

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: May 14, 2010
Judgment delivered on: May 24, 2010

+ **CRIMINAL APPEAL NO.652/2009**

DEEPAK KUMAR

....APPELLANT

Through: Mr. Akshai Malik, Advocate/
Amicus Curiae

Versus

STATE(G.N.C.T.) OF DELHI

.....RESPONDENT

Through: Mr. Lovkesh Sawhney, APP

CORAM:

HON'BLE MR. JUSTICE A.K. SIKRI

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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| 1. | Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not ? | Yes |
| 3. | Whether the judgment should be reported in Digest ? | Yes |

AJIT BHARIHOKE, J.

1. Appellant Deepak Kumar has been convicted vide impugned judgment dated 27.4.2009 in Sessions Case No. 76/07, FIR No.327/07, P.S. Moti Nagar for murder of his 40 days old child under Section 302 IPC and sentenced in terms of order dated 29.4.2009 to undergo imprisonment for life and to pay fine of Rs. 2000/-. We may note that the learned Additional Sessions Judge has not awarded any sentence in the event of default of payment of fine. Feeling aggrieved by the impugned judgment and the order on sentence, Deepak Kumar has preferred this appeal.

2. Briefly stated, case of the prosecution is that on 19.05.2007 at about 09:30 p.m., Head Constable Sukhbir, No. 2361 who was on duty at RML Hospital telephonically informed P.S. Moti Nagar that one child Umang son of Deepak has been admitted in the hospital in injured condition by his mother Deepika with the history of having sustained injury due to fall from hands. This information was recorded in Daily Diary register as Entry No. 36A. Copy of the DD report was entrusted to ASI Hari Chand (PW11).

3. On the receipt of the DD report, ASI Hari Chand (PW11) alongwith Constable Rakesh (PW10) went to RML Hospital and obtained the MLC of the child Umang who was found admitted there. He met Deepika, wife of Deepak i.e. mother of the injured child in the hospital and recorded her statement Ex.PW11/A. ASI Hari Chand sent that statement alongwith his endorsement to the police station for the registration of formal FIR and on the basis of said statement, formal FIR No. 327/07 was initially registered under Section 317/279/304 A IPC.

4. Complainant Deepika in her statement Ex.PW11/A stated that on 19.05.2007, she was present in her house No. WZ-480C, Basai Darapur alongwith her infant child Umang. At about 06:00 p.m., appellant Deepak came home after consuming liquor. She asked Deepak to give her money for expenses and the appellant Deepak saying "*Tum Maro Ya Tumhara Bacha Mare*" refused to give money for expenses. He started fighting with her and suddenly snatched the child Umang from

the complainant and threw him in the street. On this, she ran outside to pick the child but in the meanwhile, motor cycle No. DL-7SAT-9489 (Black Colour) came at a fast speed and struck against the child. Thereafter, she alongwith her neighbour Nanno Devi (PW1) and motor cycle driver Rahul (PW2) took her injured child to Moti Nagar Hospital and from there to RML Hospital where her child succumbed to his injuries.

5. After recording the statement of the complainant, ASI Hari Chand (PW11) reached at the spot of occurrence. In the meanwhile, ASI Padam Singh (PW12) also reached there, who took over the investigation under the orders of the SHO. ASI Padam Singh prepared the site plan Ex.PW12/A on the pointing of the complainant. He recorded supplementary statement of Deepika and also the statements of PW1 Nanno Devi and ASI Hari Chand (PW11). The appellant was arrested by him later in the evening of 19.05.2007 from his residence. Dead body of the deceased was identified by the complainant and Nanno Devi (PW1). It was sent for post-mortem examination and after the post-mortem, the dead body was handed over to the relatives of the deceased. Further investigation of the case was taken over by Additional SHO, Inspector Raj Kumar (PW3) on 05.07.2007, who completed the formalities of investigation and filed charge sheet against the appellants requesting for his trial for the offence under Section 304 IPC.

6. Learned Additional Sessions Judge, on consideration of the challan, charged the appellants for having committed the offence of murder punishable under Section 302 IPC. The appellant pleaded innocence and claimed to be tried.

