[COURT OF CRIMINAL APPEAL.]

1940 *Present :* **Howard C.J., Moseley S.P.J., and Wijeyewardene J.**

THE KING *v.* DE SILVA *et al.*

23—M. C. Gampaha, 3,463.

Court of Criminal Appeal Ordinance, s. 6 (2)—Conviction on two counts—The withdrawal of third count—Power of court to convict on third count or for lesser offence—Criminal Procedure Code, s. 185.

The appellants were charged—(1) with being members of an unlawful assembly the common object of which was to cause serious bodily injury to one Rogus Fernando, (2) that, being members of the said unlawful assembly, they did, in the prosecution of the said common object, commit murder by causing the death of the said Rogus Fernando, (3) that they, acting in furtherance of a common intention, did commit murder by causing the death of the said Rogus Fernando.

[1] *(1891) 1 Q. B. 594.* [2] *(1891) 1 Q. B. 560.*

The jury convicted the appellants of counts (1) and (2), whereupon Crown Counsel withdrew count (3). The Court of Criminal Appeal was of the view that there was not sufficient evidence to establish that the appellants formed an unlawful assembly or that they acted in furtherance of a common intention to cause the death of the deceased.

***Held*, that it was open to the Court acting under section 6 (2) of the Court of Criminal Appeal Ordinance to substitute a verdict under count 3 or for any lesser offence established by the evidence.**

APPEAL from a conviction before the 2nd Western Circuit of the Supreme Court. The facts are briefly stated in the head-note.

Francis de Zoysa, K.C. (with him *Siri Perera, S. de Zoysa,* and *E. L. W. de Zoysa*), for appellants.

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

Cur. adv. vult

August 30, 1940. HOWARD C.J.—

This is an appeal by all five accused on grounds of appeal involving questions of law. The verdict of the Jury was that they were guilty of (1) being members of an unlawful assembly the common object of which was to cause serious bodily injury to one Welisarage Rogus Fernando and thereby committed an offence under section 140 of the Penal Code and (2) being members of the said unlawful assembly did in prosecution of the said common object commit murder by causing the death of the said Welisarage Rogus Fernando and thereby committed an offence under sections 146 and 296 of the Penal Code. After the Jury had returned this vedict Crown Counsel withdrew a third count in the indictment which charged the accused that they acting in furtherance of a common intention did commit murder by causing the death of the said Welisarage Rogus Fernando and that they thereby committed an offence under section 296 of the Penal Code read with section 32 of the Penal Code.

The main ground of appeal was based on the contention that there was no legal proof of the charge of unlawful assembly. An "unlawful assembly" is defined in section 138 of the Penal Code. For the purposes of this case it was necessary for the Crown to establish that each of the five accused had gathered together with the common object of causing serious bodily injury to the deceased. The evidence adduced by the Crown in support of this proposition was as follows:—

(1) That on the day in question about 2 P.M. gambling was going on close to the house of the deceased who went there to stop it. That ten minutes after deceasd had come away from this place all five accused and two other men were seen coming towards the boutique of the witness Miguel Fernando. That the 3rd accused was heard to say "I am Hitler of Welisara. I was asked to get up from the place where we were gambling by Rogus. I will do something nice to him before nightfall". That the 2nd and 5th accused amongst others also made some remarks.

(2) That about 6 or 6.30 P.M. Miguel returned to his boutique and found the 5th accused lying down in the verandah. Subsequently,

the 3rd accused came there followed by the 1st and 4th accused arriving from different directions. The 3rd accused had a walking stick with a brass knob, and, after hearing something that sounded like the report of a gun, he left the boutique saying: "I asked that fellow not to fire. In spite of that he has done it. I must do something to him".

(3) That whilst the 1st, 4th, and 5th accused, the first two of whom were armed with clubs, were in the boutique, Rosalin, the 12-year old child of the deceased, came to the boutique to get some betel. That the 1st accused asked her if her father was at home. When she told him that he was, he said "Tell your father that we are gambling, ask him to come if he could". After the girl had left, the 5th accused who was said by Miguel to be drunk, said: "Kill that fellow, no harm one of us going to the gallows". Then the 1st accused said: From 6 P.M. I was behind that fellow's house but he did not come out".

(4) That a little later deceased and his wife came towards Miguel's boutique with a chulu light. Miguel tried to prevent the deceased coming to his boutique. Then the 1st, 4th, and 5th accused came out of the boutique saying: "Stop, we were waiting here to meet you" and ran towards the deceased. The deceased turned and hurried towards his house. Then the 1st accused gave him a blow with his club. The 3rd accused who had also appeared on the scene then gave him a blow with his walking stick. The 2nd accused also dealt him a blow with a club. Miguel is not able to say from which direction the 2nd and 3rd accused appeared. The deceased then fell down and the 4th and 5th accused struck him with clubs. According to the evidence of Miguel the deceased was carrying an umbrella and nothing else.

