FULL BENCH (CRIMINAL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Bagnley, and Mr. Justice Leach.

1936

July 27.

KING-EMPEROR *v.* E PE.*

Misdirection—Trial by jury—Charge of murder—Evidence establishing offence under s. 302 of Penal Code—Sole plea of accused, total denial of act—No plea of offence being under s. 304—Nature of injury—Intention of accused—Charge to the jury—No duty of Judge to explain difference between murder and culpable homicide.

In a murder trial with a jury where the evidence clearly shows that the offender struck a blow with such force and in such circumstances that his intention to cause injury sufficient in the ordinary course of nature to cause death must be inferred, and where the sole defence of the accused was that he had nothing to do with the crime and was nowhere near the scene of occurrence, and there was no plea on his behalf that the evidence indicated culpable homicide, it is no part of the Judge's duty in charging the jury to explain the law relating to the lesser offence, or to ask the jury to determine with what intention the offender struck the fatal blow. To do so would be to enter into an irrelevant explanation which may have the effect of misguiding the jury.

King-Emperor v. *Upendra Nath Das*, 19 C.W.N. 653; *Nga Mya* v. *King-Emperor*, 8 L.B.R. 306—*followed.*

Hamid v. *King-Emperor*, 2 L.B.R. 63; *On Shwe* v. *King-Emperor*, I.L.R. 1 Ran. 436—*referred to.*

Hla Gyi v. *King-Emperor*, 3 L.B.R. 75; *The King* v. *Hopper*, (1915) 2 K.B.D. 431; *Kya Nyun* v. *King-Emperor*, 8 L.B.R. 125—*distinguished.*

Tun Byu (Offg. Government Advocate) for the Crown. As a rule in murder cases the jury should be explained the distinction between murder and culpable homicide not amounting to murder. See Illustration (*a*) to s. 299 of the Criminal Procedure Code. Sections 297 and 298 of the Code explain the duty of the judge in summing up.

It is the jury who have to come to a finding on the question of intention of the accused as a finding of fact. The judge's duty is merely to expound the

* Criminal Revision No. 446B of 1936 arising out of Criminal Sessions Trial No. 23 of 1936 of this Court.

law as applicable to the case, and to make an impartial summary of the facts.

[GOODMAN ROBERTS, C.J. Is it necessary to explain the law of culpable homicide when the facts show clearly that the accused was guilty of murder or of nothing else ?]

In a clear case of murder, no. But in the present case there is a possibility that if the law relating to culpable homicide had been explained to the jury they might have returned a verdict of manslaughter.

[LEACH, J. The intention of the accused is to be gathered from the proved facts of the case. What is there in the present case to show that the accused could have had the lesser intention ?]

There is evidence to show that the accused was slightly under the influence of drink. Further there was a struggle and the stabbing took place only at the last stage of the struggle. These facts indicate that it is possible that a jury might hold that the accused was not guilty of the graver intention, and in such circumstances, the jury should not have been excluded from considering the question of intention.

Hla Gyi v. *King-Emperor* (1) ; *Kya Nyun* v. *King-Emperor* (2) ; *Nga Mya* v. *King-Emperor* (3) ; *Natabar Ghose* v. *Emperor* (4) ; *The King-Emperor* v. *Upendra Nath Das* (5) ; *Queen* v. *Shumshere Beg* (6) ; *King-Emperor* v. *Durga Charan Bipari* (7) ; *The King* v. *Hopper* (8).

(1) 3 L.B.R. 75.
(2) 8 L.B.R. 125.
(3) 8 L.B.R. 306.
(4) I.L.R. 35 Cal. 531.
(5) 19 C.W.N. 653.
(6) 9 W.R. 51 (Cr.).
(7) 26 C.W.N. 1002.
(8) (1915) 2 K.B.D. 431, 435.

