FULL BENCH (APPELLATE CRIMINAL).

Before U Thein Maung, Chief Justice, U Tun Byu and U San Maung, JJ.

H.C. 1948

Aug. 18.

THE UNION OF BURMA (COMPLAINANT)

v.

MAUNG NYUN (ACCUSED).*

Penal Code, ss. 299, 300, as amended by the Penal Code Amending Act, 1947—Causing injury which is likely to cause death—If murder.

Held : Where a person caused the death of another person, by causing an injury which was likely to cause death—

(*a*) the offence, in the absence of any circumstance which makes the act one of culpable homicide not amounting to murder, is murder if it can be deduced from a consideration of the whole facts of the case that the "offender caused the death by doing an act with the intention of causing death or with the intention of causing bodily injury as in fact is sufficient in the ordinary course of nature to cause death ;

(*b*) the offence is one of voluntarily causing grievous hurt under s. 325 or 326 of the Penal Code according to the nature of the weapon used if it can be deduced from a consideration of the whole facts of the case that the offender intended only to cause bodily injury which was likely to cause death, as ss. 299 and 300 of the Penal Code as amended do not refer to such intention like the old sections ;

(*c*) the offence is not one under s. 304A of the Penal Code if the bodily injury was caused with criminal intention to cause it, as an act done with such intention cannot be a rash or negligent act ;

(*d*) the offence is one under s. 304A of the Penal Code if the bodily injury was caused by a rash or negligent act *i.e.*, without any criminal intent but with the knowledge that it was likely to cause death ; and

(*e*) the offence is one under s. 299 or s. 300 of the Penal Code even though the bodily injury was caused by a rash or negligent act if the offender knew that the act was so imminently dangerous that it must in all probability cause such bodily injury as is likely to cause death and the court finds under s. 300A (*c*) of the Code that his intention was to cause death or bodily injury as in fact is sufficient to cause death.

Sein Kho v. *The King*, Criminal Appeal No. 1312 of 1947, overruled.

Shwe Ein v. *King-Emperor*, (1905-06) III L.B.R. 122 at p. 123 ; *Nga Na Ban* v. *King-Emperor*, (1904-06) 1 U.B.R. Penal Code 33 ; *Empress of India* v.

* Criminal Reference No. 47 of 1948, being reference made by U SAN MAUNG, J., in Criminal Appeal No. 375 of 1948.

Idu Beg, (1881) I.L.R. 3 All. 776 at pp. 779 and 780 ; *W. H. Smith* v. *Emperor*, (1926) I.L.R. 53 Cal. 333 at p. 338; *Sukaroo* v. *Emperor*, (1887) I.L.R. 14 Cal. 566; *Kyaw We* v. *King-Emperor*, 4 L.B.R. 311 at pp. 313 and 314 ; *Po Tun* v. *King-Emperor*, 4 L.B.R. 306 ; *The King* v. *Aung Nyun*, (1940) Ran. 441 (F.B.) ; *Abor Ahmed* v. *The King*, (1937) Ran. 393 ; *Shwe Hla U* v. *King-Emperor*, 3 L.B.R. 122 ; *Po Sin* v. *King-Emperor*, 5 L.B.R. 80 ; *Apalu* v. *King-Emperor*, 1 Ran. 285 ; *Munilal's* case, A.I.R. (1943) All. 853 ; *Jennings and one* v. *Kelly*, (1940) A.C. 206, referred to.

U THEIN MAUNG, C.J.—The question which has been referred to us is as follows :

" If a person causes the death of another person by causing an injury which is likely to cause death, is the offence murder as is defined in section 300 of the Penal Code in the absence of any of the extenuating circumstances enumerated in section 299 of the Penal Code ? If not, under what section of the Penal Code is such an offence punishable ?"

Now section 300 of the Penal Code as amended by the Penal Code Amendment Act, 1947, provides :

" Whoever, in the absence of any circumstance which makes the act one of culpable homicide not amounting to murder, causes death by doing an act with the intention of causing death, or with the intention of causing bodily injury as in fact is sufficient in the ordinary course of nature to cause death, commits the offence of murder."

