RASHNESS UNDER SECTION 304A OF THE PENAL CODE

Ramlan bin Salleh v. *Public Prosecutor*[1]

SECTION 304A was not part of the original Indian Penal Code of 1860 but was introduced by amending legislation in 1870. This section appears in both the Malaysian and Singapore Penal Codes[2] and reads as follows:-

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

An examination of case law in Malaysia and Singapore on s. 304A reveals that the major concern has been in relation to the negligence aspect of the provision. In particular, there is a long line of authority on the question of what standard of care should be ascribed to criminal negligence.[3]

While the importance of issue concerning negligence cannot be denied, what pur courts have virtually ignored in their deliberations over s. 304A is the other aspect of criminality embodied in s. 304A, namely, rashness. Indeed, as we shall see, some judges have regarded rashness and negligence as terms to be used interchangeably. The result is that our courts lack a firm grasp of the meaning of rashness. Neither do they seem to appreciate how rashness fits in with other related provisions in the Code nor the distinction between rashness and negligence. This judicial weakness was most recently illustrated in the Malaysian Supreme Court case of *Ramlan bin Salleh* v. *Public Prosecutor.*[4]

The Facts and Holding

The appellant was a soldier who had been convicted of the murder of his superior officer. At the time of the killing, he had been on guardroom duty at the entrance to his military camp. On seeing the deceased approaching the entrance on a motorcycle, the appellant had put his rifle on semi-automatic position and fired eight shots in two quick bursts in the direction of the moving motorcycle. Three shots struck the deceased one of which proved fatal. There was evidence that one and a half hours prior to the shooting, the appellant had been informed of the cancellation of leave which had been granted to him for the purpose of rugby training. The deceased had caused the cancellation by bringing a traffic charge against the appellant. The appellant further testified that he had no thought of killing the deceased and had fired the shots "just to frighten him". The trial judge directed the jury

[1] [1987]2M.L.J. 709

[2] Cap.45, Laws of the F.M.S. (now reprint No. 2 of 1971) and Cap.224, 1985 (Rev. Ed.), respectively. Hereinafter called "the Code".

[3] For example, see *Cheow Keok* v. *P.P.* [1940] M.L.J. 104; *Woo Sing v. R.* [1954] M.L.J. 200; *Anthonysamy* v. *P.P.* [1956] M.L.J. 247; *Mah Kah Yew* v. *P.P.* [1971] 1 M.L.J. 1; *Adhan bin Khamis* v. *P.P.* [1972] 1 M.L.J. 274. For a critical discussion of these cases, see J.K. Canagarayar, "Recent Developments in the Law Relating to Criminal Negligence in Singapore and Malaysia" [1981] 2 M.L.J. clxii; K.L. Koh and M. Cheang, *The Penal Codes of Singapore and Malaysia: Cases, Materials and Comments* Vol.I1 (1976), at pp. 242-249.

[4] *Supra,* note 1.

to consider whether they believed the appellant's story, which belief would have negatived any intention on his part to kill or wound the deceased. The jury was ultimately directed to consider two verdicts, namely, guilty of intentional murder[5] or guilty of culpable homicide not amounting to murder by virtue of the defence of provocation.[6] It found the appellant guilty of murder.

On appeal to the Supreme Court, appellant's counsel submitted that the trial judge had misdirected the jury in not presenting to them with the alternative of a third possible verdict of guilty under s. 304A of the Code.[7] The court was persuaded by this argument and held that the trial judge should have put to the jury the verdict they should return not only in the event of their rejecting the accused's story (which the trial judge did by posing the verdict of murder) but also in the event of their accepting the story. More specifically, the jury should have been invited to consider the offence under s. 304A "for firing the M.16 rifle in a rash or negligent manner..."[8] if they believed that the appellant had fired at the deceased merely to frighten him. Consequently, the Supreme Court quashed the murder conviction and ordered a retrial.

What constitutes Rashness

The Supreme Court in *Ramlan* did not discuss what rashness meant under s. 304A nor did it examine just how that concept fitted in with other provisions of the Code. It is respectfully submitted that had the court done so it might have concluded that there was a further possible verdict which the jury should have been directed to consider.

Since rashness does not appear to have been defined by the Malaysian and Singaporean Courts,[9] reference may be made to Indian decisions. In *In re, Nidamarti Nagabhushanam,* Holloway J. gave the following definition:-

> "Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope-that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness."[10]

In another Indian decision, rashness under s. 304A was described as "hazarding a dangerous act with the knowledge that it is so and that it

[5] The case report indicates that the trial judge was confining the type of murder to clauses (a) or (c) of s.300 of the Penal Code. Those clauses read as follows:- "[C]ulpable homicide is murder (a) if the act by which the death is caused is done with the intention of causing death; or...(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

[6] Exception 7 to s. 300 of the Penal Code.

