

**(1890) 07 CAL CK 0008**  
**In the Calcutta High Court**

Queen-Empress

APPELLANT

Vs

Hurree Mohun Mythee

RESPONDENT

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**Date of Decision :** 26-07-1890

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 338

**Citation :** (1891) ILR (Cal) 49

**Hon'ble Judges :** Wilson, J

**Bench :** Single Bench

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## Judgement

Wilson, J.—The prisoner is accused of several different offences, but all arising out of the same event. What you are enquiring into is the death of the girl Phulmoni, the wife of the prisoner, which occurred on the afternoon of the 16th June, and which is said to have been the result of injuries caused by the prisoner to her during the previous night. The prisoner is charged with having caused his wife's death, or having injured her, in four different forms. He is first charged with having caused her death under such circumstances as to amount to culpable homicide, though not to murder. Culpable homicide means causing the death of a person by an act which is done either with the intention of causing death, or with the knowledge that it is likely to cause death. In the present case there is no suggestion of an intention to cause death, and therefore, practically, you may take it that the case put to you upon this charge is that the accused caused his wife's death by doing an act which he knew was likely to cause death. I now take up another charge, not because it is the next in order, but because, in principle, it is the same as the first. By it the prisoner is charged with having voluntarily caused grievous hurt. The grievous hurt consists in a dangerous lacerated wound in the vagina, and he is charged with voluntarily causing that hurt. Now, gentlemen, in order voluntarily to cause that hurt, the accused must have known that what he was doing was likely to cause grievous hurt. Therefore in this charge there is this element, in common with the other, that it cannot be established unless you are satisfied that the accused knew that what he was doing was likely, in the one case, to cause death, and in the other, to cause

serious injury. Then there are two other charges corresponding in their character to each other. In one, the prisoner is charged with having caused the death of this girl by a rash and negligent act; in the other, he is charged with having caused her grievous hurt by an act so rashly or negligently done as to endanger life. If you will just bear in mind the characteristic distinction between these two pairs of charges, you will see the importance of it. In the one pair of charges, knowledge is of the essence of the charge; in the other pair of charges, knowledge is not of the essence of the charge. It has been pointed out that a fifth charge is really included in the charge of causing grievous hurt, namely, the charge of causing simple hurt.

2. It will be most convenient if I now go through the evidence with you, and then call your attention to the hearing of it upon the particular charges which are brought against the prisoner. The main evidence consists of two parts, the evidence of the people of the house in which the girl met her end, and the medical evidence. I shall refer to the first class of evidence first.

3. [His Lordship then proceeded to read the evidence to the jury, during the course of which he pointed out to them that the question as to Phulmoni's age was not of primary importance in the case, as their decision would not have to depend on any hard-and-fast rule as to age, but upon the facts of the case. He also pointed out with regard to the medical evidence that all the doctors agreed that to account for the absence of external injuries, there must have been a previous dilatation of the part, whether by natural process or some other. He then read the statement made by the prisoner, and continued--]

4. Those, gentlemen, are the whole of the materials before you, and it is upon those materials that you will have to decide what is the truth as to the facts, and then to see whether the facts bring the prisoner within any of the rules of the criminal law to which I have referred you. You will have to say, first of all, did his act cause the death of the girl? As to that you have the evidence of the people of the house as to how they found the accused and the girl when the cries or calls had brought them to the spot. If you believe the girl's mother, the girl was heard calling out, bapre! mare! and when the women went to the room and to the place where she was, she and the accused were found alone in the room. She was found covered with blood, and he was found with blood on his cloth. These circumstances, if true, tend to suggest what had been the cause of the blood which was flowing from the girl, that it was some such act as that imputed to the prisoner. And then you have the evidence of what passed between the old lady and the prisoner. She is said to have charged him with having done something improper, which endangered the life of the girl, and he is said to have remained silent. Then you have the evidence of Dr. Annoda Prosad Das as to what the accused said to him on the following afternoon. Dr. Annoda Prosad Das said, "I asked him how this happened, and he said it happened through sexual intercourse." You have also his evidence as to what he observed on the living girl, that is, clots of blood protruding from the lips of the vagina, and blood on the

mat and underneath the bed. You have, further, Dr. Cobb's evidence as to the injuries he found after death; and his evidence, and Dr. MacLeod's and Dr. Joubert's, as to the probable cause of those injuries. If you are satisfied with that evidence, you will no doubt come to the conclusion that the prisoner had sexual intercourse with the girl on that occasion, and that the haemorrhage was connected with that. On the other hand, you will give what weight you think right to the statement made by the prisoner to-day, which seems practically to involve the statement that he had no sexual intercourse with the girl at all that night. If you are satisfied with the evidence to which I have referred, you will no doubt come to the conclusion that the act of the prisoner in having sexual intercourse in the way that he did with the girl on the occasion in question, was the cause of her death. But, of course, that is only the first step in considering whether you can bring home criminal guilt to the accused; and that brings me to the law of the question and the bearing of the evidence in this case on the various charges which have been framed against the prisoner.

