

GAHC010002842019



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 13 (J) of 2019

Sri Chandan Dey @ Kiran,
S/o Late Rabi Dey,
R/o Jhulan Pool Siva Path,
P.S.- Lumding, District-Hojai (Assam),

.....Appellant.

-Vs-

State of Assam
Represented by the Public Prosecutor, Assam

.....Respondents.

Advocates for the appellant: Ms M Barman,

Advocate for the respondent: Ms S Jahan, APP, Assam.

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MRS. JUSTICE MALASRI NANDI

Date of hearing : 20.02.2023.

Date of judgment : 24.02.2023

JUDGEMENT AND ORDER (CAV)

(Malasri Nandi, J.)

Heard Ms M Barman, learned counsel appearing as *Amicus Curiae* on behalf of the appellant and Ms S Jahan, learned Additional Public Prosecutor appearing on behalf of the State of Assam

2. This appeal has been preferred by the accused appellant against the Judgment and Order dated 14.11.2018, passed by the learned Additional Sessions Judge, Sankardev Nagar, Hojai, in connection with Sessions Case No. 17/2018, whereby the accused appellant was convicted under Section 302 IPC and sentenced to undergo Rigorous Imprisonment for Life and to pay a fine of Rs. 10,000/- in default stipulation.

3. The brief facts of the case is that the informant Smt Sandhya Rani Dey lodged an FIR on 08.07.2017, before the Officer-In-charge, Lumding Police Station, stating inter alia that on the same day, at about 01:00 am (midnight) his son, the accused appellant picked up a quarrel with her husband, i.e., his father over some domestic issues and subsequently, assaulted him and killed him by strangulation.

4. On receipt of the complaint, a case was registered vide Lumding PS Case No. 124/2017,

under Section 302 IPC and the investigation was commenced. During investigation, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses, the inquest on the deadbody of the deceased was conducted and then the dead body of the deceased was forwarded to Nagaon Civil Hospital for Post-Mortem Examination. After completion of investigation, charge sheet was submitted against the accused/appellant under Section 302 IPC, before the Court of learned JMFC, Hojai. As the offence under Section 302 IPC is exclusively triable by the Court of Sessions, the case was committed accordingly.

5. During trial, the charge was framed by the trial Court under Section 302 IPC, which was read over and explained to the accused appellant, to which he pleaded not guilty and claimed to be tried.

6. To substantiate the case of the prosecution, eight witnesses were examined and marked five exhibits. After completion of trial, the statement of the accused/appellant was recorded under Section 313 CrPC wherein incriminating materials found in the evidence of the witnesses were put to him to which he denied the same. It is further stated that he has been falsely implicated in the case. After hearing the arguments advanced by the learned counsel for both the parties, the accused was convicted under Section 302 IPC, as aforesaid.

7. Learned Amicus Curiae at the very outset submits that she does not want to argue the matter with regard to the conviction of the accused appellant. But in the present case, from the statement given by the prosecution witnesses, it is borne out that there was no intention on the part of the accused appellant to kill his father. She further submits that on the fateful day, i.e. on 08.07.2017, when the incident took place, the appellant had come to his house in a drunken state and without there being any pre-meditation on his part, he under the heat of

passion assaulted his father, who was about 80 years of age and a paralytic patient, lying on the bed was weak and sick, and could not obstruct his son, which resulted his death. It is further submitted by the learned *Amicus Curiae* that in view of the said fact, the case of the accused appellant does not in any manner come within the ambit of Section 302 IPC, rather it falls under Section 304 Part-II IPC.

8. Per contra, learned Additional Public Prosecutor has admitted that on the basis of the evidence of the witnesses, it appears that there was no intention on the part of the accused/appellant to kill his father, however, the deceased was a paralytic patient and he was 80 years of age and bedridden. He was not in a position to move. The accused confined the deceased in the room, bolted the room from outside and assaulted his father, which is considered to be in a cruel manner. Under such backdrop, the trial Court has rightly convicted the accused appellant, under Section 302 IPC, which does not require any interference by this Court.

9. We have considered the submissions of learned counsel for the parties. We have also gone through the judgment of the trial Court as well as the documents available in the record of Sessions Case No. 17 of 2018.

10. PW-1 is the informant, who is the wife of the deceased and the mother of the accused. From her deposition, it reveals that on the date of occurrence, at about 12:00 am (midnight), the appellant assaulted her and her daughter (PW-2) and then they fled away from their house and the appellant threw a 'dao' aiming at them. At that time, her husband (deceased) was at home. He was sleeping in a room, but accused assaulted him with lathi, rod etc. Her husband made hue and cry. Some neighbours came to the spot, but they did not go near to

the accused as he was holding a 'dao' in his hand. After some time, she entered into the room of her husband but she found him dead. Then she informed Police. Police came and arrested the accused.

