1937

Present : **Abrahams C.J.**

THE KING *v. MENDIS et al.*

43-44—D. C. (Crim.) Galle, 15,692.

Unlawful assembly—Conviction for rioting—Alteration to one of hurt—Not a minor offence—Nor alternative offence—Elements of offence—Number of persons charged—Criminal Procedure Code, ss. 181 and 183.

In appeal a conviction for causing hurt cannot be substituted for one of rioting as hurt is a minor offence in relation to rioting within the meaning of section 183 of the Criminal Procedure Code, nor an alternative offence to rioting within the meaning of section 181 of the Criminal Procedure Code.

Quære, whether on the trial of a number of persons for being members of an unlawful assembly so many of them are acquitted that the remainder of themselves cannot form an unlawful assembly, the latter must perforce be acquitted even if it can be proved that there were other persons who, though not charged, had the same common object and were sufficient in number to constitute an unlawful assembly.

Jayewardene v. Perera et al. (*1 Thambyah Rep.* 15) doubted.

It is the duty of a trial Judge to record his finding on every charge.

APPEAL from a conviction by the District Judge of Galle.

Colvin R. de Silva, for accused, appellants.

M. F. S. Pulle, C.C., for Crown, respondent.

Cur. adv. vult.

[1] *(1927) 29 N. L. R. 242.*

[2] *1 S. C. R. 244.*

September 14, 1937. ABRAHAMS C.J.—

The two appellants were charged with four others in the following terms :—

" (1) That on or about September 6, 1936, at Kataluwa, in the District of Galle, you were members of an unlawful assembly, the common object whereof was to use criminal force, to intimidate and cause hurt ; and that you have thereby committed an offence punishable under section 140 of the Ceylon Penal Code.

" (2) That at the time and place aforesaid, you being members of the unlawful assembly aforesaid did use force in prosecution of the said common object and that you have thereby committed an offence punishable under section 144 of the Ceylon Penal Code."

There was also a charge against the first appellant of having at the same time and place where the other offences were alleged to have been committed voluntarily caused hurt to one Rajakaruna, and another charge of having at the same time and place voluntarily caused hurt to one Gunasena. The evidence for the prosecution tended to show that, in view of the funeral of a certain Warnasuriya, who was a prominent member of a Bus Association whose vehicles plied between Galle and Matara, a considerable number of persons were found on the date of the funeral at various points on the road between these two towns, and it was alleged—and it seems to me that it was extremely probable—that certain persons belonging to the Association had resolved that as they were not going to run their buses on that day, as a mark of respect to the deceased, they intended to prevent any buses belonging to competing organizations plying for hire along that route.

It was led in evidence that at the village of Kataluwa a crowd which was estimated by the witnesses as varying from 7 or 8 to 40 or 50 had pushed a motor car into the road in such a way as to obstruct motor traffic. A bus running between Colombo and Matara was held up, and Gunasena, the manager of the bus, got down and asked why passage was obstructed. The first appellant struck him in the face and said that he would not allow his bus to proceed. The second appellant came up with a club and asked Gunasena to go back. Another bus which came along the road also found its way obstructed by the crowd and the car, and Rajakaruna, the ticket collector, was struck by the first appellant. A Sub-Inspector of Police who had received complaints that buses were being stopped on the road and people assaulted, proceeded to Kataluwa and found a car on the road and about 25 people in the car and round it. These people ran away, excepting three who were sitting in the car, and these were arrested and charged by the Police. The two appellants were identified and were also charged, and so was a sixth man, though on what evidence I have been unable to ascertain. No other persons were identified. All these accused were members of the Galle-Matara Bus Association. The only accused who gave evidence was the first appellant. He said that the road was not obstructed but that as his Bus Association had stopped its service out of respect for the deceased, who had been a person of great importance and a public benefactor, he thought that all other services would be stopped. He said that he had struck Gunasena because Gunasena had spoken slightingly of the deceased, and that he

had struck Rajakaruna for purely private reasons. No other evidence was called for the defence. It should be observed that Rajakaruna was not present at the trial and the learned District Judge refused to allow his deposition to be read.

The learned District Judge, after recapitulating the evidence, stated, "I am satisfied on all the evidence that there was an unlawful assembly with the common object stated in the indictment, and that the fourth and fifth accused (the two appellants) were members of that association. Also that the fourth accused struck Gunasena because he was plying the bus for hire, and also that he struck Rajakaruna for the same reason. But I am not absolutely satisfied that the other accused were members of the unlawful assembly with the common object". He then found the first and second appellants guilty on the indictment and said that "the fourth and fifth counts do not under the circumstances arise. He then acquitted the other accused. He sentenced each of the appellants to six months' rigorous imprisonment on the first count and seven months on the second, the sentences to run concurrently.

