

1937

Present : **Hearne J.**THE KING *v.* SAYANERIS *et al.*

55-59—D. C. (Crim.), Galle, 15,691.

*Unlawful assembly—Conviction of rioting and causing hurt and grievous hurt—
Alteration of conviction by Supreme Court—Penal Code, ss. 32, 146,
315, and 317.*

Where an accused person is convicted of rioting and causing hurt and causing grievous hurt under sections 315 and 317 of the Penal Code read with section 146, the conviction may be altered by the Supreme Court in appeal to a conviction of causing hurt and grievous hurt under the sections 315 and 317 read with section 32 of the Penal Code.

A PPEAL from a conviction by the District Judge of Galle.

Rajapakse, for accused, appellants.

Pulle, C.C., for Crown, respondent.

September 6, 1937. HEARNE J.—

The appellants, five in number, were convicted of rioting and of causing grievous hurt and simple hurt. The latter convictions were under sections 317 and 315 of the Ceylon Penal Code read with section 146.

The appellant Bettagoda Radage James *alias* Jamia put forward the defence of an *alibi*, gave evidence in support of this defence and called a witness. But their evidence was not examined by the trial Judge.

It was not inherently improbable, there were no contradictions, and if the Judge rejected the evidence he should have recorded his reasons for so doing. Apart from this the evidence of the prosecution against Bettagoda Radage James was not nearly so strong as it was against his co-accused. I allow his appeal, and acquit him.

The logical sequence of this acquittal is that the remaining four appellants cannot be said to have been guilty of being members of an unlawful assembly or of riot and their convictions in respect of these offences are therefore quashed.

It remains to be considered whether the convictions of causing grievous hurt and of simple hurt under sections 317 and 315 read with section 146 can be altered to convictions under these sections read with section 32. Counsel for the appellants has submitted that this is legally possible, and I agree with him.

A contrary view was taken in India prior to the decision of their Lordships of the Privy Council in *Barendra Kumar Ghosh v. Emperor*¹. Since that case, however, while it is still the law that on a charge of riot only, the accused, if acquitted of riot, cannot be convicted of causing hurt—for causing hurt is not a necessary ingredient of riot—it has been held that “if a person has been charged with an offence under section 326 I. P. C. (section 317 Ceylon) read with section 149 (section 146 Ceylon) but has been convicted under section 326 read with section 34 (section 32 Ceylon), the conviction is not necessarily bad by reason of the absence of a specific charge under the latter section”. (*A. I. R. (1934) Sind 89 ; A. I. R. (1934) Madras 565 ; 36 Cr. L. J. 113.*)

The questions to which an Appellate Court should apply its mind in such cases are “Had the accused to meet the same set of facts or not, and has he been prejudiced by the failure to specify the charge” under which he was convicted? “If not the conviction is good”. In the present case both the questions must be answered against the appellants. I do not see that the appellants could be said to be prejudiced by a substitution of the convictions under sections 317 and 315 read with section 146 for convictions under sections 317 and 315 read with section 32, for it was plainly set out in the indictment that they were associated together with a common intention and in pursuance of that intention caused grievous hurt and hurt.

I alter the convictions accordingly. I have given the question of sentence every consideration and do not think that interference with the sentence of 9 months passed in respect of the convictions under section 317 would be justified. Although the complainant had behaved dishonestly towards a person whose agents the appellants were it is clear that in going armed with clubs extreme violence was contemplated. As the sentence for riot was concurrent with the major sentence of 9 months for causing grievous hurt the appellants' partial success on appeal is sterile.

Varied.

¹ *A. I. R. (1925) P. C. 1.*