

CASE NO.:
Appeal (crl.) 107 of 2007

PETITIONER:
Shri Harendra Nath Borah

RESPONDENT:
State of Assam

DATE OF JUDGMENT: 24/01/2007

BENCH:
Dr. ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T
(Arising out of SLP (CRL.) No.5338 of 2006)

Dr. ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the judgment of the Guwahati High Court upholding appellant's conviction under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') and sentence of imprisonment for life as awarded by the learned Sessions Judge, Dhemaji. Accusations which led to the trial of the appellant are essentially as follows:

One Premlal Verma lodged a written complaint to the Superintendent of Police, East Siang, Arunachal Pradesh on 29.9.2000 alleging that on 26.9.2000 one Fekan Das (hereinafter referred to as the 'deceased') was driving a Truck No.AS-25/641. At about 11.00 p.m. when the truck reached Ruksing Gate, the police personnel of Jonai Police Station came there in a three wheeler and assaulted the deceased. The deceased became senseless and the police left him on the road and returned to the police station. It was further alleged that the deceased was brought to the Pasighat General Hospital for treatment. On 28.9.2000, he was referred to Dibugarh for treatment and on 29.9.2000 on way to the hospital his condition became serious and he died while being brought to Pasighat.

The aforesaid information was registered. The investigation was undertaken and charge sheet was placed. The accused was absconding and, therefore, no test identification parade could be held. On conclusion of investigation, the Investigating Officer submitted the charge sheet indicating commission of offence punishable under Section 302 IPC. Charge was framed after he was arrested. In order to substantiate its accusations 16 witnesses were examined. The accused pleaded innocence. On analysis of the evidence tendered, the Trial Court found the accused guilty and convicted and sentenced as aforesaid. An appeal was preferred before the High Court. The main stand of the accused-appellant was that the evidence of the eye witnesses cannot be relied upon as there was delay in lodging the FIR, and conviction was vitiated. Further no sanction was obtained

as required under Section 197 of the Code of Criminal Procedure, 1973 (in short the 'Code'). The stand of the respondent-State on the other hand was that the evidence of PWs. 5, 6 and 7 had clearly established the accusations. It was submitted that the deceased was assaulted without any fault on his part. Further, it was pointed out that since the appellant, a police personnel was involved there was effort on the part of the other officials not to accept the information given and ultimately the grievance was made before the Superintendent of Police. The High Court found that the evidence of the three witnesses who were stated to be eye witnesses left no manner of doubt that the accused was guilty. Therefore, the appeal was dismissed.

Learned counsel for the accused submitted that even if the accusations are accepted in toto, the offence under Section 302 IPC is not made out.

Learned counsel for the respondent on the other hand supported the judgment and the conviction and sentence as passed by the Trial Court and affirmed by the High Court.

The crucial question is as to which was the appropriate provision to be applied. In the scheme of the IPC culpable homicide is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder is culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of the generic offence, the IPC practically recognizes three degrees of culpable homicide. The first is, what may be called, 'culpable homicide of the first degree'. This is the gravest form of culpable homicide, which is defined in Section 300 as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the first part of Section 304. Then, there is 'culpable homicide of the third degree'. This is the lowest type of culpable homicide and the punishment provided for it is also the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299

A person commits culpable homicide if the act by which the death is caused is done

INTENTION

(a) with the intention of causing death; or

Section 300

Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done -

(1) with the intention of causing death; or

(b) with the intention of causing such bodily injury as is likely to cause death; or

(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

(3) 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; or

KNOWLEDGE

(c) with the knowledge that the act is likely to cause death.

(4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

Clause (b) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the 'intention to cause death' is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300.

Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given. In clause (3) of Section 300, instead of the words 'likely to cause death' occurring in the corresponding clause (b) of Section 299, the words "sufficient in the ordinary course of nature to cause death" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature

to cause death. The distinction is fine but real and if overlooked, may result in miscarriage of justice. The difference between clause (b) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in clause (b) of Section 299 conveys the sense of probable as distinguished from a mere possibility. The words "bodily injury.....sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant and Anr. v. State of Kerala*, (AIR 1966 SC 1874) is an apt illustration of this point.

In *Virsa Singh v. State of Punjab*, (AIR 1958 SC 465), Vivian Bose, J. speaking for the Court, explained the meaning and scope of clause (3). It was observed that the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

The ingredients of clause "Thirdly" of Section 300, IPC were brought out by the illustrious Judge in his terse language as follows:

"To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300, "thirdly".

First, it must establish, quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved. These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three

elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

The learned Judge explained the third ingredient in the following words (at page 468):

"The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness or intended serious consequences, is neither here or there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness but whether he intended to inflict the injury in question and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion."

These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh's case (supra) for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied: i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death, viz., that the injury found to be present was the injury that was intended to be inflicted.

Thus, according to the rule laid down in Virsa Singh's case, even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point.

Clause (c) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general as distinguished from a particular person or persons \026 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, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

The above are only broad guidelines and not cast iron imperatives. In most cases, their observance will facilitate the task of the Court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

The position was illuminatingly highlighted by this Court in *State of Andhra Pradesh v. Rayavarapu Punayya and Anr.* (1976 (4) SCC 382), *Abdul Waheed Khan @ Waheed and Ors. v. State of Andhra Pradesh* (2002 (7) SCC 175), *Augustine Saldanha v. State of Karnataka* (2003 (10) SCC 472) and in *Thangiya v. State of T.N.* (2005 (9) SCC 650).

When the factual background of the case is analysed on the touchstone of principles set out above, the inevitable conclusion is that the case at hand is not covered under Section 302 IPC and on the other hand the case is covered under Section 304 Part I IPC. The conviction is accordingly altered. Custodial sentence of 10 years would meet the ends of justice.

The appeal is allowed to the aforesaid extent.