[7] This offence attracts the maximum punishment of two years' imprisonement compared to the mandatory death penalty for murder and the maximum sentence of life imprisonment for culpable homicide not amounting to murder by virtue of the defence of provocation.

[8] *Supra,* note 1, *per* Mohamed Azmi S.C.J., at p. 711.

[9] *Cf.* the Singapore High Court case of *Seah Siak How* v. *P.P.* [1965] M.L.J. 53 which defined the word "recklessly" appearing in s. 26(1) of the Road Traffic Ordinance 1961 as "heedless rashness".

[10] 7 Mad H.C.R. 119 and approved of in *Smith* v. *Emperor* A.I.R. (1926) Cal. 300; *State* v. *Banshi Singh* A.I.R. (1960) M.P. 105 and *Balachandra Waman Pathe* v. *State* [1968]S.C.D. 198.

may cause injury."[11] Both these definitions emphasise the subjective element of knowledge or consciousness contained in the concept of rashness.[12] We shall note later that this is the distinguishing feature which marks rashness from negligence.

Less apparent in these judicial definitions of rashness is the degree of risk associated with the rash conduct. While s. 304A by itself does not offer any indication of what the extent of risk is, it is contended that the answer lies in comparing the section with s. 300(d) and clause (3) of s. 299. Section 300(d) is as follows:-

> "[C]ulpable homicide is murder if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid."

Clause (3) of s. 299 reads:-

> "Whoever causes death by doing an act ...with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide [not amounting to murder]."

These three provisions share in common the requirement that an accused must have caused the death of a person. They also incorporate the mental element of knowledge while excluding intention from their ambit. Where they differ is in the degree of risk known to the accused person. Thus under s. 300(d), the most stringent of the provisions, the accused must have known his act to be "so imminently dangerous that it must in all probability cause death...". The Indian Supreme Court in *State* v. *Punnayya* paraphrased this clause in the following way:-

> "[Clause s.300(d)] would be applicable where the knowledge of the offender as to the probability of death of a person...being caused from his imminently dangerous act approximates to a *practical certainty.* Such knowledge on the part of the offender must be of the highest degree of probability."[13]

Turning next to clause (3) of s. 299, the degree of risk which must be known to the accused has been judicially expressed in terms such as "probably" as opposed to "highly probable". This was the way in which the Indian Supreme Court in *Punnayya* distinguished this provision from s. 300(d).[14] In a more recent Indian Supreme Court case, clause (3) of s. 299 was discussed in terms of a "distinct possibility of death."[15] Although a lower degree of risk is required under s. 299 than under s. 300, the offence of culpable homicide not amounting to murder is nevertheless a grave one attracting up to ten years' imprisonment. Hence the likelihood of death being caused by an accused's conduct must still be substantial.

[11] *State* v. *Narhari* A.I.R. (1969) Goa 87, *per* Jetley J.C. following *Smith, ibid.*

[12] This accords with the English common law concept of recklessness as defined in *R.* v. *Cunningham* [1957] 2 Q.B. 396. However, this is no longer the position since an element of objectivity has since been introduced; see *R.* v. *Caldwell* [1982] A.C. 341; *R.* v. *Lawrence* [1982] A.C. 510.

[13] A.I.R. (1977) S.C. 45, per Sarkaria J., at p. 51. Emphasis added.

[14] *Ibid.,* at pp. 50-52.

[15] *Sarabjeet Singh* v. *State* A.I.R. (1983) S.C. 529, *per* Desai and Misra JJ., at p. 534.

Given that s. 304A is by far the least serious of the three types of offences under consideration, it should follow that the degree of risk under s. 304A should be lower than that required for s. 300(d) and clause (3) of s. 299. The degree of risk for rashness under s. 304A could therefore be described as moderate as opposed to substantial or as a "possibility" as distinct from a "distinct possibility".[16]

Reverting to the case *of Ramlan,* the evidence was clearly that the accused knew or was conscious of the risk of firing his rifle at the deceased. The degree of risk of killing or wounding the deceased could be measured by the fact that eight shots were fired at the deceased's direction in two quick bursts, three of which hit the deceased. It was also material that the deceased was on a moving motorcycle rather than in a stationary position thereby making it more difficult for the accused to ensure that he would miss the deceased. Although these facts would be incapable of supporting the conclusion that death was a practical certainty so as to attract the murder conviction under s. 300(d), they could well have enabled the jury to conclude that there had been a distinct possibility that death could ensue from the accused's conduct. As such, the Supreme Court should have ruled that the jury should have been alerted to a fourth possible verdict, namely, culpable homicide not amounting to murder by virtue of clause (3) of s. 299.

