1967 *Present :* **H. N. G. Fernando, C.J., T. S. Fernando, J., G. P. A. Silva, J., Siva Supramaniam, J., and Tennekoon, J.**

THE ATTORNEY-GENERAL, Appellant, *and* K. B. MUNASINGHE and 3 others, Respondents

S. C. 39/67—D. C. (Criminal) Kalutara, 6625/18313

Indictment—More than one accused—Circumstances in which they can be said to have jointly committed one and the same offence—Extent of the liability of each accused—Offence committed with common intention—No requirement that section 32 of Penal Code should be specified in the indictment—Position where one accused alone is charged when he acted jointly with others—Penal Code, ss. 8, 32, 33, 35, 293—Criminal Procedure Code, ss. 167, 168, 169, 171 to 174, 178, 184.

When two or more persons who acted with common intention are charged together with committing the same offence, a failure to refer to section 32 of the Penal Code in the charge is not a bar to the accused being convicted on the basis of individual liability for a joint offence. In such a case even the word " jointly " need not be used in the charge, and each accused is responsible for any criminal act done by any of the other accused in furtherance of the common intention. If, at the conclusion of the trial, the court finds that the offence was in fact committed by some only of the accused and that the other accused were not participants, the court would still be free by reason of the provisions of section 171 of the Criminal Procedure Code to convict the former, unless the error in stating (or implying) in the charge that they committed the offence jointly with others misled them in their defence.

Four persons were tried before a District Court on an indictment. Count 1 of the indictment alleged that all of them committed the offence of causing grievous hurt with a sword to one Alwis. The 4th accused was acquitted on the ground that he took no part in the incident. The 1st accused was convicted. The evidence throughout was that only the 1st accused used a sword. In regard to the 2nd and 3rd accused, the trial Judge found that each of them struck Alwis with a club and that they and the 1st accused acted with the common intention of causing grievous hurt to Alwis. Nevertheless he acquitted the 2nd and 3rd accused stating, as reason, that the indictment had failed to say that " the accused had acted with a common intention under section 32."

Held, that the fact that no reference was made in the indictment to the common intention set out in section 32 of the Penal Code was not an error or omission which could prevent the court from convicting the 2nd and 3rd accused on count 1 of the indictment, of the offence of causing grievous hurt.

Obiter (T. S. FERNANDO, J., dissenting) : Where only one of a group of persons who have jointly committed an offence is charged and tried alone, and it is sought to make him liable for the acts of those who are not being charged at all, the charge should comply with section 169 of the Criminal Procedure Code to the extent of saying that the accused committed the offence with others unknown or named. In such a case, although it may be sometimes impracticable—particularly in cases of circumstantial evidence—to allege joint participation, the failure to do so is curable only on the rather tenuous grounds stated in section 171 of the Criminal Procedure Code.

1*——H 11883—2,130 (2/68)

APPEAL from a judgment of the District Court, Kalutara.

V. S. A. Pullenayegum, Crown Counsel, with *Faisz Mustapha*, Crown Counsel, for Appellant.

Colvin R. de Silva, with *M. L. de Silva* and *Nihal Jayawickrema*, for 2nd and 3rd Accused-Respondents, as *Amicus Curiae*.

Cur. adv. vult.

November 6, 1967. TENNEKOON, J.—

This is a case in which the Attorney-General indicted four persons in the District Court of Kalutara ; count 1 of the indictment reads as follows :—

> " That on or about the 29th day of November, 1964, at Imbula, Pelpola, in the Division of Kalutara within the jurisdiction of this Court, you did voluntarily cause grievous hurt to Loku Liyanage Sumanadasa Alwis with a sharp cutting instrument, to wit, a sword, and that you have thereby committed an offence punishable under section 317 of the Penal Code."

The 4th accused was acquitted. The learned District Judge convicted the 1st accused on count 1. In regard to the 2nd and 3rd accused he said : " There is certainly evidence to prove that the 1st, 2nd and 3rd accused acted with the common intention of causing grievous hurt to the brothers Sumanadasa and Richel ". Nevertheless the learned District Judge went on to say that as the indictment had failed to say that " the accused had acted with a common intention under section 32 " he was unable to convict the 2nd and 3rd accused on count 1.

