KALARIMADATHIL UNNI

v

STATE OF KERALA

April 22, 1966

[M. HIDAYATULLAH AND V. RAMASWAMI, JJ.]

Indian Penal Code, ss. 300 and 34—Ingredients of the four clauses of the section—Tests—Victim dying of asphyxiation, his mouth and nose having been plugged—Offence whether murder or culpable homicide—"Injury sufficient in the ordinary course of nature to cause death" in terms of cl. 3 proof of—Common intention of accused in a case covered by cl. 3.

The appellants were convicted of murder under s. 302 read with s. 34 I.P.C. on the allegation that they had laid their victim in a drain after closing his mouth with adhesive tape and plugging his nose with cotton wool soaked in chloroform, as a result of whiih death was caused. They appealed to this Court by special leave. It was contended on their behalf: (i) that their offence did not amount to murder but only to culpable homicide under the second part of s. 304, (ii) that it could not be inferred from the mere fact of death that the injury caused by the appellants was sufficient in the ordinary course of nature to cause death; this had to be proved by further evidence and (iii) that the ingredients of s. 34 I.P.C. were not satisfied.

HELD : (i) What distinguishes the offences of murder and culpable homicide is the presence of a special *mens rea* which consists of four mental attitudes in the presence of any of which the lesser offence becomes the greater. These four mental attitudes are stated in the four clauses of s. 300 I.P.C. [235 B]

(ii) The first clause of s. 300 says that culpable homicide is murder if the act by which death is caused is done with the intention of causing death. An intention to kill a person brings the matter so clearly within the general principle of *mens rea* as to cause no difficulty. Once the intention to kill is proved, the offence is murder unless one of the exceptions applies, in which case the offence is reduced to culpable homicid not amounting to murder. On the facts of the present case an intention to cause death was not proved against the appellants and the clause therefore did not apply. [235 C]

(iii) The second clause of the section deals with acts 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 harm is caused. The mental attitude here is two-fold. There is first the intention to cause bodily harm and next there is the subjective knowledge that death will be the likely consequence. English Common Law made no clear distinction between intention and recklessness but in our law the foresight of the death must be present. The mental attitude is thus made of two elements—(a) causing an intentional injury and (b) which injury the offender has the foresight to know would cause death. The present case could not fall under this clause either, because, it could not be said that the appellants who only wanted to make their victim unconscious had the subjective knowledge of the fatal consequences of the bodily harm they were causing. [235 F]

A (iv) The appellants were however guilty of murder under the third clause of s. 300. [237 G-H]

The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the B result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not. [236 B]

For the application of this clause it must be first established that an injury is caused, next it must be established objectively C what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. [236 C-D]

Virsa Singh v. *State of Punjab* [1958] S.C.R. 1495, referred to.

The bodily injury caused by the appellants was deliberate and D pre-planned and the subjective test involved in the clause was therefore satisfied. The other test namely whether the injury was sufficient in the ordinary course of nature to cause death was also satisfied in the case as in the circumstances it would have been a miracle if the victim had escaped. Death of the victim took place as a direct result of the acts of his assailants. [236 E-F]

(v) The fourth clause of s. 300 comprehends generally, the commission of imminently dangerous acts which must in all probability E cause death. What the appellants did may well be said to satisfy the requirements of this clause also, although it is ordinarily applicable to cases in which there is no intention to kill anybody in particular. (*Obiter*). [238 A]

(vi) The sufficiency of an injury to cause death in the ordinary course of nature in the terms of cl. 3 need not in every case be required to be proved by separate evidence in that regard. Where the F victim is either helpless or rendered helpless and the offender does some act which leads to death in the ordinary course and death takes place from the act of the offender and nothing else it is hardly necessary to prove more than the acts themselves and the causal connection between the acts and the end result. The sufficiency of the injury in the present case was objectively established by the nature and quality of the acts taken with the consequence which was intimately related to the acts. There was no need to establish more than this in the case. [237 B-G]

G

Anda v. *State of Rajasthan*, A.I.R. 1965 S.C. 148 referred to.

(vii) All the acts were done after deliberation by the appellants. They were of a type which required more than one person to perpetrate. That there was a common intention admits of no doubt and as clause 3 of s. 300 views the consequence of the act objectively all those who shared the common intention of causing the bodily H injury which was sufficient to cause death in the ordinary course of nature must be held responsible for the resulting offence. [238 C]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos. 102 & 103 of 1965. A

Appeals by special leave from the judgments and orders dated October 12, 1964 of the Kerala High Court in Criminal Appeal No. 80 of 1964, and Criminal Appeal No. 70 and Referred Trial No. 13 of 1964 respectively. B

Jai Gopal Sethi, C. L. Sareen and *R. L. Kohli*, for the appellant (in Cr. A. No. 102/65).

