1974 *Present :* **Malcolm Perera, J., and Vythialingam, J.**

M. FRANCIS DE SILVA and 4 others, Appellants, *and*
K. T. P. ISURUPALA (Inspector of Police (Crimes), Galle), Respondent

S. C. 563-66/73—M. C. Galle, 72353/A

Penal Code—Section 483—Criminal intimidation—" Threatens "—Threat may be communicated by means other than words.

The threat contemplated in the definition of criminal intimidation in section 483 of the Penal code can be communicated by means other than words, for example by a gesture. A verbal threat is probably the commonest means by which a threat is communicated, but there is no good reason, in principle, why a threatening gesture should be excluded from the ambit of the definition.

Murukesu v. Karunakara (2 Times 64) and *Samaranayake v. Jayasinghe* (50 N. L. R. 330) not followed.

APPEAL from a judgment of the Magistrate's Court, Galle.

L. W. Athulathmudali, with *Asoka Somaratne* and *Denzil Gunaratne*, for the accused-appellants.

Asoka de Silva, with *A. Amaranath*, for the Attorney-General.

Cur. adv. vult.

JULY 2, 1974. MALCOLM PERERA, J.—

In this case the accused were charged as follows :—

1. You the above-named accused with others unknown were members of an unlawful assembly whose common object was to commit mischief by damaging the house and household furniture, etc., in the occupation of S. G. Danawathy and that thereby committed an offence punishable under section 140 read with section 146 Chapter 19 L. E. C.

2. That at the same time and place aforesaid and in the course of the same transaction you the above-named accused with others unknown to the prosecution were members of an unlawful assembly being armed with deadly weapons, to wit : sword and etc. or with anything which used as an offence likely to cause death and that thereby committed an offence punishable under section 141 read with section 146 Chapter 19 L. E. C.

3. That at the time and place aforesaid and in the course of the same transaction you the above-named accused with others unknown were members of an unlawful assembly as set out in count 1 above commit house-breaking by night by entering into the house in the occupation of S. G. Danawathy of Welipitimodera with intent to commit mischief, which offence was committed in the prosecution of the common object and that thereby committed an offence punishable under section 443 read with section 146 Chapter 19 L. E. C.

4. That at the same time and place aforesaid that in the course of the same transaction that you the above-named accused with others unknown to the prosecution were members of an unlawful assembly as set out

in count 1 above commit the offence of criminal intimidation by threatening S. G. Danawathy with injury to her person with intent to cause her alarm which offence was committed in the prosecution of the common object as set out in count 1 above and that thereby committed an offence punishable under section 486 read with section 146 Chapter 19 L. E. C.

5. That at the same time and place aforesaid and in the course of the same transaction you the above-named accused with others unknown to the prosecution were members of an unlawful assembly as set out in count 1 above with intent to cause wrongful loss to the said S. G. Danawathy commit mischief by damaging the whole household causing damage to the extent of Rs. 8,000, which offence was committed in the prosecution of the common object as set out in count 1 above and that thereby committed an offence punishable under section 140 read with section 146 Chapter 19 L. E. C.

After trial the learned Magistrate convicted the accused on all counts on 21.5.73, and on 6.6.73 the learned Magistrate sentenced all the accused to 6 months' rigorous imprisonment on count 1, 6 months' rigorous imprisonment on count 2, 6 months' rigorous imprisonment on count 3, one month rigorous imprisonment on count 4, one year's rigorous imprisonment on count 5—sentences to run concurrently.

Learned Attorney for the appellants submits : Firstly, that the learned Magistrate has not examined the case of each accused separately ; Secondly, that each count in the charge has not been dealt with by him separately ; Thirdly, that there was no evidence to substantiate counts 2 and 4 ; and Fourthly, that the evidence against the 5th accused is unreliable in that the only witness, namely, Piyaseeli, who implicated him, had made a belated statement to the Police.

As regards the first submission, Mr. Athulathmudali most strenuously contended, not without eloquence, that the learned Magistrate had not conformed to the provisions of section 306 of the Criminal Procedure Code. The matter was fully argued and, in the course of his submission, learned Attorney made a thorough scrutiny of the evidence and of the judgment of the learned Magistrate.

