

[COURT OF CRIMINAL APPEAL.]

1944 *Present: Howard C.J., Moseley S.P.J., and Cannon J.*THE KING *v.* K. W. JAYANHAMY *et al.*4—*M. C., Avissawella, 28,961.**Murder—Two accused charged—Common intention—No proper direction to Jury.*

Where two accused were charged with murder and the prosecution had to establish that they were acting with a common intention and there was no proper direction by the learned Judge that the mere presence of the second accused at the scene of the murder did not constitute common intention.

Held, that the conviction of the second accused could not be sustained.

A PPEAL against a conviction with leave of the Court.

M. M. Kumarakulasingham, for the appellants.

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

October 16, 1944. HOWARD C.J.—

It has been submitted to us that the evidence led at the trial of the first accused was generally of such an unsatisfactory nature that the conviction cannot be upheld. We do not think there is any substance in this contention and the appeal of the first accused is dismissed.

With regard to the second accused, however, different considerations apply. It had to be established by the prosecution that the two accused were acting with a common intention. The evidence against the second accused was merely that he was with the first accused that night carrying a club and after the shooting he was seen running away with the first accused or, as the witness also put it, walking fast. There was also some evidence of motive. Apart from this there was no other evidence of a common intention between the first and the second accused. It seems to us that the charge of the learned Judge did not make it absolutely clear to the jury as to what had to be proved to establish a common intention. There was no direction on the part of the learned Judge that the mere presence of the accused at the scene of the crime did not constitute common intention. Moreover, at page 20 of the charge we find this statement: "Charles's evidence brings them (that is, both accused) to the immediate neighbourhood and brings them both together, and brings them one with a club and the other with a gun. If you believe that evidence, then they must have been acting together". Or in other words, the learned Judge told the Jury that if they believed the evidence of Charles they must convict not only the first but also the second accused. In view of that statement and the other criticisms that I have made in regard to the way in which the question of common intention was dealt with in the charge, we are of opinion that the conviction of the second accused cannot stand. The conviction of the second accused is therefore set aside.

Conviction of 2nd accused set aside.
