[IN THE COURT OF CRIMINAL APPEAL]

1962 *Present :* **Basnayake, C.J. (President), Abeyesundere, J., and G. P. A. Silva, J.**

THE QUEEN *v.* H. EKMON and 6 others

APPEALS NOS. 31 TO 37 OF 1962, WITH APPLICATIONS NOS. 35 TO 41

S. C. 61—M. C. Horana, 28453

Trial before Supreme Court—Return of verdict by jury—Power of Judge thereafter to ask them questions and to direct them to reconsider their verdict—Scope—Summing-up—Scope of Judge's power to express his opinion upon any question of fact or upon any question of mixed law and fact—Criminal Procedure Code, ss. 243, 244, 245, 247, 248, 249.

Unlawful assembly—Vicarious liability of the members—Difference between "common object" and "common intention"—Penal Code, ss. 32, 138.

Where, in a trial before the Supreme Court, the verdict of the jury is clear and unmistakable, the presiding Judge has no power to put questions to the jury. The power to ask questions conferred by section 248 (1) of the Criminal Procedure Code is limited to such questions as are necessary to ascertain what the verdict of the jury is.

Section 244 (2) of the Criminal Procedure Code permits the presiding Judge, if he thinks it proper to do so, to express his opinion upon any question of fact or upon any question of mixed law and fact relevant to the proceedings. But it does not permit him to tell the jury what their verdict should be or that any other verdict than a verdict specified by him is impossible.

Members of an unlawful assembly are not liable for acts done by any member of such assembly *in the course* of it. They are only liable for an offence committed in prosecution of the common object of the assembly and for such offence as the members of the assembly knew to be likely to be committed in prosecution of the common object. Further, when dealing with section 138 of the Penal Code, the concept of "common object" therein must not be equated with the concept of "common intention" in section 32.

After the Foreman of the jury had delivered the verdict of the jury on the first five counts of the indictment, the presiding Judge asked him a number of questions and stated that it was impossible to accept that part of the verdict according to which none of the accused-appellants was guilty of murder (count 2 in the indictment). He directed the jury to retire and reconsider their verdict on the charge of murder. When the jury returned forty-five minutes later the Foreman stated, again in answer to Court, that the jury wished to be directed on certain points. The Judge then re-charged the jury and asked them to retire and reconsider their verdict. In no uncertain terms he indicated that they should return a verdict of guilty of murder against all the appellants. Thereafter the jury unanimously found the appellants guilty of murder also.

Held, that the trial Judge acted wrongly (*a*) in refusing to take the verdict returned by the jury after the first summing-up, (*b*) in questioning them when their verdict was unmistakable, (*c*) in giving them further directions on one aspect of the case alone after the summing-up, (*d*) in not taking the verdict on all the counts once he had directed the jury to reconsider their verdict, (*e*) in expressly telling them what their verdict should be on the charge of murder.

R 5471—1,855 (4/65)

APPEAL from seven convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *S. S. Basnayake*, *D. S. Wijesinghe* and *R. Weerakoon*, for 1st, 2nd and 3rd Accused-Appellants.

Colvin R. de Silva, with *G. Barr Kumarakulasinghe*, *P. O. Wimalanaga* and *Percy Wickremasekera*, for 4th, 5th, 6th and 8th Accused-Appellants.

M. H. Amit (assigned), for all Accused-Appellants.

Vincent T. Thamotheram, Deputy Solicitor-General, for Attorney-General.

Cur. adv. vult.

December 17, 1962. BASNAYAKE, C.J.—

The seven appellants along with another who was acquitted at the end of the trial were indicted on nine charges. Five of them were on the basis that they were members of an unlawful assembly the common object of which was to cause hurt to Haputantirige Liyoris and the members of his family and that in prosecution of that common object they—

(*a*) committed the murder of Haputantirige Seelawathie,

(*b*) caused grievous hurt to Haputantirige Liyoris,

(*c*) caused grievous hurt to Geekiyanage Mapinona, and

(*d*) caused grievous hurt to Haputantirige Somawathie.