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BAGULEY, J.—This is a reference under clause 25 of the Letters Patent with regard to the correctness or otherwise of the summing-up of the Hon'ble the Chief Justice in Criminal Sessions Trial No. 23 of 1936. In this case two accused persons, E Pe and Ba Lun, were sent up for trial. The case for the Crown was that the deceased Talokgyi was seen running along the road pursued by E Pe and Ba Lun. The deceased jumped upon a moving tramcar and sat down on a seat. The two accused, E Pe and Ba Lun, continued their pursuit, caught up the tramcar, jumped on to it and assaulted Talokgyi, apparently with their hands only. Talokgyi broke away from them, scrambled over two seats and got into the women's compartment. The two accused followed him there and assaulted him again. In the end E Pe produced some kind of a weapon, either a dagger or a clasp knife and stabbed the deceased in the flank with it. They then jumped off the tram and ran away. Ba Lun was convicted under section 323 of the Indian Penal Code and his case calls for no further comment.

The defence set up by E Pe was that he was not on the tramcar at all ; he never pursued the deceased ; he never attacked him and only came on the scene when he went into the police station to which Talokgyi had been taken to make a report himself. This was the only defence raised on behalf of E Pe. If the expression may be allowed no subsidiary defences were put forward and no argument was raised that even if he had stabbed the deceased his offence would amount to something less than murder. Talokgyi after being stabbed was taken to the hospital where he died some weeks later from pneumonia and septicæmia caused by the stab wound which he had received. The post mortem showed that the stab had

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penetrated the abdominal wall. How deep the original stab was it is impossible to say as the wound does not seem to have been probed and by the time the post mortem was held it is impossible to say how deep it had gone. It must, however, have been more than $2\frac{1}{2}$ inches deep as the Doctor says that at the place where the stab wound was received the abdominal wall was $2\frac{1}{2}$ inches below the surface.

In his summing up the learned Chief Justice asked the Jury to approach the matter, first of all, from the post mortem of the deceased. He had already warned the Jury that they were the sole judges of fact and were in no way bound by any expression of opinion with regard to the facts which he might make in the course of the summing-up. He had also explained to them the duty which lay upon the Crown to prove the guilt of the accused beyond reasonable doubt and he had explained what this meant. In dealing with the facts of the case, confronting the Jury, so to speak, with the dead body he pointed out that there was no evidence whatsoever of the death being accidental which would, of course, have resulted in a verdict of not guilty. He then pointed out that all the evidence there was was that the two accused chased the deceased on to the tram and that somebody drew a knife while on the tram and stabbed the deceased with it, and that if the Doctor's evidence was accepted the offence must be regarded as murder unless there were special circumstances which made it a lesser offence.

After this he dealt with the evidence offered by the Crown, and to the summing-up of the evidence no exception has been taken. The learned Chief Justice next proceeded to point out that E Pe had not set up any defence that the offence might be culpable homicide merely and not murder. There

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was no evidence of provocation or of the accused having acted in the exercise of the right of self-defence and the statement was made—

"You must infer a man's intention from what he does, and if a man stabs another man in the middle of the body with a knife, which goes in 2½ inches deep, he must certainly be held to intend to cause injury sufficient in the ordinary course of nature to cause death."

This statement the learned Chief Justice then went on to support by reference to two cases : *Hamid* v. *King-Emperor* (1) and *On Shwe* v. *King-Emperor* (2), and then occurs the passage in which he says

"I have decided that it is my duty to direct you that, if you find that E Pe was there and inflicted this stab wound, you ought to find him guilty of murder : if you find he was there and you are not satisfied that he inflicted a stab wound, you may find him guilty of the much lesser offence of causing voluntary hurt . . . if you are not satisfied that he was one of the deceased's assailants at all, then you would say he was not guilty."

The last two parts of this passage no one can object to in any way and it must be remembered that earlier in his summing-up the learned Chief Justice had dealt with the possibility of an accident. The question, however, which has to be considered is whether there was misdirection in saying :

"If you find that E Pe was there and inflicted this stab wound, you ought to find him guilty of murder."

It was argued that in a case of this kind the offence could be murder only if E Pe were held to have inflicted the injury which resulted in the death of Talokgyi if he stabbed him either with the intention of causing his death or with the intention of causing

(1) 2 L.B.R. 63. (2) (1923) I.L.R. 1 Ran. 436, 444.

injury sufficient in the ordinary course of nature to cause death. It was argued that the question of what the intention of E Pe was was a matter of fact, and that should have been left to the Jury and in directing the Jury to find as a matter of law that if the stab wound was inflicted by E Pe they must find him guilty of murder amounted to misdirection.