No complaint has been made with regard to the learned Judge's charge to the Jury. In fact perusal of the charge indicates that the law with regard to the ingredients of the offence of "unlawful assembly" were most meticulously explained with reference to the evidence in the case. But before the Jury could find the accused guilty on counts (1) and (2) it was incumbent on the prosecution to prove that each accused was a member of the unlawful assembly at the time the offence for which he is held liable was committed. The common object of the unlawful assembly was the infliction of serious bodily injury on the deceased. The only evidence to connect the 2nd accused with this common object was the fact that he was with the other accused in the early part of the afternoon when they were proceeding from the place of gambling towards the boutique of Miguel and was present when the 3rd accused made the alleged threat against the deceased and also that he arrived on the scene of the assault after the deceased had been struck by the 1st and 3rd accused with clubs and struck the deceased with a club. This evidence is not, in our opinion, sufficient to prove that the 2nd accused was a member of an unlawful assembly. Even if there was sufficient evidence to show that the common object of the remainder of the accused was the causing of serious bodily injury to the deceased, this evidence does not establish an unlawful assembly inasmuch as the participators in the

assembly would be reduced to four. The conviction of the accused on the two counts dependent on the existence of an "unlawful assembly" cannot, therefore, be upheld.

It has been contended by Mr. Gunasekera that, if the convictions on counts (1) and (2) cannot be sustained, the withdrawal of count (3) does not preclude this Court from finding the accused or some of them guilty under this count, or in the alternative ordering a new trial thereon. In this connection he relies on section 185 of the Criminal Procedure Code read in conjunction with section 6 (2) of the Court of Criminal Appeal Ordinance, No. 23 of 1938. Moreover Crown Counsel contends that apart from count (3) it was on this indictment possible for the Jury to have found on count (2) a verdict of murder without "unlawful assembly". As authority for this proposition he has referred us to *Rama Boyam*[1] and *The King v. Sayaneris*[2]. We are in agreement with these contentions. We do not, however, consider that the ends of justice will be served by directing a new trial. We, therefore, propose to have recourse to the powers vested in us by section 6 (2) of the Court of Criminal Appeal Ordinance.

In deciding whether the evidence justifies a conviction under count (3) we have given careful consideration to the question as to whether it was proved that the accused or any of them were acting in furtherance of a common intention to cause the death of the deceased. The evidence tendered by the Crown in support of such a common intention is summarized in paragraphs (1) to (4) of the second paragraph of this judgment. That evidence which is mainly the testimony of the witness Migual is, however, considerably weakened by the evidence of Rosalin, the deceased's daughter, who states that of the accused she saw only the 1st accused in the boutique when she went there to get betel. The 4th and 5th accused, although alleged by Miguel to have come out of the boutique with the 1st accused, dealt their blows on the deceased at a late stage in the assault and only after he had fallen down. The 2nd and 3rd accused, moreover, appeared on the scene of the assault from different directions. There was no evidence to indicate that those in the boutique warned the other conspirators of the expected arrival of the deceased at the scene of the assault. In these circumstances we are of opinion that the presence of the accused at the scene of the assault must be deemed to have been fortuitous and not in pursuance of a preconcerted plan. There is, therefore, no evidence that the death of the deceased was caused by the accused in furtherance of a common intention. A conviction of the accused or any of them under section 296 of the Penal Code read with section 32 is not therefore possible.

The fact that a conviction under count (3) as framed is not warranted by the evidence does not preclude us from finding the accused guilty of offences arising out of individual acts committed by them in the course of this affray. We have, therefore, dealt with the accused on this basis. The 1st accused has in giving evidence admitted that he struck the deceased two blows with his club. The medical evidence establishes that those blows alighted on the head of the deceased and caused his death. The 1st accused maintains, however, that these blows were

[1] *(1934) A. I. R., Madras 565.*

[2] *39 N. L. R. 148.*

struck in self-defence through fear that he would be killed after he had himself been struck by the deceased on the head with an iron rod or wooden club. We are of opinion that the evidence tends to show that the deceased came towards the boutique spoiling for a fight and that the 1st accused was only too ready to gratify this wish. We take into consideration also the bodily injuries found on the various accused. In other words the evidence indicates that the act of the 1st accused was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without his having taken undue advantage or acted in a cruel or unusual manner. Moreover the fact that the 1st accused used a club and not a weapon that was necessarily lethal raises a doubt, having regard to the circumstances in which the blows were struck, as to whether the necessary proof of intention is present to constitute the offence of murder. The offence committed by the 1st accused, therefore, comes within exception 4 to section 294, and he is guilty of culpable homicide not amounting to murder.

There is no doubt that the remaining accused were present at and participated in the assault on the deceased. The medical evidence does not, however, bring home with sufficient certainty to any of these accused the responsibility for the infliction of any injuries on the body of the deceased. In these circumstances the only offence established against them is one of assult under section 343 of the Penal Code.

The order of the Court, therefore, is as follows: The convictions of the five accused under counts (1) and (2) of the indictment are set aside. The 1st accused is convicted of culpable homicide not amounting to murder under section 297 of the Penal Code and sentenced to 10 years' rigorous imprisonment. The 2nd, 3rd, 4th, and 5th accused are convicted of assault under section 343 of the Penal Code and sentenced to 3 months' rigorous imprisonment.

Convictions varied.