11. In her cross-examination, PW-1 replied that her husband was taking treatment for last 2 years and he could not move freely. Her husband was about 80 years of age. He was a Pujari in a Shiv Mandir. On the night of occurrence, the accused started quarreling with her and her daughter. But PW-1 admitted that she did not state before the Investigating Officer that the accused appellant assaulted her husband with rod and lathi. PW-1 also admitted that she did not mention in the FIR and stated before the IO that the accused appellant was holding a 'dao' in his hand at the relevant time of incident.

12. PW-2 is the daughter of the informant and the deceased and sister of the accused appellant. She deposed before the Court that on the relevant date of incident, at night, she was at home along with her parents. Then the accused/appellant came home and he started to abuse them. He took a knife. Then they came out from the house. But her father was at home as he was sick. Later on, her brother killed his father by strangulating his neck. After some time, they came back home and found that her father was lying dead in his bed.

13. In her cross-examination, PW-2 replied that the accused appellant was a truck-driver. He used to drink alcohol. On the night of occurrence, he was not drunk. They were in doubt that the accused appellant had killed his father by strangulation.

14. PW-3 is a witness on inquest. He was present when inquest was conducted on the dead body of the deceased.

15. PW-4 is the neighbour of the informant as well as the deceased and the accused.

According to him, on the date of incident, at about 12/12:30 am, at midnight, one Papu Singh came to their house and informed that accused/appellant had assaulted his father, i.e., the deceased. Thereafter, he along with some other neighbouring people went to the house of the informant. The mother of the accused, the informant and her daughter were standing in front of their house and they did not enter into their house out of fear. They heard hue and cry of the victim/deceased- "Don't kill me Baba (son)". The door of the room in which the victim was being assaulted was closed from inside. He asked to open the door, but accused did not open it. The mother and sister of the accused also tried to open the door, but they failed. In the early morning, the accused came out from the room and they informed Police. They caught him and handed him over to the Police. This witness also stated that they found the father of the appellant lying dead on his bed.

16. In his cross-examination, PW-4 replied that when he went to the house of the informant, he was accompanied by Papu Singh, the mother and sister of the accused and the mother of Papu Singh. It was suggested that he did not state before the IO about his meeting with Papu Singh and he did not tell him what he had stated before the Court.

17. PW-5 is the Medical Officer. He deposed before the Court that on 08.07.2017, he was working as Medical and Health Officer at Nagaon Civil Hospital. On that day he conducted Post-Mortem Examination on the dead body of one Rabi Dey, in connection with Lumding PS Case No. 124 of 2017, on police requisition and found the following.

- i) No any external injury seen all over the body
- ii) No any ligature mark was seen on deep dissection of abdomen.
- iii) Peritoneal cavity is seen filled with dark red blood and spleen was found to be ruptured.

18. The doctor opined that the death was due to shock as a result of hemorrhage, due to splenic rupture due to blunt trauma abdomen.

PW-5 has proved the Post-Mortem Report vide Exhibit-2.

19. In his cross-examination, PW-5 replied that in maximum cases of splenic rupture, it is caused in beating due to dashing on some hard substance and long disease like haemotological disease. He did not find any external injury on the stomach of the deceased.

20. PW-6 is also a neighbour of the informant. From his deposition, it discloses that the incident took place in the month of July, 2017, at about 12 to 12:30 am at midnight. He heard the voice of the victim/deceased that-" don't kill me baba (son)". Then he immediately went to the house of one Ranjit Mondal (PW-4) and informed him about the incident. Then they went to the house of the informant. The mother and sister of the accused were standing outside the house. The door of the room was closed from inside, in which the victim was being assaulted by the accused/ appellant. They asked the accused to open the door, but he did not open the door. The next morning, the accused opened the door and at that time, the local people caught him and handed him over to the Police. The victim was found dead in his bed, inside the room.

21. In his cross-examination, PW-6 replied that at about 12:00 am midnight, he heard the sound of the beating and outcry of the victim that "Baba ! (son) don't kill me". It was suggested that PW-4 did not state the said fact to the Investigating Officer.

22. PW-7 is the Circle Officer of Lanka Revenue Circle at the relevant time of incident. According to him, on 08.07.2017, he conducted inquest on the dead body of the deceased, which was identified by his daughter, in connection with Lumding PS Case No. 124 of 2017.

He prepared the inquest report vide Exhibit-1 in presence of the witnesses.