5. Now, gentlemen, I must begin by asking you carefully to distinguish a certain branch of the law which has no connection with this case from other branches of the law which may have a connection with it. The branch of the law which has no connection with this case is the law of rape. It is probably within the knowledge of you all, gentlemen, that the crime of rape consists in having sexual intercourse with a female either without her consent, or when she is of such an age that she cannot in law consent, and that the crime consists in the fact of intercourse independently of circumstances, of intention, of knowledge, and of consequences. And, in the case of married females, as you probably know, the law of rape does not apply as between husband and wife after the age of ten years. But it by no means follows that because the law of rape does not apply as between husband and wife, if the wife has attained the age of ten years, that the law regards a wife over ten years of age as a thing made over to be the absolute property of her husband, or as a person outside the protection of the criminal law. That of course cannot be supposed. Under no system of law with which Courts have had to do in this country, whether Hindu or Mahomedan, or that framed under British rule, has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her as for instance, if the circumstances be such that it is certain death to her, or that it is probably dangerous to her life. The law, it is true, is exceedingly jealous of any interference in matters marital, and very unwilling to trespass inside the chamber where husband and wife live together, and never does so except in cases of absolute necessity. But, as I have said, the criminal law is applicable between husband and wife wherever the facts are such as to bring the case within the terms of the Penal Code. I am not aware that there has occurred any case in this country in recent years in which such a matter has come under the consideration of a Criminal Court; but in earlier times there are recorded instances in the reports of the Sudder Nizamat, in which husbands have been criminally punished for having sexual intercourse with their wives with fatal

results, in consequence of their wives being unfit by reason of immaturity for such intercourse, even in cases which did not fall within the law of rape. But at present we are guided simply by the Penal Code, and we have to see what provisions of the Penal Code are or may be applicable to the facts of this case.

6. I have just said that the law of rape is not applicable; and from that follow certain consequences, One is, that in cases to which the law of rape is not applicable, neither Judges nor juries have any right to do for themselves what the law has not done--I mean not done with reference to girls above the age of ten that is, to lay down any hard-and-fast line of age, and to say, we think that when sexual intercourse takes place with a female below such an age, it is dangerous and must be regarded as punishable, and when sexual intercourse takes place with females above that age, it is safe and must be regarded as right. We have no right to do that because the law has not done it, and therefore in cases of sexual intercourse with females above ten years of age, but of whom it is alleged that they are so immature as to render sexual intercourse dangerous, we cannot take the simple and easy method, as in cases of rape, of enquiring merely into the age of the girl. We have to enquire into all the circumstances of each individual case. And, secondly, when we come to apply the law to the facts of each case, we have no hard-and-fast line drawn for us as in the case of rape, in which the fact of sexual intercourse is the only matter to be inquired into, but we have to do with a wholly different class of evidence involving many delicate considerations, of intention, of knowledge, of rashness, of negligence, and of consequences. Thus you will see that the real practical difference between the case of wives under ten years of age and the case of wives over ten years of age is that, in the case of wives under ten years of age, there is a hard-and-fast line laid down for us, as to the condition of the wife, her age; and a hard-and-fast rule as to what constitutes criminality in the husband; if he has had sexual intercourse he is guilty of rape. But in cases of wives over ten years of age, you have to consider, on the one hand, not only the question of age, but questions of physical condition, and, on the other, questions of motive, questions of intention, questions of knowledge, questions of rashness, questions of negligence, and questions of consequences. In such cases we have not to do with any general question as to what is the usual age of puberty, or what we should say, if attempting to lay down a general rule, is the safe age for the consummation of marriage. We have simply to do with the facts of the particular case on the evidence, and to say whether, having regard to the physical condition of the particular girl with whom sexual intercourse was had, and to the intention, the knowledge, the degree of rashness or of negligence, with which the accused is shown to have acted on the occasion in question, he has brought himself within any of the provisions of the criminal law.

