[COURT OF CRIMINAL APPEAL.]

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

THE KING *v.* SELLATHURAI *et al.*

APPEALS 73-83 WITH APPLICATIONS 209-219.

S. C. 14—M. C. Mallakam, 1,092.

Unlawful assembly—Prosecution of common object—Vicarious liability—Armed with deadly weapons—Misdirection—Penal Code, sections 141 and 146.

In order to make members of an unlawful assembly vicariously liable for the act of any one of them under section 146 of the Penal Code, the act must be one which, upon the evidence, appears to have been done with a view to accomplish the common object attributed to the members of the unlawful assembly.

The vicarious liability attaching to a person by reason of his being a member of an unlawful assembly is not sufficient for a member of such assembly who is unarmed to be found guilty of an offence under section 141 of the Penal Code.

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

H. V. Perera, K.C. (with him *M. M. Kumarakulasingham*), for the appellants.

T. S. Fernando, C.C. (with him *E. L. W. de Zoysa, C.C.*), for the Crown.

Cur. adv. vult.

October 20, 1947. HOWARD C.J.—

The appellants were charged at the Jaffna Assizes on an indictment containing several counts the first of which was that on or about April 22, 1946, being members of an unlawful assembly, the common object

[1] (1939) *A. C. 231.*

of which was to cause hurt to Murugar Chelliah, Velan Sinnapodian and Murugan Nagan, they have committed an offence punishable under section 140 of the Penal Code. There were fourteen other counts in the indictment, count 2 charging an offence under section 141 and count 3 under section 144. The remaining charges related to offences committed under various sections of the Penal Code read in conjunction with section 146 which imposed vicarious liability on members of the unlawful assembly referred to in count 1. There were thirteen accused of which the eighth and twelfth were found not guilty of any offence. The remaining accused were found guilty on counts 1, 2 and 3 and attempted culpable homicide not amounting to murder on counts 4, 5 (*a*), 5 (*b*), 6 (*a*), and voluntarily causing simple hurt on counts 5, 6, 6 (*b*), 7, 8, 9 (*a*) and 9 (*b*), and not guilty on count 9. All except the sixth and thirteenth accused who were fined were sentenced to various terms of imprisonment.

The facts that led up to these offences being committed are as follows :— On April 22, 1946, Murugar Chelliah, Velan Sinnapodian and Murugan Nagan were working as the employees of a physician called Kathirathamby, on a fence which adjoins the compound of the thirteenth accused. While they were engaged on this work, the thirteenth accused about 2 P.M., came up and said "don't fence". The workers sent for Kathirathamby who came and told the thirteenth accused that they would stop fencing if the headman came and told them not to do so. The workers then proceeded with their fencing. The thirteenth accused then said to her son "Go and fetch uncle". The twelfth accused, the thirteenth accused's uncle, then arrived with the tenth accused, one of his sons, and another son. The came and stood talking there for some time with the thirteenth accused. The thirteenth accused then called out to her son and told him to bring people from the cigar factory. The boy then went away while the tenth, twelfth and thirteenth accused remained. Then about 15 or 20 men came. The following were identified :—the first and second accused carrying guns, the third accused with an axe, the fourth, sixth and eleventh accused with swords, and fifth and seventh accused with clubs. The fourth accused began cutting down the fence. The third and fifth accused started pulling down the fence. The tenth accused threw stones at the workers. One of the latter Chelliah Pulle ran away followed by Nagan. Then Velan Sinnapodian ran away. The seventh accused called out "Sinnapodian is running, shoot". Sinnapodian turned and found the first accused with a gun. He was then shot in the leg. The eleventh accused then cut him on his back with a sword, the ninth accused cut him on the arm with a sword and the seventh accused struck him on the head. He then lost consciousness. With regard to the other two labourers, Chelliah after he ran away heard the report of a gun behind him. He turned and looked back and the fourth accused cut him with a sword on the left side of his face. He then lost consciousness. The third labourer, Nagan, was shot at by the first accused while he was running away. He also received a second shot but did not identify the person who fired this shot. He was also cut by the fourth accused with a sword and the third accused with an axe. He then lost consciousness. Another man, Thavacy Murugan, who was in the vicinity also received injuries from a pellet from a gun and was also

hit by stones. The gun was fired by the second accused. Another man, Eliyavan Kanthan, who came attracted by the cries also received gun shot wounds.

Mr. H. V. Perera on behalf of the appellants made the following points :—

(*a*) that there was no evidence on which the Jury could find the thirteenth accused guilty ;

(*b*) that only persons armed could be found guilty on counts 2, an offence committed in contravention of section 141 of the Penal Code ;

(*c*) that the trial Judge has misdirected the Jury in regard to the vicarious liability under section 146 of the Penal Code of certain of the appellants arising from the fact that they were members of an unlawful assembly.

In regard to (*a*) we agree with Mr. Perera that there was no evidence on which the Jury could convict the thirteenth accused of being a member of the unlawful assembly, the common object of which was to cause hurt. It is true that the thirteenth accused sent a message by her son to the twelfth accused and afterwards by the same agency to the workers in the cigar factory. She was also a spectator of what afterwards occurred. On the other hand there is no evidence what the cigar factory workers were to do when they came to her compound. The evidence in regard to the thirteenth accused being a member of the unlawful assembly is purely circumstantial. It cannot be said that such evidence is consistent only with her guilt. The conviction and sentence of the thirteenth accused on the various counts are therefore set aside.