7. In order to prove the guilt of the appellant, prosecution has examined 12 witnesses in all. Material witnesses who have given eye witness account of the occurrence are PW1 Nanno Devi and PW2 Rahul Sarin. The medical evidence is provided by PW6 Dr. Pawan Kumar, Medical Officer, RML Hospital, who prepared the MLC Ex.PW6/A of the deceased, Dr. Manpreet Kaur Sethi, Autopsy Surgeon (PW7), who conducted post-mortem examination on the dead body of the deceased and prepared the report Ex.PW7/A and PW8 Jaswant Singh, Medical Record Technician, RML Hospital, who has proved the complete case sheet pertaining to the treatment of Umang Ex.PW8/A. All other witnesses are police officials, who participated in investigation of the case at different stages after the occurrence.

8. The prosecution, however, could not examine complainant Deepika, who had left Delhi after the occurrence and could not be traced.

9. PW1 Nanno Devi has testified that on the relevant day i.e. about nine months prior to her examination in court, she was present in her house which is located across the *gali* on opposite side of the house of the complainant and the appellant. At around 06:00 p.m., a quarrel

ensued between the appellant and his wife. Appellant was drunk and she noticed from her house that the appellant snatched the child Umang from his wife and threw the child out of the home on the road saying '*Tu Mar, Tera Bacha Mar, Main Kharchae Ke Paise Nahi Dunga*'. Thereafter, the appellant fled away on a scooter. She also stated that when the child was thrown out, a motor cycle was coming on the road but the motor cycle did not hit the child. In the cross-examination, she admitted that her house is located on the third floor of a building, whereas the house of the accused is located on the ground floor. She denied the suggestion given to her by the amicus that the child had been put on the road by the complainant Deepika or that while leaving the child on the road, she commented 'let the child die'. She also denied the suggestion that the child had sustained injuries because of the impact of the motor cycle.

10. PW2 Rahul Sarin has stated that on 19.05.2007 at about 06:00/06:15 p.m., he was going to Moti Nagar on his motor cycle No. DL-7SAT-9489. When his motor cycle reached in front of house No. WZ-480C Basai Darapur, a child was suddenly thrown out from the said house. The child landed in front of his bike and he immediately applied the brakes. The mother of the child immediately rushed out of the house. Some neighbours also collected there and PW1 Nanno Devi was one of them. He further stated that the appellant came out of the house. He was hurling abuses at his wife and child and he started his scooter and went away. According to this witness, the complainant

Deepika told that accused was drunk and he had thrown the child outside the house. On humanitarian ground, he took the complainant and the child on his bike to the hospital. Later on, Nanno Devi (PW1) also reached there. He has also denied the suggestion that he had taken the child to the hospital on the asking of the complainant and other residents as he was at fault or that he had bribed the police to twist the facts.

11. PW7 Dr. Manpreet Kaur Sethi is the Autopsy Surgeon who conducted the post mortem on the body of the deceased. She observed following injuries on external and internal examination of the dead body:

- “1. Rub abrasion, irregular shape, redish on left knee 1 x 1 cm.
2. Abrasion 3x2 cm.m, present on right knee irregular, redish in colour.
3. Abrasion on front of right side upper abdomen at subcostal area 3x3 cm in size, irregular in shape.
4. Abrasion irregular in shape present on right side frontomedial aspect to dorsal aspect of right forearm in an area 10 cm.x3 to 4 Cm.
5. Swelling and deformity at right arm. On cut section fracture right humerus mid shaft with localised collection of hematoma at fracture site.

On internal examination, following injuries were found:-

1. **Head:-** Swelling in an area of 7x6 Cm at right side occipito-parietal region. On incision underneath right red coloured subscalp hematoma alongwith sub periosteal hematoma present along with fracture of parietal bone.
(depressed type), subdural and subarachnoid hematoma underneath with corresponding contused brain matter. Blood vessels dilated and engorged.
2. **Neck:-** NAD.
3. **Chest:-** As mentioned and on incision-redish coloured hematoma collection present vertically in right side chest muscles extending from 3rd rib to 7th rib in an area of 14 Cmx3to4Cm and underneath 3rd,

4th, 5th, 6th ribs found fractured at posterior axillary line with collection of hematoma locally.

