1936 *Present :* **Abrahams C.J., Maartensz and Moseley JJ.**

KING *v.* SALAMON *et al.*

45—P. C. Gampaha, 35,006.

[2ND WESTERN CIRCUIT, 1936.]

Misdirection to jury—Charge of culpable homicide not amounting to murder—Deceased suffering from an enlarged spleen—Proof of knowledge of consequences of assault—No presumption to be drawn from consequences of an act—Penal Code ss. 293, 311, and 314.

Where the accused were charged before the Assize Court with culpable homicide not amounting to murder and the learned Commissioner of Assize in his charge to the jury directed them "that it was not necessary that the Crown should prove definitely that each of the accused in fact knew that death could be caused by striking a man with a fist and that knowledge of the consequences likely to follow from the assault made on the deceased must be inferred from the actual consequences of the attack".

Held, that it was not a proper direction in law. It is not proper to impute knowledge of the consequences of an act to a person merely because the consequences resulted from it.

Held, further, that in the circumstances the accused were guilty of causing hurt under section 312 of the Penal Code.

THIS was a case stated by the Attorney-General under section 355 (3) of the Criminal Procedure Code for the determination of the Supreme Court. The facts are stated in the reference as follows :—

The above-named prisoners were charged with committing culpable homicide not amounting to murder by causing the death of one Liyana Pathirennehelage Podisingho on or about May 10, 1935, at Wadurawa in the division of Gampaha of the District of Negombo. They were tried before the Hon. Mr. V. M. Fernando, then Commissioner of Assize, and an English-speaking Jury on May 28, 1936, and convicted of the offence with which they were charged by a unanimous verdict. Each of the prisoners was thereupon sentenced to undergo five years' rigorous imprisonment.

The deceased Podisingho had a daughter named Sopi Nona. She was the mistress of the first prisoiner Salamon. On May 9, 1935, Sopi Nona left the house of the first prisoner at Wadurawa and proceeded to Polgahawela. The first prisoner sent Sopi Nona's brother Piyasena to Polgahawela to fetch her back.

On May 10, 1935, about 8 A.M., Sopi Nona returned to Wadurawa to the house of the deceased. About an hour or an hour and a half later the first prisoner entered the house of the deceased accompanied by the other prisoners. The first prisoner struck Sopi Nona with a stick. The deceased asked the first prisoner not to strike his daughter. Then the first prisoner struck the deceased on his shoulder and on the chest. The third prisoner seized the deceased and pushed him against a wall and the second prisoner and the third prisoner also joined in the assault on the deceased. All the four prisoners struck the deceased with their closed fists, chiefly on the abdomen.

The medical evidence showed that the deceased was 55 years of age and that externally there was a contusion over the left side of the front aspect of the chest. On internal examination there was the following injuries :—

(1) A rupture of the anterior margin of the spleen 2 in. long.
(2) A rupture over the internal surface of the spleen 2 in. long.

There were also two ruptures of the liver, one over the anterior border of the liver and the other over the external surface of the liver.

In the opinion of the Medical Officer who gave evidence death was due to haemorrhage and shock resulting from the ruptures of the spleen and of the liver. The spleen was enlarged as a result of disease to twice its normal size and a comparatively light blow would have been sufficient to cause its rupture. The liver was of normal size and in the opinion of the Medical Officer "considerable force must have been used to cause a rupture of the liver. The injuries on the liver were not necessarily fatal in the sense that 50 per cent. of persons who had received such injuries might with proper treatment be expected to recover. Death might not have resulted in this case if the spleen had not been ruptured. In other words if there was no injury to the spleen Podisingho (the deceased) may possibly have recovered from his other injuries. Cross-examined with regard to the absence of remarks on the body, Dr. Suppramaniam, the Medical Officer, stated that he would have expected more extreme injuries unless all the blows had been struck on a flexible part of the body like the abdomen". The learned Commissioner in his charge to the jury dircted them "that it was not necessary that the Crown should prove definitely that each of the accused in fact knew that death could be caused by striking a man with the fist, and that knowledge of the consequences likely to follow from the assault made on Podisingho must be inferred from the actual consequences of that attack".

