BANDARA
VS
ATTORNEY GENERAL

COURT OF APPEAL.
BALAPATABENDI. J.
BASNAYAKE. J.
CA 76/2001.
H. C. AVISSAWELLA 17/2001.
OCTOBER 10, 2005.
NOVEMBER 2, 2005.

Penal Code - Sections 294, 296, 317–Murder or culpable homicide not amounting to murder- Where to draw the line ? – Injuries not intended- Conviction bad ?

The accused-appellant was indicted for causing the death of one C punishable under section 296, and was also charged for causing grievous hurt to two young children (section 317). After trial the accused was convicted as charged and sentenced to death in respect of the 1st charge (section 296) and 10 years in respect of the other charges.

In appeal it was contended that, the proper conviction should have been for culpable homicide not amounting to murder as the accused had only intended to cause bodily harm and not death, and as regards the conviction under section 317 the accused never intended harm on the children and the children came by their injuries purely due to an accident.

HELD :

(1) The accused by throwing acid on to the deceased had intended to cause the injuries actually caused. The injuries caused were sufficient in the ordinary course of nature to cause death. The injuries were said to be fatal and the deceased succumbed to the injuries within 24 hours.

(2) This would mean that the probability of death occurring was very high. The fact that the accused intended to cause only bodily harm and not death is therefore immaterial. Section 294 amply demonstrates this position. Although the High Court Judge found the accused guilty of

murder under the second limb of section 294, it should be considered as the third limb of section 294.

Held further:

(3) It is quite immaterial that the death caused was that of a man other than whose death was intended. Where the accused has the intention to kill someone, and if with the intention, he kills somebody else, he is guilty of committing murder.

(4) As harm was intended on someone, the accused has no escape from liability of the injuries caused to the children either.

APPEAL from an order of the High Court of Avissawella.

Case referred to :

(1) *Sudershan Kumar vs. State of Delhi*-AIR 1974 SC 2328
(2) *Somapala vs. The Queen* - 72 NLR 121
(3) *Rajwant Singh vs. State of Kerala* - AIR 1966-1874 SC
(4) *Virsa Singh vs. State of Punjab* - AIR 1958 SC 465
(5) *Anda vs. State of Rajastan* - AIR 1966 SC 148 at 151
(6) *Vishnu Daga Pagar and Others vs. State of Maharastra*-1997 3 Cri LJ2430
(7) *State of Karnataka vs. Vedanayagam* - 1995 SC 231
(8) *Thakura Das vs. State* - AIR 1967 Allahabad 495 - 1995 Cri LJ 1455
(9) *In re Singam Padayachi*-AIR 1944 Madras 223 (1944 Cri LJ 729)
(10) *K. V. Edwin* - 44 NLR 297
(11) *Q vs. Latimar* - 17QBD 359
(12) *Harishankar alias Hari Shankar Sharma vs. State of Mysore* 1979 Cr LR 466 (SC)
(13) *Ballan vs. The State* - AIR 1955 All 626

Dr. *Ranjith Fernando* with Ms. Deshani Jayatilleke and Ms. Amila Udayangani for accused-appellant.

Ms. Kumuduni Wickramasinghe, SSC, for respondent.

Cur. adv. vult.

April 25, 2006.

ERIC BASNAYAKE J.

The accused appellant (accused) was indicted in the High Court of Avissawella for causing the death of H. P. Jayatissa Caldera, punishable

under section 296 of the Penal Code. He was also charged for causing grievious hurt to Thilini Sathya Lokupathirana aged 6 years and Lahiru Rukshan Lokupathirana aged 5 years, punishable under section 317 of the Penal Code. After trial the accused was convicted as charged and sentenced to death in respect of the first charge and 10 years each in respect of the 2nd and 3rd charges. This is an appeal against the conviction and the sentences.