And section 299 thereof as amended by the same Amendment Act sets out the circumstances which make the act one of culpable homicide not amounting to murder. The sections as amended do not contain any reference to knowledge or to bodily injury which is likely to cause death.

So far as knowledge is concerned the Legislature appears to have adopted the view that where an act has been done in pursuance of an intention to do bodily harm to another, the case must be decided according to the intention which must be attributed

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to the offender in doing the act although in the majority of cases the question of intention is merely the question of knowledge and in making an inference as to his intention, the knowledge which must be attributed to him must usually be a matter for consideration.

In this connection it must be noted that Fox J. observed in *Shwe Ein* v. *King-Emperor* (1) [which has been followed in *Nga Na Ban* v. *King-Emperor* (2)] :

"The finding, however, appears to me to be inappropriate to a case like the present in which death has been caused by an act done in the intentional causing of bodily injury to a particular individual.

In such a case the question to be considered is with what intention did the accused commit the act. His knowledge of the probable results of his act must almost necessarily be a matter to be considered also, since knowledge and intention are usually closely bound up together. Where the act has been done in pursuance of an intention to do bodily harm to another, the case must, in my opinion, be decided according to the intention which must be attributed to the offender in doing the act, and the words and clause of section 299 and section 300 of the Indian Penal Code, which deal with knowledge, have no direct application to such a case."

He also observed at pp. 125 and 126 *ibid* :

"In the absence of an expression of his intention by the accused previous to or after or at the time of committing the act, his intention can only be inferred from the act itself and the circumstances under which it was done. In making an inference as to the accused's intention, the knowledge which must be attributed to him must usually be a matter for consideration. As Mr. Mayne says in paragraph 201 of his Criminal Law of India :

'Intention is sometimes a presumption of law : sometimes it is a mere fact to be proved like any other fact. A man is assumed to intend the natural or

(1) (1905-1906) 3 L.B.R. 122 at p. 123.

(2) (1904—1906) I U.B.R. Penal Code 33.

necessary consequences of his own act, and in the majority of cases the question of intention is merely the question of knowledge. If I strike a man on the head with a loaded club, I am assumed to know that the act will probably cause death, and if that result follows, I am assumed to have intended that it should follow.'

Thus in a case like the present in which death has been caused by intentional bodily injury inflicted by the accused on the deceased, the question of what knowledge must be attributed to the accused comes in as a means of arriving at his intention when he committed the act which caused the death, and for that purpose, and not for the purpose of deciding whether the case falls within the 4th clause of section 300 or the last part of section 304 must the question be considered."

Cf. section 300A (*c*) of the Penal Code which reads :

" 300A. In sections 299 and 300 :

* * * *

(*c*) the offender's knowledge that an act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, is a relevant factor in proving the nature of his intention."

The legal effect of omission to refer to bodily injury likely to cause death is not so clear. The old sections have been amended by insertion of the words " as in fact is " between the words " bodily injury " and the words " sufficient in the ordinary course of nature " ; but " such bodily injury as in fact is sufficient in the ordinary course of nature to cause death " cannot *in all cases*, include bodily injury likely to cause death.

The distinction between bodily injury likely to cause death and bodily injury (as in fact is) sufficient in the ordinary course of nature to cause death is fine

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and I agree with my brother U San Maung J. that circumstances may indicate the intention was to cause death or such bodily injury as in fact was sufficient to cause death although the bodily injury actually caused was merely likely to cause death. However, there must be cases in which circumstances do not indicate such intention and the bodily injury is only likely to cause death.

In *Sein Kho* v. *The King* (1) a Bench of the late High Court of Judicature at Rangoon convicted under section 304A of the Penal Code a man who stabbed another in the chest " as he must be deemed to have acted with the knowledge that the injury would be likely to lead to death."

Now section 304A provides :

" Whoever causes the death of any person by doing any rash or negligent act not punishable as culpable homicide or murder shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both : provided that, if the act is done with the knowledge that it is likely to cause death, the term of imprisonment may extend to ten years."