23. PW-8 is the Investigating Officer. He deposed in his evidence that on 08.07.2017, he was working at Lumding Police Station. On that day, on receipt of an ejahar, from the informant at Lumding Police Station, the Officer-In-Charge, Lumding Police Station, registered a case vide Lumding PS Case No. 124 of 2017, under Section 302 IPC and the same was endorsed to him for investigation. Accordingly, he visited the place of occurrence. The public detained the accused/ appellant and they handed him over and he took him in custody. He also found the dead body of the deceased in the bed in his house. He informed the Circle officer of the Lanka Revenue Circle to conduct inquest on the dead body of the deceased and accordingly, inquest was conducted and he sent the dead body to the Nagaon Civil Hospital for Post-Mortem examination. Thereafter, he recorded the statement of the informant and other witnesses, drew sketch map and arrested the accused and thereafter, interrogated him. After completion of investigation, he submitted charge sheet against the appellant under Section 302 IPC, vide Exhibit-3.

24. Admittedly, in this case, there is no eye-witness to the incident. The accused-appellant was found inside the room, where the deceased was sleeping. The Medical Officer who conducted Post-Mortem Examination on the dead body of the deceased, found no any external injury all over the body, except rupture of spleen. No any weapon of assault was seized during investigation. According to the informant, i.e., PW-1, the accused was found with a 'dao' in his hand. PW-2 has stated that when the accused appellant came home, he took a knife and having seen the same, she and her mother fled away from the place of occurrence. PW-2 specifically stated that the accused appellant killed her father by strangulating his neck, but the Medical Officer did not find any ligature mark on the neck of

the deceased. PW-1 stated that the accused assaulted her husband, i.e., the deceased with lathi and rod. It transpires from the evidence of witnesses that none of them had seen the accused appellant assaulting his father, i.e., the deceased. But, it is true that the accused appellant was found inside the room, where the deceased was sleeping on the bed, which was supported by the neighbour of the informant, i.e., PW-4 and PW-6. It also appears from their evidence that the door was closed from inside and they asked the accused to open the door, but he did not open it. On the next day morning, when the accused appellant came out of the room, he was caught by the neighbouring people and the deceased was found dead on his bed.

25. Now the question comes, as to whether the act on the part of the appellant constitutes the offence punishable under Section 302 IPC or Section 304 Part-II IPC!

26. Though the learned counsel for the accused/appellant has fairly submitted that she did not argue about the finding of the trial Court with regard to the act of the accused appellant, since we are dealing with a criminal case involving a sentence of life imprisonment, we think it better to satisfy our judicial conscience with regard to the sufficiency of evidence available on record, which has achieved the requisite standards of evidence termed in legal glossary as the proof beyond reasonable doubt and also the approach of the subordinate court in appreciation of evidence in convicting the accused appellant.

27. In order to appreciate the arguments of the learned counsel as aforesaid, there is a need to refer to the law on the subject. Hon'ble Supreme Court in *Rampal Singh vs. State of Uttar Pradesh*; reported in (2012) 8 SCC 289, in the following paragraphs, discussed distinction between Section 302 and Section 304 IPC as well as distinction in 304 Clause I

and Clause II as under:-

"10. We are of the opinion that elucidative discussion on the legal principles governing the distinction between [Sections 300, 302](#) of the Code on the one hand and [Section 304](#), Part I and Part II of the Code on the other, would be necessary to precisely answer the questions raised.

11. [Sections 299](#) and [300](#) of the Code deal with the definition of 'culpable homicide' and 'murder', respectively. In terms of [Section 299](#), 'culpable homicide' is described as an act of causing death (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such an act is likely to cause death. As is clear from a reading of this provision, the former part of it, emphasises on the expression 'intention' while the latter upon 'knowledge'. Both these are positive mental attitudes, however, of different degrees. The mental element in 'culpable homicide', that is, the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the three stated manners noted-above, it would be 'culpable homicide'. [Section 300](#), however, deals with 'murder' although there is no clear definition of 'murder' in [Section 300](#) of the Code. As has been repeatedly held by this Court, 'culpable homicide' is the genus and 'murder' is its species and all 'murders' are 'culpable homicides' but all 'culpable homicides' are not 'murders'.

12. Another classification that emerges from this discussion is 'culpable homicide not amounting to murder', punishable under [Section 304](#) of the Code. There is again a very fine line of distinction between the cases falling under [Section 304](#), Part I and Part II, which we shall shortly discuss.