7. Now, gentlemen, applying these general considerations to the facts of this particular case, I shall ask you now to consider the several charges brought against the accused. He is first charged with culpable homicide. As I pointed out to you before, to constitute culpable homicide, there must have been either a

criminal intention, of which there is no trace whatever in the present case, or there must have been knowledge that the act that was done was likely to cause death; so that you will be entitled to convict the accused of culpable homicide if you find that his act caused the death of his wife, and that he knew that it was likely to do so. I do not think I can properly withdraw that charge from your consideration; but I think it is my duty to say that I think there is hardly such solid and satisfactory ground as would make it safe to say that this man must have had knowledge that he was likely to cause the death of the girl.

8. In connection with this matter, I specially invite your attention to a part of the medical evidence upon which great stress was laid by the Counsel for the defence, and that is, upon the question whether there had or had not been previous sexual intercourse between the prisoner and his wife. The importance of it is this, that if he had had previous sexual intercourse with his wife, and no danger apparently followed from it, it would make it very difficult to say that he must have known that on the present occasion her life would be likely to be placed in danger. The evidence as to that consists, first, of the evidence of the women of the house if you think they are speaking correctly, their evidence excludes all likelihood of there having been sexual intercourse in the child's grandfather's house, but of course it cannot exclude the idea of there having been sexual intercourse between the accused and the girl during the time she was in her father-in-law's house. His statement is that they had had sexual intercourse during that time. As to the likelihood of that, some at least of the gentlemen of the jury are better able to judge than I am. The expression of one of the women was that the girl was sent to the father-in-law's house as a bride. Whether she was likely to be sent to her father-in-law's house for the purpose of having sexual intercourse with her husband, or not, I cannot tell. You may perhaps be able to say. He, at any rate, says that he had sexual intercourse with her during that time.

9. Now the medical evidence upon this point appears to come to this. Dr. Cobb found on the post-mortem that the principal folds of the vagina, that is, the fourchette and the hymen, were wanting. He also speaks to minor matters, such as the wrinkles in the interior part of the vagina, and he thinks that the absence of these folds, and principally of the fourchette and the hymen, can only be accounted for on the supposition of there having been previous sexual intercourse. The other two medical men who were examined took very much the same view of the matter, but they say at the same time that of course the removal of these obstacles may be effected by artificial means or by disease, though they say that it also may well indicate previous sexual intercourse.

10. There is, on the other hand, one matter in connection with this, which I think I ought to point out. Dr. Cobb, at first, only spoke of previous intercourse. When his attention was called to the distinction between an act or acts of intercourse in which penetration was effected to such an extent as to pass the hymen, but not to the extent which took place on this occasion, namely, to reach the extreme

end of the vagina and the part actually ruptured, he said he could not say--he was not prepared to speak. Dr. Macleod and Dr. Joubert, both speaking from the indications found on the post-mortem examination, say they think that though there may have been previous sexual intercourse, it must either have been an intercourse involving penetration less complete than that which took place on the occasion now being enquired into, or, as Dr. Macleod put it, there must have been less sexual vigour. You will, of course, in those, as in all matters, give the benefit of any doubt in favour of the prisoner. If you think that there had been previous intercourse, whether it was a complete intercourse in the sense of penetrating the whole length of the vagina, or a less complete penetration, but involving the passage of the hymen, I think you will find it difficult to come to the conclusion that on this occasion the prisoner must have known that he was likely to cause the death of the girl; and unless you could come to this conclusion, you could not find him guilty of culpable homicide.

11. The charge which I before took second, I take now; that is, the charge of voluntarily causing grievous hurt. The grievous hurt is the same injury, already spoken of, that is, the rupture of the vagina, and the same considerations apply as in the case of the first charge. If the prisoner had sexual intercourse with the girl before, whether complete penetration was effected or not, it will be difficult to say that he must have known that on this occasion he was likely to cause any such grievous hurt as the rupture of the vagina; and unless you are able to come to this conclusion, you cannot convict him on this charge.

12. Now, gentlemen, I come to the two other charges on which wholly different considerations arise. The charges are based on the prisoner having done a rash and negligent act. Now I have already pointed out to you that in the case of girls over ten years of age every case has to be judged on its own merits, and that is peculiarly the case in an enquiry of this kind, where you have to say whether or not there has been a rash or negligent act on the part of the man. Now, in order to constitute the offence of causing death by a rash and negligent act, the death must be caused by the act of the accused, and that act must be a rash or negligent act, I do not propose to do what I think is a dangerous thing, that is, to try and give any abstract definition of words used in the law, but which the framers of the law have not themselves defined. The wiser course, I think, is to explain those words so far as is necessary for the purposes of the case before us, and no further.

