[COURT OF CRIMINAL APPEAL.]

1945 *Present:* **Keuneman, Wijeyewardene and Jayetileke JJ.**

THE KING *v.* CROOS *et al.*

1—M. C. Colombo, 27,483.

Court of Criminal Appeal—Verdict of culpable homicide not justified—Grave and sudden provocation—No common intention—Attempt to commi culpable homicide substituted in the case of 2nd accused.

The two accused were indicted for murder and convicted of culpable homicide. On the Judge's direction "If there was grave and sudden provocation, the offence would be culpable homicide not amounting to murder. If there was no grave and sudden provocation, it would be a case of murder itself" the Jury brought in a verdict of culpable homicide not amounting to murder against the 2nd accused.

There was no evidence that the injury inflicted by the 2nd accused, although it was intended to kill, endangered life or contributed to the death of the deceased

The death of the deceased had in fact been caused by an injury inflicted by the 1st accused between whom and the 2nd accused there was no common intention established.

Held, that a verdict of "Guilty of an attempt to commit culpable homicide not amounting to murder where hurt has been cause" should be substituted for that of culpable homicide in the case of the 2nd accused.

APPEAL against a conviction by a Judge and Jury before the Western Circuit.

G. E. Chitty for the accused, appellants.

E. H. T. Gunasekara, C. C., for the Crown.

Cur. adv. vult.

March 12, 1945. KEUNEMAN J.—

The appeal and the application of the 1st accused have already been dismissed, and the matter that remains relates to the 2nd accused.

The deceased in this case had two injuries:

(1) an incised wound on the left side of the front of the chest penetrating into the chest, and causing a wound on the left ventricle of the heart, which was necessarily fatal.

(2) an incised wound on the back of the lower end of the left side of the abdomen, which penetrated to a depth of 1½ inches, but no internal injury was discovered. No bone was cut, and there is no evidence that this injury endangered life, or contributed to the death of the deceased.

The evidence showed that the 1st accused caused injury (1) while the deceased was held by the 2nd accused, and that thereafter the 2nd accused caused injury (2), and it is clear that the majority of the jury so held.

In his charge to the jury the learned Trial Judge dealt fully and adequately with the question of common intention on the part of the two accused. He also added—

> " If you accept the view that he had no intention of acting with his brother . . . . then you have to consider what he did later . . . . Then he would be liable on his own account, that is as an independent act of his own, and not liable in the same way as the 1st accused. He would be free of any complicity in the 1st accused's stabbing, but there would be a case to consider of his own act."

Thereafter the Trial Judge dealt with the evidence that the 2nd accused acted under grave and sudden provocation, and added " If you think it was an independent act, and there was grave and sudden provocation, then the offence would be culpable homicide not amounting to murder ".

Later the Trial Judge added that in the absence of common intention " If there was grave and sudden provocation, the offence would be culpable homicide not amounting to murder. If there was no grave and sudden provocation, it would be a case of murder itself ".

Thereafter the jury by a majority brought in a verdict of culpable homicide against the 2nd accused. Objection has been taken to the two latter passages of the charge, and we agree that on the evidence available the charge is incorrect. It would have been correct if there was any evidence to show that injury (2) either accelerated or contributed to the death of the deceased. But there was no evidence to this effect, and we are of opinion that the conviction of the 2nd accused for culpable homicide cannot be supported. At the same time it is clear that the 2nd accused has correctly been found guilty of an offence, but it is a matter of difficulty to decide what verdict should be substituted in place of the present verdict. The medical evidence certainly does not definitely show that injury (2) amounted to grievous hurt or endangered life.

However, after the verdict, for the purpose of imposing sentence, the Trial Judge enquired from the jury what the effect of their verdict was, and the jury declared that they had held that the 2nd accused as well as the 1st accused intended to kill the deceased but had acted under grave and sudden provocation. We do not, however, know what the verdict was on the question of common intention between the two accused, and the 2nd accused must have the benefit of that. As regards his own offence, regarded as an independent offence, we know that the majority of the jury held that he intended to kill. The injury he inflicted was with a dangerous weapon, in a part of the body where danger to life was evident, viz., the back of the abdomen, and the blade had penetrated 1½ inches. In all the circumstances we think the correct verdict to be substituted for the present one is " Guilty of an attempt to commit culpable homicide not amounting to murder ". Had the Trial Judge based his charge on the attempt, we do not think objection could have been taken to his charge.

We accordingly substitute for the verdict arrived at by the jury the verdict of " Guilty of an attempt to commit culpable homicide not amounting to murder where hurt has been caused ". We delete the present sentence and impose on the 2nd accused a sentence of four years' rigorous imprisonment.

Varied.