4. **Abdomen:-** NAD with 15 ml. of curd inside the stomach with rancid smell”.

12. She opined the cause of death as the result of craniocerebral damage (head injury) which was sufficient to cause death in ordinary course of nature and according to her, all the injuries were fresh in time and ante-mortem in nature. She opined the nature of the death to be homicide. In cross-examination by learned amicus, she specifically denied the suggestion that the injuries found on the person of the deceased could have been caused by the impact of a speedy motor cycle.

13. Appellant Deepak Kumar in his examination under Section 313 Cr.P.C. denied the prosecution version and explained thus:

“Q.29.....

Ans. I am innocent. I have been implicated falsely. I left my wife and child at home, I had clothes for embroidery work for customers and I left the home on my scooter. I came back to my residence at about 9.30 pm, there was gathering of crowd. I was apprised that my child received injuries in an accident and child has been taken to the hospital. I went to hospital in Hari Nagar where I did not find any child. I came back to my home and in the meantime, I received telephonic call on the mobile phone, since my wife’s mobile phone was with me that all the persons have come to home and I shall also come home. The persons who called me on the mobile phone, there was a female voice. Then I came to my residence. When I reached my residence, my wife was at home, Nanno was also present but my child was not there. I inquired about my child and I was apprised that he was admitted in the hospital. I was arrested by the police at about 11/11.30 pm on 19.05.2007 and I have been implicated falsely.

I do not want to produce any witness in defence”.

14. The learned Trial Judge, on consideration of the material on record and the submissions made on behalf of the rival parties, found

the appellant guilty of murder of child Umang mainly on the strength of testimony of PW1 Nanno Devi and PW2 Rahul Sarin and convicted the appellant under Section 302 IPC.

15. Defence of the appellant is that he has been falsely implicated and he was not even present at the place of occurrence when the incident took place. Learned amicus curiae has submitted that the instant case has been registered on the complaint Ex.PW11/A of Deepika, mother of the child who claimed to be the only person present in the room when the child was thrown out in the street by the appellant. Thus, she was the best witness to prove the charge. However, prosecution has failed to produce her and this fact, by itself, is sufficient to extend the benefit of doubt to the appellant.

16. We are not convinced with the argument. On perusal of the record, it is clear that prosecution cannot be faulted for non-examination of the complainant Deepika as a witness as she could not be produced as she was not available at the given address. Ex.PW5/B is the service report dated 07.01.2009 pertaining to the summons issued by the court for appearance of complainant Deepika as a witness. In this report, ASI Padam Singh of P.S. Moti Nagar has stated that he visited the address at District Jalpaigudi, West Bengal on 05.12.2008 to serve the summons on Deepika at the residence of her maternal uncle Suleman where he met Mr. Suleman and his wife Anees Mins who told him that Deepika was daughter of late sister of Suleman.

Deepika had visited the village nine months earlier, thereafter she left the village without leaving her address at Delhi and they assured that as and when she would visit the village, they would tell her about the summons. From the aforesaid service report, it is obvious that despite of efforts made by the prosecution to procure the presence of Deepika as a witness she could not be served with the summons for want of her current address. Since non-production of Deepika as a witness was beyond the control of the prosecution, it cannot be taken as a circumstance to outrightly reject the testimony of the other two eye witnesses examined by the prosecution, namely, PW1 Nanno Devi and PW2 Rahul Sarin.

17. Learned amicus curiae has criticised the testimony of PW1 Nanno Devi on the ground that as per her own admission, she could not have been the eye witness to the occurrence. Dilating on the argument, learned amicus curiae submitted that as per the testimony of PW1 Nanno Devi, the appellant and his wife Deepika were residing on the ground floor of a building on one side of the street and her house was located at the third floor of another building across the street opposite the house of the appellant. He submitted that Nanno Devi claims to have heard the appellant uttering the words "*Tu Mar, Tera Bacha Mar, Main Kharchae Ke Paise Nahi Dunga*" and she also saw him throwing the child Umang out on the street immediately after uttering those words. This, according to learned amicus curiae, is an impossibility, given the location of the house of Nanno Devi. Thus, he has contended

that it is not safe to rely upon the testimony of Nanno Devi. Regarding testimony of PW2 Rahul Sarin, learned amicus curiae has submitted that he also is not a reliable witness because he obviously had a reason to falsely depose against the appellant in order to save his own skin. In support of this contention, he has drawn our attention to the FIR of this case Ex.PW9/C which was initially registered under Section 317/279/304A IPC, which tended to implicate the witness for causing death of Umang due to rash and negligent driving.