13. With regard to this I tell you that if you are of opinion that the act of the accused caused the death of the girl, that is to say, that the act of cohabitation on the part of the accused had the effect of rupturing the vagina, and so causing the haemorrhage which led to her death; if you should further be of opinion that that act was in itself dangerous, that is to say, that the act of cohabitation between a fully developed man, such as the accused is, and a girl so immature as this girl was, is, in itself, a thing likely to lead to dangerous consequences; and if you further think that the act that was done was one of such a character

as to indicate either a reckless indifference to the welfare of the girl, or a want of reasonable consideration about what the accused was doing; if you think that the act was one which the husband of that girl, if he had had a reasonable regard to the welfare of the girl, and had exercised reasonable thought as to the act he contemplated doing, would have abstained from doing, then you will be justified in finding that the accused caused the death of the girl by a rash or negligent act.

14. The questions then that you have to consider as to this charge are, first, did the accused cause this girl's death. I do not propose to repeat the evidence bearing upon death. Secondly, was the act that was done really a dangerous one, and in considering this you have to look at the facts of this particular case. The evidence of the women of her family is that she had not attained the age of puberty. The evidence of the medical men is that she had not attained the age of puberty in any sense whatever. Dr. Cobb, if he speaks correctly, shows that she had not attained the size which was requisite to make the contact between male and female reasonably suitable. He says that her organs, such as the ovary, were not developed, that menstruation had not commenced, and that the external signs of puberty were not present; and I think you will find there is no trace in the evidence of any sign of puberty except the single one of partially developed breasts, which the medical men say is a sign that the stage of puberty is approaching or commencing, but not that it is attained. The question of what is the best test of fitness for sexual intercourse is one perhaps about which people may differ. But the prosecution say that no such question arises in this case because whatever test, or group of tests, you apply, or whatever view you take about such matters, this girl was immature for all purposes; and if you believe the medical evidence and the evidence of the women of the house, it seems to me that the prosecution is right in so putting it.

15. That, gentlemen, is the evidence as to the condition of the girl; and that being the state of the girl, was it dangerous for an adult man to have connection with her? You have had the evidence of the medical men, Dr. Cobb, Dr. Macleod, and Dr. Joubert, and they all express the opinion that if the act of connection were to take place between an adult person and a girl such as she was, in the condition in which she was, it would be highly dangerous, because not only were other injuries likely to follow, but the particular injury which did occur in the particular instance was the likely and natural consequence of the act.

16. If then, gentlemen, you think that the act that was done was one likely to be dangerous, the remaining question for you to consider is, was the accused, in doing that act, doing a rash or negligent act. In regard to this matter the fact, if it be a fact, that the accused had previous intercourse, more or less complete, with the girl, though a matter proper to be considered, would not be, to the same extent, an answer to this charge as in the case of the charge of culpable homicide; because an act may be a rash or negligent act, an act which a man with a proper regard for the safety of his wife and giving proper attention to what he was doing would not do, and yet the state of his mind may be very far

short of knowledge that he is likely to cause her death or serious injury. What you have to say is, whether the act done was a rash and negligent act in the sense which I have indicated to you for the purposes of the present charge.

17. The remaining charge is the charge of causing grievous hurt by an act so rashly and negligently done as to endanger life. The same considerations which I have brought to your notice in connection with the previous charge, apply to this charge also. You cannot convict unless you are satisfied that the prisoner caused the grievous hurt which the girl sustained, that is, the rupture of the vagina which led to her death, and that the act which caused it was rash or negligent and dangerous to life.

18. Those, gentlemen, are the charges, and the observations I have made are those which occur to me as likely to assist you. You will have to consider, first, is the prisoner guilty of culpable homicide; secondly, is he guilty of voluntarily causing grievous hurt; thirdly, is he guilty of causing death by doing a rash or negligent act; and fourthly, is he guilty of causing grievous hurt by doing a rash or negligent act dangerous to life.

19. [The Jury acquitted the prisoner on the first three charges, but convicted him of the offence covered by the 4th charge of the indictment, namely, u/s 338 of the Penal Code, and he was sentenced to one year's rigorous imprisonment.