[COURT OF CRIMINAL APPEAL]

1964 *Present :* T. S. Fernando, J. (President), Sri Skanda Rajah, J., and G. P. A. Silva, J.

K. A. ANDRAYAS and 6 others, Appellants, *and* THE QUEEN, Respondent

C. C. A. 87 TO 93 OF 1964, WITH APPLICATIONS 91 TO 97

S. C. 2—M. C. Walasmulla, 25102

Unlawful assembly—Burden of proof—Vicarious liability—Duty of judge to give adequate direction to jury—Penal Code, ss. 140, 146, 296.

Mere membership of an unlawful assembly, without more, does not render each member of that unlawful assembly criminally liable for an offence committed by some other member thereof. Such liability arises at law only when the existence of a certain other element or elements specified in section 146 of the Penal Code has been established.

Merely reading out to the jury the text of section 146 of the Penal Code is inadequate by way of a direction to the jury on the law which renders persons vicariously responsible for the offences of others on the basis of membership of an unlawful assembly.

In a prosecution for being members of an unlawful assembly, the burden of proof is throughout on the Crown to satisfy the jury beyond a reasonable doubt that five or more than five persons got together with an unlawful common object.

APPEALS against certain convictions in a trial before the Supreme Court.

G. E. Chitty, Q.C., with *E. B. Vannitamby, George Rajapakse, Kumar Amerasekere* and *M. Kanakaratnam*, for the accused-appellants.

R. Abeysuriya, Crown Counsel, for the Crown.

Cur. adv. vult.

October 27, 1964. T. S. FERNANDO, J.—

The seven appellants stood indicted as the 1st to the 7th accused at the trial on three charges which alleged that all of them—

(1) were members of an unlawful assembly, the common object of which was to cause hurt to one Don Edwin—an offence punishable under section 140 of the Penal Code ;

(2) were guilty of the offence of murder of Don Edwin in that one or more members of the said unlawful assembly did commit murder by causing Don Edwin's death, which murder was committed in prosecution of the said common object or was such as the members of the unlawful assembly knew to be likely to be committed in prosecution of the said common object, and that all were members of the said unlawful assembly at the time of the commission of that murder—an offence punishable under section 296 read with section 146 of the Penal Code ;

(3) were guilty of murder by causing the death of the said Don Edwin—an offence punishable under section 296 of the Penal Code.

It was evident from the proceedings that in respect of charge (3) described above the prosecution relied on the principle of liability embodied in section 32 of the Penal Code.

By the unanimous verdict of the jury the accused were found not guilty of charge (3), but were all found guilty (*a*) of charge (1) and (*b*) of committing culpable homicide not amounting to murder in respect of charge (2). The appeals must therefore be considered on the basis that the jury by its verdict negatived the existence of a common intention on the part of the seven appellants to kill Don Edwin or, indeed, to cause hurt to him.

The main ground of appeal was that the directions to the jury in respect of the law that renders persons vicariously responsible for the offences of others on the basis of membership of an unlawful assembly were both inadequate as well as wrong. The validity of this ground of appeal urged on behalf of the appellants could be discussed after I have set down briefly the facts which formed the case against the appellants.

Of the persons accused, the 2nd is the father of the 3rd, while the 5th is the father of the 1st and 6th accused. The 7th accused was said to be an uncle of the 3rd, while the 4th bore the same surname as the 2nd and the 3rd accused.

The sole witness of the attack on the deceased was Peter, the son of the deceased, a lad some seventeen years of age. He claimed to have witnessed the attack on his father which, according to him, took place some little time after 7 p.m. He said he carried an electric torch with him by the aid of which as well as the moonlight he identified the persons who attacked his father. He himself received injuries, one at least of which he attributed to a blow with a katty dealt on him by the 6th accused. According to this witness Peter when he was returning home from school that very afternoon, he saw the 1st and the 4th accused and a man named Kiriya uprooting boundary fence-sticks of a fence which a few days before that had been repaired by the deceased. He questioned the 4th accused why those fence-sticks were being uprooted whereupon he was kicked by the latter. He hurried home and related to his mother what he had seen and suffered, and his mother in turn related later to the deceased on his return home from some journey what she had herself learnt from Peter. The deceased left his home in the evening accompanied by Peter in order to make a complaint at the Police station. It was not disputed that the deceased made a complaint to the Police and that Peter himself did not go into the Police station premises with his father

but remained at the bazaar. The deceased was killed on his way home after complaining to the Police, probably within an hour of the making of that complaint.

To continue the evidence of Peter, when he and his father were on their way home they saw the 2nd, 3rd and 7th accused in the verandah of the house of the last-mentioned of them. These three accused persons then got on to the road with short clubs (polu keli) in their hands and followed Peter and the deceased at a quick pace. Peter and the deceased then hurried towards their own home when, at some point on the road opposite the house of one Kavanihamy, the 4th accused struck the deceased on his head with a club, a blow which caused the latter to fall on the embankment by the side of the road. After the deceased fell the 1st, the 4th, the 5th and the 6th accused struck the fallen man. The 1st and the 4th accused used clubs, the 5th a mammoty and the 6th a katty in their attack upon the deceased. The 2nd, the 3rd and the 7th accused who had themselves come up by this time joined in the assault on the deceased. The 6th accused, in addition, as stated above already, hit Peter on his face with the katty. Peter ran home and returned towards the scene of the attack accompanied by his mother, but they were both chased off by the 1st, 4th, 5th and 6th accused.

