

1948

[COURT OF CRIMINAL APPEAL]

*Present* : Wijeyewardene A.C.J. (President), Jayatileke S.P.J. and  
Nagalingam J.

THE KING *v.* GABO SINGHO *et al.*

*Appeals Nos. 28-33, with Applications Nos. 120-125*

*S. C. 22—M. C. Panadure, 44,174*

*Court of Criminal Appeal—Charge of unlawful assembly—Common object—Liability of one accused for act of another—Particulars in indictment—Penal Code, section 146.*

An accused person is entitled to know with certainty and accuracy the ground on which it is sought to make him criminally liable for the act of another.

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

*T. B. Dissanayake*, for the first and third appellants.

*K. A. P. Rajakaruna*, for the second and sixth appellants.

*H. V. Perera, K.C.*, with *E. B. Sathurukulasinghe*, for the fourth appellant.

*M. M. Kumarakulasingham*, with *L. G. Weeramantry* and *M. Ratnam*, for the fifth appellant.

*H. A. Wijemanne, Crown Counsel*, for the Crown.

*Cur. adv. vult.*

June 30, 1948. WIJEYWARDENE A.C.J.—

Seven accused were charged on an indictment containing three counts. The first count charged them with being members of an unlawful assembly whose common object was to commit housebreaking and

<sup>1</sup> *L. R. 6 C. P. (180).*

robbery, while the third count charged each one of them with the murder of Kodigamuwage David. The second count, which is the relevant count that has to be considered by us, was as follows :—

“ That at the time and place aforesaid, you being members of the unlawful assembly aforesaid did in prosecution of the common object set out in count 1 commit murder by causing the death of one Kodigamuwage David of Mattegoda ; and that you have thereby committed an offence punishable under section 296 of the Penal Code read with section 146 of the said Code.”

By their unanimous verdict the Jury found the appellants guilty on counts 1 and 2 and acquitted the sixth accused.

In the course of his charge to the Jury the learned trial Judge said :—

(a) “ If you find that the killing amounted to murder, then you will find that each one of these accused would be guilty of murder if the act of killing David was either committed in the prosecution of the common object, that is to say the robbery, or if that killing was such an act that the members of the unlawful assembly knew to be likely to be so committed. It is only on these conditions that you can find a member of an unlawful assembly guilty of murder if he did not actually strike the fatal blow. Now the Crown alleges that this fatal blow was at least such as the members of the unlawful assembly knew to be likely to be committed, and it is a vital decision for you to make whether on the evidence you think that that blow, if it did amount to murder at all—we will come on to that—was a blow such as the members knew to be likely to be committed, and in deciding that you will bear in mind various factors ”. (pages 6 and 7).

(b) “ It (section 146) says that if an offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly or such as the members of the unlawful assembly knew to be likely to be committed in prosecution of that object, every person who at the time of the commission of the offence is a member of the same assembly is guilty of that offence . . . . You must be satisfied first of all that it was a murderous blow, secondly that they knew that that kind of blow was likely to be committed.” (pages 7 and 8).

(c) “ Now you will see that under that charge the Crown has to prove murder. With regard to the element of murder that it would have to prove, if you find that an accused was guilty of being a member of the unlawful assembly, then you have only got to find that the murderous blow was such as the members knew to be likely to be committed.” (page 13).

(d) “ In this case you may find that there is not enough evidence to show common intention, with the possible exception of the first accused, to kill, but merely a knowledge that murder was likely to result from such a raid on the house.” (page 14).

(e) “ It is for you to consider whether you find that the killing was the sort of thing that they may have known was likely to be committed.” (page 23).

(f) " If you find that somebody committed murder, then you must, before you can convict any of the accused whom you have found to be members of that unlawful assembly, be satisfied that murder, that is to say killing of a murderous nature, was either actually committed in prosecution of the common object, which is robbery, or in this particular case the evidence would more go towards your finding that the act, the murderous act, was such as the members knew to be likely to be so committed." (pages 53 and 54).

There is no doubt that the learned trial Judge proceeded to deliver his charge as if the second count in the indictment mentioned not only that the offence of murder was committed by a member of the unlawful assembly " in prosecution of the common object of that assembly " but the offence of murder so committed was one " such as the members knew to be likely to be committed in prosecution of that object ".

An accused person is entitled to know with certainty and accuracy the ground on which it is sought to make him criminally liable for a murder committed by another. The Crown has taken special care in the second count to state specifically that the liability of all the members of the unlawful assembly for the murder committed by one of them arose out of the fact that the murder was committed in prosecution of the common object of that assembly. That was, therefore, the case which the accused had to meet. If the Crown desired to make the members of the unlawful assembly liable on the second ground set out in section 146, the Crown should have moved to amend count 2.

Acting under the proviso of section 5 (2) of the Court of Criminal Appeal Ordinance we allow the appeals and order a fresh trial of the appellants.

*Re-trial ordered.*

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