Harbans Singh, for the appellant (in Cr. A. No. 103/65).

A. S. R. Chari, V. Narayana Menon and *M. R. K. Pillai*, for the respondent (in both the appeals). C

The Judgment of the Court was delivered by

Hidayatullah, J. This judgment will also govern the disposal of Criminal Appeal No. 102 of 1965 (*Rajwant Singh* v. *The State of Kerala*). The appellants in these two appeals have been convicted under ss. 302/34, 364, 392, 394 and 447 of the Indian Penal Code. Unni (appellant in this appeal) has been D sentenced to death and Rajwant Singh (appellant in the other appeal) has been sentenced to imprisonment for life. No separate sentences under the other sections have been imposed on Unni but Rajwant Singh has been sentenced to four years' rigorous imprisonment under ss. 392 and 394, Indian Penal Code, with a direction that the sentences shall run concurrently with the sentence of imprisonment for life. The High Court of Kerala has E dismissed their appeals and confirmed the sentence of death on Unni. They now appeal by special leave of this Court.

These appellants were tried with three others, of whom two were acquitted. One Taylor was also convicted of the same offences and was sentenced in the aggregate to imprisonment for life. He has not appealed to this Court. We are not concerned F with them. The case relates to the death of one Lt. Commander Menianha of the Naval Base, I.N.S. Vendurthy, Willingdon Island, Cochin Harbour, on the night of March 30, 1963. Unni was attached as a rating to this Naval Base and at the time of the offence was on leave. Taylor, who has not appealed was an ex-sailor and Rajwant Singh was attached to I.N.S. *Vikrant*. The case of the prosecution was that these persons conspired together G to burgle the safe of the Base Supply Office on the eve of the pay-day, when a large sum of money was usually kept there for distribution on the pay-day. They collected various articles such as a Naval Officer's dress, a bottle of chloroform, a hacksaw with spare blades, adhesive plaster, cotton wool and ropes. On the night in question they decoyed the Lt. Commander from his H house on the pretext that he was wanted at the Naval Base, and in a lonely place caught hold of him. They covered his mouth

A with the adhesive plaster and tied a handkerchief over the plaster and plugged his nostrils with cotton wool soaked in chloroform. They tied his hands and legs with rope and deposited him in a shallow drain with his own shirt put under his head as a pillow. They then went up to the sentry, who was induced to part with his rifle to one of the accused who had dressed himself as an B officer, and attacked him. The sentry would have received the same treatment as his Lt. Commander but he raised a hue and cry and attracted the attention of the watchman. Fearing detection the assailants released the sentry and took to their heels. The sentry after escaping informed the Officer-on-duty at the Base and stated that he had recognised Rajwant Singh as one of his assailants. Next morning the dead body of the Lt. Commander C was discovered in the drain where he had been left by the assailants.

Investigation followed and five persons were placed on trial before the Session Judge, Ernakulam Division, who convicted three and sentenced them as stated above and acquitted the other two. The appeals of these persons before the High Court failed. D In these appeals the complicity of the appellants in the offence is not challenged but it is argued that the evidence for the prosecution does not establish the offence of murder but of causing grievous hurt or of culpable homicide not amounting to murder. It is also contended that s. 34 of the Indian Penal Code could not be used against any of the accused. Unni has also contended that the sentence of death was not proper as the case against him E was indistinguishable from that of the other two. We shall deal with these arguments.

Our attention has been drawn to the inquest and postmortem reports to establish what was actually done to the Lt. Commander. From these, it is established that the legs of the victim were tied with rope and his arms were tied behind his back. A large adhesive plaster was stuck over his mouth and completely sealed it. F A handkerchief was next tied firmly over the adhesive plaster to secure it in position. The nostrils were plugged with cotton soaked in chloroform. Counsel for the appellants submit that all this shows that the assailants did not intend to kill the Lt. Commander but to render him unconscious. It is admitted that the closing of the mouth with the adhesive plaster and the handkerchief was complete and that it must have been impossible for the Lt. Com- G mander to breathe through his mouth. The description, however, shows that the nostrils were also plugged with cotton wool soaked in chloroform. This was clearly stated in the inquest report and also in the postmortem report and was established not only by the witnesses proving the inquest report but also by the doctor who performed the autopsy. In addition the prosecution has H exhibited and proved numerous photographs of the dead body from various angles and these things are clearly seen in the

photographs. According to the doctor death was due to asphyxiation.

