[COURT OF CRIMINAL APPEAL.]

1940 *Present :* **Howard C.J. and Keuneman and Nihill JJ.**

THE KING *v.* BELLANA VITANAGE EDDIN.

16—M. C. Kalutara, 45,867.

Culpable homicide not amounting to murder—Charge of murder—Plea of culpable homicide not taken nor raised in defence—Basis for such defence on facts proved—Duty of Judge to put the alternative before the jury.

In a charge of murder it is the duty of the Judge to put to the jury the alternative of finding the accused guilty of culpable homicide not amounting to murder when there is any basis for such a finding in the evidence on record, although such defence was not raised nor relied upon by the accused.

THIS was an appeal from the refusal of Nihill J. to grant the appellant leave to appeal under rule 24 of the Court of Criminal Appeal Rules.

Mackenzie Pereira, for the accused.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

June 4, 1940. HOWARD C.J.—

This is an appeal from the refusal of my brother Nihill to grant the appellant leave to appeal under rule 24 of the Court of Criminal Appeal Rules, 1940. When this application was heard by my brother the appellant was not represented by Counsel. The appeal to my brother was made on grounds which were mentioned in his application. The appellant before the Court of Appeal has been represented by Mr. Mackenzie Pereira, who has relied in his argument not on the grounds of appeal which were before my brother but on another ground. That ground was that the learned Judge in his charge to the jury omitted to give the jury, or put to the jury, the alternative of finding the accused guilty of culpable homicide not amounting to murder. That defence was not raised nor relied upon by the accused at his trial. That fact in itself would not be sufficient to relieve the Judge of the duty of putting this alternative to the jury if there was any basis for such a finding in the evidence on the record. It therefore remains for consideration as to whether there was anything in the record of the evidence to provide material on which the jury could find the accused guilty of culpable homicide not amounting to murder.

The question which the jury had to decide was as to the intention of the accused, that is to say, whether the act by which the death was caused was done with the intention of causing death, or secondly, if it was done

with the intention of causing such bodily injury as the offender knows to be likely to cause death to the person to whom the hurt is caused, or thirdly, if it was done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. If the case came within any of these three examples the offence of which the accused was guilty was murder. The learned Judge referred to the injuries found on the deceased and left it to the jury to say whether those injuries indicated that the accused caused them with the intention of causing death or of causing such bodily injury as is likely to cause death.

Now, turning to the medical evidence we find that there were four injuries inflicted on the head, the first three of which caused three separte fractures. The fourth did not cause a fracture but it was inflicted on the right side of the back of the head, indicating that at the time when it was inflicted the deceased was running away. The medical evidence is also to the effect that the deceased man had been assaulted practically all round, front, left, right and the rear of the face, that the injuries could have been caused by blows with a club, that Nos. 1, 2 and 3 were the result of heavy blows and that after receiving injuries 2 and 3 it was not likely that the man could have spoken. He also states further on in his evidence that the injuries on the deceased would have caused death in the ordinary course of nature but each wound by itself is not necessarily fatal.

Now, what inference is to be drawn from the nature of the injuries that were inflicted on the deceased or can any other inference be made from those injuries except that the accused intended to cause death, or such bodily injury as he knew was likely to cause death, or to cause bodily injury to the deceased and the bodily injury intended to be caused was sufficient in the ordinary course of nature to cause death. I think it is obvious that no other intention can be inferred from the nature of the blows, the part of the body on which they were inflicted and the force with which they were inflicted. That, moreover, is not the only evidence as to the intention of the accused. The witness Silva, a fishmonger of Paiyagala, gave evidence that he was present on the Colombo-Galle road that night and he heard the deceased say to the accused "You threatened to kill me. If you can, do so now". This witness says that he separated the two men, and the accused at the same time said "You be on the lookout. Before dawn I will kill you". If any other evidence was required as to the intention of the accused it is supplied by the evidence of this man Silva, which amounts to evidence of a definite threat on the part of the accused.

In view of what I have said with regard to the medical evidence and the threat, we are of opinion that the jury could have arrived at no other verdict except one of murder. In these circumstances it was not the duty of the learned Judge to put before the jury an alternative issue with regard to culpable homicide not amounting to murder. To do so would have merely confused their minds as to the issues on which they had to find.

The application must be refused.

Application refused.