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47/1961

Nos. 31 and 32 of 1961

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N

THE QUEEN ... ... Appellant

and

SHARMPAL SINGH SON OF PRITAM SINGH .. .. Respondent

AND B E T W E E N

SHARMPAL SINGH SON OF PRITAM SINGH .. .. Appellant

and

THE QUEEN ... ... Respondent

(Consolidated Appeals)

C A S E FOR THE APPELLANT TO THE FIRST ABOVE APPEAL AND RESPONDENT TO THE SECOND ABOVE APPEAL (HEREINAFTER REFERRED TO AS "THE APPELLANT")

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and Respondent (Second Appeal).

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ON APPEAL
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BETWEEN

THE QUEEN ... ... Appellant

and

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(Consolidated Appeals)

CASE FOR THE APPELLANT TO THE FIRST ABOVE APPEAL AND RESPONDENT TO THE SECOND ABOVE APPEAL (HEREINAFTER REFERRED TO AS "THE APPELLANT")

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1. These are appeals by Special Leave granted on the 12th day of June, 1961, from a Judgment of the Court of Appeal for Eastern Africa (hereinafter referred to as "the Court of Appeal") dated the 28th November 1960 allowing the appeal of the Respondent to the First Appeal (hereinafter referred to as "the Respondent") from a judgment dated the 3rd June 1960 of the Supreme Court of Kenya convicting the Respondent of murder and sentencing him to death. The Court of Appeal by their said judgment set aside the said conviction and sentence and substituted therefor a conviction of manslaughter and a sentence of eight years imprisonment.

pp.139-142

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2. The first appeal raises points on the true construction of the definition of murder in the Penal Code of Kenya (Cap.24 of the Laws of Kenya). The second appeal concerns the definition of manslaughter in the said Code.

3. Section 198 of the said Code defines manslaughter as follows :-

> "198. Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm".

Section 199 provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. Section 202 defines malice aforethought as follows :-

> "202. Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances :
>
> (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
>
> (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> (c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony".

4. The Respondent was charged and convicted before the said Supreme Court (Wicks J. with three assessors) with the murder of his wife Ajeet Kaur (hereinafter called "Ajeet") on the night of the 28th to 29th February 1960 at their home in Kibuye in the Colony of Kenya. The evidence that the Respondent caused the death of Ajeet was circumstantial. The substance of the evidence called by the Appellant at the trial is summarised in paragraphs 5 to 14 below. The Respondent neither gave nor called any evidence at the trial. He made an unsworn statement from the Dock the effect of which is summarised in paragraph 15 below. p.52

5. The Respondent and Ajeet lived in one room in a flat on the ground floor of a building in Jaipur Street, Kisumu. They had been married for about a year and Ajeet was some four to six months pregnant at the time of her death. Ajeet's brother, Upkar Singh Pardesi (P.W.9), his wife Inderjit Kaur (P.W.10) and their two children aged 5 and 7 lived in another room in the same flat. The building was divided into several flats which opened, as did the Respondent's flat, into a courtyard. In addition there was a door leading from the Respondent's flat down some steps into the street. In the Respondent's room there were two beds, one (usually slept in by the Respondent) placed along the wall adjoining the courtyard and the other (Ajeet's) along a wall in which there was a door leading to the verandah. From the verandah it is possible to reach the courtyard and the remainder of the flats. In the early evening of the 28th February, 1960, all the occupants were in the flat. At some time around about 7 p.m. Upkar Singh Pardesi went out with some friends. At about 8 p.m. Inderjit Kaur went to bed with one child. The other child, a son named Amarjeet, was then asleep in a bed in the Respondent's room. The Respondent and p.33 p.41

