*Privy Council Appeals No.* 31 *and No.* 32 *of* 1961

**The Queen** – – – – – – – – – *Appellant*

*v.*

**Sharmpal Singh, son of Pritam Singh** – – – – – *Respondent*

*and*

**Sharmpal Singh, son of Pritam Singh** – – – – – *Appellant*

*v.*

**The Queen** – – – – – – – – – *Respondent*

(Consolidated Appeals)

FROM

**THE COURT OF APPEAL FOR EASTERN AFRICA**

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# REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH NOVEMBER, 1961

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*Present at the Hearing:*

LORD MORRIS OF BORTH-Y-GEST.

LORD HODSON.

LORD DEVLIN.

[*Delivered by* LORD DEVLIN]

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These are two appeals from a judgment of the Court of Appeal for Eastern Africa. The accused, Sharmpal Singh, the respondent in the first appeal, was in June, 1960, tried before Wicks, J. with the aid of three assessors for the murder of his wife. The three assessors each stated it as his opinion that the accused was not guilty, but the Judge decided that he was and convicted him accordingly. The Court of Appeal quashed that conviction and substituted for it a conviction of manslaughter. From this the Crown appeals asking that the Judge's verdict of murder should be restored; and the accused also appeals, asking for a verdict of acquittal.

The facts of the case are stated in detail in both judgments of the courts below and on most of them there are concurrent findings which have not been challenged before the Board. For the purpose of considering the submissions placed before the Board, they can be stated very shortly.

The accused and his wife were a young Sikh couple who had been married for less than a year; the wife was about four months gone with child. They lived in a flat in Kisumu which they shared with the wife's brother and his family. The marriage was a happy one. Between 9.30 p.m. and 3.45 a.m. on the night of 28th-29th February, 1960, the accused killed his wife while she was in bed. The defence called no evidence at the trial but the accused made an unsworn statement which is now relevant in only one particular. He stated that on that night he had had intercourse with his wife; and the medical evidence indicated that intercourse had taken place just before death. Death was due to asphyxia; and the asphyxia was caused by pressure on the left chest applied simultaneously with pressure on the neck and throat. There were no signs of bruising on either the neck or the chest; nor were there any other external marks of injury that might have caused death. But there were manifold signs of internal injury in both the neck and chest, extending in the case of the neck to half its circumference. According to the medical evidence the simplest explanation of these injuries is that they were caused by a hand or hands on the throat and a knee or elbow on the chest. An assailant who was throttling the woman might pin her down with a knee on her chest. But the case for the defence was argued on the footing that

the accused killed his wife with a hand pressing on her neck and throat and an elbow pressing on her chest during what was described as a " sexual embrace "; their Lordships understand this expression to mean no more than that the handling of the throat and the pressure on the chest were part of the love-making or bodily movements that went with the sexual act. The medical witnesses were unable to say how severe or how prolonged such pressure would have had to have been in either place in order to cause death by asphyxia; they did say, however, that the absence of external marks afforded no indication of lack of force.

After the death of his wife the accused prepared an elaborate plan of deception in order to make it appear that she had been attacked and robbed while on her way to the toilet which was outside the flat. He took the dead body out to the courtyard, stabbed it in two places with a knife and faked other signs of robbery. The prosecution naturally rely upon this as evidence of a crime which the prisoner was desperately anxious to conceal; the defence submit that it is equally consistent with panic seizing the prisoner when he found his wife had died accidentally.

The main defence in both courts below was that which the accused had prepared in this manner and it was persisted in until the case reached the Board. Nearly all the evidence at the trial was devoted to this issue and the trial Judge delivered a very full and careful judgment upon it. In his cross-examination of the medical witnesses Counsel for the defence gave some indication of an alternative line by seeking to obtain from them some material to show that death could have been caused accidentally during a sexual embrace. But he did not pursue the point in his submission at the end of the case and the trial Judge glanced at it only to dismiss it. He said:— " 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 refuses to submit to it, or even, she having consented to intercourse, the accused strangled her to gratify his lust ".