The learned Attorney-General has appealed against the acquittal of the 2nd and 3rd accused on count 1 of the indictment. When this matter came up before my brothers Justice Abeyesundere and Justice Alles, they made order as follows :—

> " In this appeal the Attorney-General appeals from the acquittal of the 2nd and 3rd accused on count (1) of the indictment. The learned District Judge has ordered the acquittal holding that the indictment was bad because section 32 of the Penal Code was not specified. He has held that the evidence disclosed common intention on the part of the 1st, 2nd and 3rd accused.
>
> Mr. Pullenayegum, Crown Counsel, appearing for the Attorney-General, submitted that it was unnecessary to specify section 32 of the Penal Code in the indictment.

There are two conflicting judgments of the Court of Criminal Appeal in regard to the question whether or not section 32 should be specified in the indictment where the prosecution relies on common intention. In the case of *The Queen v. Mudalihamy*[1] the three Judges of the Court of Criminal Appeal who heard that case were unanimously of the view that section 32 should have been specified in the indictment. In the latter case of *G. K. Ariyadasa v. The Queen*[2] the majority of the three Judges constituting the Court of Criminal Appeal did not follow the decision in *The Queen v. Mudalihamy*.

For the aforesaid reason, we recommend that the Chief Justice exercise his powers under section 51 of the Courts Ordinance and refer this appeal to a Bench of five or more Judges."

This matter now comes before this Bench of five Judges in pursuance of a reference by My Lord the Chief Justice under section 51 of the Courts Ordinance.

The question then that arises on this reference is whether when two or more persons are charged together with committing the same offence a failure to refer to section 32 of the Penal Code in the charge is a bar to the accused being convicted on the basis of individual liability for a joint offence.

Before proceeding to examine the possible answers to this question, it will be useful, I think, to make a brief reference to the background in which the question must be examined.

The Penal Code is a Code which defines a number of offences ; each of these definitions deals only with the case of a single individual doing or omitting to do a thing and makes such act or omission punishable.

It is, of course, immediately apparent that just as much as an innocent act can be performed by more persons than one, so also, an act which is made punishable by law (and is therefore an offence) can also be done or committed by more persons than one. Thus the definition of any offence in the Penal Code will apply not only to the case of one person doing the act made punishable by law but also to the case of more persons than one jointly doing such an act.

Indeed, section 8 which occurs in the Chapter headed " General Explanations " states " words importing the singular number include the plural number ". Accordingly, when, for instance, section 293 of the Penal Code says in the singular that " Whoever causes death by doing an act with the intention of causing death..... commits the offence of culpable homicide ", we must understand the section as also saying that " Where more persons than one cause death by doing acts with the intention of causing death..... such persons commit the offence of culpable homicide." Thus we get a plurality of persons capable of

[1] *(1957) 59 N. L. R. 299.* [2] *(1965) 68 N. L. R. 66.*

committing one and the same offence and questions immediately arise in such cases as to—

(i) whether each participant is only liable for the offence partially and proportionately or whether each is severally liable for the offence committed by all ;

(ii) the approach to the question of *mens rea* where *mens rea* is an ingredient of the offence ; the presence of more persons than one necessarily means the presence of more 'minds' than one.

The answer to these problems is to be found among the "General Explanations" to the Code which are contained in Chapter 2 thereof. Sections 32, 33 and 35 occur in this Chapter ; they are three sections dealing with situations in which more persons than one combine to commit, one and the same offence.

It is unnecessary for the purposes of this opinion to examine the exact content and scope of each one of these sections. It would be sufficient to say that they lay down the law (i) as to the circumstances in which more persons than one can be said to have jointly committed one and the same offence, and (ii) as to the extent of the liability of each such person.

The main question that arises on this reference relates to the procedural aspects of charging and trying more persons than one who have committed one and the same offence.

Section 184 of the Criminal Procedure Code deals with certain trial aspects in such a case. This section is one—and the only one—dealing with joinder of accused persons. It deals with many circumstances in which more persons than one can be tried together at one trial. That portion of section 184 relevant to the present discussion reads as follows :—

> " Where more persons than one are accused of *jointly committing the same offence*.....they may be charged and tried together or separately as the court thinks fit."

An illustration of more persons than one charged in this way is given in the first illustration under the section :

> "A and B are accused of the *same murder*. A and B may be indicted and tried together for *the murder*."