The facts are not in dispute. The incident occurred on 20.03.1996 at Bathika Damayanthi's house. She was the 1st witness for the prosecution. The deceased was a cousin brother of Bathika's husband. The deceased lived close to Bathika's house. The deceased was in the habit of visiting Bathika's house. The accused too was married to a cousin of her husband. Two or three days prior to this incident the accused's wife having had an argument with the accused had spent a few days with Bathika. Thereafter the accused had reconciled with her and had left with her. The wife of the accused had apparently left the accused again and the accused had not been able to find her this time. The accused had a belief that the deceased was keeping her in a secret place. Although there is no evidence to that effect, this appeared to be the motive to cause the injuries.

On the fateful day at about 7 p.m. the deceased was in Bathika's house watching television with Bathika's two children [while seated in bed]. The accused having come with a bottle containing acid concealed in a bag had poured some in to a cup and thrown it at the deceased. The deceased got a splash. The two children too had been exposed to it and were in hospital for more than 20 days.

According to medical evidence the deceased had 35% burn injuries. The burns were on the face, chest, abdomen, back of the chest and other places of the body. These injuries were fatal in the ordinary course of nature and even if prompt medical treatment was given the deceased would not have survived. He died within 24 hours of receiving the injuries.

The Learned High Court Judge considering the second limb of section 294 of the Penal Code convicted the accused of murder. The learned counsel for the accused submitted that the accused only intended to cause bodily harm; therefore he could not be convicted for murder but for culpable homicide not amounting to murder. With regard to the injuries caused to the children the learned counsel submitted that the accused should be discharged as he did not intend causing any injuries to them. The children came by their injuries purely on accident.

In this appeal therefore there are two questions to be decided, namely :

1. Whether the proper conviction should have been for culpable homicide not amounting to murder and not murder as the accused had only intended to cause bodily harm and not death.

2. Whether the conviction was bad in law with regard to the injuries caused to the children as the accused never intended harm on the children and the children came by their injuries purely due to an accident.

1. Murder or culpable homicide not amounting to murder ?

The Learned High Court Judge states in his judgment that the accused would not have intended death. A similar situation arose in the case of *Sudershan Kumar Vs. State of Delhi*[1] where the accused poured acid on the body of the deceased who died in consequence thereof 12 days later. The injuries caused to the deceased were of a dangerous character and were sufficient collectively in the ordinary course of nature to cause death. 35% of the surface of the body of the deceased was burnt as a result of the injuries received by her. The appellant's contention was that he did not intend to kill Maya Devi but intended only to disfigure her, and, therefore, the offence would fall either under section 304, Part 1 (section 297 of the Penal Code) or under section 326 (section 317 of the Penal Code) of the Indian Penal Code. Dismissing the appeal Mathew J. held that the act of the accused in pouring acid on the body was a preplanned one and he intended to cause the injuries which he actually caused. As the injuries caused were sufficient in the ordinary course of nature to cause death, the accused is guilty of an offence punishable under section 302 of the Indian Penal Code (section 296 of our Penal Code).

"The offence of murder is defined under section 300 (section 294 of the Penal Code) of the IPC. According to clause 3 of that section, culpable homicide is murder if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death".

In *Somapala vs. The Queen*[2] H. N. G. Fernando C. J. observes at 123, "the 3rd limb of section 294 postulates one element which is also present in the second clause of section 293, namely, the element of the intention to cause bodily injury; but whereas the offence of culpable homicide is committed, as stated in the second clause of section 293, when there is intention to cause bodily injury likely to cause death, the offence is one of

murder under the 3rd limb of section 294 only when the intended injury is sufficient in the ordinary course of nature to cause death. In our opinion, it is this third limb of section 294 which principally corresponds to the second clause of section 293; and (as is to be expected) every intention contemplated in the latter second clause is not also contemplated in the former third limb. An injury which is only likely to cause death is one in respect of which there is no certainty that death will ensue, whereas the injury referred to in the third limb of section 294 is one which is certain or nearly certain to result in death if there is no medical or surgical intervention. This comparison satisfies us that the object of the Legislature was to distinguish between the cases of culpable homicide defined in the second clause of section 293, and to provide in the 3rd limb of section 294 that only the graver cases (as just explained) will be cases of murder. If this was not the object of the Legislature, then there would be no substantial difference between culpable homicide as defined in the second clause of section 293 and murder as defined in the third limb of section 294. It will be seen also that if the object of the second limb of section 294 was to adopt more or less completely the second clause of section 293, then the third limb of section 294 would be very nearly superfluous".