18. We do not find merit in this contention. In order to properly appreciate the criticism of the amicus curiae against the testimony of PW2 Rahul Sarin, it is necessary to have a look on the contents of the FIR. The FIR was recorded on the basis of statement made by Deepika, mother of the deceased child wherein she had stated that on the fateful evening of 19.05.07 at about 06:00 p.m., when she asked money for expenses from her husband i.e. the appellant, he refused to give her money and said "*Tum Maro Ya Tumhara Bacha Mare*" and started fighting with her and he suddenly snatched the child Umang from her and threw him in the street. On this, she (the complainant) rushed outside to pick her child but in the meanwhile, motorcycle DL-7SAT-9489 came at a fast speed and struck against the child. Thereafter, she took the child alongwith the motorcycle driver Rahul Sarin to the hospital where the child was declared dead. From the aforesaid facts narrated in the FIR, there could be no doubt about the presence of PW2 Rahul Sarin at the spot when the child was thrown in

the street. From the FIR, it is also clear that by no stretch of imagination, Rahul Sarin could be faulted for the incident even if his motorcycle had actually struck the child because as per the facts narrated in the FIR, the child was suddenly thrown in the street and PW2 Rahul Sarin could not have comprehended that someone would throw the child in front of his motorcycle. Thus, under the given facts, PW2 Rahul Sarin was not under threat of being held responsible for the death of Umang to prompt him to depose falsely against the appellant. Thus, we find no reason to suspect his version. On the other hand, the contents of the FIR do tend to show his presence at the spot at the time of occurrence.

19. Coming to the testimony of PW1 Nanno Devi. As referred to above, she testified in the Court that she saw the incident of throwing of child by the appellant from her third floor room and she also heard appellant uttering "*Tu Mar, Tera Bacha Mar, Main Kharchae Ke Paise Nahi Dunga*". Contention of learned amicus curiae is that PW1 Nanno Devi being at third floor of the building across the street could not have heard the above utterances by the appellant from such a distance. Under normal circumstances, this contention may hold force, but whether or not Nanno Devi could have heard said utterances depended upon the decibel level of speech of the appellant when he uttered those words. From the material on record, it is obvious that the appellant had uttered those words while he was having an argument regarding household expenses with his wife Deepika.

Therefore, it is not surprising that he uttered those words in a loud voice which could be overheard by PW1 Nanno Devi. As regards the other limb of argument that Nanno Devi could not have seen the appellant throwing the child outside the room, it is suffice to say that it would depend upon the width of the street and the fact whether or not there was any building or structure within the line of vision from the third floor room of Nanno Devi to the room in which the occurrence took place. Of course, the Site Plan Ex.PW12/A proved on record by the Investigating Officer leaves much to be desired and it does not show the location of houses of the appellant and the witness Nanno Devi (PW1), but this by itself cannot be taken as a circumstance to discard the testimony of the otherwise reliable witness PW1 Nanno Devi, which finds corroboration from the testimony of PW2 Rahul Sarin who has stated that Nanno Devi was amongst the persons who immediately collected at the spot. We may note that, according to the Nanno Devi, she had overheard the argument between the appellant and his wife. Therefore, it is not surprising that on hearing the utterance by the appellant in an angry tone, as a matter of curiosity PW1 Nanno Devi tried to see what was happening and was able to see the appellant throwing the child on the street. Thus, under the circumstances, we find no reason to suspect the testimony of PWs Nanno Devi and Rahul Sarin.