In addition to the other evidence establishing the connection of Unni and Rajwant Singh with this crime there is a confession by Rajwant Singh before the Sub-Magistrate, Cochin in which he graphically describes the part played by him and Unni. Rajwant Singh also stated that they only wanted the Lt. Commander and the sentry to remain unconscious while they rifled the safe and took away the money. It is contended that we must accept the confession as a whole and must hold on its basis that the intention was not to kill, and that the offence of murder is therefore not established. As this is the most important point in the case we shall consider it first.

This point was argued by Mr. J. G. Sethi on behalf of Rajwant Singh and his arguments were adopted by Mr. Harbans Singh on behalf of Unni. Mr. Sethi argued that the offence was one of causing grievous hurt or at the worst of culpable homicide not amounting to murder and punishable under s. 304 (second part) of the Indian Penal Code. It is quite plain that the acts of the appellants resulted in the death of the victim and the offence cannot be placed lower than culpable homicide because the appellants must have known that what they were doing was likely to kill. The short question, therefore, is whether the offence was murder or culpable homicide.

Mr. Sethi submits that of the three clauses of s. 299, which define the offence of culpable homicide, the first deals with intentional killing and the second with injuries which are intentionally caused and are likely to cause death. He submits that these two clauses form the basis of the offence of murder and culpable homicide punishable under he first part of s. 304 and the third clause, which involves the causing of death with the knowledge that by his act the offender is likely to cause death, is the foundation of offence of culpable homicide not amounting to murder punishable under the second part of s. 304. He submits that the appellants did not intend causing the death of the Lt. Commander but took action to keep him immobilised and silent while they rifled the safe. To achieve their purpose they tied the victim and closed his mouth and plugged the nostrils with cotton soaked in chloroform. Each of these acts denoted a desire to keep the Lt. Commander out of the way for the time being but not to kill him. Nor can the acts be described as done with the intention of causing such bodily injury as was likely to kill. At the most, says he, it can be said that the death was caused with the knowledge on the part of the appellants that by their acts they were likely to cause death and that brings the matter within s. 304 II, I.P.C.

A The argument requires close examination. Two offences involve the killing of a person. They are the offence of culpable homicide and the more henious offence of murder. What distinguishes these two offences is the presence of a special *mens rea* which consists of four mental attitudes in the presence of any of which the lesser offence becomes greater. These four mental attiB tudes are stated in s. 300, I.P.C. as distinguishing murder from culpable homicide Unless the offence can be said to involve at least one such mental attitude it cannot be murder. We shall consider the acts of the appellants in relation to each of the clauses of s. 300.

The first clause says that culpable homicide is murder if the C act by which death is caused is done with the intention of causing death. An intention to kill a person brings the matter so clearly within the general principle of *mens rea* as to cause no difficulty. Once the intention to kill is proved, the offence is murder unless one of the exceptions applies in which case the offence is reduced to culpable homicide not amounting to murder. As there is no question of any of the exceptions they need not be mentioned. D But it is plain that the appellants did not contemplate killing the Lt. Commander. No part of their preparations shows an intention to kill. Had they so desired, they had ample time and opportunity to effectuate that purpose without going to the trouble of using cotton soaked in chloroform to stuff the nostrils. They had only to hold his nose closed for a few minutes. The confession to which we have referred also shows that the news of the death of the Lt. E Commander came to them with as much surprise as shock. In these circumstances, the first clause of s. 300 cannot apply.

The second clause deals with acts 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 harm is caused. The mental attitude here is two-fold. There is first the intention to F cause bodily harm and next there is the subjective knowledge that death will be the likely consequence of the intended injury. English Common Law made no clear distinction between intention and recklessness but in our law the foresight of the death must be present. The mental attitude is thus made of two elements—(a) causing an intentional injury and (b) which injury the offender has the foresight to know would cause death. Here the injury or G harm was intended. The appellants intended tying up the victim, closing his mouth by sticking adhesive plaster and plugging his nose with cotton wool soaked in chloroform. They intended that the Lt. Commander should be rendered unconscious for some time but they did not intend to do more harm than this. Can it be said that they had the subjective knowledge of the fatal conseH quences of the bodily harm they were causing? We think that on the facts the answer cannot be in the affirmative. To say that the act satisfied the test of subjective knowledge would be really

tantamount to saying that the appellants intended to commit the murder of the Lt. Commander which, as said already, was not the case.

The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not. As was laid down in *Virsa Singh* v. *The State of Punjab*[1] for the application of this clause it must be first established that an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established.

