[COURT OF CRIMINAL APPEAL.]

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

THE KING *v.* SURABIAL SINGHO.

Application No. 172 of 1946.

S. C. 5—M. C. Gampaha, 27,169

Court of Criminal Appeal—Alteration of verdict of jury.

Where the accused was found guilty of the offence of culpable homicide not amounting to murder when the proper verdict which the jury should have returned upon the evidence was a verdict that he was guilty of voluntarily causing grievous hurt with a dangerous weapon—

Held, that a conviction under section 317 of the Penal Code should be substituted.

APPLICATION for leave to appeal against a conviction in a trial before the Supreme Court.

F. A. Hayley, K.C. (with him *H. W. Jayewardene*), for the applicant.

No appearance for the Attorney-General.

December 3, 1946. SOERTSZ A.C.J.—

The verdict of the jury in this case implies quite clearly that they accepted the case for the prosecution that the injured man was injured by the fire-arm discharged by the accused. It is clearly established by the medical evidence in the case that the injuries that resulted to the injured man were of a grievous nature. The injured man died some time after he had received these injuries and the two Doctors who testified

in the course of the trial said that it was very probable that the broncho-pneumonia of which the man died ultimately was brought about or induced as a result of his condition, that is to say, in consequence of the nature of the injuries he had received, but they went on to say that they could not positively declare that the death of the deceased was not due to an independent cause. In those circumstances there arose at least a substantial doubt, to the benefit of which the accused was entitled. The learned trial Judge in the course of his charge appears to have taken the view that the offence of murder or culpable homicide not amounting to murder could not be sustained upon the evidence in this case. We are therefore of opinion that the proper verdict that the jury should have returned in this case was a verdict that the prisoner was guilty of voluntarily causing grievous hurt with a dangerous weapon, to wit, a gun.

Then arises the question of sentence. Mr. Hayley, appearing for the applicant, submits that if the verdict of the jury had been correctly returned as a verdict that the accused was guilty of voluntarily causing grievous hurt with a dangerous weapon, it is not probable that the trial Judge would have imposed the sentence he has now imposed of 10 years' rigorous imprisonment on the assumption that the offence of which the accused was found guilty was the offence of culpable homicide not amounting to murder. But in regard to that submission, it is not without significance that the learned Judge in addressing himself to the question of sentence in the first instance sentenced the accused to a term of 12 years' rigorous imprisonment. In a short time he appears to have taken the view that that was not a sentence which he was entitled to pass on the accused in the circumstances of this case because he had the accused brought up before him and he addressed him in these terms: "In view of the facts disclosed in the case the maximum term to which you could have been sentenced was 10 years, but I sentenced you to a term of 12 years' rigorous imprisonment. That is an illegal sentence. In the circumstances I reduce the term of imprisonment to 10 years and that term of 10 years will be substituted for the term of 12 years which I passed on you the other day." In addition there is the fact that in the course of addressing the accused the learned trial Judge said: "You have been found guilty of a very serious charge. I am not in a position to say that the verdict of the jury is not justified. Private vengeance in these matters should not be allowed to find a place in village life", and so on. In those circumstances it would appear that the learned Judge addressed himself to the question of sentence with a great deal of care and caution and we are unable to say, as Mr. Hayley invites us to say, that the learned Judge would, if the jury had returned in the first instance a verdict of guilty of voluntarily causing grievous hurt with a dangerous weapon, have sentenced the accused to a lesser term of imprisonment than that which he passed upon him.

In those circumstances we see no reason to alter the sentence passed on the accused, but in regard to the conviction of culpable homicide not amounting to murder, we direct that a conviction under section 317 of the Penal Code be substituted for it.

Conviction altered.