What are the matters that need be stated in a charge when more persons than one are accused of jointly committing the same offence ? Section 169 of the Criminal Procedure Code reads (the italicizing is mine)—

> " Where the nature of the case is such that the particulars mentioned in the last two preceding sections do not give the accused sufficient notice of the matter of which he is charged, the charge shall also contain such particulars of the *manner in which the alleged offence was committed* as will be sufficient for that purpose."

To take a case of a charge of joint murder. Murder can be committed in many ways, by bare hands, by blows with a blunt instrument, by hanging, drowning, poison, the gun, or in one of many other innumerable ways. These would be the many 'manners' in which the offence of murder may be committed. It is the same with other offences, though with some the 'manner' can vary with every case, in others there is little or no scope for variations in the manner of committing the offence.

Are there any other matters which can be regarded as part of the 'manner' of committing an offence ? Where more persons than one are involved in the commission of one offence there are some cases in which there is what appears to be equal participation : for example X and Y may join in bludgeoning A to death each attacking with a club ; in this type of case it is more often than not impossible to prove which of the participants inflicted the fatal injury ; details of the participation may be obscure and beyond the reach of any investigator ; but before a case of joint commission of the offence is established it would be necessary for the prosecutor to prove that both X and Y attacked, that one or more of the blows (irrespective of who struck) resulted in the death of A and that each X and Y were acting in furtherance of the common intention of both to cause the death of A. There can also be, seemingly unequal participation : X and Y may join in order to achieve their common intention of causing the death of A, X doing the bludgeoning while Y keeps a look-out to prevent their being surprised by an intruder. This is the type of case in which it has been said of persons who play a role similar to Y's, that " he also serves who only stands and waits ". Y has not done anything which, in the physiological sense, can be said to have caused the death of A. No medical witness will testify that Y's act of keeping watch caused, or was one of the factors contributing to, the death of A. But it is unnecessary to understand the expression " cause death " in section 293 of the Penal Code in this somewhat limited medico-legal sense. The result achieved by X and Y is the death of A. The acts by which that result was intended to be achieved are the totality of the acts of both persons. Some of the acts would never by themselves achieve the ultimate result intended ; they would only be furthering the attainment of that result. Turning for a moment to activities which are not *prima facie* criminal : if two men set out to fell a tree and only one of them lays his axe to the tree trunk while the other's activities are confined to lopping off branches of adjacent trees in order to secure a free fall for the tree to be felled and thereafter to standing on the adjacent public road in order to warn passers-by of the danger of a falling tree, there is no strain either on the use of language, or on truth, to say that they both jointly felled the tree. As was said by Lord Sumner in the case of *Barendra Kumar Ghosh* [1] in dealing with the meaning of section 34 of the Indian Penal Code (which is identical with section 32 of our Code) : " 'Criminal act' means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence."

[1] *A. I. R. 1925 P. C. 1.*

Whatever, then, may be the nature of the participation of each person in a joint crime, it seems to me that the evidence which tends to establish the nature of the participation of each not only establishes his participation but also establishes the manner in which the criminal act was done, i.e. by several persons acting together.

I am accordingly of opinion that the fact of a person committing an offence not singly by himself, but by participating with others, is a fact relating to the manner of committing the offence. In a case of joint murder, say, by shooting with a gun, the material relating to the manner of committing the offence would include not only the fact of causing the death by shooting with a gun, but also of the fact of each causing the death jointly with others. In a case of joint cheating, " manner " would include both the nature of the deception and the fact of each accused acting jointly with others to achieve the deception. Indeed there does not appear to be much controversy over this aspect of the matter. In *Mudalihamy's* case and in *Ariyadasa's* case (both of which will be referred to in greater detail later on in this judgment) there is a clear, if unexpressed, assumption that the *joint* committing of an offence is a matter relating to the ' manner ' of committing such offence.

I am therefore of the opinion that the fact of an offence having been committed jointly with others is something which section 169 requires to be included in the charge where that is the prosecution case and where it is not the intention of the prosecutor to signify to the accused that the prosecution case is that he committed the offence by himself alone.