The remaining four charges were a repetition of the same charges of murder and grievous hurt on the basis that those acts were committed in furtherance of the common intention of all.

Except the seventh, who is a relation of Liyoris, the accused are related to each other. The 1st and 6th accused are brothers. The 8th is their cousin. The 2nd and 4th are nephews of the 1st. The 8th accused's sister is married to the 4th accused's brother. The 5th accused's daughter is the mistress of the 6th.

Shortly the facts are as follows :—Liyoris and the accused all lived in the same neighbourhood, Dandiris the 7th accused being the closest neighbour as he lived in the land adjoining Liyoris's. They were not on good terms. The cause was disputes over land. Liyoris the injured man owned two houses, one old and the other new. On the day in

question Liyoris was in his old house. On 9th August 1960 there was a dispute over the barbed-wiring of the boundaries of the new house. In the course of it the 6th accused Jundi caused grievous hurt to Liyoris by striking him with an iron rod. He was prosecuted for that offence. On 17th November 1960 he pleaded guilty to the lesser offence of causing grievous hurt under provocation and was fined Rs. 50, for the payment of which he was allowed time till 24th November. Liyoris who had gone to the Court for the case returned at about 2 p.m. He had hardly had his noon-day meal when the 4th and 6th accused entered his compound and shouted, "Leeriyo come out to eat you". They were followed by the 7th accused. Liyoris's daughters prevented him from getting out saying, "You are a man with a fractured arm". About this time his wife arrived and at the same time some of the other accused—1st, 2nd, 3rd, 5th and 8th—came to the main road along the 'devata' road. The 4th and 6th accused ordered her, "Dapiya Liyora Eliyata". She was struck with a reaper as she replied, "He is a man with a fractured arm. He cannot be put out". Her daughter Seelawathie who was a school teacher and had just returned from school intervened saying, "Don't assault my mother". Then Jundi struck her with a club and she fell. Liyoris who was spurred to action by the attack on his daughter went out with an axe and with it started to attack Jundi who in turn attacked him and knocked him down. Somawathie who followed him was also attacked and injured. The description of the attack on Liyoris, his wife and his daughters does not clearly establish the existence of an unlawful assembly as alleged in count 1 of the indictment. It would appear that the active participants were 4th and 6th accused and that the others were onlookers. Those two accused by their utterances indicated that they were after the blood of Liyoris and the attack on his wife and daughters was incidental as they stood in their way. If they played any part, it was in defence of the 6th accused whom Liyoris attacked with an axe. The prosecution produced an axe marked P2 which was found in Liyoris's house in between a door and an almirah, but made no attempt to connect it with the crime.

The jury after a deliberation lasting 2 hours and 25 minutes returned a unanimous verdict against the appellants on the charges of unlawful assembly, causing grievous hurt to Liyoris, Mapinona and Seelawathie. On the charge of murder of Seelawathie they returned a unanimous verdict of simple hurt. They did not return a verdict on the other charges as they were directed that, if they found against the prisoners on the charges involving unlawful assembly, they need not return a verdict on charges 6, 7, 8 and 9.

After the Foreman had delivered from the jury box the verdict of the jury in regard to each of the accused on the first five counts of the indictment, the following dialogue occurred between the learned Commissioner of Assize and the Foreman :

"2418. *Court : Q :* That is to say, you have found the 1st, 2nd, 3rd, 4th, 5th, 6th, and 8th accused guilty on the first count ?

Foreman : Yes.

2419. *Court : Q :* On the 2nd count of murder you have found them guilty of causing simple hurt ?

Foreman : Yes, My Lord.

2420. *Court : Q :* Then nobody according to you is guilty of murder ?

Foreman : No.

2421. *Court : Q :* You have not considered the other counts ?

Foreman : No.

2422. *Court : Q :* Did you consider the act of any individual person, apart from these acts ? Apart from unlawful assembly did you consider the individual act of any individual, with regard to the death of the woman ?