Their Lordships agree with the Court of Appeal that the trial Judge fell into error (a very natural one considering the nature of the defence that was pressed upon him) in that he overlooked that the Crown not only had to dispose of the defence set up but had also to prove that the evidence adduced by the prosecution was consistent only with murder. In their Lordships' opinion the inability of the medical evidence to speak with precision about the degree of force used, together with other circumstances in the case to which they will later refer, opened up both manslaughter and accident as alternative possibilities requiring consideration. It is now well established by a series of authorities, in which *Mancini v. D.P.P.* [1942] A.C. 1 is the first and still the best known, that it is the duty of the Judge to deal with such alternatives if they emerge from the evidence as fit for consideration, notwithstanding that they are not put forward by the defence. This may impose a heavy burden on the Judge when, as in the present case, attention is concentrated by the defence on quite different issues. The use of the word " strangle " in the passage which their Lordships have quoted is criticised by Mr. Dean, and it does seem to suggest that the Judge was taking it as proved that the accused's object, once the act was admitted, was to cause death.

Before the Court of Appeal Counsel for the appellant did not raise either manslaughter or accident as matters to be considered. He did not raise accident even when the Court itself raised manslaughter. The Court does not in its judgment refer to the possibility of accident. The accused's complaint now is that the Court of Appeal should have gone further than it did and should have concluded that accident was a possibility which raised at least a reasonable doubt about the verdict of guilty; while the Crown complains that the Court erred in law in substituting manslaughter for murder, contending that on the facts proved murder was the only verdict correct in law.

Before considering these rival submissions, their Lordships will make some observations about the powers and duty of an appellate court on an appeal from the result of a trial by judge with the aid of assessors, as to which there was no disagreement at the Bar. If it had been a trial by jury, the failure of

the trial judge to direct the jury to consider manslaughter as an alternative verdict of guilt and accident as an alternative ground for acquittal would have been fatal; an appellate court would have to quash the conviction and either discharge the prisoner or order a new trial. Mr. Dean has not contended that a similar result should follow from a similar failure to direct the assessors. The reasons they gave for their opinions showed that all three of them, notwithstanding a very clear direction by the learned judge on the nature and effect of circumstantial evidence, based their conclusion on the fact that there was no direct evidence of murder; it may well be that their opinion on any other points left would have shown an equal disregard of the law. The powers of the Court of Appeal are contained in the Eastern Africa Court of Appeal Rules 1954 and provide by Rule 41 that the Court " may confirm, reverse or vary the decision of the trial court ". It is agreed that the Court of Appeal in a case such as the present one is entitled and bound to consider whether the inferences that ought to be drawn from the facts proved demonstrate beyond reasonable doubt that the accused was guilty.

Their Lordships will consider first the submission for the Crown. The law of murder and manslaughter is set out in sections 198, 199 and 202 of the Penal Code of Kenya. A person who by an unlawful act or omission causes death is guilty at least of manslaughter; and if the act is done with malice aforethought, he is guilty of murder. Malice aforethought is established where *inter alia* there is " knowledge that the act or omission causing death will probably cause the death of or grievous harm to " another person; and in section 5 of the Code grievous harm is defined as including anything likely seriously or permanently to injure health or any organ. The Crown submits that the definition of " grievous harm " is untouched by the observations on this point of Viscount Kilmuir, L.C. in *D.P.P. v. Smith* [1961] A.C. 290. But it submits also that " knowledge ", in the passage which their Lordships have quoted from the Code, does not mean actual knowledge, but means, in accordance with the decision in *D.P.P. v. Smith*, the knowledge that a reasonable man would have of the probable consequences of his acts and omissions. The Crown contends that in reaching its conclusion the Court of Appeal ignored in this respect the law as laid down in *D.P.P. v. Smith.*

