APPELLATE CRIMINAL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

1888.
July 18.

QUEEN-EMPRESS
against
DAMODARAN.*

Penal Code s. 304*a*—*Causing death by a criminal act.*

Where death is caused by an act being in its nature criminal, s. 304*a* of the Indian Penal Code has no application.

APPLICATION under ss. 435 and 439 of the Code of Criminal Procedure by the Public Prosecutor to set aside a conviction by W. M. Scharlieb, Presidency Magistrate (Black Town), and to direct a committal to sessions.

The facts of the case are set out in the judgment of the magistrate, which was as follows :—

"The facts of this case, as proved by the prosecution and not denied by the prisoner, are very simple, and there is no doubt that the deceased, Muniappan, met with his death from the injuries sustained by him at the hands of the prisoner. But after all, it was a sudden drunken squabble in which there was no premeditation whatever, and certainly no previous animosity on the part of the prisoner against the deceased. This is clear from the deposition which I took from the deceased himself when he lay on his death-bed in the General Hospital. The deceased solemnly assured me that he and the prisoner had never had any previous misunderstanding, and that all that had led to the prisoner falling upon him and beating him in the manner he did the previous evening was the altercation that had taken place between them at the time at the toddy-shop. It appears that the deceased, who was a cook in the service of Conductor Taylor living in the Ordnance Lines, went with two fellow-cooks between 8 and 9 that night, viz., the 19th March last, to a toddy-shop near the Memorial Hall where they had some toddy to drink; that as they were

* Criminal Revision Case No. 285 of 1888.

leaving, the man (Manikam, W. 4), who had served them with their liquor, asked deceased for the payment of some money which he (deceased) said he had already paid, and that the prisoner, who happened to be lolling about at the time against a post in the verandah, interposed—in the insolence of his youth perhaps—and insisted on the deceased paying for what he had drunk before leaving the shop. The deceased—not unnaturally—bid the prisoner mind his own business and leave the toddy-seller and himself to settle their own differences. As the two got into words, another servant of the toddy-shop named Govindan (W. 5) put them out of the shop. The two, viz., the prisoner and the deceased, passed into the street continuing their altercation; and when they were in front of a betel-bazaar next to the toddy-shop, they passed from words to blows, in the course of which the deceased was knocked down and sat upon by the prisoner, who appears to have dealt the prostrate man some further blows about the neck and body. The evidence of the deceased's wife, Paliam (W. 1), and of his two companions, Chockalingam (W. 2) and Mukundu (W. 3), does not touch the details of the fight. As Mrs. Taylor called for her supper, Paliam ran to the toddy-shop, which was close by, to fetch her husband to serve it, but she only arrived on the spot to see the prisoner seated on her husband in the act of assaulting him, when she seized the prisoner by the hair of his head and dragged him off her husband. Chockalingam and Mukundu had lingered in the verandah of the toddy-shop to light their cheroots and did not come out till attracted by the noise in the street, and then they only came on the scene as Paliam ran up and dragged the prisoner off the prostrate body of her husband. The deceased was lying insensible on the ground; his wife and friends tried to set him on his legs, but he could not stand; and as his head seemed to be helplessly hanging down, they carried him to his godown in the Ordnance Lines, and then his wife, Paliam, ran and fetched the police, who conveyed the deceased to the General Hospital, where he died at noon on the 21st March from fracture of the spine. Seeing that the facts of the case were not disputed, and that the prisoner, who simply pleaded that he was so drunk that he had no consciousness of what had taken place, had no defence to make, the question I had to debate in my own mind was the nature of the charge established against the prisoner. The prisoner might be committed to the High Court to take his trial under s. 304