Foreman : We have not considered, My Lord. We find they are not guilty of causing murder.

Court : I find it difficult to accept that verdict in regard to the 2nd count. I don't agree with you. Therefore, I direct you to retire and reconsider your verdict. If there has been unlawful assembly and in the course of which any one had been killed, it cannot be simple hurt—because she had been killed and that injury was not a simple injury. It was a grievous injury which had damaged the brain. Therefore it is impossible to accept that verdict. I would direct you to retire and reconsider your verdict. ''

The jury then retired. The time was 5·35 p.m. and they returned at 6·20 p.m. The Clerk of Assize then asked them—

"2423. *Q :* Are you unanimously agreed upon your verdict on count 2 with regard to the first prisoner Handaragamage Ekmon ?

2424. *Foreman :* My Lord, I can say something before that ?

2425. *Court :* You want directions ? You want further directions ?

Foreman : I want to say something. Because out of the 2½ hours we took in our deliberations, we spent the most in deciding these points. We have been influenced by certain considerations.

2426. *Court : Q :* I don't want to hear your considerations. I only want the points on which you want directions. What are the points on which you want directions ?

Foreman : We want to be directed on the evidence of the doctor where he said that the rim of the axe could have caused the injury. It was also said during the course of the trial that the body was not found where the fatal blow is alleged to have been dealt, and where she is alleged to have fallen immediately. The axe was not mentioned to the police by Liyoris, but was found by the Police on their own.

Court re-charges the jury. "

The jury retired at 6·35 p.m. and returned at 7 p.m. The Clerk of Assize then addressed the following questions to them :

" 2427. *Q :* Are you unanimously agreed upon your verdict in regard to count 2 ?

Foreman : We are unanimously agreed.

2428. *Clerk of Assize : Q :* By your unanimous verdict do you find the 1st prisoner guilty of murder ?

Foreman : Guilty.

2429. *Clerk of Assize :* By your unanimous verdict do you find the 2nd prisoner guilty of murder ?

Foreman : Guilty.

2430. *Clerk of Assize :* By your unanimous verdict do you find the 3rd prisoner guilty of murder ?

Foreman : Guilty.

2431. *Clerk of Assize :* By your unanimous verdict do you find the 4th prisoner guilty of murder ?

Foreman : Guilty.

2432. *Clerk of Assize :* By your unanimous verdict do you find the 5th prisoner guilty of murder ?

Foreman : Guilty.

2433. *Clerk of Assize :* By your unanimous verdict do you find the 6th prisoner guilty of murder ?

Foreman : Guilty.

2434. *Clerk of Assize :* By your unanimous verdict do you find the 8th prisoner guilty of murder ?

Foreman : Guilty.

Clerk of Assize : Gentlemen, please attend whilst your Foreman signs the verdict. Your unanimous verdict is that the 1st, 2nd, 3rd, 4th, 5th, 6th and 8th prisoners are guilty on counts 1 to 5 of the indictment and the 7th prisoner is not guilty of any offence. "

The transcript reads thus thereafter :

"The 7th prisoner Geekiyanage Dandiris Singho is acquitted and discharged.

2435. *Court to Crown Counsel :* Anything against them ?

Crown Counsel : Abraham alias Jundy, the 6th accused has a previous conviction, that is for disposing stolen property, cattle valued at Rs. 150 under section 396, and charged in Magistrate's Court, Avissawella, in case No. 38998 and sentenced to 3 months' rigorous imprisonment on 17th February, 1960.

2436. *Court :* You have got the proceedings ?

Crown Counsel : Yes, it is admitted.

Court : That is not a matter which should be taken into account.

Court to prisoners : On count 1 I sentence each of you to 6 months' rigorous imprisonment. On count 3 I sentence each of you to 7 years' rigorous imprisonment. On count 5 I sentence each of you to 7 years' rigorous imprisonment. These sentences to run concurrently. "

Sentence of death was next passed on all the appellants after each of them had been asked why sentence of death should not be passed.