Rashness versus Negligence

The Supreme Court in *Ramlan* simply related the accused's conduct of shooting to the offence under s. 304A by referring to the possibility of such conduct being committed "in a rash or negligent manner..". The judgment did not spell out what the difference was between rashness and negligence and consequently there was no discussion whatsoever of what the specific issues were which the jury should consider when applying these separate concepts to the facts.

The major feature of rashness which distinguishes it from negligence is that rashness requires knowledge on the accused's part of the risk of harm that would be caused by his conduct while negligence does not. Thus for rashness, the enquiry would be whether the accused actually knew of the risk of causing harm while for negligence it would be whether a reasonable person placed in the accused's position would have acted in a more cautious manner. The test for rashness is therefore subjective while that for negligence is objective. Unfortunately this distinction has not always been appreciated by our judges. For instance, in the Malaysian Federal Court case of *Adnan bin Khamis* v. *Public Prosecutor,* Ong C. J. made the following comment in relation to s. 304A:

> "[T]he test to be applied for determining the guilt or innocence of an accused person charged with rash or negligent conduct is to consider whether or not a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others..."[17]

[16] In *Smith, supra,* note 10, rashness under s. 304A was defined in part as being "without any intention to cause injury or knowledge that it will be *probably* caused". Emphasis added.

[17] [1972] 1 M.L.J. 274, at p.278, citing with approval a similar comment by the Indian High Court in *Smith, supra,* note 10, at p. 304. See also the Malayan High Court case of *Anthonysamy, supra,* note 3 at p. 250, a decision which was approved of by the Singapore High Court in *Mah Kah Yew, supra,* note 3.

This comment reveals a judicial tendency to permit rashness to be subsumed under negligence whenever s. 304A is considered. Besides disregarding the disjunctive "or" between the words "rash" and "negligent" in s. 304A, this tendency goes against strong Indian judicial authority highlighting the difference between rashness and negligence. The following passage from the Indian Supreme Court decision in *Balachandra Waman Pathe* v. *State* sets out the correct position which our courts should adhere to in future:-

> "There is a distinction between a rash act and a negligent act...Criminal negligence is the gross and culpable neglect or failure to exercise that reasonably and proper care and precaution to guard against injury...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...[A] culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope of that they will not, and often with the belief that the actor has taken sufficient precautions to prevent this happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and if he had he would have had the consciousness. The imputability arises from neglect of the civic duty of circumspection"[18]

The court went on to say that "as between rashness and negligence, rashness is undoubtedly the graver offence" since it requires an accused person to have actually known of the possibility that his conduct might injure others.[19]

The Malaysian Supreme Court in *Ramlan* would have greatly contributed to the understanding and application of S.304A had it cited the above passage or otherwise presented in its own words the distinction between rashness and negligence. In relation to rashness, the court could have gone on to state that it was the trial judge's duty to direct the jury to consider whether the appellant knew that firing in the way he did might possibly result in the deceased's death. On the other hand, if the accused's conduct was viewed in terms of negligence, the jury should have been directed to consider how such conduct measured up to the standard of care to be expected of a reasonable person in the same circumstances as the accused. When dealing with the concept of "the reasonable person", the court could consider the appropriateness of applying principles stemming from the law of provocation where such a concept has received considerable judicial attention.[20] If the same approach is taken as in the law of provocation, certain of the accused's characteristics such as the clarity of his vision and his skill with guns could be attributed to the "reasonable person".

The Supreme Court could also have intimated that in the event of the appellant being convicted of S.304A, his sentence should reflect either the fact that he had been found guilty of rashness or of

18 *Supra,* note 10, *per* Hedge J., at pp. 206-207.

19 *Ibid.,* at p. 207.

20 For example, see *Nanavati* v. *State* A.I.R. (1962) S.C. 605; *Vijayan* v. *P.P.* [1975] 2 M.L.J. 8. See also Yeo, S., "The Provoked 'Reasonable' Singaporean/Malaysian: An Update" [1987] 2 M.L.J. cclxxxv.

negligence with the former type of criminality generally attracting a higher penalty than the latter. Finally, the court could have stated that its pronouncements concerning rashness and negligence were equally applicable to other offences in the Code which definitions contain the phrase "rash or negligent act".[21] It is hoped that our courts will expound upon the law of s. 304A in the ways suggested in this comment when another opportunity presents itself.

STANLEY YEO MENG HEONG*

[21] For example, ss. 279, 336, 337 and 338.

*LL.B. (Sing.), LL.M. (Well.), LL.M. (Syd.), Advocate and Solicitor, Supreme Court of Singapore, Lecturer, Faculty of Law, University of Sydney.