APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

1879
Feb. 26.

THE EMPRESS *v.* KETABDI MUNDUL.*

Culpable Homicide—Rashness, Negligence—Penal Code, ss. 304, 304*A*, 336, 337, *and* 338—*Enhancement of Sentence.*

Section 304A of the Penal Code does not apply to a case in which there has been the voluntary commission of an offence against the person.

If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result; and if such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness because its consequences have been unfortunate. Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under ss. 336, 337, 338, or 304A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender and placed in their appropriate place in the class of offences of the same character.

Nidamarti Nagabhushanam (1) cited and approved.

THIS was a reference to the High Court under s. 287 of Act X of 1872.

It appeared that a female child of eight or nine years of age, who had not arrived at puberty, was the wife of the prisoner. She was brought by her father to the prisoner's house for the purpose of being left there. But, in consequence of her distress, her father remained for the night. At night the child and the accused went inside the house; the fathers of both the child and the accused remaining outside in the verandah. After midnight, the child leaving the house, apparently with the intention of going home to her father's house, got into a canoe, which sank and left her the water; from which she was rescued by the prisoner's

* Criminal Statement or Reference, No. $\frac{P}{8}$ of 1879, by A. C. Brett, Esq., Sessions Judge of Jessore, dated the 22nd November 1878.

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

father and brought back to the house by the prisoner. The prisoner having pulled her into the house, kicked her on the back with his bare foot, from which kick the child fell down and died almost immediately.

From the medical evidence it appeared that the girl was quite healthy, and that she had died from rupture of the anterior coat of the stomach caused by external violence, which might have resulted from a violent kick with a bare foot; there was also a slight wound on the head, and a bruise on the back of the neck; and it was stated by the medical officer that the child had not had connection with a man. The prisoner was committed on the charge of culpable homicide. The Sessions Judge was of opinion that the case did not amount to culpable homicide, inasmuch as the prisoner had no intention to cause death, and had not the knowledge that the act was likely to cause death. He, therefore, convicted the prisoner under s. 304A, and sentenced him to one year's rigorous imprisonment, because the prisoner, in carrying out his intention to cause hurt, committed a rash act which, even if he did not know it to be likely to cause death, was of a nature not altogether unlikely to lead to that result.

On the case coming up before the High Court, a rule was issued calling upon the prisoner to show cause why the conviction should not be modified and the sentence enhanced.

No one appeared either for the prisoner or the Crown.

The opinion of the High Court was given by

AINSLIE, J. (BROUGHTON, J., concurring).—We do not concur in the view of the law taken by the Sessions Judge. In the case of *Khiran Nomiya* (1) this Court, on 3rd September 1877, held, that s. 304A does not apply to a case in which there has been the voluntary commission of an offence against the person. If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result.

(1) Unreported.

1879

EMPRESS v. KETABDI MUNDUL.

If such knowledge can be imputed, the result is not to be attributed to mere rashness; if it cannot be imputed, still the wilful offence does not take the character of rashness, because its consequences have been unfortunate. Acts, probably or possibly, involving danger to others, but which in themselves are not offences, may be offences under ss. 336, 337, 338, or 304A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves, must be judged with regard to the knowledge, or means of knowledge, of the offender and placed in their appropriate place in the class of offences of the same character.

There is a judgment of the Madras Court—*Nidamarti Nagabhushanam* (1)—in which Mr. Justice Holloway explains the use of the words 'rashness' and 'negligence' in the Penal Code, and this judgment has been recently approved by the Chief Court of the Punjab, and reproduced in a Circular issued by it to all Civil Courts.

Mr. Justice Holloway says,—"Culpable rashness is acting with consciousness that mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precaution to prevent their happening.

"The imputability arises from acting despite of the consciousness.

"Culpable negligence is acting without the consciousness that illegal or mischievous effects will follow, but in circumstances which show that the actor has not exercised the caution incumbent on him, and that if he had, he would have had the consciousness.

"The imputability arises from the neglect of the civil duty of circumspection.

"It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts themselves intended which are the producers of death."

We, therefore, set aside the conviction under s. 304A.

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

1879

EMPRESS v. KETABDI MUNDUL.

The facts set out above appear to us to require that the accused should be convicted under s. 304.

In judging of knowledge had by the accused, we must consider the circumstances: the blow that to one person, or under ordinary circumstances, may not, in the ordinary course of nature, be likely to cause death, may yet be imminently dangerous to another, or under special circumstances.

To kick a girl of tender age with such force as to produce rupture of the abdomen in a healthy subject, appears to us to be an act of such a character that no reasonable man could be ignorant of the likelihood of its causing death.

We, therefore, convict the prisoner Ketabdi under the latter part of s. 304, Indian Penal Code, and sentence him to five years' rigorous imprisonment, to run from the date of his original sentence.

Conviction modified and sentence enhanced.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice McDonell.

JUGGOBUNDHOO SHAHA (DEFENDANT) *v.* PROMOTHONATH ROY (PLAINTIFF).*

1879 *Jany.* 29.

Jalkar—Fishery—Occupation, Rights of.

The right of occupancy which accrues to tenants who have occupied or cultivated land for twelve years or upwards, does not arise in respect of the right called jalkar or fishery. That is a right which may be let out by ijaradars under the landlord, and may be enjoyed under them so long as their ijara continues, but is liable to be determined at the expiration of the ijara.

THE plaintiff in this suit sought to recover from the defendant khas possession of the jalkar or right of fishery over 44 bigas and 3 cottas of land covered with water. Of these 44 bigas

* Appeal from Appellate Decree, No. 285 of 1878, against the decree of Baboo Kishen Chunder Chatterjee, Officiating Subordinate Judge of Nuddea, dated the 18th of December 1877, reversing the decree of Baboo Krishna Behary Mookerjee, Munsif of Kooshtea, dated the 13th of September 1876.