courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.
Website: www.courtkutchehry.com
Printed For:
Date: 07/11/2025

(1866) 03 CAL CK 0001

Calcutta High Court

Case No: None

The Queen		APPELLANT
	Vs	
Gorachand Gope and Others		RESPONDENT

Date of Decision: March 3, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.
There are, in my opinion, several important distinctions between murder and culpable homicide; an offence cannot amount to murder, unless it falls within the definition of culpable homicide, for s. 300 merely points out the cases in which "culpable homicide is murder." But an offence may amount to culpable homicide without amounting to murder. Culpable homicide is not murder, if the case falls within any of the exceptions mentioned in s. 300. The causing of death by doing an act with the intention of causing death is culpable homicide. It is also murder, unless the case falls within one of the exceptions in s. 300. Causing death with the intention of causing bodily injury to any person if the bodily injury intended to be inflicted is sufficient, in the ordinary course of nature, to cause death, in my opinion, falls within the words of s. 299-- "with the intention of causing such bodily injury as is likely to cause death," and is culpable homicide. It is also murder, unless the case falls within one of the exceptions; see s. 300, cl. 3. Causing death by doing an act with the knowledge that such act is likely to cause death is culpable homicide, but it is not murder, even if it does not fall within any of the exceptions mentioned in s. 300, unless it falls within cls. 2, 3 or 4 of s. 300; that is to say, unless the act by which the death is caused 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 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 unless 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. In speaking of acts, I of course include illegal omissions. There are many cases falling within the words of s. 299-- "or with the knowledge that he is likely by such act to cause death" that do not

fall within the 2nd, 3rd or 4th clauses of s. 300, such for instance, as the offences described in ss. 279, 280, 281, 282, 284, 285, 286, 287, 288, and 289, if the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must, in all probability, cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death or such bodily injury as is described in cl. 2 or 3 of s. 300. As an illustration; suppose a gentleman should drive a buggy in a rash and negligent manner, or furiously along a narrow crowded street. He might know that he was likely to kill some person, but he might not intend to kill any one, or to cause bodily injury to any one. In such a case, if he should cause death, I apprehend, he would be guilty of culpable homicide not amounting to murder, unless it should be found, as a fact, that he knew that his act was so imminently dangerous that it must, in all probability, cause death or such bodily injury, &c. as to bring the case within the 4th clause of s. 300. In an ordinary case of furious driving, the facts would scarcely warrant such a finding. If found guilty of culpable homicide not amounting to murder, the offender might be punished to the extent of transportation for life or imprisonment for ten years, with fine (see ss. 304 and 59); or if a European or American, he would be subject to penal servitude, instead of transportation. It would not be right in such a case that the offender should be liable to capital punishment for murder. The first part of s. 304 would not apply to the case. That applies only to cases which would be murder, if not falling within one of the exceptions in s. 300. If a man should drive a buggy furiously, not merely along a crowded street, but intentionally into the midst of a crowd of persons, it would probably be found, as a fact, that he knew that his act was so imminently dangerous that it must, in all probability, cause death or such bodily injury, &c., as in cl. 4, s. 300. From the fact of a man''s doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such a presumption; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street, in which the driver might know that his acts would be likely to cause death. Presumption of intention must depend upon the facts of each particular case. Suppose a gentleman should cause death by furiously driving up to a railway station. Suppose it should be proved that he had business in a distant part of the country, say at the opposite terminus, that he was intending to go by a particular train; and that he could not arrive at his destination in time for his business by any other train; that at the time of the furious driving, it wanted only two minutes to the time of the train''s starting; that the road was so crowded that he must have known that he was likely to run over some one and to cause death. Would any one under the circumstances presume that his intention was to cause death? Would it not be more reasonable to presume that his intention was to save the train. If the Judge or jury should find that his intention was to save the train, but that he must have known that he was likely to cause death, he would be guilty of culpable homicide not amounting to murder, unless they should also find that the risk of causing death was such that he must have known, and did know, that his act must, in all