13. In the case of [State of Andhra Pradesh v. Rayavarapu Punnayya and Anr.](#) (1976) 4 SCC 382, this Court while clarifying the distinction between these two terms and their consequences, held as under: -

In the scheme of the penal Code, 'culpable homicide' is genus and 'murder' its species. All 'murder' is 'culpable homicide' but not vice-versa. Speaking generally, '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](#)."

14. [Section 300](#) of the Code proceeds with reference to [Section 299](#) of the Code. "Culpable homicide' may or may not amount to 'murder', in terms of [Section 300](#) of the Code. When a 'culpable homicide is murder', the punitive consequences shall follow in terms of [Section 302](#) of the Code while in other cases, that is, where an offence is 'culpable homicide not amounting to murder', punishment would be dealt with under [Section 304](#) of the Code. Various judgments of this Court have dealt with the cases which fall in various classes of firstly, secondly, thirdly and fourthly, respectively, stated under [Section 300](#) of the Code. It would not be necessary for us to deal with that aspect of the case in any further detail. Of course, the principles that have been stated in various judgments like [Abdul Waheed Khan @](#)

Waheed and Others v. State of A.P. [(2002) 7 SCC 175], Virsa Singh v. State of Punjab [AIR 1958 SC 465] and Rajwant and Anr. v. State of Kerala [AIR 1966 SC 1874] are the broad guidelines and not cast-iron imperatives. These are the cases which would provide precepts for the courts to exercise their judicial discretion while considering the cases to determine as to which particular clause of Section 300 of the Code they fall in.

15. This Court has time and again deliberated upon the crucial question of distinction between Sections 299 and 300 of the Code, i.e., 'culpable homicide' and 'murder' respectively. In Phulia Tudu & Anr. v. State of Bihar (now Jharkhand) 2007 SC 3215], the Court noticed that 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 these sections.

16. The Court in Phulia Tudu (supra) provided the following comparative table to help in appreciating the points of discussion between these two offences :

"Section 299

Section 300

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

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

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

(1) with the intention of causing 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 or incurring the risk of causing death or such injury as is mentioned above." |

28. The distinction between Section 304 Part I and Part II has been drawn by the Hon'ble Supreme Court in [Alister Anthony Pareira v. State of Maharashtra](#) (2012) 2 SCC 648, in the following words:

".....For punishment Under Section 304 Part I, the prosecution must prove: the death of the person in question; that such death was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death. As regards punishment for Section 304 Part II, the prosecution has to prove the death of the person in question; that such death was caused by the act of the accused and

that he knew that such act of his was likely to cause death..."

29. In the aforesaid settled legal principles, now we dwell upon the evidence on record in the instant case. It is an admitted fact to the prosecution that at the time of incident, the witnesses examined by the prosecution were not present so as to confirm when and how the deceased died, but from the evidence of PW-1, PW-2, PW-4 and PW-6, it reveals that the accused/appellant was found inside the room where the deceased was sleeping on a bed. The door of the room was bolted from outside. Though PWs-1, 2 4 and 6 had made request to open the door, but the accused/ appellant did not open it. On the next day morning, when he came out from the room the deceased was found dead on his bed. There was no explanation from the side of the accused/appellant as to how the deceased died inside the room where he was present.

30. After analyzing the record, it is evidently clear that there was no pre-meditation on the part of the appellant. There is no evidence that the appellant made any special preparation for assaulting the deceased with an intent to kill his father. From the evidence of the witnesses, it also appears that the accused is a habitual drunkard and there was frequent quarrel between the accused appellant and his family members. Apparently, it can be assumed that the accused/appellant in the heat of passion, under the influence of liquor, had assaulted his father, as a result of which, he died. From the aforesaid proved facts and circumstances on record, it cannot either be said that the appellant had the intention that such action on his part would cause the death or such bodily injury to the deceased, which was sufficient in the ordinary course of nature to cause the death of the deceased.

31. Applying the above settled principle of law, which has been enumerated in the aforesaid

cases, we are of the considered view that it is a fit case for modifying the sentence and the appellant ought to have been convicted under Section 304 Part-II IPC instead of Section 302 IPC. We accordingly, while maintaining the conviction of the appellant, alter the sentence of the appellant from Section 302 IPC to Section 304 Part II IPC and sentence him to undergo Rigorous Imprisonment for 8 (Eight) Years, for committing the offence under Section 304 Part II IPC and also to pay the fine as directed by the trial Court. The period which he detained in custody shall be set off from the period of imprisonment imposed on him. The conviction under Section 302 IPC is set aside.

32. In the result, the appeal is partly allowed, with the aforesaid modification.

33. Send down the LCR.

JUDGE

JUDGE

Comparing Assistant