Their Lordships do not consider that anything in this case turns upon the application of the principle enunciated in *D.P.P. v. Smith.* In that case the acts of the accused were proved by direct evidence. In the present case they are not; and the problem is to determine as a matter of inference what the accused actually did and what degree of force he used. Once these are determined, the Board is bound to presume, because there is nothing to suggest the contrary, that the accused intended the consequences that would naturally follow from the exercise of the degree of force proved. The accused did not himself give evidence and so there is no conflict between his intention as deposed to in evidence and that which would have been formed by a reasonable man in his position: the latter is the only guide. Likewise, their Lordships do not think it important in this case to decide whether the harm necessary to constitute the offence has to be serious or really serious or grievous. There is nothing to suggest that the accused intended merely to maim or cripple his wife; if he was deliberately inflicting any serious injury on her, he must have meant her to die. For the purpose of the Crown's submission, the Board will assume in its favour that the definition of grievous harm in the Code is unaffected by *D.P.P. v. Smith.*

Their Lordships have therefore to ask themselves whether they are satisfied that the degree of force used was so extreme as to be consistent only with an intent to do serious harm. They are not so satisfied. Mr. Brabin rightly submits that the Crown is not obliged to prove a motive; but just as the presence of motive can greatly strengthen the case for the prosecution, so its absence can weaken it. There is here a complete absence of motive. The marriage was a new and happy one. Only an abnormal man could intend to strangle his wife while making love to her and there is no suggestion of known abnormality. The medical witnesses accepted that an inexpert strangler generally uses much more violence than is necessary to cause death; and the fact that there were no external signs of violence or of any struggle create, like

the absence of motive, a weakness in the prosecution's case. These considerations are of themselves enough to induce in their Lordships' minds, as they did in the minds of the Judges in the Court of Appeal, a real doubt about the accused's guilt of murder.

Their Lordships have next to ask themselves whether they are satisfied that the degree of force used was unlawful. The question is whether what was done was within the limits permitted by the wife's submission to intercourse and its normal accompaniments or whether it went beyond those limits so as to consitutute an assault upon her amounting at least to a matrimonial offence. Mr. Dean has argued that a verdict of manslaughter should not be returned unless it is proved that the accused knowingly acted with reckless disregard for his wife's safety. That may be the proper test under the Code when the accused is guilty of omission or where the unlawful act is not aimed at the victim, as in the case of careless driving; see per Kilmuir, L.C. in *D.P.P. v. Smith* at 325. But where there is an act done by the accused, such as the squeezing of the neck, the only question under the Code is whether that act is unlawful.

If death had been caused solely by the pressure on the chest, it would have been quite consistent with accident and the contact would obviously have been within the permitted limits. The difficulty in the way of the defence is to find a plausible explanation for the handling of the neck; the internal injuries suggest at least extensive pressure. Since an expert can cause death with very little force, it is conceivable that a husband might accidentally hit upon the same means. But deaths caused accidentally in sexual intercourse when the wife has ordinary health must be very rare indeed. The natural inference from the medical evidence is that the accused pressed much too hard. It is possible that as the Court of Appeal thought, the accused was " applying pressure in an excess of sadism to frighten or torment her, or to overcome resistance ". But it is unnecessary to say more than that the evidence of the prosecution, unless explained away, proved that the accused had gone well beyond the limits.

This is the sort of case in which a not incredible explanation given by the accused in the witness box might have created a reasonable doubt. But there is no explanation; and the prisoner's silence is emphasised by his consequent conduct. How did he come to squeeze his wife's throat? When the prisoner, who is given the right to answer this question, chooses not to do so, the Court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence it has got nor dissuaded from reaching a firm conclusion by speculation upon what the accused might have said if he had testified. On the evidence they have their Lordships are left with no reasonable doubt that this was a case of manslaughter.

For these reasons their Lordships have humbly advised Her Majesty to dismiss both appeals.

(84336) Wt. 8235/73 100 1/62 Hw.

**In the Privy Council**

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THE QUEEN

*v.*

SHARMPAL SINGH

SHARMPAL SINGH

*v.*

THE QUEEN

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DELIVERED BY

LORD DEVLIN

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