1954 *Present :* **Pulle J.**

H. JAYARAM *et al.*, Appellants, *and* SARAPH (P. S. 1958), Respondent

S. C. 928-929—M. C. Nuwara Eliya, 8,404.

Unlawful assembly—Conviction of less than five persons—In what circumstances permissible—Penal Code, s. 140.

Where, according to the charge and the case for the prosecution, not more than six persons in all were members of an unlawful assembly, and four of them are acquitted, the conviction of the two remaining accused under section 140 of the Penal Code cannot be sustained even if the court finds that four persons other than those acquitted constituted an unlawful assembly along with those convicted.

APPEAL from a judgment of the Magistrate's Court, Nuwara Eliya.

A. B. Perera, with *J. C. Thurairatnam*, for the 1st and 2nd accused appellants.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 19, 1954. PULLE J.—

In this case six accused persons were charged on four counts, the first of which alleged that they did " form members of an unlawful assembly ". The remaining counts charged them with rioting, causing hurt and using criminal force as " members of the unlawful assembly as aforesaid ". In respect of causing hurt and using criminal force the sections of the Penal Code referred to were 314 and 343 read with section 146 in each case. The learned Magistrate convicted the 1st and 2nd accused on all the charges but acquitted the 3rd to 6th accused on the ground that while the 1st accused, the 2nd accused and four others were members of an unlawful assembly he was not satisfied that the four other persons were identified as the 3rd to 6th accused. On behalf of the 1st and 2nd accused it is submitted that the acquittal of the 3rd to 6th destroyed the basis of the convictions of the 1st and 2nd accused who could not by themselves form an unlawful assembly. It was not part of the case for the prosecution that besides the six persons charged there were others who were members of the assembly.

A large number of authorities were cited on behalf of the appellants but it is not necessary to refer to more than two. The rest could be distinguished on the ground that the findings either in the trial court or in appeal were that there was no proof that those who were convicted were so associated with others not charged as to constitute an unlawful assembly.

In *Jayawardene v. Perera and two others* [1] six persons were charged with committing criminal trespass and rioting. At the trial the 2nd, 5th and 6th accused were acquitted but the remaining three were convicted of rioting. This conviction was set aside and in the course of his judgment Lawrie A.C.J. said,

> " Now if five men together commit criminal trespass it becomes an unlawful assembly, and if force or violence is used, it becomes a riot. The evidence is that a large number of persons assembled ; the charge was that of that large number six had a common unlawful object and had used force or violence, but in the course of the trial the Magistrate acquitted three of the six. Those who were convicted were not of sufficient number to make an unlawful assembly, and, if they committed acts of force or violence, they were not guilty of rioting. "

Referring to this case Abrahams C.J. said in *King v. Mendis* [2],

> " I am by no means certain that the learned Judge in that case meant to lay down as an absolute proposition that if on a trial of a number of persons for being members of an unlawful assembly, so many are acquitted that the remainder of themselves cannot form an unlawful assembly, they must perforce be acquitted even if it can be proved that there are other persons who, though not charged, had the same common object as the persons convicted and were sufficient in number to constitute with those persons an unlawful assembly ".

The learned Chief Justice also referred to *Rex v. Dias et al.* [3] in which Soertsz J. refused to state a case at the end of a trial which resulted in the conviction of four out of five persons who were charged with being members of an unlawful assembly, there being evidence of persons, other than the five charged, being also members of the unlawful assembly. *Jayawardene v. Perera and two others* [1] was cited to him but the report was not then available to him. He thought that the charge was that six persons had a common unlawful object and that " the six men charged formed the unlawful assembly ". He went on to add, " In the present case it is quite different. The charge is definitely that these five accused were members of an unlawful assembly, not that they only constituted the unlawful assembly and the evidence from the very outset was that they were acting in concert with others ".

It will be seen, therefore, that the opinion of Soertsz J. appears to be that if a number of persons are charged as having " formed " the unlawful assembly, a conviction of at least five is necessary to sustain that conviction. Whereas, if the charge against them was that they were members of an unlawful assembly a conviction of less than five of those charged could be supported, if there was evidence that others besides those acquitted constituted an unlawful assembly along with those who were convicted. The decision in *Ram Rup and another v. Emperor* [4] entirely supports the contention of the appellants in the present appeal.

[1] *(1899) 1 Tambayah's Reports 15.*
[2] *(1937) 39 N. L. R. 182. at p. 184.*
[3] *(1935) 17 Ceylon Law Recorder 16.*
[4] *A. I. R. 1945 Allahabad 31.*

The headnote reads,

> " Where not more than eight persons in all have taken part in the occurrence in question and five of them acquitted, conviction of the remaining accused under section 147 or section 149 cannot be sustained. "

Among the cases cited by the Crown reliance was placed mostly on *King v. Suriya Aratchige Fernando et al.* [1]. In my opinion this case can be distinguished. The allegation in the charge against the four appellants and one Daniel Fernando who was acquitted was that they were members of an unlawful assembly. I have verified this by referring to the indictment. In the course of his judgment Wijeyewardene J. (President) stated that it was not the case for the Crown that the five accused who were indicted were the only members of the unlawful assembly. I have no reason to think that the decision in that case would have been the same had the indictment alleged and the evidence sought to prove that the five accused persons and they alone constituted the unlawful assembly.

I would also distinguish *Ramasray Ahir and others v. Emperor* [2]. Although nine accused were charged and five of them acquitted there were some twenty persons who were proved to have made a concerted attack on a constable. There are dicta in *Feroze Din and others v. Emperor* [3] which support the Crown. The circumstances of this case were of a most unusual character. The six appellants who were convicted as members of an unlawful assembly of the offence of wrongful confinement appealed to the Sessions Judge and the latter intended to affirm the convictions of all, but, owing to a mistake, the names of three of the persons who were acquitted by the Magistrate were placed among those convicted and three of those whose convictions were intended to be affirmed were acquitted. I am not surprised that the Court refused to set aside the convictions of the remaining three.

In the present case the charges clearly informed the six accused persons that they formed the unlawful assembly. The evidence was also to the same effect, namely, that only six persons took part in the assault and that these persons were the accused. The finding of fact that the 3rd to 6th accused were not members of any unlawful assembly should have resulted in the verdict that the charges against the 1st and 2nd accused were not proved.

I come to the conclusion, though regretfully, that the appeals succeed. The convictions and sentences are set aside.

Appeals allowed.

[1] *(1947) 48 N. L. R. 200.*

[2] *A. I. R. 1928 Patna 454.*

[3] *A. I. R. 1929 Lahore 59.*