The first part of the section which is the principal enactment relates to causing death by rash and negligent act—which is not punishable as culpable homicide or murder, *e.g.* under section 299 or section 300 read with section 300A (*c*). So " the act " mentioned in the second part of the section which is in the form of a proviso, must also be a rash and negligent act. With reference to the section, as it stood before the amendment, Straight J. observed in the *Empress of India* v. *Idu Beg* (2) :

" Section 304A does not say every unjustifiable or inexcusable act of killing not hereinbefore mentioned shall be

(1) Criminal Appeal No. 1312 of 1947.

(2) (1881) I.L.R. 3 All. 776 at pp. 779 and 780.

punishable under the provisions of this section, but it specifically and in terms limits itself to those rash or negligent acts which cause death but fall short of culpable homicide of either description. According to English law, offences of this kind would come within the category of manslaughter, but the authors of our Penal Code appear to have thought it more convenient to give them a separate *status* in a section to themselves, with a narrower range of punishment proportioned to their culpability. It appears to me impossible to hold that cases of direct violence, wilfully inflicted, can be regarded as either rash or negligent acts * * * Although I do not pretend for a moment to exhaust the category of cases that fall within section 304A, I may remark that criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so, and that it may cause injury, but without intention to cause injury, or knowledge that it will probably be caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular, which, having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted."

[*Cf.* Cuming J. in *W. H. Smith* v. *Emperor* (1).]

The same may still be said of the new section 304A in spite of the insertion of the proviso. Rash acts can be said to be intentional or deliberate only in the sense that the risk of causing injury is run deliberately or intentionally and not in the sense that they are done with the deliberate object or intention of causing injury to any particular individual. [Cf. *Sukaroo v Empress* (2).] So the proviso is not applicable to "cases of direct violence, wilfully inflicted", *i.e.* to cases of causing bodily injury with the criminal intention to cause such injury, *e.g.* by deliberately stabbing or cutting a man with a knife. It applies only to cases of hazarding dangerous or wanton acts with the knowledge

(1) (1926) I.L.R. 53 Cal. 333 at p. 338. (2) (1887) I.L.R. 14 Cal. 566.

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that they are so or with recklessness or indifference as to the consequences—but without any criminal intention to cause bodily injury to any particular individual.

For the above reasons we cannot follow the ruling in *Sein Kho* v. *The King* (1) and we would answer the questions under reference in the abstract, *i.e.* without considering the facts of the particular case as follows :

Where a person caused the death of another person by causing an injury which was likely to cause death—

(*a*) the offence, in the absence of any circumstance which makes the act one of culpable homicide not amounting to murder, is murder if it can be deduced from a consideration of the whole facts of the case that the offender caused the death by doing an act with the intention of causing death or with the intention of causing bodily injury as in fact is sufficient in the ordinary course of nature to cause death ; see *Kyaw We* v. *King-Emperor* (2) in which Hartnoll J. observed :

> " Intention cannot in my opinion be correctly inferred merely from a consideration of the injuries inflicted—the results of the act—though in many cases the nature of the injuries forms a valuable piece of evidence in deducing it ; but it must also be deduced from a consideration of the whole facts of the case."

See also *Po Tu* v. *King-Emperor* (3).

(*b*) the offence is one of voluntarily causing grievous hurt under section 325 or 326

(1) Criminal Appeal No. 1312 of 1947.

(2) 4 L.B.R. 311 at pp. 313 and 314.

(3) 4 L.B.R. 306.

of the Penal Code according to the nature of the weapon used if it can be deduced from a consideration of the whole facts of the case that the offender intended only to cause bodily injury which was likely to cause death, as sections 299 and 300 of the Penal Code as amended do not refer to such intention like the old sections [Cf. *Empress of India* v. *Idu Beg* (1)] ;

(*c*) the offence is not one under section 304A of the Penal Code if the bodily injury was caused with criminal intention to cause it, as an act done with such intention cannot be a rash or negligent act ;

(*d*) the offence is one under section 304A of the Penal Code if the bodily injury was caused by a rash or negligent act, *i.e.* without any criminal intent but with the knowledge that it was likely to cause death ; and

(*e*) the offence is one under section 299 or section 300 of the Penal Code even though the bodily injury was caused by a rash or negligent act if the offender knew that the act was so imminently dangerous that it must in all probability cause such bodily injury as is likely to cause death and the Court finds under section 300A (*c*) of the Code that his intention was to cause death or bodily injury as in fact is sufficient to cause death. (*Cf.* the old section 300 Fourthly and Illustration (*d*) thereto.)