How is this to be done ? Must there be a reference to section 32 in the charge ? Indeed the question referred to this court is in this very form. Formulated thus the question must, I think, be answered in the negative. Section 32 does not create an offence ; it is only a section laying down a principle of liability. At the same time it must not be forgotten that it lays down a principle of liability *where an accused person commits a crime in a particular way or manner, i.e. by joining with others ;* and accordingly the question should perhaps be re-formulated in this way : " In a case where an accused person is sought to be made liable on the basis that he was one of many who jointly committed a single offence, must there be reference in the charge to the fact of the offence having been committed jointly before the prosecution can call in aid the provisions of section 32 to bring home individual liability ? "

This question must, I think, be answered differently in relation to two different types of cases that arise in our courts ; they are—

(i) cases in which the participants or some of them are *charged and tried together* for the one offence alleged to have been committed by them ; and

(ii) cases in which one only of the participants to an offence committed jointly with others is *charged and tried alone.*

(i) In the first type of case, viz. where more persons than one are alleged to have committed one and the same offence and are to be tried at one trial, there would ordinarily be one charge ; there is nothing in section 178 of the Criminal Procedure Code which requires a separate charge in respect of each such person. The section reads : " For every distinct offence of which any person is charged there shall be a separate charge." In a case of murder, where A, B and C are alleged to have committed one and the same murder of say X, it would be legitimate to charge A, B and C with having committed the murder of X in one charge, because they are charged of one offence and not of distinct offences. But, necessarily, there is implicit in a charge so drafted three distinct charges —one against A, one against B and one against C. If the case fails against one, it does not mean that the case against the other two fails. A may be acquitted while B and C are convicted. This is possible only because there is impliedly a separate charge against each one of the several persons accused of committing the one offence. It is, I think, fairly clear that if the charge were split up it would result in three charges each reading—

You A, did jointly with B and C commit the murder of X.

You B, did jointly with A and C commit the murder of X.

You C, did jointly with A and B commit the murder of X.

It thus becomes apparent that when the charge is drafted as one, the idea of each having committed the offence jointly with the other two is necessarily implied and it becomes a matter of indifference whether the word " jointly " is used in the charge or not. What is important to note is that each accused is clearly given notice of the fact that the prosecution case against him is that he committed the crime jointly with the others and that the provisions of sections 32, 33 or 35, as the case may be, would be relied on by it to establish his liability to be convicted and punished as though he committed the offence by himself alone. It is perhaps also important to note that if, at the conclusion of the trial, the court finds that the offence charged was in fact committed by one of the accused alone and that the other accused were not participants, the court would still be free by reason of the provisions of section 171 of the Criminal Procedure Code to convict that one accused—unless of course the error in stating (or implying) in the charge that he committed the offence jointly with others misled that accused in his defence.

(ii) In the second type of case, viz. : where only one of a group of persons who have jointly committed an offence is charged and tried alone, the position is such that, in my opinion, a bare compliance with the requirements of section 167 and 168 of the Criminal Procedure Code would be inadequate to give the accused sufficient notice of the matter with which he is charged, for the reason that a charge against one person that he committed an offence would signify to the accused that the prosecution case is that he committed the offence by himself alone. Accordingly in

such a case the charge should comply with section 169 to the extent of saying that the accused committed the offence jointly with others unknown or named. It is hardly necessary to add that any *other* particulars in regard to the manner of committing the offence may also have to be added in seeking to act in full compliance with section 169. An omission in such a case to allege that the accused committed the offence jointly with others may deprive the court of the power to apply the principles of constructive liability contained in section 32 (or sections 33 and 35), if to do so would be prejudicial to the accused. Section 171 of the Criminal Procedure Code would thus come into play in such a situation.

To sum up then, it is my opinion that where any accused person is sought to be made liable on the basis of his being one of many participants in an offence jointly committed by such persons, the charge must make it clear that such participation is being alleged ; this is achieved either—

(*a*) by the very fact that several persons are charged together with one offence at one trial, or

(*b*) by the use in the charge of such words as " together with X " or " together with others unknown " in a case where all the participants are not actually charged.

It may of course be sometimes impracticable—particularly in cases of circumstantial evidence, of which a vivid example is the case of *Ramlochan v. The Queen* referred to later in this judgment—to allege joint participation. But it is well to note that the failure to do so is curable only on the rather tenuous grounds stated in section 171. However, it seems to me that in those cases where the evidence in the hands of the prosecution indicates the joint commission of the crime it would be unsafe, and even unfair, for the Crown to omit the necessary allegation on the bare faith of section 171.