In his statement made to the Police that same night—within an hour of the attack on the deceased—Peter did not mention that the 2nd, 3rd and 7th accused joined in attacking his father. The discrepancy on this point between his testimony at the trial and his statement to the Police was of vital importance, particularly as the only witness available to speak to the participation of the several accused persons in this attack was Peter himself. The conviction of the appellants was dependent on their being proved to have been members of an unlawful assembly. The death of the deceased resulted from an injury which penetrated his heart. That this injury must have been caused with a sharp thin-bladed knife was not capable even of dispute. Although Peter claimed to have seen the weapons each of the accused used he did not claim to have seen a knife. It was, of course, probable that he did not see the entirety of the attack on his father, but he took it upon himself to say at the trial that he saw even the 2nd, 3rd and 7th accused attack his father after the other accused had dealt blows. Excluding the stab injury to the heart, the other injuries on the deceased were not sufficient in the opinion of the medical witnesses to cause his death. It was not denied before us that the prosecution did not claim to have established the identity of the person who dealt the fatal blow. In these circumstances, as the jury negatived the existence of a common intention to kill the deceased, the directions given by the learned trial judge on the question of criminal liability based on unlawful assembly require careful scrutiny.

On the appellants' behalf, apart from the main point indicated earlier, it was urged that the jury was not correctly directed in regard to the burden of proof in respect of the charges based on unlawful assembly,

viz., charges (1) and (2). At the outset of his charge, the trial judge stated :—

> "In order to constitute an unlawful assembly there must be a minimum of five persons : that is the irreducible minimum. So that when you sift the evidence if you can safely say to yourselves that there were only three or four or two, however much you may believe that they assaulted the deceased, still the charge of unlawful assembly should fail because there must be a minimum of five persons in order to constitute an unlawful assembly."

There is some little force in the argument that the above direction was capable of leading a jury to think that there was some kind of obligation on the defence to reduce the number of five persons required under our law to constitute an unlawful assembly. The burden of proof being throughout on the prosecution, it was for the prosecution to satisfy the jury beyond a reasonable doubt that five or more than five persons got together with an unlawful common object. The direction reproduced above was, we are free to say, open to the objection already noted above ; but, had there been nothing else open to objection in the learned judge's directions to the jury, we could hardly have been expected to pay any serious attention to it as affecting the maintainability of the verdicts reached by the jury.

It was, however, pressed upon us that there were other directions bearing upon the question of vicarious liability more open to objection. These other directions formed the subject of the main ground of appeal. The passages from the trial judge's charge to the jury quoted below exhaust his explanation of the law which was to guide the jury in reaching their verdicts on charges (1) and (2) :—

> (*a*) "If having formed an unlawful assembly one or more members commit an offence then it becomes serious in this sense ; that everyone of those persons that forms the unlawful assembly is guilty of that offence, if it was done in the prosecution of the common object or if there was reasonable chance or reasonable probability of such an act being done. For instance, if there is an unlawful assembly of five or more persons and one of them commits murder all the members of the unlawful assembly are guilty of murder. If one of them commits culpable homicide all the members are guilty of culpable homicide. If one of them commits simple hurt all the members are guilty of having committed simple hurt if the unlawfuly assembly charge is established.
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> So, in the second count, which is a serious count, the prosecution alleges that having formed themselves into an unlawful assembly that one or more members of this assembly—that is one of these seven accused—not an outsider—murdered Don Edwin and therefore all seven are guilty of murder. That is the second count."—*pp.* 259–60.

(*b*) " If you are convinced that they, being members of an unlawful assembly caused the death of the victim, but the person who committed the offence did not have in him a murderous intention, but he had the knowledge that death would be the likely result of his act, then the offence committed is culpable homicide not amounting to murder, and they are all liable for it, being members of an unlawful assembly. If the Crown has proved, beyond reasonable doubt, that these accused formed an unlawful assembly and that they caused the death of this man, then it is open to you to bring in a verdict of culpable homicide not amounting to murder on the ground that they had the knowledge that death would be the probable result of their act."—p. 262.

(*c*) " If you, after considering the evidence given by Peter, cannot draw the inference that anyone of these accused caused the death of the deceased, then none of them can be found guilty of murder. If you are, however, convinced that they were members of an unlawful assembly and that they attacked the deceased, you will find them guilty of the second count that they being members of an unlawful assembly did cause hurt to Don Edwin. If you hold that these seven accused were members of an unlawful assembly, and one or more of them had the murderous intention at the time they assaulted and attacked this man, then they are guilty of murder. If they did not have the murderous intention, but if they had the knowledge that death would be the likely result of their act, then they would be guilty of culpable homicide not amounting to murder. If you are unable to draw the inference that they caused the death of this man, Don Edwin, then they will be guilty, while being members of an unlawful assembly, of having caused hurt to this man."—pp. 264-65.