(1) (1881) I.L.R. 3 All. 776 at pp. 779 and 780.

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U TUN BYU, J.—I agree.

U SAN MAUNG, J.—In a case before me which occurred after the 1st of August 1947, a person caused the death of another by deliberately cutting him on the back with a *dah* thus causing an injury likely to cause death ; and the question which I have referred for the decision of a Bench or a Full Bench, according as my Lord the Chief Justice may direct, is as follows :

> " If a person causes the death of another by causing an injury which is likely to cause death, is the offence murder as defined in section 300 of the Penal Code in the absence of any of the extenuating circumstances enumerated in section 299 of the Penal Code? If not, under what section of the Penal Code is such an offence punishable ? "

The sections referred to in the question propounded, are sections of the Penal Code as substituted by the Penal Code (Amendment) Act, 1947, Burma Act, No. XXXIII of 1947, by which the law relating to culpable homicide was amended with effect from the 1st August 1947. The law as it stood before the amendment came into force has been fully explained in the judgment of Roberts C.J. in *The King* v. *Aung Nyun* (1) where it was pointed out that the second clause of section 299 (old) refers to intention apart from knowledge, and that the offence of culpable homicide by doing an act by which the death is caused with the intention of causing such bodily injury as is likely to cause death can exist independently of section 300 (old) of the Penal Code and is punishable under the first part of section 304 (old) of the Penal Code.

Under the law, as now amended, the definition of the offence of murder appears in section 300 (new) of

(1) (1940) Ran. 441 (F.B.).

the Penal Code which is as follows :

" 300. Whoever, in the absence of any circumstance which makes the act one of culpable homicide not amounting to murder, causes death by doing an act with the intention of causing death, or with the intention of causing bodily injury as *in fact* is sufficient in the ordinary course of nature to cause death, commits the offence of murder."

The italicized is mine.

The circumstances which make the act, one of culpable homicide not amounting to murder are those which are set out in Clauses (A), (B), (C), (D) and (E) of section 299 (new) of the Penal Code which enacts that where any of these circumstances are present, the offence committed is culpable homicide not amounting to murder.

In so far as is relevant for the purpose of this reference, a comparison of the old section 300 of the Penal Code and the new section 300 shows that culpable homicide is murder under both the old and the new section 300 if death is caused by doing an act with the intention of causing death. Therefore, those acts which were held to be murder because they fell within the meaning of the first clause of section 300 (old) of the Penal Code will still be murder as defined in section 300 (new) of the Penal Code. Now, as observed by Hartnoll J. in *Kyaw We* v. *King-Emperor* (1) the intention of a person cannot be correctly inferred merely from a consideration of the injuries inflicted—the result of the act—though in many cases the nature of the injuries forms a valuable piece of evidence in deducing it; but it must also be deduced from a consideration of *the whole facts of the case.* So also, in the case of *Po Tu* v. *King-Emperor* (2) where the accused cut another person on the head with a heavy

(1) 4 L.B.R. 311 at p. 313. (2) 4 L.B.R. 306.

