[IN THE COURT OF CRIMINAL APPEAL]

1957 *Present :* Basnayake C.J. (President), Pulle J., and Sinnetamby J.

REGINA *v.* PERIYASAMY and another

APPEALS 86 AND 87 OF 1956, WITH APPLICATIONS 116 AND 117

S. C. 4—M. C. Kalutara, 27552

Charge of murder—Verdict of attempt to commit culpable homicide not amounting to murder—Legality—Criminal Procedure Code, ss. 183 (1), 183A—Penal Code, ss. 294, 300, 301, 490.

A person charged with murder can, if the evidence warrants it, be convicted of attempt to commit murder or of attempt to commit culpable homicide not amounting to murder within the meaning of section 300 or section 301 respectively of the Penal Code although he was not charged with such offences.

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

Colvin R. de Silva, with *P. B. Tampoe* and *D. Vithanage*, for Accused-Appellants.

V. T. Thamotheram, Senior Crown Counsel, for Attorney-General.

Cur. adv. vult.

March 25, 1957. BASNAYAKE, C.J.—

The accused-appellants Periyasamy son of MuttuWeeran and Singaram son of Muttu Karuppan were indicted on a charge of murder of one Vella Kutti son of Kutti Thevar on 20th November 1955. The first appellant was by a unanimous verdict found guilty of culpable homicide not amounting to murder and sentenced to undergo a term of 10 years' rigorous imprisonment, while the second appellant was found guilty of attempted culpable homicide not amounting to murder by a verdict of 5 to 2 and sentenced to undergo a term of 5 years' rigorous imprisonment.

Shortly the material facts are as follows. The deceased and the first appellant were Indian immigrant labourers resident on Culloden Estate in the Kalutara District. The second appellant was a kangany on the same estate. On the day of the tragedy towards nightfall there was a quarrel in which the participants were Ramalingam, the second appellant, and one Pandian. In the course of it Pandian attacked Ramalingam and injured him. The deceased who lived in a line room nearby was asleep at the time. Being disturbed by the quarrel he came out of his room. Seeing the second appellant, he advised him thus: "We need not fight, you had better get to your room." Then the first

2——J. N. B 66337-1,593 (6/57)

appellant came on the scene and dealt the deceased a blow on his head with a black rod, saying : "Who are you to question us ? ". As the deceased staggered on receiving the blow the second appellant stabbed the deceased in his abdominal region and held him by his neck and pushed him. The deceased fell in the drain nearby. The appellants then ran away and the deceased was removed to hospital. The deceased's death was caused by the blow given by the first appellant which caused a fracture of his skull and laceration of his brain. The stab injuries were sufficient in the ordinary course of nature to cause death. They damaged the deceased's right kidney and the intestines. The kidney had to be removed and the intestines to be sutured.

The evidence is that the second appellant stabbed with a long-handled tapping knife ; but one witness says that he pushed the deceased with a stick or club and did not use a knife. The District Medical Officer who held the post-mortem examination is of opinion that a short pointed knife with a cutting edge had been used and not a tapping knife which is a bifurcated weapon.

The first appellant did not give evidence but the second did. He denied that he stabbed the deceased or that he even saw him that night. He said it was at the hospital where he had gone to see some persons who were injured that evening that he heard that he had been accused of stabbing the deceased.

The Crown which had opened its case on the footing of a common intention to commit murder on the part of the two appellants submitted, at the end of the trial, that there was no evidence of common intention and invited the jury to consider the act of the first appellant as independent of that of the second. The learned Commissioner directed the Jury that they were free to return a verdict of attempted murder against the second appellant if they accepted the evidence that he stabbed the deceased. He also directed them in view of the medical evidence that death resulted from the head injury and not the injuries caused by the second appellant and that he could not be found guilty of murder, but that it was open to them to return a verdict of attempted murder, attempted culpable homicide not amounting to murder, or voluntarily causing grievous hurt with an instrument for cutting or stabbing.

Learned counsel for the appellants did not question the correctness of the conviction of the first appellant but pressed the appeal of the second on the ground that the verdict was unreasonable.

It was submitted to us as a matter of law that the second appellant having stood his trial on a charge of murder and not on a charge under section 300 of the Penal Code, was entitled to an acquittal and that it was not open to the trial Judge to direct the Jury to find a verdict either under section 300 or section 301 of the Code. Although the marginal note to section 300 reads "Attempt to murder", it was contended that that section creates an offence defined by its own limits and that it does not penalise the attempt to commit the offence defined in the first four paragraphs of section 294. On this premiss it was argued that section 183A of the Criminal Procedure Code which provides that a person charged with an offence can be convicted of an attempt to commit that

offence although not charged with such attempt has no application. In regard to section 183A it was further argued that its applicability was restricted to the class of attempts covered by section 490 of the Penal Code and that there was no room to call section 490 in aid where the offence attempted is murder. In regard to the latter submission reliance was placed on the judgment of Straight J. in *Queen-Empress v. Niddah*[1] where he held that section 511 of the Indian Penal Code, which corresponds to section 490 of our Code, does not apply to attempts to commit murder which are fully and exclusively provided for by section 307. The learned Judge declined to follow an earlier judgment of the Bombay High Court in *Regina v. Cassidy*[2] in which a conviction under section 307 was set aside in appeal and a conviction under sections 299 and 300 read with section 511 was substituted therefor.

The precise point raised on this appeal did not fall to be determined in the Indian cases referred to, for in neither of them was the charge one of murder. Having regard to the charge in the indictment and the evidence placed before the jury in support of that charge it was open, in our opinion, to the Judge to direct the jury to find a verdict under section 300 or section 301 if the ingredients constituting either offence were proved.

The prosecution set out to establish as against the second appellant the following facts :—

(1) that he " caused " two injuries of which the one on the head of the deceased inflicted by Periyasamy was the immediate cause of death—section 32 of the Penal Code.

(2) that he had the requisite murderous intention.

Under (1) above the prosecution was able to prove that he caused only one injury, namely the injury to the abdomen which did not however result in death. Under (2) the prosecution was able to prove that the second appellant only had the knowledge that by cutting the deceased he was likely to cause his death. What was eventually proved fell within the larger area of facts which were necessary to establish the charge in the indictment. Had the jury held under (2) that he had the intention to cause grievous hurt a conviction under section 317 would have been beyond question.

Does it make any difference to the propriety of the conviction that they held that the second appellant knew at the time he cut the deceased that his act was likely to result in death ? I see none. Both, in our opinion, are covered by section 183 (1) of the Criminal Procedure Code.

The argument that the constituent elements of the offence made punishable under section 300 must be regarded independently of section 294 cannot be supported because section 300 explicitly refers to "murder" and the only place where one can look for a definition of that word is section 294. For the above reasons we dismiss the appeals of both the appellants but direct that their respective sentences should commence to run from 8th October 1956.

Appeals dismissed.

[1] *14 Allahabad 38.*

[2] *4 Bombay H. C. R. 17.*