[COURT OF CRIMINAL APPEAL.]

1945 *Present:* **Soertsz S.P.J., Keuneman and Wijeyewardene JJ.**

THE KING *v.* U. A. FERNANDO *et al.*

44—M. C. Chilaw, 24,345.

Court of Criminal Appeal—Charge of murder—Two accused—Issue of common intention—Inconsistency between verdict of jury and rider they added—Penal Code, s. 32.

The two accused were convicted of the offence of murder. On the question whether they acted with common intention the Crown relied mainly upon the evidence that the deceased man and his companions went to the house of the 1st accused on the invitation of the 1st and 2nd accused to come there and discuss a settlement of some cases then pending between the parties, and that they were attacked when they went there in response to that invitation. On this material, as put to them by the trial Judge, the jury considered the question of common intention and returned the verdict of "guilty of murder" and, at the same time, added a rider to their verdict recommending the accused to mercy on the ground that there was no premeditation.

Held, that the rider of the jury was not consistent with their verdict and negatived their finding as regards common intention.

APPEAL against a conviction by a Judge and Jury before the Western Circuit.

A. H. C. de Silva (with him *M. M. Kumarakulasingham* and *Mahesa Rutnam*) for the accused, appellants.

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

Cur. adv. vult.

May 17, 1945. SOERTSZ S.P.J.—

Counsel for the appellants, in the course of his argument, invited our attention to various passages in the notes of evidence, and in the charge to the jury and he submitted, upon them, that the learned trial Judge had formed a very strong view of the case and had, in enforcement of

that view, dealt unequally with the case for the Crown on the one side, and the case for the defence on the other, treating with indulgence the infirmities of the evidence given by the witnesses favourable to the case for the Crown, and with elaborate criticism those of the witnesses who supported the defence. Counsel asked us to hold that, in consequence, the appellants had not had a fair trial. In regard to this submission, we do not think it necessary to say anything more than that, in our opinion, no case has been made out for a retrial. We find that although the trial Judge did indicate, perhaps somewhat too clearly and strongly, his own views on the facts in the case, he told the jury more than once that, ultimately, they were the sole judges on questions of fact, and that they were free to form their own opinions of the witnesses and of the weight to be attached to their evidence. Upon an examination of the whole charge we cannot say that there was any violation or disregard of any principle of law or of any rule of procedure that would justify us in ordering a retrial in this case.

The question that has caused us great anxiety is whether, upon all the evidence, and upon the terms of the verdict returned by the jury, the conviction of the two appellants of the offence of murder should be upheld. We find that it is clearly established by the evidence that the fatal injuries on the deceased man were inflicted by the second appellant. The first appellant is shown, as clearly, to have caused a non-grievous injury with a long-bladed weapon. Those being the facts, it follows that, when the Crown indicted both appellants on a charge of murder, it based itself upon section 32 of the Penal Code to impute to the appellants a common intention to cause death. In support of that allegation the Crown appears to have relied mainly upon the evidence led to show that the deceased man and his companions went to the house of the first appellant on an invitation to them to come there and discuss a settlement of some cases then pending between the parties, and that they were attacked when they went there in response to that invitation. The case for the Crown was that this invitation was a pretext for inveigling the deceased and his party to the house of the first appellant in order, there, to attack them.

In his charge the trial Judge, when he came to deal with the question of common intention, put to the jury the evidence of this invitation as the one matter from which it was open to them to infer the requisite common intention. This is what the Judge said: " if you believe the evidence given that the two accused came there that afternoon and wanted Arthur and Cyril to come there for the settlement of the case or for talking about a settlement, and the two accused did so either with the intention of luring them to their place and attacking the deceased severely and unmercifully with weapons, they can then be said to have the common intention of inflicting an injury likely to cause death, killing him, if necessary, and each would be guilty of murder. Getting Cyril and Arthur to that place was a mere blind in that case. "

It is not unreasonable to assume that it was upon this material that the jury considered the question of common intention and although the verdict they returned—guilty of murder—implies that they found the requisite common intention, the rider they added to their verdict

recommending the appellants to mercy on the ground that there was no premeditation leads almost inevitably to the conclusion that they did not accept the evidence that there had been an invitation to a conference with a view to an attack.

The jury were not asked to address themselves to the question of a common intention on any other hypothesis. For instance, they were not asked to consider the matter on the hypothesis that the deceased and his companions had been invited without any ulterior motive and when they were there a dispute arose and the two appellants then acting together in pursuance of a common intention attacked them and caused the death of the deceased.

Even if the jury had been directed to approach the question in that way they would have had to strain and stretch the evidence too far to base upon it a common intention to cause death. The transaction that resulted in the death of the deceased moved so rapidly as to make it extremely difficult to impute, fairly, a common intention to both the appellants. The evidence establishes that there was a fight between the first appellant and Cyril in which the deceased and Arthur intervened, and that when cries were raised in the house of the first appellant where the fight was taking place the second appellant who lived in a house some 125 yards away ran up, and seeing a fight in progress, attacked the strangers in his brother's house. The deceased fell mortally injured under the blows of the second appellant, and then the first appellant delivered a blow with a long-bladed weapon and inflicted an injury that exposed one of his ribs. It was, undoubtedly, a cruel and revengeful blow, but its real effect was to cause a non-grievous injury, and it can hardly be said that in the circumstances of this case, the first appellant's blow accelerated the death of the deceased. At any rate, there was nothing elicited in the course of the examination of the medical officer to show that it did.

In our opinion, on the evidence in the case the more reasonable and the fairer view to take is that each appellant should be held responsible for his acts alone. In that view, although *prima facie* the offence of the second appellant would appear to be an offence of murder, there is the evidence already referred to, that seems to us to mitigate that offence and to reduce it to culpable homicide not amounting to murder. If the jury had been more fully directed on this point they would, probably, have found the second prisoner guilty of the lesser offence. That at any rate, in our view, was the second appellant's offence, on the case as it stands. We would, therefore, set aside the conviction of murder and find the second appellant guilty of culpable homicide not amounting to murder and pass a sentence of twelve years' rigorous imprisonment.

In regard to the first appellant the evidence shows that he used a long-bladed weapon on a man who was already severely injured, and we think that in all the circumstances the inference that may be fairly drawn is that he must have known that his act was likely to cause death. We, therefore, find him guilty of attempt to commit culpable homicide not amounting to murder and direct that he undergoes rigorous imprisonment for a period of six years.

Varied.