The main submissions of learned counsel are set out in the grounds 2 to 5 in the notice of appeal which are as follows :—

" 2. There is no legal verdict in the case.

3. There was no power in the learned Commissioner to direct the jury to reconsider a particular count of the indictment after the Jury had returned a verdict on all the charges on which the accused were tried.

4. The learned Commissioner had not the power in the circumstances of the case to direct the jury to reconsider the verdict and in any event acted wrongly in purporting to exercise the said power.

5. The proceedings subsequent to the jury returning its verdict on the first occasion were illegal and had no warrant in law. "

We shall now proceed to discuss these grounds : It is important to bear in mind the basic consideration that all trials before the Supreme Court are trials *by* Jury, *before* a Judge or Commissioner of Assize or where the Chief Justice orders that any trial should be at Bar by Jury before three Judges (s. 216 (1)). The duties of the Judge and of the Jury are precisely defined in sections 243, 244 and 245 of the Criminal Procedure Code.

" 243. When the case for the defence and the prosecuting counsel's reply (if any) are concluded the Judge shall charge the Jury summing up the evidence and laying down the law by which the jury are to be guided.

244 (1) It is the duty of the Judge—

(*a*) to decide all questions of law arising in the course of the trial and especially all questions as to the relevancy of facts which it is proposed to prove and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties, and in his discretion to prevent the production of inadmissible evidence whether it is or is not objected to by the parties ;

(*b*) to decide upon the meaning and construction of all documents given in evidence at the trial ;

(*c*) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given ;

(*d*) to decide whether any question which arises is for himself or for the jury.

(2) The Judge may if he thinks proper in the course of his summing-up express to the jury his opinion upon anv question of fact or upon any question of mixed law and fact relevant to the proceeding.

(Illustrations omitted)

245. It is the duty of the jury—

(*a*) to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge to be returned ;

(*b*) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine whether such words occur in documents or not ;

(*c*) to decide all questions which according to law are to be deemed questions of fact ;

(*d*) to decide whether general indefinite expressions do or do no apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

(Illustrations omitted)

The following provisions govern the return of the verdict, the taking and recording of it—

247 (1) When the jury are ready to give their verdict and are all present the Registrar shall ask the foreman if they are unanimous.

(2) If the Jury are not unanimous the Judge may require them to retire for further consideration.

(3) After such further consideration for such time as the Judge considers reasonable or if either in the first instance the foreman says that they are unanimous or the Judge has not required them to retire, the Registrar shall say (the Jurors being all present) : ' Do you find the accused person (naming him) guilty or not guilty of the offence (naming it) with which he is charged ? '

(4) On this the foreman shall state what is the verdict of the jury.

248 (1) Unless otherwise ordered by the Judge the Jury shall return a verdict on all the charges on which the accused is tried and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

(2) If the Judge does not approve of the verdict returned by the Jury he may direct them to reconsider their verdict, and the verdict given after such reconsideration shall be deemed to be the true verdict.

249 (1) The Registrar shall make an entry of the verdict on the indictment and shall then say to the jury the words following or words to the like effect :

' Gentlemen of the jury : attend whilst your foreman signs your verdict. The finding of you (or of so many of you as the case may be) is that the prisoner A, B, is guilty ' (or not ' guilty ').

(2) The foreman shall sign the verdict so entered and the verdict when so entered and signed, but not before, shall be final.