It is necessary, before concluding, to deal with the two cases which gave rise to this reference, and also to apply these conclusions to the instant case.

The case of *Queen v. Mudalihamy* [1] was one in which one person was charged *simpliciter* with murder and it was sought to make him liable not for an act or acts done by him alone but for acts done by him jointly with others. At page 302 of the judgment the following passage occurs :—

" . . . . although the omission to mention section 32 in the charge in a case where more persons than one are being charged with an offence and it is sought to make them vicariously responsible for a criminal act committed by one of them in furtherance of their common intention, may not be fatal to a conviction, if it is clear to the accused that they are being made vicariously liable for the acts of one of them, we think that it is desirable even in such cases to refer to section 32 or other

[1] *(1957) 59 N. L. R. 299.*

appropriate section of that group in the charge and certainly in this case, if it was sought to make the person vicariously responsible for the acts of those who are not being charged at all, it was necessary that the appellant should have been made aware at the outset that it was a charge of vicarious liability that he had to repel. We are of opinion that section 169 of the Criminal Procedure Code requires that it should be done."

For reasons already stated I do not agree that there should be any reference in the charge to section 32, (33 or 35) of the Penal Code in any of the situations contemplated in this passage. These sections deal not with the manner of the commission of an offence but with the consequences ensuing from an offence being committed in a particular manner ; subject to this comment, I am broadly in agreement with the approach made to the problem in *Mudalihamy*.

In the case of *Ariyadasa v. The Queen* [1] it was submitted for the Crown and the argument was adopted by the majority of the court that illustrations (*b*) and (*e*) given under section 169 of the Criminal Procedure Code support the view that in a charge of murder where the accused is sought to be made liable under section 32 as participant in a joint murder, there need not be any reference to section 32 or indeed to the fact that he was being sought to be made liable not for his act alone but for the totality of acts of himself *and others*. With respect I do not think such an implication arises from illustrations (*b*) and (*e*) which read as follows :—

" (*b*) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(*e*) A is accused of the murder of B at a given time and place' The charge need not state the manner in which A murdered B. "

Each of these illustrations deals only with the case of one person being sought to be made liable for his own acts and accordingly the word ' manner ' in each illustration refers only to that aspect of the manner of committing an offence, which relates to the means employed and not to the commission of the offence by joining others in the commission of it. If illustrations (*b*) and (*e*) are to have any influence in the decision of this matter we would end up with the curious result that in a case of joint cheating reference would have to be made to section 32 or at least to the joint commission of the offence, *but not in a case of murder*. With all respect I find it difficult to agree.

In *Ariyadasa's case* reliance was also placed on the West Indian Case of *Ramlochan v. The Queen*.[2] In that case the accused Ramlochan was charged alone with the murder of his wife. There was apparently nothing in the charge to indicate that the Crown case was that the accused had

[1] *(1965) 68 N. L R. 66.* [2] *(1956) A. C. 475.*

committed the offence jointly with another or others ; nor apparently was there in the charge any reference to that provision of the Criminal Law of Trinidad parallel to our section 32. The case was one based on circumstantial evidence ; after the close of the prosecution case the accused Ramlochan was called upon for his defence. He gave evidence on his own behalf. In cross-examination by Counsel for the prosecution it was suggested that the accused had a partner in the committing of the crime and that the fatal blow was struck by his partner and that Ramlochan himself was only present and assisting the other. In dealing with a submission that improper prejudice may have been caused to the appellant by the nature of the cross-examination their Lordships stated : " On the evidence it was open to the jury, in their Lordships' opinion, to take the view that the accused committed this deed alone or that he committed it with the assistance of some other person. The trial judge did not exclude the first alternative, though he may have stressed the view that the evidence might be taken to indicate that the murder was committed by more than one person. But that is not in their Lordships' opinion fatal to a conviction because it was a view open to the jury to take on the evidence."

I take this part of the Privy Council judgment to be authority only for the proposition that the conviction of a person for an offence on the basis that he with others committed the offence is not *necessarily* bad because the charge only indicated that he was being sought to be made liable for a crime committed by himself alone. I think this is the law that is also contained in our own section 171 of the Criminal Procedure Code which reads :

> " 171. No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission."