In regard to (*b*) Mr. Fernando has cited the Indian case of *in re K. Ramaraja Tevan and fifteen others*[1] for the proposition that the vicarious liability attaching to a person by reason of his being a member of an unlawful assembly is sufficient for a member of such assembly who was unarmed to be found guilty constructively of an offence under section 141. We are unable to accept the authority of this case. It is in conflict with *Sabir and another v. Queen Empress*[2]. It seems to us to be contrary to the express wording of the section which uses the words "whoever, being armed with any deadly weapon or with anything which, used as a weapon of offence, is likely to cause death". Moreover in the present case there is no mention of section 146 in count 2 of the indictment and therefore no suggestion that the guilt of some of the accused depended on their vicarious liability under this section. In these circumstances we are of opinion that there was no evidence that the fifth, seventh and tenth accused were carrying weapons of the nature contemplated by section 141 and their convictions and sentences on this count are set aside.

With regard to (c) Mr. Perera has invited our attention to certain passages in the charge of the trial Judge. On pp. 36-37, he stated as follows :—

"And if you find any one of them guilty of the offence of attempted culpable homicide not amounting to murder then everyone of those who, you say, was in that unlawful assembly would be guilty of that offence. Everyone of them.

[1] *(1930) I. L. R. 53 Madras 937.* [2] *(1894) I. L. R. 22 Calcutta 277.*

Supposing you say that the 3rd accused Kandasamy, when he cut Nagan with an axe on the shoulder, should have known that his act was likely to cause death, and you find him guilty of an attempt to commit culpable homicide not amounting to murder, then everyone of the others, provided there were more than five, would be guilty of the same offence, namely, the offence of attempt to commit culpable homicide not amounting to murder".

Again on p. 38 he states as follows :—

"Then, in regard to the 4th count which charges them with having cut Murugan Chelliah with a sword, if you are satisfied that their intention in inflicting that injury was to cause death or to cause such bodily injury as would be sufficient in the ordinary course of nature to cause death, then you would find each of the persons of the unlawful assembly guilty of the offence of attempted murder; but if you are not satisfied that they had a murderous intention; that the person who inflicted the injury had no murderous intention, but only the knowledge that his act was likely to cause death, then you would find each of the members of the unlawful assembly guilty not of attempted murder, but of attempt to commit culpable homicide not amounting to murder."

On p. 47 the following statement is to be found at the end of the charge :—

"The position is that if any act amounting to a crime was done in furtherance of the common obect of the unlawful assembly every other member of that unlawful assembly who did not do that act would be equally guilty because he was a member of that unlawful assembly and that act was done in furtherance of the common object. So that if you find that the fourth accused for instance, was guilty of attempt to commit culpable homicide not amounting to murder and if you find that that was done in prosecution of a common object to cause hurt then every member of that unlawful assembly would in the ordinary course be liable to be punished though he himself had not committed that act which amounted to culpable homicide not amounting to murder."

It is to be observed that in the earlier passages the trial Judge suggested to the Jury that if they found one or other of the accused guilty of the offence of attempted murder, the vicarious liability of those who were members of the unlawful assembly, the common object of which was to cause hurt, would make those persons constructively guilty of that offence by reason of the provisions of section 146. On the last page of the charge the trial Judge does seem to have modified his previous conception of the law inasmuch as he says that "that act must be done in furtherance of the common object". Now the common object of this particular unlawful assembly was to cause hurt to Murugar Chelliah, Velan Sinnapodian and Murugan Nagan. Can it be said that, if attempted murder or attempted culpable homicide not amounting to murder was committed by one of the members of the unlawful assembly, such offence was committed "*in prosecution of the common object of that assembly*" within the meaning of those words in section 146? Mr. Perera contends

that the phrase does not mean the same as the phrase "*during the prosecution of the common object of the assembly.*" With this contention we agree. The offence committed must be immediately connected with the common object of the unlawful assembly of which the accused were members. In other words the act must be one which upon the evidence appears to have been done with a view to accomplish the common object attributed to the members of the unlawful assembly. No offence executes or tends to execute the common object unless the commission of that offence is involved in the common object. In this connection see judgment of Phear J. in *The Queen v. Sahid Ali* [1]. The case of *Behari and others v. King Emperor* [2] also supports the interpretation of section 146 as detailed in this judgment. We do not consider that the trial Judge's charge contained an accurate and adequate explanation of the phraseology of section 146 and in particular of the words "in prosecution of the common object of that assembly". Nor do we think that it was open to the Jury on the facts of this case to find that the constructive liability to which I have referred attached to those who did not take an active part in the murderous assaults referred to in counts 4, 5A, 5B and 6A.

We think however that all these accused, that is to say the fifth, sixth, seventh, ninth, tenth and eleventh accused in addition to those who committed specific acts are all guilty under counts 4, 5A, 5B and 6A of intentionally causing grievous hurt under section 317 of the Penal Code read in conjunction with section 146. We consider the offence of causing grievous hurt immediately connected with the common object of the unlawful assembly. In this connection I would invite attention to the Indian case of *in re Manikyam Kondayya* [3]. We, therefore, substitute in the case of all the appellants other than the thirteenth, whose conviction is set aside, for the findings of guilty of attempted culpable homicide not amounting to murder on counts 4, 5A, 5B and 6A findings of guilty of intentionally causing grievous hurt. We make no modification in the sentences imposed on these appellants on these counts.

Conviction of thirteenth accused set aside.
Conviction of other accused varied.