

[COURT OF CRIMINAL APPEAL]

1969 *Present*: H. N. G. Fernando, C.J. (President), Samerawickrame, J.,
and Weeramantry, J.

R. G. SOMAPALA, Appellant, *and* THE QUEEN, Respondent

C. C. A. 103 OF 1968, WITH APPLICATION 152

S. C. 15/68—M. C. Gampaha, 18785/B

*Charge of murder—Meaning of what is commonly called “murderous intention”—
Misdirection—Penal Code, ss. 293, 294.*

In directing the Jury on the question of murderous intention, the trial Judge stated :—

“ Did he cause those injuries with an intention to kill ? That is one of the intentions which falls within the three types of murderous intentions. The second one, that is, an intention of causing bodily injury with knowledge that the bodily injury intended was likely to cause death. There again, gentlemen, it is murderous intention. 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. ”

Held, that there was misdirection in that there was a lack of appreciation of important points of difference between s. 293 and s. 294 of the Penal Code. While the act of causing death with knowledge that the act is likely to cause death is culpable homicide, such an act is not murder, unless either (a) the offender intends to cause bodily injury and has the special knowledge that the intended injury is likely to cause the death of *the person injured*, or (b) the offender knows that, because the act is so imminently dangerous, there is the high probability of causing death or an injury likely to cause death.

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

Colvin R. de Silva, with *F. C. Perera*, *I. S. de Silva* and *E. B. Vannitamby* (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Crown.

Cur. adv. vult.

March 12, 1969, H. N. G. FERNANDO, C.J.—

In this appeal against the conviction of the appellant of a charge of murder his Counsel has contended that there was misdirection in law in the explanation to the Jury by the trial Judge of the meaning of what is

commonly called 'the murderous intention'. The explanation is contained in two passages in the summing-up which we now cite :—

“Gentlemen, a person is guilty of murder when he does an act which causes death and the act is done with one of three types of intention. Firstly, the intention of causing death ; secondly, the intention of causing such bodily injury with knowledge that the bodily injury intended was likely to cause death, and thirdly, the intention of causing bodily injury without any knowledge but of such gravity that it is sufficient in the ordinary course of nature to cause death.”

“Did he cause those injuries with an intention to kill ? That is one of the intentions which falls within the three types of murderous intentions. The second one, that is, an intention of causing bodily injury with knowledge that the bodily injury intended was likely to cause death. There again, gentlemen, it is murderous intention. 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.”

In order to consider the question whether these explanations are incorrect, it is necessary to set out and compare the provisions of ss. 293 and 294 of the Penal Code :—

“ s. 293 (set out in paragraph form)—

- (1) Whoever causes death by doing an act with the intention of causing death ;
- (2) Whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death ; and
- (3) Whoever causes death by doing an act with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.”

“ s. 294. Except in the cases hereinafter excepted, culpable homicide is murder—

Firstly—If the act by which the death is caused is done with the intention of causing death ; or

Secondly—If it is 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 the harm is caused ; or

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 ; or

Fourthly—If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.”

It is manifest that s. 293 comprises a wider group of cases than does s. 294, and that the latter section classifies as murder only some, and not all, of the cases in the wider group.

No difficulty arises with regard to the offence of culpable homicide which is defined in the first clause of s. 293, i.e. causing death by doing an act with the intention of causing death ; this clause is co-terminous with the 1st limb of s. 294, and thus the offence of culpable homicide defined in this first clause of s. 293 is also an offence of murder.

Under the second clause of s. 293, the act of causing death is culpable homicide if done “with the intention of causing such bodily injury as is likely to cause death.” At first impression, the intention specified in that second clause may not appear to differ very much from the (murderous) intention defined in the 2nd limb of s. 294, i.e. “that intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused.” This in fact appears to be the impression in the mind of the learned Commissioner. His explanation of the second type of murderous intention is “an intention of causing bodily injury with knowledge that the bodily injury is likely to cause death”; the omission from this explanation of the concluding words of the 2nd limb—*of the person to whom the harm is caused*—indicates in our opinion a lack of appreciation of an important difference between s. 293 and s. 294. That difference will become clear when our comparison of the two sections is completed.

The 3rd limb of s. 294 postulates one element which is also present in the second clause of s. 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 s. 293, when there is intention to cause bodily injury *likely to cause death*, the offence is one of murder under the 3rd limb of s. 294 only when the intended injury is *sufficient in the ordinary course of nature to cause death*. In our opinion, it is this 3rd limb of s. 294 which principally corresponds to the second clause of s. 293 ; and (as is to be expected) every intention contemplated in the latter second clause is not also contemplated in the former 3rd 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 3rd limb of s. 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 s. 293, and to provide in the 3rd limb of s. 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 s. 293 and murder as defined in the 3rd limb of s. 294. It will be seen also that if the object of the 2nd limb of s. 294 was to adopt more or less completely the second clause of s. 293, then the 3rd limb of s. 294 would be very nearly superfluous.