20. Even if, for the sake of argument, it is assumed that Nanno Devi did not see the appellant throwing the child on the street, the fact

remains that as per the statement of Rahul Sarin (PW2) and Nanno Devi (PW1), immediately after the occurrence, the appellant came out of the house and went away on his two-wheeler scooter. The aforesaid conduct of the appellant by itself points towards the guilt of the appellant. Had he not thrown the child on the street, under the natural course of circumstances, he was expected to rush and pick up his child from the street instead of escaping from the place of occurrence.

21. There is one more aspect to this case. The appellant in his statement under Section 313 Cr.P.C. took the defence that at the time of occurrence, he was not present at the spot and actually he had left his house at 05:30 p.m. for his work. His explanation is that he had left his wife and child at home as he had clothes for embroidery work for customers. If this explanation was true, then the appellant could easily have examined anyone of those customers whom he had visited on the fateful evening to substantiate his defence. He, however, has not produced any witness to establish this half-hearted plea of alibi. This circumstance also goes against the appellant.

22. It is further submitted by learned amicus curiae that actual cause of death of child Umang is doubtful in this case. Dilating on the argument, learned amicus curiae took us through the cross-examination of PW6 Dr. Pawan Kumar of RML Hospital who prepared the MLC of the deceased and who testified that the injuries found on the person of the deceased could have been due to fall or due to

impact of some vehicle or a hard blunt substance. Learned amicus curiae submitted that from this, a possibility cannot be ruled out that the deceased Umang sustained fatal injuries due to fall from hands, which fact is also recorded in DD No.36A(Ex.PW5/A) recorded at the Police Station on the basis of information conveyed on telephone by Head Constable Sukhbir who was on duty at RML Hospital at the relevant time. Learned amicus curiae, in view of the aforesaid facts, has urged us to extend the benefit of doubt to the appellant because a possibility of the deceased having suffered injuries by fall from hands cannot be ruled out and also because the complainant Deepika, who was the best witness in this case, has not been produced as a witness to clarify the position.

23. We are not convinced with the above argument. As regards the facts referred in DD No. 36A (Ex.PW5/A), it is suffice to say that this information is recorded by the Duty Officer in Daily Diary on the basis of information given by Head Constable Sukhbir who was on duty at RML Hospital. Head Constable Sukhbir is not an eye witness, therefore, the content of DD report is nothing but a hearsay evidence which is inadmissible. Otherwise also, it is not clear in the DD report as to what is the basis of this information. Thus, no importance can be attached to this fact. Even the above referred version of Dr. Pawan Kumar regarding the possible cause of the injuries sustained by the child Umang also does not help the appellant because it is only an opinion and does not rule out the possibility of the child having

suffered fatal injuries because of having been thrown in the street by the appellant. The testimony of PW1 Nanno Devi and PW2 Rahul Sarin referred to above, in our considered view, firmly establishes that it was the appellant who had thrown the child Umang from the room into the street which resulted in fatal injuries to the child. Thus, we find no merit in the above contention.

24. Further, it is argued that as per the testimony of Dr. Pawan Kumar, a possibility cannot be ruled out that the child had died due to injuries sustained on being hit by the motorcycle, therefore, the appellant cannot be held guilty for murder of child and he is entitled to benefit of doubt.

25. This argument is misconceived. Dr. Manpreet Kaur, Autopsy Surgeon was examined as PW7. She conducted post-mortem examination on the body of the child and she has categorically ruled out the possibility of the child having been run over by the motorcycle by stating that had there been an impact of motorcycle, there would have been tyre marks on the body of the child, which were not found at the time of post-mortem examination. She also denied the possibility of the child having been left on ground by someone and thereafter hit by a speeding motorcycle. Once the possibility of the child having been hit by a motorcycle is ruled out, there is no reason for nursing any doubt about the cause of death of the child. We may also note that even if it is assumed that the child, after being thrown in

the street, was hit by the motorcycle of Rahul Sarin, then also the appellant is responsible for causing death of the child because the incident, in such an eventuality, is the direct consequence of the act of the appellant in throwing the child into the street. In view of the discussion above, we have no hesitation in concluding that the learned Trial Court has rightly relied upon the testimony of PW1 Nanno Devi and PW2 Rahul Sarin to return the finding that the child Umang sustained fatal injuries as a result of his being thrown into the street by the appellant.