probability, cause death, &c., within the meaning of cl. 4, s. 300. If they should go further, and infer from the knowledge that he was likely to cause death, that he intended to cause death, he would be guilty of murder, and liable to capital punishment. It appears to me the rules contained in ss. 407 and 419 of the Code of Criminal Procedure are not applicable to a case which the Court, as a Court of Revision, thinks it right to take up. An appeal is matter of right in all cases in which an appeal is given; but a revision is in the discretion of the Court. An appeal is for matter of fact as well as for matter of law. A revision is only on matter of law. The two cases, therefore, are very different. When s. 407 says that an appeal shall not lie from a judgment of acquittal, it means that the prosecutor shall not, as a matter of right, be entitled to apply to reverse the judgment of acquittal, either upon the facts or upon the law. But s. 404 authorizes the Court to call for and examine the record of any criminal trial in which it shall appear that there has been error in the decision upon a point of law, and may determine any point of law arising out of the case, and thereupon pass such order as to the Court may seem right. S. 405 enacts that "it shall be lawful for the Sudder Court to call for and examine the record of any case tried by a Court of Session, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed, and as to the regularity of the proceedings of the Court. If it appear to the Sadder Court that the sentence passed is too severe, the Sudder Court may pass any mitigated sentence warranted by law. If the Sudder Court shall be of opinion that the sentence or order is contrary to law, the Sudder Court shall reverse the sentence or order, and pass such judgment, sentence or order as to the Court shall seem right, or, if it deem necessary, may order a new trial." The word "sentence" in the latter section may mean the award of punishment merely, or the whole judgment, including the finding. If it refers only to the award of punishment, the finding would stand; and I can scarcely see the necessity or use of the words "or may order a new trial." The words "sentence or order" are in many sections used as including the finding, and not merely the awards of punishments--ss. 415, 416, 417, 420. But, whatever may be the construction of the word "sentence, in s. 405, there can be no doubt that, under s. 404, the Court may set aside a judgment of acquittal for error in point of law. Suppose the decision of a Judge should be monstrously absurd 5 suppose, upon an indictment for murdering a child, the Judge and the Assessor should find that the prisoner caused the death of the child by doing an act with the intention of causing its death, and that the case did not fall within any of the exceptions mentioned in s. 300 of the Penal Code; but suppose they should also find that the child was under the age of six months, and the Judge should hold that it was not murder to kill a child under that age, and should therefore acquit the prisoner and order him to be discharged,--could it be contended that the judgment of acquittal could not be set aside, and that the prisoner should go free for ever? I apprehend that the Court, as a Court of Revision, would clearly have the power to set aside the judgment of acquittal, and declare that, upon the facts found, the prisoner was guilty of murder, and send the case back to the Judge, ordering him to apprehend the prisoner (if he had been discharged), and to pass the proper sentence upon him. If, in the case above supposed, the Judge were to say, it is not necessary to try whether death was caused by an act done with the intention of causing death, because if it was so caused the prisoner was not

guilty of murder. I find that the child was under the age of six months, and, therefore, acquit the prisoner--in such a case, there would be no finding on the facts, and the Court, as a Court of Revision, would merely set aside the acquittal, and order a new trial. I have supposed an error in law, which is not likely to occur. I put it merely as an illustration; there are many constructions of law equally erroneous, though not so clearly so. Again, suppose a Magistrate, in a case triable by him, should convict of an offence, and the Sessions Judge, on appeal, should, without going into the facts, reverse the decision upon a point of law, and order the prisoners to be discharged, stating that, assuming the facts to be as found by the Magistrate, the prisoner was not guilty of an offence, this Court, if the Judge were wrong in point of law, could, as a Court of Revision, reverse his decision, and direct him to try the appeal upon its merits. If a Judge, on appeal, should uphold the finding of a Magistrate on the facts, and reverse his decision in point of law, and pronounce a judgment of acquittal, and order the prisoner to be discharged, then, as the acquittal would be merely on a point of law, this Court, as a Court of Revision, might reverse the judgment of acquittal, and order the sentence of the Magistrate to stand.

2. There are also cases in which, notwithstanding s. 419(2), the Court, as a Court of Revision, could enhance a punishment.

3. In the case of The King v. Bourne 7A & E., 58, it was held that a sentence of transportation for an offence, for which the only punishment was death, was erroneous and must be reversed. The Court held that they could merely reverse the erroneous sentence, but could not pass the right one, and the prisoners were discharged. The law was amended by 11 and 12 Vic., c. 78, by which the Court, upon reversing an erroneous sentence, may give the proper judgment. Here, under s. 405 of the Criminal Procedure Code, the Court, as a Court of Revision has a similar power; but in order to do so, it may be necessary to enhance the punishment. In the case suggested by Campbell, J., if a Sessions Judge should pass sentence of rigorous imprisonment for fourteen years for murder, such a sentence would be bad; for it is not authorized by law--s. 302 of the Penal Code; or if he should pass sentence of transportation for seven years for the offence of murder, committed by a person under sentence of transportation for life, the sentence would be contrary to law; see s. 303, by which death is the only punishment which can be awarded. In such cases the Court, as a Court of Revision, could, under s. 405, reverse the sentence, and pass the proper sentence, notwithstanding that in such a case the sentence must be enhanced in order to pass a legal sentence, in the former case from four years" rigorous imprisonment to death or transportation for life, and in the hitter from transportation for seven years to sentence of death. S. 405 says, if the Court shall be of opinion that the sentence or order is contrary to law, it "shall reverse the sentence or order, and pass such judgment, sentence or order as to the Court shall seem right, or, if it deem necessary, may order a new trial." In the case supposed, in which a prisoner under sentence of transportation for life should be found guilty of murder and sentenced to transportation for seven years, the Court might think the finding right upon the evidence, and there would, therefore, be no necessity for ordering a new trial. In such a case a

question might arise, whether the Court would be bound to pass the only legal sentence, viz., death, or might send the case back to the Sessions Judge to pass the sentence. I am of opinion that the Court might send the case back with an order to pass the proper sentence, under the words "shall pass such judgment, sentence or order," &c. In the case supposed of a prisoner being sentenced to fourteen years" rigorous imprisonment for murder, upon setting aside the erroneous sentence, the right sentence would be a discretionary one, viz., "death or transportation for life." In such a case, I think the Court ought to send the case back for proper sentence to be passed, in the same manner as it would do under s. 402.

