

[COURT OF CRIMINAL APPEAL]

1968 *Present* : H. N. G. Fernando, C.J. (President), T. S. Fernando, J.,
and Tambiah, J.

K. A. CHARLIS, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPEAL No. 159 OF 1967, WITH APPLICATION No. 207

S. C. 28/67—M. C. Matara, 32323

Penal Code—Scope and purpose of s. 294—Distinction between murder and culpable homicide not amounting to murder—Murderous intention—Misdirection.

Where A strikes Z with the intention of causing bodily injury, and Z dies in consequence of the blow, although the blow is not sufficient in the ordinary course of nature to cause the death of a person in a sound state of health, it would be a misdirection to tell the jury that, according to the provisions of the second paragraph of section 294 of the Penal Code, A is liable to be convicted of murder. A case which does not fall within the third limb of section 294 of the Penal Code is not one of murder, unless the offender actually knows of a rather special peculiarity or defect suffered by the injured person and knows also that for that reason the injury caused to him is likely to cause his death.

APPEAL against a conviction at a trial before the Supreme Court.

Colvin R. de Silva, with Nihal Jayawickrama, S. S. Wijeratne and (assigned) A. M. Coomaraswamy, for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

January 30, 1968. H. N. G. FERNANDO, C.J.—

The accused in this case was convicted of murder by the unanimous verdict of the Jury and sentenced to death. But after hearing argument we made order setting aside that verdict and sentence and substituting therefor a verdict of culpable homicide not amounting to murder and a sentence of seven years rigorous imprisonment.

The case for the prosecution was that the deceased person, one Weeraman, was wheeling a bicycle along the road followed by his son on foot, and that they met the accused who was standing at a road junction with a sword in hand. The accused questioned the deceased and asked him "where are you going?", and when the deceased gave an answer to this question the accused tried to strike the deceased with the sword

but apparently missed, and the sword fell out of the accused's hand. Thereupon the accused pulled out a knife from his waist, and to use the son's words "he pressed the knife into the deceased's abdomen".

The death of the deceased did not occur immediately, nor even soon after he received this injury. In fact he was operated on several times and he died only about five weeks later. Indeed Counsel for the defence suggested to us that it was possible to argue that the medical evidence fell short of strict proof that the stabbing with the knife was the actual cause of death. But in the circumstances of the case it was not necessary to pursue this point further.

We have referred to the history subsequent to the infliction of the injury, because the unusually long interval between the infliction of the injury and the actual death appears to have led the learned trial judge himself to entertain some doubts as to the accused's state of mind when he used his knife on the deceased man.

In his summing up the learned Judge directed the Jury that the murderous intention requisite to found a conviction of murder is one of three intentions, the first two of which are respectively the intention of causing death, and the intention of causing bodily injury, the injury thus intended being sufficient in the ordinary course of nature to cause death. The two states of mind thus mentioned are those referred to in the first and the third paragraphs of s. 294 of the Penal Code. Thereafter the learned Judge referred to the third kind of murderous intention in the following direction:—

"What is the third kind of intention? It is also a murderous intention which is somewhat similar to what I have just told you, that is, the act of intention of causing bodily injury and the bodily injury is of such a nature that the offender knows it to be likely to cause death to the person that injury is inflicted, that is also a murderous intention. Let me repeat that third one. It is also a murderous intention to intend to cause bodily injury and the bodily injury is such that the offender knows it likely to cause the death of that person. It says as the offender knows. What the law needs is not one's personal knowledge but the knowledge of a reasonable man."

At a later stage another similar reference was made to the same matter:—

"Well, look at the third kind of murderous intention. It is if the act is done with the intention of causing bodily injury which bodily injury, any reasonable person will know, is likely to cause the death of that person. If you intend to plunge a knife into the stomach of another man, ask yourselves, would or would not any reasonable man anticipate that by that act he is very likely to cause the death of that person. Would or would he not? If your answer is, "Yes", then again you have the murderous intention present."

It is clear from the language of these directions that the learned Judge intended to explain to the Jury the scope and purpose of the second paragraph of s. 294, viz., if it is 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 the harm is caused ; we are satisfied that this explanation of the law was gravely incorrect. The second illustration lettered (b) which follows almost immediately after the statutory provision in s. 294 is clearly intended to explain the meaning of the second limb of s. 294. That illustration contemplates a case where A strikes Z with the intention of causing bodily injury, and Z dies in consequence of the blow, although the blow is not sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. The illustration thereafter distinguishes between two alternative situations :—

- (1) If A knows that Z is labouring under some disease because of which a blow is likely to cause his death, then A is guilty of murder despite the fact that the case is not one covered by the third limb of s. 294.
- (2) If A does not know that Z is suffering from such a disease, then he is not guilty of murder.

Cases to which the second limb of s. 294 is applicable are quite rare and the instance which does sometimes occur is that in which a person having an enlarged spleen dies in consequence of a blow which would not ordinarily result in the death of a healthy person. Such an instance is not covered by the third limb of s. 294 because the blow is not sufficient in the ordinary course of nature to cause death. Nevertheless the actual knowledge possessed by the giver of the blow that it is likely to cause the death of the particular person attacked converts a case, which otherwise would be only culpable homicide, into one of murder.

The directions given by the learned trial Judge in this case were to the effect that the test imposed in the second limb of s. 294 is objective and not subjective ; but we hold that the true test is purely subjective, and that a case which does not fall within the third limb of s. 294 is not one of murder, unless the offender actually knows of a rather special peculiarity or defect suffered by the injured person and knows also that for that reason the injury caused to him is likely to cause his death.

There is no question but that s. 293 of the Code defines the *genus* culpable homicide, and that s. 294 defines the *species* murder. Section 293 specifies the three states of mind each one of which will make an act of causing death the offence of culpable homicide :—

- (a) the intention of causing death,
- (b) the intention of causing such bodily injury as is likely to cause death,
- (c) the knowledge of the likelihood of causing death.

Every offence of culpable homicide, of course, is not also an offence of murder ; and s. 294 is intended to declare which offences falling under s. 293 will also be offences of murder. Thus the first limb of s. 294 declares that an offence of culpable homicide committed with the intention which I have specified in paragraph (a) above is murder ; and s. 294 declares in its third limb that an offence of culpable homicide committed with the intention I have specified in paragraph (b) is also murder.

If then anything in s. 294 has the further effect that every offence of culpable homicide committed with the knowledge which I have specified in paragraph (c) above is also murder, it would follow that every single offence of culpable homicide will also be an offence of murder. To construe s. 294 in such a manner would be to obliterate the distinction between culpable homicide and murder. In our opinion the directions of the learned trial Judge concerning what he referred as the " third kind of murderous intention ", was substantially a direction that the element of knowledge mentioned in s. 293 is not different from that which is mentioned in the second limb of s. 294. With respect we must hold that direction to be contrary to law.

Having regard to the directions which were given to the Jury, we were unable at the stage of appeal to exclude the possibility that the Jury returned a verdict of murder in this case in pursuance of the incorrect direction. For these reasons we altered that verdict to one of culpable homicide.

Verdict altered.
