Present : Lyall Grant J. 1928.

GUNARATNE *v.* SOYSA *et al.*

709-709A—P. C. Kalutara, 26,814.

Unlawful assembly—Common object—Offence to be specified—Penal Code, s. 138.

In a charge of being members of an unlawful assembly, the offence, which it was the common object of such unlawful assembly to commit, must be specified.

APPEAL from a conviction by the Police Magistrate of Kalutara.

Rajapakse (with *Wendt*), for appellant.

November 15, 1928. LYALL GRANT J.—

The three accused-appellants were charged (1) with being members of an unlawful assembly whose common object was to commit an offence, (2) with voluntarily causing simple hurt to ten persons with clubs and stones, and (3) with committing mischief by damaging a bus.

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All the accused were convicted and sentenced on each count.

On appeal it was objected—(1) That the Magistrate should not have tried this case as he had previously received a complaint from one of the complainants against the accused, (2) that a charge of being a member of an unlawful assembly whose common object was to commit an offence must specify the offence, (3) that there is no evidence against any of the accused of causing simple hurt to any of the persons mentioned in the charge, and (4) that there is no complaint of mischief by the owner or driver of the bus.

I do not think there is any substance in the first objection. It was not taken at the trial and appears to be a mere after-thought on appeal. There is nothing to show that it ever occurred to the accused that they were prejudiced by the complainants having made a previous complaint against them or that they were in fact so prejudiced.

The second objection is more serious. The offence of being a member of an unlawful assembly, if proved, may have far-reaching results. It may make the member responsible for acts which he did not commit and did not intend to commit.

The law therefore requires strict proof that the assembly is unlawful. It is not sufficient to aver that the assembly is for the purpose of committing an offence, without specifying the nature of the offence. In order to make a member of an assembly criminally liable for joining that assembly, it must be clearly shown in what respect the assembly was unlawful, and the nature of the unlawfulness must be specified in the charge, otherwise the accused does not know of what offence he is accused. Suppose he were accused of joining an assembly, the common object of which was to commit a murder, and the evidence showed that the common object was to commit insult, he would be gravely prejudiced in making his defence if he could be convicted without an alteration in the charge.

If, however, as here, the charge merely sets forth that the common object of the assembly was to commit an offence without specifying what offence, it is impossible for the accused to know the charge which he is called upon to meet. Very often an assembly meets quite lawfully, but in course of time it forms the intention to do some unlawful act. That intention is imputed to each individual who remained in the assembly after the general intention is held to have been formed whether he personally had such intention or not. But the intention may change as time goes on. There may be formed an intention to commit trespass and later there may be added an intention to commit arson and murder. Before the latter intention is formed the accused may have left the assembly.

The words of the sub-section are " To commit any mischief or criminal trespass or other offence," not merely to " commit an offence."

The Indian Courts have insisted on the common object being distinctly described in the indictment. See *Tafazzul Ahmed Chowdrey v. Queen Empress*[1] and also *Sabir and another v. Queen Empress.*[2]

In the latter case the conviction was quashed because it was not clear which of two common objects the jury held to be proved, and also because if the jury held that the common object was to "injure Nidu" that common object was never charged at all and the accused person had no opportunity of meeting it. The Court goes on to observe that "the finding of the jury with regard to the common object may have very great effect upon the seriousness of the crime, and therefore the punishment."

In *Behari Marton v. Queen Empress*[3], it was held that an accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge he must be seriously prejudiced in his defence. This is true in all cases, but it is more especially true in cases where it is sought to make him responsible for acts not committed by himself but by others with whom he was in company.

The charge here is merely that the accused were members of an unlawful assembly composed of five or more persons with the common object of committing an offence. The conviction agrees with the charge.

No hint is given of the nature of the offence intended, and it is clear that a conviction on this count is bad.

It is true that in the judgment the Magistrate says the common object was that of abusing and harassing the Police Vidane and his supporters, but there is nothing to show that the accused knew that they were charged with this offence. Even here it is doubtful what offence is disclosed.

The failure of this charge makes it necessary to examine closely the evidence on the other charges against each of the accused.

The only specific act of hurt which the Magistrate has found proved against any of the accused is a blow received by one Haramanis. The Magistrate says that Haramanis stated that he received this injury from the first accused. But Haramanis distinctly says that he received this injury from the second accused, and that the first accused did nothing. It is Pedrick who says the first accused struck Haramanis.

The Magistrate makes a passing reference to the injury to Pedrick, but Pedrick says he cannot say who gave him these injuries.

Of the ten persons alleged to have been assaulted, only one other was called as a witness, and though she says she was hit by a stone, she does not say who threw it.

[1] *26 Indian Law Rep. Cal. Series, p. 633.* [2] *22 Cal. 276 (New Series).*
[3] *11 Cal. 106.*

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There is therefore no evidence on which any of the accused can be convicted of hurt.

In regard to the charge of criminal mischief to the bus, no complaint has been made by the owner or driver or anyone responsible for it.

The only evidence against any of the accused on the charge is that Haramanis says the first accused "dug" the bus with a closed clasp knife. He does not say where or with what result.

On the other hand Pedrick says the accused did not strike the bus. Here again the evidence is altogether inconclusive.

The evidence generally gives one the impression that the witnesses are either unable or unwilling to give definite testimony against any of the accused.

No case has been made out against any of the accused. Their appeals are allowed and they are acquitted.

Set aside.