In *Ramlochan's case* the Privy Council were, I think, clearly of the view that having regard to the whole of the proceedings at the trial there could have been no prejudice to the accused by the jury being told that they could convict even if they held that the accused had committed the crime jointly with another. The following passage occurs a little ahead of the earlier quoted passage :—

> " The Crown was not bound to state its theories in advance. These theories were inferences from evidence which, it may be assumed, Crown Counsel explained to the jury on opening that he was about to lead. Their Lordships are unable to extract from the evidence led for the prosecution that the Crown had tied itself to any view of how the murder was committed. In cross-examination counsel was, however, in their Lordships' view, *bound* to put to the accused any inferences from the evidence which he proposed to put before the jury."

Indeed it seems to me that there is here a clear implication that the matters referred to in this passage were sufficient to establish that the accused had not been prejudiced even if the verdict of the jury was based on a finding that Ramlochan was merely assisting another who in fact struck the fatal blow. The decision of the Privy Council may well have been different if a case of prejudice had been made out. Illustrations (*a*) and (*b*) to section 171 bring out this same principle clearly :—

(*a*) A is charged under section 237 of the Penal Code with " having been in possession of counterfeit coin having known at the time when he became possessed thereof that such coin was counterfeit ", the word " fraudulently " being omitted in the charge. Unless it appears that A was in fact misled by this omission the error shall not be regarded as material.

(*b*) A is charged with cheating B and the manner in which he cheated B is not set out in the charge or is set out incorrectly. A defends himself, calls witnesses, and gives his own account of the transaction. The court may infer from this that the omission to set out the manner of the cheating is not material.

In my view *Ramlochan's case* does not conflict with the view I have taken in this matter.

Ariyadasa's case was similar to the *Ramlochan case* in that there was a simple charge of murder against one accused and the judge directed the jury that they could convict the accused even if, on the evdence, they came to the conclusion that the fatal blow was not struck by the accused but that the deceased had been inveigled to a particular place in pursuance of a common plan between the accused and another and that the other assaulted the deceased in pursuance of that common plan to kill.

In dealing with a submission that the failure to refer to section 32 of the Penal Code in the charge was in the circumstances fatal to the conviction, the majority of the court, after examining the cases of *Mudalihamy* and *Ramlochan*, stated as follows :—

" For reasons which have been outlined above the majority of us were unable to agree with the observations of this Court in *Mudalihamy's case* and uphold the second ground of appeal. In the opinion of the majority of the Court (1) the charge as framed gave the appellant, having regard to the circumstances of this case, such particulars of the charge as he was entitled at law to receive and (2) *there was neither prejudice* to him nor misdirection by the trial judge " (the italicising is mine).

Respectfully, I would disagree with the statement that the charge contained no error or omission ; however the finding that there was no prejudice to the accused brings the case in substance into line with *Mudalihamy* and *Ramlochan* and within the principle contained in section 171 of the Criminal Procedure Code.

Applying the conclusions I have reached and indicated above to the present case : I am of opinion that this being one in which four persons were charged in one charge with the offence of voluntarily causing grievous hurt and tried at one trial, the charge on which they were tried was sufficient to give each of the accused notice of the matter of which he was charged. There should have been no doubt in the mind of each accused that he was in fact facing a charge of having jointly with his co-accused committed the offence. There was no objection taken to the legality of the single charge and the single trial ; that was an objection that would have been available to the accused if they were under the impression that they were being charged with four separate offences of causing hurt to Sumanadasa Alwis. I am perfectly convinced that the defence were aware, despite the absence of words to that effect, that the charge was that the four accused jointly committed the offence and that the relevant provisions of law would necessarily be relied upon by the Crown to bring home individual liability. Accordingly, the learned District Judge having held that the 1st, 2nd and 3rd accused voluntarily caused grievous hurt to Sumanadasa Alwis each acting in furtherance of the common intention of all to cause grievous hurt, (and no argument has been addressed to us that such finding was wrong), the 2nd and 3rd accused each became liable, upon application of the law as contained in section 32 of the Penal Code, to be convicted of the offence of voluntarily causing grievous hurt as though it were committed by himself alone.

I would accordingly hold that the learned District Judge was wrong in holding that there was any error or omission in the charge (count 1) which prevented him from convicting the 2nd and 3rd accused. I would set aside the acquittals of these two accused, convict them each on count 1 and sentence them each to a term of 9 months rigorous imprisonment, which is the term which was imposed by the District Judge on the 1st accused himself.

