1940 *Present :* **Howard C.J.**

POLICE SERGEANT KULATUNGA *v.* MUDALIHAMY *et al.*

477—484—M. C. Gampola, 19,271.

Unlawful assembly—Elements of charge—Police Sergeant a material witness—Impropriety of acting as prosecutor—Penal Code, s. 140.

In a charge of unlawful assembly under section 140 of the Penal Code it must be established that each accused knew the common object of the assembly and that he was a member of the assembly which he intentionally joined.

It is improper for a Police Sergeant, who is a material witness for the prosecution to conduct the prosecution.

APPEAL from a conviction by the Magistrate of Gampola.

L. A. Rajapakse (with him *Percy de Silva*), for the accused, appellants.

S. J. C. Schokman, Crown Counsel, for the complainant, respondent.

Cur. adv. vult.

September 6, 1940. HOWARD C.J.—

This is an appeal from the conviction of the appellants by the Magistrate of Gampola of the following charges :—

(*a*) Forming members of an unlawful assembly with the common object of causing hurt to one P. G. Gunasekera and Mallinahamy and causing damage to their house and thereby committing an offence punishable under section 140 of the Penal Code.

(*b*) Being members of an unlawful assembly with the common object of causing hurt to the said P. G. Gunasekera and Mallinahamy and causing damage to their house did cause hurt to the said P. G. Gunasekera by assaulting him with hands and Mallinahamy with flail and damage to the house of P. G. Gunasekera and Mallinahamy by pelting stones in prosecution of their common object and thereby commiting an offence punishable under section 144 of the Penal Code.

[1] *21 N. L. R. 97.*

[2] *(1940) 41 N. L. R. 193.*

The case for the prosecution was based on the evidence of the complainants, P. G. Gunasekera and Mallinahamy, with the corroborating testimony of R. G. Somapala, Kiri Banda, and Dingiri Banda the Arachchi of Dunukeulla. At 7 P.M. on the day in question the 2nd accused made a complaint to the Arachchi that P. G. Gunasekera and one Mudiyanse had committed robbery of Rs. 4 due to him. He proceeded to the house of Gunasekera and asked him to come to the Police Station. He saw there, in addition to Gunasekera, Mallinahamy, Somapala and Kiri Banda. He states that whilst he was in the compound, twenty-five people came there, four of whom, namely, the 1st, 2nd, 4th, and 6th accused entered the house. The 1st accused had a flail and the 2nd a katty. The evidence of Gunasekera and Mallinahamy was to the effect that about 2 P.M. the 2nd accused came to his house and abused them. This abuse was returned by Gunasekera and continued between 2 P.M. and 6 P.M. About 7.15 P.M. the Arachchi arrived and wanted Gunasekera to go to the Police Station on a complaint by the 2nd accused. Later Gunasekera saw the 1st accused in the hall with a flail, and according to Mallinahamy the 1st accused struck her a blow on the hip. Then 1st, 2nd, 3rd, 4th, 6th, 7th, and 8th accused entered the house. The 2nd accused had a katty, whilst 3rd accused had a club. Gunasekera says he was assaulted with hands and dragged outside about 30 yards after a struggle. Mallinahamy testifies as to this and states that she saw the 2nd accused deal a blow at Gunasekera, whilst the 4th, 6th, and 8th accused struck him with their hands. Gunesekera says he got free and ran back and locked the door of the house. The 3rd, 5th, 6th, and 7th accused then pelted the house with stones, the 1st, 2nd, 4th, and 8th accused being also there with others who took no part. The doors, windows and flower pots were damaged. After accused left a katty, flail, club, a sarong belonging to the 4th accused and towel belonging to the 1st accused were found in the house. Somapala corroborates the evidence of Gunesekera and Mallinahamy. Kiri Banda was also there but is only able to testify to the entry of the 1st accused into the house and to his striking Mallinahamy with a flail.

