FAROOK
VS
ATTORNEY GENERAL

COURT OF APPEAL.
BALAPATABENDI J. (P/CA).
BASNAYAKE J.,
C. A. NO. 163/2001.
HC AMPARA 428/200.
MARCH 22, 2006.
APRIL 27, 2006.

Penal Code - Sections 294, 296, 297, 375, Failure to consider the culpability on the basis of knowledge - Single stab injury - No murderous intention ?- Sufficiency of high probability of death in the ordinary way of nature ?- Offence of murder ?

The Accused Appellant was indicted and convicted of causing the death of one SL (section 296) and causing simple hurt to one AL (section 315).

In appeal it was contended that, the trial Judge had failed to consider culpability under Section 297 on the basis of knowledge and that there is evidence of a sudden fight, which the trial Judge had failed to consider and arrive at a lesser culpability and that there was no motive/displeasure or any quarrel and that there was only a single stab injury.

HELD:

(i) As regards the attempt to bring the case to one of culpable homicide not amounting to murder mainly on the basis that there is no intention to cause death, the intention that is required is to cause the injury in fact inflicted. If the intended injury is sufficient to cause death in the ordinary course of nature, the offence is murder;

(ii) The injury which caused the death was the one inflicted by the accused. The sufficiency of the injury was objectively established. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues, and if the causing of the injury is intended, the offence is murder;

(iii) The determinent factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature, that is to say, if the probability of death is not so high, the offence does not fall within murder but within culpable homicide not amounting to murder or something less.

APPEAL from the Judgment of the High Court of Ampara.

Cases referred to :

1. *Weerappan vs Queen* — 76 NLR 109 (not followed)
2. *Somapala vs Queen* — 72 NLR 121 at 126
3. *Rajwant Singh vs State of Kerala* — AIR 1966 SC 1874
4. *Virsa Singh vs State of Punjab* — AIR 1958 SC 465
5. *Anda vs State of Rajasthan* — AIR 1966 SC 148 at 151
6. *Voshnu Daga Pagar and other vs State of Maharastra* — 1997 3 Cr LJ 2430
7. *State of Karnataka vs Vedanayagam* — 1995 SCC 231
8. *In Re. Sangaram Padiyachi* — AIR 1944 Mad. 223

Dr. Ranjith Fernando with *Amila Umayangani* and *Deshani Jayatilake* for Accused Appellant.

Gihan Kulatunga S. S. C., for Attorney General.

Cur.adv.vult.

November 30, 2006.

ERIC BASNAYAKE, J.

The accused appellant (the accused) was indicted in the High Court of Ampara for causing the death of Uduman Kudu Sulaiman Lebbe on 27.07.1982, an offence punishable under section 296 of the Penal Code. He was also charged for causing simple hurt with a knife to Abdul Latif under Section 315 of the Penal Code. After trial the accused

was convicted on the first charge and was sentenced to death. He was acquitted on the second charge. This is an appeal against the said conviction and the sentence.

The accused and the deceased were uncle and nephew. On the previous night the accused had spent the night at the deceased house. Latif and Hameed are the two eye witnesses to the incident. The incident had occurred at about 11 a. m. on 27.07.1982. According to Latif when the accused stabbed the deceased he had gone towards the deceased and the accused had stabbed him too. However the learned Judge acquitted the accused on the charge of causing injury to Latif. Hameed said that the accused, having walked away from the deceased, came back and stabbed the deceased. There appears to be no evidence of any fight or anything to provoke the accused. No motive was revealed. It transpired that the deceased had gone to the police station to complain against the accused over a quarrel the accused had had with another relation. The accused appears to have questioned the deceased over this.

On admission to hospital the deceased had been pronounced death. Death appears to have occurred within a period of about one hour after the injury was caused. According to the P. M. R. marked P1 death was due to shock and internal hemorrhage following stab injury. The injury was 1" long on upper front of left side of the chest 1 1/2" away from the left sterna boarder on the 3rd inter coastal space at mid clavicle line. The upper lobe of the left lung was found pierced. Two pints of blood was found in the left thoracic cavity.

