[COURT OF CRIMINAL APPEAL]

1947

Present : **Wijeyewardene J. (President), Jayetileke and Canekeratne JJ.**

THE KING *v.* SURIYA ARATCHIGE FERNANDO, *et al.*

Appeals 5-8, with Applications 44-47.

S. C. 124—M. C. Panadure, 43,725.

Misdirection—Failure of trial Judge to direct Jury on a possible verdict—Unlawful assembly—Conviction of less than five persons—Penal Code, s. 146.

The appellants were convicted of murder.

The trial Judge directed the Jury not to consider the verdict of culpable homicide not amounting to murder when, in fact, it was open to them to consider such a verdict.

Held, that there was misdirection.

Less than five persons can be convicted of having been members of an unlawful assembly if it can be proved that there were 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.

APPEALS, with applications for leave to appeal, against four convictions in a trial before the Supreme Court.

A. H. C. de Silva (with him *Mahesa Ratnam*), for the first accused.

H. Wanigatunga (with him Mahesa Ratnam), for the second accused.

G. P. J. Kurukulasuriya (with him *Dodwell Gunawardana*), for the third accused.

M. M. Kumarakulasingham, for the fourth accused.

Boyd Jayasuriya, C.C., for the Attorney-General.

Cur. adv. vult.

April 2, 1947. WIJEYEWARDENE J.—

The four appellants and one Daniel Fernando were indicted on two counts The first count was that they were members of an unlawful assembly, and the second count was that they, as members of an unlawful assembly, committed murder by causing the death of one Carolis Perera. The Jury found the four appellants guilty of murder and returned a verdict of not guilty in favour of Daniel Fernando.

It was contended in appeal that, in view of the acquittal of Daniel Fernando, it was not open to the Jury to return a verdict against the appellants under section 296 read with section 146 of the Penal Code. We do not think there is any merit in that contention. In the first place, it was not the case for the Crown that the five accused who were indicted were the only members of the unlawful assemby. Moreover, it is quite clear from the proceedings that, while there was overwhelming evidence that the four appellants and another took part in the transaction which resulted in the death of Carolis Perera, there were circumstances which involved in some doubt the identity of the fifth person—whether it was Daniel Fernando or a brother of his.

There remains, however, the second point argued in appeal—that there was a misdirection when the learned trial Judge stated in the course of his charge that a verdict of culpable homicide not amounting to murder did not arise for consideration in this case.

The evidence led by the Crown showed clearly that the appellants and another had inflicted a number of injuries on Carolis Perera. The defence was that the second accused inflicted some injuries on Carolis Perera in the exercise of the right of private defence and that later some other persons—not the other accused in the case—came and joined in the attack on Carolis Perera. The trial Judge asked the Jury to consider whether any of the accused were guilty of murder or of voluntarily causing grievous hurt and invited them to acquit the accused if they rejected the evidence for the Crown or thought it probable that the injuries on Carolis Perera were caused in the circumstances deposed to by the second accused. He proceeded to say, " Counsel for the defence has referred to culpable homicide not amounting to murder, but I will ask you not to consider that ". After careful consideration, we have reached the decision that this was a misdirection. It is not possible

for us to speculate as to whether the Jury would or would not have returned a verdict of culpable homicide not amounting to murder if they did not receive the direction not to consider such a verdict. It was open to the Jury to consider such a verdict in this case, though it is somewhat difficult to say how a reasonable Jury could have brought such a verdict.

The decision of the Court is that a verdict of culpable homicide not amounting to murder should be substituted for the verdict of murder. We sentence each of the appellants to undergo rigorous imprisonment for ten years and pay a fine of Rs. 1,000 and in default undergo rigorous imprisonment for a further period of three years. We direct that half the fine paid or recovered should be given as compensation to the heirs of Carolis Perera.

Conviction altered.