Ajeet were in their room. Ajeet was sewing a blouse. At about 9.30 p.m. Upkar Singh Pardesi returned entering through the door leading into the Respondent's room, which the Respondent opened for him, and then shut and bolted. Ajeet was then in her bed with Amarjeet. Upkar Singh Pardesi went to bed checking the double door on the verandah which he found to be locked with the key on the inside. He also noticed that the electric lights in the verandah and the courtyard were switched off. The switch to the courtyard light was on the verandah. All the windows are burglar proof with upright iron bars about three inches apart. Upkar Singh Pardesi went to sleep at about 11 p.m. At 3.45 a.m. he woke and went to the kitchen for a glass of water. As he passed through the verandah he saw that the lights were on in the courtyard and the Respondent's room. He looked into the room and saw the Respondent apparently asleep in his bed with Amarjeet and Ajeet's bed empty. He saw that the light in the toilet was on and then he saw Ajeet's body lying on the murram (stony earth) part of the courtyard. He shouted at her but she did not reply. She was lying on her back, her left arm stretched out, her right arm near her chest; her head was towards the boy's quarters, and her legs, which were a little bent, were towards the exit from the yard. He clothes were stained with blood. Upkar Singh Pardesi roused his wife who came out followed by the Respondent. Upkar Singh Pardesi felt Ajeet's heart and thought that it was still beating. He and his wife carried Ajeet onto the concrete part of the yard and laid her there. From there the Respondent and some houseboys carried her to his room and laid her on the floor. An electric pad was put on her chest to keep her warm. Upkar Singh Pardesi went to get Dr. Hasham (P.W.8) who arrived at about 4 a.m.

6. On his arrival Dr. Hasham examined Ajeet. She was unconscious. He felt for her pulse and thought at first that he could feel it although he was not sure. He found her abdomen very warm but her face

very cold. He thought she was suffering from shock but was not dead. He found two stab wounds, one on the right side of the chest at about the bottom of the ribs and the other towards the midline. She had been bleeding only from the first wound and that had stopped. The doctor arranged for the girl to be taken to the Nyanza General Hospital.

7. At the Hospital the girl was further examined by Dr. Hasham and Mr. Treadway. At first Dr. Treadway was not sure whether she was alive or dead and took steps to resuscitate her. This had no effect and he and Dr. Hasham examined her and found she was dead. Dr. Treadway formed the conclusion that she had been dead at least a quarter of an hour, possibly an hour and a quarter or longer. Her lower clothing was found to be very wet with urine.

8. On the 1st March 1960 Dr. Rogoff the Government Pathologist performed a post-mortem examination on the body of Ajeet. His conclusions based on microscopic examination were that the two stab wounds had not been inflicted before death but had been inflicted after death probably about a quarter of an hour or more thereafter: that death had been caused by asphyxia: that asphyxia was due to strangulation, which had caused internal injuries on both sides of the neck and windpipe, which were inflicted before death. The Doctor also found internal injuries to the woman's chest. There were no external injuries to the neck or chest but in the Doctor's view the lack of such injuries was not inconsistent with strangulation, but did indicate that the strangulation had been performed while the woman was lying on a soft surface, for example, a bed with a mattress. In his view the simplest way in which the internal injuries to the neck and chest might have been caused was by somebody placing his knee or elbow on the woman's chest and applying pressure with his hands to her throat. One of the grounds for the Doctor's conclusion that death was due to asphyxia by strangulation was that the woman's

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bladder was found to be nearly empty. In cases of asphyxia and strangulation causing vagal inhibition (stopping of the heart) the victim loses control and micturates (almost completely evacuating the bladder.) The Doctor also found fresh spermatozoa in the vagina smear, indicative of recent sexual intercourse just before or after death, There was no evidence of any disease.

pp.26-32 9. Another post-mortem examination had been performed by a Doctor Ngure on the 29th February 1960. He thought that one of the stab wounds had been inflicted before death but he made no microscopic examination of the wounds. He was of opinion that death was due to asphyxia and possibly from haemorrhage and shock due to the stab wound.

pp.6-7 10. Donald Bradwell (P.W.2) the Government Analyst said in evidence that he found extensive urine stains on the woman's pantaloons, underpants and on the mattress of her bed, these he ringed with coloured pencil. The urine had passed right through the mattress which indicated a complete micturition. No blood was found on the mattress although it was found on the pantaloons and the underpants.

11. Evidence was given that a number of articles of clothing belonging to Ajeet were found at various places. Her headdress and one shoe were found inside the lavatory in the courtyard and another shoe in the drain also in the courtyard. The blouse which she had been seen sewing earlier the same night was found under a bush on some waste ground 22 paces outside the courtyard door. She was found to be wearing only one steel bangle whereas she normally wore in addition three gold bangles.

12. The Police found no evidence of any forced entry into the building and no sign of any struggle in the courtyard or in the lavatory. All the windows were found to be secure.

p.143 13. A statement made by the Respondent to the Police was produced in evidence. In

this statement he denied that he knew anything about Ajeet's death. He said he had himself been to the lavatory in the courtyard at about 2.30 a.m. to 3 a.m. that night but he had seen and heard nothing. He had not heard his wife go out later and had been awakened by Upkar Singh. He said that three or four days earlier he had seen three strange men standing in the courtyard.

