

[COURT OF CRIMINAL APPEAL]

1947 Present : Howard C.J. (President), Jayetileke and Dias JJ.

THE KING v. HENDRICK *et al.*

Appeals 21-33, with Applications 69-81.

S. C. 92—M. C. Colombo, 19,683.

Evidence—Identification—Hearsay—Corroboration.

A number of persons were charged with having been members of an unlawful assembly. A Police Sergeant gave evidence to the effect that at an identification parade he made notes of the various identifications made by certain police officers and that the accused were those persons who were identified. The Police Sergeant's evidence, although it was hearsay, was, however, linked up with that of the police officers who stated that they identified certain persons.

Held, that the evidence, if accepted, was sufficient in law to prove identity.

Abdul Wahab v. Emperor (1926) 27 *Crim. L. J.* 836, followed.

A PPEALS, with applications for leave to appeal, against certain convictions in a trial before a Judge and Jury.

H. V. Perera, K.C. (with him *Colvin R. de Silva* and *M. M. Kumarakulasingham*), for the first, second, and third appellants.

M. M. Kumarakulasingham, for the fourth, fifth, sixth, ninth, tenth to thirteenth appellants.

C. S. Barr Kumarakulasinghe (with him *K. Sivasubramaniam*), for the seventh and eighth appellants.

T. S. Fernando, C.C. (with him *A. C. Alles, C.C.*), for the Crown.

Cur. adv. vult.

June 23, 1947. HOWARD C.J.—

This is an appeal by thirteen accused who were charged with the following offences:—

- “1. That on or about November 19, 1945, at Fort, in the District of Colombo, you were members of an unlawful assembly the common object of which was to voluntarily cause hurt to Police officers, in particular to Sub-Inspector C. G. Wilkinson, Police Sergeant 755 Punchi Banda *alias* Bandara, Police Constable 109 Thangarajah, Police Constable 677 George Silva, Police Constable 1337 Fernando, Assistant Superintendent of Police D. C. T. Pate, and Police Constable 3185 Maximian, all of the Ceylon Police; and that you have thereby committed an offence punishable under section 140 of the Penal Code.
2. That at the time and place aforesaid, you being armed with deadly weapons and being members of the unlawful assembly aforesaid did in prosecution of the said common object commit the murder of Police Sergeant 755 Punchi Banda *alias* Bandara of the Fort Police; and that you have thereby committed an offence punishable under section 296 read with section 146 of the Penal Code.”

All thirteen accused were found guilty on count 1 by the unanimous verdict of the Jury. By a majority of 5 to 2 they were found guilty of voluntarily causing grievous hurt with a dangerous weapon on count 2. Each of the accused were sentenced to 6 months' rigorous imprisonment on count 1 and 4 years' rigorous imprisonment on count 2, the sentences to run concurrently. The appeal has been argued in the main by Mr. H. V. Perera, K.C., who appeared for the first, second, and third accused, but the other accused have been represented separately. The incident that led to the commission of the offences arose as the result of a procession of strikers coming into collision with a party of Police. The procession which consisted of harbour workers was proceeding from Front Street *via* Lotus Road towards Parsons Bridge. According to the evidence of Sub-Inspector Wilkinson the number of people in the procession was about 300. Banners were being carried. The Inspector decided to accompany the procession in order to ensure its orderly conduct. The Police party consisting of the Sub-Inspector, 2 Sergeants, and 6 Constables, one of whom was Sergeant Banda, the deceased, started in the Police van. As the head of the procession was going into Upper Lotus Road, the Police van was blocked and the Inspector, one Sergeant and three Constables got down and rushed up to Parsons Bridge junction. The Inspector reached the head of the procession. Whilst the Inspector was at the round-about at the Parsons Road junction, P. C. Thangarajah came and complained that he had been assaulted in the face by a number of the members of the procession. P. C. Thangarajah pointed out one of the men who had assaulted him and the Inspector went up and arrested him. He struggled and was placed in the Police van in spite of attempts by others in the procession to rescue him. At this time about 7 police officers were near the van. According to the Inspector bricks were then thrown at the police and he saw persons in the

procession pulling out short sticks from their shirts. He also noticed a push cart with soda water bottles on the right hand side of Parsons Bridge being broken up. The Inspector with Sergeant Banda, the deceased, rushed to the cart. They could not prevent the cart being broken up and the members of the procession arming themselves with sticks and bottles. The Inspector was struck several times. At this time the Police van with the other police had disappeared and the Inspector and Sergeant Banda were the only Police officers in the vicinity.

The Inspector told Sergeant Banda to run. Sergeant Banda ran *via* Canal Row towards York Street followed by a large crowd of people. The Inspector ran to the same direction and was picked up by a Military truck. Stones and sticks were flung at the truck but he got away and reached the Fort Police Station *via* the State Council portion of Lotus Road and Queen Street.

The other members of Inspector Wilkinson's party were also assaulted by the crowd but they managed to get back to the Fort Police Station. P. C. Thangarajah borrowed a bicycle, but the others came back in the van. At the Fort Police Station Assistant Superintendent of Police Weinman organized another Police party consisting of himself, an Inspector, two Sub-Inspectors and about 12 other officers. They went in the Police van and reached Parsons Bridge *via* York Street.