The Learned Commissioner states as follows in his summing up while explaining the third limb of section 294 :-*The third is, neither you have the intention to cause death nor the intention of causing such bodily injury with knowledge that the bodily injury intended was likely to cause death, but you have an intention to cause bodily injury, without any such knowledge, but the bodily injury is of such gravity that it is sufficient in the ordinary course of nature to cause death."*

Fernando C. J. observed that this explanation is perhaps literally correct, but the statement, that there need not be present the knowledge that the injury intended was likely to cause death can, it seems, be confusing. The requirement in the third limb that the intended injury is sufficient in the ordinary course of nature to cause death presupposes at least an offender's presumed knowledge that the intended injury is sufficient... death.

Fernando C. J. further observed that in the more common cases of homicide, a verdict of murder can be returned if the Jury finds that the offender had the intention to cause death. If they do not so find, the case will ordinarily fall within the third clause of section 293 because of the offender's knowledge of the likelihood of causing death; and then the important question is whether the offence is elevated in to the third limb of section 294 by reason of the gravity of the intended injury." at 125 and at 126.

The difference between the offence of murder and culpable homicide not amounting to murder is well explained in *Rajwant Singhe vs. State of Kerala*[3]. Here the accused conspired to burgle the safe of the Base Supply Officer. They collected various articles such as chloroform, adhesive plaster, cotton wool and hacksaw etc. On the night in question the accused caught the Lt. Commander. His legs were tied with rope and his arms were tied behind his back. A large adhesive plaster was stuck over his mouth and completely sealed. A handkerchief was next tied firmly over the adhesive plaster to secure it in position. The nostrils were plugged with cotton soaked in chloroform and he was deposited in a shallow drain with his own shirt put under his head as a pillow. Thereafter the accused went after the safe. Anyhow the plan failed and the accused bolted off. The following day the dead body of the Lt. Commander was discovered in the drain where he had been left. Counsel for the appellants submitted in that case that the accused did not intend to kill the Commander but render him unconscious while they rifled the safe and that the offence of murder was not established. The question to decide was whether the offence was murder or culpable homicide.

Hidayatullah J. considering the offences of culpable homicide not amounting to murder and murder" said two offences involve the killing of a person. They are, the offence of culpable homicide and the more heinous offence of murder. What distinguishes these two offences is the presence of a special *mens rea* which consists of four mental attitudes in the presence of any of which the lesser offence becomes greater. These four mental attitudes are stated in section 300, I. P. C. as distinguishing murder from culpable homicide. (section 294 of our Penal Code) **Unless the offence can be said to involve at least one such mental attitude it cannot be murder** .... The first clause says that culpable homicide is murder if the act by which death is caused is done with the intention of causing death. An intention to kill a person brings the matter so clearly within the general principle of *mens rea* as to cause no difficulty. Once the intention to kill is proved, the offence is murder unless one of the exceptions applies, in which case the offence is reduced to culpable homicide not amounting to murder. The appellants here did not contemplate killing the Lt. Commander.

The second clause deals with acts 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 harm is caused. The mental attitude here is two fold.

There is first the intention to cause bodily harm and next there is the subjective knowledge that death will be the likely consequence of the intended injury. English Common Law made no clear distinction between intention and recklessness but in our law the foresight of the death must be present. The mental attitude is thus made of two elements (a) causing an intentional injury and (b) which injury the offender has the foresight to know would cause death. Here the injury or harm was intended . . . They intended that the Lt. Commander should be rendered unconscious for some time but they did not intend to do more harm than this. Can it be said that they had the subjective knowledge of the fatal consequences of the bodily harm they were causing. We think that on the facts of the case the answer cannot be in the affirmative.