In support of his submissions he relied on the case of *Thurai Aiyah v. Pathimany*[1], 15 C. L. W. 119, where Nihill J. said: "Such difficulties as arise in determining this appeal are, I am bound to say, due to an imperfect state of the reasons for the conviction entered on the record by the learned Magistrate. A mere outline of the case for the prosecution and the defence, embellished by such phrases as 'I accept the evidence for the prosecution', 'I disbelieve the defence', is by itself an insufficient discharge of the duty cast upon a Magistrate by section 308 (1) of the Criminal Procedure Code."

In the case of *Ibrahim v. Inspector of Police, Ratnapura*[2] 59 N. L. R. 235, de Silva A. J. said "Nowhere has the Magistrate given any reasons for his conclusions, nor does he appear to have considered the evidence given by the appellant and his witnesses. The learned Magistrate's omission to state the reasons for his decision has deprived the appellant of his fundamental right to have his conviction reviewed by this Court and has thus occasioned a failure of justice."

With respect, I am in full agreement with the views expressed by the learned Judge in those cases. In this case can it be said that the learned Magistrate omitted to state his reasons for his decision? Having carefully examined the evidence and the judgment, I do not think so. In his judgment—especially at pages 51 to 54 and 59 and 60—the learned Magistrate has carefully examined the cases of each accused separately and dealt with each count in the charge and given his reasons for his findings. In the result I am unable to assent to the first and second submissions put forward by the learned Attorney for the appellants.

With regard to the third submission urged on behalf of the appellants, I cannot agree that there was no evidence to substantiate count 2 of the charge. In his evidence, Premadasa stated that he saw the 2nd accused Amarapala damaging the petromax lamp with a club and striking the wall clock with a club. Thus, there is clear evidence that a member of the unlawful assembly was armed with a deadly weapon. The learned Magistrate has accepted Premadasa's evidence, and upon his evidence, taken with the rest of the evidence, count 2 is clearly made out.

It was argued that since no verbal threats were uttered against Danawathy by anyone of the members of the unlawful assembly, count 4 has not been proved.

[1] *(1939) 15 C. L. W. 119.*

[2] *(1957) 59 N. L. R. 235.*

It was the contention of Mr. Athulathmudali that in order to maintain a charge under section 486 of the Penal Code there must be the uttering of threatening words. Learned Attorney did not, however, cite any authorities in support of his submissions. Section 483 of the Penal Code reads as follows :—

> " Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of anyone in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation. Explanation—A threat to injure the reputation of any deceased person in whom the person threatens is interested is within this section.
>
> *Illustration*
>
> A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. "

The submission of learned Attorney seems to be supported by the view expressed by Bonser C.J. in 4376 District Court of Badulla reported in Koch's Reports p 66. The report reads: " Section 486 of the Penal Code refers to threats either by writing or by word of mouth. Pointing a gun at a man is a gesture which would cause a person to apprehend that the person making that gesture is about to use criminal force against him—punishable by section 343 of the Penal Code. "

A. St. V. Jayewardene A.J. considered a similar situation in the case of *Murukesu v. Karunakara*[1], 2 Times of Ceylon Law Reports p. 64, Jayewardene A.J. said : " The objection is that the facts, even if accepted as true, do not disclose the commission of an offence under section 486 because there was no threat. It has been held that under section 483 which defines criminal intimidation it is necessary that the threat should be either verbal or in writing (see judgment of Bonser C.J. 4376 D.C. Badulla reported in Koch's Report p. 66).

I have gone through the evidence and I find that there is no verbal threat, and the Magistrate himself says that the accused had a knife in his hands at the time he went towards the complainant, although he did not verbally threaten the complainant. Therefore, it is not possible to say that the accused has

[1] *2 Times 64.*

committed an offence under section 483 punishable under section 486. The Magistrate finds that the accused held up his knife in a threatening manner. If he did so in fact he might have been guilty of an offence, with which however he was not charged. Considering the circumstances of this case I do not think that any useful purpose would be served by sending the case back for a fresh trial on an amended charge. The point of law raised must be upheld and the accused acquitted."