In charging the Jury in the way in which he did the learned Chief Justice seems to have had in his mind the provisions of section 299 of the Criminal Procedure Code, which states that it is the duty of the Jury to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned. Reference was made to *Hla Gyi* v. *King-Emperor* (1). This was also a murder case in which the accused stabbed the deceased. The facts of the case are not given in the report and in the judgment of Adamson C.J. occurs the passage :

"The learned Judge did not explain to the jury the distinction between murder and culpable homicide, or tell them under what views of the facts the accused ought to be convicted of murder or culpable homicide, or to be acquitted. I think that this omission amounts to a vital misdirection."

It is not very easy to see whether *Hla Gyi*'s case is parallel to the case now under consideration as the nature of the wound caused is not mentioned. *Kya Nyun* v. *King-Emperor* (2) was also cited. In this case the accused was charged with murder and the deceased received a wound penetrating her chest to a depth of $3\frac{3}{4}$ inches and two serious stabs on her right arm. It would appear that in this case the defence that the offence committed was under section 304, Indian Penal Code, was raised as it was dealt

(1) 3 L.B.R. 75. (2) 8 L.B.R. 125.

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with at some length in the charge to the Jury, and it was laid down that the Jury should have been asked four questions :

"(1) Did he stab with the intention of causing death? If so, their verdict would be murder under section 302, Indian Penal Code.

(2) Did he stab with the intention of causing bodily injury sufficient in the ordinary course of nature to cause death? If so, their verdict would be murder.

(3) Did he stab with the intention of causing only such bodily injury as was likely to cause death? If so, their verdict would be culpable homicide not amounting to murder punishable under the first part of section 304, Indian Penal Code, or

(4) Is he guilty of voluntarily causing grievous hurt by means of a dangerous weapon? If so, their verdict would find so under section 326, Indian Penal Code."

There can be no possible doubt that each of these four questions would have been perfectly correct and no possible exception could have been taken to a summing-up in this form, but it must be remembered that the defence was put forward that the offence might have been one under section 304 or section 326 of the Indian Penal Code. No such defence was raised in the present case.

Reference was also made to *Queen* v. *Shamshere Beg* (1). This case, however, is of little assistance because the extracts from the charge to the Jury show that the learned Judge practically dictated to the Jury what verdict they should find. *Natabar Ghose* v. *Emperor* (2) was also cited but in this case the charge to the Jury contains so many misdirections including, it would appear, a misrepresentation of the effect of the medical evidence that I do not think any advantage could be gained by examining it in detail ; but it is clear that one important question to which the Sessions

(1) 9 W.R. 51. (2) (1908) I.L.R. 35 Cal. 531.

Judge omitted reference altogether was the question whether in causing the death of the deceased the accused had the intention to cause death, or such injury as was likely to cause death, or knowledge that it was likely to cause death. The case, however, was complicated by the introduction of section 149 of the Indian Penal Code and it would seem that there was no charge of murder framed at all.

Another case cited was *The King* v. *Hopper* (1), a decision of the Court of Criminal Appeal in England. This was a case in which the main defence was that the killing was accidental, but in addressing the Court the accused's counsel indicated that if the Jury would not accept that view he would ask them to find that the crime was manslaughter and not murder on the ground that there was evidence of provocation. The Judge, however, taking the view that there was no evidence of provocation such as would reduce the crime to manslaughter, directed the jury that it was impossible for them to find a verdict of manslaughter, and that if they did not come to the conclusion that the killing was accidental, they must find a verdict of murder. The Court of Criminal Appeal differing from the Judge who tried the case held that there was some evidence which would, if the jury accepted it, justify them in finding a verdict of manslaughter, and the conviction for murder was altered to one of manslaughter.

