[COURT OF CRIMINAL APPEAL]

1973 *Present* : **H. N. G. Fernando, C.J. (President), Deheragoda, J., and Rajaratnam, J.**

I. KUMARASINGHE, Appellant, *and* THE STATE, Respondent

C. C. A. APPEAL No. 29 OF 1973, WITH APPLICATION No. 31

S. C. 578/72—M. C. Kurunegala, 77984

Charge of murder—Mitigatory plea of sudden fight or grave and sudden provocation—Misdirections—Penal Code, s. 294, Exceptions 1 to 5—Position when there is no evidence of any of the Exceptions.

In a prosecution for murder, the trial Judge's directions concerning the Exception of sudden fight included the following statement :—

"So the law says you cannot attribute to a person who acts in such a situation the murderous intention. But, gentlemen, the law says he should have known when he caused those injuries that it was likely to result in death and, therefore, the offence of murder gets reduced to one of culpable homicide not amounting to murder."

Held, that the statement did not correctly set out the law. Any of the five Exceptions specified in section 294 of the Penal Code is applicable in a case, and only in a case, in which an accused has caused death with murderous intention.

Held further, that, in the instant case, in the absence of any evidence which could bring into operation any of the five Exceptions specified in s. 294 of the Penal Code, the only alternatives open to the Jury were, *either* to convict the prisoner of the offence of culpable homicide not amounting to murder on the ground that he had only the knowledge that his act was likely to cause death *or else* to convict him of murder if they were convinced that he had acted with a murderous intention. The distinction between such "knowledge" and "murderous intention" was not brought to the notice of the Jury in the passage from the charge cited above.

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

W. H. Perera (Assigned), for the accused-appellant.

Ranjith Gunatilleke, State Counsel, for the State.

Cur. adv. vult.

October 8, 1973. H. N. G. FERNANDO, C.J.—

The prisoner in this case was convicted of the murder of one Gunarathhamy and was sentenced to death.

1*—A 08589—3,000 (74/08)

Having dealt with the facts in his charge to the Jury, the learned Commissioner directed the Jury regarding the verdict which could be returned, if the prosecution had established beyond reasonable doubt that it was this prisoner who caused the death of the deceased man.

These directions commenced with the explanation of the offence of murder and of what is in law "a murderous intention"; the Jury were instructed that if a murderous intention was established in this case, the prisoner had to be convicted of murder.

There was no evidence indicating that the prisoner may have assaulted the deceased man in a course of a sudden fight or under grave and sudden provocation. Nevertheless the directions which followed in the charge to the Jury dealt with the exception of sudden fight, and the Jury were directed that, if they took the view that there was a sudden fight between the prisoner and the deceased man, "the offence of murder would be reduced to one of culpable homicide not amounting to murder." These directions concerning sudden fight included the following statement:—

> "So the law says you cannot attribute to a person who acts in such a situation the murderous intention. But, gentlemen, the law says he should have known when he caused those injuries that it was likely to result in death and, therefore, the offence of murder gets reduced to one of culpable homicide not amounting to murder."

With respect we must observe that this statement does not correctly set out the law. Any of the five Exceptions specified in s. 294 of the Penal Code (including the Exceptions dealing with provocation and sudden fight) is applicable in a case, and only in a case, in which an accused has caused death with the murderous intention; if the mitigating circumstances set out in any of these Exceptions are established, the occasion can never arise for "the offence of murder to get reduced to one of culpable homicide not amounting to murder", since the effect of such an Exception is that the accused is guilty only of culpable homicide not amounting to murder, despite the fact that he did entertain a murderous intention. It is not therefore correct that in such a case the law does not attribute to the accused a murderous intention, and only attributes to him the knowledge that his act is likely to result in death.

In the instant case, in the absence of any evidence which could bring into operation any of the five Exceptions specified in s. 294, the only alternatives open to the Jury were, *either* to convict the

prisoner of the offence of culpable homicide not amounting to murder on the ground that he had only the knowledge that his act was likely to cause death *or else* to convict him of murder if they were convinced that he had acted with a murderous intention.

The distinction between such "knowledge" and "murderous intention" was not brought to the notice of the Jury in the passage from the charge which we have cited above. In fact that passage could well have created the impression that the law attributes the murderous intention to an accused unless he is shown to have acted in a course of a sudden fight.

The next passages in the charge to the Jury dealt with the possibility that the offence of murder is reduced to one of culpable homicide, if the accused had acted under grave and sudden provocation. These passages were followed immediately by the following statement:—

> "If you are not satisfied that the accused had a murderous intention at the time he inflicted the injury, then you will proceed to consider whether the accused knew that there was the likelihood of his causing the death of the deceased, in which event your verdict will be one of culpable homicide not amounting to murder on the ground of knowledge."

The statement which we have just cited is the only passage in the charge which referred to *knowledge* of the likelihood of causing death as opposed to *the murderous intention.* But even this statement occurs in a context in which the learned Commissioner was referring to a possible verdict of culpable homicide not amounting to murder, on the ground of grave and sudden provocation. There was thus no clear direction that, quite independently of any question of a sudden fight or of provocation, a verdict of culpable homicide should be returned, if on the evidence the Jury could reach beyond doubt only the conclusion that the prisoner acted with the knowledge that his act was likely to cause death. In the absence of a clear and separate direction to this effect, the possibility of returning a verdict only of culpable homicide on the available evidence was virtually withdrawn from the Jury.

For this reason we allowed the appeal, and we substituted for the verdict and sentence a verdict of culpable homicide not amounting to murder and a sentence of 10 years' rigorous imprisonment.

Verdict altered.