In the case of *Samaranayake v. Jayasinghe*[1] (50 N.L.R. 330), Basnayake J. (as he then was) said : " A threat is a declaration of an intention to punish or hurt, and to threaten is to give a warning of the infliction of an injury or to announce one's intention to inflict an injury as punishment or in revenge. "

The answer to the question under discussion can be found in the meaning of the word ' threatens ' in section 383. According to the Short Oxford Dictionary, the word ' threaten ' means : " (1) to try to influence (a person) by menaces ; (2) to declare one's intention of inflicting an injury upon another ". The Chambers 20th Century Dictionary gives the meaning of the word ' threaten ' as : " to declare the intention of inflicting punishment or other evil upon another ; to terrify by menaces ; to present the appearance of coming evil or of something unpleasant. A ' menace ' is a " show of intention to do harm ".

I am of the view that a threat can be communicated by a declaration or by a show of intention to do harm by means other than words, for example by a gesture. A verbal threat is probably the commonest means by which a threat is communicated but it is not the only means by which a threat can be announced. To say that there must be a verbal threat in every case of criminal intimidation is to restrict the meaning of the word ' threaten '. I am not inclined to give so narrow a meaning to the word ' threatens ' in section 483 of the Penal Code. With respect, I disagree with the views expressed by Bonser C.J., Jayewardene A.J. and Basnayake J. in the cases mentioned above. I see no good reason, in principle, why a threatening gesture should be excluded from the ambit of the definition of the offence given in section 483 of the Penal Code.

In this case witness Danawathy stated in her evidence that " on the night of 13/14th of February, when I was sleeping I heard a sound as if the glass shutters of the window were being broken upon. My son Premadasa had a torch light in his hand. There was a lamp in the house, but it was not burning. Prema-

[1] *(1948) 50 N. L. R. 330.*

dasa flashed his torch. I saw the windows broken. There were some people in the verandah and some in the garden. When I and my son came to the verandah, I heard stones being pelted at the house. The 1st, 2nd, 3rd and 4th accused broke open the rear door and entered the house".

In the light of these facts, I think the learned Magistrate was right in convicting the accused on count 4.

There appears to be substance in the fourth submission of Mr. Athulathmudali. The only witness who implicates the 5th accused is Piyaseeli. She states that she identified the 5th accused by the light of the torch he was flashing that night. She made her statement to the Police only the day after the incident. It is her evidence that she did not tell her brother or anyone else that the 5th accused was one of the culprits.

The learned Magistrate, in considering the evidence of this witness in relation to the 5th accused, states: "One cannot expect a clear cut, rational behaviour at a stage of this nature where all the household articles of considerable value had been wantonly damaged."

In his evidence the 5th accused stated that on the night of 30th February at 9.00 p.m. he went to the Police Station at the request of the brother of the 1st accused. On the 15th he had reported at the Police Station as requested by the Police. On a consideration of the evidence of Piyaseeli and of the 5th accused, a reasonable doubt arises as to whether the 5th accused had a hand in the criminal transaction spoken to by the prosecution witnesses, particularly in view of the belatedness of the statement of Piyaseeli. I give the benefit of this reasonable doubt to the 5th accused and acquit him.

The question of sentence has given me considerable concern.

In the course of the trial, the 1st accused had died. The learned Magistrate has inadvertently convicted him and imposed sentences on him. I set aside formally the conviction and sentences imposed on the 1st accused who had died before the learned Magistrate made his order.

The learned Magistrate has imposed a term of 6 months' rigorous imprisonment on count 3 which is a charge of house-breaking by night with intent to commit mischief and a sentence of one year's rigorous imprisonment on count 5 which is a charge of mischief. The maximum term of imprisonment prescribed for the offence of house-breaking by night with intent to commit

mischief is 5 years' rigorous imprisonment, while the maximum for the offence of mischief is 2 years' rigorous imprisonment. I think the graver of the two offences is the one set out in count 3, for which offence the Magistrate has imposed a term of 6 months' rigorous imprisonment.

I am of the view that while deterrent sentences should be imposed for offences of this nature, the sentence passed in respect of count 5 is excessive in the circumstances of this case.

I therefore set aside the sentences imposed on the 2nd, 3rd and 4th accused in respect of count 5 and substitute in its place a sentence of 6 months' rigorous imprisonment. The sentences are to run concurrently.

VYTHIALINGAM, J.—I agree.

Convictions of 2nd, 3rd and 4th accused affirmed.