The question of law now submitted for final determination is whether the Commissioner's direction to the jury that "it was not necessary that the Crown should prove definitely that each of the accused knew that death could be caused by striking a man with the fist and that knowledge of the consequences likely to follow from the assault must be inferred from the actual consequences of the attack" was a proper direction in law.

H. V. Perera (with him *S. Nicholas*), for the accused.—It is submitted that the direction of the Judge was that there was a presumption in law and that the jury had no option in the matter. The jury were in fact told that the mere proof of the consequence—in this case death—is sufficient for the Crown to establish the offence. It is knowledge that is material, not intention. Intention is ruled out. There is no evidence that the accused knew that the particular deceased had an enlarged spleen. The only knowledge that could be imputed to them is that they would use their fists. In a case like this you cannot attribute to them knowledge that anyone of them would strike the man in a particular place. Can you impute to them knowledge that simple hurt would be caused? To convict them of voluntarily causing grievous hurt it is necessary to impute knowledge on the part of each person that the others would cause grievous hurt. It is possible that one person had that knowledge only—not the knowledge that other persons would cause grievous hurt. If one person had that knowledge, it would be unfair to impute to the others knowledge that the man would be grievously injured or would die. Counsel cited *Gour's Penal Code (1936 ed.)*, p. *971, para. 3241, and p. 1034, para. 3439*, and *Penal Code, s. 33.*

J. W. R. Illangakoon, K.C., Attorney-General (with his *M. F. S. Pulle, C.C.*), for the Crown.—The learned Judge has apparently put the case to the jury on this footing that the degree of violence used was the measure of the knowledge possessed by the accused. When the learned Judge used the word "consequence", he meant the proximate consequence—

that is the rupture of the liver. The consequence of the blow was the rupture of the liver. It is not clear that he intended to convey to the jury that from that fact knowledge must be presumed. If he did not explain this sufficiently they might have been misled. Counsel cited *Gour's Penal Code (4th ed.), p. 971, para. 3246, and p. 1699, para. 3448.*

Cur. adv. vult.

November 4, 1936. ABRAHAMS C.J.—

This is a case which was submitted for our determination by the Attorney-General under section 355 (3) of the Criminal Procedure Code.

The convicted persons were four in number, and they were tried before the Hon. Mr. V. M. Fernando, then Commissioner of Assize, and a jury, and were convicted of culpable homicide not amounting to murder, the offence with which they were charged. They were sentenced each to undergo five years' rigorous imprisonment. The evidence for the Crown was that these four men invaded the premises of the deceased apparently in pursuit of the mistress of the first prisoner who was also the daughter of the deceased. Some altercation broke out and the four prisoners pushed the deceased against a wall and struck him with their closed fists, chiefly on the abdomen. The deceased who was about 55 years of age, was found, on the autopsy, to have sustained two ruptures of the spleen and two ruptures of the liver. The Medical Officer who conducted the post-mortem said that death was due to haemorrhage and shock resulting from the ruptures of those two organs. The spleen was enlarged as a result of disease to twice its normal size and a comparatively light blow would have been sufficient to cause its rupture. The liver was of normal size, and in the opinion of the Medical Officer considerable force must have been used to cause a rupture of it. The injuries on the liver were not necessarily fatal in the sense that 50 per cent. of persons who had received such injuries might, with proper treatment, be expected to recover. Death might not have resulted in this case if the spleen had not been ruptured.

