[COURT OF CRIMINAL APPEAL.]

1943 *Present :* **Soertsz S.P.J., Hearne J. and Jayetileke J.**

THE KING *v.* R. A. EDWIN.

1—M. C. Anuradhapura, 7,943.

Murder—Intention of accused to cause the death of a person—Killing another person—Culpable homicide—Penal Code, s. 295.

Where the accused fired at a person, intending to murder him and caused the death of another person whose death was not intended,—*Held*, that he was guilty of murder.

APPEAL against a conviction with the certificate of the trial Judge.

H. A. Chandrasena, for the appellant.

T. S. Fernando, C.C., for the Crown.

April 19, 1943. SOERTSZ J.—

This appeal came before us on a certificate of My Lord the Acting Chief Justice who tried the case in the Assize Court. Counsel who appeared in support of the appeal stated that he had no submission whatever to make to us in regard to the charge to the Jury which

he respectfully took leave to describe as being as full and as fair to the accused as a charge could be. But he contended that the Jury acted unreasonably in accepting the evidence of the witnesses Banda, Kiri Banda and Lensuwa despite the many infirmities in that evidence to which the Judge had repeatedly called their attention, and in finding upon that evidence that the appellant intended to cause death, for that was what they declared their finding to be when questioned by the learned Judge in the course of their verdict being taken. It seems to us that the assumption by Counsel that the Jury in finding the intention of the appellant to have been what they said it was relied on the evidence of those three witnesses is unwarranted. The learned Judge in the course of his charge made it quite clear to the Jury that they could, even if they disbelieved those witnesses, find that the intention of the accused was to cause death, when he directed them, thus :—

> "If you do not believe the threat, it does not necessarily mean that you cannot believe that the accused had an intention to kill."

With all respect, that is our view too, for there is considerable evidence of a circumstantial character from which such an intention could have, reasonably, been inferred.

Counsel next submitted that, on the evidence in the case, the correct verdict, if the Jury found that it was the appellant who fired the gun, would have been that he was guilty of culpable homicide not amounting to murder on the ground that on the evidence in the case, it could not be said that the appellant, to whom the deceased man was a complete stranger, intended to cause his death, and that the most that could be said was that he must have known that, although he did not intend to cause the death of the deceased or some other stranger on the road in the crowd of people assembled there, it was likely that he might cause the death of such a person. In regard to this argument, we find that the learned Judge dealt with this point too in his charge. He said :

> "One thing I must tell you. It is quite immaterial that the death caused was that of a man other than his whose death was intended. I will give you an illustration to make it clear to you. If A fires at B with the intention of killing him and accidentally hits C, and B goes scot free, the intention of the person who shot C is the same as if B was killed according to plan."

We are in respectful agreement with that direction. It disposes of the argument of Counsel. To judge by the verdict returned by the Jury that was most probably the view they themselves took.

In regard to the point that, assuming that the intention of the appellant was to kill Andy or Thegis by shooting at one of them, the distance between the appellant and those men was, probably, greater than the charge of his gun could carry with fatal results, our view is, firstly, that there is no evidence to indicate that the gun the accused used could not be fatally effective at those distances, especially having regard to the fact that in the load there was a slug or something equivalent to a slug ; secondly, unless the crime charged is an impossible one, in the circumstances, the intention of an assailant is not to be inferred necessarily from the result actually achieved by him or from the result that could have been

achieved by him as disclosed by later investigation, unless, of course, as we have already observed, the assailant was addressing himself to something impossible.

Lastly, Counsel submitted to us that the case of the appellant fell under sub-section (4) of section 294 of the Penal Code and that the Jury appeared to have failed to consider that case to see whether it could be said that, assuming the appellant to have done an act which he must have known to be so imminently dangerous as in all probability to cause death he had an excuse for so doing. In regard to this, the presence or absence of an excuse is the determining factor one way or the other, and there is not the scintilla of evidence forthcoming from the case for the Crown to suggest an excuse and the appellant did not say or hint that there was an excuse. Nor can we even glimpse such an excuse in all the circumstances of this case.

It was for these reasons that we dismissed the appeal.

Appeal dismissed.