Submission of the learned counsel for the accused

There is no dispute that the accused caused the death of the deceased. The learned counsel submits that the learned trial Judge had failed to consider the culpability under section 297 of the Penal Code on the basis of knowledge. He also submits that although there is evidence of a sudden fight the learned Judge had failed to consider the same and arrive at a lesser culpability. Further he states that there is no evidence of any displeasure or motive to harm the deceased and/ or any evidence of premeditation. The accused had met the deceased by chance. There was no evidence of any quarrel. He submits that

there was only a single stab injury. The learned counsel was resting his argument on the Judgment of *Weerappan v. Queen* [1]

Submission of the learned Senior State Counsel

When it is proved that a person has committed the act which caused the death of the deceased and that the said act comes within any one of the four limbs of Section 294 of the Penal Code, the accused is guilty of murder unless he qualifies for any of the exceptions. He further submits that if there is evidence that the said act was committed with the intention of causing the death the court is not permitted to consider the liability on the basis of knowledge. The learned counsel rests his argument on the Judgment of H.N. G. Fernando C. J. in *Somapala Vs. Queen* [2] N. L. R. 121 at 126 that "in the more common case of homicide, a verdict of murder can be returned if the jury finds that the offender had the intention of causing the death."

In *Weerappan vs. Queen* one accused held the hands of the deceased while another stabbed him on the chest and inflicted an injury which cut the cartilage of two ribs and cut also the walls of the pericardium and the right ventricle. The injury was necessarily fatal. The court considered that the single stab injury inflicted might indicate the absence of the murderous intention. Hence the verdict was substituted to one of Culpable homicide not amounting to murder. The third limb of Section 294 of the Penal Code and Illustration (c) was given no attention. Therefore with all due respect to the Their Lordships, I am of the view that this Judgment was decided per incuriam and should not be followed.

Section 294 of the Penal Code is as follows :

294. Except in the cases hereinafter excepted, culpable homicide is murder

Thirdly - **If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;**

The illustration further clarifies the legal position which is as follows :

> (c) **A intentionally gives Z a sword cut or club wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder although he may not have intended to cause Z's death** (emphasis is added).

The learned counsel made an attempt to bring the case to one of culpable homicide not amounting to murder mainly on the basis that there was no **intention to cause death. The intention that is required is to cause the injury in fact inflicted. If the intended injury is sufficient to cause death in the ordinary course of nature, the offence is murder. The law is crystal clear on this point.**

The difference between the offence of murder and culpable homicide not amounting to murder is well explained in *Rajwant Singhe vs. State of Kerala* [3]. Here the accused conspired to burgle the safe of the Base Supply Officer. They collected various articles such as chloroform, adhesive plaster, cotton wool and hacksaw etc. On the night in question the accused caught the Lt. Commander. His legs were tied with rope and his arms were tied behind his back. A large adhesive plaster was stuck over this mouth and completely sealed. A handkerchief was next tied firmly over the adhesive plaster to secure it in position. The nostrils were plugged with cotton soaked in chloroform and he was deposited in a shallow drain with his own shirt put under his head as a pillow. Thereafter the accused went after the safe. Anyhow the plan failed and the accused bolted off. The following day the dead body of the Lt. Commander was discovered in the drain where he had been left.

Counsel for the appellants submitted in that case that the accused did not intend to kill the Commander but render him unconscious while they rifled the safe and that the offence of murder was not established. The question to decide was whether the offence was murder or culpable homicide.

Hidayatullah J considering the offences of culpable homicide not amounting to murder and murder; said "two offences involve the killing of a person. They are the offence fo culpable homicide and the more herinous offence of murder. What distinguishes these two offences is the presence of a special mens rea which consists of four mental attitudes in the presence of any of which the lesser offence becomes greater. These four mental attitudes are stated in S. 300, I. P. C as distinguishing murder from culpable himicide. (S. 294 of our Penal Code) **Unless the offence can be said to involve at least one such mental attitude it cannot be murder ...** The first clauses says that culpable homicide is murder if the act by which death is caused is done with the intention of causing death. An intention to kill a person brings the matters so clearly within the general principle of mens rea as to cause no difficulty. Once the intention to kill is proved, the offence is murder unless one of the exceptions applies, in which case the offence is reduced to culpable himicide not amounting to murder. The appellants here did not contemplate killing the Lt. Commander.

The second clause deals with acts done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom harm is caused. The mental attitude here is two fold. There is first the intention to cause bodily harm and next there is the subjective knowledge that death will be the likely consequence of the intended injury. English Common Law made no clear distinction between intention and recklessness but in our law the foresight of the death must be present. The mental attitude is thus made of two elements (a) causing an intentional injury and (b) which injury the offender has the foresight to know would cause death. Here the injury or harm was intended . . . They intended that the Lt. Commander should be rendered unconscious for some time but they did not intend to do more harm than this. Can it be said that they had the subjective knowledge of the fatal consequence of the bodily harm they were causing. We think that on the facts of the case the answer cannot be in the affirmative.