On the other hand, we have the decision of a Full Bench of five Judges of the late Chief Court of Lower Burma in the case of *Nga Mya* v. *King-Emperor* (2), that a Judge is under no obligation to raise a case for the accused which his advocate had not raised and for which there was no real justification.

(1) (1915) 2 K.B.D. 431. (2) 8 L.B.R. 306.

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The facts of this case are that the murder was committed by stabbing the deceased with a sharp pointed kitchen knife in the back to a depth of five and a half inches. The accused was said to have accompanied his blow with an exclamation that could only mean that he struck the blow intentionally and he showed savagery in keeping the knife in the injured man's body. The murder seems to have been committed in the course of a sudden quarrel, and in the judgment of Fox C.J. at page 312 occurs the passage :

"There was in my opinion no room for any reasonable man coming to the conclusion that he may have stabbed with the intention merely of causing bodily injury likely to cause death. In such a case it appears to me that in performing the duty of laying down the law by which the jury was to be guided it was not incumbent on the Judge to explain a part of the law which if they had acted on they would have done wrong. In such a case they were to be guided not by the law as to culpable homicide not amounting to murder but by the law as to murder. I am unable to hold that the Judge erred in omitting to explain to the jury the distinction between murder and culpable homicide not amounting to murder.

Ormond J. puts the matter more shortly :

"And if in a trial for murder, a verdict of culpable homicide not amounting to murder, could not properly be come to,—upon any aspect of the case before the Court,—the Judge is not called upon to explain the law relating to such offence."

Twomey J. on page 316 says :

" In such doubtful cases the Judge would be bound to explain the law as to the minor offence as well as the major offence. In the present case, if we look only to the weapon used and the nature of the injury there can be no doubt at all that the offender's intention fell within clause (i) or clause (iii) of section 300."

Robinson J., the Judge whose summing-up was under examination, referring to the question of the possibility of the accused being convicted under section 304, Indian Penal Code, says at page 324:

"It certainly never occurred to me and it did not as far as I can see occur to Counsel for the Crown that there was any such plea. The evidence did not appear to me to afford any real foundation for any such plea and so I did not put it to the jury."

And Parlett J. who also agreed that the summing-up was correct, in dealing with sections 297 and 298 of the Criminal Procedure Code, says at page 326:

"* * * the illustration means that if the legal question of the distinction between murder and culpable homicide not amounting to murder arises in the course of the trial, the Judge must explain it to the jury, it being part of the law by which they are to be guided; where no such question arises, it cannot be said to be his duty to enter into an irrelevant explanation which may have the effect of misguiding the jury. Nor is there any force in the argument that as the definition of culpable homicide is the basis of that of murder it is necessary in all cases to explain the distinction between the two. It is quite possible, as the present case shows, to explain fully and correctly what murder is without stating what it is not."

Lastly we were referred to *The King-Emperor* v. *Upendra Nath Das* (1), a case which was dealt with by a Full Bench of five Judges, including the Chief Justice. The accused in this case was placed on trial on charges under sections 302, 304 and 326, Indian Penal Code. He was defended by counsel who argued that the case against the accused was one of murder or nothing. Grave and sudden provocation was no part of the defence case. The Judge in charging the jury laid down the law under section 302, Indian Penal Code, but not under section 304 or the exceptions to

(1) 19 C.W.N. 653.

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section 300. It would appear that in this case it was argued subsequently that there might have been provocation which would have brought the case under section 304, Indian Penal Code, although this defence was not raised at the trial of the murder case, and in the judgment of Sir Lawrence Jenkins C.J. at page 663 it is stated :

> " It would therefore come within the duty of the Judge to determine whether any evidence had been given on which the jury could properly find the question for the party on whom the onus of proof lies, for that is a question of law.
>
> We have heard much of a scintilla of evidence and its paralysing effect on the power of the Judge to assist the jury ; that is an argument that might possibly have possessed some force in the early part of the last century. But the scintilla theory is now exploded.
>
> It is not enough to say that there was some evidence. A scintilla of evidence clearly would not justify the Judge in leaving the case to the jury. There must be evidence on which they might reasonably and properly conclude the fact to be established : "