(*d*) " Before I pass on to the third count I will merely read out to you the section of the Penal Code which makes each member of an unlawful assembly liable for the acts of the others ".—(Here the learned judge read out the text of section 146 as it appears in the Penal Code)—p. 266.

Then, just before he concluded—

(*e*) " In regard to the second charge—the 2nd charge is a charge of murder—you can only find them guilty of murder if you are satisfied that one of these people caused the death of Don Edwin with a murderous intention while all were members of an unlawful assembly."—p. 304.

(*f*) " If you say that one of these people caused the death of Don Edwin not with a murderous intention but only with a knowledge that death would be the likely result then the proper verdict on count (2) would be while being members of an unlawful assembly that they committed culpable homicide not amounting to murder "—p. 305.

Inasmuch as the jury did, in respect of the 2nd count of the indictment, return against all the accused a verdict of guilty of the offence of culpable homicide not amounting to murder, it must be assumed that, in spite of Peter's failure to see a knife in the hands of any of the accused, they reached the conclusion that one of the accused had caused the death of the deceased, although they were unable to say which one of them had done so. Further, they have negatived the existence of a murderous intention on the part of the person who actually caused the death of Don Edwin. Having regard to the undisputed fact that the death of Don Edwin was the result of a stab wound into the heart with a thin-bladed knife, it becomes difficult for us to appreciate how the absence in that person of a murderous intention could reasonably have been reached. However that may be, it could not seriously be doubted that on the directions given to them the jury might well have thought that it was open to them to convict all the accused of committing the offence of culpable homicide not amounting to murder if their conclusion was that one of these accused caused the fatal injury and that all seven were members of the unlawful assembly. It was, in our opinion, necessary for the trial judge to have given an adequate direction to the jury that mere membership of an unlawful assembly did not render each member of that unlawful assembly criminally liable for an offence committed by some other member thereof. It was not, in our opinion, a correct direction of the jury that mere membership of an unlawful assembly, without more, rendered each member of that unlawful assembly criminally liable for an offence committed by some other thereof. Such liability arose at law only when the existence of a certain other element or elements specified in section 146 of the Penal Code had been established. It was, in our opinion, not an adequate discharge of the trial judge's function to content himself with a reading out to the jury of the text of the said section 146. We would here respectfully apply, by way of analogy, the dictum of the majority of the Court in the case of *Podisinghov. The King* [1] which was to the effect that merely reading out to the jury the section of the Code relating to criminal conspiracy was inadequate by way of a direction on the law which renders persons liable to punishment on the basis of a conspiracy. In the instance under review the position was made even more unfortunate by the use by the learned judge of the words " I think I will *merely* read out "—as quoted earlier at passage (*d*) of his directions—which words were capable of leaving on the jury the impression that the question was not one for serious concern. Even this reading out of the

[1] *(1951) 53 N. L. R. at p. 60.*

text of the section did not stand alone. At one stage—vide passage (*a*) reproduced above—the learned judge appears to have equated knowledge on the part of the members of the unlawful assembly that the offence in question was likely to be committed in prosecution of the common object to " a reasonable chance of the commission of such an offence ". Such an equation appears to us to have diminished the extent of the burden of proof that lay upon the prosecution.

Having regard to the facts of the case under review by us where the sole witness for the prosecution had in his statement to the Police implicated as attackers only the 1st, 4th, 5th and 6th accused, although he chose to say in court that the 2nd, 3rd and 7th accused also joined later in the attack, it is undeniable that, on that witness's version of the incident as narrated to the Police, the question of the presence of five persons at the scene of the attack was beset with some doubt. In that situation a very clear direction in respect of the manner in which vicarious liability arose was necessary, and we have endeavoured to show above—by quoting all the relevant directions given to the jury—that the actual directions were not only inadequate but were capable of leading the jury into thinking that all that the prosecution had to prove was (1) the commission of an offence by one of the members of an unlawful assembly and (2) membership—without more—on the part of the other members. This inadequacy of direction, being on a point on which direction was necessary, constituted in our opinion a misdirection of the jury, and the main ground of appeal had to be upheld and the appeals allowed.

We might add that we were of opinion that there was some substance in another point raised by the appellants, viz., that the jury was neither invited to consider the case against each of the appellants individually nor was any attempt made in the summing-up to do so. The 2nd, 3rd and 7th accused, according to Peter, began to follow the deceased from a point on the road which—according to measurements proved in evidence—was about 433 yards south of the place where the deceased was first struck by the 4th accused. This circumstance, coupled with the inconsistency between Peter's statement and his evidence, made it imperative for more consideration to have been given at the trial in this case to the question of the three persons who followed the deceased having constituted themselves members of an unlawful assembly along with the four persons who were said to have been on the road in front of Kavanihamy's house.

We were invited by Crown Counsel to consider the application in this case of the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance or, alternatively, to order a retrial. We felt ourselves quite unable to adopt either of these courses, and therefore allowed the appeals and quashed the convictions of all the appellants.

Convictions quashed.