It is argued by Counsel for the appellants that as the learned District Judge has acquitted four accused out of the six, the remaining two, the appellants, are also entitled to acquittal because two persons by themselves cannot constitute an unlawful assembly. He has cited the case of *Jayewardene v. Perera and two others* [1], in which six men were charged with rioting, and three of these were acquitted, and Lawrie A.C.J. held that the remaining three could not be convicted. I am by no means certain that the learned Judge in that case meant to lay down as an absolute proposition that if on a trial of a number of persons for being members of an unlawful assembly, so many are acquitted that the remainder of themselves cannot form an unlawful assembly, they must perforce be acquitted even if it can be proved that there are other persons who, though not charged, had the same common object as the persons convicted and were sufficient in number to constitute with those persons an unlawful assembly. I am by no means sure that it was not the form of the charge, that is to say the charge of rioting *simpliciter*, that was the basis of the decision in that case. Akbar J. in an unreported case (S. C. No. 26-30—D. C., Ratnapura, No. 1,466/1,479) of March 9, 1934, appeared to think otherwise and agreed, though in somewhat brief language, with the view that he thought Lawrie A.C.J. held, but Soertsz J. (then A.J.) held in S. C. No. 33—P. C. Kalutara, No. 15,527, when refusing to state a case on the point on December 17, 1935, in a very carefully considered judgment, that if Lawrie A.C.J., meant to lay down categorically that there must be an acquittal in such a case, that decision is not justified. This point may, it is true, have to be decided some day, but I do not propose to give any opinion on it myself because I think that the convictions in the case before me must be quashed on other grounds. Four out of six persons charged with being members of an unlawful assembly having been acquitted, the natural question is, if the two appellants were members of an unlawful assembly who were the other persons, not less than three, who had with them the common object set out in the first charge so as to make up the required number of five? The learned District Judge has not said categorically that there were five persons who were members of

[1] *1 Thambyah Rep. 15.*

an unlawful assembly but he seems to have assumed that out of the whole of the crowd, whose numbers have been variously estimated, at least three persons other than the two appellants, had those common objects set out in the charge. Now having found that four people in that crowd did not have the required common object, how can he say that any others who were not known and had not been identified had that object? It may very well be, in fact I should think it was quite likely, that some people intended to obstruct and perhaps to intimidate or even to use violence, but there must be a definite finding for the requirements of the law to be satisfied or else it must appear from the evidence that no other finding is reasonably possible. The first alternative has not been satisfied, and I certainly cannot say from the evidence as I read it that the second alternative has been satisfied either. I therefore acquit the appellants on the first two charges.

There is a further question for decision, and that is whether the first appellant is to escape conviction on the other charges preferred against him. The learned District Judge has said that in view of his finding him guilty on the first two charges the others do not under the circumstances arise. I interpret that as meaning that he thinks that the offences of hurt are merged in the offence of rioting. Crown Counsel asks me to alter the conviction for rioting to a conviction for hurt. He does not contend, and I should not agree with him if he did, that hurt is a minor offence in relation to rioting within the meaning of section 183, and it certainly is not an alternative offence to rioting within the meaning of section 181 of the Criminal Procedure Code, so that I am unable to see how I can substitute a conviction for hurt for one of rioting. I am, however, by no means sure that the learned District Judge having held that the evidence of hurt having been caused was acceptable, did not by thinking that the hurt merged in the rioting in fact convict of hurt and merely omit to record a formal conviction because he thought it superfluous. It is obvious that he intended to hold that the first appellant was guilty of hurt, and whether he merely failed to record a formal conviction or failed to convict at all I am of the opinion that my revisionary powers enable me to correct the irregularity, whatever it is, in order that justice should not be frustrated. I must observe that a trial Court should record its finding on every charge and convict or acquit as the case may be. The failure to perform that elementary duty has in this instance led to long and complicated argument.

I convict the first appellant of the offence of causing hurt to Gunasena, and as Rajakaruna did not come forward to give evidence and could not be found for that purpose I do not take it upon myself to make any order in respect of that charge.

As to the sentence, hurt is not in itself a very serious offence, and there is nothing on the record to show that Gunasena received a violent blow, but the circumstances of the attack on him are very bad. The accused acted in a ruffianly manner and it is desirable that law abiding people using the roads should not be held up and assaulted. There have been too many offences in this country in respect to the running of motor buses, and people who are engaged in that traffic must be shown that they are not autocrats of the road. I sentence the first appellant to six weeks' rigorous imprisonment.

Varied.