The van drove past the Regal Theatre and the Assistant Superintendent then noticed the procession ahead of them going towards Slave Island. The Police party got ahead of the procession and then formed a cordon along the road. Many members of the procession were armed with bottles, clubs and stones. When the Police party were about 20 yards from the procession, members of the latter started to throw stones at them. The Assistant Superintendent then ordered a baton charge. The procession broke up and the thirteen accused were arrested by the Police and put in the van. At the Police Station they were placed in the cells. At 12 noon an identification parade was held, the thirteen accused being mixed up with twelve other persons collected by the Police from the street. At this parade the following identifications were made by the Police. The first, fifth, and eleventh accused were identified as being amongst those who were arrested by Assistant Superintendent Weinman's party and placed in the Police van. The first accused and fifth accused had weapons. The second, third, fourth, sixth, seventh, ninth, tenth, twelfth, and thirteenth accused were all identified as having been present in the procession at Parsons Bridge when the first attacks were made on the Police. There was no identification of the eight accused as being at Parsons Bridge or as one of those arrested after the baton charge.

There was no identification of the persons who had caused the death of Sergeant Banda. A witness called Mohamed Ali watched Inspector Wilkinson making the arrest after P. C. Thangarajah had complained of being assaulted. This witness also saw the commencement of the assault on the Police with stones. He states that after this the Inspector and Sergeant were left and they were assaulted with bottles, clubs and stones. He saw the Inspector get into the Military truck and a crowd of people chasing the Sergeant down York Street. Stones hit the Sergeant on the

head and he fell down between Parsons Bridge and Canal Row. The crowd then attacked him with clubs on his head and all over the body. They then dispersed. Shortly after a European came along and with the witness's assistance placed the injured man in a car and took him to the hospital. He died the same day from laceration of the brain.

Counsel for the appellants have not with any degree of force argued that the convictions of all the accused except the eighth on count 1 is not in accordance with the evidence. The only evidence against the eighth accused is the fact that all the persons placed in the van were subsequently placed on their trial and that he must have been in the van because he was charged. We think there is a measure of doubt in regard to the eighth accused having regard to the failure of any Police officer to identify him and to the general confusion that prevailed. We therefore set aside the conviction of the eighth accused on both counts. The convictions of all the other accused on count 1 are affirmed.

The contentions of Counsel for the defence rest on firmer ground when count 2 is considered. With regard to the first, fifth, and eleventh accused there was no direct evidence to establish their presence at Parsons Bridge. Mr. Fernando asks us to say that it must be inferred from their presence at the time of Assistant Superintendent Weinman's baton charge that they were also present at Parsons Bridge. This is circumstantial evidence which must be conclusive as to their being in the procession when Sergeant Banda was assaulted. It is however possible that they joined the procession after Parsons Bridge and after the assault on Sergeant Banda. In these circumstances it has not been proved beyond reasonable doubt that these accused were members of the unlawful assembly at the time when the assault on Sergeant Banda took place. The convictions of these accused on count 2 are therefore set aside.

In regard to the other accused, namely, the second, third, fourth, sixth, seventh, ninth, tenth, twelfth, and thirteenth, we think there was evidence as to their presence at Parsons Bridge just prior to the assault on Sergeant Banda. There was, therefore, evidence to prove not that they were as members of the unlawful assembly guilty of his murder, but as found by the Jury of voluntarily causing grievous hurt under the provisions of section 317 read with section 146 of the Penal Code. The convictions of these accused on count 2 are therefore affirmed.

One or two points made by Mr. H. V. Perera deserve attention. He has maintained that there was a misdirection at p. 49 of the learned Judge's charge and from the passages to which he drew our attention contended that the Jury might draw the inference that it was not necessary in order to convict the accused of their liability under section 146 of the Penal Code for them to have been actually members of the unlawful assembly at the time when the assault on Sergeant Banda took place. The learned Judge on numerous occasions in his charge has stated that before the accused could be convicted it must be proved that they were members of the unlawful assembly, at the time the offence was committed. On the last page but one of the summing up this final direction appears. In these circumstances we do not consider there is any substance in this point.

Mr. Perera has also invited our attention to the unsatisfactory identification of the accused. Not one of the accused were identified by the Police officers who gave evidence either in the Magistrate's Court or in the trial Court. The only evidence of identification is derived from the evidence of the Police officers who state that they arrested certain persons as the result of the baton charge and then picked out those persons at the identification parade held by Sergeant Jayasinghe. The evidence of Sergeant Jayasinghe is to the effect that he made notes of the various identifications made by the Police officers and the accused are those persons who were identified as being arrested as the result of the baton charge. Some of them were also identified as being present at Parsons Bridge. Mr. Perera also maintained that the identification parade was unsatisfactory as it should have contained more than twelve persons who were not accused. It is true that certain criticisms can be levelled at the evidence of identification. These infirmities were, however, brought to the notice of the Jury by the learned Judge in the clearest terms. In spite of these infirmities the Jury have accepted this evidence. I need hardly say that the sole evidence of Sergeant Jayasinghe as to the identifications would not have sufficed in law as it would have been hearsay—*vide Abdul Wahab v. Emperor*¹. The evidence of Sargeant Jayasinghe is, however, linked up with that of the Police witnesses taking part in the baton charge, who have stated that they identified certain persons.

Such a method of identification is specially approved in the Indian case that I have cited. In these circumstances there is no objection to the acceptance by the Jury of such evidence as being sufficient in law to prove identity.

Conviction of eighth accused on both counts set aside.

Other convictions affirmed on count 1.

Convictions of the first, fifth, and eleventh accused on count 2 set aside.

Convictions of the other accused on count 2 affirmed.
