[COURT OF CRIMINAL APPEAL]

1952 *Present :* **Nagalingam S.P.J. (President), Gratiaen J. and Pulle J.**

MENDIS *et al.*, Appellants, *and* THE QUEEN, Respondent

APPEALS NOS. 76–77 WITH APPLICATIONS NOS. 116–117

S. C. 12—M.C. Balapitiya, 66,743

Charge of murder—Evidence of injury by club blow—Supervening toxœmia causing death—Criminal responsibility of accused—Extent of his criminal liability—" Sufficient in the ordinary course of nature to cause death "—Penal Code, s. 293, Explanation 2, and s. 294, Clause 3.

Where toxæmia supervened upon a compound fracture which resulted from a club blow inflicted by the accused and the injured person died of such toxæmia—

Held that as the injured man's death was not immediately referable to the injury actually inflicted but was traced to some condition which arose as a supervening link in the chain of causation, it was essential in such cases that the prosecution should, in presenting a charge of murder, be in a position to place evidence before the Court to establish that " in the ordinary course of nature " there was a very great probability (as opposed to a mere likelihood) (*a*) of the supervening condition arising as a consequence of the injury inflicted, and also (*b*) of such supervening condition resulting in death.

APPEALS, with applications for leave to appeal, against two convictions in a trial before the Supreme Court.

M. M. Kumarakulasingham, with *G. C. Niles*, for the accused appellants.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

[1] *(1906) 3 Bal. 43.*

February 8, 1952. GRATIAEN J.—

The appellants were jointly tried for the murder of Yagama Vincent Silva, the offence being alleged to have been committed by them on 21st November, 1950. They were both found guilty by the unanimous verdict of the Jury.

The case for the prosecution was that on the morning of 21st November, 1950, the appellants, actuated by a common intention, brutally attacked Yagama Vincent Silva with a sword and a club, causing him grievous injuries with both weapons. The injured man, who was in a collapsed condition and was suffering from shock as the cumulative effect of the injuries sustained by him, was removed to the Government Hospital at Balapitiya where he was examined by the District Medical Officer, Dr. Tissaweerasinghe who gave him such skilled medical attention as the facilities available in that particular hospital permitted. One incised injury in particular would necessarily have caused death "*in the ordinary course of nature*", but surgical treatment prevented this result. There was still a risk, however, that death might result from septic poisoning setting in as the result of another injury (the nature of which I shall more particularly describe hereafter). Dr. Tissaweerasinghe had explained in the course of his evidence in the Magistrate's Court that the appropriate serum was not available in his hospital, and it was presumably for this reason that the injured man was despatched to Colombo for treatment at the General Hospital at 10 a.m. on the next day. Unfortunately, however, toxæmia had already set in, and Silva died that evening. A post-mortem examination was conducted at 7.45 a.m. on 23rd November by the Judicial Medical Officer, Dr. G. S. W. de Saram, in whose opinion death was due to "toxæmia from gas gangrene following a compound fracture of the right leg".

It is evident that toxæmia, which was the *immediate* cause of death, supervened upon a particular injury resulting from a club blow for which the jury, properly directed and upon ample evidence, have imputed joint criminal responsibility to both appellants. The details of the injury at the time of the autopsy are described as follows by Dr. de Saram :—

> "A punctured wound 3/8th inch in diameter by quarter inch deep over the upper right shin three inches below the knee with underlying fracture of both bones of leg. There was blistering and black discolouration over the whole front and sides of right leg and swelling of the right foot and knee."

Dr. de Saram also states that, upon internal examination, he discovered that underlying this wound there was "a comminuted fracture of the main bone of the right leg over an area 3″ by 1½″ and a fracture of the outer bone at same level. The surrounding muscles were soft and there was offensive exudate. The whole of the right lower extremity was infiltrated with gas". With regard to the immediate cause of death, namely, "toxæmia from gas gangrene", Dr. de Saram's evidence is to the effect that "gangrene is quite a common infection in Ceylon. It is brought about by bacterial infection. *If the injured man fell on contaminated soil or if his skin was contaminated gangrene could set in*".

He expressed the opinion that the injury which I have described in detail was sufficient in the ordinary course of nature to cause death " in the sense that (he) was thinking of death being caused by infection, and that is really how death in fact was caused ". As far as we can judge, however, from his evidence on record, he was not invited to elucidate his opinion any further or to elaborate the grounds upon which that opinion was based. Nor is it certain that he had prominently before his mind what the law regards as " sufficient in the ordinary course of nature to cause death " in relation to the elements of the offence of " murder " as defined in the Ceylon Penal Code.

