[COURT OF CRIMINAL APPEAL]

1970 *Present :* H. N. G. Fernando, C.J. (President), Alles, J., and Wijayatilake, J.

C. ABEYSUNDERA, Appellant, *and* THE QUEEN, Respondent

C. C. A. APPLICATION No. 188/69

S. C. 316/69—M. C. Galle, 59195

Charge of murder—Injuries inflicted by accused on deceased—Death of deceased two weeks later—Causal connection between death and injuries—Proper consideration necessary.

The accused-appellant, who was charged with murder, was convicted at the trial of culpable homicide not amounting to murder. The deceased, who was stabbed on the abdomen by the appellant, was operated on the same day and the injuries were healing at the time of her death nearly two weeks later. A post-mortem examination showed that death was due to cardio-respiratory failure following extensive broncho-pneumonia of the lung. According to the medical evidence, broncho-pneumonia was a *possibility and not a probability*, and there was a reasonable doubt whether the death of the deceased was as a result of the injuries inflicted by the appellant.

Held, that, on the medical evidence led, the charges of murder or culpable homicide not amounting to murder should have been withdrawn from the consideration of the jury. Accordingly, the verdict should be altered to one of attempted culpable homicide not amounting to murder.

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

D. A. E. Thevarapperuma, for the accused-appellant.

V. S. A. Pullenayegum, Senior Crown Counsel, with *Tyrone Fernando*, Crown Counsel, for the Crown.

Cur. adv. vult.

May 22, 1970. ALLES, J.—

At the conclusion of the argument in this case we set aside the conviction of the appellant for culpable homicide not amounting to murder and substituted in its place a verdict of attempted culpable homicide, since in our view, it was not established beyond reasonable doubt, that the appellant was responsible for the death of the deceased. We now set down the reasons for our order.

The case for the prosecution was that the deceased, an elderly woman, was stabbed on the abdomen by the appellant on the morning of 21st February, 1969. The wound had penetrated into the abdomen and eight feet of the small intestine were protruding. There were thirteen perforations on the intestines and Dr. Paramanathan who examined her on

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the same day was of the opinion that these injuries would have caused death "in the ordinary course of nature". She was operated on the same day about 10.30 a.m. by Dr. Rasiah, the Surgeon of the Galle Hospital, and the injuries were healing at the time of her death on 6th March, 1969. A post-mortem examination was held on the body on the following day and Dr. Wickremesinghe testified that death was due to cardio-respiratory failure following extensive broncho-pneumonia of the lung. On being questioned specifically whether the injuries caused by the appellant were instrumental in the deceased contracting broncho-pneumonia, the Doctor gave the following answer :—

> "Yes, indirectly ; in the sense that the injuries could have caused the deceased to be in bed for a long period and that may have caused the patient getting broncho-pneumonia."

Although in examination-in-chief the Doctor expressed the view that, considering her age and the injuries, the broncho-pneumonia was a natural and probable consequence of the treatment that ensued upon the injuries, in cross-examination he stated that as a result of surgical treatment the injuries were healing and it was unfortunate that she had contracted broncho-pneumonia. His final assessment of the position was that broncho-pneumonia was a *possibility and not a probability*. The medical evidence therefore at least created a reasonable doubt whether the death of the deceased nearly two weeks later was as a result of the injuries inflicted by the appellant.

In *Herashamy* [1] the medical evidence was that the deceased died of pneumonia aggravated by a stab wound but no evidence was given as to how the pneumonia was aggravated by the stab and no explanation was given as to how the opinion was formed that pneumonia was aggravated by the injury. The Court of Criminal Appeal consequently refused to admit a statement of the deceased made at the time the injuries were inflicted as being one admissible under Section 32 of the Evidence Act. In *Surabial Singho* [2] the Doctors who testified to the injuries on the deceased said that "it was *very probable* that the broncho-pneumonia of which the man died was brought about or induced as a result of his condition, that is to say, in consequence of the nature of the injuries he had received, but they went on to say that they could not *positively declare* that the death of the deceased was not due to an independent cause. In those circumstances there arose at least a substantial doubt, to the benefit of which the accused was entitled." The trial Judge took the view, with which the Court of Criminal Appeal agreed, that the offences of murder and culpable homicide not amounting to murder could not be sustained on the evidence in the case.

Finally in *Mendis v. The Queen* [3], in a case where toxaemia supervened upon a compound fracture which resulted from a club blow inflicted by the accused, Gratiaen J. held that the prosecution in presenting a charge

[1] *(1916) 17 N. L. R. 83.* [2] *(1916) 18 N. L. R. 69.*
[3] *(1952) 54 N. L. R. 177.*

of murder should 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".

Following the principles laid down in the above decisions it seems to us that on the medical evidence led in the instant case, the charges of Murder or Culpable homicide not amounting to murder should have been withdrawn from the consideration of the jury. The learned trial Judge however appears to have taken the view that the fortuitous circumstances of the supervening broncho-pneumonia did not exonerate the appellant from his responsibility for the death of the deceased but was only a circumstance which would reduce the offence of murder to culpable homicide not amounting to murder. Said he in the course of the charge :—

> "In consequence of the fortuitous circumstance death ensued. That would enable you to take the view that as far as the person who committed the act which resulted in the death is concerned, he is guilty of some offence. Of course, but for the act that was committed, death would not have resulted. So that, upon this evidence that has been placed before you the safer view for you to take is that it would not be necessary to consider the offence of murder but you *should consider the offence of culpable homicide not amounting to murder* because it was in consequence of the act done by the accused that death eventually resulted, that there was the supervening cause of death, namely, broncho-pneumonia which could not have been foreseen as a probable consequence of the act which the assailant committed.
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> So in that state of affairs, as I said, it is for you to consider the question of *culpable homicide not amounting to murder* inasmuch as the actual death resulted from the intervention of a fortuitous illness which was only a possibility and not a probability having regard to the evidence of the doctor, and if the healing process had taken its normal course then the deceased would have probably lived ; but for the unfortunate fact that broncho-pneumonia had come in the deceased would have lived and this would not have been a charge of murder but might have been a charge of attempted murder. Shall we say the accused person is very unfortunate because what might otherwise have been a charge of attempted murder has become a charge of murder."

It is perhaps these observations which prompted Crown Counsel, on the invitation of the Judge, to draw the attention of the learned Judge at the conclusion of the charge that a verdict of culpable homicide or murder was not possible unless the jury were satisfied that the injuries caused by the appellant resulted in the death of the deceased, and he submitted that the proper verdict in the case should be one for attempted murder. The learned trial Judge, however, gave no directions to the jury on a possible verdict of attempted murder or attempted culpable homicide and

asked them to consider only the possible verdicts as explained by him earlier. On these directions the jury brought a verdict of culpable homicide, but in our view the medical evidence did not warrant such a course.

We therefore altered the verdict to one of attempted culpable homicide not amounting to murder and imposed a sentence of three years' rigorous imprisonment on the appellant.

Verdict altered.