H. N. G. FERNANDO, C.J.—I agree.

G. P. A. SILVA, J.—I agree.

SIVA SUPRAMANIAM, J.—I agree.

T. S. FERNANDO, J.—

This is an appeal by the Attorney-General from an acquittal of the 2nd and 3rd accused who (along with two others, the 1st and 4th accused) were tried before the District Court of Kalutara on an indictment containing two charges. The first charge alleged that all four accused committed the offence of voluntarily causing grievous hurt with a sword to one Sumanadasa Alwis, an offence punishable under section 317 of the

Penal Code. The second charge alleged that they committed a similar offence by cutting one Richel Alwis. At the close of the case for the prosecution, the District Judge made order discharging (acquitting ?) the 4th accused. This order was made on the ground that there was no evidence that he took part in the incident which resulted in hurt to the two men above-named. The other three accused were called upon for their defence, and, at the conclusion of the evidence called by them, the trial judge acquitted all three accused on the second charge, viz., that in respect of the grievous injury received by Richel Alwis. In regard to the first charge, the judge held that the 1st accused had cut Sumanadasa Alwis with a sword and found him guilty of the offence charged. There was no evidence that either of the other two accused (the 2nd and 3rd) had caused an injury or injuries with a sword. The trial judge found as a fact that the 2nd accused hit Sumanadasa Alwis on his leg with a club causing a grievous injury, and that the 3rd accused too hit him with a club. While stating in his judgment that the 1st, 2nd and 3rd accused had acted with the common intention of causing grievous hurt to Sumanadasa Alwis, the learned judge, observing that " in the circumstances of a case like this the accused should be (made ?) aware that they are held liable because of the common intention, and for this purpose the indictment should definitely state that the accused acted with a common intention . . . . . section 32 ", acquitted the 2nd and 3rd accused on the first charge as well.

The appeal before us is confined to a canvassing of the acquittal on the first charge.

The trial in this case was preceded by a committal after an inquiry in the Magistrate's court, and there was no suggestion of a variation between the evidence for the prosecution in the Magistrate's court and that at the trial. The accused heard the evidence given in the Magistrate's court and had access to the brief containing the record of that evidence. When the first charge alleged that all four accused committed the offence of causing grievous hurt with a sword, and the evidence throughout was that only the 1st accused used a sword, it must have been clear enough to the 2nd and 3rd accused that the charges against them rested on liability set out in section 32 of the Penal Code. The prosecution was therefore not required to specify this last-mentioned section in the charge. When the learned trial judge stated that, although the evidence established that the 1st, 2nd and 3rd accused had acted in furtherance of a common intention, but that he was obliged to acquit the 2nd and 3rd accused as the charge omitted any reference to section 32, with all respect, I think he was in error. His attention had not been drawn to the decision of this Court in *Thambiah v. Tennekoon*[1] which held that when two persons were charged with causing grievous hurt on the basis that they acted in furtherance of an intention shared in common between them it was unnecessary to specify section 32 of the Penal Code in the charge. The prosecution in the case now before us had, in my opinion, complied with the provisions

[1] *(1949) 51 N. L. R. 186.*

of the Criminal Procedure Code relating to the framing of the charge, and this appeal has to be allowed. I would therefore set aside the acquittal of the 2nd and 3rd accused on the first charge and enter a conviction against them thereon. Each of them will serve in respect of that conviction a term of nine months' rigorous imprisonment.

As no appeal has been preferred in respect of the acquittal of the accused on the second charge, it is sufficient to say here that no opportunity arises to consider the correctness of that acquittal.

I should have been content to say no more on this appeal but for the fact that the two judges of this Court before whom this appeal was first taken up for hearing and who caused it to be referred to this Bench thought that the conflict between the decisions in *The Queen v. Mudalihamy*[1] and *Ariyadasa v. The Queen*[2] merited consideration by a fuller Bench. The two cases mentioned above do not deal with a situation similar to that which arose upon the trial that preceded the present appeal, and, speaking for myself, I should have preferred a consideration of the conflict on an occasion on which a case of the kind met with in *Mudalihamy* or *Ariyadasa* had again arisen and we had had the benefit of argument on the specific point. Anything this Court can now say in respect of the nature of the charge in such a case must necessarily be *obiter*. Nevertheless, as the conflict between these two decisions has been mentioned in the reference made to this Bench, and as my brother Tennekoon who has been kind enough to send me an advance copy of his own judgment has considered the nature of the conflict, I think I should express very shortly why I am still of the opinion that even in a case where only one or more but not all the persons alleged to have participated in the doing of a criminal act are charged it is not obligatory on the prosecution to specify in the charge either (*a*) that section 32 is relied on or (*b*) that the person or persons charged acted jointly with others, known or unknown.