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of the Penal Code on the charge of culpable homicide not amounting to murder, or his case was open to be determined by this court under s. 304*a* for causing the death of a person by doing a rash act not amounting to culpable homicide. In *Nidamarti Nagabhushanam* v. *The Queen*(1) the prisoner killed his mother by beating and kicking her. The Sessions Judge found that the death resulted from a brutal beating and kicking; but, acquitting the prisoner of culpable homicide on the ground that the violence was not such as the prisoner must have known to be likely to cause death, he convicted the prisoner under the new s. 304*a* of causing death by a rash act. The High Court did not think the Judge's reason any ground for acquitting the prisoner of culpable homicide not amounting to murder, because the question was, whether the act was done with the knowledge of causing bodily injury likely to cause death. In the case in question, the brutal beating and kicking and dragging by the hair of an old woman of 60 was by a powerful man who had acted without the smallest provocation. The High Court pointed out that culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope they may not, and often with the belief that the actor has taken precautions to prevent them happening, and that the imputability arises from acting despite the consciousness. In the present case the facts are widely different. The deceased, according to Dr. Smith who made the *post-mortem* examination, was a well nourished man, in strong good health, while, to all appearance, the prisoner is a young and rather a small and lightly built man, and, as far as the police knew, he is not a professional bully or a frequenter of gymnasiums. He appears to have officiously interfered on behalf of the toddy-seller, and when told to mind his own business got into words with the deceased. As to what happened in the street after they were turned out of the shop, there is the evidence of a cooly named Arogiam (W. 6) who had come to the betel bazaar to buy betel. This man's evidence was not given in any clear or intelligible manner. When coming to the supreme point in the case, his words could scarcely be grasped, and he really conveyed more by his pantomime than by the actual words he used. This man was the only eye-witness forthcoming

(1) 7 M.H.C.R., 119.

of what occurred. According to him, the deceased first struck the prisoner, who immediately retaliated with a blow, and, as the deceased turned away, sprang upon him, struck him on the neck, pushing him at the same time, and thus threw him down. All this was done, apparently in a moment, in the suddenness of the provocation and without any premeditation whatever. The only circumstance which bears upon intention or consciousness is that Arogiam says that when laying hands on the deceased, the prisoner exclaimed he would twist his neck. On this point, I am not disposed to place much reliance on the witness' statement. He dealt more in gesture than in words at this particular point, and although he fitted in the words to suit his pantomime, it appeared from his description of what the prisoner did that he gave him a violent blow on the back of the neck, and at the same time pushed him with his fist thus planted on the nape. It may here be noted that the deceased in his deposition before death did not say a word about the prisoner twisting his neck. But even if it be true that the prisoner said 'I will twist your neck,' such words are often used in an angry moment without any meaning, and then there is the doubt that there was any consciousness on the part of the prisoner that such a treatment of a man's neck might cause injury to the spine and thus likely lead to death. To my mind, upon a careful review of the whole of the evidence, it was the hot-headed act of a young man in drink angered first by altercation and then provoked by being struck. It was in fact a drunken squabble, when passions are more or less excited on both sides and blows are struck without calculating the cost. The medical officer was of opinion that the injury to the spine was most likely caused by planting the fist or knee against the back of the neck and then violently wrenching the head backwards. The evidence of Arogiam so far consists with this that, as gathered from his description of the scene he witnessed, the prisoner violently struck the deceased on the back of his neck and simultaneously pushed him with his fist thus planted. This had in all probability the effect of jerking the deceased's head backwards, but there was no putting forth of the other hand and wrenching the head backwards with it. The blow on the neck was no doubt repeated perhaps several times; for the medical officer found that there was a contusion on the nape of the neck and that there was an extravasation of blood beneath the skin, which he said must

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have been caused by repeated blows of the fist. Being of opinion that the circumstances of the case, as gathered from the witnesses and as spoken by the deceased himself before his death, are not such as to justify me in framing a charge against the prisoner of culpable homicide not amounting to murder, and that it is not a case of sufficient importance to put before a Judge and Jury, I find that the prisoner did cause the death of the deceased by using violence to him which had the effect of injuring his spine, and I therefore convict him under s. 304*a* of the Penal Code of causing death by a rash act not amounting to culpable homicide and sentence him to suffer rigorous imprisonment for the space of one year."

The Public Prosecutor (Mr. *Shaw*) for the Crown.

The Court (Muttusami Ayyar and Parker, JJ.) delivered the following

JUDGMENT:—We are clearly of opinion that s. 304*a* of the Penal Code has no application in this case. The magistrate has misapprehended the purport of the remarks made in *Nidamarti Nagabhushanam* v. *The Queen*(1). There is evidence that the accused struck the deceased several blows on the nape of the neck and that the spine was fractured. There is no dispute as to these facts.

The act being in its nature criminal, s. 304*a* has no application. On referring to the evidence, we are unable to say there was not a *primâ facie* case of culpable homicide not amounting to murder, which was an offence triable exclusively by the High Court.

We set aside the conviction and sentence and direct the magistrate to commit the accused to the ensuing sessions on a charge of culpable homicide not amounting to murder.

(1) 7 M.H.C.R., 119.