14. On this evidence the case for the Appellant was that Ajeet had met her death by being strangled in her bed by the Respondent. The Respondent had then arranged the evidence so that it would appear that she had been killed by some intruders while going to the lavatory in the courtyard. For that purpose he had inflicted the stab wounds on her dead body, and placed her body in the courtyard and her shoes and headdress and blouse where they were later found. He removed her gold bangles to make it appear that she had been robbed.

15. The Respondent made an unsworn statement from the dock. He said he did not kill his wife. He was not on bad terms with her. On the night of her death they had sexual intercourse at 11 p.m. Amarjeet urinated in Ajeet's bed that night. p.52

16. The learned Trial Judge summed up the case to the Assessors who all gave their opinion that the Respondent was not guilty. pp.53-55

17. The learned Trial Judge gave judgment on the 3rd June 1960, finding the Respondent guilty of murder as charged. In the course of this judgment the learned Trial Judge said that he accepted the evidence of Dr. Rogoff as to the manner in which Ajeet met her death, that is, by strangulation. The Judge further found that this happened while she was in her bed and caused her to wet the bed. He said he was satisfied that she was not attacked by any intruder or any inmate of the flat other than the Respondent. The learned Trial Judge dealt with a suggestion put to Dr. Treadway in cross-examination that the pp.55-77

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compression of Ajeet's chest could have been caused by a violent sexual embrace and that a violent sexual embrace might result in asphyxia if Ajeet had been suffering from certain diseases or disabilities. As to the latter suggestion the learned Trial Judge accepted the evidence that Ajeet was a normal healthy girl not suffering from the disease or disability alleged and therefore by implication he rejected the suggestion that her death could have been caused by compression of her chest in a violent sexual embrace. The learned Trial Judge also said:-

p.74. l.7.

> "However whether it was during intercourse or whilst Ajeet was just lying in her bed, to strangle one's wife is murder be it to stifle her complaints because she objects to intercourse or refused to submit to it or even she having consented to intercourse the Accused strangled her to gratify his lust".

18. After judgment sentence of death was passed and the Respondent was given leave by the Trial Judge to appeal on facts as well as law and a Memorandum of Appeal to the Court of Appeal dated the 2nd August 1960 was filed by his Advocate. The substance of the Respondent's appeal was that the prosecution had failed to prove that the Respondent had killed his wife.

pp.80-82

19. On the 1st and 2nd September 1960 the appeal was argued before the Court of Appeal (Sir Kenneth O'Connor President, Mr. Justice Gould and Mr. Justice Crawshaw, Justices of Appeal). After hearing the argument on behalf of the Respondent and on behalf of the Appellant the President asked Counsel whether "this could be a sexual crime, strangulation not intended to cause death". This suggestion had never been made by the defence at the Trial nor had it been raised in the Memorandum of Appeal or argued on behalf of the Respondent before the Court of Appeal. In dealing with this point, Counsel for the Respondent suggested that the compression of the chest could have been caused in a sexual embrace, for

example by the Respondent's elbow, but did not suggest that the injuries to the neck could have been so caused.

20. During the course of his argument before the Court of Appeal, Counsel for the Respondent had referred to two passages in two medical text books which he relied on as contradicting the evidence of Dr. Rogoff that the two stab wounds had been inflicted on Ajeet after her death. The Court of Appeal took these passages into consideration but as neither of them had been put to Dr. Rogoff in cross-examination the Court on the 11th November 1960 caused Dr. Rogoff to be called before them so that he could be cross-examined on these passages. Dr. Rogoff adhered to the opinion he had expressed at the trial namely, that the wounds were inflicted after death, qualifying his evidence at the trial that the wounds were inflicted a quarter of an hour after death by saying that the earliest they could have been inficted was ten minutes after death.