(3) When by accident or mistake a wrong verdict is delivered the Jury may before it is signed or immediately thereafter amend the verdict. "

The verdict of the jury on counts 1 to 5 delivered in the first instance was unmistakable ; but the learned Commissioner proceeded to ask them a number of questions which he had no right to ask. The power to ask questions conferred by section 248 (1) is limited to such questions as are necessary to ascertain what the verdict of the jury is. Here the verdict was clear and there was nothing that needed clarification. Even after the unauthorised questioning had further clarified the verdict of the jury, the learned Commissioner proceeded to express his disagreement with the verdict on the charge of murder in very strong terms. He not only said that he did not agree with their verdict, but he also said that it was impossible to accept it and directed them to retire and re-consider their verdict on the charge of murder. In doing so he made the following observations which are obscure and so far as they are capable of a meaning wrong in law :

" If there has been unlawful assembly and in the course of which anyone had been killed, it cannot be simple hurt—because she had been killed and that injury was not a simple injury. It was a grievous injury which had damaged the brain. "

The expressions " simple injury " and " grievous injury " are not terms known to the Penal Code. It is difficult to understand what the learned Commissioner meant to convey by the words :

" If there has been unlawful assembly and in the course of which anyone had been killed, it cannot be simple hurt—because she had been killed and that injury was not a simple injury. "

It is not the law that members of an unlawful assembly are liable for acts done by any member of such assembly *in the course* of it. They are only liable—

(*a*) for an offence committed by any member in prosecution of the common object of the assembly ; or

(*b*) for such offence as the members of the assembly knew to be likely to be committed in prosecution of the common object.

The direction quoted above was therefore wrong in law.

When the jury returned after 45 minutes of reconsideration they were not permitted to give their verdict, nor was the Foreman permitted to offer an explanation which he wanted to give. But the learned Commissioner brushed aside his explanation and kept on asking whether they wanted directions. When the Foreman indicated some of the points on which the jury wanted directions, the learned Commissioner proceeded to address them for the third time, not so much on the points on which the Foreman asked for directions, but on the vicarious liability of the members of an unlawful assembly, and asked them to retire and re-consider their verdict for the second time—a course of action for which there is no authority in the Code. In his address to the jury the learned Commissioner in no uncertain terms indicated that they should return a verdict of guilty of murder against all the appellants. He said, " If you accept that evidence that it was the 6th accused who hit Seelawathie on the head, then it is impossible for you to bring any other verdict than one of murder on the evidence of the witnesses and on the medical evidence. " In the course of his charge he more than once not only usurped the functions of the jury by directing them on questions of fact on which they were the sole Judges, but he also misdirected them many times. Some of the more serious misdirections are set out below :

(1) " If the prosecution evidence of Liyoris, Mapinona and Somawathie is accepted by you that it was a blow delivered by Jundi that alighted on Seelawathie's head, then there was sufficient intention because any injury that causes fracture and injury to the brain is sufficient, I told you, in the ordinary course of nature to result in death. Then you can infer intention to commit murder. "

(2) " If you hold that these seven accused—I am now omitting the 7th accused—formed members of an unlawful assembly and one of them hit, whether it is Jundi or anyone else does not matter, but the evidence is that it was Jundi that hit on Seelawathie's head, then you are entitled to hold that every one of them is guilty of that offence of murder. "

(3) " You have held that there was unlawful assembly and you have also held that this unlawful assembly caused grievous hurt to three other persons namely, Liyoris, Mapinona and Somawathie ; then if one of those unlawful assembly members hit Seelawathie on the head, then the verdict should be one of murder because there would be the requisite intention. "

(4) " I told you that a person who hits another on the head and causes such an injury may be presumed to have the murderous intention. That is a presumption of fact on which you are entitled to act, though not obliged to do so. "

(5) " These are the two injuries Seelawathie had. Lacerated wound 2" long on top of right side of head, internal to parietal eminence and directed forwards and slightly to the left, scalp deep ; the surrounding area was contused ; the other is a contusion on top of left side of head

over the region of parietal eminence. With regard to the charge of murder we are not concerned with the third injury she had, the injury on the thigh, because that would not have caused death. (*Here the internal injuries are described.*) If any of these accused caused any of these two injuries on the head, then the charge of murder is proved. Simple hurt is un-understandable. "

(6) " If you have held, as you have done with regard to unlawful assembly in regard to all the accused except the 7th accused, then this is a clear case of murder. Of course, I told you my opinion is not binding on you on any question of fact. Now that I have re-directed you, you can consider your verdict. "