The learned Commissioner in his charge to the jury directed them "that it was not necessary that the Crown should prove definitely that each of the accused in fact knew that death could be caused by striking a man with the fist, and that knowledge of the consequence likely to follow from the assault made on Podisingho must be inferred from the actual consequences of that attack". An application was made to him, on behalf of the prisoners, to state a case under section 355 (1) of the Criminal Procedure Code. This he refused to do. The Attorney-General has therefore submitted for our determination the question whether the Commissioner's direction to the jury, above referred to, was a proper direction in law. Section 293 of the Penal Code which defines culpable homicide, read as follows :—

> "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide",

and it was evidently sought to charge the accused with the knowledge that they were likely by the assault on the deceased to cause his death.

I am of opinion that this direction was wrong. There is no authority in law or in logic for so interpreting the words of section 293. Analysed, the direction amounts to this: that the accused persons must be taken to have known what the probable consequence of their act of assaulting the deceased would be, because those consequences in fact followed from the act. It is manifest that the jury must have come to the conclusion that they had no option but to convict. I cannot help feeling that the learned Commissioner did not really mean precisely what he said, because in his order refusing the application to state a case the following passage occurs:—". . . . with regard to knowledge, I directed them that such knowledge could be inferred *a posteriori*. 'A person may truthfully declare', says *Gour (5th ed.), p. 967,* 'that he did not know that his act was likely to cause death, and yet he may be rightfully found to have had that knowledge. The standard which the Court fixes before itself is that of a reasonable man, and the question it ultimately asks itself is not whether the accused had the knowledge, but whether as a reasonable man he could have had that knowledge. And for this purpose the act itself is the real test'". Knowledge of the probable consequences of an act may be presumed from the nature of the act itself and the nature of the act should obviously form the basis of an inquiry into whether or not the doer of that act must be held to have had knowledge of its probable consequences, but that form of a *posteriori* reasoning is very different from imputing knowledge of the consequences of an act merely because those consequences happened.

Although we are compelled to hold that this direction was wrong, it is nevertheless our duty to consider whether, if the direction had been correct, the jury would in all reasonable probability have returned the same verdict. In view of the medical evidence, I am unable to see how they would have been justified in so doing. From that evidence it would appear that but for the rupture of the diseased spleen, the deceased man had an even chance of recovering, and I am unable to see on what process of reasoning, in the absence of any evidence to that effect, that knowledge of this condition could be fairly imputed to the accused.

Then, can the accused be convicted of any, and if so, of what offence? They obviously committed the offence of hurt punishable under section 314 of the Penal Code, and since death actually resulted from the assault that they committed it must be inferred that they committed grievous hurt. The only kind of grievous hurt that they could possibly be held to have committed appears to be that figuring in the eighth category in section 311 of the Penal Code, that is to say, any hurt which endangers life. It is beyond argument that apart from the injury to the spleen, the injury to the liver endangered the sufferer's life. Now, in order to convict of the offence of voluntarily causing grievous hurt, it must be proved that the act which caused grievous hurt was done with the intention of causing grievous hurt, or with the knowledge that grievous hurt was likely to be caused, and, proceeding on that definition, did the four accused when they assaulted the deceased intend to injure him in such a way that his life would be endangered, or short of that intention, did they have the knowledge that they were likely to inflict upon him injury likely to put his life in danger? The jury undoubtedly could have come to that

conclusion, but can we hold that they in all probability would have come to that conclusion had they been specifically and properly directed on the point ? It must be remembered that the accused assaulted the deceased with their fists, though they undoubtedly did strike him in a dangerous part of the body. I am unable to say that if I myself had been trying a case, sitting without a jury, I should not have had some doubts as to the accuseds' guilt, and in view of that opinion I am by no means satisfied that the jury would not have had some doubts.

It would appear then that the conviction should be altered to one of voluntarily causing hurt punishable under section 312 of the Penal Code. The assault undoubtedly was a cowardly one and was entirely unprovoked, and I do not think any injustice would be done to the accused if they suffered the maximum sentence, that is to say, 1 year's rigorous imprisonment, and I think that the sentence of 5 years' rigorous imprisonment should be reduced to that figure.

MAARTENSZ J.—I agree.

MOSELEY J.—I agree.

Conviction varied.