The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. **If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not.** As was laid down in *Virsa Singhe vs. State of Punjab*[4] for application of this clause it must be first established that **an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established.** (emphasis added).

Applying these tests to the acts of the accused the injury which caused the death was the one inflicted by the accused. The sufficiency of the injury was objectively established . . . As was pointed out in *Anda vs. State of Rajastan*[5] "the emphasis in clause thirdly is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and if the causing of the injury is intended, the offence is murder". . . .

The fourth clause comprehends generally, the commission of imminently dangerous acts which must in all probability cause death. To tie a man so that he cannot help himself, to close his mouth completely and plug his nostrils with cotton wool soaked in chloroform is an act imminently dangerous to life, and it may well be said to satisfy the requirements of the last clause also, although that clause is ordinarily applicable to cases in which there is no intention to kill anyone in particular. We need not however, discuss the point in this case. The court having held that the offence committed was murder, dismissed the appeal.

In the case of *Vishnu Daga Pagar and Others vs. State of Maharastra*[6] the deceased party and the accused party were residents of the same village. Till a day prior to the incident the relations between the parties were cordial. On the morning of the date of the incident it was found that the bund between the field of the complainant and the accused were destroyed by the accused. The deceased had gone to the accused and questioned the accused. An hour later the accused having come with others, inflicted a sickle blow on the head of the deceased. The deceased died the same day. Death was due to shock as a result of a fracture of the skull and inter cranial haemorrhage. The injuries were sufficient in the ordinary course of nature to cause death.

The contention of the counsel for the defense was that no offense of murder was made out. He contended that only a solitary blow was inflicted and if he wanted to kill him he would have repeated the blow. He also contended that it was the blunt side of the sickle that was used. He also argued that such injury caused does not always end in death and there are cases of recovery after the vault of the scull was fractured.

The medical evidence is that the deceased died on account of a fracture of the scull and inter cranial haemorrhage and the injuries were sufficient in the ordinary course of nature to cause death. Sahai J held that "**in order to bring an offense within the third limb of section 300, two things have to be established namely (1) there should be intention to cause bodily injury which has been actually caused to a person. In other words the bodily injury caused should not be accidental; and (2) the injury caused should be sufficient in the ordinary course of nature to cause death.**–*State of Karnataka Vs. Vedanayagam*[7] **If such an intention to cause that particular injury is made out and if the injury is found to be sufficient in the ordinary course of nature**

to cause death, then clause thirdly of section 300 IPC is attracted" The expression 'ordinary course of nature' means normal course or due course. At best it may envisage a high probability of death. On the converse the word 'always' means inevitable or invariably. In our judgment the expression "sufficiency in the ordinary course of nature to cause death" only means in normal or due course or at the best may envisage a high probability of death but certainly does not mean that the injury should invariably or inevitably lead to death. The distinction between the expressions high probability of death and death invariably or inevitably taking place though fine is substantial and if overlooked may result in gross-miscarriage of justice. Note 8 at page 2437.

The following judgments were relied on by court. In *Thakura Das vs. State*[8] the court observed thus; "it is not necessary for the application of clause (3) of section 300 that the injury must be such as would make it impossible for the injured to escape death. All that is required is that the injury intended must be such as would in the ordinary course of nature be sufficient to cause death. There may be a case in which even though the injury was sufficient in the ordinary course of nature to cause death the injured may escape death but, if he dies as a result of such an injury the offence would be covered by clause (3) of section 300 and be murder. If however the injury is of such a nature as is only likely to cause death and would not in the ordinary course be sufficient to cause death, it would be culpable homicide not amounting to murder"

The next case cited is *Anda vs. State of Rajastan (supra)* where Hidayatullah J. observed thus : "the third clause views the matter from a general stand point. It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The sufficiency is the probability of death in the ordinary way of nature and when this exists and death ensues and the causing of such injury is intended the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body of which the injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature, that is to say, if the probability of death is not so high, the offence does not fall within murder but, within culpable homicide not amounting to murder or something less".