At the conclusion of the third address to the Jury the Foreman observed :

" On the last point, My Lord, the axe was not mentioned to the police, but found by the police on their own. "

The learned Commissioner replied :

" Yes, the axe was not mentioned. Inspector Mendis says this man was in a bad state. Mr. Mendis has stated that Liyoris' condition was bad. So that it may be due to that that he did not mention it or it may be due to the fact that he used it in defence of his daughter and himself, but he might have thought that he might get into difficulties and therefore did not mention it. But that does not mean that the axe was used, that is just because the doctor says that it could be caused with an axe. But the evidence is that the axe was not used by (*sic*) Seelawathie. It is on the basis I take it that you have accepted the evidence for the prosecution, the evidence of the prosecution witnesses, that you have brought in the other verdicts of unlawful assembly, causing grievous hurt etc. to other persons. "

It would appear from the passages quoted above that the learned Commissioner travelled outside the proper scope of a charge to the Jury, namely, summing up the evidence and laying down the law by which the Jury are to be guided. Contrary to his own concept of his duty as expressed in the words cited below, he sought to force on the jury his view that on count 2 no other verdict than murder was possible :

" It is not my duty to advise you as to what verdict you should find, nor is it my business to tell you what verdict I will find if I was in the jury-box. "

He also sought to give his own explanation of the flaw in the prosecution case pointed out by the Foreman at the end of his direction to them for the third time, viz., that the axe was not mentioned to the police but found by the police on their own. His action was a negation of the sentiments expressed in the words he quoted at the outset of his summing-up. Quoting the Judge who presided over the trial of Christy he said :

"We believe in this country, in the Criminal law, that the best tribunal to get at the truth of the acts and decide them is a Jury of 12 people called by chance from their various and different avocations to hear the evidence, and, subject to being assisted by counsel and directed by Court, to come to a conclusion."

Section 244 (2) permits the presiding Judge, if he thinks it proper to do, to express his opinion upon any question of fact or upon any question of mixed law and fact relevant to the proceedings. But it does not permit a Judge before whom a trial by jury is held to tell the jury what their verdict should be or that any other verdict than a verdict specified by him is impossible or that the charge is proved. Such observations go beyond the expression of an opinion upon any question of fact or mixed law and fact relevant to the proceedings and are improper in a charge to the jury. The rules which the Judge in a trial by Jury should observe in expressing his opinion have been transgressed in the instant case. Apart from that the learned Commissioner's observations contain misdirections too numerous to be dealt with specifically.

The learned Commissioner acted wrongly—

(*a*) in refusing to take the verdict returned by the jury after the summing-up,

(*b*) in questioning them when their verdict was unmistakable,

(*c*) in giving them further directions on one aspect of the case alone after the summing-up,

(*d*) in refusing to hear what the Foreman wished to say in explanation,

(*e*) in not permitting the Registrar to make the entry of the verdict in the first instance,

(*f*) in treating the verdict on counts 1, 3, 4 and 5 as final before the verdict had been entered,

(*g*) in not taking the verdict on all the counts once he had directed the jury to re-consider their verdict,

(*h*) in forcing the jury to his view, and

(*i*) in expressly telling them what their verdict should be.

Apart from the above illegalities, the misdirections in both his addresses to the jury after they had returned the verdict are fatal to the conviction.

Learned counsel also submitted that in his summing-up the learned Commissioner misdirected the jury on the law particularly on the law relating to unlawful assembly. The following observations of the learned Commissioner are unhappy and are likely to have misled the jury as to the burden on the prosecution.