21. On the 28th November 1960, the judgment of the Court of Appeal was delivered by Mr. Justice Gould. In this judgment the Court of Appeal rejected all the matters argued on behalf of the Respondent or raised in his Memorandum of Appeal, but referred to the question which the Court itself had raised, that is, whether accepting that the death had been caused by the Respondent the evidence was sufficient to establish beyond reasonable doubt that he had intended to cause death or grievous bodily harm or knew that his act would cause death or grievous harm so that his crime was murder. The learned Justice of Appeal then considered the medical evidence and said that the injuries to Ajeet's throat were in the opinion of the Court of Appeal quite consistent with a firm pressure rather than a violent struggle and with the Respondent having killed Ajeet during or just after a sexual embrace applying pressure "in an excess of sadism to frighten or torment her or to overcome resistance". pp.106-136 p.135 l.32

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p.135 l.36

22. The learned Justice of Appeal then quoted a passage from the judgment of the Trial Judge, part of which is reproduced in paragraph 17 above, and continued :-

p.136 l.5

"We are with respect unable to agree with all that is said in that passage. To strangle one's wife is only murder if the act of strangulation is done with the intention of killing or doing grievous harm or with knowledge that the act will probably cause death or grievous harm - section 202 of the Penal Code. We do not think that the circumstantial evidence eliminates as a reasonable possibility that the appellant did not have such an intention or such knowledge, but caused a great deal more harm than he intended or anticipated. The learned judge considered it unlikely that the Appellant would have replaced the trousers of the deceased in such circumstances, or that they would have been wet. Why not? The trousers could have been left in the bed during sexual intercourse, and become wet in that way. Before taking the body outside to simulate death by an attack by an intruder the appellant could be expected to replace the trousers and underpants. With respect we are unable to agree with the reasoning of the learned judge on this particular matter. The evidence of the relations between the appellant and the deceased shows that they lived a happy married life. The deceased was pregnant and no motive whatever has been shown for an intentional killing."

p.136 l.31

23. The Appellant submits that the passages from the judgment of the Court of Appeal referred to in paragraphs 21 and 22 above are open to very serious criticisms. It may be that the absence of external marks on Ajeet's neck indicated that the pressure on the neck had been firm and no unnecessary violence was used. But it is submitted that it is quite wrong to say that

this is consistent with an attack committed in an excess of sadism. It is submitted that such an attack would from its very nature be accompanied by violence. The fact that there was no evidence of a struggle would indicate that Ajeet was attacked unawares and in circumstances which prevented her resisting her attacker. A sudden attack by her husband would have this result. The fact that there were no exterior injuries was consistent with the attack being made by some person who intended later to take steps to cause it to ne thought that she had not been strangled in her bed but had met her death in some other way, as was done in this case by (it is submitted) the Respondent. Further it was unfortunate that the Court of Appeal should come to any conclusion on this point, which they had themselves raised for the first time, without asking for Dr. Rogoff's opinion, particularly as the Court had directed that he should be recalled for further questioning. It may be mentioned here that such cross-examination at the trial of the medical witnesses as had suggested that the deceased oman's injuries might have been caused by or during sexual embrace was limited to the injury to her chest and not to the injuries to her neck. Further, the suggestion that the attack took place "during or shortly after a sexual embrace" (which the Appellant assumes to mean an embrace during the act of sexual intercourse) was inconsistent with the evidence that Ajeet's lower garments were wet with urine caused by micturition during strangulation. The Court of Appeal said that there was no reason why "the trousers" should not have been left in the bed during intercourse and become wet in that way. Here again, this was the first time that this possibility had been suggested. Indeed, this possibility was never put by the Court of Appeal itself to Counsel during the argument. It is relevant to remember that the garments which were stained with urine were both the pantaloons and underpants. This suggestion was that both these garments having been removed for

the purpose of intercourse remained in the bed in such a position that they became wet with urine on micturition. This suggestion involved consideration of the parts of the garments which were found to be stained with urine. These parts were pointed out to the Trial Judge by the Government Analyst and it is clear that the Trial Judge did not consider that it was possible that the garments became so stained otherwise than by being worn by Ajeet at the moment of micturition, nor did Defending Counsel who also saw the garments in Court consider it worth suggesting to the Trial Judge that the garments became stained in the manner suggested by the Court of Appeal.