To continue with the comparison of the two sections, it is noteworthy that the *element of knowledge* is specified only in the third clause of s. 293, and again only in the 2nd and 4th limbs of s. 294. This fact at least *prima facie* justifies a supposition that the 2nd and 4th limbs of s. 294, under which *knowledge* is an element of the offence of murder, are intended to correspond, not with the second clause of s. 293, but instead with the third clause of the latter section. This third clause declares to be culpable homicide "an act done with the knowledge that the offender is likely by such act to cause death", and it is obvious that knowledge here comprises both a *general* knowledge, i.e. held objectively, or a *special* knowledge held subjectively with respect to the person injured. On the other hand, the language of the 2nd limb of s. 294 *prima facie* denotes only the subjective knowledge as to the likelihood of the death of *the person to whom the harm is caused*. There is thus evidence in the 2nd limb of s. 294 of a design to classify as murder some but not all of the offences of culpable homicide defined in the third clause of s. 293. There is evidence also of a similar design in the 4th limb of s. 294; knowledge, that an act is *so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death*, is knowledge, not merely of the likelihood of causing death, but of the high probability of causing death or injury likely to cause death; so that many cases which fall within the third clause of s. 293 will not be murder within the meaning of the 4th limb of s. 294.

It thus appears that while the act of causing death with knowledge that the act is likely to cause death is culpable homicide, such an act is not murder, unless either—

(a) the offender intends to cause bodily injury and has the special knowledge that the intended injury is likely to cause the death of *the person injured*, or

(b) the offender knows that, because the act is so imminently dangerous, there is the high probability of causing death or an injury likely to cause death.

Support for this analysis is found in the judgment of Melvill J. in *Reg. v. Govinda*¹ in which the 2nd and 4th limbs of our s. 294 are referred to as (2) and (4) respectively, and the third clause of our s. 293 is referred to as (c) :—

“The essence of (2) appears to me to be found in the words which I have underlined. The offence is murder, if the offender knows that the particular person injured is likely, either from peculiarity of constitution or immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death.”

“(c) and (4) appear to me intended to apply (I do not say that they are necessarily limited) to cases in which there is no intention to cause death or bodily injury. Furious driving, firing at a mark near a public road, would be cases of this description. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder.”

For these reasons, we are of opinion that the explanation of the learned Commissioner as to the second type of murderous intention is incorrect in that it does not emphasize that the 2nd limb of s. 294 requires, not an objective knowledge or the presumed knowledge of a reasonable man, but instead the knowledge subjectively of the likelihood of the death of the person to whom the harm is caused. In this way the summing-up left it open to the Jury to convict the accused of murder although the accused may not actually have had the particular knowledge specified in the 2nd limb of s. 294.

This apparent misunderstanding of the proper relationships between s. 294 and the wide definitions of culpable homicide in s. 293 seems also to have influenced the learned Commissioner's explanation of the 3rd limb of s. 294. In explaining the 3rd limb, the learned Commissioner states as follows :—

“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.”

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 3rd 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.

¹ (1876) 1 Bom. 342.

In the more common cases of homicide, a verdict of murder can be returned if the Jury find 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 s. 293 because of the offender's knowledge of the likelihood of causing death ; and then the important question is whether the offence is elevated into the 3rd limb of s. 294 by reason of the gravity of the intended injury. The learned Commissioner's explanation of this 3rd limb might tend to obscure the importance of this question.

For present purposes we think it sufficient to point out, as was pointed out in the citation to which we have referred, that reference to the 2nd limb of s. 294 need not ordinarily be made in the common type of case which is tried in our Courts. As a general rule it will be safer to refer to the 2nd limb, only when there is evidence of the offender's actual knowledge that the particular injury was likely to cause the death of the particular person because of some peculiarity of constitution or immature age or other special circumstances. Similarly there need be no reference to the 4th limb of s. 294 save in cases in which the facts resemble those set out in the illustration (d) to the first part of s. 294.

We are unable to say in the instant case that, if the Jury had been correctly directed as to the meaning in our law of "murderous intention", they would without doubt have convicted this appellant on the charge of murder. Had the element of the knowledge of the likelihood of causing death been referred to only as an element of the offence of culpable homicide, the Jury may reasonably have convicted only of that offence.

We accordingly set aside the verdict and sentence, and we substitute therefor a verdict of culpable homicide not amounting to murder and impose on the appellant a sentence of seven years rigorous imprisonment.

Conviction altered.