> " *Therefore, whoever inflicted those injuries on her may be presumed to have had what is known as a murderous intention. A sane person may be presumed to intend the natural and probable consequences of his act. That is a presumption of fact on which you are entitled to act though not obliged to do so.* Now what was the natural and probable consequence of the act of that person, whoever he be who hit this woman on the head as a result of which she died ? Would you not from the nature of the weapon used, from the nature of the injuries caused, from the nature of the site, in this case the head, would you not infer that the person, whoever he be who did this act, had what is known as a murderous intention ? I think towards the closing stages of Mr. Tampoe's address he stated this and I have made a note of it: ' One blow being struck on the head of Seelawathie in the course of a fight does not mean that whoever who struck intended to kill. ' I have told you the law on the subject and the presumption of fact that should be drawn and you will accept what I have said as correct. "

Having first stated that a murderous intention may be presumed, he next went on to state that " an intention may be inferred from facts and circumstances ". Where there is a presumption in favour of the prosecution, the burden of disproof is cast on the defence.

In a criminal trial there is nothing presumed in favour of the prosecution. The burden of establishing the charges laid against the accused lies on the prosecution throughout the trial. The learned Commissioner's direction that whoever inflicted the injuries on Seelawathie may be presumed to have what is known as a murderous intention is wrong and is a misdirection. Even the statement, " A sane person may be presumed to intend the natural and probable consequences of his act, " is open to question under our law, although English Judges have occasionally charged juries in that sense. Under our law the prosecution must prove the ingredients of the offence. There is no statutory presumption in regard to intention. Section 114 provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case. Neither that provision nor the maxims sub-joined to it introduce into our law the presumption referred to by the learned Commissioner. Nor is section 100 of the Evidence Ordinance authority for the introduction of that legal concept from the English criminal law in so far as it is recognised in criminal proceedings in that country. There too it would appear from the discussion on the subject by leading writers on criminal law (Glanville Williams' Criminal Law (2nd Ed. 1961), General Part, ss. 35 & 291), that it is not universally recognised and is in conflict with some of the well-known and authoritative decisions on the burden of proof in criminal cases involving *mens rea* (*see* Meade (1909) 1 K. B. 895, and Woolmington (1935) A. C. 462).

Now presumption is not the same as inference. In presumption the presumed fact is taken to be true or entitled to belief without examination or proof unless and until it is disproved while inference is the conclusion drawn from one or more proved facts or a combination of them. For example the nature of the weapon used, the ferocity of the attack, and the parts of the body struck with the weapon are facts on which an inference as to the intention of the wrong-doer may be based, but it would be wrong to say that his intention may be presumed from those circumstances.

We now come to the learned Commissioner's directions in regard to the law of unlawful assembly. They are by no means clear, and may have confused the jury. The learned Commissioner introduced into his explanation both the concept of " common object " and " common intention" and used them as if they were synonymous and as if common intention was also an ingredient of the definition of unlawful assembly. The concept of " common intention " is to be found in section 32 and the concept of " common object " in section 138. When dealing with section 138 the concept of " common object " therein must not be equated to the concept of ' common intention " in section 32. Object and intention are not the same. Even in the indictment the indicting authority appears to have endeavoured to observe the distinction. But the learned Commissioner did not keep them in their proper place and in the course of his charge he mixed the two. He said, for example,

> " If at the beginning there was only the common intention of causing hurt to Liyoris but the other common object of causing hurt to the other members of the family came in subsequently also it would amount to a common object . . . . " (p. 353).

> " But in the case of common object each one may have had the intention of causing hurt to Liyoris but they need not have shared that common intention independently. If they came with that intention, and five of such persons came together, then it would become an unlawful assembly. There the object would be common and if there were five or more persons with this object, then they would form an unlawful assembly without any prior concert among themselves. " (p. 355).

> " In the case of unlawful assembly as well as common intention, the principle is that they also serve who also stand and wait . . . . Similarly, in the case of common intention also the mere presence of those who share the common object, giving encouragement and support to a person or protection to the persons who are actually committing the act is in iteslf an offence. " (p. 358).

In view of the numerous illegalities and the misdirections on vital aspects of the case we allow the appeals, quash the convictions and direct a judgment of acquittal to be entered.

Accused acquitted.