It will be seen, therefore, that the case of *Nga Mya* v. *King-Emperor* (1) is strongly in favour of the course which the learned Chief Justice took in the present case. The injury inflicted in the present case was not so deep and there was no statement accompanying the stab to show the intention of the accused ; on the other hand, in that case the fight arose apparently on the spur of the moment, and in the present case the determination of the attacker was shown not by words but by the fact that the murder was committed at the end of a long and determined chase ; even when the victim got on to a moving tramcar his pursuers continued to chase, caught up the tramcar and assaulted him and when he broke away to another part of the tramcar they followed him

(1) 8 L.B.R. 306.

and E Pe stabbed him. This determination is a very important element in showing the intention of the accused.

It is true that the intention of the man who kills another is a matter of fact which has got to be determined in order to decide whether the offence is murder or merely culpable homicide. The two cases cited by the learned Chief Justice: *Hamid* v. *King-Emperor* (1) and *On Shwe* v. *King-Emperor* (2) are authority for holding that a person who stabs another in the abdomen with sufficient force to penetrate the abdominal walls must undoubtedly be held to have intended to cause injury sufficient in the ordinary course of nature to cause death. The head note is quite general, but it must, of course, be understood that that means that it is his intention in the ordinary way, because all presumptions with regard to intention are rebuttable. In the present case there is absolutely no evidence on the record to show that the accused when he inflicted this stab had any intention other than the one which must normally be drawn in cases in which one man intentionally stabs another with sufficient force to penetrate the abdominal walls. It was not a case in which the deceased was so thin that the abdominal walls were only just under the surface of the skin; they were protected by two and a half inches of flesh and muscle, and for a knife to penetrate to that extent showed the intention of the man who stabbed: the intention was to drive the knife home into the body of his victim. There being no evidence of any kind upon which a jury could reasonably have come to the conclusion that the accused had any intention other than the ordinary one deducible from his acts, the learned Chief Justice in

(1) 2 L.B.R. 63. (2) (1923) I.L.R. 1 Ran. 436, 444.

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his summing-up was under no duty, to quote Parlett J. in *Nga Mya* v. *King-Emperor* (1),

"to enter into an irrelevant explanation which may have the effect of misguiding the jury."

For these reasons I would hold that the summing-up in this case was correct.

GOODMAN ROBERTS, C.J.—I agree.

LEACH, J.—I agree.

CIVIL REVISION.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

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Aug. 5.

RATILAL MEHTA *v.* PRAGJEE. *

Limitation—Summary suit on negotiable instrument—Application for leave to defend—Period allowed—Rangoon Small Cause Court Rules, 100 and 101—Rule 101 ultra vires*—Rules made under power conferred by ss. 122 and 128 (2) (f) of Civil Procedure Code—Rangoon Small Cause Court Act (Burma Act VII of 1920), ss. 31, 32—Limitation Act (IX of 1908), s. 29 and sch. I, art. 159.*

The combined effect of rules 100 and 101 of the Rangoon Small Cause Court Rules of 1922 is, in a summary suit on a negotiable instrument, to make the period allowed between the service of summons and the filing of the application for leave to appear and defend not more than five days, and in some cases as short as two days. The provisions of these rules are contrary to those of article 159 of the Limitation Act which gives a period of ten days during which such an application can be made.

Held that the rules in question were made in exercise of the powers conferred by s. 122, read with s. 128 (2)(f) of the Code of Civil Procedure, and not in exercise of the powers conferred by s. 32 of the Rangoon Small Cause Court Act. The Court has no power by such rules to abrogate or vary the periods of limitation set out in the Limitation Act in respect of proceedings to which that Act applies.

S. A. Ganny v. *Russell*, I. L.R. 8 Ran. 380—*followed.*

Held, therefore that s. 29 of the Limitation Act had no application, and that Rule 101 of the Rangoon Small Cause Court Rules was *ultra vires* to the extent that it conflicted with the provisions of art. 159 of the Limitation Act.

(1) 8 L.B.R. 306.

* Civil Revision No. 209 of 1936 from the decree of the Small Cause Court of Rangoon in Civil Regular No. 3671 of 1936.