[COURT OF CRIMINAL APPEAL.]

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

THE KING *v.* M. G. P. FERNANDO.

APPEAL 46 OF 1946, with APPLICATION 170.

S. C. 88—M. C. Chilaw, 27,953.

Non-direction—Alteration of conviction by Court of Criminal Appeal.

In a prosecution for attempt to commit murder the verdict which the jury returned was one of voluntarily causing grievous hurt. Having returned that verdict, they went on to say that in their opinion there was "latent provocation". In the summing-up the existence of the offence of causing grievous hurt on grave and sudden provocation was not brought to the attention of the jury.

Held, that, in the circumstances, the conviction should be altered and that a conviction should be entered under section 326 of the Penal Code.

APPEAL, with application for leave to appeal, against a conviction in a trial before the Supreme Court.

A. H. C. de Silva, for the appellant.

H. A. Wijemanne, C.C., for the Attorney-General.

November 18, 1946. SOERTSZ A.C.J.—

This is a case in which the appellant appeals against a conviction of causing grievous hurt entered against him. The charge preferred against him was that he attempted to commit the murder of the injured man, his brother. The learned trial Judge in the course of his charge to the jury dealt adequately with the charge of attempt to commit murder and with the charge attempt to commit culpable homicide not amounting to murder. He indicated to the jury sufficiently that for the constitution of the offence of attempt to commit murder a murderous intention is essential and he went on to say that if that murderous intention was not sufficiently established in their view it was open to them to consider whether the case was more properly one of attempt to commit culpable homicide not amounting to murder on the ground that the assailant knew or ought to have known that what he was doing was likely to cause death. He also told them that even if they found a murderous intention it was nevertheless open to them to return a verdict of culpable homicide not amounting to murder if they found grave and sudden provocation. The verdict of the jury indicates clearly, we think, that in their view there was neither a murderous intention nor the requisite knowledge for the constitution of the offence of attempt to commit culpable homicide not amounting to murder, because the verdict they returned was one of voluntarily causing grievous hurt. Having returned that verdict, they went on to say that in their opinion there was "latent provocation". It is rather difficult for us to speculate as to what exactly the foreman of the jury meant when he used the words "latent provocation". Provocation of whatever degree or quality it might

have been still was provacation and seems to indicate to us that what the jury meant to convey somewhat artlessly was that they thought that the injury was caused on provocation. That might have been more clearly expressed by the jury, we think, if the learned trial Judge had directed them that in the circumstances of this case it would be relevant to consider whether the attack upon the injured man was an attack delivered by the accused on grave and sudden provocation in which case he would have directed them that it would be possible for them to return a verdict of causing grievous hurt on grave and sudden provocation. In other words, the existence of such an offence was not brought to the attention of the jury.

In all the circumstances of this case we think that the conviction should be altered and that a conviction should be entered under section 326 of the Penal Code and on the facts of this case we think it will be sufficient in respect of that offence to sentence the appellant to a term of 2 years' rigorous imprisonment.

Conviction and sentence altered.