24. Further, the hypothesis of the Court of Appeal did, in the Appellant's submission, involve a verdict of murder. The Court of Appeal suggested that the Respondent might have applied pressure to Ajeet's throat "in an excess of sadism to frighten or torment her or to overcome resistance". This prompts the questions: of what was the woman to be frightened? how was she to be tormented? How was her resistance to be overcome? Every sane person knows that pressure on a person's windpipe can easily cause death, and it must have been, of course, to her knowledge that the pressure applied to her throat would result in her death unless it were quickly relaxed; it was the combination of that pressure and that knowledge which was to frighten or torment the woman or cause her to cease resistance It was fear of death which was to frighten or torment the woman and it was fear of death which was to overcome resistance. Further it was this knowledge that death could easily result which as stated above any sane person would have known, which made this act murder. The assailant was doing an act which in fact caused, and which any sane man would know was likely to cause death or grievous harm. The fact that the Respondent may not have wished to cause death because he intended to relax the pressure when he had tormented or frightened his wife to his satisfaction, or because he hoped that his wife would cease resistance

before she died, is not material. In this context the Appellant will refer to the last words of section 202 (b). It is submitted that the Court of Appeal applied a subjective test to the provisions of section 202 of the Penal Code when they should have applied the test set out in the case of Director of Public Prosecutions v. Smith (1960 (3) W.L.R. 546). It is further submitted that the Respondent must be presumed to have intended the reasonable and natural consequence of his act in applying pressure to Ajeet's throat and such consequences were her death.

25. On the hearing of the Respondent's petition for special leave to appeal, it was for the first time contended on his behalf that upon the evidence given at the trial there was a possibility that the Respondent killed his wife by misadventure or accident. The Appellant submits firstly that the evidence does not leave such a possibility open. It has to be borne in mind that the Respondent's wife had severe internal injuries to her throat and on both sides of her neck as well as severe internal bruising to her chest; that these injuries were, as the trial Judge and the Court of Appeal both found, inflicted upon the Respondent's wife whilst she lay in bed and were only consistent with the application of firm and prolonged pressure applied to parts affected. Further, it is to be observed that no attempt was made, at any stage, by the cross-examination of the prosecution witnesses, by the leading of evidence for the defence or in the course of argument for the Respondent, to support the suggestion of accident or misadventure, which defence would of course have been inconsistent with the Respondent's case as presented at the trial or on appeal. The Appellant submits secondly, that it is wrong in principle that a mere possibility of a defence or accident or misadventure not relied upon by a convicted person and inconsistent with such defences as he put forward, should be relied upon as a ground either for disturbing a verdict or for ordering a re-trial which could be used as a

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forum for ventilating a hypothetical case; such a course would, it is submitted, be subversive to the proper administration of justice in criminal cases.

26. The Respondent was granted special leave to appeal to Her Majesty in Council on the ground that on the conclusion of the Court of Appeal it was not established that the verdict should be manslaughter as the Respondent had not committed any unlawful act and therefore the correct verdict should have been an acquittal. It is submitted that even on the view expressed by the Court of Appeal the act of the Respondent was clearly an unlawful act within the meaning of section 198 of the Penal Code. It is an unlawful act for any person to apply pressure to a woman's throat even if she be his wife, so as to put her in danger of, and in fear of, strangulation. The Court of Appeal did not find that the wife consented to this act done by the Respondent. Indeed, there was no evidence on which any Court could have found that there was any such consent. It is not necessary that the act to be unlawful should amount to a criminal offence, but if it is so necessary, this act did amount to a criminal assault.

27. The Appellant will therefore submit that the Appellant's appeal be allowed, the Respondent's appeal be dismissed, and the verdict and sentence of the Supreme Court of Kenya be restored for the following (among other)

R E A S O N S

1. BECAUSE the Respondent was guilty of murder as charged.

2. BECAUSE the Respondent had or must be deemed to have knowledge that his act would probably cause the death of his wife within the wording of section 202 of the Penal Code.

3. BECAUSE the Respondent had or must be deemed to have an intention to cause the death of his wife within the wording of Section 202 of the Penal Code.

4. FOR the reasons given by the House of Lords in the case of Director of Public Prosecutions -v- Smith (supra.)

5. BECAUSE the findings of the Court of Appeal were not justified by the evidence.

6. BECAUSE the Court of Appeal applied wrong principles in allowing the Respondent's appeal.

10 7. FOR the reasons contained in the judgment of the learned Trial Judge.

28. In the alternative to the above the Appellant will submit that the Respondent's appeal be dismissed for the following (among other)

R E A S O N S

1. BECAUSE the Respondent was guilty of manslaughter within the wording of section 198 of the Penal Code.

20 2. BECAUSE the Respondent caused the death of his wife by an unlawful act within the wording of section 198.

3. BECAUSE on the evidence the defence of accident was not open to the Respondent.

4. BECAUSE in this case it is wrong on principal to permit the defence of accident to be raised on appeal.

5. BECAUSE of the reasons contained in the Judgment of the Court of Appeal.

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