The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the

intentionally caused injury must be viewed objectively. **If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not.** As was laid down in *Virsa Singhe vs. State of Punjab* [4] for the application of this clause it must be first established that **an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established** (emphasis added).

Applying these tests to the acts of the accused the injury which caused the death was the one inflicted by the accused. The sufficiency of the injury was objectively established . . . As was pointed out in *Anda vs. State of Rajastan*[5] at 151 "the emphasis in clause thirdly is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and if the causing of the injury is intended, the offence is murder" . . .

The fourth clause comprehends generally, the commission of imminently dangerous acts which must in all probability cause death. To tie a man so that he cannot help himself, to close his mouth completely and plug his nostrils with cotton wool soaked in chloroform is an act imminently dangerous to life, and it may well be said to satisfy the requirements of the last clause also, although that clause is ordinarily applicable to cases in which there is no intention to kill anyone in particular. We need not however, discuss the point in this case. The court having held that the offence committed was murder, dismissed the appeal.

In the case of *Vishnu Daga Pagar and others vs. State of Maharastra* [6] the deceased party and the accused party were residents of the same village. Till a day prior to the incident the relations between the parties were cordial. On the morning of the date of the incident it was found that the bund between the field of the complainant and the

accused were destroyed by the accused. The deceased had gone to the accused and questioned the accused. An hour later the accused having come with others, inflicted a sickle blow on the head of the deceased. The deceased died the same day. Death was due to shock as a result of a fracture of the skull and internal hemorrhage. The injuries were sufficient in the ordinary course of nature to cause death.

The contention of the counsel for the defense was that no offense of murder was made out. He contended that only a solitary blow was inflicted and if he wanted to kill him he would have repeated the blow. He also contended that it was the blunt side of the sickle that was used. He also argued that such injury caused does not always end in death and there are cases of recovery after the vault of the skull was fractured.

The medical evidence is that the deceased dies on account of a fracture of the skull and inter cranial hemorrhage and the injuries were sufficient in the ordinary course of nature to cause death. Sahai J held that in order to bring an offense within the 3rd limb of Section 300, two things have to be established namely (1) there should be intention to cause bodily injury which has been actually caused to a person. In other words the bodily injury caused should not be accidental; and (2) the injury caused should be sufficient in the ordinary course of nature to cause death *State of Karnataka vs. Vedanayagam* [7]. If such an intention to cause that particular injury is made out and if the injury is found to be sufficient in the ordinary course of nature to cause death, then clause thirdly of section 300 IPC is attracted" The expression 'ordinary course of nature' means normal course or due course. At best it may envisage a high probability of death. On the converse the word 'always' means inevitable or invariably. In our judgment the expression "sufficiency in the ordinary course of nature to cause death" only means in normal or due course or at best may envisage a high probability of death but certainly does not mean that the injury should invariably or inevitably lead to death. The distinction between the expressions high probability of death and death invariably or inevitably taking place, though fine, is substantial and if overlooked may result in gross-miscarriage of justice (at 2437).

In *Anda vs. State of Rajastan Hidayatullah* J observed thus. "the third clause views the matter from a general stand point. It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The sufficiency is the probability of death in the ordinary way of nature and when this exists and death ensues and the causing of such injury is intended the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body in which the injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature, that is to say, if the probability of death is not so high, the offense does not fall within murder but, within culpable homicide not amounting to murder or something less".

In the case of In re *Singaram Padayachi* [8] the court observed thus : "We are not prepared to assent to any agreement that an injury sufficient in the ordinary course of nature to cause death is an injury, which inevitably and in all circumstances must cause death. If the probability of death is very great, then it seems to us the requirement of thirdly under section 300 are satisfied, and the fact that a particular individual may be the fortunate accident of skilled treatment or being in possession of a particularly strong constitution have survived an injury which would prove fatal to the majority of persons subjected to it, is not enough to prove that such an injury is not sufficient 'in the ordinary course of nature' to cause death". The court having held that there is high probability of death dismissed the appeal.

Considering the time within which death occurred, the learned Judge had correctly classified the injury as necessarily fatal. Hence the intention of the accused is manifestly shown. The accused had clearly intended to cause the necessarily fatal injury that was caused which resulted in death before admission to the hospital. I am of the view that the learned Judge had rightly convicted him. The appeal is therefore dismissed.

BALAPATABENDI J. – I agree.

Appeal dismissed.