In his judgment the learned Magistrate seems to have applied his mind first of all to an examination of the main feature of the defence that the case was a false one engineered by the Arachchi and the Sergeant. Having rejected this part of the defence, the Magistrate accepts the evidence led for the prosecution and their version of the incident. Nowhere in the judgment are the charges against the accused examined in the light of the evidence with the view of discovering whether the ingredients of those charges have been established beyond all reasonable doubt. Both charges involved the proof of an unlawful assembly. It had, therefore, to be proved by the prosecution that there was an unlawful assembly with a common object as stated in the charges. So far as each individual accused was concerned it had to be proved that he was a member of the unlawful assembly which he intentionally joined. Also that he knew of the common object of the assembly. The Magistrate does not in his judgment seem to have applied his mind to the elucidation of these aspects of the case which were vital so far as the conviction of the accused on such charges was concerned. If these features of the case

had been analysed, I am of opinion that the Magistrate would have arrived at a different conclusion. In cases of unlawful assembly a rioter is made liable for the act of his confederate. But before that liability can be imposed it must be proved that the person was a member of the assembly, that the offence was committed in prosecution of the common object or must be such as the members knew to be likely. In this case the evidence establishes that Gunasekera and the 2nd accused spent the afternoon abusing each other, that subsequently the Arachchi arrived to assist the former, that the 1st accused came into Gunasekera's house and hit Mallinahamy with a flail, and that some of the other accused also came into the house and assaulted Gunasekera. It has also been proved that the 1st accused was in hospital for 22 days suffering from 4 stab wounds and one caused by a blunt instrument. Two of these injuries were grievous. Although Gunasekera alleges that he was assaulted and dragged along the ground by several of the accused, there is no evidence of his having received any injuries. The story of the prosecution witnesses regarded from its most favourable aspect does not to my mind establish an unlawful assembly with that degree of certainty required by the law. Viewing the case as a whole the verdict can only be regarded as unreasonable and against the weight of evidence. In these circumstances the appeal must be allowed and the convictions of all the appellants on both counts set aside.

There is another aspect of the case to which my attention has been directed in the course of the hearing of this appeal. The case for the prosecution in the Magistrate's Court was conducted by Sergeant Kulatunga. At an early stage in the proceedings Mr. G. E. de Silva who appeared for the accused stated that his position is that this case is a conspiracy by the prosecuting Sergeant Kulatunga and the Arachchi against these accused and the Sergeant should not conduct the trial. Mr. de Silva also stated that his client has submitted a petition against the Sergeant. The Sergeant challenged this statement. The learned Magistrate made the following order :—

> "It is not uncommon for the prosecuting Sergeant or Inspector to give evidence. The Sergeant will proceed to conduct the trial."

The Sergeant subsequently gave evidence for the prosecution. He was not merely a formal witness. His examination in chief occupies two and a half pages of the record and his cross-examination another two and a half pages. In cross-examination he admitted that the 2nd accused had sent a petition against him. The question of allowing a policeman to act as an advocate before a tribunal has been considered in several English cases. In *Webb v. Catchlove*[1] Mr. Justice Hawkins said that he thought it a very bad practice to allow a policeman to act as an advocate before any tribunal, so that he would have to bring forward only such evidence as he might think fit and keep back any that he might think likely to tell in favour of any person placed upon his trial. *Webb v. Catchlove* was referred to in the judgment of Lord Coleridge C.J. in *Duncan v. Toms*[2] in the following terms :—

> "In the general observations made in *Webb v. Catchlove* I should entirely concur. I agree that it is a bad practice for a policeman, being

[1] *3 T. L. R. 159.*

[2] *16 Cox 267.*

a general officer of the law, and one who ought to stand indifferent between the parties to appear and act as an advocate in Courts of Justice. I entirely agree and I entirely concur in the observations made in that case against such a practice."

The objection taken by the Judges in these two cases to policemen conducting the case for the prosecution was based on the ground that their position would not allow them to act impartially. The remarks of the Judges apply with even greater force in this case where the prosecuting Sergeant gave evidence that was not of a purely formal character and against whom allegations of bias and partiality were made that went so far as to accuse him of having taken part in fabricating the case against the accused. How could such a person be expected to hold the scales evenly and to stand indifferent between the rival parties? The conduct of the prosecution by Sergeant Kulatunga indicated that the maxim that "Justice should not only be done but be manifestly and undoubtedly seen to be done" had been completely ignored in regard to this aspect of the case.

Appeal allowed.