The third authority cited is In re *Singaram Padayachi*[9] where the court observed thus : "We are not prepared to assent to any agreement that an injury sufficient in the ordinary course of nature to cause death is an injury, which inevitably and in all circumstances must cause death. If the probability

of death is very great, then it seems to us the requirement of thirdly under section 300 are satisfied, and the fact that a particular individual may be the fortunate accident of his having secured specially skilled treatment or being in possession of a particularly strong constitution have survived an injury which would prove fatal to the majority of persons subjected to it, is not enough to prove that such an injury is not sufficient 'in the ordinary course of nature' to cause death". The court having held that there is high probability of death dismissed the appeal.

The accused in this case under review, by throwing acid on to the deceased had intended to cause the injuries actually caused. The injuries caused were sufficient in the ordinary course of nature to cause death. Those injuries were said to be fatal and the deceased succumbed to the injuries within 24 hours. This means that the probability of death occurring was very high. The fact that the accused intended to cause only bodily harm and not death is therefore immaterial. The section itself amply demonstrates this position. Section 294 is as follows :-

"294 Except in the cases hereinafter excepted, culpable homicide is murder-"

Thirdly-**If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;**

The illustration further clarifies the legal position which is as follows :-

(c) **A intentionally gives Z a sword cut or club wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder although he may not have intended to cause Z's death** (emphasis is added).

In this case although the learned High Court Judge finds the accused guilty of murder under the second limb of section 294, it should be under the third limb of section 294.

2. Injuries not intended ?

Section 295 of the Penal Code is as follows :-

> If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose

death he intended or knew himself to be likely to cause (emphasis added).

In *King vs. Edwin*[10] the accused fired at a person intending to kill him and caused the death of another person whose death was not intended. Soertz S. P. J. with Hearne and Jayatileke JJ agreeing held that the accused was guilty of murder. The Supreme Court approved the following charge. "It is quite immaterial that the death caused was that of a man other than his whose death was intended . . . If A fires at B with the intention of killing him and accidentally hits C and B goes scot free, the intention of the person who shot C is the same as if B was killed according to plan. The appeal was dismissed.

In *Queen vs. Latimer*[11] the accused intended to strike one Chapple with a belt and struck the prosecutrix who was standing close by. Lord Coleridge C. J. said "a man who has an unlawful and malicious intent against another and in attempting to carry out, injures a third person is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the Judges call general malice and that is enough". Where the appellant has the intention to kill A and if with the intention, he kills somebody else, he is undoubtedly guilty of committing murder. *Harishankar alias Harishankar Sharma vs State of Mysore-Gower*[12] at 2565.

In *Ballan vs The State*[13] a shot fired at a Sub Inspector struck a constable and death ensued. Roy J said at 629 "It may be pointed out that the intention of causing death is not the intention of causing the death of any particular person. The 1st illustration to section 299 (section 293 of the Penal Code) shows that a person can be guilty of culpable homicide of a person whose death he did not intend. The same may be gathered from illustration 'd' to clause (4) of section 300 IPC (section 294 of the Penal Code). That illustration says that where A without any excuse fires loaded cannon in to a crowd of persons and kills one of them, A is guilty of murder although he may not have had a premeditated design to kill any particular individual" Roy J said that the scope of section 301 of the IPC (295 of our Penal Code) is clear enough.

As harm was intended on someone, the accused has no escape from liability of the injuries caused to the children either. Both arguments of the learned counsel therefore fail-Hence the appeal is dismissed.

BALAPATABENDI J. – *I agree.*

Appeal dismissed.