APPELLATE CRIMINAL.

Before U Thaung Sein, J.

H.C. 1948

Mar. 29.

MAUNG SEIN AND ONE (APPELLANTS)

v.

THE UNION OF BURMA (RESPONDENT).*

Penal Code, s. 304A (2)—Joint attack with sticks—Mutual fight—Right of private defence—No common intention—Cause and injury likely to cause death—Real offence committed.

The appellants had jointly assaulted with sticks one R who died as a result of the injuries received. Only one of such injuries was a fatal wound and there was no evidence as to who struck the fatal blow. There had been a fight between the deceased and the appellants.

They were convicted under s. 304A (2) of the Penal Code for doing a rash act with knowledge that it was likely to cause death. The lower Court found that there was no common intention to cause the death of R.

Held : That the conviction under s. 304A (2) was not sustainable as it could not be said that those who did not strike the fatal blow contemplated such a blow by others and they were not guilty under s. 302.

Gouridas Namasudra v. *Emperor*, 36 Cal. 659, applied.

Sulaiman v. *The King*, (1941) Ran. 258, followed.

The common intention was to cause grievous hurt and the accused was guilty under s. 324, Penal Code.

U Mya Thein (Government Advocate) for the respondent.

U THAUNG SEIN, J.—The two appellants Maung Sein and Maung Lun have been convicted of offences under section 304A (2) of the Penal Code and were sentenced to four years' rigorous imprisonment each by the learned Special Judge (U Po On), Mergui.

The case against them was that they had taken part in a joint assault with sticks on one Maung Ret who died as a result of the injuries received. No less than five injuries were found on the deceased but only one

* Criminal Appeals Nos. 171-2 of 1948 being appeal from the order of Special Judge of Mergui, dated the 26th January 1948, in Criminal Regular Trial No. 22 of 1947.

of these was a fatal wound and it is not known as to who actually struck that fatal blow.

The incident in question arose out of a quarrel between the spectators at a game of top-spinning in the village of Kyauktaung in the Palaw Township on the 7th September 1947. It appears that several children were engaged in the game and among the onlookers were the deceased Maung Ret, the appellants Maung Sein and Maung Lun and several others. Suddenly one Maung Ba Tun went up to the deceased Maung Ret and slapped him on the face. The latter ran into a neighbouring house, apparently with a view to arm himself. He came out a few moments later with a stick in his hand and attacked Maung Ngwe Tin, the brother of the appellants. As might be expected, there was an exchange of blows on both sides and a free fight ensued in which the appellants joined in on the side of Maung Ngwe Tin. The fight ended with the appearance of the mother of the deceased at the scene, but by then Maung Ret had fallen to the ground with several injuries in the head and was speechless. There can be little doubt that the injuries on Maung Ret were the result of the blows delivered by the appellants by means of sticks. The deceased was rushed to the hospital, but unfortunately for him he died a day after his admission.

Although five injuries were found on the deceased, *i.e.* three on the head and the remainder on the arm and shoulders, only one of those injuries on the head, which had resulted in the fracture of the skull and concussion of the brain, was necessarily fatal.

The evidence on record leaves no room for doubt that there had been a fight between the deceased on the one side and the appellants on the other. Death was the direct result of the injuries inflicted by the two appellants. But as there was nothing to suggest that

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the appellants had any common intention to cause the death of Maung Ret the learned trial Judge correctly refrained from convicting them of murder or culpable homicide not amounting to murder. However, the learned trial Judge states that the deceased Maung Ret had attacked an unarmed man Maung Ngwe Tin and as such the appellants who were standing nearby were entitled to defend Ngwe Tin. The learned trial Judge next held that in causing the death of Maung Ret the appellants had exceeded the right of defence of Ngwe Tin by causing more harm than was necessary in the circumstances of the case. He accordingly convicted them under section 304A (2) of the Penal Code, *i.e.* of having caused the death of Maung Ret by doing a rash act with knowledge that it was likely to cause death.

Now, in the first place, the learned Special Judge is apparently unaware that where there is a mutual fight none of the parties involved in the fight are entitled to plead the right of private defence. In the present case the fight started with the slapping of Maung Ret's face and was a continuous transaction till the mother of Maung Ret arrived on the scene. The appellants cannot therefore plead that they acted in the defence of Maung Ngwe Tin when they assaulted Maung Ret.

Next the learned Special Judge has remarked that there was no common intention on the part of the appellants to cause the death of Maung Ret. I am therefore at a loss to understand how he was able to convict the appellants of having caused the death of Maung Ret by means of a rash and negligent act with full knowledge that it was likely to cause death. The attack was, no doubt, a joint one, but the appellants do not appear to have intended to cause the death of Maung Ret. Death did, of course, ensue and the question that arises is as to the offences for which the appellants should have been convicted. The

assaults on the deceased were concentrated mainly on the head and the appellants should at least have known that severe blows delivered on the head are likely to result in grievous injuries. In my opinion it would be reasonable to presume that the appellants did have a common intention to cause grievous hurt when they assaulted the deceased. I note that the learned Special Judge referred to the ruling in *Gouridas Namasudra* v. *Emperor* (1) where it was laid down as follows :

" Where several accused persons struck the deceased several blows, one of which only was fatal, and it was not found who struck the fatal blow, it was held that, in the circumstances, it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, and that they were all guilty under section 326, and not under section 302, of the Penal Code."

But, unfortunately, the learned trial Judge did not apply it correctly to the facts before him and merely relied on it as authority for the view that the appellants could not be convicted of murder or culpable homicide not amounting to murder. The ruling clearly explains that the appellants should have been convicted of causing grievous hurt. The same principles are also expressed in the case of *Sulaiman* v. *The King* (2). I quote below from the head-note as follows :

" If the common intention of the accused and his associates by committing an assault was not to cause injury known to be likely to cause death, but to cause grievous hurt, though the combined effect of the injuries actually caused was likely to cause death, the accused is guilty of the offence of causing grievous hurt and not of culpable homicide not amounting to murder."

Applying these principles to the case under consideration the two appellants should have been convicted of causing grievous hurt under section 325, Penal Code.

(1) 36 Cal 659.

(2) (1941) Ran. 258.

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I accordingly alter the convictions to ones under section 325 of the Penal Code. As regards the sentence meted out to the appellants, in view of their youth I am of opinion that four years' rigorous imprisonment is too severe. I accordingly reduce the sentence on the two appellants to three years' rigorous imprisonment each.