26. Lastly, it is submitted by learned amicus curiae that even if the case of the prosecution is taken to be a gospel truth, then also the conviction of the appellant for the offence of murder of child Umang punishable under Section 302 IPC is not justified and at best, the wrongful act of the appellant falls within the purview of the offence of culpable homicide not amounting to murder punishable under Section 304 IPC.

27. Killing of a human being by another human being is homicide. Such killing may be lawful or it may be unlawful. When the killing is unlawful, it is culpable homicide. Indian Penal Code classifies culpable homicide into two categories, namely, "culpable homicide not amounting to murder" punishable under Section 304 IPC and "murder", which is a graver form of culpable homicide punishable under Section 302 IPC. What distinguishes these two offences is the presence of

mens rea which comprises of different forms of mental states as defined under Section 300 IPC. The distinction between culpable homicide not amounting to murder and murder has been set forth by the Supreme Court in the matter of **State of A.P. Vs. Rayavarapu Punnayya, (1976) 4 SCC 382**, inter alia, in the following terms:

“12. In the scheme of the Penal Code, “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 this generic offence, the Code practically recognises three degrees of culpable homicide. The *first* is, what may be called, “culpable homicide of the first degree”. This is the greatest 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.

13. The academic distinction between “murder” and “culpable homicide not amounting to murder” has vexed the courts for more than a century. 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 minutae 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 -

Section 300

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

INTENTION

- | | |
|---|---|
| a) With the intention of causing death; or | 1) with the intention of causing death; or |
| b) With the intention of causing such bodily injuries 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 of such injury as is mentioned above. |
|---|---|

14. 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.

15. 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.

16. 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” 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.

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20. 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 — 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.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is “murder” or “culpable homicide not amounting to murder”, on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to “culpable homicide” as defined in Section 299. If the answer to this question is *prima facie* found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of “murder” contained in Section 300. If the answer to this question is in the negative the offence would be “culpable homicide not amounting to murder”, punishable under the *first* or the *second* part of Section 304, depending, respectively, on whether the second or the

third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be “culpable homicide not amounting to murder”, punishable under the first part of Section 304, of the Penal Code.

22. 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.”

28. On perusal of the FIR Ex.PW9/C which was recorded on the basis of the complaint of Deepika, mother of the deceased child Umang which also finds support from the testimony of PW1 Nanno Devi, it transpires that as per the case of the prosecution, on the relevant day at about 6:00 pm, the appellant came home after consuming liquor. Complainant Deepika demanded money from him for meeting the expenses, which request was declined by the appellant. This resulted in a quarrel/heated arguments and in the process, the appellant uttered the words “*“Tum Maro Ya Tumhara Bacha Mare”*” and thereafter snatched the child from the mother and threw him in the street. As a consequence thereof the child suffered fatal injuries and died. From the aforesaid factual matrix, it is apparent that the incident took place suddenly without any premeditation as a result of the heated arguments and quarrel between the appellant and his wife. Therefore, no intention to kill the child on the part of the appellant can be inferred. The child was thrown into the street from a ground floor room, therefore, we find it difficult to attribute the knowledge to the

appellant that his act was so grave and dangerous that it would in all probabilities result in death of the deceased. Therefore, in our view, the requisite ingredients of Section 300 IPC, which defines the offence of murder, are lacking in this case. Thus, we find it difficult to sustain the conviction of the appellant under Section 300 IPC and convert it into conviction for the offence of culpable homicide not amounting to murder, punishable under Section 304 Part I IPC.

29. This brings us to the question of sentence. The appellant is a young man who is in incarceration for the last about three years. As per his nominal roll, his conduct in Jail is satisfactory. He, because of the unfortunate act committed by him in a fit of anger, has lost his young child. Keeping in view the aforesaid facts and the other accompanying circumstances, we, while maintaining the fine imposed by the learned Additional Sessions Judge, convert the sentence of imprisonment of the appellant from life to 10 years rigorous imprisonment. In our view, this will meet the ends of justice.

30. The appeal is disposed of in aforesaid terms.

AJIT BHARIHOKE, J.

MAY 24, 2010
pst

A.K. SIKRI, J.