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chopper, slicing off a bit of the frontal bone and cutting the brain and the victim died from the effect of the injury, it was held that though the medical evidence showed that the wound was not certain, although likely to cause death, that the accused's intention must be inferred not merely from the actual consequences of his act, but from the act itself; and as the natural consequence of an act of the kind in question would be death, the accused must be presumed to have intended to cause death. In this case, there was a difference of opinion between Ormond J. who held that the offence committed by the accused was culpable homicide not amounting to murder punishable under the first part of section 304 of the Penal Code because the accused's intention must be gathered solely from the facts of his act as disclosed in the medical evidence, and Hartnoll, J. who held that the offence committed by the accused was murder because the intention of the accused must be gauged not only from the result of his act, but also from the other facts of the case. On a reference being made to Irwin O.C.J., the learned Officiating Chief Justice, made the following remarks which appear to me to be most apposite :

"I do not think it is necessary to dissent from the proposition that in this particular case the accused's intention must be gathered solely from the one act of cutting, but I cannot agree that it must be gathered solely from the effects of that act as disclosed in the medical evidence. Such an inference necessarily implies that the accused intended to cut a slice off his grandfather's head of the precise size that he did in fact cut off, without varying a hair's breadth one way or the other. Not one man in a million is capable of doing that. Suppose the accused had taken the chopper with both hands and struck with sufficient force to cleave the skull from forehead to chin, but had missed his aim and only slightly grazed the forehead, would it be possible to avoid the inference that he intended to cause death? Or suppose a man fires a bullet at another, misses his heart by an

inch or two, and pierces the lung. A bullet wound through a lung, I believe, is not necessarily fatal, but if in the case I put it did prove fatal, I have no doubt that the crime would be murder.

In the present case then I would infer the accused's intention from his act, but not solely from the consequences of that act. I think it is a matter of common knowledge that the result of cutting a man on the head with a heavy chopper is generally death, and the appellant must be held to have known that that is the natural consequence of such an act; and he must therefore be presumed to have intended to cause death."

In my opinion, the law has been correctly laid down in *Po Tu* v. *King-Emperor* (1) which has not yet been overruled since it was made 40 years ago. Therefore, when a person causes the death of another by causing an injury, which according to the medical evidence, is only likely to cause death, the offence may be murder as defined in section 300 (new) of the Penal Code, if the other circumstance appearing in evidence shows that there was intention on the part of the person causing the injury to cause the death of the other.

One of these circumstances is indicated in Clause (*b*) of section 300 A of the Penal Code which provides that where death is caused by bodily injury, the offender's knowledge of the weakness or infirmity of the person on whom the bodily injury is inflicted is a relevant factor in proving the nature of his intention. This clause may be compared with the second clause of section 300 (old) of the Penal Code and Illustration (*b*) thereto.

The next question which arises for consideration is "What offence is committed by a person who causes the death of another by causing an injury which is likely to cause death, if the circumstances appearing in evidence do not show that there is intention on the

(1) 4 L.B.R. 306.

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part of the person causing the injury to cause the death of the other?"

Now, on a comparison of the third clause of section 300 (old of the Penal Code and the new section 300 it is clear that a radical change in the law has taken place regarding the presumption to be drawn when the result of an act of a person is the causing of death of another by causing an injury as *in fact*, is sufficient in the ordinary course of nature to cause death. According to the law as it stood before Burma Act XXXIII of 1947 came into force, though an injury caused by a person to another may, in fact, be sufficient in the ordinary course of nature to cause death, it is not murder unless it was also intended that the injury should be sufficient in the ordinary course of nature to cause death. Such an intention is ordinarily presumed if the injury is inflicted on a vital part of the body. However, where the accused in an altercation smote the deceased with great force on the leg above the ankle with his *dah* with such force that he cut through the bones and the arteries and as a result the man died four days later, it was held that though the accused did *in fact* inflict an injury sufficient in the ordinary course of nature to cause death, the intention to cause such injury could not be imputed to him, and that he should be convicted under the first part of section 304 of the Penal Code. So in that case although the injury caused was in fact sufficient in the ordinary course of nature to cause death the accused was held to have caused the death by doing an act with the intention of causing such bodily injury as is likely to cause death within the meaning of the second clause of section 299 (old) of the Penal Code. See *Abor Ahmed* v. *The King* (1).

(1) (1937) Rang. 393.