No Court would like to say anything that may tend to discourage utmost candour on the part of the prosecution, and it would be a very desirable thing for the prosecution to set out in the charge the fullest particulars possible of the offence, both in respect of the matter with which the accused is or are charged as well as the manner in which the offence alleged was committed. What is *desirable* to have mentioned in the charge is, however, not the same thing as what is *required* to be mentioned therein. So long as the prosecution has complied with the provisions of the Criminal Procedure Code in respect of the particulars *required* to be stated in the charge, no question of the prosecution invoking the aid of section 171 of that Code can arise, because there would then be neither error nor omission in the charge. The charge is something that has to be framed by the prosecution before the trial commences, and the adequacy of the charge must be judged by the material available to the

[1] *(1957) 59 N. L. R. 299.* [2] *(1965) 68 N. L. R. 66.*

Crown before the trial commenced. Something may transpire in the course of the evidence, or there may even be a change of front on the part of a prosecution during a trial, and in such situations the trial court has always a discretion to permit an alteration of the charge and sometimes even an adjournment the alteration may necessitate—section 172 to 174 of the Code. Where a charge framed alleges that A, B and C committed an offence, and this is understood as implying that they jointly committed that offence, the fact that during the evidence recorded at the trial it transpires that not only A, B and C, but that D and E, or D or E, also participated in that joint offence, does not, in my opinion, render the charge upon which A, B and C stood their trial defective by reason of error or omission that is contemplated in section 171. It is hardly necessary to add that it is immaterial whether the additional offender or offenders disclosed in the evidence is or are identified or unidentified.

In a case of direct evidence, it would not be unfair to assume, the prosecution would, generally speaking, be aware of the manner in which the offence was committed. The extent of the knowledge on the part of the prosecution of the manner of the commission of the offence would often be different in a case dependent on circumstantial evidence. The particulars *required* to be mentioned in a charge cannot, in my opinion, vary according as the evidence available is direct or circumstantial. The Code contemplates no such distinction and, I think, cannot fairly contemplate such a distinction.

Ramlochan v. The Queen [1] serves as a graphic illustration of the kind of situation that can arise in a case of circumstantial evidence. Ramlochan stood two trials, the jury having found itself unable to agree at the first trial. Throughout the entirety of that first trial, the Crown's case was that Ramlochan alone killed the deceased Toy. At the second trial too its case was the same until the cross-examination of the accused began. In the course of that cross-examination, Crown Counsel, for the first time, suggested that the deceased was actually killed by some other man, and that Ramlochan merely assisted that killing by participating therein. Their Lordships of the Privy Council did not consider this suggestion as a change of front on the part of the prosecution. That view of their Lordships was possible because they thought the charge framed was adequate. It is in this context that their Lordships observed that "the Crown was not bound to state its theories in advance". The Court also stated as follows :—

> " The Crown case was that the accused had murdered this girl. How and in what circumstances the fatal blow was struck was one of the mysteries of the case. Whether or no the accused, if he carried out the murder, was assisted by someone else was another unknown feature in the case. Whether the accused himself struck the girl's head or was a party to someone doing so was immaterial. In either case he was guilty of murder."

[1] *(1956) A. C. 475.*

It being clear that the Crown theory at the time the trial commenced was that Ramlochan himself killed the deceased, it necessarily follows that the Crown could not have been expected to particularise in the charge that Ramlochan only assisted another in the killing. Even if the law had permitted an amendment of the charge at the later stage, the Crown did not and could not have been expected to give up either theory, both theories being consistent with the evidence relied upon. The decision in that case serves, in my opinion, to illustrate that even when the Crown put forward a different theory no change in the charge became necessary. On either theory the charge was one of murder. There was no change in the matters requiring proof. I do not understand that decision to mean that the charge was erroneous but that the accused was not misled or prejudiced by the error.

Acquittals set aside.