, for the Attorney-General.

December 6, 1946. SOERTSZ A.C.J.—

At the conclusion of the argument in this case, we set aside the conviction of the appellant of the offence of attempt to commit culpable homicide not amounting to murder and we substituted a conviction under section 315 of the Penal Code and sentenced the appellant to a term of one year's rigorous imprisonment.

We now give our reasons for that order. The main submissions made to us by Counsel for the appellant were—(*a*) that serious contradictions and discrepancies between the versions of the transaction that resulted in the injury to the injured woman were not adequately presented by the Judge to the Jury in his charge to them; (*b*) that the defence which was an alibi was prejudiced by the Judge forming an erroneous view of an entry in the diary of the Korale which supported the defence; (*c*) that there was misdirection in that the Judge did not direct the Jury to consider, alternatively, a conviction under section 315 of the Penal Code.

In regard to the first point we are satisfied that, on the whole, the Jury were sufficiently directed in that respect. We have carefully examined the question arising on the second submission and we would say that, for our part, we do not think that there was an alteration in the diary from 8 P.M. to 3 P.M. The two letters affixed to the numeral indicate clearly that the original numeral could not have been 8, and if it had not been 8, it could not have been anything but 3. We find, however, that although the Judge put his view to the Jury as being that there had been an erasure, he told them that it was for them to come to a conclusion on that point and that they were, perhaps, in a better position in that

respect. The view we ourselves are inclined to take is that the entry in the diary is highly suspicious quite apart from the question of erasure or no erasure and the Jury were, probably, of the same opinion. There are strong indications that this entry was fabricated to support the appellant's alibi.

In regard to the third point, we agree that, in the peculiar circumstances of this case, the occasion arose for the learned Judge to submit to the Jury for their consideration the alternative of finding the appellant guilty of an offence under section 315 and that his omission to do so amounted to misdirection. It is on this ground that we made the order we did.

Conviction and sentence altered.