Under the law as now amended the accused in *Abor Ahmed*'s case would be deemed to have committed murder as defined in section 300 (new) of the Penal Code. This change in the law has obviously been made with a view to simplify, as far as is possible, the deduction to be drawn from the proved facts, when one of the facts proved is that an accused person has caused an injury which is, in fact, sufficient in the ordinary course of nature to cause death, regard being had to the medical evidence in the case. When this fact is on record, the offence is *prima facie* murder whatever may be the other circumstances appearing in the case, namely, the number of blows given, the nature of the weapon used, and the part of the body on which the injury or injuries have been inflicted.

In cases where death is caused medical witnesses are wont to classify the injury received by the deceased person under one or other of the following categories :

(1) Necessarily fatal,
(2) Sufficient in the ordinary course of nature to cause death,
(3) Likely to cause death.

There can be no difficulty where the injury is classified as necessarily fatal because an intention to cause death can, in the generality of cases, be presumed, on the maxim that a man is presumed by law to intend the ordinary and natural as well as necessary consequences of his act. The difficulty that will arise is in regard to injuries which the medical officer classified under the second or third category. As pointed out in *Shwe Hla U* v. *King-Emperor* (1) between the degree of bodily injury intended as expressed by the words "such bodily injury as is likely to cause death" in section 299 (old) of the Penal Code and by the words "bodily

(1) 3 L.B.R. 122.

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injury sufficient in the ordinary course of nature to cause death" in section 300 (old) of the Penal Code, is fine, though appreciable, and depends upon the degree of probability of death resulting from the act.' *See* also *Po Sin* v. *King-Emperor* (1) and *Apalu* v. *King-Emperor* (2). So, where the medical officer makes a distinction between an injury sufficient in the ordinary course of nature to cause death and an injury likely to cause death, great care will have to be exercised to examine him carefully as to his reason for the classification, as, if the injury is held to be, in fact, sufficient in the ordinary course of nature to cause death, the offence is *prima facie* murder as defined in section 300 (new) of the Penal Code.

Assuming that the injury caused is *in fact* only likely to cause death and the circumstances from which an intention to cause death may be inferred are absent, what offence will the person causing the injury have committed after the law relating to culpable homicide has been amended by Burma Act XXXIII of 1947? In this connection, our attention has been drawn to the case of *Sein Kho* v. *The King* (3) where the accused Sein Kho caused the death of one Nyi Aung by stabbing him with a spear and causing an injury which was held to be likely to cause death, and it was held by a Bench of the late High Court of Judicature at Rangoon that the conviction should be one under section 304A of the Penal Code as substituted by section 7 of the Burma Act XXXIII of 1947. This section reads as follows:

"Whoever causes the death of any person by doing any rash or negligent act not punishable as culpable homicide or murder shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with

(1) 5 L.B.R. 80. (2) 1 Ran. 285.
(3) Criminal Appeal No. 1312 of 1947.

both ; provided that, if the act is done with the knowledge that it is likely to cause death, the term of imprisonment may extend to ten years."

I have carefully read the judgment in *Sein Kho*'s case and with great respect I must say that the learned Judges who decided that case had apparently overlooked the fact that as the offence took place on the 4th March 1947, before Burma Act No. XXXIII of 1947 came into force, the reference to section 304A of the Penal Code as inserted by section 7 of the aforesaid Act was irrelevant and that Sein Kho should have been convicted under the first part of section 304 of the Penal Code, *vide* the ruling in the case of *The King* v. *Aung Nyun* (1). Furthermore, the learned Judges' observation that since the injury caused by the accused was merely likely to cause death the offence would be one falling within part 2 of section 304 of the Penal Code, if the matter fell to be determined under the old law, is incorrect. There is ample authority for the view that the offence punishable under the second part of section 304 of the Penal Code, is culpable homicide under the circumstances mentioned in the last part of section 299 (old) of the Penal Code, that is to say where death is caused by doing an act with the knowledge that it is likely to cause death. In *Shwe Ein* v. *King-Emperor* (2) Fox J. observed, " where the act has been done in pursuance of an intention to do bodily harm to another the case must, in my opinion, be decided according to the intention which must be attributed to the offender in doing the act, and the words and clause of section 299 and section 300 of the Indian Penal Code, which deal with knowledge have no direct application to such a case." *See* also the case of *Munilal* (3) where it was held that the second

(1) (1940) Rán. 441 (F.B.). (2) 3 L.B.R. at p. 122.
(3) A.I.R. (1943) All. at p. 853.