Applying these tests to the acts of the appellants we have to see first what bodily injury has been established. The bodily injury consisted of tying up the hands and feet of the victim, closing the mouth with adhesive plaster and plugging the nostrils with cotton soaked in chloroform. All these acts were deliberate acts which had been pre-planned and they, therefore, satisfy the subjective test involved in the clause. The next question is whether these acts considered objectively were sufficient in the ordinary course of nature to cause death. In our judgment they were. The victim could only possibly breathe through the nostrils but they were also closed with cotton wool and in addition an asphyxiating agent was infused in the cotton. All in all it would have been a miracle if the victim had escaped. Death of the victim took place as a direct result of the acts of his assailants.

Mr. Sethi suggested that the victim must have struggled to free himself and had rolled into the drain and this must have pushed up the cotton further into the nostrils. This is not correct. The victim was placed in the drain by his assailants because his folded shirt was placed under his head and had obviously fainted by that time. No one seems to have been aware of his presence; otherwise discovery would have taken place earlier. This leads to the only conclusion that there was no change in the circumstances in which the victim was left by the assailants. The bodily injury proved fatal in the ordinary course of nature. The ordinary course

[1] [1958] S.C.R. 1495.

A of nature was neither interrupted nor interfered with by any intervening act of another and whatever happened was the result of the acts of the assailants, and their acts alone.

Mr. Sethi argues that the sufficiency of the injury to cause death in the ordinary course of nature is something which must B be proved and cannot be inferred from the fact that death has in fact taken place. This is true of some cases. If a blow is given by reason of which death ensues, it may be necessary to prove whether it was necessarily fatal or in the language of the Code sufficient in the ordinary course of nature to cause death. In such a case it may not be open to argue backwards from the death to the blow, to hold that the sufficiency is established because death C did result. As death can take place from other causes the sufficiency is required to be proved by other and separate evidence. There are, however, cases and cases. Where the victim is either helpless or rendered helpless and the offender does some act which leads to death in the ordinary course and death takes place from the act of the offender and nothing else, it is hardly necessary to prove more than the acts themselves and the causal connection D between the acts and the end result. Mr. Sethi contends that the concentration of chloroform, the quantity actually used and its effect on the victim ought to have been proved. Alternatively he argues that the quantity of the cotton wool used to plug the nostrils and the manner of plugging should have been established before a finding can be given that the bodily injury was sufficient in the ordinary course of nature to cause death. This would, of E course, have been necessary if it could at all be thought that not the acts of the assailants but some other intervening circumstance might have led to the death of the victim. But there was none. There was no interference by anyone else. Death was due to asphyxiation whether caused by the mechanical obstruction of the nostrils or by chloroform as an asphyxiating agent, or both. Whichever way one looks at it, the injury which caused the death was F the one inflicted by the assailants. The sufficiency of the injury was objectively established by the nature and quality of the acts taken with the consequence which was intimately related to the acts. There was no need to establish more than this in the case. As was pointed out in *Anda* v. *State of Rajasthan*[1] "the emphasis in clause thirdly is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high pro- G bability of death in the ordinary way of nature and when this exists and death ensues, and if the causing of the injury is intended, the offence is murder". In this case the acts of the appellants were covered by the third clause in s. 300.

As we are satisfied that this case falls within clause thirdly we H need hardly consider whether it falls also within the fourth clause or not. That clause comprehends, generally, the commission of

[1] A. I. R. 1965 S. C. 148 at 151.

imminently dangerous acts which must in all probability cause death. To tie a man so that he cannot help himself, to close his mouth completely and plug his nostrils with cotton wool soaked in chloroform is an act imminently dangerous to life, and it may well be said to satisfy the requirements of the last clause also, although that clause is ordinarily applicable to cases in which there is no intention to kill any one in particular. We need not, however, discuss the point in this case. We accordingly hold that the offence was murder.

All the acts were done after deliberation by the appellants. They were of a type which required more than one person to perpetrate. What was done had already been discussed and the execution of the plan was carried out as contemplated. That there was a common intention admits of no doubt and as clause 3 of s. 300 views the consequence of the act objectively all those who shared the common intention of causing the bodily injury which was sufficient to cause death in the ordinary course of nature must be held responsible for the resulting offence. Even if the consequence was different from what was actually intended, those who abetted (and the appellants were either offenders principally or abetters) would be equally responsible under s. 113 of the Indian Penal Code provided they knew that the act which they were abetting was likely to cause that effect. On the argument of the appellants that s. 304 II applies, it is obvious that the above provision must be attracted. In our judgment the appellants were rightly adjudged guilty under s. 302/34, Indian Penal Code.

As regards the sentence of death passed on Unni, we see no reason to interfere. He was the master mind behind the whole affair and the sentence of death was, therefore, appropriate. We see no force in either appeal. They will be dismissed.

Appeals dismissed.