4. By the statute 11 and 12 Vict., c. 78, s. 5, the Court, when it reverses a judgment, may either pass a proper judgment, or remit the case to the lower Court, in order that such Court may pass the proper judgment. It appears to me that in all cases in which the Court, as a Court of Revision, thinks it right to reverse an acquittal on a point of law, or to reverse, as erroneous, a sentence, in order that the right sentence may be passed, if the right sentence would enhance the one already passed, the offender should have an opportunity of being heard by himself or his pleader or agent, either before the lower Court, if the case is remitted to it, or before the High Court, if the Judges pass the proper sentence themselves.

5. The Court may act as a Court of Revision after it has acted as a Court of Appeal, if it find it necessary to do so, in order to correct an error in law which cannot be set right on appeal. For instance, if a man should be found guilty of a murder, and sentenced to seven years" transportation, if the prisoner should appeal on the facts, the Court might uphold the finding of guilty of murder on appeal, and afterwards, as a Court of Revision, might set aside the sentence of seven years" transportation, and pass a legal sentence for murder, or send it back to the lower Court to pass such sentence, pointing out, as they would in a case under s. 402, what is the proper punishment. As a Court of Revision the Court cannot reverse the finding of a jury.

6. In the present case, the attention of the Judge should, I think, he called to another error which he committed. He says, the prisoners who were present, assisting in taking away Amordi and assisting by their presence in the beating of him, abetted the commission of culpable homicide, &c. It does not follow that, because they were present with the intention of taking him away that they assisted by their presence in the beating of him to such an extent as to cause death. If the object and design of those who seized Amordi was merely to take him to the thannah on a charge of theft, and it was no part of the common design to beat him, they would not all be liable for the consequence of the beating merely because they were present. It is laid down that, when several persons are in company together engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence, the others will not be involved in the guilt, unless the act done was in some manner in furtherance of the common intention. It is also said, although a man is present when a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a

principal merely because he did not endeavour to prevent it or to apprehend the felon. But if several persons go out together for the purpose of apprehending a man and taking him to the thannah on a charge of theft, and some of the party in the presence of the others heat and ill-treat the man in a cruel and violent manner, and the others stand by and look on without endeavouring to dissuade them from their cruel and violent conduct, it appears to me that those who have to deal with the facts might very properly infer that they were all assenting parties and acting in concert, and that the beating was in furtherance of a common design, I do not know what the evidence was, all that I wish to point out is, that all who are present do not necessarily assist by their presence every act that is done in their presence, nor are consequently liable to be punished as principals.

---

(1) Act X of 1872, s. 297.-- "If, in any case, either called for by itself or reported for orders, or which comes to its knowledge, it appears to the High Court that there has been a material error in any judicial proceeding of any Court subordinate to it, it shall pass such judgment, sentence or order thereon as it thinks fit.

"If it considers that an accused person has been improperly discharged, it may order him to be tried, or to be committed for trial;

"If it considers that the charge has been inconveniently framed, and that the facts of the case show that the prisoner ought to have been convicted of an offence other than that of which he was convicted, it shall pass sentence for the offence of which he ought to have been convicted;

"Provided that if the error in the charge appears materially to have misled and prejudiced the accused person in his defence, the High Court shall annul the conviction and remand the case to the Court below with an amended charge, and the Court below shall thereupon proceed as if it had itself amended such charge.

"If the High Court considers that any person convicted by a Magistrate has committed an offence not triable by such Magistrate, it may annul the trial and order a new trial before a competent Court.

"If it considers that the sentence passed on the accused person is one which cannot legally be passed for the offence of which the accused person has been convicted, or might have been legally convicted upon the facts of the case, it shall annul such sentence and pass a sentence in accordance with law.

"If it considers that the sentence passed is too severe, it may pass any lesser sentence warranted by law; if it considers that the sentence is inadequate, it may pass a proper sentence."

2Act XXV of 1861, s. 419.- "The Appellate Court, after pursuing the proceedings of the lower Court, and after hearing the plaintiff or his Counsel or agent, if they appear, may

alter or reverse the finding and sentence or order of such Court, but not so as to enhance any punishment that shall have been awarded."