Learned Counsel for the appellants has very properly conceded that upon these facts the appellants were at least guilty of culpable homicide not amounting to murder. The force with which the blow was delivered shattered the bones of the right leg of the injured man who in consequence collapsed into a stream from which he had to be helped out, and the appellants must have known that a considerable time was bound to elapse before the deceased could be given medical treatment by anyone who chanced to rescue him. It was justifiable, therefore, to impute to the appellants the knowledge that, in all the circumstances attending the transaction, infection was likely to supervene upon the injury inflicted. In our opinion it was not necessary that the appellants should have had the knowledge that the infection might probably take the form of gas gangrene rather than some other kind of infection equally likely to end fatally. Nor would one impute the requisite knowledge to the appellants solely for the reason that the deceased succumbed to the injuries inflicted by them. Even if he had escaped infection altogether and survived, knowledge of the likely fatal consequences of those acts could have still been properly imputed to the appellants.

In our opinion, the immediate cause of death, namely, toxæmia, which supervened was without doubt a likely consequence of an injury which one or the other of the appellants had inflicted in furtherance of the common intention of both. The injury itself, though it preceded toxæmia in time and in order of causation, had " brought the deceased man into a new hazard of death " and " the extraneous supervening circumstance (which was not inherently improbable) had converted that hazard into a certainty ". *Kenny's Outlines of Criminal Law (15th edition) page 149.* In that state of things, criminal responsibility was, in our opinion, very properly imputed by the jury to the appellants for the immediate cause of death. As Lord Halsbury said in *Brintons Ltd. v. Turvey* [1], " by calling the consequence of an injury a disease, one cannot alter the nature of the consequences of the injury that has been inflicted ". *Brintons' case* was concerned with a question arising under the Workmen's Compensation Act, but the observations quoted by me have been adopted as having equal application to decisions affecting criminal responsibility for death resulting from a disease which supervenes a felonious act. *Russell on Crimes (10th edition), Volume 1, page 471.* On this aspect of the case we think that the jury were correctly and adequately directed by the learned presiding Judge.

[1] *(1905) A. C. 230.*

There remains for consideration, however, the more difficult question whether the convictions for *murder* were justified upon the evidence. In the facts of the present case, this depends on whether there was evidence upon which the jury, properly directed, could reasonably hold that the act of the appellants which caused the death of Vincent Silva was also *from its very nature* " sufficient in the ordinary course of nature to cause death ". These words in clause 3 of the definition of " murder " contained in section 294 of the Penal Code require that the probability of death ensuing from the injury inflicted was *not merely likely but " very great, though not necessarily inevitable ". In re Singaram Padayachi and others* [1]. If, on the other hand, the evidence establishes that there was probability *in a lesser degree* of death ensuing from the act committed, the finding should be that the accused intended to cause an injury *likely* to cause death and the conviction should be culpable homicide not amounting to murder. *Ratanlal's Law of Crimes (16th edition), page 705.* With great respect, we are not convinced that the learned Judge's charge, though in all other respects unexceptionable, sufficiently emphasised the degree of probability which was essential to justify a conviction for murder.

Special difficulties attach to criminal cases where the injured man's death is not immediately referable to the injury actually inflicted but is traced to some condition, such as septic poisoning, which arose as a supervening link in the chain of causation. It is essential in such cases that the prosecution should, in presenting a charge of murder, be in a position to place evidence before the Court to establish that " in the ordinary course of nature ", there was a very great antecedent probability (as opposed to a mere likelihood) (*a*) of the supervening condition arising as a consequence of the injury inflicted, and also (*b*) of such supervening condition resulting in death. Applying this test to the present case, we think that Dr. de Saram's evidence does not go far enough to establish the *first* of these requirements beyond reasonable doubt.

With regard to the second requirement, it is of course besides the point that the injured man's life might possibly have been saved by the earlier application of the appropriate serum, if it had been available at the Balapitiya Hospital. Indeed, the evidence makes it clear, we think, that *in the ordinary course of nature,* (i.e. " without resorting to proper remedies and skilful medical treatment "—vide *Explanation 2 to section 293*) the toxæmia, once it had supervened upon the injury, would inevitably have caused death. But this circumstance by itself was insufficient to justify the convictions for murder, for the evidence, in our opinion, does not prove beyond doubt that there was " a very great probability " that the bacterial infection which, in Dr. de Saram's opinion, brought about " toxæmia from gas gangrene " would supervene upon the injury inflicted upon Vincent Silva. We therefore quash the convictions for murder and substitute in the case of each appellant a conviction for culpable homicide not amounting to murder. We sentence each appellant to undergo a term of ten (10) years' rigorous imprisonment.

Convictions altered.

[1] *A. I. R. (1944) Mad. 223.*