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part of section 304 of the Penal Code is to be read with the last few words of section 299 and has no reference to section 300 or to the exceptions therein.

Apparently, it is the mistaken assumption that the offence would be one falling within the second part of section 304 of the Penal Code under the old law, which has led the learned Judges in *Sein Kho*'s case to assume that it would fall within the second part of section 304A of the Penal Code as substituted by Burma Act No. XXXIII of 1947. No reason has been given why the act done by the accused Sein Kho who had stabbed the deceased Nyi Aung on the chest with a spear thus causing an injury likely to cause death should be regarded as a rash or negligent act done with the knowledge of its likelihood to cause death within the meaning of section 304A (new) of the Penal Code and the proviso thereto. In my opinion, such an act as was done by the accused Sein Kho cannot possibly be regarded as a rash and negligent act within the meaning of that section.

Under the old law the causing of death by rash and negligent act was punishable under section 304A which reads :

> "Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Undoubtedly, this section was not in existence when the Indian Penal Code was enacted in 1860 and was only inserted therein by Act No. XXVIII of 1870. However, offences requiring proof of rashness or negligence as an essential ingredient for the commission thereof were in the Indian Penal Code as it was originally enacted in 1860, for example, section 279 of the Penal Code punishes rash driving

or riding on a public way, section 280 of the Penal Code punishes rash navigation of vessel, section 284 punishes rash and negligent conduct with respect to poisonous substance, section 285 punishes rash and negligent conduct with respect to fire or combustible matter, etc. Now, the following commentary to section 279 which appears under the heading "So rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person" in Ratanlal and Thakore's Law of Crimes, Sixteenth Edition, seems to be apposite :

"A rash act is primarily an over-hasty act and is thus opposed to a deliberate act, but it also includes an act which though it may be said to be deliberate, is yet done without due deliberation and caution. The most formally scientific analysis of negligence is that of Austin. He draws a distinction between negligence, heedlessness, and rashness, which, though closely allied, 'are broadly distinguished by differences.'

In cases of Negligence, the party performs not an act to which he is obliged. He breaks a positive duty.

In cases of Heedlessness or Rashness, the party does an act from which he is bound to forbear. He breaks a negative duty.

In cases of Negligence, he adverts not to the act, which it is his duty to do.

In cases of Heedlessness, he adverts not to *consequences* of the act which he does.

In cases of Rashness, he adverts to those consequences of the act ; but, by reason of some assumption *which he examines insufficiently* he concludes that those consequences will not follow the act in the instance before him.

'Negligence' has been defined to be the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Viewed in the light of these observations when a person deliberately attacks another with a *dah* or with a spear and causes his death by causing an injury

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which is likely to cause death, the offence can hardly be one coming within the ambit of section 304A (new) of the Penal Code. Perhaps, it may be argued that the proviso to section 304A should not be construed with reference to the main provision therein. However, as held by the House of Lords in *Jennings and another* v. *Kelly* (1), there is no rule that the first or enacting part of an act is to be construed without reference to the proviso and the proper course is to apply the broad general rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest. The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together, is to prevail. Maxwell on Interpretation of Statutes, at page 165 of the Ninth Edition.

Therefore, in my opinion, when a person causes the death of another by causing an injury which is likely to cause death, if the circumstances appearing in evidence do not show an intention to cause death, he should be convicted under section 325 or under section 326 of the Penal Code as the case may be, regard being had to the nature of the weapon or means used in causing the injury. As observed by Fox J. in *Shwe Ein* v. *King-Emperor* (2) :

> "There are cases in which, although an offender has actually caused death as a consequence of bodily injury inflicted by him, he has been held liable for only one or other of the minor offences of grievous hurt or hurt."

My answer to the question propounded will, therefore, be in the sense indicated above.

I also agree to the answers proposed by my Lord.

(1) (1940) A.C. 206. (2) 3 L.B.R. at p. 122.